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96TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 96-1396

CRIMINAL CODE REVISION ACT OF 1980

REPORT

together with

ADDITIONAL, SEPARATE, SUPPLEMENTAL, AND DISSENTING VIEWS

OF THE

COMMITTEE ON THE JUDICIARY

TO ACCOMPANY

H.R. 6915

[Including Cost Estimate of the Congressional Budget Office]

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SEPTEMBER 25, 1980.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
60-899 O WASHINGTON : 1980

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96TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 96-1396

CRIMINAL CODE REVISION ACT OF 1980

SEPTEMBER 25, 1980.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DRINAN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, SEPARATE, SUPPLEMENTAL, AND DISSENTING VIEWS

[To accompany H.R. 6915]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 6915) to revise title 18 of the United States Code, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause of the bill and inserts a new text which appears in italic type in the reported bill.

INTRODUCTION

Background

Need for legislation

Unlike several of the States,[1] and unlike most of the other countries of the world, the United States has never enacted a true "criminal code." The criminal statutes have been consolidated, reordered, and revised technically in 1877 (Revised Statutes), 1909 (35 Stat. 1088), and 1948 (62 Stat. 683). However, corrections were, by and large, limited to eliminating gross inconsistencies. As a result, the Federal criminal law has always remained a consolidation—a body of law drafted by different groups to deal with diverse problems on an *ad hoc* basis—rather than a uniformly drafted, consistently organized code. The absence of a general substantive reform has left us with complex, confusing and even conflicting laws and procedures that have aggravated problems associated with rendering justice to the individual as well as to society. The lack of a systematic, coherent code has caused a number of major problems.

First, and most significant, is the uncertainty in the law that has developed. This lack of certainty and concomitant uneven application of the law lowers respect for the law and breeds disrespect for established legal norms. The courts of appeals are divided regarding the interpretation of certain laws, and enforce a different "Federal" law in various regions of the country. For example, tolling the statute of limitations by fleeing the jurisdiction requires an intent to avoid prosecution in the First, Second and Fifth Circuits. It does not in the Fourth, Eighth, and District of Columbia Circuits. See discussion at 50–51 *infra*. The Second Circuit, alone among Federal courts, does not require materiality of a false statement for prosecutions under 18 U.S.C. 1001. See discussion at 177, *infra*. The Circuits are hopelessly divided on the extent to which oral false statements come within the purview of 18 U.S.C. 1001. See discussion at 178–79, *infra*. Uncertain and uneven application of the law breeds disrespect for the law.

[1] ALA. CODE tit. 13A (1978 Sp. Pamp.); ALASKA STAT. tit. 11 (1978 Pamp.); ARIZ. REV. STAT. ANN. tit. 13 (1978); ARK. STAT. ANN. tit. 41 (1977 Replmnt. Vol. 4); COLO. REV. STAT. tit. 18 (1978 Replmnt. Vol. 8); CONN. GEN. STAT. tit. 53a (1977); DEL. CODE ANN. tit. 11 (1975); FLA. STAT. ANN. tit. 44 (1976); GA. CODE ANN. tit. 26 (1978); HAWAII REV. STAT. tit. 37 (1976 Replmnt. Vol. 7A); ILL. ANN. STAT. ch. 38, § 1–1 (Smith-Hurd 1972); IND. CODE ANN. tit. 35 (Burns, 1979 Replmnt. Vol.); IOWA CODE ANN. tit. 35 (crim. code) title 37 (corrections code) (West 1979);
KAN. STAT. ANN. ch. 21 (1974); KY. REV. STAT. ANN tit. 50 (1975 Replmnt. Vol. 16); LA. REV. STAT. ANN. tit. 14 (West 1974); ME. REV. STAT. ANN. tit. 17–A (West, 1979 Pamp.); MINN. STAT. ANN. ch. 609 (West 1964); MO. ANN. STAT. tit. 38 (Vernon 1979); MONT. REV. CODES ANN. tit. 45 (1979); NEB. REV. STAT. ch. 28 (1978 Cum. Supp.); N.H. REV. STAT. ANN. tit. 62 (1974); N.J. STAT. ANN. tit. 2C (West, 1980 Sp. Pamp.); N.M. STAT. ANN. ch. 30 (1978); N.Y. PENAL LAW (McKinney 1975); N.D. CENT. CODE tit. 12.1 (1976 Replmnt. Vol. 2);
OHIO REV. CODE ANN. tit. 29 (Baldwin, 1979 Replmnt. Unit); OR. REV. STAT. tit. 16 (1977 Replmnt. Part); PA. CONS. STAT. ANN. tit. 18 (Purdon 1973); P.R. LAWS ANN. tit. 33 (1978 Cum. Pocket Supp.); S.D. COMPILED LAWS ANN. tit. 22 (1979 Rev.); TEX. PENAL CODE ANN. (Vernon 1974); UTAH CODE ANN. tit. 76 (1978 Replmnt. Vol. 8B); VA. CODE tit. 18.2 (1975 Replmnt. Vol. 4); WASH. REV. CODE ANN. tit. 9A (1977); WIS. STAT. ANN. tit. 45 (West 1958).

The uncertainty is not confined, though, to differing interpretations of the same provision. It runs throughout the Federal criminal code where one word is used in a number of provisions. For example, the term "willful" has been construed by the courts in a variety of ways, often inconsistently and contradictorily. The courts have defined a "willful" act as an act done voluntarily as distinguished from accidentally, an act done with specific intent to violate the law, an act done with bad purpose, an act done without justifiable excuse, an act done stubbornly, an act done without grounds for believing it is lawful, and an act done with careless disregard for whether or not one has the right so to act. *See, e.g., Screws* v. *United States*, 325 U.S. 91 (1945); *Spies* v. *United States*, 317 U.S. 492 (1943); *United States* v. *Murdock*, 290 U.S. 389 (1933), and cases cited therein; National Commission on Reform of Federal Criminal Laws, *Working Papers* 148–51 (1970) (the National Commission will hereinafter be referred to by its more common name, the "Brown Commission").

Another source of confusion is the legislative practice of defining Federal crimes in such a way as to make the Federal nexus an element of the offense, indistinguishable from other elements. Questions inevitably arise as to whether the state of mind (*mens rea*) requirements modify the circumstances specifying the Federal nexus, thereby causing confusion about what conduct is actually proscribed. For example, an individual may actually engage in a fraudulent scheme of national scope but because that individual did not know (the state of mind) of the transportation in interstate commerce (the Federal nexus) that individual cannot be prosecuted under Federal law. *Compare United States* v. *Tannuzzo*, 174 F.2d 177 (2d Cir.), *cert. denied*, 338 U.S. 815 (1949); and *United States* v. *Sherman*, 171 F.2 619 (2d Cir. 1948), *cert. denied sub nom. Grimaldi* v. *United States*, 337 U.S. 931 (1949); *with Wilkerson* v. *United States*, 41 F.2d 654 (7th Cir. 1930), *cert. denied*, 282 U.S. 894 (1931). Because particular constitutional grounds for prohibiting conduct have been used for each offense, in order to satisfy the needs perceived at the time of enactment, the present approach also leaves irrational gaps and inconsistencies in the application of Federal criminal laws. Conviction for the commission of a fraudulent scheme may depend on whether the mail or the telephone is used. *See* Brown Commission, *Working Papers* 40–41 (1970).

Present law also divides one offense into a spectrum of offenses, one distinguished from another only by different bases of Federal intervention, and then scatters them throughout the various provisions of Federal law. Thus, theft is currently split into theft of Government property, theft of the mails, theft from interstate commerce, etc. The interpretation and application of multiple provisions inevitably result in inconsistencies, loopholes, and technicalities.

The sentencing structure of present Federal criminal law also cannot escape criticism. Indeed, it is riddled with irrationality and inconsistency. In title 18 alone, there are no fewer than 17 different maximum terms, apart from the death penalty, and 14 different fine levels. Grading of offenses is also erratic. Similar conduct is often treated with gross disparity. For example, robbery of a federally insured bank, 18 U.S.C. 2113, carries a maximum prison term of 20 years, while robbery of a post office, 18 U.S.C. 2114, carries a 10 year maximum prison term. In plain terms, the present penalty structure offends the precept of equality before the law. In addition to a disparate penalty structure, current Federal law does not provide any coherent rationale for the imposition of sentences. Judges are given no guidance as to Congressional intent with respect to the purposes of sentences.

The absence of a comprehensive Federal sentencing policy is further demonstrated by the lack of meaningful guidance to the judiciary with respect to the appropriate range of penalties for similarly situated offenders. This lack of direction has produced significant, and unwarranted, variations in sentences imposed on offenders. This disparity in treatment cannot be remedied for many offenders because there is no system of appellate review of sentence.

Sentencing in Federal courts is also hampered by the lack of clearly delineated procedures for the resolution of factual disputes, the absence of statutory provisions for the use of alternatives to incarceration, and inadequate fine levels.

The shortcomings of the present Federal criminal law are not limited to statutory law. Many of the most important sections of the law do not appear at all in statutory form. Such areas as the requisite states of mind for culpability, the substantive law of conspiracy, and other areas have never been fully codified. As a result, the understanding of the law is made more burdensome, the law is often unclear, and in some cases it is inconsistent. Furthermore, while these issues are often central to the determination of criminality, the elected representatives of the people have never effectively participated in the fundamental choices of penal policy posed by these issues.

In short, the Federal penal law as a whole reflects the neglect with which it has been treated for so long. Because of its lack of clarity, consistency, and comprehensiveness, it tends to undermine the very system of justice of which it is the foundation.

Brown Commission

The present legislative effort to recodify Federal criminal laws was initiated by President Lyndon B. Johnson in his March 9, 1966 message to Congress entitled "National Strategy Against Crime." In that message, the President stated:

> We must modify our criminal laws.
>
> I propose the appointment of a Commission to conduct a comprehensive review of all the Federal criminal laws and to recommend total revisions. . . .
>
> A number of our criminal laws are obsolete. Many are inconsistent in their efforts to make the penalty fit the crime. Many—which treat essentially the same crimes—are scattered in a crazy quilt patchwork throughout our criminal code. . . .
>
> We are a nation dedicated to the precepts of justice, the rule of law, and the dignity of man.
>
> Our criminal code should be worthy of those ideals.

Legislation to establish such a commission was introduced shortly thereafter by the Hon. Emmanuel Celler in the House of Representatives and the late Hon. John McClellan in the Senate. In testimony on the proposal before Subcommittee No. 3 of the House Committee on the Judiciary, the Department of Justice elaborated on the need for revision:

> Several illustrations may help. Is it not puzzling that it is a felony punishable by a fine of not more than $1,000 or im-

prisonment for not more than 7 years, or both, to actually maim a person, while an assault with intent to commit such a felony is punishable by a fine of not more than $3,000 or imprisonment for not more than 10 years, or both? Is maiming a lesser offense than assault with intent to maim?

The various false penalty [sic] . . . statutes are equally confusing. Under section 1001 of title 18, United States Code, false statements generally are punishable by a fine of not more than $10,000 or imprisonment for not more than 5 years, or both. However, under various other statutes, false statements of a particular type are subject to lesser penalties. For instance, false statements in connection with Federal Savings and Loan Insurance Corporation transactions or Federal Housing Administration transactions are punishable by a fine of not more than $5,000 or imprisonment for not more than 2 years, or both. . . .

Some statutes are obsolete or incorrect and should be either updated or repealed. . . .

These are just several examples of the areas in which our criminal code could be improved; there are many others. It will be the task of the Commission to find them and recommend their improvement to the Congress.

Subsequent to the hearings, the subcommittee reported a similar bill which had been introduced by Hon. Richard Poff, currently Justice of the Supreme Court of Virginia. Representative Poff's bill created the National Commission on Reform of Federal Criminal Laws, with a somewhat broader mandate than the commission proposed by the Administration, i.e., "to make a full and complete review and study of the statutory and case law of the United States for the purpose of formulating and recommending to the Congress legislation which would improve the Federal system of Criminal Justice." The Poff bill was approved by the full Judiciary Committee, and later became law. (Pub. L. No. 89–801.)

All recent versions of reforms of the Federal criminal laws are rooted in the work of the National Commission, popularly known as the Brown Commission, after its chairman, Hon. Edmund G. Brown, Sr., Governor of California. The Commission consisted of 12 members—three judges, six members of Congress (three from each House), and three people appointed by the President.

In addition to Governor Brown, these included Representative Poff, Senator McClellan, Hon. Robert W. Kastenmeier, Representative from Wisconsin, Hon. Abner Mikva, former Representative from Illinois and currently Judge of the Court of Appeals for the District of Columbia Circuit, Hon. Sam Ervin, former Senator from North Carolina. Hon. Roman Hruska, former Senator from Nebraska, Hon. George Edwards, Jr., Judge of the Court of Appeals for the Sixth Circuit, Hon. A. Leon Higginbotham, former Judge of the District Court for the Eastern District of Pennsylvania and currently Judge of the Court of Appeals for the Third Circuit, Hon. Thomas J. McBride, Judge of the District Court for the Eastern District of California, Donald Scott Thomas, Esq. of Texas, and Theodore Voorhees, Esq., of the District of Columbia. In addition, Hon. Don Edwards, Representative from California, and Hon. James Carter, former Judge of

the Court of Appeals for the Ninth Circuit, served as members of the Commission from its inception until October 1969 and December 1967, respectively.

The Commission was aided in its work by a distinguished advisory committee, which was chaired by the late Supreme Court Justice Tom C. Clark and whose membership included Hon. Patricia Roberts Harris, Hon. Elliott L. Richardson, Dean Louis H. Pollack of the Yale Law School, Maj. Gen. (retired) Charles L. Decker, formerly the Judge Advocate General of the United States Army, and Milton G. Rector, the President of the National Council on Crime and Delinquency.

The Brown Commission drew upon research prepared by a highly qualified staff, and upon consultant reports prepared by experts in various areas of criminal law. These various materials were published in three volumes as the *Working Papers of the National Commission on Reform of Federal Criminal Laws* (1970).

At the start of its work, the Brown Commission decided to focus upon drafting a new substantive criminal code. In June of 1970 the Commission published a study draft of a revised criminal code and invited public comment upon its draft. The Brown Commission's *Final Report*, which takes the form of a recommended new title 18 of the United States Code, was issued in January 1971. Following each section of the draft code is a commentary prepared by the Commission. With the transmittal of the *Final Report* to the Congress and the President, the Brown Commission went out of existence.

Congressional action

92d and 93d Congresses.—The Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures, chaired by Senator John L. McClellan, a Brown Commission member, began hearings on the recodification of Federal criminal laws in February of 1971, shortly after the Brown Commission's *Final Report* was published. Senator McClellan introduced the first Federal criminal law recodification bill in January 1973, at the start of the 93d Congress (S. 1).

Contemporaneously with the start of Senator McClellan's hearings, President Richard M. Nixon directed the Justice Department to evaluate the Brown Commission's *Final Report* and recommend legislation to Congress. The Justice Department reported its recommendations during the First Session of the 93d Congress, and the Administration's proposed legislation was introduced in both Houses. The Brown Commission's recommendations were also introduced in legislative form. None of the bills introduced in the 93d Congress was reported out of subcommittee in either House.

94th Congress.—In January of 1975, at the start of the 94th Congress, Senator McClellan introduced a revised recodification bill that included elements of his and the Nixon Administration's bill of the 93d Congress. The bill was again designated S. 1, and Senator McClellan's subcommittee conducted further hearings. A substantial amount of opposition to the bill was heard, and late in the Second Session Senator McClellan's subcommittee reported S. 1 without recommendation. The Senate Judiciary Committee did not act on the bill.

Toward the end of the 94th Congress, the majority and minority leaders of the Senate, in an effort to move S. 1, suggested that four

Senators closely involved with the bill—the late Senators Philip Hart and John L. McClellan and Senators Roman Hruska and Edward M. Kennedy—work out a compromise bill that could be brought before the Senate. Negotiations to that end continued through the end of the 94th Congress.

In the House, both the McClellan-Nixon Administration bill and the Brown Commission recommendations were introduced. In addition, 3 members of the Brown Commission—Representatives Robert W. Kastenmeier, Don Edwards, and Abner Mikva—together with several other Members of Congress, introduced recodification legislation that they had drafted.

95th Congress.—The negotiations in the Senate to work out an acceptable bill continued into the 95th Congress. In early May of 1977, Senator McClellan introduced S. 1437, a compromise bill that he and Senator Kennedy had drafted with the encouragement and assistance of Attorney General Griffin B. Bell. (Senators Hart and Hruska were no longer in Congress.) The McClellan-Kennedy bill was introduced in the House, and in addition, Representative William S. Cohen reintroduced the bill that he had cosponsored in the 94th Congress with Representatives Kastenmeier, Edwards, and Mikva.

Senator McClellan's subcommittee recommended S. 1437 to the Senate Judiciary Committee, which reported favorably on the bill in November 1977. The Senate took up the bill at the beginning of the Second Session and on January 30, 1978, passed it by a vote of 72–15.

In the House, the Subcommittee on Criminal Justice began working on the recodification legislation early in the First Session. The subcommittee's work included roundtable discussions with Members of Congress, Federal judges, and other persons interested in the Federal criminal justice system; some 16 open-discussion meetings at which the Senate-passed bill, Representative Cohen's bill, and recodification legislation from previous Congresses, were gone over in detail; 23 hearings, at which some 110 witnesses testified; and some 16 markup meetings, during the course of which the subcommittee drafted its recodification bill. The subcommittee began circulation of a tentative draft of its bill in June 1978, and on July 28, 1978, the subcommittee ordered a clean bill introduced and reported favorably. Because of the lateness of the Session, the Judiciary Committee was unable to take up the subcommittee's bill, and on October 4, 1978, the Committee adopted a resolution authorizing the subcommittee to report on its findings with regard to the recodification of Federal criminal laws.

The subcommittee's report was published as Committee Print No. 29 of the 95th Congress. In its report, the subcommittee stated its findings that the proposals for reform were seriously flawed. The report seriously questioned whether any "omnibus" reform of the Federal criminal law could be accomplished in a satisfactory manner. The subcommittee expressed a belief that any recodification must include significant reform, and that this could only be accomplished through an "incremental" approach, whereby offenses were "reformed" in small groups through numerous pieces of separate legislation. The bill reported by the subcommittee (H.R. 13959) incorporated the initial step of this incremental approach by repealing a number of obsolete offenses.

96th Congress.—On September 7, 1979, Senators Kennedy, DeConcini, Thurmond, and Hatch introduced S. 1722, a revised version of S. 1437 of the previous Congress. The Senate Judiciary Committee held several days of hearings and markups on S. 1722, and on January 17, 1980, that Committee, by a vote of 14–1, reported favorably on the bill, which is now pending on the Senate calendar.

In the House, the Subcommittee on Criminal Justice began work on recodification early in the First Session with 4 days of hearings on the concept of recodification. Following the hearings, the subcommittee reached the conclusion that revision of the Federal laws could not be accomplished by an "incremental", piecemeal approach. Reform would require uniform definitions of such matters as states of mind and a systematic approach to Federal nexus requirements. Any attempt to consolidate part of the criminal law would of necessity leave in effect many portions of current law which would overlap with the offenses contained in the new code, and conflicting interpretations would remain in effect. On the other hand, the subcommittee determined that previous efforts at recodification had serious flaws. Such efforts tended to increase Federal criminal jurisdiction in an unpredictable manner. The consequences of many procedural changes in the proposals were not sufficiently investigated. The definitions of substantive offenses were frequently ambiguous.

The subcommittee, therefore, decided to take an approach that would constitute a middle ground between the "omnibus" and "incremental" approaches. It would draft legislation that was limited to a reform of the substantive criminal law and sentencing. No effort would be made to revise and reform crimes defined outside of title 18 of the United States Code. In drafting its proposal, the subcommittee agreed to abide by certain precepts. In areas of controversy, Federal law would be merely recodified. Reform would be limited to those portions of current law where the need for reform was great and where there was general consensus concerning the type of reform necessary. Absent a demonstration of compelling need, the scope of Federal criminal jurisdiction would be maintained at the *status quo*, and in some cases reduced.

Guided by these principles, the subcommittee devoted 74 public meetings to drafting a new title 18. During this process, information and recommendations were sought and received from the Department of Justice, the American Bar Association, the Business Roundtable, the American Civil Liberties Union, and many other groups. The subcommittee studied current statutory and case law, the recommendation of the Brown Commission, the provisions of the Model Penal code and the codes of the various States, and the previous legislative proposals for reform. During August 1979, the subcommittee circulated a draft code, which was introduced in the Senate as S. 1723, to interested groups, academics, and other portions of the public for comment.

In September and October 1979, the subcommittee held 10 more days of hearings. Witnesses representing over 40 organizations testified or submitted written statements to the subcommittee. Following the hearings, the subcommittee devoted an additional 69 meetings to revising the draft legislation. On January 7, 1980, Representatives

Drinan and Kindness introduced H.R. 6233, the product of the subcommittee's work. Finally, on March 11, 1980, the subcommittee voted 7–1 to recommend H.R. 6915, a "clean" version of the proposal, to the full Judiciary Committee.

On April 23, 1980, the full Committee began mark up of H.R. 6915. During 18 days of mark up, the Committee considered more than 90 amendments to the bill. The Committee deliberations were guided by the same precepts that governed the subcommittee's drafting of the proposal. On July 2, 1980, the Judiciary Committee voted by voice vote to recommend H.R. 6915, as amended, to the House of Representatives.

H.R. 6915 as Reported

H.R. 6915 consists of three titles. Title I repeals all of the provisions of present title 18 of the United States Code and replaces those provisions with a new, comprehensive, and uniform criminal code. Title II of the bill reenacts certain provisions of present title 18 of the United States Code and makes conforming and other changes in criminal provisions outside of title 18. Title III of the bill contains the effective date for the legislation.

The proposed new criminal code established by Title I of the bill is divided into five subtitles: Subtitle I—"Provisions of General Applicability"; Subtitle II—"Offenses"; Subtitle III—"Sentencing and Corrections"; Subtitle IV—"Administration and Procedure"; and Subtitle V—"Ancillary Civil Proceedings."

Subtitle I of the proposed criminal code contains general provisions. It defines terms used throughout the proposed code, sets forth bars and defenses applicable to criminal offenses, defines the culpable states of mind used in the description of the crimes, and sets forth principles of accomplice liability.

Subtitle II of the proposed code defines criminal offenses. A common format is used. The initial subsection defines and classifies the offense for purposes of punishment. If the punishment for the offense will depend on several factors, the second subsection will contain the classification of the offense. Special definitions, defenses, and bars are set forth in separate subsections, and the final subsection will usually describe those situations in which the Federal government can prosecute the offense. If there is no separate jurisdiction subsection, a general rule in section 111(b) of the proposed code sets forth when there is Federal jurisdiction over the offense.

Subtitle III of the proposed code deals with sentencing. It sets forth the punishment that a Federal judge is authorized to impose and defines the maximum prison term and maximum fine for each class of offense. This subtitle also sets forth the factors for consideration and the procedure for imposition of sentence. Subtitle IV of the proposed code contains matters relating to administration and procedure, such as the Interstate Agreement on Detainers, and the method by which a court order authorizing a wiretap may be obtained. Subtitle V of the proposed code contains provisions relating to forfeiture of property, civil actions to restrain racketeering activities, and the imposition of civil disabilities upon convicted defendants.

H.R. 6915 attempts to consolidate in one title of the United States Code all Federal felony offenses. A number of Federal felonies currently found outside of title 18, however, have complicated legislative and judicial histories that are not easily preserved through the language and conventions of the proposed code. As a result, many of these offenses are incorporated into title 18 by cross-reference. The definitions of those offenses remain where they are currently located, in other titles and laws.

The Committee does not intend to alter the substance of the offenses to which it cross-references, nor does it intend to change any judicial interpretations of those offenses. It should be noted that the application of such matters as the rules concerning states of mind is limited by the proposed code to offenses described in title 18 (*see, e.g.*, sections 101, 301). A cross-referenced offense is not "described" in proposed title 18. In addition, a cross-reference uses the term "to violate," which is defined in section 101 of the proposed code so as to incorporate the elements and states of mind required by the provision outside of title 18.

Subtitle I of Title II of H.R. 6915 reenacts certain offenses in current title 18. These are offenses prohibiting a specific and narrowly defined course of conduct which, because of their nature, are not covered by the more generalized offenses. For the most part, the language of these offenses has not been changed, except to remove gender references. In a few cases, obsolete penalty and other provisions were modified. All offenses in subtitle I of Title II, with the exception of the reenactment of section 953 (the "Logan Act") and section 794 of current title 18, are misdemeanors or infractions, or are cross-referenced in the proposed code.

Subtitle II of Title II consists primarily of technical and conforming amendments. These are generally of three types. The first group amends the various felony provisions outside title 18 which are cross-referenced in the proposed code so as to reflect the specification of the penalty in the proposed code. The second group amends various cross-references in laws outside title 18 to sections of title 18 so as to reflect the new sections of the proposed code, or, where appropriate, the reenactments of current title 18 sections. The third group of amendments repeals certain provisions outside of title 18 which prohibit conduct that will be proscribed by one or more sections of the proposed code. Finally, subtitle II amends certain provisions of titles 28 and 42 of the United States Code in order to facilitate the prevention of "child-snatching" (parental kidnapping).

TITLE I OF THE BILL—REVISION OF TITLE 18

Title I of the legislation repeals all of the provisions of current title 18 of the United States Code. The repealed provisions are replaced with a comprehensive and uniform criminal code. The proposed new code established by Title I of the bill is divided into five subtitles—subtitle I (provisions of general applicability), subtitle II (offenses), subtitle III (sentencing and corrections), subtitle IV (administration and procedure), and subchapter V (ancillary civil proceedings).

Subtitle I—Provisions of General Applicability

Subtitle I of the proposed code contains general provisions. These provisions relate to the definition of terms frequently used in the pro-

posed code and to matters pertaining to Federal criminal jurisdiction; to definition of the states of mind used in the description of the various offenses; to matters of complicity; and to generally-applicable bars and defenses.

Chapter I—General Definitions and Other General Rules

Introduction

This chapter sets forth the general rules applicable to the proposed code. The Committee decided not to include as part of this chapter any statements about general principles regarding criminal liability or the construction of criminal statutes. The Committee considers that such principles are so basic to the criminal law as not to require codification. Many of such principles are constitutionally required. In addition, the Committee is concerned that a codification of some of the basic principles of criminal law might be construed as indicating an intent not to carry forward other principles not so codified.

The Committee, in not codifying such principles, in no manner intends to alter the basic premise of Anglo-Saxon criminal law that a person may not be convicted of an offense absent proof by the prosecution, beyond a reasonable doubt, of every factor involved in the commission of a criminal offense. As applied to the proposed code, this means that the conviction of a criminal defendant requires proof beyond a reasonable doubt that—

(1) the defendant, either as the actor engaged in the conduct or as an accomplice, is responsible for the conduct that is described in the section defining the offense, and in any provision of law incorporated, directly or indirectly, in the definition of the offense;

(2) any circumstances described in such a section or provision incorporated existed at the time of such conduct;

(3) any results so described were caused by such conduct;

(4) the states of mind so described existed with respect to such conduct, circumstances, or results; and

(5) a basis for Federal jurisdiction so described existed with respect to the offense.

In addition, any defense or bar to prosecution properly raised by the defendant must be proved not to have existed beyond a reasonable doubt. The prosecution must also rebut any affirmative defense which the defendant has established by a preponderance of the evidence. *See* section 122 of the proposed code.

The Committee further intends that issues involving causation continue to be resolved according to the principles developed through the common law. *See generally* R. Perkins, *Criminal Law* 685–738 (2d ed. 1969); W. LaFave & A. Scott, *Criminal Law* 246–67 (1972).

The Committee does not intend to modify in any manner the use of the rule of "lenity" in the construction of criminal statutes. As recently reiterated by the Supreme Court,

> "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Thus, where there is ambiguity in a criminal statute, doubts are to be resolved in favor of the defendant.

United States v. *Bass*, 404 U.S. 336, 347–48 (1972) (citations omitted).

Finally, the Committee intends that any other general principles of criminal law which are not expressly abrogated by the proposed code, and which are not inherently inconsistent with the provisions of the proposed code, shall continue to operate. Many such principles are noted in the discussion of particular sections of the proposed code. However, the failure to discuss any such principle should not be considered to reflect an intent to abandon it.

Subchapter I—Definitions

§ 101—General definitions

Section 101 defines 36 terms used throughout the proposed code. These definitions are occasionally limited for the purpose of a section, subchapter, or chapter, and other definitions appear elsewhere in the proposed code for the purposes of a section, subchapter, or chapter. These definitions are, in general, modifications or definitions found in current law, the Brown Commission (*Final Report* section 109), and previous legislative recodification proposals. While most of the definitions are self-explanatory, a few deserve special note.

The term "act" is defined to mean voluntary bodily movements. As such, it does not include bodily movements that do not involve consciousness, such as reflex actions or behavior while asleep. An omission to act, or a simple possession, cannot constitute an act since it does not involve bodily movement.

In contrast, the term "conduct" is defined to include acts, possessions, and omissions to perform an act when there is a duty to act. The Committee has not attempted to define circumstances under which a duty to act may arise, but intends to leave the further development of this concept to case law. The Committee recognizes that the existence of a duty to act may arise from a number of circumstances, including but not limited to a familial relationship, a statute, a contract, a voluntary assumption of care, and the creation of a peril. *See generally* W. LaFave & A. Scott, *Criminal Law* 182–91 (1972).

Thus, if the conduct required for an offense is described as "any conduct", the offense may be committed through an act, a possession, or an omission to fulfill a legal duty to act. If, however, the conduct is described as "any act", the offense requires some type of affirmative, volitional behavior. The term "action" is a variant of "act," and when used to describe conduct also requires affirmative behavior.

The term "actor" is used in the proposed code to refer to the person engaging in the conduct proscribed by the section defining an offense. Thus, the actor may not always be the defendant in a case. The term "defendant" is not defined, but is used in its accepted legal meaning to refer to a person who has been charged with an offense. Since sections 501–03 of the proposed code permit a person to be tried and held liable for the conduct of another, the defendant in a case is not always the actor. Thus, if a defense refers to the "defendant", the existence or nonexistence of the defense depends upon circumstances involving the person on trial for the offense. If, however, a defense refers to the "actor", the defense will succeed or fail depending upon circumstances involving the person for whose conduct the defendant is alleged to be liable.

The definition of the term "fraud" is a variation of the false statement offense described in section 1742 of the proposed code. As discussed at 141–42 *infra* with regard to the offense of conspiring to obstruct a government function by fraud, the Committee is concerned that the terms "fraud" and "defraud" have been construed so expansively by courts in recent years as to lose any clear contours; yet the Committee was also concerned with defining a broad area of deceptive conduct, the use of which to obtain certain ends could be prohibited. By employing the same terms used to define the false statement offense, and expanding the coverage to include oral as well as written misrepresentations, the Committee believes that it has devised a definition which includes all forms of deceptive behavior without also including behavior which, while criminal, is only deceptive in that it is concealed from authorities. The due process requirements of notice regarding the nature of proscribed behavior dictate that the latter type of conduct be proscribed by specific offenses, not by a generic "fraud" or "defraud" which gives no significant notice of what is prohibited.

The term "offense", when unmodified, refers to violations of Federal law, other than the Uniform Code of Military Justice. This exclusion ensures that nothing in the proposed code will be construed as affecting the substance or procedure of the Uniform Code of Military Justice.

If the term "offense" is modified by another term, such as "State", it refers to a violation of the criminal laws of the specified legal entity. A reference to a "State" offense of necessity includes offenses described in the laws of political subdivisions of a State, such as cities or counties. Such subdivisions are not sovereign, but can only enact crimes by virtue of authority conferred by the State; thus, any "local" offenses are, in reality, "State" offenses.

The term "physical force" refers to "physical action" against another. "Action", a variant of the term "act," requires affirmative, volitional behavior. The requirement that it be physical excludes such behavior as speech. The action must be directed "at another" in a physical sense, not merely in terms of the actor's motive; i.e., the force must be directed at the person of another or at the person's close appurtenances, such as spectacles or a hat. Thus, the physical removal of an object belonging to another, but not on the person of another, cannot be considered "physical force", even though the action is intended to deprive the other of a property right. Where affirmative, physical behavior not directed at the person or close appurtenances of another is intended to be proscribed, the term "physical action" is used.

SUBCHAPTER II—FEDERAL CRIMINAL JURISDICTION

Introduction

Traditionally, Federal jurisdiction refers to the power of the Federal government to make and enforce laws. As used in the proposed code, however, Federal jurisdiction means the nature and extent of that power, and how that power is exercised. Sections 111–14 outline the nature of territorial, special, extraterritorial and Indian Country jurisdiction. Section 115 establishes rules for the exercise of jurisdiction when both the Federal and State authorities have the right to investigate and prosecute. Section 116 states that factual determinations relating to the existence or nonexistence of Federal jurisdiction are to be made by the trier of fact, unless both parties otherwise agree. Finally, section 117 establishes the rule that the existence of Federal jurisdiction does not generally preempt the right of a State to exercise criminal jurisdiction.

The power of the Federal government to make and enforce criminal laws is limited in two important respects. First, the United States, as a sovereign nation, has the right to exercise authority over its own territories within the limits of international law. The nature of these limits is discussed in detail in section 111(c) of the proposed code. Second, under the United States Constitution, the Federal government is granted certain specified powers, and the remainder of the powers are held by the States and the people of the United States. However, the Constitution provides at least four specific grants of criminal law authority to the Federal government: (1) to provide for the punishment of counterfeiting the securities and current coin of the United States (article I, section 8, clause 6); (2) to define and punish piracies and felonies committed on the high seas and offenses against the law of nations (article I, section 8, clause 10); (3) to prosecute offenses within Federal enclaves (article I, section 8, clause 17); and (4) to declare the punishment of treason (article III, section 3, clause 2). A variety of statutes has been enacted since 1790 to protect these clearly Federal interests.

In addition to the powers that are specifically enumerated, Congress has constitutional authority to regulate other matters, such as the use of the mails and interstate and foreign commerce. It is primarily through such authority that the scope of Federal jurisdiction has been expanded over the last 200 years to include jurisdiction of an auxiliary type. This type of jurisdiction proscribes conduct which generally is also a violation of the laws of one or more of the States. The Federal government's auxiliary jurisdiction is derived from the means used to complete the crime or from the effect the crime had on a matter of Federal interest. *See* H. Friendly, *Federal Jurisdiction: A General View* (1973); Schwartz, *Federal Criminal Jurisdiction and Prosecutorial Discretion*, 13 L. & Contemp. Prob. 64 (1948).

The growth of the Federal criminal law has, however, been marked by certain inconsistencies. Current Federal statutes incorporate into the definition of the offense the jurisdictional basis for the Federal prosecution. Frequently, the basis for exercising Federal criminal jurisdiction appears to be of primary importance when compared with the underlying misconduct. For example, what would be defined in a State statute as "robbery" or "extortion" has been prohibited in an

equivalent Federal provision (18 U.S.C. 1951) because the conduct "obstructs, delays, or affects commerce . . . by robbery or extortion."

Historically, this approach to Federal jurisdiction has been used because various Congresses have decided that imposing Federal criminal sanctions for misconduct is appropriate only to the extent that the misconduct obstructs a specific Federal function and injures the integrity of the Federal government. Punishment for the misconduct, absent such a Federal interest, is thus left primarily to the States.

This approach limits Federal jurisdiction on an offense-by-offense basis, but it has a number of serious deficiencies:

(1) The means of causing the harm (for example, interstate travel) is the focus of attention instead of the nature of the misconduct and the actor's culpability for that conduct.

(2) Offenses are multiplied. For example, under current law, every wrongful use of the mails constitutes a separate offense under 18 U.S.C. 1341.

(3) Circumstances giving rise to Federal jurisdiction are often described inconsistently. For example, robbery and extortion require an effect on interstate or foreign commerce, whereas the making of an extortionate extension of credit requires no proof of such effect (*compare* 18 U.S.C. 1951 *with* 18 U.S.C. 892).

(4) Some current laws have been interpreted as requiring that the prosecution prove that the defendant had a particular mental state in connection with the jurisdictional basis of the offense, even though the existence of such an "anti-Federal" intent has nothing to do with the actor's culpability. For example, some courts have required that the Government prove that the defendant knew that the mails were being used.

(5) The grading of the penalties for some misconduct is too low, in comparison to State law parallels, because the focus is on the jurisdictional basis rather than on the nature of the misconduct.

These criticisms led the Brown Commission to suggest that the basic approach to Federal jurisdiction be changed. The Brown Commission and all recodification legislative proposals subsequent to its *Final Report* separate the question of jurisdiction from the description of the prohibited conduct. Use of this method, coupled with other drafting techniques, retains the advantages of limiting jurisdiction on an offense-by-offense basis while minimizing the disadvantages. This method permits a clear delineation of the Federal interest, while reducing dramatically the number of specific Federal offenses. For example, the proposed code reduces the current law's 173 perjury and false statement offenses, 134 theft offenses, and 89 counterfeiting and forgery offenses into five offenses.

The Committee's approach in the proposed code is to specify the Federal jurisdiction over an offense in a separate subsection of the offense. This approach protects primary Federal interests while appropriately limiting the auxiliary Federal role. The Committee carefully and painstakingly examined each of the new offenses and their antecedents to ensure that the proposed code generally retains the scope of current Federal law. The only notable exceptions to this rule were taken when a strong case was made to change current law in order to protect a vital Federal interest or to preserve the delicate State-Federal relationship.

The Committee's approach permits a jurisdictional basis to vary from offense to offense. For example, the kidnapping provision in section 2321(c)(1)(B) of the proposed code requires that the victim be moved across a State line before there is Federal jurisdiction, but the operating a gambling business provision in section 2741(c)(2)(B) of the proposed code provides for Federal jurisdiction if *any* person moves across a State line in the commission of the offense.

One of the most controversial recommendations for Federal jurisdiction made by the Brown Commission, and presently followed in modified form in the Senate recodification legislation, is the suggestion that the proposed code provide for ancillary ("piggyback") jurisdiction.[1] This would drastically expand the number of Federal offenses because it creates Federal jurisdiction for crimes which ordinarily would not be within the reach of the Federal government, but which occur during the course of criminal conduct over which there is Federal jurisdiction. For example, current law, the Brown Commission and the Senate bill all provide for jurisdiction over the robbery of a local grocery store where the robbery affects interstate or foreign commerce. Under current law, however, there would be no Federal jurisdiction over a murder that took place during the course of the robbery. The use of "piggyback" jurisdiction would allow Federal prosecutors to prosecute the murder because the murder occurred during the robbery.

The proponents of "piggyback" jurisdiction claim that it is logical, clear, and more certain than current law. As in the example above, it permits consolidation of trials or plea bargains. The Brown Commission claimed that "piggyback" jurisdiction avoids the alleged unfairness of several current law provisions that increase penalties for persons who cause injury or death during the course of a Federal offense, without specifying any requisite state of mind for the enhanced penalties. The use of "piggyback" jurisdiction requires the prosecution to prove the elements of each crime.

Although "piggyback" jurisdiction over offenses occurring in the course of crimes for which Federal jurisdiction already exists will encourage the Federal government to prosecute the conduct constituting the entire criminal episode, such jurisdiction will, if the Federal government proceeds first, deprive the State authorities of any incentive to prosecute the offense. As noted above, much of current Federal law authorizes the Federal government to exercise auxiliary jurisdiction. This back-up ability may become primary if there is no need to defer at least part of the prosecution to State and local officials. As Solicitor General Wade H. McCree has noted,

> Whenever federal prosecutors preempt the prosecution in areas of overlapping jurisdiction, the state criminal justice machinery

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[1] "Piggyback" jurisdiction is strongly opposed by the National Association of Attorneys General. NAT'L ASS'N OF ATTORNEYS GENERAL, FINAL REPORT 2–3 (Mar. 3, 1980); *see also Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Congress, 1st and 2d sessions, Serial No. 52, at 306–08, 779, 1191; *Hearings on Reform of Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary and Before the Senate Comm. on the Judiciary*, 92d Cong., 1st sess., through 96th Cong., 2d sess. at 927–34, 944–52, 1166–78, 3030–34, 3328–61. *See also* Quigley, *The Federal Criminal Code Revision Plan: An Epitaph for the Well-Buried Dead*, 47 GEO. WASH. L. REV. 459 (1979) *see generally* Note, *Piggyback Jurisdiction in the Proposed Federal Criminal Code*, 81 YALE L.J. 1209 (1972).

appears less attractive to well-qualified personnel, and the state system loses an opportunity to improve its own quality, capacity, and responsibility by handling a complex matter. Furthermore, particularly when the primary impact of a crime is local, a community loses the opportunity to have prosecutorial discretion properly exercised by its officers who may be more responsive to local values and sentiments. Accordingly, we should encourage state and local prosecutors to take a larger role in law enforcement in several substantive areas, and the federal authorities should defer to this responsible exercise of state sovereignty.

Address by Solicitor General Wade H. McCree before the Prosecuting Attorneys Association of Michigan, reprinted in Congressional Record, August 5, 1977, at H–8852, 8854 (daily ed.).

One of the most substantial problems with "piggyback" jurisdiction, the problem of inconsistent verdicts, has never been satisfactorily resolved by the proponents of "piggyback" jurisdiction. For example, a person who commits extortion under Federal law may also commit an aggravated battery over which Federal jurisdiction would not otherwise exist. Under the concept of "piggyback" jurisdiction, the person could be charged in Federal court with both extortion and aggravated battery under Federal law. However, if the person was acquitted on the extortion charge, the Federal nexus involved in the aggravated battery would no longer exist, and the aggravated battery charge would have to be dismissed despite any verdict of conviction.

"Piggyback" jurisdiction, with regard to this resulting dismissal, is not analogous to the concepts of ancillary and pendant jurisdiction in civil cases. Under those concepts, claims based on State law, and over which the Federal court gained jurisdiction solely because of a connection with a Federal claim, can be adjudicated by Federal courts even after the Federal claim has been dismissed. Any such analogy loses its validity upon examination of the use of the term "jurisdiction."

The term "jurisdiction," as used in "ancillary jurisdiction" and "pendent jurisdiction," refers to the constitutional and statutory ability of the Federal courts to hear a case. This is the traditional meaning of the term jurisdiction.[2] As used in the proposed code, however, circumstances giving rise to Federal jurisdiction are those circumstances which give rise to the constitutional power of the Congress to prohibit the conduct in question. Whether or not these circumstances are termed "elements" of a crime, they are an integral part of the crime itself. Without the existence of those circumstances, Congress lacks the ability to make the conduct criminal, and the offense cannot exist. Thus, if an underlying offense is dismissed, the "piggybacked" offense must also be dismissed, not because the court "lacks jurisdiction," but because no Federal crime has been committed.[3] This dismissal would have the unfortunate effect of precluding any subsequent State prose-

[2] BLACK'S LAW DICTIONARY 991 (4th ed. 1951) defines "jurisdiction" as "the authority by which courts and judicial officers take cognizance of and decide cases . . . the legal right by which judges exercise their authority."

[3] Thus, the analogous concept to ancillary and pendant jurisdiction would be the granting to Federal courts, in certain situations, of the authority to decide State criminal actions, under State law and with the State authorities as the prosecuting party.

cution for either offense in the more than 20 States which prohibit subsequent prosecutions for offenses arising from the same transaction.[4]

The Committee carefully considered the use of "piggyback" jurisdiction, but decided not to use it for three reasons. First, "piggyback" jurisdiction represents a dramatic change from current law, and a change about which there is significant controversy. The Committee concluded that some of the anomalies of current law can be removed without resort to "piggyback" jurisdiction. Thus, the Committee has carried forward the provisions of current law which increase the penalties when certain results occur (such as death or bodily injury), but has required a particular state of mind on the part of the defendant regarding the result before the increased penalty will apply. *See, e.g.*, section 2321 of the proposed code.

Second, the use of "piggyback" jurisdiction would expand Federal jurisdiction at the expense of potential State court prosecutions. No one has explained why "trial economies" can better be achieved in Federal than in State courts. No evidence has been presented why State courts should be considered incompetent to handle both a bank robbery and a murder committed in the course of the robbery.[5] Proponents of "piggyback" jurisdiction argue that the expansion of Federal jurisdiction can be limited by "piggybacking" only serious offenses against the person. *See* Pauley, *An Analysis of Some Aspects of Jurisdiction under S. 1437, the Proposed Federal Criminal Code*, 47 Geo. Wash. L. Rev. 475, 495 (1979). This approach would present additional difficulties. Juries would be precluded from finding a defendant guilty of any lesser included offense. For example, if a defendant were accused of a "piggybacked" aggravated battery, and the jury found that the aggravating circumstances did not exist, the jury would be forced to acquit the defendant, rather than permitted to convict the defendant of battery. This would hold true regardless of the legal result of an acquittal of the underlying offense which provided the jurisdictional basis for prosecution of the "piggy-backed" offense.

Finally, the Committee concluded that the problem of inconsistent verdicts is a compelling reason to reject "piggyback" jurisdiction. In those States prohibiting subsequent State prosecutions, a serious offender, perhaps a murderer, would go unpunished. Victims of that person's crime would be left without recourse through the criminal justice system. While such a result may sometimes be justified in order to protect the constitutional rights of all citizens, as in those situations where a defendant's constitutional rights have been seriously violated, the Committee does not believe that such results can be justified by "trial economies."

[4] *See e.g.*, ALASKA STAT. § 12.20.010 (1972); ARIZ. REV. STAT. ANN. § 13–112 (1978); ARK. STAT. ANN. § 41–108 (1977); CAL. PENAL CODE § 656 (West 1970); COLO. REV. STAT. § 18–1–303 (1978); DEL. CODE ANN. tit. 11, § 209 (1979); GA. CODE ANN. § 26.507 (1978); HAWAII REV. STAT. § 701–112 (1976); ILL. ANN. STAT. ch. 38, § 3–4 (Smith-Hurd 1972); IND. CODE ANN. § 35–41–4–5 (1979); KAN. STAT. ANN. § 21–3108 (1974); KY. REV. STAT. § 505.050 (1975); MINN. STAT. ANN. § 609.045 (West 1964); MONT. REV. CODE ANN. § 46–11–504 (1979); N.J. STAT. ANN. § 2C:1–11 (West 1980); N.Y. CRIM. PROC. LAW § 40.20 to 40.30 (McKinney 1971); 18 PA. CONS. STAT. ANN. § 111 (Purdon 1973); UTAH CODE ANN. § 16–1–404 (1978); WIS. STAT. ANN. § 939.7 (West 1958); People v. Cooper, 398 Mich. 450, 247 N.W.2d 866 (1976); State v. Hogg, 118 N.H. 262, 385 A.2d 844 (1978).

[5] In fact, a number of United States Attorney's offices routinely decline prosecutions of bank robberies. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' WRITTEN GUIDELINES FOR THE DECLINATION OF ALLEGED VIOLATIONS OF FEDERAL CRIMINAL LAWS 7–8 (1979).

In addition to the thorough review of jurisdiction for each separate offense and the rejection of the use of "piggyback" jurisdiction, the Committee took two other steps to clarify the nature and extent of Federal jurisdiction. The Committee sets forth in section 115 of the proposed code guidelines for determining whether it is appropriate to exercise Federal jurisdiction when the conduct involved violates both State and Federal law. Second, the Committee provides in section 117 that as a general principle the existence of Federal jurisdiction does not preclude the exercise of criminal jurisdiction by Indian tribes, the States, or the military when such authorities also have jurisdiction.

§ *111—Federal jurisdiction*

This section sets forth the general rules for determining the jurisdictional reach of the offenses described in the proposed code.

Subsection (a) provides that if a separate subsection of an offense sets forth one or more circumstances that give rise to Federal jurisdiction, there is Federal jurisdiction over the offense when such a circumstance exists or has occurred and the offense is committed within (i) the general jurisdiction of the United States, or (ii) the special jurisdiction or Indian Country jurisdiction of the United States (to the extent that either of such jurisdictions is specified as a circumstance in the separate subsection).

The formulation of subsection (a) excludes from its purview offenses in the proposed code which are described as a violation of, or which involve conduct required by, a provision outside of title 18 or by a rule issued pursuant to such a provision. In the case of such offenses, there is Federal jurisdiction to the extent provided by the nontitle 18 provision. Thus, the offense of providing arms for a riot, which is described in section 2732 of the proposed code, sets forth the prescribed conduct and provides for Federal jurisdiction where the offense affects interstate or foreign commerce or a Federal government function. An offense under section 2732 is federally prosecutable only if (1) the offense is committed within the general jurisdiction of the United States and (2) the offense affects interstate or foreign commerce or a Federal Government function. On the other hand, the offense of revealing private information submitted for a Government purpose, which is described in section 2125 of the proposed code, speaks of violating specified nontitle 18 provisions. Since section 2125 does not set forth proscribed conduct and thereby describe an offense within title 18, the Federal jurisdiction for section 2125 is provided in the specified nontitle 18 provisions.

Frequently more than one jurisdictional base is set forth in an offense. Proof of any one of the jurisdictional bases is sufficient to establish Federal jurisdiction. Proof of more than one jurisdictional base, however, does not thereby increase the number of offenses committed. *See* section 116(b) of the proposed code.

Subsection (b) provides a second general rule for ascertaining whether there is Federal jurisdiction—if there is no separate subsection specifying circumstances that give rise to Federal jurisdiction, then there is Federal jurisdiction over the offense when it is committed within (1) the general jurisdiction of the United States, or (2) the special jurisdiction of the United States. Thus, if nothing is said in a section defining an offense (other than a cross-referenced offense),

there is Federal jurisdiction anywhere within the territory or the special jurisdiction of the United States.

Subsection (c) provides for Federal jurisdiction over crimes that occur outside of the United States (other than on the high seas). Current law is not directly comparable. Existing Federal provisions do not generally address directly the question of whether there is extraterritorial Federal criminal jurisdiction. Under current law, the courts have struggled to divine Congressional intent, usually without any pertinent legislative history. Swigert, *Extraterritorial Jurisdiction*, 13 Harv. Int'l L.J. 348 (1972). This process has created certain anomalies and inconsistencies, which the proposed code resolves.

Subsection (c)(1) provides for extraterritorial Federal jurisdiction when, and to the extent that, the description of the offense so provides. This approach is supported by the American Bar Association. *See* testimony of William Greenhalgh, on behalf of the American Bar Association, Hearings on Revision of Federal Criminal Laws Befor the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. (1980). Using generally accepted concepts of international law, the Committee determined whether to apply extraterritorial jurisdiction on an offense by offense basis. There are five articulable bases for the exercise of legislative jurisdiction of nations: (1) the territorial principle (either the objective theory, *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911), or the protective theory, Harvard Research in International Law, Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. Supp. (1935)); (2) the nationality principle (i.e., the nationality of the offender); (3) the protective principle (national interest injured by the offender); (4) the passive personality principle (nationality of the victim); and (5) the universality principle (jurisdiction based upon which nation has custody of the offender), *see, e.g.*, 18 U.S.C. 1651; *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820); *United States* v. *The Priates*, 18 U.S. (5 Wheat) 184 (1820); *United States* v. *Holmes*, 18 U.S. (5 Wheat.) 412 (1820). Those principles have received a varying degree of recognition in international law. *See generally* Brierly, *The Law of Nations* (5th ed. 1955); 2 Moore, *Digest of International Law* (1960); 1 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2d rev. ed. 1945). The first and second principles are almost universally recognized, and the third is generally recognized. The fourth principle is recognized by some countries and rejected by others. The fifth principle is only recognized in cases involving internationally recognized crimes (e.g., piracy). The Committee delineated the nature and extent of extraterritorial jurisdiction for each offense, applying these principles to the extent that they are consistent with the fundamental precepts of international law and national sovereignty. *See* Brown Commission, *Working Papers* 69–73 (1970); *Restatement (Second) of Foreign Relations Law of the United States* sections 18(b), 38 (1965). With only three exceptions, which are set forth in subsections (c)(2), (3), and (4), the description of each offense in the proposed code indicates whether or not there is extraterritorial Federal jurisdiction.

Subsections (c)(2), (3), and (4) set forth the exceptions to the offense by offense approach—i.e., those situations in which there is

extraterritorial Federal jurisdiction even though nothing about such jurisdiction may be said in the description of the offense. Subsection (c)(2) provides for extraterritorial Federal jurisdiction over offenses perpetrated by or against a national of the United States at a place outside the jurisdiction of any nation (e.g., ice floes in Antarctica). *See United States* v. *Escamilla*, 467 F. 2d 341 (4th Cir. 1972).

Subsection (c)(3) provides for extraterritorial Federal jurisdiction over offenses perpetrated by a Federal public servant (other than a member of the armed forces subject to court martial jurisdiction) who is outside the United States because of official duties. *See* Brown Commission, *Final Report* section 208(f) (1971). Subsection (c)(3) also provides for extraterritorial jurisdiction (1) over offenses committed by a person who is a member of the Federal public servant's household and who is residing abroad because of the public servant's official duties, and (2) over offenses committed by a person accompanying the military forces of the United States. These provisions expand present law somewhat, but the expansion is supported by the Departments of State, Defense and Justice. *See also* Hearings on H.R. 763, H.R. 6148, and H.R. 7842 before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, 95th Cong., 1st sess., Serial No. 16 (1977); Horhaly & Mullin, *Extraterritorial Jurisdiction and its Effect on the Administration of Military Criminal Justice Overseas*, 71 Mil. L. Rev. 1 (1976). This change also responds to the concerns raised by the Comptroller General. General Accounting Office, *Some Criminal Offenses Committed Overseas by DOD Civilians are not being Prosecuted: Legislation is Needed* (report No. GGD 78-12, Sept. 11, 1979).

Subsection (c)(4) provides for extraterritorial Federal jurisdiction over offenses constituting a conspiracy or an attempt to commit a Federal offense within the United States or offenses committed in whole or in part within the United States where the accused participates outside the United States, if there is a substantial Federal interest in the investigation or prosecution of the offense. This provision brings forward current case law. *Ford* v. *United States*, 273 U.S. 593, 622 (1927); *Rivard* v. *United States*, 375 F.2d 882, 886 (5th Cir. 1967); *United States* v. *Downing*, 51 F.2d 1030 (2d Cir. 1931). The requirement that there be a substantial Federal interest recognizes the important role of comity among nations and is consistent with present Federal practice. *See Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597 (9th Cir. 1976). When the existence of a substantial Federal interest is contested, the question will ultimately be decided by the court in which the prosecution is proceeding, as is the case now when jurisdiction is attacked. A Federal investigating agency, however, will of necessity make the initial determination that there is a substantial Federal interest in order to commence the investigation. The Committee intends that Federal agencies continue to give great weight to the importance of comity in making these decisions. *See* Address by Griffin Bell, Attorney General of the United States, to the American Bar Association, August 8, 1977. Under the doctrine of comity, in any case where the interests of more than one country are affected, Federal courts may decide that, although jurisdictional contacts with the United States exist, there is not a sufficiently substantial and primary United States interest involved to warrant assertion

of United States jurisdiction. *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 613 (9th Cir. 1976); *Mannington Mills* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Restatement (Second) of Foreign Relations Law of the United States* section 40 (1965). The Committee intends that "a substantial Federal interest in the investigation or prosecution" exists only if an offense causes or threatens harm—of the type sought to be prevented in describing the offense—(1) within the United States, (2) to an individual who is a citizen, national or resident of the United States, (3) to an organization organized under the laws of a State or having its principal place of business in the United States, or (4) to the United States.

The proposed code does not use the term "element of the offense", so that it is not necessary specially to provide that the existence of Federal jurisdiction is not an element of the offense. Such a provision is superfluous because the prosecution must prove Federal jurisdiction beyond a reasonable doubt. *See* discussion of section 116(a) of the proposed code.

§ *112—General jurisdiction of the United States*

This section provides that an offense is committed within the general jurisdiction of the United States if it is committed within the geographic United States which includes all places and waters, continental or insular, subject to the jurisdiction of the United States. Areas within the geographic United States, but which are not States, the District of Columbia, or organized territories or possessions, are also treated in section 113 (special jurisdiction of the United States) of the proposed code. A similar result occurs under current law. *Cahn* v. *United States*, 152 U.S. 211 (1894).

§ *113—Special jurisdiction of the United States*

This section provides that there is jurisdiction over an offense committed within the special jurisdiction of the United States if the offense occurs within (1) the special territorial jurisdiction of the United States; (2) the special maritime jurisdiction of the United States; or (3) the special aircraft jurisdiction of the United States. The section provides expanded definitions for each of the terms.

Subsection (b) defines the special territorial jurisdiction of the United States to mean: (1) real property over which the United States has exclusive or concurrent jurisdiction (e.g., the land used for the National Institutes of Health); (2) an unorganized territory or unorganized possession of the United States; (3) an island, rock, or key containing guano, which the President designates as pertaining to the United States; and (4) a facility for exploration of natural resources operated on or above the outer continental shelf. This does not include the District of Columbia, *Johnson* v. *United States*, 225 U.S. 405 (1912), which has its own criminal laws.

The coverage of real property in subsection (b)(1) is derived from article I, section 8, clause 17 of the Constitution, which gives Congress authority to regulate "all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Subsection (b)(1) essentially restates 18 U.S.C. 7(3), and judicial interpretations of that section are intended to be preserved. *United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S.

876 (1973). *See also United States* v. *Holmes*, 414 F. Supp. 831, 836–37 (D. Md. 1976).

The coverage of unorganized territories and possessions in subsection (b) (2) is derived from article IV, section 3, clause 2 of the Constitution, which gives Congress authority to "make all needful rules and regulations respecting the territory or other property belonging to the United States."

Subsection (b) (3) carries forward current law with respect to guano islands. The coverage of off-shore exploration facilities in subsection (b) (4) follows the recommendation of the American Bar Association.

Subsection (c) defines the special maritime jurisdiction of the United States to mean: (1) the high seas; (2) any other waters within the admiralty or maritime jurisdiction of the United States and outside the jurisdiction of any State; (3) a vessel within the admiralty or maritime jurisdiction of the United States and outside of the jurisdiction of any State, where that vessel belongs, in whole or part, to the United States, a citizen of the United States, or a corporation, created by or under the laws of the United States or a State; and (4) a vessel registered under the laws of the United States that is upon the waters of any of the Great Lakes or the waters connecting them, or upon the Saint Lawrence River where it constitutes the international boundary line.

Providing for jurisdiction over offenses that occur on the high seas carries foward the policy behind present 18 U.S.C. 7(1). "High seas," a difficult term to define with exactitude, means those parts of the sea that, in accordance with international law, are not included within the territorial jurisdiction of any nation. *See generally* Clark, *Criminal Jurisdiction over Merchant Vessels Engaged in International Trade*, 11 J. Mar. L. & Com. 219 (1980).

Subsection (d) defines the special aircraft jurisdiction of the United States. The definition covers five types of aircraft during the period when such aircraft are in flight (which is defined to be from the moment when all external doors are closed following embarkation until the moment when any such door is opened for disembarkation or, in the case of a forced landing, until a competent authority takes over responsibility for the aircraft and the persons and property aboard the aircraft). The term "aircraft" is defined in section 101 of the proposed code to mean any craft used or designed for flight or navigation in air or in space.

The first type of aircraft covered is an aircraft owned by the United States, a State, a locality, or a corporation organized under the laws of the United States or a State. This carries forward 18 U.S.C. 7(5). The second type covered is civil aircraft of the United States, which brings forward 49 U.S.C. 1301(5). The third type covered is any other aircraft within the United States, which brings forward 49 U.S.C. 1301(34)(c).

The fourth type of aircraft covered is any other aircraft outside the United States that (a) has its next scheduled destination or last port of departure in the United States, and that next lands in the United States, or (b) has an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) committed aboard and that lands in the United States with the alleged offender still aboard. This carries forward the provisions of section 101 of the Federal Aviation Act, which was enacted to implement the Convention for the Suppression of Unlawful Seizure of Aircraft. The fifth type of aircraft covered is any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee has no principal place of business, whose permanent residence is in the United States. This carries forward 49 U.S.C. 1301(34).

§ 114—Indian country jurisdiction

Section 114, when read in combination with the jurisdictional provisions of various substantive offenses, carries forward the current law with respect to the application of Federal criminal laws to Indian Country. *See* 18 U.S.C. 1151, 1152, 1153 and 3243. For a discussion of current law in this area, see Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976); Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951 (1976).

Subsection (a)(1) carries forward the definition of Indian country currently found in 18 U.S.C. 1151. The provisions of subsection (a)(2) carry forward the second paragraph of 18 U.S.C. 1152, the General Crimes Act. The language of the second paragraph of 18 U.S.C. 1152 appears to preclude the exercise of Federal jurisdiction over intra-Indian crimes. However, this apparent preclusion is overridden by the Major Crimes Act, 18 U.S.C. 1153, which provides for Federal jurisdiction over certain serious crimes against the person in intra-Indian situations. The first paragraph of 18 U.S.C. 1152 provides that "except as otherwise provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, shall extend to the Indian country". This provision means, essentially, that (with certain limitations)[1] the Federal law which applies within the special jurisdiction of the United States applies within Indian country. Thus, the net effect of the General Crimes Act is to make Federal enclave law (i.e., the law applicable within the special jurisdiction of the United States) applicable only to interracial crimes in Indian country.

Recent Supreme Court decisions also make clear that tribal courts have no inherent jurisdiction to try non-Indians. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). Tribal courts do, however, have jurisdiction over certain Indian offenses. *See, e.g.*, 25 U.S.C. 1311; 25 C.F.R. sections 11.1–11.21 (1979).

The Committee provides for Federal jurisdiction over 17 serious crimes against the person when the offense is by or against an Indian in Indian country. This has the effect of continuing the coverage of the Major Crimes Act, 18 U.S.C. 1153. While the Major Crimes Act provides for Federal jurisdiction over 14 offenses, the Committee provides for Federal jurisdiction for 17 offenses. The difference is accounted for by the Committee's express listing of lesser-included offenses. This is consistent with current law, which permits conviction for a lesser-included offense even though that offense is not listed in the Major Crimes Act. *United States* v. *John*, 587 F.2d 683, 688 (5th

[1] Despite the plain language of 18 U.S.C. 1152, that section does not apply to offenses committed by a non-Indian against a non-Indian victim in Indian country. *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 499–500 (1946); Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney 104 U.S. 621 (1881). The General Crimes Act also does not extend Federal criminal jurisdiction to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively (i.e., intra-Indian crimes), or crimes committed by an Indian against a non-Indian where the Indian has not been punished by tribal law). United States v. Wheeler, 435 U.S. 313, 330 n. 30 (1978).

Cir.), *cert. denied*, 441 U.S. 925 (1979); *Felicia* v. *United States*, 495 F.2d 353 (8th Cir.), *cert. denied*, 419 U.S. 849 (1974).

The 17 offenses for which the proposed code provides Federal jurisdiction when the offense is by or against an Indian in Indian country are those set forth in 2301 (murder), 2302 (manslaughter), 2311 (maiming), 2312 (aggravated battery), 2314 (aggravated assault), 2321 (kidnaping), 2322 (aggravated criminal restraint), 2323 (criminal restraint), 2331 (aggravated criminal sexual conduct), 2332 (criminal sexual conduct), 2333 (sexual abuse of a minor), 2501 (arson), 2502 (aggravated property destruction), 2511 (criminal entry), 2521 (robbery), 2522 (extortion) and 2531 (theft) (only if the value of the property stolen is $100 or more).

Federal jurisdiction is provided for certain crimes when there is an interracial aspect—sections 2313 (battery), 2315 (terrorizing), 2316 (communicating a threat), 2531 (theft) (if the value of the property stolen is less than $100), and 2761 (violating State or local law in an enclave).

Subsection (b) (1) carries forward the chart from Public Law 83–280 that provides that certain States have criminal jurisdiction within specified Indian country. Public Law 83–280 authorizes those States, with the approval of the Secretary of the Interior, to retrocede criminal jurisdiction to the Federal government. The only changes in the chart made by the Committee relate to those portions of Indian country where jurisdiction has been so retroceded. Thus, for example, the Burns-Paiute Indian Reservation in Oregon has been deleted from the chart since criminal jurisdiction over that reservation has been retroceded (44 Fed. Reg. 26,169 (1979)). *See also* 41 Fed. Reg. 8516 (1976) (relating to Menominee Indian Reservation in Wisconsin). The Committee was concerned that by reenacting the Public Law 83–280 chart without change, Congress would inadvertently renew the grant of jurisdiction to the States. The Committee has been informed by the Departments of Justice and Interior, and the affected Indian parties, that the chart in subsection (b) (1) represents an accurate listing as of May 1, 1980. The Committee does not intend to work any changes in the method of retrocession or in the current status of Indian lands covered by Public Law 83–280.

Subsection (b) (2) carries forward without change the provisions of 18 U.S.C. 3243.

The general laws of the United States apply to both Indians and non-Indians within Indian country. *See*, *e.g.*, the racketeering offense described in section 2701 of the proposed code. The proposed code thus carries forward current law. *Stone* v. *United States*, 506 F. 2d 561 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975); *Walks on Top* v. *United States*, 372 F.2d 422 (9th Cir.), *cert. denied*, 389 U.S. 879 (1967).

§ *115—Concurrent jurisdiction*

This section creates standards for determining whether Federal authorities should exercise jurisdiction when a State also has jurisdiction. This provision is new to Federal law, but is derived from the recommendations of the Brown Commission (*see Final Report*, section 207.) The Committee recognizes that in numerous instances there will be both State and Federal jurisdiction over certain conduct and that

Federal jurisdiction ordinarily should not be exercised unless a substantial Federal interest can be shown.

Subsection (a) provides that the existence of Federal jurisdiction does not, in itself, require the exercise of that jurisdiction, nor does the exercise of that jurisdiction preclude a subsequent discontinuation of the exercise of that jurisdiction.

The existence of concurrent jurisdiction affects the delicate Federal-State relationship. In order to ensure that Federal jurisdiction is exercised only in those situations where there is a significant public interest in Federal prosecution, subsections (b) and (c) direct the Attorney General to promulgate guidelines for the exercise of Federal jurisdiction which are based upon (1) the severity of the offense; (2) the nature and extent of the Federal interest; and (3) the availability of Federal, State and local resources. Subsection (d) directs Federal authorities to consider these guidelines when deciding whether to exercise Federal jurisdiction in instances where there is concurrent State jurisdiction. The use of hortatory language is intended to encourage the regular use of such guidelines. The absence of any penalty provisions for noncompliance with this section clearly indicates the Committee's view that a failure to consider, or a misapplication of, the guidelines will not be an appropriate basis for litigation in the context of an individual criminal case. The provision that non-compliance not form the basis of a motion to dismiss or other collateral attack by the defendant is based on the recommendations of the Brown Commission, *Final Report* section 207 (1971). Non-compliance would, of course, be admissible in connection with a challenge based on discriminatory enforcement of the law. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962).

Subsection (e) directs the Attorney General to consult periodically with State and local law enforcement officials about the exercise of Federal jurisdiction when the States have concurrent jurisdiction. *See* United States Department of Justice, *Principles of Federal Prosecution* 7, 12 (1980) (consideration should be given to whether there is a substantial Federal interest in the prosecution). The Attorney General is also directed to report annually to Congress on the exercise of concurrent Federal jurisdiction. Such reports should assist Congress in its oversight role and permit a more detailed examination of which crimes or circumstances most appropriately require Federal prosecution.

§ *116—Determination of Federal jurisdiction*

Subsection (a) provides that the existence of Federal jurisdiction is a matter to be determined by the trier of fact. This determination must, of course, be based upon proof beyond a reasonable doubt. See discussion at 12 *supra*. This procedure is comparable to the present practice because matters involved in the determination of "jurisdiction" under the proposed code generally are elements of the offense in current law. While subsection (a) restates what the Committee believes would be the result if nothing were said, the Committee included the subsection because many recent legislative proposals have removed the determination of "jurisdiction" from the province of the trier of fact.

Subsection (b) provides that the existence of more than one circumstance which gives rise to Federal jurisdiction over an offense does not thereby increase the number of offenses committed.

§ 117—Federal jurisdiction: when preemptive

Subsection (a) establishes that Federal jurisdiction over an offense does not necessarily preclude States, Indian communities, or the military from exercising concurrent jurisdiction. Nothing in this subsection grants jurisdiction to the States, Indian tribes or the military which they do not otherwise possess. The phrase, "except as otherwise provided by law", is meant to include within ~~its~~ reach the Constitution of the United States, Acts of Congress, and definitive judicial construction of the Constitution and Acts of Congress. Thus, this section does not affect in any way the relationship between Indian tribes and the States, *see Talton* v. *Mayes*, 163 U.S. 376 (1896); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), nor does this section affect the validity of the various Supreme Court decisions which approve of the exercise of State criminal jurisdiction in certain circumstances. *See New York ex rel. Ray* v. *Martin*, 326 U.S. 496, 499–500 (1946). Subsection (a) also preserves the jurisdiction of courts of military justice. *See Relford* v. *Commandant*, 401 U.S. 355 (1971).

Subsection (b) provides that the Attorney General may, by order, preempt State jurisdiction in two types of cases. The first type of cases involves the offenses of murder (section 2301), manslaughter (section 2302), maiming (section 2311), aggravated battery (section 2312), battery (section 2313), kidnaping (section 2321), criminal restraint (section 2322), or a conspiracy under section 1102 to commit any of the foregoing offenses, if the victim is a specified Federal official (the President, the Vice-President, a Member of Congress) or a "federally protected foreign individual" (a term defined in section 101 of the proposed code). The second type of cases involves (1) the offenses described in chapter 21, subchapter II (election offenses) of the proposed code, (2) the offense described in section 1754 (trading in public office) of the proposed code, and (3) the offenses described in sections 2103 (interfering with a Federal benefit), 2104 (unlawful discrimination) and 2316 (communicating a threat) of the proposed code, but only to the extent that such offenses involve conduct proscribed by the Federal Election Campaign Act of 1971. The preemption provision for election offenses is based on section 104 of Public Law 93–443. *See also* 2 U.S.C. 453.

Present law (18 U.S.C. 351(f) and 1751(h)) permits the preemption of State jurisdiction where a specified Federal official is the victim of an assault, homicide or kidnaping. Subsection (b) extends present law by adding "federally protected foreign individuals." This was done because of the potentially significant impact upon the foreign relations of the United States that is posed when high level foreign visitors are the victims of the serious crimes listed in subsection (b)(1)(B). The list of offenses covered by present law is somewhat expanded by adding other degrees of the basic offenses covered by the present law. For example, by adding criminal restraint, the subsection expands upon the present provision's reference to kidnaping, but does

so by adding what under the proposed code is a lesser included offense of kidnaping.

Subsection (c) was adopted by the Committee at the suggestion of the National Association of Attorneys General. Subsection (c)(1) provides that an order under this section calling for preemptive Federal jurisdiction expires one year after the order is issued (or sooner if rescinded by the Attorney General). Subsection (c) provides the Federal Government with an opportunity for an extension of such a preemption order beyond the first year through a process which would lead to obtaining a court order. The limitation on the duration of a preemptive order takes into account the existence of a number of State penal code provisions which include a 3 year statute of limitations. The temporary nature of the preemption recognizes the important Federal interest, yet also provides the States with the chance to prosecute before the expiration of the applicable State statute of limitations.

Subsection (c)(2) requires that the Federal Government, in order to extend the effect of a preemption order, make an application to the appropriate United States district court. The appropriate United States district court would be the court wherein venue would lie if a Federal prosecution came to fruition. The subsection also requires that the Federal Government give notice to the prosecuting attorney for any State or locality whose criminal jurisdiction has been suspended by a preemption order. This notice, and the accompanying right to participate in the Federal court proceeding, should guarantee the affected parties the right to present the available evidence to the court.

Subsection (c)(3) provides that the court shall enter appropriate orders concerning any application for an extension of the preemption order. In reaching this determination, the court should consider the guidelines required by section 115 of the proposed code.

SUBCHAPTER III—OTHER GENERAL RULES

§ 121—Effect of question of law

This section restates the general principle of law that issues involving the application of the law to a given set of facts (i.e., questions of law) are to be resolved by the court. Where, however, there is a dispute regarding the underlying facts to which the law is to apply, the decision regarding those facts must be made by the trier of fact.

§ 122—Proof as to bars and defenses

This section sets forth the methods, and burdens, of proving bars and defenses. Bars and defenses are matters which exculpate, excuse, or justify a defendant even though the defendant has engaged in conduct which would otherwise constitute the offense in question. Subsection (a) provides that where a matter of exculpation is denominated a "bar to prosecution," the existence of the matter is a question of law, and is therefore to be determined by the court (see section 121 of the proposed code). Subsection (b) provides that the defendant carries the burden of producing evidence (not the burden of proof) with regard to a matter of exculpation which is denominated a "defense." Once the defendant introduces evidence that supports a reasonable belief as to the existence of the defense, the prosecution has the burden of disproving the exist-

ence of the defense beyond a reasonable doubt. This approach is consistent with current practice. Subsection (c) specifies that a defendant has the burden of proving a matter of exculpation which is denominated an "affirmative defense" by a preponderance of the evidence.[1] Placing the burden of persuasion on the defendant is a departure from the typical current practice and has been utilized by the Committee primarily in two types of cases: (1) where the matter of exculpation depends upon evidence over which the defendant exercises control; and (2) where the matter of exculpation is one which does not exist in current law.

§ *123—Civil remedies and powers unimpaired*

This section clarifies that the revision of title 18 is not intended to affect civil proceedings or the civil authority of the courts, except where explicitly provided.

Chapter 3—States of Mind

Current Law

The proposed code adopts a structure for defining offenses which is derived from the American Law Institute's Model Penal Code and the recommendations of the Brown Commission. This structure is a departure from the format used in present Federal criminal provisions and is, in the Committee's judgment, an important change that will make Federal criminal provisions easier to understand.

It is generally stated that there are two components of a crime: conduct and intent. To violate the criminal law, the actor must engage in the prohibited conduct (*actus reus*) with the requisite state of mind (*mens rea*). Professor Perkins summarizes the traditional view this way:

> [T]here are two components of every crime: One of these is objective, the other is subjective; one is physical, the other is psychical; one is the *actus reus*, the other is the *mens rea*. Although two or more offenses may have the same objective component, as in the case of murder and manslaughter, the *actus reus* generally differs from crime to crime. In murder it is homicide; in burglary it is nocturnal breaking into the dwelling of another; in uttering a forged instrument it is the act of offering as good an instrument which is actually false. In like manner the *mens rea* differs from crime to crime. In murder it is malice aforethought; in burglary it is the intent to commit a felony (and under some statutes an intent to commit any public offense); in uttering a forged instrument it is "knowledge" that the instrument is false plus an intent to defraud.

R. Perkins, *Criminal Law* 743 (2d ed. 1969) (footnote omitted).

[1] The term "affirmative defense" has a meaning in the proposed code that is different from the traditional meaning of that term. An affirmative defense traditionally is any matter of exculpation concerning which the defendant has the burden of producing evidence. If the defendant introduces some quantum of evidence about the matter, then the prosecution has the burden of persuasion and must disprove the defense. *See* W. LaFave & A. Scott, Criminal Law 46–49 (1972). In this sense, all defenses in the proposed code are traditional affirmative defenses. However, following the recommendation of the Brown Commission (Final Report § 103), the Committee has decided to use the term "affirmative defense" to refer only to those defenses concerning which the defendant has both the burden of producing evidence and the burden of persuasion.

The traditional analysis that a crime consists of two components, conduct and intent, is somewhat misleading. First, there are components to the *actus reus* other than conduct. For example, a typical burglary offense is defined as the entry of the dwelling of another in the nighttime with intent to commit a felony. The conduct component of the offense is the entry. In order to establish the *actus reus*, however, the prosecution must show more than an entry. The prosecution must also show that the building entered was a dwelling, that the dwelling belonged to someone other than the actor, and that the entry took place at night. These factors are circumstances that must exist at the time of the conduct.

In addition to circumstances, a criminal statute may also require certain results of the proscribed conduct. For example, the offense of false pretenses typically proscribes the obtaining of the property of another by means of untrue representations of fact with intent to defraud. The conduct component is the representation of fact. However, proof of the *actus reus* is not established by showing a representation of fact. It must also be shown that the representation was false (a circumstance), that property was obtained (a result), and that the property obtained was property of another (a circumstance).

Thus, in analyzing the *actus reus* of an offense, it is helpful to speak of conduct, the circumstances (if any) that must attend that conduct, and the results (if any) that must attend that conduct. This is the approach of the American Law Institute's Model Penal Code (*see* section 1.13(9)) and of the Brown Commission (*see Final Report* section 103(1)). It is also the approach taken in the Senate recodification proposals.

The traditional analysis is also somewhat misleading because the *mens rea* requirement of traditional law is not a unitary concept. Traditional criminal law uses two terms to refer to mental state requirements: general intent and specific intent. Each term has been given a number of different meanings. However, in most cases general intent has been interpreted as a requirement that one know the nature of one's conduct and the circumstances under which that conduct occurs. Thus, in order to be convicted of common law battery, one need only be aware that one is using force against another. Specific intent has had two generally acknowledged meanings: (1) any mental state more stringent than general intent (*e.g.*, the malice aforethought required for common-law murder); and (2) a particular motive or purpose (*e.g.*, the intent to commit a felony discussed above with respect to burglary, and the intent to defraud discussed above with respect to false pretenses). Current Federal law utilizes both general and specific intent, but has added over 70 variants of these mental state requirements. Some of these variants, such as "maliciously" or "willfully", appear to be more stringent than general intent. Others, such as "negligently", are less restrictive. The confusion is multiplied by the fact that the same term may be given different meanings by the courts when it appears in different sections of current title 18 of the United States Code.[1]

[1] For a discussion of the different meanings given the term "willful," see Note, *An Analysis of the Term "Wilful" in Federal Criminal Statutes*, 51 Notre Dame Law. 786 (1976).

Most modern criminal codes adopt a structure derived from the Model Penal Code and endorsed by the Brown Commission.[2] Mental states are assigned to each component of the *actus reus*, including (1) the conduct involved, (2) the results, if any, that must be caused by the conduct, and (3) the circumstances, if any, under which the conduct must occur. Modern codes also supplement these components and companion mental states, when appropriate, with additional requirements involving purpose or motive. These additional requirements reflect the matters traditionally denominated "specific intent," when that term is used to mean a particular motive or purpose.

Thus, the Model Penal Code of the American Law Institute uses four basic terms to describe the states of mind used in its substantive offenses (*see* section 2.02(2)). The Model Penal Code also uses, on occasion, a specific intent requirement (*see, e.g.*, section 221.2 (burglary), which requires an intent to commit a crime at the time of entry). The Brown Commission also decided to use a limited number of terms to describe the states of mind used in the substantive offenses. While the Brown Commission listed five terms (intentionally, knowingly, recklessly, negligently, and willfully), it really only used four, since willfully was defined to mean intentionally, knowingly or recklessly (*see* section 302(1) of the *Final Report*). The Brown Commission also used the specific intent concept (*see, e.g.*, section 1711 (burglary) of the *Final Report*) and on occasion required proof of a motive (*see, e.g.*, section 1515 (discriminatory interference with speech or assembly related to civil rights activities) of the *Final Report*).

The bill passed by the Senate last Congress and the bill reported by the Senate Judiciary Committee this Congress use four basic terms to describe the required state of mind in the substantive criminal offenses. These four are intentional, knowing, reckless, and negligent (*see* S. 1437, 95th Cong., 2d sess., proposed section 301 of title 18 (1978); S. 1722, 96th Cong., 1st sess., proposed section 301 of title 18 (1980)). Those bills also use the specific intent concept (*see, e.g.*, section 1711 (burglary) of their proposed title 18) as well as requiring proof of a motive (*see, e.g.*, section 1504 (unlawful discrimination) of their proposed title 18).

The Committee has followed the structure of the modern proposals and decided to specify four states of mind—intentional, knowing, reckless, and negligent—and on occasion to require proof of a specific intent or a motive.

§ 201—*Definitions of states of mind*

Subsection (a) defines the term "states of mind" as (1) any mental state required to be proved with respect to a component of a crime (conduct, circumstances, and results) and (2) any specific intent (purpose) or motive that is required to be proved. Subsection (a) also provides that a specific intent requirement is denoted by the phrase

[2] *See, e.g.*, ALA. CODE tit. § 13–A–2–2 (1977); ARIZ. REV. STAT. ANN. § 13–105(5) (West 1978); ARK. STAT. ANN. § 41–203 (1977); COLO. REV. STAT. §18–1–501 (1978); CONN. GEN. STAT. ANN. § 53a–3 (West Supp. 1980); DEL. CODE ANN. tit. 11 § 231 (1979); HAWAII REV. STAT. § 702–206 (1976); ILL. ANN. STAT. ch. 38, §§ 4–4, 4–5, 4–6, 4–7 (Smith-Hurd 1972); IND. CODE ANN. § 35–41–2–2 (1979); KY. REV. STAT. § 501.020 (1975); ME. REV. STAT. ANN. tit. 17–A, § 10 (West 197 Pamph.); MO. ANN. STAT. § 562.016 (Vernon 1979); MONT. REV. CODES ANN. § 94–2–103 (1979); N.H. REV. STAT. ANN. § 626.2 (II) (1974); N.J. STAT. ANN. § 2C:2–2(b) (West 1980); N.Y. PENAL LAW § 15.05 (McKinney 1975); N.D. CENT. CODE § 12.1–02–02 (1976); OHIO REV. CODE ANN § 2901.22 (1975); OR. REV. STAT. § 161.085 (1977); 18 PA. CONS. STAT. ANN. § 302(b) (Purdon 1973); S.D. COMPILED LAWS ANN. § 22–1–2(1) (1979); TEX. PENAL CODE ANN. tit. 2, § 6.03 (Vernon 1974); UTAH CODE ANN. § 76–2–103 (1978); WASH. REV. CODE ANN. § 9A.08.010(1) (1977).

"with intent," while a motive requirement is denoted by the phrase "because of."

Subsection (b) defines an "intentional" state of mind and provides that one's state of mind is intentional as to one's conduct or the result of one's conduct if such conduct or result is one's conscious objective. The intentional state of mind is applicable only to conduct and results. Since one has no control over the existence of circumstances, but only over the decision whether to act under those circumstances, one cannot "intend" circumstances. Thus, the proposed code does not use an "intentional" state of mind with regard to circumstances.

The definition of "intentional" in subsection (a) is narrower than the dictionary definition of "intentional." For the purposes of the proposed code, therefore, "intentional" means more than that one *voluntarily* engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person's conscious objective.

Subsection (c) defines a knowing state of mind as (1) an awareness of the nature of the conduct, (2) an awareness of or a firm belief in the existence of the circumstance and (3) an awareness of or a firm belief in the substantial certainty of the result.

The proposed code's distinction between an "intentional" state of mind and a "knowing" state of mind is narrow but important. As recently stated by Mr. Justice Rehnquist,

> Perhaps the most significant, and most esoteric, distinction drawn by [Model Penal Code] analysis is that between the mental states of "purpose" and "knowledge." As we pointed out in *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978), a person who causes a particular result is said to act purposefully (intentionally) "when he consciously desires that result, whatever the likelihood of that result happening from his conduct"; while he is said to act knowingly if he is aware "that the result is practically certain to follow from his conduct, whatever his desire may be as to that result." [footnote omitted.]
>
> In the case of most crimes, "the limited distinction between knowledge and purpose has not been considered important since 'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results,'" [citation omitted] . . . .
>
> In certain narrow classes of crimes, however, heightened culpability has been thought to merit special attention.

United States v. *Bailey*, 444 U.S. 394 (1980). (The term "purposeful" in the Model Penal Code is the equivalent of "intentional" in the proposed code.)

Subsection (d) defines a "reckless" state of mind and provides that one's state of mind is reckless concerning a circumstance or a result if one is aware of and disregards a risk that the circumstance exists or that the result will occur, where the risk is of such magnitude that to disregard the risk constitutes a gross deviation from a reasonable standard of care. Disregarding a risk is intended to mean acting despite an awareness of the risk. The reckless state of mind does not apply to conduct since one who is not asleep or unconscious, or whose cognitive functions are not so radically disordered as to create a state analogous

to unconsciousness, is always at least aware of the nature of one's conduct. For example, one who strangles another, believing one is squeezing a lemon, at least is aware that one is squeezing something. The fact that it is a person being squeezed is a circumstance.

Subsection (e) defines a "negligent" state of mind and provides that one's state of mind is negligent concerning a circumstance or a result if one ought to be aware of a risk that the circumstance exists or the result will occur, and the risk is of such magnitude that to fail to perceive the risk constitutes a gross deviation from a reasonable standard of care. The negligent state of mind, for reasons set forth above with respect to the reckless state of mind, is applied only to circumstances and results.

The distinction between the reckless state of mind and the negligent state of mind, for the purposes of the proposed code, lies in whether or not the risk is perceived. If the risk is not perceived, then one is negligent but not reckless.

Although the terms "reckless" and "negligent" are terms drawn from the civil law, their definitions in the proposed code are significantly different from civil law definitions. (Civil law definitions of negligence, gross negligence, and recklessness vary from jurisdiction to jurisdiction.) Two features in particular distinguish these concepts in the proposed code from the civil law: (1) recklessness in the proposed code requires a subjective awareness of the risk; and (2) to constitute either negligence or recklessness, the deviation from a reasonable standard of care must be gross.

§ *302—State of mind requirement for offenses described in this title*

This section sets forth general rules for determining the states of mind required to prove an offense.

Subsection (a) provides that, unless otherwise specified, the state of mind required for conduct is knowing. This rule is dictated by the fact that conduct can only be knowing or intentional, and by the fact that the knowing state of mind is more frequently used in current law and in the proposed code than is any other state of mind. While the Committee has specified the state of mind required for conduct in each of the offenses it has drafted, section 302 is necessary because in the future offenses may be drafted without such specification.

Subsection (b) provides that the state of mind required for conduct will apply to circumstances and results unless otherwise specified. This rule makes it unnecessary to distinguish among the components of an offense (conduct, circumstances and results) in order to determine the applicable state of mind. Where more than one state of mind is specified, it will be clear to which component each state of mind applies. The Committee's approach in subsection (b) is similar to the approach of the Brown Commission and the Model Penal Code. The virtue of the rule set forth in this subsection is that one can always determine the required states of mind by reading the statutory language, without resort to the legislative history. This is a significant improvement over other legislative proposals under which, for example, it would be necessary to determine whether "damages", as used in a property destruction offense, refers to conduct or to a result in order to determine the applicable state of mind. *See generally* Rothstein,

Special Report—Federal Criminal Code Revision: Problems With Culpability Provisions, 15 Crim. L. Bull. 157 (1979).

The effect of subsections (a) and (b) is that, in the absence of language to the contrary, a knowing state of mind will be required for conduct, results, and circumstances. This comports with the usual interpretations of the general intent requirement of current law. As Mr. Justice Rehnquist noted in *United States* v. *Bailey*, 444 U.S. 394, 405 (1980), "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent" (citation omitted).

Mr. Justice Holmes similarly spoke of the meaning of general intent, "If a man intentionally adopts certain conduct in circumstances known to him, and that conduct is forbidden by the law under the circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." *Ellis* v. *United States*, 206 U.S. 246, 257 (1907). *See also United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied sub nom. Ehrlichman* v. *United States*, 413 U.S. 933 (1977); *United States* v. *Byrd*, 352 F.2d (2d Cir. 1965).

The term "provision defining the offense" used in subsections (a) and (b) is intended to include the definitions of terms used in the description of the offense.

Subsection (c) provides that the rules regarding states of mind apply to conduct, results and circumstances which are specified in provisions classifying offenses, unless otherwise provided. The Committee believes that this rule is appropriate because matters which constitute elements of an offense in current law have become factors to be considered in grading in the proposed code.

Subsection (d) provides that, unless a law explicitly states otherwise, no state of mind must be proved for other matters involved in a criminal offense, such as bars to prosecution, defenses, affirmative defenses, and the existence of Federal jurisdiction and venue.

The Committee does not intend that a provision stating that a type of conduct is described in a particular section of law, or that a particular term is defined in a particular section of law, should be considered a circumstance, as such term is used in this section (thereby requiring proof of the same state of mind as that applied to the conduct, even in the absence of an explicit requirement). Rather, such a provision is merely a shorthand manner of describing the conduct, or defining the term. As such, the provision requires no state of mind, unless specified otherwise.

Subsection (e) provides that a requirement of knowledge of the existence of a particular circumstance may be satisfied by proof that the actor was aware of a high probability of the existence of that circumstance, unless the actor actually believed that the circumstance did not exist. The language of subsection (e) comes from the Model Penal Code (section 2.02(7)). The Model Penal Code language, in the words of its drafters, "deals with the situation British commentators have denominated 'wilful blindness' or 'connivance,' the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist." Model Penal Code section 2.02, Comment at 129–30 (Tent. Draft No. 4, 1955). The Committee intends to incorporate this Model Penal Code concept as that con-

cept has been explained in such Federal cases as *United States* v. *Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976); and *United States* v. *Jacobs*, 475 F. 2d 270 (2d Cir.), *cert. denied sub nom. Thaler* v. *United States*, 414 U.S. 821 (1973).[1]

Willful blindness is not equivalent to "recklessness" as used in the proposed code. Willful blindness requires an awareness of a high probability of the existence of the circumstance. *See United States* v. *Jewell*, 532 F.2d 697, 700 n. 7 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976), quoting G. Williams, *Criminal Law*:

> A court can properly find willful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is willful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.

Further, "willful blindness" can be obviated by actual belief that the circumstances does not exist. Such subjective obviation is not possible where the standard is recklessness.

§ *303—Satisfaction of state of mind requirement by proof of other state of mind*

This section provides that a requirement that a particular state of mind be proved with respect to conduct, a result, or a circumstance may be met by proof of a "higher" state of mind. Proof of an intentional state of mind will therefore satisfy a requirement of a knowing state of mind; proof of a knowing or intentional state of mind suffices to prove a reckless state of mind; and proof of a reckless, knowing, or intentional state of mind satisfies a requirement of a negligent state of mind.

Chapter 5—Complicity

§ *501—Accomplices*

This section sets forth the principles by which an individual may be convicted of an offense based on the conduct of another. Like current Federal law, it rejects the common-law distinction among principals, principals in the second degree, and accessories before the fact. All are treated as principals, and all are equally liable. The proposed code does not treat accessories after the fact as accomplices but holds them liable under section 1711 (hindering law enforcement).

Subsection (a) sets out general rules for determining accomplice liability. Subsection (a)(1) provides that an individual is criminally liable for an offense committed by another if that individual, with the intent that an offense be committed, commands, induces, procures or aids the other to commit the offense. Current 18 U.S.C. 2 defines as a principal one who "aids, abets, counsels, commands, induces or procures" the commission of the offense. The Committee deleted the word "abets" as superfluous, and the word "counsels" because of concern that it might be interpreted as prohibiting activity protected by the first amendment. The Committee has followed the approach of the vast majority of Federal cases and has required an

[1] For a criticism of the concept of willful blindness as developed by Federal courts, see Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 Iowa L. Rev. 468 (1977).

intent that the offense be committed. *See Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *United States* v. *Pearlstein*, 576 F.2d 531, 546 (3d Cir. 1978); *United States* v. *McMahon*, 562 F.2d 1192, 1195 (10th Cir. 1977); *United States* v. *Barclay*, 560 F.2d 812, 815–16 (7th Cir. 1977); *United States* v. *McDaniel*, 545 F.2d 642, 644 (9th Cir. 1976); *United States* v. *Crockett*, 534 F.2d 589, 600 (5th Cir. 1976); *United States* v. *Hathaway*, 534 F.2d 386, 399 (1st Cir. 1976); *United States* v. *Crow Dog*, 532 F.2d 1182, 1195 (8th Cir. 1976); *United States* v. *Prince*, 529 F.2d 1108, (6th Cir.), *cert. denied sub nom. Pandelli* v. *United States*, 429 U.S. 838 (1976); *United States* v. *Johnson*, 513 F.2d 819, 823 (2d Cir. 1975); *United States* v. *Barlow*, 470 F.2d 1245 (D.C. Cir. 1972). The Committee rejected the suggestion that mere knowledge that an offense will be committed should suffice to establish accomplice liability.[1]

The National Commission on Reform of the Federal Criminal Laws recommended language providing that a person may be held liable for an offense committed by another when, "having a legal duty to prevent its commission, he fails to make proper efforts to do so." *Final Report* section 401. The Committee believes that the term "aids" includes omissions to act when there is a legal duty to do so, as well as affirmative conduct. As noted by Professors LaFave and Scott, such omissions are generally considered sufficient to establish accomplice liability even though such liability is not ordinarily explicitly stated in statutes. "Thus . . . in the absence of positive encouragement, the owner of a car who sat beside the driver might become an accomplice to the driver's crime of driving at a dangerous speed." W. LaFave & A. Scott, *Criminal Law* 504 (1972). The actor, of course, would have to intend that the offense occur. In view of the Committee's belief concerning the meaning of "aids", the Committee rejected the recommended language of the Brown Commission as superfluous.

One aspect of accomplice liability based upon omissions to act which is not clear in current law is the liability of law enforcement officers for failing to take reasonable steps to prevent a crime. The Fifth Circuit has indicated, in dictum, that a failure by a law enforcement officer to prevent a crime is not, in all circumstances, a basis for accomplice liability:

> [I]t may be conceded that, if an officer has knowledge that a crime is to be committed or has actually been committed, and merely stands by and does nothing to prevent the commission or to apprehend and punish the offenders, he is not necessarily guilty of aiding and abetting its commission, although he may be guilty of malfeasance in office.

Collins v. *United States*, 65 F. 2d 545, 547 (5th Cir. 1933) (holding that an officer is liable when the officer participates in the arrangements

[1] The Committee is only aware of four cases which have been cited as authority for the proposition that accomplice liability can be based on mere knowing assistance. *See* Sen. Rep. No. 96–553 at 76 (1980); Sen. Rep. No. 95–605 at 71, 72 n. 39 (1977). Backun v. United States, 112 F.2d 635 (4th Cir. 1940), is of dubious authority in view of the Supreme Court decision in Nye & Nissen v. United States, 336 U.S. 613 (1949). Similarly, Malatkofski v. United States, 179 F.2d 905 (1st Cir. 1950), is of questionable value in light of the First Circuit's subsequent opinion in United States v. Hathaway, 534 F.2d 386 (1st Cir. 1976). United States v. Greer, 467 F.2d 1064 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973), does not hold that knowledge is sufficient for accomplice liability, but only that proof of knowledge is a necessary component of proof of intent to aid an offense. *Id.* at 1069. Only United States v. Harris, 435 F.2d 74 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971), appears to support the proposition for which it is cited.

for committing a crime and promises protection in its commission. The Committee is not aware of any Federal case with a holding specifically stating the extent of law enforcement liability for intentionally failing to prevent a crime.

Under the Committee approach, as under current law, an officer may be liable, under certain circumstances, for failing to take reasonable steps to prevent an offense when the officer has a duty to prevent it. The extent of the duty may vary according to the circumstances. For example, an officer engaged in an undercover or similar operation would have no duty to prevent the commission of an offense. Similarly, there may be no duty to prevent an offense when an effort to do so may endanger others, or when the effort would be futile. More importantly, in accordance with the *Collins* dictum, mere knowledge that the offense is being committed would be insufficient as a basis for liability. The officer must *intend* that the offense be committed.

Subsection (a)(2) provides that an individual who causes a third party to engage in criminal activity is criminally liable for that activity. The accomplice is actually the motivating party in such a situation and is not merely aiding the third party. The accomplice, therefore, need only have the state of mind required for the offense committed by the third party, or that the third party would have committed if the third party had had the requisite states of mind. For example, if A knowingly causes B to direct physical force at C, and C is injured, A need only have been reckless with regard to the risk of injury in order to be convicted of battery under section 2313 of the proposed code.

Subsection (a)(2) is primarily designed to cover persons who commit crimes through innocent agents. For example, D tells E that D has permission to enter F's house and remove the television, when in fact D lacks such permission. D gives E the key to the house and asks E to get the television as a favor. D is aware of a significant risk that F may be at home when E arrives. E does as D requested and F is in fact at home. E has engaged in the conduct required for a violation of the criminal entry offense described in section 2511 of the proposed code. However, since E lacks the required states of mind, E is not guilty. Nonetheless, D, who had the states of mind required for a violation of section 2511(b)(1) of the proposed code, is guilty of violating that section, a class C felony. However, D cannot be guilty of a crime greater than that of which E would have been guilty. For example, if D had thought E was entering a dwelling, and in fact E merely entered a warehouse, D would only be guilty of a violation of section 2511(b)(2) of the proposed code, a class D felony.

Subsection (a) makes no special provision for the liability of coconspirators for the conduct of others. With respect to accomplice liability, coconspirators are to be treated in the same manner as any other person who allegedly aids an offense, i.e., a defendant is to be held liable only for those offenses committed by coconspirators which the defendant intended to occur and to which the defendant lent assistance. The Committee thus rejects the "Pinkerton doctrine" of accomplice liability, attributed to the Supreme Court decision in *Pinkerton* v. *United States*, 328 U.S. 640 (1946), whereby a defendant can be held liable for all conduct of coconspirators which is reasonably foreseeable and in furtherance of the conspiracy. Inasmuch as the *Pinkerton* doctrine derives from an interpretation of current 18 U.S.C. 2, and such an interpretation is not compatible with section 501 of the proposed code, the Committee does not believe it necessary to include language in section 501 which would expressly repudiate the doctrine.

In abrogating *Pinkerton* liability, the Committee follows the lead of the Model Penal Code (section 2.06) and the Brown Commission (*Final Report* section 401). Even if the scope of liability is limited, per the *dictum* of the Supreme Court in *Pinkerton*, to those acts which are "reasonably foreseeable", this form of liability is equivalent to holding a person responsible for negligence. The Committee believes that holding a person criminally responsible for negligence is, except in the rarest instances, inappropriate since, by definition, the actor is not aware of the wrongdoing. *See generally* Hall, *Negligent Behavior Should Be Excluded from Criminal Liability*, 63 Colum. L. Rev. 632 (1963). Applying a negligent standard with such a broad sweep as that which flows from *Pinkerton* could lead to serious injustice. As noted by the drafters of the Model Penal Code.

> The reason for [not including *Pinkerton* liability] is that there appears to be no other or no better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise. In *People v. Luciano*, 277 N.Y. 348, 14 N.E.2d 433 (1938), for example, Luciano and others were convicted of sixty-two counts of compulsory prostitution, each count involving a specific instance of placing a girl in a house of prostitution, receiving money for so doing or receiving money from the earnings of a prostitute, acts proved to have been done pursuant to a combination to control commercialized vice in New York City. The liability was properly imposed with respect to these defendants, who directed and controlled the combination; they commanded, encouraged and aided the commission of numberless specific crimes. But would so extensive a liability be just for each of the prostitutes or runners involved in the plan? They have, of course, committed their crimes; they may actually have assisted others; but they exerted no substantial influence on the behavior of a hundred other girls or runners, each pursuing his or her own ends within the shelter of the combination. A court would, and should hold that they are all parties to a single, large, conspiracy; this is itself, and ought to be, a crime. But it is one crime. Law would lose all sense of proportion if in virtue of that one crime, each were held accountable for thousands of offenses that he did not influence at all.

Mode Penal Code section 2.04, Comment at 21 (Tent. Draft No. 1, 1953).

The Committee agrees with the conclusion of the staff memorandum for the Brown Commission:

> If an organized crime offense, or something similar [*see* section 2701 of the proposed code], and the felony-murder doctrine [*see* section 2301(a)(3) of the proposed code] are available, there seems little, if anything, to gain from the *Pinkerton* doctrine. If the coconspirator is an accomplice in a

serious offense, his "legal" liability for another serious offense would not warrant a consecutive sentence, even if permissible under the proposed Code. If he is not an accomplice—or is an accomplice in a minor offense only, while other coconspirators may have committed serious ones—he may be given a severe sentence as a coconspirator on principles of conspiracy liability alone. At the same time the *Pinkerton* doctrine could be the source of otherwise avoidable problems: (a) is the coconspirator liable for crimes committed before he joined the conspiracy, as he is for overt acts (a principle which serves another purpose)? (b) do different rules of evidence apply to his liability for conspiracy and his liability for the specific offense? (c) can he be acquitted for conspiracy and re-tried for the specific offense? (d) should the test of withdrawal from the conspiracy be the same as for terminating liability for the specific offense?

The policy argument favoring *Pinkerton* liability has been stated as being that the criminal acts are "sufficiently dependent upon the encouragement and material support of the group as a whole to warrant treating each member as a causal agent." While there is plausibility to this view, the argument seems to go no further than to support the provision which makes mere membership in a conspiracy a crime even though there is no complicity relationship to the crimes which may be committed.

Brown Commission, *Working Papers* 156–57 (1971) (footnotes omitted).

The Committee's decision to abrogate *Pinkerton* liability is supported by the American Bar Association, *see* statement of William Greenhalgh, Chairperson, Committee on Crime Code Revision, on behalf of the American Bar Association, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. (1980), the Business Roundtable, *see* appendix to statement of Irving Shapiro, on behalf of the Business Roundtable, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee, 96th Cong., 1st sess. (1980) (discussion of section 401(b) of S. 1437), the American Civil Liberties Union, *see* statement of John Shattuck, on behalf of the American Civil Liberties Union, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. (1980), and the Federal Public and Community Defenders, *see* statement of Federal Public and Community Defenders, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee on the Judiciary (1980), as well as by leading scholars of criminal law, *see e.g.*, Hearings on H.R. 6869 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st and 2d sess., Serial No. 52, at 347–49 (1978) (testimony of Prof. Paul Marcus, University of Illinois Law School); W. LaFave & A. Scott, *Criminal Law* 513–15 (1972).

The Committee considered but rejected a proposal to create a form of "attempted accomplice liability." As suggested by the Brown Commission, this would take the form of a new crime of "solicitation," which would punish a person who "commands, induces, entreats, or otherwise attempts to persuade another person to commit a particular felony, whether as a principal or accomplice. ... ." Brown Commission, *Final Report* section 1003 (1971). Such a crime would be entirely new to Federal law. Although current law frequently penalizes "soliciting", the solicitation prohibited is inchoate conduct performed by a person who would necessarily be involved in the offense itself were the offense to be committed. For example, 18 U.S.C. 201 prohibits soliciting a bribe. Such solicitation is merely an attempt to engage in the basic prohibition, i.e., receiving a bribe. The "solicitation" offense would not address such conduct (which remains punishable under section 1751 of the proposed code), but rather would provide punishment for a person who asks a public servant to solicit a bribe from a third person, or asks another person to offer a bribe to a public servant. Such conduct does not constitute a crime under current law unless the person asked in fact engages in the prohibited conduct, in which case the person requesting the conduct is liable as an accomplice.

The Committee agrees with the Judicial Conference of the United States who testified that there is "no need for such a provision", "there is a potential for abuse of the provisions of the prosecutor" and "the provision on accomplices should suffice." Testimony of Judge Alfonso J. Zirpoli, Senior District Court Judge, Northern District of California, and Chairman of the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, Hearings on H.R. 6869 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong. 1st and 2d sess., Serial No. 52, at 1487 (1979). The Committee is particularly concerned with potential free speech restrictions inherent in a solicitation offense. *See* testimony of John Shattuck on behalf of the American Civil Liberties Union, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice House Committee on the Judiciary, 96th Cong. 1st sess. (1980). Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 Colum. L. Rev. 625, 627 (1961) (comments generally that no entirely satisfactory solution has been found to the first amendment problems in this area).

The Committee also considered but rejected the creation of a lesser form of accomplice liability, to be known as "Facilitation." As recommended by the Brown Commission, such an offense would criminalize knowingly providing substantial assistance to a person intending to commit a felony (*Final Report* section 1002). A general provision covering mere knowing assistance is not known to current law. See discussion at 36–37 supra. The Committee believes that the creation of a general form of such liability could seriously impede the free flow of commercial goods by forcing merchants to inquire into the intentions of each purchaser, lest the merchant be accused of being "willfully blind" (see discussion at 35–36 *supra*) concerning the future criminal use of the goods. In addition, such liability might significantly deter the exercise of first amendment rights. *See* Statement of John Shat-

tuck, on behalf of the American Civil Liberties Union, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. 1980).

The Committee believes that where a person assisting a crime has a stake in the venture, the person will generally intend the success of the crime. In those instances where the Congress wishes to punish mere knowing assistance, such punishment should be accomplished through a specific prohibition. See, e.g., section 2722 of the proposed code, prohibiting transportation of a firearm with reasonable cause to believe that it will be used to commit a felony.

Subsection (b) provides that an individual is not criminally liable for the criminal conduct of another if that individual was the victim of the offense or was a person whose conduct was a necessary part of the definition of the offense. Thus, for example, an underage female who consents to sexual intercourse with a man cannot be convicted as an accomplice to the sexual offense proscribing any sexual conduct with underage females. The current law approach requires courts to guess at the intention of the Congress that did not include the conduct of the accomplice in the definition of the offense. *See generally Gebardi* v. *United States*, 287 U.S. 112 (1932) (holding a woman who consented to interstate transportation for immoral purposes not to be an accomplice to a violation of the Mann Act, 18 U.S.C. 2421) and cases cited therein. This subsection puts the burden on the Congress enacting the criminal provision to state clearly which participants are to be held liable. Such an approach was recommended by the Model Penal Code, section 2.06(b), was adopted in modified form by the Brown Commission, section 401(1), and is included in many State codes. *See, e.g.*, Ala. Code section 13A–2–24; Ark. Stat. Ann. section 41–305(1); Del. Code tit. 11 section 273; Hawaii Rev. Stat. section 702–224; Ill. Stat. Ann. ch. 38, section 5–2(c)(1); Ky. Rev. Stat. section 502.040(1); Me. Rev. Stat. tit. 17A, section 57(5); Mo. Rev. Stat. section 562.041(2); Mont. Rev. Codes Ann. section 94–2–107(3); N.H. Rev. Stat. Ann. section 626:8(VI)(a); N.J. Rev. Stat. section 2C:2–6(e)(1); N.D. Cent. Code section 12.1–03.01; Or. Rev. Stat. section 161.165; Pa. Cons. Stat. tit. 18 section 306(f); Wash. Rev. Code section 9A.08.020(5). Thus, where more than one actor is required for the commission of an offense, the proposed code explicitly states who is to be held liable. For example, if A offers B a bribe, and B accepts, both are guilty of a violation of the bribery offense described in section 1751 of the proposed code, since that section prohibits offering and accepting bribes. On the other hand, if, for example, D harbors E, knowing that E is sought for a crime, only D can be convicted of a violation of the hindering law enforcement offense described in section 1711 of the proposed code. D, of course, can be convicted of the crime for which he or she is being sought and for any other crimes, such as escape (section 1714 of the proposed code), which may have occurred.

In addition, subsection (b) ensures that an actor is only held liable for the offense for which Congress intended liability. A person, for example, who purchases heroin clearly aids the seller in committing a violation of the trafficking in an opiate offense described in section 2711 of the proposed code. The buyer also intends that the offense be committed. Absent this subsection, the buyer could be convicted, as an accomplice, of the serious offense of trafficking in an opiate, a very inappropriate result. Inasmuch as the buyer's conduct, however, is inevitably incident to the offense of trafficking, this subsection prevents such a conviction. The buyer will then appropriately be guilty only of a violation of the possessing a drug offense described in section 2713 of the proposed code.

The operation of this subsection is confined to title 18 because the current offenses outside of title 18 were not drafted to conform with this provision. Thus, in such offenses Congress may have intended that a person whose involvement is necessarily incident to the offense be held liable as an accomplice. For example, 26 U.S.C. 7214(a)(2) prohibits an employee of the Internal Revenue Service from receiving a reward, except as prescribed by law, for the performance of duties. The person who gives the reward is engaging in conduct inevitably incident to the offense. Nonetheless, that person may be held liable as an accomplice. *See Standefer* v. *United States*, 100 S. Ct. 1999 (1980). Since subsection (b) is limited in application to title 18, it will in no manner change this result.

Subsection (c) restates the rule that ignorance of the law is no excuse by providing that an "intent that the offense be committed" does not require that the defendant realize that the conduct is prohibited. The defendant must simply intend that any conduct or results required for the offense occur, and believe that any circumstances required for the offense will occur. The Committee believes that subsection 501(a)(1) would be interpreted in this manner even in the absence of subsection 501(c), but wishes to ensure that no confusion exist.

Subsection (d) defines "victim", for the purposes of the exclusion in subsection (b), as a person who suffers harm from an offense, or against whom a threat or use of physical force specified in the description of the offense is directed. A person who shares in the profits or proceeds of the offense is excluded from the definition. The purpose of the definition is to prevent collusion between the perpetrator of an offense and an ostensible victim. Thus, an employee of a bank who arranges to be robbed, in order to share the fruits of the robbery, cannot seek exculpation even though the employee was the object of a threat of force. In addition, the definition insures that those who might be "societal victims" of the harm which the offense is designed to prevent cannot on that basis seek acquittal as a "victim". Thus, a heroin addict who aids the sale of narcotics in order to get money to support the addiction cannot claim to be a victim of the sale of narcotics.

§ 502—Liability of organizations for conduct of agents

Subsection (a), which is designed to codify current Federal law imputing to an organization criminal liability for the conduct of its agent, provides that an organization is criminally liable for the conduct of an agent acting within the scope of the agent's employment or range of authority where the agent intends the conduct to benefit the organization. The basic rule enunciated in the leading Federal cases is that an organization is liable for the criminal violation if the organization was the intended beneficiary of the act, even though

the act was misguided and the organization does not benefit therefrom.[1] *See* Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1246–47 (1979); Hauptly & Rider, *The Proposed Federal Criminal Code and White Collar Crime*, 47 Geo. Wash. L. Rev. 523 (1979). Federal cases generally have rejected the so-called "due diligence" defense offered by organizations and has upheld determinations of organizational liability based on the acts of agents in violation of company policy. *See United States* v. *Cadillac Supply Co.*, 568 F.2d 1078, 1090 (5th Cir. 1978); Miller, *Corporate Criminal Liability*, 38 Fed. B.J. 49, 62 n.74 (1979), and cases cited therein. This result is quite logical, because if organizations could escape liability by claiming that an agent violated organization policy, all an organization would have to do is promulgate a "no illegal conduct" policy.[2] Subsection (a) (1) (B) provides that an organization will be criminally liable for an agent's conduct if the organization ratifies the agent's conduct after that conduct has occurred. *See Continental Baking Co.* v. *United States*, 281 F.2d 137, 199 (6th Cir. 1960).

Subsection (a) (2) provides that there is organizational liability if the conduct involves a failure by the organization, or an agent of the organization, to discharge a specific duty of conduct imposed on the organization by law. *See United States* v. *Parfait Powder Co.* 163 F. 2d 1008 (7th Cir.), *cert. denied*, 332 U.S. 851 (1948); *United States* v. *Armour and Co.* 168 F.2d 342 (3d Cir. 1948).

Section 101 of the proposed code defines "organization" to be an association of persons, other than a government, that constitutes a legal entity. This definition includes corporations, unions, trade associations, and foundations and is consistent with current Federal case law. *See* Brown Commission, *Working Papers* 173–74 (1970). *See also United States* v. *A & P Trucking Co.*, 358 U.S. 121 (1958) (criminal sanctions applicable to partnerships); *United States* v. *Montana Food Distribution Ass'n*, 271 F. Supp. 403 (D. Mont. 1967) (criminal sanctions applicable to nonprofit trade associations).

Subsection (b) provides that an organization is not criminally liable under subsection (a) of this section where the conduct is that of a person made the agent of the organization by operation of law and without the consent of the organization. The organization is

[1] In addition to this basic principle, the Federal courts have imputed criminal liability in offenses involving both absolute liability and for offenses involving proof of knowledge or willfulness. *E.g., O.I.T. Corp.* v. *United States*, 150 F.2d 85, 99 (9th Cir. 1945) (conspiracy to make false statements in order to influence F.H.A. based on acts of branch manager); *United States* v. *Milton Marks*, 240 F.2d 838 (3rd Cir. 1957) (submitting a knowingly false claim against the United States); *Zito* v. *United States*, 64 F.2d 772 (7th Cir. 1933) (conspiracy to violate Prohibition Act, based in activities of salesmen). Another major principle is that involvement of the organization's managerial or supervisory personnel is not a necessary requisite to the establishment of criminal liability for the organization. There is organizational liability based on the conduct of an agent when such agent meets the other prerequisites, and is acting within the area of responsibility of such agent. *See United States* v. *Steiner Plastics Mfg. Co.*, 231 F.2d 149, 153 (2d Cir. 1956); *United States* v. *George F. Fish, Inc.*, 154 F.2d 708, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1928); *O.I.T. Corp.* v. *United States*, 150 F.2d 85, (9th Cir. 1945); *United States* v. *Armour & Co.*, 168 F.2d 342, 344 (3rd Cir. 1948); *Standard Oil Co.* v. *United States*, 307 F.2d 120, 127 (5th Cir. 1962).

[2] Nothing in this section precludes the development of a defense. *See* section 721 (relating to nature and effect of defenses) of the proposed code. *See generally* Brown Commission, *Final Report* section 402 (1971); Model Penal Code section 2.07. In addition, nothing in this section is intended to preclude the evolution of judicially developed doctrines limiting organizational liability like that used by the Ninth Circuit in *United States* v. *Beusch*, 596 F.2d 871 (9th Cir. 1979) ("whether measures taken to enforce corporate policy in this area will adequately insulate the corporation against such acts" goes to the question of whether the agent had authority to act and whether the agent was acting on behalf of the organization.

criminally liable for the conduct of such persons, however, if the organization ratifies or adopts the conduct. Subsection (b) is necessary in order to avoid inappropriate imposition of criminal liability; it would be unfair to hold an organization criminally liable for the conduct of an agent over which the organization has no effective control. Thus, subsection (b) carries forward the limitation on organizational liability found in 29 U.S.C. 106 (relating to the relationship between national and local unions).

§ *503—Liability of agents for conduct of an organization*

This section, restating current Federal law, allows an agent to be held criminally responsible for conduct in which the agent engaged on behalf of an organization. This clarifies the basic principle that the agent can be held accountable for conduct that was not intended to benefit the agent personally. *See* Brown Commission, *Final Report* section 403 (1971); Brown Commission, *Working Papers* 209–213 (1970).

§ *504—Certain defenses precluded*

This section describes two situations that do not constitute a defense to a prosecution in which a person is being charged with criminal liabilty for the conduct of another. The section provides that, except as otherwise provided by law, (1) the mere fact that a person is incapable of committing the offense in question does not prevent that person from being liable as an accomplice to the offense, and (2) the conviction of the perpetrator is not necessary for conviction of another person as an accomplice.

Paragraph (1) is a restatement of a common law rule. *See, e.g., United States* v. *Lester*, 363 F.2d 68, 72 (6th Cir.), *cert. denied*, 385 U.S. 1002 (1966). Thus, a private citizen may be guility of a violation of section 1751 (bribery) of the proposed code if that person aids a public servant to solicit a bribe, even though the private citizen could not violate that section by personally soliciting a bribe. Similarly, a private citizen may be convicted as an accomplice to a law enforcement officers' violation of section 2102 (interfering with civil rights under color of law) of the proposed code.

Paragraph (2) carries forward the policy of 18 U.S.C. 2, which treats all accomplices to a crime as "principals", and thus abrogates the common law doctrine that an accessory to a crime cannot be convicted unless the principal has been tried and convicted. *See Standefer* v. *United States*, 100 S. Ct. 1999 (1980). *See generally* W. LaFave & A. Scott, *Criminal Law* 500–01 (1972).

§ *505—Bar to prosecution*

This section bars prosecuting a defendant as an accomplice if all of the persons for whose conduct the defendant is being held criminally liable have been acquitted for lack of evidence. This bar does not apply when the alleged liability is for having caused the actor's conduct (section 501(a) (2) of the proposed code), when the lack of evidence is due to an order of suppression, or when the acquittal is due to something other than a lack of evidence (e.g., the successful assertion of the entrapment defense).

Section 505 provides a limited exception to the rules set forth in section 504, discussed *supra*, and modifies the current law rule as expressed in *Standefer* v. *United States*, 100 S. Ct. 1999 (1980). The Committee believes that this exception promotes the interests of jus-

tice by minimizing inconsistent treatment of persons charged with liability for the same conduct. The reason for the inapplicability of the bar to a situation in which the verdicts are returned in the same trial is the settled rule that inconsistent verdicts in the same proceeding are permissible in criminal cases as reflecting the mercy dispensing powers of the jury. *See, e.g., United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn* v. *United States*, 284 U.S. 390 (1932).

Chapter 7—Bars and Defenses

Subchapter I—Bars to Prosecution

Current Law

1. Time limitations.—Although not known at common law and depending on legislative enactment for their existence, *see United States* v. *Cadarr*, 197 U.S. 475, 478 (1905); *United States* v. *Marion*, 404 U.S. 307, 317–18 (1971), statutes of limitations are today a part of the criminal law of virtually every State as well as the Federal Government. *See* Brown Commission, *Working Papers* 281 (1970).

The primary reasons for restrictions of time revolve around accepted notions that prompt investigation and prosecution insure that conviction or acquittal is a reliable result and not the product of faded memory or unavailable evidence; that time limitations may serve to encourage law enforcement authorities to expedite their investigation and discovery of crimes; that, with certain exceptions involving particularly heinous offenses or offenses which are secretive in nature and thus difficult to discover, ancient wrongs should not be resurrected; and that community security and economy in the allocation of enforcement resources require that most effort be concentrated on recent crimes. *See Toussie* v. *United States*, 397 U.S. 112 (1970).

Existing provisions of the United States Code dealing with time limitations on prosecution, of general application to civilian offenses, apply not only to offenses of national scope, but also to offenses prosecuted in enclaves under the Assimilative Crimes Act (18 U.S.C. 13), *United States* v. *Arden*, 158 F. 996 (D.N.J. 1908), and to offenses prosecuted under the District of Columbia Code, *Askins* v. *United States*, 251 F. 2d 909 (D.C. Cir. 1958). Of course, nothing in such statutes of limitations as now exist or as are here proposed affects a defendant's right to invoke the constitutional guarantees of due process and speedy trial as the basis for dismissing a prosecution, even though timely commenced under the applicable statute of limitations. *See United States* v. *Marion*, 404 U.S. 307 (1971).

Federal law currently contains a single section establishing a general period of limitation and several sections of specific limitation. The general section (18 U.S.C. 3282), which was enacted in 1954, provides that "[e]xcept as otherwise expressly provided by law", a prosecution for a noncapital offense must be instituted within 5 years after the commission of the offense.

There is a specific section dealing with capital offenses (18 U.S.C. 3281) that provides that an offense "punishable by death" may be instituted at any time. As a result of Supreme Court holdings on the death penalty, however, none of the approximately 15 death penalty provisions in title 18 is valid. *See* discussion at 433–34 *infra*. It may be possible to contend that, notwithstanding the invalidity of the death

penalty, the unlimited time period in existing offenses which formerly carried that penalty remains applicable. *See Coon* v. *United States*, 411 F.2d 422 (8th Cir. 1969) (noting but failing to resolve the issue). *Compare United States* v. *McNally*, 485 F.2d 398 (8th Cir.), *cert. denied*, 415 U.S. 978 (1974), *with United States* v. *Watson*, 496 F.2d 1125 (4th Cir. 1973).

Other sections of the United States Code which set specific time limitation periods include 18 U.S.C. 3283 (5 years for prosecution for violating the "customs" or "slave trade" laws), 3285 (one year for contempt proceedings under 18 U.S.C. 403), 3286 (one year for prosecutions under 18 U.S.C. 2198), and 3291 (10 years for prosecutions for violating nationality, citizenship, and passport laws); 50 U.S.C. 783(e) (10 years for prosecution under that section) and 2278 (10 years for prosecution of restricted data offenses under 42 U.S.C. 2274–78); 26 U.S.C. 6531 (3 years for prosecutions of the internal revenue laws, with 8 categories of such offenses having a 6 year period of limitation); 17 U.S.C. 115(a) (3 years for prosecutions of criminal offenses set forth in title 17); 2 U.S.C. 455(a) (3 years for prosecutions of offenses set forth in subchapter I of the Federal Election Campaign Act (2 U.S.C. 431–42); and section 19 of the Internal Security Act of 1950, 64 Stat. 1005 (10 years for prosecutions under 18 U.S.C. 792–94).

The period of limitation starts when the offense has been committed. For some offenses, however, the time when an offense has been committed is not easily ascertainable. Because of this, certain offenses are referred to as "continuing offenses". The period of limitation for continuing offenses begins at some point after the termination of the proscribed conduct. Thus, the concept of a continuing offense addresses not the question of the length of the period of limitation, but rather when that period begins to run. Because the practical effect of a finding that an offense is continuing is to extend the period within which a prosecution may be commenced, the courts have held that statutes of limitation generally begin to run when the crime is complete, *Pendergast* v. *United States*, 317 U.S. 412 (1943); and that an offense will be treated as continuing only when the language of a provision of law or the nature of the offense itself compels the conclusion that Congress so intended. *See Toussie* v. *United States*, 397 U.S. 112 (1970).

Congress has expressly declared only three offenses to be continuing crimes. One offense is described in 18 U.S.C. 3284, which provides that concealing the assets of a bankrupt or other debtor is a continuing offense until the debtor has been finally discharged or a discharge has been denied. In *Guglielmini* v. *United States*, 425 F.2d 439 (2d Cir.), *cert. denied*, 400 U.S. 820 (1970), the court held that the rationale of this provision applied also to the situation where the bankrupt had waived the right to a discharge. The other offenses are described in 22 U.S.C. 618(e) and 50 U.S.C. 856 and deal with failures to register. Both sections provide that failing to register—in the case of the former, as a foreign agent having knowledge of, or having received instruction or assignment in, a foreign espionage system—is deemed a continuing offense for as long as such failure exists.

Despite the judicial policy in favor of "repose", *see, e.g., United States* v. *Scharton*, 285 U.S. 518 (1932), and the near presumption against construing offenses as being continuing for statutes of limitation purposes, a number of offenses have been held to be continuing

crimes by their very nature. The foremost among these is a conspiracy, which the Supreme Court has held continues as long as the conspirators engage in overt acts in furtherance of their plot. *United States* v. *Kissel*, 218 U.S. 601 (1910); *Brown* v. *Elliot*, 225 U.S. 392 (1912); *Toussie* v. *United States*, 397 U.S. 12 (1970). Similarly, it has been held that offenses involving the possession of contraband are continuing crimes. *Von Eichelberger* v. *United States*, 252 F.2d 174 (9th Cir. 1958).

The courts have, however, rejected most attempts to classify offenses as "continuing." In *United States* v. *Irvine*, 98 U.S. 450 (1878), it was held that a crime of wrongful withholding of a pension did not continue, for statute of limitation purposes, for however long the pension was withheld. A conspiracy to make a false statement in an official proceeding, unaccompanied by an allegation of a conspiracy to defraud, has also been held not to be a continuing crime. *United States* v. *Davis*, 533 F. 2d 921 (5th Cir. 1976). An indictment for contempt in the presence of the court, predicated upon the making of a misrepresentation, has been ruled not to be a continuing offense, notwithstanding subsequent continuous cooperation in concealing the scheme to which the misrepresentation related, although the court noted that had the indictment charged an offense of broader sweep, such as an obstruction of justice, the scheme would have constituted a continuing offense. *Pendergast* v. *United States*, 317 U.S. 412 (1943). Finally, in *Toussie* v. *United States*, 397 U.S. 112 (1970), the Court held that failing to register for the draft, as required within 5 days after one's eighteenth birthday, was not a continuing offense under the then applicable provisions of 50 U.S.C. App. 462(a), despite the existence of a longstanding Selective Service System regulation stating that the duty to register "shall continue at all times."

Present Federal statutes and rules do not separately address the question of when a prosecution is commenced for statute of limitation purposes, but the great majority of limitation statutes are worded so as to hinge the commencement of prosecution to the return of an indictment or the filing of an information. *See, e.g.*, 18 U.S.C. 3282. A partial reflection of this view is found in 26 U.S.C. 6531, applicable to internal revenue offenses, which provides that, if a "complaint is instituted" within the limitations period prescribed (either 3 or 6 years, depending on the type of internal revenue offense), then "the time shall be extended until the date which is 9 months after the date of the making of the complaint." The courts have ruled that, in order to toll the statute of limitations, the complaint must be valid, i.e., the complaint must establish probable cause to believe the accused committed an offense. *See Jaben* v. *United States*, 381 U.S. 214 (1965); *United States* v. *Bland*, 458 F.2d 1 (5th Cir.), *cert. denied*, 409 U.S. 843 (1972).

Rule 31(c) of the Federal Rules of Criminal Procedure permits a finding of guilt for an offense necessarily included in the offense charged in appropriate evidentiary circumstances. Out of this Rule arises the problem whether a conviction for a lesser included offense may be sustained where the lesser offense is barred by the statute of limitations, even though the charged, "greater" offense is not. The law in most State jurisdictions, as well as the District of Columbia, is that a conviction under the lesser included offense in these circumstances will not stand. *See Chaifetz* v. *United States*, 288 F.2d 133 (D.C. Cir. 1960), *rev'd in part but cert. denied on this issue*, 366 U.S. 209 (1961). Although the doctrine may work an injustice in some situations, the underlying rationale seems to be that to permit the opposite result would enable prosecutors to revive time-barred offenses merely by obtaining an indictment for a greater offense.

Aside from continuing offenses and the application of special provisions suspending the running of the statute of limitation (e.g., when a person is a fugitive), a statute of limitation normally begins to run when the offense is complete. In the internal revenue statutes, however, Congress has provided that, in the case when a tax return is filed or a tax is paid before the statutory deadline, the limitation period begins to run on the date when the return or payment was due (without regard to any extension of time obtained by the taxpayer). These statutes are based on the desirability, for purposes of administrative convenience in criminal tax investigations, of a uniform expiration date for most taxpayers, despite variations in the dates of actual filing. *See* 26 U.S.C. 6513, 6531. In *United States* v. *Habig*, 390 U.S. 222, 225–26 (1968), the Court held that, where an extension of time is secured but the return is filed *after* the original statutory due date, the period of limitations starts to run when the return is filed rather than on the date (but for the extension) when it was due. Otherwise, the limitation period would begin before the offense was even committed.

Current Federal law contains two sections designed to enable a prosecution to be recommenced within a reasonable time, without being subject to a challenge based on the statute of limitation, where the charges have been dismissed without prejudice either shortly before the statute of limitation is due to expire, or after it has expired.

Where a defect in the charge is found after the period of limitation has run and an indictment is dismissed "for any error, defect, or irregularity with respect to the grand jury," or an information is found "defective or insufficient for any cause," 18 U.S.C. 3288 permits a new indictment to be returned within 6 months of the date of dismissal or, if no grand jury is in session when the dismissal occurs, within 6 months after the next regular grand jury is convened. Where the dismissal occurs before the limitations period has expired, 18 U.S.C. 3289 repeats the language of 18 U.S.C. 3288 as to the types of dismissals covered and provides that, if the dismissal occurs within 6 months of the date when the statute is due to expire, then a new indictment may be brought within 6 months after the limitations period has run, as provided in 18 U.S.C. 3288.

The applicable statute of limitation may be suspended in certain circumstances. When the United States is "at war", 18 U.S.C. 3287 provides that the running of any statute of limitation applicable to enumerated categories of offenses "shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." Enacted in the early 1940's, when the generally applicable period of limitations was only 3 years, the purpose of this section was to prevent crimes related to the commercial aspects of the war program, "committed in the hurlyburly of war," from going unpunished. *See United States* v. *Gottfried*, 165 F.2d 360 (2d Cir.), *cert. denied*, 333 U.S. 860 (1948). By Presidential Proclamation, hostilities with regard to World War II were declared terminated on December 31, 1946. 12 Fed. Reg. 1 (1946). The

question whether 18 U.S.C. 3287 applies only during a congressionally declared war seems never to have arisen. No reported cases exist dealing with its attempted application during the Korean or Vietnam conflicts.

The applicable statute of limitation is suspended when the offender is "fleeing from justice". 18 U.S.C. 3290. It is unclear whether the person involved must have an intent to avoid justice. The ambiguity derives from *Streep* v. *United States*, 160 U.S. 128 (1895), the Supreme Court's only discussion on the subject. There the defendant, shortly after commission of the offense, was indicted by the State and fled to Europe. The defendant was subsequently indicted by the Federal government after the expiration of the normal period of limitation. The question was whether the trial judge had correctly declined to instruct the jury that, in order to find that the defendant had been fleeing from justice, it was necessary to show that the defendant intended to flee from Federal justice as opposed to the justice of the State. The Supreme Court sustained the trial court's refusal to give the instruction, holding that "it is sufficient that there is an intent to avoid the justice of the State having criminal jurisdiction over the same territory and the same act." *Id.* at 135. Thus, the opinion did not directly confront the issue whether any intent to avoid justice is an element of the 18 U.S.C. 3290. The ambiguity with respect to this issue stems from the Court's discussion—in *dicta*—as to whether the phrase "fleeing from justice" in 18 U.S.C. 3290 is to carry the same meaning as the phrase "fugitive from justice" in the extradition section, 18 U.S.C. 3182, where an intent to avoid justice has been held not to be an element. *Appleyard* v. *Massachusetts*, 203 U.S. 222, 227–29 (1906).

The Fifth, First, and Second Circuits, interpreting *Streep*, have held that 18 U.S.C. 3290, unlike the extradition law, does require an intent to avoid prosecution. *Donnell* v. *United States*, 229 F.2d 560 (5th Cir. 1956); *Brouse* v. *United States*, 68 F.2d 294 (1st Cir. 1933); *Jhirad* v. *Ferrandina*, 486 F.2d 442 (2d Cir. 1973). In *Donnell* the court observed:

> [T]he purposes the two statutes were designed to serve are entirely different. When one state indicts a person then physically within another state, it is entitled to extradite him immediately for trial, and it is of no importance that the "fugitive" had been absent from the state of the indictment only one day for that state is entitled to his return regardless of what took him away.
>
> But it would do violence to the reason and purpose of section 3290 to hold that a person was "fleeing from justice" so as to suspend the running of the statute of limitations if he legitimately left the district of the supposed crime or moved his home openly to another district, being all the while easily accessible to any officer who might have a warrant to serve....

Donnell v. *United States*, 229 F.2d 560, 564 (5th Cir. 1956).

On the other hand, the Fourth, Eighth, and District of Columbia Circuits adopt the view that an intent to avoid justice is not an element under 18 U.S.C. 3290, based on their contrary reading of the *Streep* decisions. *Bruce* v. *Bryan*, 136 F. 1022 (4th Cir. 1905); *King* v. *United States*, 144 F.2d 729 (8th Cir. 1944), *cert. denied*, 324 U.S. 854 (1945); *McGowen* v. *United States*, 105 F.2d 791 (D.C. Cir.), *cert. denied*, 308 U.S. 552 (1939).

With respect to other issues, it is settled that, to constitute "fleeing from justice," the defendant need not leave the State or district, but need only depart from his or her usual abode and conceal him- or herself. *United States ex rel. Demarois* v. *Farrel*, 87 F.2d 957 (8th Cir.), *cert. denied*, 302 U.S. 683 (1937); *Ferebee* v. *United States*, 295 F. 850 (4th Cir. 1924); *Porter* v. *United States*, 91 F. 494 (5th Cir. 1898). Moreover, the flight need not occur after a prosecution has been commenced, if an intent to avoid prosecution is present. *Streep* v. *United States*, 160 U.S. 128 (1895). There is a further conflict, however, over the question whether incarceration in another State or country will trigger the operation of 18 U.S.C. 3290. *Compare Taylor* v. *United States*, 238 F.2d 259 (D.C. Cir. 1956), *with United States* v. *Hewecker*, 70 F. 59 (S.D.N.Y.), *certificate dismissed*, 164 U.S. 46 (1896).

In addition to 18 U.S.C. 3290, a special suspension of limitation provision exists in 26 U.S.C. 6531 for internal revenue offenses. That section provides that the "time during which the person committing any of the various offenses under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of [18 U.S.C. 3290] shall not be taken as any part of the time limited by law for the commencement of such proceedings." The courts have held that, with respect to the language dealing with absences from the United States, the section is absolute, requiring no intent to avoid justice and extending to ordinary business and pleasure trips. *United States* v. *Myerson*, 368 F. 2d 393 (2d Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

Another special suspension of limitation provision is contained in 50 U.S.C. 783(e), which provides a 10-year limitation period for certain criminal subversive activities. The final sentence of 50 U.S.C. 783(e) provides that if, at the time of the offense, the defendant is an officer or employee of the United States or an agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or an agency thereof, the defendant may be prosecuted within 10 years after the defendant has ceased to be so employed. In effect, the provision suspends the running of the limitations period for as long as the defendant is a Federal employee.

2. *Immaturity.*—Under the common law an infant was subject to prosecution and conviction as an adult if the infant had developed sufficient intelligence and moral perception to distinguish between right and wrong and to comprehend the legal consequences of acts. *See* 43 C.J.S. *Infants* 94 (1978). However, a child under 7 years of age was deemed incompetent to have a criminal intent. *See* R. Perkins, *Criminal Law* 837–41 (2d ed. 1969). As an alternative to this rule, which required an individualized determination of the offender's maturity, the States and the Federal government have generally developed provisions that give more uniform results by fixing specific age limits below which prosecution as an adult is prohibited.

A "juvenile" is defined by 18 U.S.C. 5031 to be someone "who has not attained his eighteenth birthday." A juvenile alleged to have committed an act in violation of a law of the United States that is not punishable by at least 10 years imprisonment and who is not surrend-

ered to State authorities must be proceeded against as a juvenile delinquent unless the juvenile requests treatment as an adult, 18 U.S.C. 5032. No Federal proceedings may be initiated unless the Attorney General certifies that the appropriate State court is not willing or has no jurisdiction to proceed or that the State's juvenile facilities are inadequate. Prior to 1974, the section permitted the Attorney General to proceed against any person, no matter how youthful, as an adult.

Only juveniles 16 years of age or older at the time of the offense may be tried as an adult and then only if the crime involves the possible imposition of at least 10 years imprisonment.

Federal prosecutions of juveniles as adults are rare. There are no Federal family courts outside the District of Columbia and the Federal territories, and Federal policy is in nearly all instances to turn over to the States youths who have violated Federal law. United States attorneys rarely request authority from the Attorney General to prosecute juveniles criminally, and few authorizations are granted. Such authorizations are reserved for exceptional cases in which a youth has committed some major criminal act and does not appear to be suitable for treatment as a juvenile delinquent. Brown Commission, *Working Papers* 218 (1970).

§ *701—Nature of bars*

This section provides that the codification of a bar to prosecution in the proposed code does not preclude the courts from developing other bars. This section does, however, preclude the courts from modifying those bars that are codified, unless a modification is constitutionally compelled.

§ *702—Immaturity*

Section 702 and section 6101 of the proposed code address the question of whether a juvenile charged with a Federal crime should be proceeded against as a juvenile or an adult. Both sections carry forward the policies behind current law, the Juvenile Justice and Delinquency Prevention Act of 1974 (18 U.S.C. 5031–42). In that Act, Congress effectuated its decision that the States were best equipped to deal with the problems of juveniles. It should be noted that the number of juveniles in Federal custody has been declining over the past 20 years.

Subsection (a), like present Federal law, bars Federal prosecution of a juvenile under the age of 18 at the time the alleged offense was committed.

Subsection (b) carries forward current Federal law and provides 2 exceptions to the bar described in subsection (a). First, subsection (b)(1) provides that a juvenile may be treated as an adult if the Government so moves the court and: (1) the juvenile was 16 or 17 at the time the offense was committed; (2) the alleged offense is a class A, B or C felony; and (3) the court determines under section 6101 of the proposed code that it is in the interests of justice to treat the juvenile as an adult. Second, subsection (b)(2) provides that a juvenile may waive juvenile proceedings and be treated as an adult.

§ *703—Statute of limitations*

This section addresses the question of time limitations on the commencement of Federal prosecutions. It clarifies current Federal law

regarding what the time restrictions are, when they begin to run, and the consequences of their expiration.

Restrictions on the commencement of prosecutions because of the passage of time serve several important societal functions. Governmental resources are concentrated on the most recent and serious offenses, and law enforcement officials are encouraged to investigate expeditiously. Moreover, reliable results—either convictions or acquittals—are furthered by the use of more recent evidence and testimony. *See Toussie* v. *United States*, 397 U.S. 112 (1970). "These statutes provide predicability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *United States* v. *Marion*, 404 U.S. 307, 322 (1972).[1]

Subsection (a) provides that (unless otherwise provided by law) the statute of limitation for felonies and misdemeanors is 5 years, with no statute of limitation for murder. The approach of current Federal law is to provide a general period of limitation (5 years for noncapital offenses; *see* 18 U.S.C. 3282) with a number of sections providing different periods of limitation for certain specific offenses. This subsection also provides a 3 year statute of limitation for infractions.

Subsection (b) provides that the statute of limitation stops running for any period when the actor is a fugitive from justice. This provision is derived from 18 U.S.C. 3290. The Committee intends to carry forward the construction of that section that requires proof of an intent to avoid justice by the fugitive. *See, e.g., Jhirad* v. *Ferrandina*, 486 F.2d 442 (2d Cir. 1973).

Subsection (c) provides that indictments and informations may supercede dismissals occuring both before and after the applicable period of limitation has run, but only within certain time limits. This subsection restates 18 U.S.C. 3288 and 3289.

Subsection (d) extends the time period for offenses in which a material element is either fraud or a breach of fiduciary duty, for offenses involving official misconduct, and for bankruptcy offenses. The time period is extended one year from the date the offense was discovered or should have been discovered, if the offense is discovered within 3 years after the period of limitation would otherwise have expired. This subsection is derived from the recommendations of the Brown Commission. *See* Brown Commission, *Final Report* section 701(4) (1971); Brown Commission, *Working Papers* 296 (1970). *See also* Model Penal Code section 1.06; Model Penal Code section 1.07, Comment at 21 (Tent. Draft No. 5, 1956).

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[1] As the Supreme Court said in United States v. Marion, 404 U.S. 307, 322–33 n. 14 (1972) (citations omitted).

> The Court has indicated that criminal statutes of limitation are to be liberally interpreted in favor of repose. The policies behind civil statutes of limitation are in many ways similar. They "represent a public policy about the privilege to litigate," and their underlying rationale is "to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory." Such statutes "are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected," they "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared," and they "are primarily designed to assure fairness to defendants. . . . [C]ourts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." As in the criminal law area, such statutes represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights: "The theory is that even if one has just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Subsection (e) provides that the period of limitation commences to run from the day the last remaining conduct or result required for the offense occurs, with 3 exceptions. First, subsection (e)(2)(A) provides that where the offense is a conspiracy, the period commences to run at the time the last relevant event in the conspiracy occurs. This restates current Federal case law, *Brown* v. *Elliot*, 225 U.S. 392, 400 (1912). Second, subsection (e)(2)(B) provides that where the offense involves a "failure to register", the period commences to run on the last day of the period during which the actor is required to register. *See, e.g.*, 50 U.S.C. App. 462(d). Third, subsection (e)(2)(C) provides that where the offense is a continuing offense (*e.g.*, possession of contraband (section 1921 of the proposed code)), the period commences to run on the day the course of conduct ends. An offense is "continuing" only if there is a legislative intent, which is clear on the face of the section creating the offense, that the offense be considered a continuing offense. For example, a violation of section 2701 (relating to racketeering) of the proposed code continues until the last act of the "pattern of racketeering activity" occurs.

Subsection (f), like present Federal law, provides that the filing of an indictment or an information commences a prosecution and thereby stops the running of the statute of limitation.

SUBCHAPTER II—DEFENSES

Current Law

Although current Federal law provides statutorily for defenses to specific offenses, *see, e.g.*, 18 U.S.C. 1623, it does not codify any general defenses to crimes. Federal courts have, however, applied many of the common law defenses as general defenses to Federal crimes, and have occassionally fashioned new defenses or new forms of old defenses. The discussion below is not intended to include all such defenses in Federal law, but merely to discuss the most frequently invoked defenses.

1. *Insanity.*—Congress has never enacted legislation on the insanity defense. The Supreme Court has generally left development of standards to the courts of appeal, and those courts, over many years, have gradually broadened the defense.

The foundation of the defense was established in *M'Naghten's Case*, 8 Eng. Rep. 718 (H. L. 1843), in which the "right-wrong" test was introduced:

> To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

The next step was the widespread adoption of an additional volition test, exculpating a defendant who knew what he or she was doing and that it was wrong, but whose actions were, because of mental disease, beyond his or her control. *See Davis* v. *United States*, 165 U.S. 373, 378 (1897). This is sometimes called the "irresistible impulse" addition to the *M'Naghten* test. However, because its formulation frequently does not require that the abnormality be characterized by

sudden impulse as opposed to brooding and reflection, it is more appropriate to term it a "control" or "volitional" test.

A third stage was the repudiation of both *M'Naghten* and its volitional supplement by the famous decision of *Durham* v. *United States*, 214 F.2d 862 (D.C. Cir. 1954). There, the court enunciated this formulation: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874. The court did not define the terms of the new rule in that decision. After numerous appellate opinions refining, clarifying, expanding, and limiting *Durham* over a period of 18 years, the District of Columbia Circuit overruled it in *United States* v. *Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

Meanwhile, the other Federal courts of appeals, with some modifications have moved from *M'Naghten* and its volitional modification to the proposal of the American Law Institute's Model Penal Code, which provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of law." Model Penal Code section 4.01. This formulation was incorporated in the Brown Commission, *Final Report* section 503 (1971). Nine of the 11 circuits have adopted the Model Penal Code version, although, with the exception of the Fourth Circuit, the alternative formulation—using "wrongfulness" in lieu of "criminality"—has been chosen. *See United States* v. *Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States* v. *Chandler*, 393 F.2d 920 (4th Cir. 1968); *Blake* v. *United States*, 407 F.2d 908 (5th Cir. 1969); *United States* v. *Smith*, 404 F.2d 720 (6th Cir. 1968); *United States* v. *Shapiro*, 383 F.2d 680 (7th Cir. 1967); *Pope* v. *United States*, 372 F.2d 710 (8th Cir. 1967); *Wade* v. *United States*, 426 F.2d 64 (9th Cir. 1970); *Wion* v. *United States*, 325 F.2d 420 (10th Cir. 1963); *United States* v. *Brawner*, 471 F.2d 969 (D.C. Cir. 1972). The Third Circuit has adopted only the "volitional"portion of the test, i.e., "lacked substantial capacity to . . . conform to the requirements of law." *United States* v. *Currens*, 290 F.2d 751 (3d Cir. 1961). The First Circuit has not recently considered the question.

2. *Intoxication.*—Under present Federal law, no special legal doctrine is applied to the vast majority of criminal cases where intoxication is associated with the commission of a criminal act. Intoxicated persons often intend their conduct in a way similar to those who are sober. As a result, voluntary intoxication is quite uniformly held not to be exculpatory or to afford a defense in itself. *See, e.g.*, *United States ex rel. Rucker* v. *Myers*, 311 F.2d 311 (3d Cir. 1962), *cert. denied*, 374 U.S. 844 (1963). This principle prevails even if the defendant's intoxication was a manifestation of a disease (e.g., chronic alcoholism) and thus in some sense not wholly voluntary, since the commission of offenses forms no "characteristic and involuntary pattern of the disease." *See Powell* v. *Texas*, 392 U.S. 514, 559 n.2 (1968) (Fortas, J., dissenting); *Driver* v. *Hinnant*, 356 F.2d 761 (4th Cir. 1966). Indeed in *Powell*, the Supreme Court rejected a claim that chronic alcoholism was a constitutionally required defense even to a charge of public drunkenness, on the ground that, while the chronic alcoholic may have no control over drinking, it is no necessary part of the disease that the chronic alcoholic be drunk in public. *See also United States* v. *Moore*, 486 F.2d 1139

(D.C. Cir.) (*en banc*), *cert. denied*, 414 U.S. 980 (1973) (drug addiction not a defense to possession of drugs for personal use).

Although voluntary intoxication is not recognized as a defense *per se*, the Federal courts—like those in virtually every State—hold that such intoxication may be considered in determining whether the defendant possessed the "specific intent" required for the commission of certain crimes. *See, e.g., Kane* v. *United States*, 399 F.2d 730, 736 n. 11 (9th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969). On the other hand, where the crime is said to involve only a "general intent," proof of intoxication is held irrelevant to guilt. Examples of crimes falling in the latter category are felony murder, *United States ex rel. Rucker* v. *Myers*, 311 F.2d 311 (3d Cir. 1962), *cert. denied*, 374 U.S. 844 (1963); second degree murder and manslaughter, *United States* v. *Jewett*, 438 F.2d 495, 498–500 (8th Cir.), *cert denied*, 402 U.S. 947 (1971); *Kane* v. *United States*, 399 F.2d 730, 736 (9th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969); rape, *Henry* v. *United States*, 432 F.2d 114, 119 (9th Cir. 1970), *cert. denied*, 400 U.S. 1011 (1971); and assault with a dangerous weapon, *Parker* v. *United States*, 359 F.2d 1009 (D.C. Cir. 1966). Examples of offenses to which proof of intoxication is deemed relevant are first degree (nonfelony) murder, kidnapping, burglary, and theft. *See Tucker* v. *United States*, 151 U.S. 164, 169 (1894); *Wheatley* v. *United States*, 159 F.2d 599 (4th Cir. 1946). *See also United States* v. *Jacobs*, 473 F.2d 461 (10th Cir.), *cert. denied*, 412 U.S. 920 (1973).

An analysis of the cases applying the "specific intent" versus "general intent" doctrine tends to support the conclusion that where an element of the offense requires actual knowledge or intent, intoxication evidence has been deemed pertinent to show the defendant's lack of such mental state. Where, however, the mental element of an offense is satisfied by proof of recklessness or negligence, the courts have not been disposed to consider intoxication as a defense. For instance, recklessness as to ownership of property is thought insufficient for larceny, and intoxication may negate the purpose or knowledge required. On the other hand, recklessness is sufficient for manslaughter, and intoxication is not allowed to disprove it.

The defense of involuntary intoxication has never been considered by the Federal courts. Traditionally, involuntary intoxication is treated the same as insanity. R. Perkins, *Criminal Law* 894–98 (2d ed. 1969). Of the States with codified criminal laws, nine have defenses based upon involuntary intoxication which apply in the same manner as the operative insanity defense in the jurisdiction. *See* Ark. Stat. Ann. section 41–207 (1977); Colo. Rev. Stat. Ann. section 18–1–804 (1978); Del. Code Ann., tit. 11 section 423 (1979); Ga. Code Ann. section 26–704 (1978); Hawaii Rev. Stat. section 702–230(3) (1976); Ill. Ann. Stat. ch. 38, section 6–3 (Smith-Hurd 1972); Kan. Stat. Ann. section 21–3208 (1974); Ky. Rev. Stat. Ann. section 501.08(2) (Baldwin 1975). Fifteen states, however, have adopted provisions allowing a defense of involuntary intoxication only when a required state of mind is negated. *See* Alaska Stat. section 11.81.630 (1962); Ariz. Rev. Stat. Ann. section 13–503 (1978); Conn. Gen. Stat. Ann. section 53a–7 (West 1958); Idaho Code section 18–116 (1979); Iowa Code Ann. section 701.5 (West 1979); Me. Rev. Stat. Ann. tit. 17–A, section 58–A (1980 Pamphlet); Minn. Stat. Ann. section 609.075 (West 1964); Mont. Rev. Codes Ann. section 45–2–203 (1979); Nev. Rev. Stat. section 193.220 (1977); N.H. Rev. Stat. Ann. section 626.4 (1974); N.Y.

Penal Law section 15.25 (McKinney 1975); Or. Rev. Stat. section 161.125 (1977); S.D. Codified Laws Ann. section 22–5–5 (1979); Utah Code. Ann. section 76–2–306 (1978); Wash. Rev. Code Ann. section 9A.16.090 (1977).

3. *Mistake.*—Traditional analyses of mistakes as a defense to criminal proceedings have attempted to divide mistakes into those of law and those of fact.

The generally stated rule is that ignorance or mistake of fact is an excuse for conduct that would otherwise be criminal. This would appear to be the rule in Federal law. For instance, a witness who, through mistake or ignorance, testifies falsely under oath is not guilty of perjury. *See, e.g., Beckanstin* v. *United States*, 232 F. 2d 1, 4 (5th Cir. 1956). *See also Konda* v. *United States*, 166 F. 91 (7th Cir. 1908) (lack of knowledge of the content of a package sent through the mail, even if such ignorance is a result of negligence, is a defense to a criminal prosecution for knowingly depositing such matter in the mails). This general statement, however, is too sweeping. For example, if conduct would constitute the same crime under the circumstances as the actor believed those circumstances to be, as well as under the circumstances that actually existed, the mistake constitutes no defense. Professor Perkins sets out a more specific version of the rule:

> It may be stated as a general rule . . . that mistake of fact will disprove a criminal charge if the mistaken belief is (a) honestly entertained, (b) based upon reasonable grounds and (c) of such a nature that the conduct would have been lawful and proper had the facts been as they were reasonably supposed to be.

R. Perkins, *Criminal Law* 939–40 (2d ed. 1969).

Perkins also points out that the second requirement of his formulation is not applicable, in general, if the offense requires a specific intent or other special mental element. *Id.* at 940–41. Thus, a person who, through mistake, drives the wrong way on a highway and causes the death of another in an accident could not be found guilty of intentional murder, but could be found guilty of manslaughter, if the mistake was not reasonable. *See United States* v. *Pardee*, 368 F. 2d 368 (4th Cir. 1966).

A further difficulty with the general rule is that it is not always simple to distinguish a mistake of fact from a mistake of law. Frequently, the fact in question is actually a legal conclusion. For example, if X picks up Y's umbrella, believing it to be X's own umbrella, it is generally a mistake of fact. However, X may be aware that the umbrella was the same as the umbrella belonging to Y, but incorrectly believe that ownership of Y's umbrella had passed to X through a contract. This would be a mistaken "legal fact." Nonetheless, X, because of the mistake, could not, under either scenario, be convicted of larceny. However, some mistakes of fact or legal fact do not constitute a defense. Traditionally, neither the mistaken belief that one's wife is dead (fact) or that one has a valid divorce (legal fact) is a defense to bigamy. *See* discussion in W. LaFave & A. Scott, *Criminal Law* 356–60 (1972).

The apparently inconsistent results from the application of the mistake of fact defense can be largely reconciled by focussing on the states of mind required for the offense in question. Thus, since larceny requires an intent to deprive another of that person's property, any

mistake which negates that intent provides a defense. On the other hand, where no state of mind is required, as is the case with regard to bigamy in many jurisdictions, a mistake of fact will not provide a defense. *Id. See also* R. Perkins, *Criminal Law* 939–48 (2d ed. 1969).

"Mistake of law" refers to incorrect beliefs that the conduct in question is lawful. Such a mistake is generally not a defense to a crime. This rule has often been stated and applied by Federal courts. *See, e. g., United States* v. *International Minerals and Chemical Corp.*, 402 U.S. 558 (1971); *Williams* v. *North Carolina*, 325 U.S. 226, 238 (1945); *Sinclair* v. *United States*, 279 U.S. 263 (1929); *Horning* v. *District of Columbia*, 254 U.S. 135 (1920); *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 68 (1910); *Reynolds* v. *United States*, 98 U.S. 145, 167 (1878); *Braswell* v. *United States*, 224 F.2d 706, 710 (10th Cir.), *cert. denied*, 350 U.S. 845 (1955).[1]

As stated in *Horning* v. *District of Columbia*, 254 U.S. 135, 137 (1920):

> It may be assumed that [the defendant] intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law.[2]

Despite the general rule, Federal courts have permitted a defense based on mistake of law when the mistake negates a state of mind required for the offense.

In *United States* v. *Murdock*, 290 U.S. 389 (1933), the Supreme Court held that the term "willfully", when used in a tax provision, requires knowledge that the conduct in question violates the law. Later, in *United States* v. *International Minerals and Chemical Corp.*, 402 U.S. 558 (1971), the Court ruled that the word "knowingly" in the law in question did not require knowledge of the particular regulation violated. The Court reiterated, however, that such knowledge may be required when the state of mind is "willfully", particularly if the crime is *malum prohibitum*. The Court even suggested that such a requirement might be constitutionally required.

Similarly, in *Williamson* v. *United States*, 207 U.S. 425, 453 (1908), the Supreme Court approved the following instruction by a district judge:

> Having now placed before you the timber and stone law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under it, and fully and honestly lays all the facts before his

[1] A rare exception to the ignorance-is-no-excuse precept is where a penal statute requires affirmative action by a class of persons who could not reasonably be expected to know of its provisions (*e.g.*, a local statute requiring all previously convicted felons to register.) In such a case, the Supreme Court held that knowledge of the statute was a constitutional prerequisite to a conviction for failing to comply with its requirements. Lambert v. California, 355 U.S. 225, 228 (1957). For the most part, however, the dissenters' prediction that the decision would turn out to be an "isolated deviation from the strong current of precedents—a derelict on the waters of the law," *id.* at 232, 245, has proved accurate.

[2] These words were written in the context of a prosecution for engaging in the business of a pawnbroker without a license in the District of Columbia, the defendant had removed most of his business to Virginia, but had retained a part of it—significant enough to warrant conviction—in the District.

> counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves willful and unlawful intent; even if such advice were an inaccurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.

In accordance with *Williamson*, it has been held that a person could not be convicted under 18 U.S.C. 1165 for "willfully and knowingly" trespassing upon Indian lands if the person acted in good faith reliance upon the advice of counsel that the person had a right to go on the lands. *See United States* v. *Pollman*, 364 F. Supp. 995, 1003–04 (D. Mont. 1973). Similarly in *Long* v. *State*, 44 Del. 262, 65 A.2d 489 (1949), the court held that a conviction for bigamy must be reversed where the defendant had relied on competent but incorrect legal advice that a foreign divorce was valid. On the other hand, where the provision does not require proof of evil motive, but merely a conscious course of conduct undertaken with awareness of the risk of illegality, the courts have held that good faith reliance on legal advice, or reliance upon one's own personal understanding of the law, is not a defense. *See, e.g., Braden* v. *United States*, 365 U.S. 431, 437–38 (1961) (sustaining conviction for contempt of Congress under 2 U.S.C. 192 for refusing to answer a question).

Similarly, reliance on advice of counsel that a certain course of conduct was lawful has been held not to constitute a defense where other evidence shows the defendant's lack of good faith or fraudulent intent. *See, e.g., United States* v. *Custer Channel Wing Corp.*, 376 F.2d, 675, 683 (4th Cir.), *cert. denied*, 389 U.S. 850 (1967); *United States* v. *Painter*, 314 F.2d 939 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963); *United States* v. *Schaefer*, 299 F.2d 625, 629 (7th Cir.), *cert. denied*, 370 U.S. 917 (1962); *United States* v. *Hill*, 298 F. Supp. 1221 (D. Conn. 1969).

Thus, in the analysis of both mistake of law and mistake of fact, much confusion is dispelled if one directs the analysis toward the state of mind required for the crime. If the mistake of fact, "legal fact," or law negates the required state of mind, no offense is committed. Application of this analysis will yield the same result as current case law in all but a few instances. The exceptions are due to the confusion in the case law and common law regarding states of mind—i.e., the general intent and specific intent distinction. *See* discussion at 31–32, *supra*.

4. *Reliance upon official misstatement.*—An additional defense based upon "mistake" was adopted by the Model Penal Code (section 2.04 (3)) and the Brown Commission (see *Final Report*, section 609). Those proposals would provide a defense when a person reasonably relied upon an official statement of a person or body in authority that the conduct in question was lawful. This defense is, of course, closely related to the mistake of law and mistake of fact defenses discussed above. However, in modern code formulations, the defense of reliance upon official misstatement is designed to deal with those mistakes which do not negate a required state of mind. Although the defense is some-

times denominated a form of entrapment, its essential rationale is one of estoppel resting on the basic notion that it would be unfair to impose penal sanctions in light of governmental misleading. Thus, for penal purposes, if reliance by the defendant was appropriate under the circumstances, the defendant should be considered as having conformed with the law.

Although the Model Penal Code formulation has never been expressly approved by Federal courts, the Supreme Court has dealt with the defense of "authoritative" misleading in a variety of contexts. In *Johnson* v. *United States*, 318 U.S. 189 (1943), the defendant erroneously invoked the fifth amendment privilege against self-incrimination in reliance upon a ruling of the trial judge, who allowed the prosecutor to comment adversely on the defendant's refusal to testify. In later exercising its supervisory power over the Federal courts to disapprove the practice of commenting adversely on a defendant's invocation of the fifth amendment privilege in these circumstances, the Supreme Court stated:

> An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. . . .
>
> We would of course not be concerned with the matter if it turned only on the quality of legal advice which [the defendant] received. But the responsibility for misuse of the grant of the claim of privilege is the court's.

Id. at 197, 199.

The next case to deal at length with the official misstatement defense was *Raley* v. *Ohio*, 360 U.S. 423 (1959). There a State investigative commission advised four witnesses that they could invoke the privilege against self-incrimination—which they all did—while in fact a State statute existed conferring automatic immunity from prosecution (and thus precluding an invocation of the fifth amendment privilege). The witnesses were subsequently convicted for contempt for failure to answer the questions. The Supreme Court unanimously reversed as to three of the defendants, stating that to sustain the convictions would be "to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." *Id.* at 438, 443. The conviction of the fourth defendant was affirmed by an equally divided court, on the ground that that defendant did not rely on the advice or determination of the commission in refusing to answer a particular question.[3]

The *Raley* principle was extended in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), to a police chief trying to control a demonstration in progress. The defendant was convicted for having paraded "near a building housing a court" with intent to interfere with the administration of justice. The Supreme Court construed the evidence as establishing that the police chief had given permission, which was relied upon by the

[3] Both *Johnson* and *Raley* refer to the defense as a form of entrapment. Although reliance on official misstatement of law is related to entrapment in that they share the theme that criminal conduct has been induced by official action, the defenses differ significantly in that true entrapment involves governmental activity of a much more active nature, inducing a person to commit a crime; official misstatement, on the other hand, contains no element of solicitation or exhortation to criminal conduct, but consists of the comparatively passive conduct of furnishing an erroneous legal interpretation.

demonstrators, for the demonstration to take place across the street from the courthouse. Notwithstanding the subsequent judicial determination that the demonstration was "near" the courthouse, the Court viewed the "on-the-spot permission" as an official interpretation that across the street was not "near" the courthouse for this particular demonstration. Accordingly, the Court held that conviction amounted to the "indefensible sort of entrapment" present in *Raley*—convicting a citizen for doing what the State had clearly authorized. To the dissenting justices' complaint, among others, that the police chief could not authorize violations of his State's criminal laws, the majority answered that it read the statute as containing this narrow regulatory discretion for purposes of a permissible peaceful demonstration, stating that it is "a far cry from allowing one to commit for example, murder, or robbery." *Id.* at 569. The Court cited, in this regard, Model Penal Code Section 2.04(3)(b).

Raley was applied again in *United States* v. *Laub*, 385 U.S. 475 (1967), involving criminal charges arising out of area travel restrictions on travel to Cuba under a practice uniformly represented by the State Department as not falling within any criminal provisions. The Court observed that "[o]rdinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. . . . We may not convict 'a citizen for exercising a privilege which the State clearly had told him was available to him.'" *Id.* at 487. Significantly, in *Laub*, the Court did not require that the reliance upon the official misstatement occur as a result of a direct imparting of a legal interpretation by a representative of the State (as in *Johnson*, *Raley*, and *Cox*), but deemed it sufficient that the defendant had relied on the existence of a well-known general position of the responsible official or agency. *See also United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 670–75 (1973), affirming the reversal of a conviction because the trial court had refused to permit the defendant to try to prove that it had relied on a "longstanding official administrative construction" of the applicable statute.

The lower Federal courts have also recognized the doctrine. For example, in *United States* v. *Barker*, 546 F.2d 940 (D.C. Cir. 1976), the court reversed the convictions of two Watergate "footsoldiers" involved in the burglary of Dr. Fielding's office, because the trial judge erroneously precluded the defendants from seeking to establish that they took part in the break-in while laboring under a good faith and objectively reasonable belief that their act, which had been ordered by a higher government official, was in fact authorized in the name of national security. However, no single formulation of the defense was able to gain approval by a majority of the court.

The defense has to be subject to a number of limitations in its application. It is not enough, for example, that there has been official awareness of illegal conduct coupled with acquiesence or failure to prosecute for a period of time. *See e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 (1940); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 624–28 (1953). However, the misleading activity need not always take the affirmative form of conveying false or incorrect information. In the context of the selective service laws, one court has held that the defense applies "where the local board, knowing full

well that a registrant holds an erroneous impression of his rights or obligations in the selective service system, nevertheless fails to make any effort to correct the registrant's error or assist him in any way. *United States* v. *Timmins*, 464 F.2d 385, 387 (9th Cir. 1972) (involving a registrant who wrote to his local board that, while he considered himself to be a conscientious objector on moral and religious grounds, he doubted whether he had the formal qualifications necessary to qualify as a conscientious objector, after reading Form 150 sent to him by the local board). The holding in *Timmins* may well be uniquely confined to the selective service system, based upon the affirmative obligation of that particular agency to assist selective service registrants. *But cf. United States* v. *Insco*, 496 F.2d 204, 208–09 (5th Cir. 1974).

In order for the defense to be successfully asserted, there must also be more than mere subjective misleading; the reliance upon an official misstatement of law must have been reasonable. As stated in *United States* v. *Lansing*, 424 F.2d 225, 227 (9th Cir. 1970):

> [I]t is clear that more is required than a simple showing that the defendant was as a subjective matter misled, and that the crime resulted from his mistaken belief.
>
> When a defendant claims, as does appellant here, that his criminal conduct was the result of reliance on misleading information furnished by the government, society's interest in the uniform enforcement of law requires at the very least that he be able to show that his reliance on the misleading information was reasonable—in the sense that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.

With respect to the reasonableness of reliance, Federal courts have generally held that a party is entitled to rely upon judicial orders entered in the party's case at all levels without fear of criminal prosecution, if the act or omission permitted thereunder is later determined to be unlawful. *See United States* v. *Mancusco*, 139 F.2d 90 (3d Cir. 1943); *United States* v. *Polizzi*, 450 F.2d 880 (9th Cir. 1971). However, what would have been reasonable reliance will not excuse criminal conduct if the actor is bent on wrongdoing and does not honestly believe that the conduct is lawful. *See e.g., United States* v. *Painter*, 314 F.2d 939, 943 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963), and cases cited therein. As to non-parties, the question whether reliance on lower court decisions is justified is considerably more difficult. The Federal decisions, albeit sparse, seem to indicate that one not a party may not rely on a decision of a lower court to justify one's acts, even if one acted in good faith. *See United States* v. *Calamaro*, 137 F.Supp. 816 (E.D. Pa. 1956), *rev'd on other grounds*, 236 F.2d 182 (3d Cir.), *aff'd*, 354 U.S. 351 (1957); *Leon* v. *United States*, 136 A.2d 588 (Mun. Ct. App. D.C. 1957). *See also State* v. *Stiggles*, 202 Iowa 1318, 210 N.W. 137 (1926). *But see Wilson* v. *Goodwin*, 291 Ky. 144, 163 S.W. 2d 309 (1942); *State* v. *Stout*, 90 Okla. Crim. 35, 210 P.2d 199 (1949). *Cf. United States* v. *Potts*, 528 F.2d 883 (9th Cir. 1975) *(en banc)* (refusing to apply a decision overruling a prior restrictive interpretation of a gun control statute retroactively, on the ground of lack of adequate notice to previous violators).

On the other hand, it is arguable that the requirements of "reasonable reliance" and "good faith" belief in the legality of one's conduct should be dispensed with in the case of reliance upon statutes and Supreme Court decisions; i.e., that these represent such authoritative sources of law that, so long as they remain in force, no criminal sanctions should attach to a person whose conduct is in conformity therewith. A similar doctrine prevails as to State statutes and the decisions of State courts of last resort. For example, it has been held that in a situation where a statute repeals an older enactment, the charged act then occurs in conformity with the new statute, but the new statute is thereafter declared unconstitutional, the accused may successfully invoke the defense of official misstatement. *See Claybook* v. *State*, 164 Tenn. 440, 51 S.W. 2d 499 (1932). *Cf. Clark* v. *Anderson*, 502 F.2d 1080 (3d Cir. 1974) (due process prohibits State, following ruling that statute is unconstitutional, from applying the received predecessor statute to defendant in same case in which successor statute was found void). Similarly, the defense has been ruled available for conduct occurring during the tenure of a decision by the highest court of a State interpreting a statute or holding it unconstitutional, notwithstanding a subsequent decision overruling the prior interpretation or holding of invalidity. *See, e.g., Commonwealth* v. *Trousdale*, 297 Ky. 724, 181 S.W. 2d 254 (1944); *State* v. *O'Neil*, 147 Iowa 513, 126 N.W. 454 (1910). *Cf. James* v. *United States*, 366 U.S. 213 (1961) ("willfulness" requirement for tax offense cannot be proven where conduct was legal under prior Court decision which had been limited, but was not overruled until instant case). However, some courts have created an exception to this doctrine where the conduct was inherently "wrongful or immoral," i.e., *malum in se*. *See State* v. *Knox*, 186 N.W. 2d 614, 643 (Iowa 1971).

5. *Duress.*—At common law, as under Federal law today, duress is recognized as a defense to all crimes except murder and, perhaps, offenses involving an intent to take life, such as attempted murder or assault with intent to kill. *See* R. Perkins, *Criminal Law* 951–53 (2d ed. 1969). *See generally United States* v. *Moore*, 486 F.2d 1139, 1180 (D.C. Cir.) *(en banc)* (opinion of Leventhal, J., joined by McGowen and MacKinnon JJ.), *cert. denied*, 414 U.S. 980 (1973); *R.I. Recreation Center, Inc.* v. *Aetna Casualty & Surety Co.*, 177 F.2d 603 (1st Cir. 1949).

Much of the Federal law, still relatively meager, dealing with the defense of duress arose in the context of treason prosecutions. In one early decision the court, while recognizing the defense, indicated that it was limited to situations solely involving the "fear of immediate death, not the fear of any inferior personal injury nor the apprehension of any outrage on property." *United States* v. *Vigol*, 2 U.S. (2 Dall.) 346 (Cir. Ct. Pa. 1795). *See also Respublica* v. *McCarty*, 2 U.S. (2 Dall.) 86, 87 (Sup. Ct. Pa. 1781). Subsequent treason cases arising out of World War II mitigated the stringency of the doctrine so as to permit the defense to be asserted (albeit finding it insufficient on the facts) where the defendant was under the apprehension of serious and immediate bodily harm, as well as threat of imminent death, although the court in one case noted, in rejecting a contention that the defense be expanded to include threats of future, non-immediate harm, that the person claiming the defense must be one "whose resistance has brought him to the last ditch." *D'Aquino* v. *United States*, 192 F.2d 338, 357–59 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952)

("Tokyo Rose" case); *Gillars* v. *United States*, 182 F. 2d 962, 976 (D.C. Cir. 1950) ("Axis Sally" case). *See also Kawakita* v. *United States*, 343 U.S. 717, 735 (1952) (*dictum*). *Contrast State* v. *Toscano*, 74 N.J. 421, 378 A.2d 777 (1977) (imminence of threatened harm not required). This modest expansion of the defense to include threats of imminent and serious bodily harm has since become widely accepted in Federal case law. *See, e.g., United States* v. *Patrick*, 542 F. 2d 381, 386–88 (7th Cir. 1976); *United States* v. *Birch*, 470 F. 2d 808, 812–13 (4th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *United States* v. *Palmer*, 458 F. 2d 663, 665 (9th Cir. 1972). However, the cases have declined to go beyond that point, holding, for example, that threats of imprisonment, even if unjustified, do not establish the defense. *See Phillips* v. *United States*, 334 F. 2d 589, 590–91 (9th Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965); *United States* v. *Birch*, 470 F. 2d 808 (4th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *D'Aquino* v. *United States*, 192 F. 2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952).

It has also been held that the threat must remain constant and inescapable during the relevant period. *See Giugni* v. *United States*, 127 F.2d 786, 791 (1st Cir. 1942); *Shannon* v. *United States*, 76 F.2d 490 (10th Cir. 1935).

The cases, moreover, continue to adhere to the venerable rule that threats of damage to property or financial loss are inadequate grounds for claiming compulsion sufficient to excuse criminal conduct. In *United States* v. *Palmer*, 458 F.2d 663, 665 (9th Cir. 1972), the court held that the defendant's contention that his illegal reentry into the United States was justified since he allegedly faced "financial ruin" if he failed to appear for a deposition, was insufficient to constitute duress. However, there is precedent to the effect that economic threats may be sufficient to negate the specific intent required for certain offenses, such as bribery. *See United States* v. *Barash*, 412 F.2d 26, 29–30 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969).

One issue not yet settled by the Federal decisions is the extent, if any, to which a claim of duress may be predicated upon a threat of serious injury or threat to a third person. The few Federal cases touching on the question seem to imply that reasonable apprehension of immediate death or serious bodily harm to a close relative will excuse criminal conduct, but no case seems yet to have extended the defense to a threat involving a person not related to the effender (e.g., an employee in a bank whose life is threatened by robbers). *See United States* v. *Stevison*, 471 F.2d 143, 146–47 (7th Cir. 1972); *Johnson* v. *United States*, 291 F.2d 150, 155 (8th Cir.), *cert. denied*, 368 U.S. 880 (1961); *R. I. Recreation Center* v. *Aetna Casualty & Surety Co.*, 177 F.2d 603, 605 (1st Cir. 1949).

6. *Protection of persons.*—Current Federal law regarding the defense of persons, whether of oneself or of others, is essentially that which was developed at English common law. The basic principle is that an individual who is free from fault is justified in using force in self-defense or in defense of others to the extent that such individual reasonably believes such force is necessary to protect him- or herself or some other person from personal harm threatened by the unlawful act on another. As stated by Professor Perkins, the test is not the actuality of impending harm nor the actual amount of force needed to prevent it. The reasonable belief of the defender is controlling in both respects. R. Perkins, *Criminal Law* 993–1002 (2d ed. 1969).

In short, a defender, though mistaken as to the necessity of a defensive use of force, will still have the defense available as long as the defender acted reasonably under the circumstances. The same rule of reasonableness applies to the use of deadly force. However, the use of deadly force is considered justified only where the defendant acts under a reasonable belief as to its necessity to protect him- or herself or another from a risk of death or serious bodily injury rather than some lesser harm.

Many cases have dealt with the right of an individual to protect him- or herself from unprovoked, unlawful attack. This right is fundamental to the stability of society and was early recognized by the English courts. Somewhat later developed was the concept that the individual's right of self-help could properly be extended to others, such as to family and servants. Eventually it was recognized that one could go to the aid of any other person if that person was the innocent victim of an unlawful attack. The right to self-help and to intervene for the protection of others is uncontested and recognized today in the Federal courts. *See, e.g., United States* v. *Jackson*, 569 F.2d 1003 (7th Cir. 1978); *United States* v. *Grimes*, 413 F.2d 1376 (7th Cir. 1969); *Harris* v. *United States*, 364 F.2d 701 (D.C. Cir. 1966); *Inge* v. *United States*, 356 F.2d 345 (D.C. Cir. 1966).

Equally recognized both at English and American common law was a somewhat more limited right of self-defense accorded one who had initially provoked the use of unlawful force. It is often stated, however, that words alone can never constitute provocation. *Cf. Rowe* v. *United States*, 164 U.S. 546, 555 (1896) (holding that defendant, who had attacked deceased because of offensive words, was entitled to raise defense of protection of self, since defendant later withdrew from combat). Federal law permits an aggressor to recover the right to self-defense if the aggressor withdraws from the attack and communicates that withdrawal to the victim. In *Rowe*, the Court in *dictum* cited with approval many cases and treatises regarding the principle that "though the defendant may have . . . provoked the conflict, yet, if he withdrew from it in good faith and clearly announced his desire for peace, then, if he be pursued, his rights of self-defense revive." *Id.* at 556–57.

The Court in *Rowe* also cited with approval a case stating that the right of self-defense also returns to one who, having engaged in mutual combat, withdraws from the combat and communicates that withdrawal. *Id.* at 556

In addition, under current Federal law if one uses excessive force, or force out of proportion to necessity, in claimed self-defense, one is guilty of assault, an unlawful act. *See United States* v. *Stahls*, 194 F. Supp. 849 (S.D. Ind. 1961). If the initial aggressor then reasonably believed that he or she was in imminent danger of bodily harm, it would be due to this unlawful act, and the right of self-defense may be recovered. However, no Federal case on this point has been located.

It should be emphasized that the self-help defense is available even to one who was mistaken as to the necessity for its use, so long as the belief in its necessity or in the degree or force required was not unreasonable. In determining whether a defendant has acted reasonably, one must, of course, always recognize the nature of the situation giving rise to the use of self-defense. What might seem reasonable at a later time and in a different place might not have appeared

as reasonable alternatives to a defendant trying to defend him- or herself. In the words of Mr. Justice Holmes, "(d)etached reflection cannot be demanded in the presence of an uplifted knife." *Brown* v. *United States*, 256 U.S. 335, 343 (1921). *See also Hebah* v. *United States*, 456 F.2d 696, 709 (Ct. Cl.), *cert. denied*, 409 U.S. 870 (1972); *Inge* v. *United States*, 356 F.2d 345 (D.C. Cir. 1966); *United States* v. *Linn*, 438 F.2d 456, 460 (10th Cir. 1971).

Current Federal law maintains the rule that a person may use reasonable force to resist an unlawful arrest. *John Bad Elk* v. *United States*, 177 U.S. 529, 537 (1900); *United States* v. *Di Re*, 332 U.S. 581 (1948) (*dictum*); *United States* v. *Heliczer*, 373 F.2d 241 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967); *United States* v. *Angelet*, 231 F.2d 190 (2d Cir.), *cert. denied*, 351 U.S. 952 (1956). *Dicta* in some cases, however, suggests an erosion of the principle where an officer's authority is plain. *See United States* v. *Martinez*, 465 F.2d 79 (2d Cir. 1972); *United States* v. *Simon*, 409 F.2d 474 (7th Cir. 1969). In addition, the Ninth Circuit has refused to apply the rule where the illegality of the arrest was "derivative", i.e., due not to lack of probable cause but rather to the illegality of the search which produced the evidence supplying probable cause. *United States* v. *Moore*, 483 F.2d 1361 (9th Cir. 1973). None of the cases applying the rule addresses the question of whether the unlawfulness of the arrest is to be determined according to the defendant's belief or according to an objective standard.

Current Federal law permits the use of deadly force where a person reasonably believes that such force is required in order to defend against an imminent danger of death or serious bodily harm. *Brown* v. *United States*, 256 U.S. 335 (1921); *Beard* v. *United States*, 158 U.S. 550 (1895).

The Supreme Court has held that there is no general duty to retreat as a condition to the use of deadly force. However, the Court noted that one of the circumstances a jury may consider in determining whether a defendant's resort to deadly force was reasonable is the availability of a safe retreat. *Brown* v. *United States*, 256 U.S. 335 (1921). Of the 38 states having justifiable homicide statutes or codified defenses, 13 require retreat as a precondition to the use of deadly force. Alaska Stat. section 11.81.335(b) (1962); Ark. Stat. Ann. section 41-507(2)(a) (1977); Conn. Gen. Stat. Ann. section 53a-19(b)(1) (West 1958); Del. Code Ann. tit. 11, section 464(e)(2) (1979); Hawaii Rev. Stat. section 703-304(5)(b) (1976); Iowa Code Ann. section 704.1 (1979) (see case law); Me. Rev. Stat. Ann. tit. 17A, section 108(2)(c)(3)(a) (1980 Pamph.); N.H. Rev. Stat. Ann. section 627:4(3)(a) (1974); N.J. Stat. Ann. section 2C:3-4(2)(b) (1980); N.Y. Penal Law section 35.15(2)(a) (McKinney 1975); N.D. Cent. Code section 12.1-05-07(b) (1975); 18 Pa. Cons. Stat. Ann. section 515(b)(2)(ii) (Purdon 1973); Tex. Penal Code Ann. tit. 2, section 9.32(2) (Vernon 1974).

7. *Protection of property.*—Current Federal law with regard to the defense of an individual's property is virtually the same as that which was early developed at English common law. The judgment was there made, and remains valid today, that the stability of society requires that a person be secure both in person and property to the extent of justifying reasonable use of force in their defense. The Federal rule permits an individual to resort to the use of force in defense of

property to the extent reasonably required to prevent or terminate an unlawful interference with the right to that property. Whether or not the use of force is "reasonably required" will, of course, vary from case to case and will depend upon the specific factual setting. *See McNabb* v. *United States*, 123 F.2d 848 (6th Cir. 1941), *rev'd on other grounds*, 318 U.S. 332 (1943).

The protection of property is currently, in general, not grounds for the use of deadly force. *Id.* Whether this general rule is subject to any exceptions has not been considered by Federal courts. Of course, where an immediate danger is created to other persons during the course of a "property" offense, *e.g.*, a burglary of an occupied home, the rules permitting the use of deadly force to protect persons would be applicable.

8. *Exercise of public authority.*—The defense of justification based upon public authority has a common law origin in cases involving the use of force by military or law enforcement officials or by members of a posse. Most of the law in this country on the subject has been developed by State courts. *See generally* R. Perkins, *Criminal Law* 977–86 (2d ed. 1969); W. LaFave & A. Scott, *Criminal Law* 389, 402–07 (1972). However, the applicable principle was stated in a relatively early Federal case involving a homicide prosecution. The central issue in the case involved the shooting of a sentry of a soldier escaping from a military compound. The court found the shooting justifiable on the ground that no bad faith had been shown and that it was within the sentry's proper duties to shoot at an escapee. After discussing the duty of a soldier to obey the orders of a superior, the court went on to discuss the principle that would apply where the soldier was not acting in direct obedience to an order but pursuant to duty as the soldier conceived it. The court concluded:

> [U]nless the act were manifestly beyond the scope of [the soldier's] authority, or . . . were such that a man of ordinary sense and understanding would know that it was illegal . . . it would be a protection to him if he acted in good faith and without malice.

United States v. *Clark*, 31 F. 710, 717 (E.D. Mich. 1887). *See also United States* v. *Lipsett*, 156 F. 65 (W.D. Mich. 1907).

No more modern Federal decision dealing with the public duty defense apparently exists in the context of a *criminal* prosecution of a public official. An exception may be *United States* v. *Barker*, 546 F.2d 940 (D.C. Cir. 1976). There the court reversed the convictions of two Watergate "footsoldiers" involved in the burglary of Dr. Fielding's office, on the ground that the trial judge had erroneously precluded them from seeking to establish a defense based upon a good faith and objectively reasonable reliance on the fact that the orders they received from a superior in the White House to conduct the break-in were lawful in the interests of national security. Although the members of the panel disagreed as to the precise nature of the defense potentially available, it appears that the defense recognized by the appellate court more properly falls within the area of a justified reliance on an official misstatement of law—discussed above—than within the framework of the traditional public authority defense under discussion here. However, following the decision of the Supreme Court that Federal agents could be civilly sued for damages based upon a

breach of the fourth amendment in the conduct of a search and seizure, *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the lower Federal courts have had to determine the extent of a privilege or defense applicable to such agents. The doctrine that has uniformly emerged from the cases is that the agents are not absolutely privileged but may assert a defense that their actions were based upon a good faith and reasonable belief in the validity of an arrest or search and in the necessity for carrying out an arrest or search in the manner in which was done. *Jones* v. *Perrigan*, 459 F.2d 81 (6th Cir. 1972); *Hill* v. *Rowland*, 474 F.2d 1374 (4th Cir. 1973); *Zweibon* v. *Mitchell*, 516 F.2d 594, 670–71 (D.C. Cir. 1975) (*en banc*).

It seems reasonable to assume that Federal courts would apply a similar defense in criminal prosecutions.

At common law any person was privileged to arrest another for treason, felony, and for a breach of the peace committed in that person's presence. An officer was justified in making an arrest without a warrant for a felony if the officer reasonably believed that the crime had been committed and that the arrestee was the person who committed it. A private citizen, however, was protected in making such an arrest only if the felony had in fact been committed and the citizen had reasonable grounds for believing that the arrestee was the guilty party. R. Perkins, *Criminal Law* 878 (2d ed. 1969). Today, the authority to make arrests in governed almost entirely by statute. *See e.g.*, 18 U.S.C. 3050–56; 8 U.S.C. 1357; 19 U.S.C. 1581; 21 U.S.C. 878. These sections generally confer on Federal agents the power to make arrests without a warrant where they have reasonable grounds to believe that the person to be arrested has committed a felony. *See also Bell* v. *United States*, 371 F.2d 35 (9th Cir.), *cert. denied.*, 386 U.S. 1040 (1967). Reasonable grounds, as used in 18 U.S.C. 3052, has been held to have the same meaning as probable cause as used in the fourth amendment. *United States* v. *Green*, 525 F.2d 386 (8th Cir.

A distinction must be made between the authority to make an arrest and the extent of the right to use force in effectuating an arrest. Obviously, unless the arrester has the authority to make the particular arrest, any use of force to bring about the apprehension is unprivileged. Assuming the existence of the proper authority to make the arrest, the common law provided that an arrester was privileged to use only that force that was reasonable under the circumstances. Excessive force was prohibited. Moreover, deadly force was never permitted in making an arrest for a misdemeanor. This latter rule applied when the arrest for the misdemeanor was initially made and to an attempt to escape from an arrest already made, whether the arrest was pursuant to a warrant or not, and whether the arrestee was guilty or innocent of the charge. It was felt better to allow someone guilty of a misdemeanor to escape rather than to take that person's life. *See* R. Perkins, *Criminal Law* 980–81 (2d ed. 1969). The fact that the crime for which the arrest was being made was a misdemeanor did not, however, deprive the arrester of the privilege of self defense against an attack from one resisting arrest, even to the extent of using deadly force if reasonably required. *See* McDonald, *Use of Force by Police to Effect Lawful Arrest*, 9 Crim. L.Q. 435 (1967); *Restatement (Second) of Torts* section 131 (1965), and cases cited in Appendix (1966) (1978 Supp.).

A different rule applied to the use of force to arrest a person for a felony. At common law a fleeing felon could be killed if the felon could not otherwise be apprehended. This privilege extended to both public officials and private citizens and arose because of the common law requirement that all felonies be punished by death. A killing in the course of an arrest was merely regarded as a premature execution. However, the private citizen acted at peril when not acting pursuant to a warrant. If the citizen was attempting to make an arrest for a felony and the arrestee was not in fact guilty of the crime, the private citizen's use of deadly force was not privileged. *See* R. Perkins, *Criminal Law* 982 (2d ed. 1969).

However appropriate the fleeing felon rule may have been at a time when all felonies were punishable by death, the rule makes little sense today when the death penalty, where it exists, is restricted to a very few of the most heinous offenses. Furthermore, many crimes that are today classed as felonies do not involve physically dangerous conduct, while many misdemeanors, such as reckless driving, do. The distinction between a felony and a misdemeanor, in and of itself, is therefore no longer a rational criterion upon which to justify the use of deadly force.

Recognizing this, the American Law Institute, in its original Restatement of Torts, limited the privilege of using deadly force to an arrest for treason or for a felony that normally threatens death or serious bodily harm.[4] In formulating its Model Penal Code, the Institute reiterated its belief that a fundamental reform of the law relating to the use of deadly force to effect an arrest was necessary. Accordingly, Model Penal Code section 3.07(2)(b) would authorize the use of deadly force where the arrest is for a felony and the arresting officer or person assisting the arresting officer believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if apprehension is delayed.

In a similar mannner, the Brown Commission would have justified the use of deadly force only if it was necessary to effect the arrest of a person who committed a felony involving violence, who was attempting to escape by the use of a deadly weapon, or who was likely to endanger human life or inflict serious bodily injury unless apprehended without delay. *Final Report* section 607(2)(d) (1971). *See also* President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 189 (1967); *Mattis* v. *Schatr*, 502 F.2 588 (8th Cir. 1976) (*en banc*), *vacated on other grounds sub nom. Ashcroft* v. *Mattis*, 431 U.S. 171 (1977).

9. *Necessity.*—The defense of duress, discussed above, is closely re-

[4] In 1948, however, the Institute was forced to abandon this more restrictive rule and return to the felony test of common law. For "[e]very case which actually decides the question agrees that the original English common law is still the law." RESTATEMENT (SECOND) OF TORTS § 131 Appendix (1966); *see also* Pearson, *The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957, 964 (1930); Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 275–76 (1940). *But see* the following cases which are cited in opposition to the position taken by the RESTATEMENT OF TORTS in 1931: Stinnett v. Virginia, 55 F.2d 644 (4th Cir. 1932); Thompson v. Norfolk & W. Ry. Co., 116 W. Va. 705, 182 S.E. 880 (1935).

lated to the defense of necessity. The defense of necessity can be said to arise when the pressure of natural physical forces compels a person, in an emergency, to choose a criminal act as the lesser of two evils. *See* W. LaFave & A. Scott, *Criminal Law* 381–88 (1972); R. Perkins, *Criminal Law* 956–61 (2d ed. 1969). The defense has not been the subject of much discussion in Federal courts. Two early cases, however, presented easy applications of the defense. In *The William Gray*, 29 F. Cas. 1300 (C.C.N.Y. 1810) (No. 17,694), the court excused the master of a ship of violating an embargo by taking refuge in a forbidden port when forced to do so by a violent storm. In *United States* v. *Ashton*, 24 F.Cas. 873 (C.C. Mass. 1834) (No. 14,470), sailors who refused to obey a captain's orders so that they could force the captian to return an unseaworthy vessel to port for repairs, were found not guilty of mutiny. The defense was also discussed in *United States* v. *Holmes*, 26 F.Cas. 360 (C.C.E.D.Pa. 1842) (No. 15,383), where it was held insufficient to justify crew members who threw a number of passengers from a lifeboat in order to prevent the boat from floundering and killing all 41 on board. (The defendant was, however, only tried for manslaughter, and only sentenced to 6 months hard labor.) Necessity is generally not considered an excuse for the intentional taking of an innocent life. *See* R. Perkins, *Criminal Law* 957–59 (2d ed. 1969).

The Model Penal Code (section 3.02) proposed a version of the defense. Entitled "Justification Generally: Choice of Evils", the defense would require that (1) the harm to be avoided be greater than that sought to be prevented by the law violated; (2) no law provide exceptions or defenses dealing with the specific situation involved; and (3) there appear no legislative purpose to exclude the justification claimed. The defense is not applicable to offenses based upon recklessness or negligence if the actor is reckless or negligent, respectively, in bringing about the situation compelling the choice of harms. The Brown Commission, on the other hand, preferred not to codify the defense, stating:

> [T]he so called choice of evils rule . . . has not been included . . . on the view that, while its intended application would be extremely rare in cases actually prosecuted, even the best of statutory formulations . . . is a potential source of unwarranted difficulty in ordinary cases. . . . Codification, as opposed to case by case prosecutive discretion, is regarded as premature.

Brown Commission, *Final Report* 43 (1971).

Occasionally a situation may develop that falls somewhere between duress and necessity, but still within the scope of justified conduct. The typical duress case involves a situation in which one person, by threatening certain consequences, orders another to engage in criminal conduct. The typical necessity case involves dangers that arise from natural circumstances. Cases arise, however, where an individual acts to avoid a greater harm from a person who has not given a command to engage in criminal conduct. For example, a person may escape from a prison in order to prevent physical and sexual assaults by prison personnel or fellow inmates. The Supreme Court has indicated that under certain circumstances such conduct may be justified if the actor immediately contacts the authorities in order to terminate the actor's

status as an escapee. *United States* v. *Bailey*, 444 U.S. 394 (1980). *See also People* v. *Lovercamp*, 43 Cal. App. 3d 823 (1974).

10. *Unlawful entrapment.*—The defense of unlawful entrapment, although of comparatively recent origin in the United States, has received more attention in Federal decisions than any other defense. The Supreme Court has rendered at least six decisions on the subject since 1932, while the lower Federal courts have decided hundreds of cases dealing with it. *See Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Russell*, 411 U.S. 423 (1973); *Osborn* v. *United States*, 385 U.S. 323 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963); *Sherman* v. *United States*, 356 U.S. 369 (1958); *Sorrells* v. *United States*, 287 U.S. 435 (1932); *see also* DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U. San Fran. L. Rev. 243, 244–52 (1967).

In general, entrapment is a defense which may be asserted when a defendant is induced by government agents into committing all the elements of a criminal offense. *United States* v. *Russell*, 411 U.S. 423, 435 (1973).[5]

Thus, entrapment is a defense to an act which was the product of improper activity of law enforcement officials. On the other hand, merely affording a defendant with an opportunity or facilities for the commission of an offense is not entrapment. *Osborn* v. *United States*, 385 U.S. 323 (1967). Beyond these broadly stated principles there is a long history of controversy concerning the nature and authority for a defense of entrapment. Thus, the defense of unlawful entrapment requires a thorough analysis of the major Supreme Court decisions.

Sorrells v. *United States*, 287 U.S. 435 (1932), involved a prosecution under the National Prohibition Act for selling whiskey to an undercover Federal Agent. The evidence was characterized as "sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that the defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation." *Id.* at 441. The question before the Court was whether, on these facts, the rulings of the court below that there was no entrapment as a matter of law were correct.[6] Eight

[5] The defense is to be distinguished from other manners of defending against a charge, such as proving a "frame up", an example of which is the "planting" of contraband on a person. Smith v. United States, 331 F.2d 734, 790–91 (D.C. Cir. 1964) (*en banc*). Williamson v. United States, 331 F.2d 441 (5th Cir. 962), *cert. denied*, 381 U.S. 950 (1965). In a "frame-up", the accused never commits the offense and thus cannot be said to have been entrapped into doing so. In the hypothetical above, for example, as a result of the Government's conduct, an essential ingredient of the offense, i.e., knowledge by the accused of the substance possessed, is lacking. *See* Brown Commission, Working Papers 310–12. *See also* United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973). A "frame-up" can be asserted with regard to crimes which are either *mala in se* and statutory offenses of lesser gravity. Sorrell v. United States, 287 U.S. 435, 451 (1932) (Roberts, J., concurring).

[6] The majority in *Sorrells* found its rationale for the entrapment defense in a statutory construction whereby the activity of the entrapped defendant was not intended to be covered by the criminal statute in question and such a defendant was therefore innocent. From this rationale, a test and procedural consequences focusing on the innocence of the defendant developed. The *Sorrells* minority, on the other hand, found its rationale for the defense in a public policy that required that the Court preserve the purity of its own process. If the Court's self-established supervisory power over the judicial process, which was not well-articulated until the enunciation of the *McNabb-Mallory* rule (which precludes the use of a confession obtained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure) some years later, had been established by the time of *Sorrels*, the diverging views might not have emerged. *See* Brown Commission, Working Papers 314 (1970).

justices thought the ruling erroneous, but divided sharply over the nature of the entrapment defense.

Chief Justice Hughes, writing for five members of the Court in *Sorrells* held that the doctrine of entrapment was predicated on the view that Congress could not have intended that the "processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id.* at 448. The Court noted the well established principle that "the fact that officers or employees of the Government merely afforded opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." *Id.* at 441. The Court stated, however, that "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id.* at 442.

The opinion of the majority further stated:

> [T]he defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises [citation omitted]. The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it.

Id. at 451.

Mr. Justice Roberts, in a concurring opinion joined by three members of the *Sorrells* Court, approached the issue somewhat differently. He contended that the the basis for an entrapment defense should be a rule of "public policy" based upon the integrity of the judicial process rather than upon imputed congressional intent. He emphasized concern about improper government conduct and indicated that the rationale for the defense ought not to be the innocence of the defendant but "the inherent right of the court not to be made the instrument of wrong." Justice Roberts viewed entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer." *Id.* at 454. The opinion concluded that where inducement or instigation by the government was shown, the prosecution should not be permitted in rebuttal to introduce evidence of the defendant's predisposition. *Id.* at 453–59.

The Supreme Court next considered the entrapment defense in *Sherman* v. *United States*, 356 U.S. 369 (1958), which involved a conviction for selling narcotics to a government informer. All nine justices agreed that on the evidence, a defense of entrapment was established as a matter of law. The Court, however, was "sharply divided"

once again over the elements of the entrapment defense. *Lopez* v. *United States*, 373 U.S. 427, 434 (1963). Chief Justice Warren, writing for the majority in *Sherman*, held that reversal was required under the rationale of the majority in *Sorrells*, which he characterized as follows:

> In *Sorrells* v. *United States*, 287 U.S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S. at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.
>
> However, the fact that government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials. See 287 U.S. at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.

Sherman v. *United States*, 356 U.S. 369, 372–73 [emphasis in original].

In a concurring opinion for four justices, Mr. Justice Frankfurter, like Mr. Justice Roberts in *Sorrells*, advocated an entrapment defense predicated on the nature of police conduct. He emphasized that:

> This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. These test shifts attention from the record and predisposition of the particular defendant to the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime....

Id. at 383–84.

Mr. Justice Frankfurter also stated that permitting an inquiry into the defendant's reputation, past criminal history and prior inclination to commit crimes was dangerously prejudicial. *Id.* at 382.

The Supreme Court in *Sherman* also specifically reaffirmed the holding in *Sorrells* "that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." *Id.* at 377. In *Masciale* v. *United States*, 356 U.S. 386 (1958), the Court, dividing as in *Sherman*, held that since the testimony on entrapment was conflicting, the issue was properly submitted to the jury.

In *United States* v. *Russell*, 411 U.S. 423 (1973), the Supreme Court again embarked upon an in-depth examination of the entrapment defense. *Russell* involved a prosecution for manufacturing and selling methamphetamine ("speed"). The predisposition of the defendant, who was engaged with others in the continuing manufacture of the drug, to commit the offenses was conceded. The evidence showed that an undercover agent, posing as a member of a syndicate desirous of controlling the manufacture of the drug in the region, offered to supply the defendant with a chemical ingredient needed in the manufacturing process, in return for one-half the quantity of the drug produced. The defendant accepted the agent's offer, was supplied with the chemical, and thereafter manufactured and sold the drug to the agent. The defendant was convicted for these acts, but the court of appeals reversed on the basis of alternative holdings that the government's furnishing of an essential ingredient (a) constituted entrapment as a matter of law, or (b) constituted an intolerable degree of government participation in the crime so as to violate constitutional due process. The Supreme Court, dividing five to four, reversed and reinstated the conviction.

After reviewing the decisions in *Sorrells* and *Sherman*, the majority rejected the defendant's contention that the role played by the undercover agent in obtaining the conviction violated the Constitution. Noting that the evidence disclosed not only that the chemical supplied by the agent could have been obtained without the agent's services but that it had been in fact obtained on other occasions by the defendant and his associates, the Court stated:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California*, 342 U.S. 165 (1952), the instant case is distinctly not of that breed. [The agent's] contribution of propanone to the criminal enterprise already in process was scarcely objectionable. The chemical is by itself a harmless substance and its possession is legal. While the Government may have been seeking to make it more difficult for drug rings, such as that of which [Russell] was a member, to obtain the chemical, the evidence described above shows that it nonetheless was obtainable. The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment, *Kinsella* v. *United States ex rel, Singleton*, 361 U.S. 234, 246 (1960).

United States v. *Russell*, 411 U.S. 423, 431–32 (1973).

The dissenting justices indicated, in two separate opinions that they would adopt the theory of entrapment espoused by Justices Roberts and Frankfurter in *Sorrells* and *Sherman*, respectively. Mr. Justice Stewart, writing for three of the dissenting justices, stated:

> In my view, a person's alleged "predisposition" to crime should not expose him to government participation in the criminal transaction that would be otherwise unlawful. [Footnote omitted]
>
> This does not mean, of course, that the Government's use of undercover activity, strategy, or deception is necessarily unlawful. *Lewis* v. *United States*, 385 U.S. 206, 208–209 (1966). Indeed, many crimes, especially so-called victimless crimes, could not otherwise be detected. Thus, government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so. *Osborn* v. *United States*, 385 U.S. 323, 331–332 (1966). See also *Sherman* v. *United States*, *supra*, at 383–384 (Frankfurter, J., concurring).
>
> But when the agent's involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred....

Id. at 444–45.

Most recently, in *Hampton* v. *United States*, 425 U.S. 484 (1976), the Court considered a factual variation on the *Russell* theme. Five of the eight justices participating in the decision voted to affirm the conviction. All of these justices agreed that, in view of the defendant's predisposition, the classic defense of entrapment itself was not available. The prevailing opinion for three members of the Court took the position that the finding of predisposition likewise precluded a holding that constitutional due process had been violated, and also stated that, given predisposition, the remedy for any official overstepping of the proper boundaries of law enforcement conduct was by way of administrative or criminal action against the officers themselves, rather than by the creation of judicial remedies "freeing the equally culpable defendant". *Id.* at 490. Two members of the Court in concurring opinion agreed that the government's action in the case had neither violated constitutional due process nor supported an invocation of the Court's supervisory powers; but the concurring opinion was unwilling to endorse the plurality's conclusion that "no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition." *Id.* at 495.

Three members of the Court, while reaffirming adherence to the minority view of entrapment espoused by Mr. Justice Stewart in *Russell*, indicated that they would have reversed the defendant's conviction as an exercise of supervisory power, on the ground that the government's involvement in the offense exceeded permissible limits. *Id.* at 497–500.

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ment must disprove entrapment beyond a reasonable doubt. *See, e.g.*, *Notario* v. *United States*, 363 F.2d 169 (9th Cir. 1966); *Government of Virgin Islands* v. *Cruz*, 478 F.2d 712, 716 (3d Cir. 1973); *United States* v. *Harrell*, 436 F.2d 606, 612 (5th Cir. 1970). The courts vary, however, as to the type of proof required in order to cause the government to introduce evidence to meet its burden. Some circuits require merely that the accused show "some indication," through government witnesses or otherwise, that a government agent corrupted him or her. *Kadis* v. *United States*, 373 F.2d 370, 373–74 (1st Cir. 1967). Other courts separate the elements and require that the accused first show by a preponderance of the evidence that the government induced him to commit the offense, whereupon the government must reply by proving the accused's predisposition. *See United States* v. *Viviano*, 437 F.2d 295, 298–99 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971).

The foregoing analysis of the two predominant approaches toward the defense is not intended as an endorsement of one or the other approach, nor as an effort to affect further judicial development of the defense. It is presented here as an explanation of the status of current case law.[7]

§ 721—Nature and effect of defenses

This section provides that the codification of a defense in the proposed code does not preclude the courts from applying current defenses that are not codified or developing new defenses. Some examples are "necessity" (*see* Model Penal Code section 3.02; *United States* v. *Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383)); "execution of public duty" (*see* Model Penal Code section 3.03); Brown Commission, *Final Report* section 602 (1971)); and "use of force in law enforcement" (*see* Model Penal Code section 3.07; Brown Commission, *Final Report* section 602 (1971)).

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[7] The controversy about entrapment has continued over a number of years. MODEL PENAL CODE section 2.13 (1952) adopted a largely "objective" approach to the entrapment defense. This view has also been urged by the Brown Commission. *See* BROWN COMMISSION, FINAL REPORT § 702 (1971). The issue has also been addressed by a large number of commentators, the majority of whom prefer the objective approach to entrapment. *See* Y. KAMISAR, MODERN CRIMINAL PROCEDURE 119 (4th ed. 1978 Supp); Note, *Hampton v. United States: Last Rites for the "Objective" Theory of Entrapment?*, 9 COLUM. HUMAN RIGHTS L. REV. 223, 246 n. 146 (1977). Finally, the entrapment issue has divided both State legislatures and State courts.

The following States have adopted the objective approach to entrapment; (1) ARK. STAT. ANN. § 41–209 (1977); (2) COLO. REV. STAT. § 81–1–709 (1973); (Reigan v. People, 210 P.2d 991 (Colo. 1979); (3) FLA. STAT. ANN. §812.28(4) (1978); (4) HAWAII REV. STAT. § 702–237 (1976); (5) N.H. REV. STAT. ANN. § 626.5 (1974); (6) N.Y. PENAL LAW § 40.05 (McKinney 1975); (7) N.D. CENT. CODE 12.1–05–11 (1976); (8) 18 PA. CONS. ANN. § 313 (Purdon 1973); (9) TEX. PENAL CODE ANN. tit. 2, § 8.06 (Vernon 1974); (10) UTAH CODE ANN. § 76.2–303 (1978).

While both the New York and the Utah statutes use language which appears to state an objective test for the entrapment defense, courts have construed these laws to allow a subjective approach. People v. Calvano, 30 N.Y.2d 199, 282 N.E. 2d 322, 331 N.Y.S. 2d 430 (1972); State v. Curtis, 542 P.2d 744 (Utah 1975).

The following States have codified the subjective approach to entrapment: (1) CONN. GEN. STAT. ANN. § 53a–15 (West 1972); (2) DEL. CODE ANN. tit. 11, § 432(1) (1979); (3) GA. CODE ANN. § 26–905 (1978); (4) ILL. ANN. STAT. ch. 38 § 7–21(1) (Smith-Hurd 1972); (5) IND. CODE ANN. § 38–41–3–9 (Burns 1979); (6) KAN. STAT. ANN. § 21–3210 (1974); (7) KY. REV. STAT. § 505.010 (1975); (8) MO. ANN. STAT. § 562.066 (Vernon 1979); (9) MONT. REV. CODES ANN. § 45–2–213 (1979); (10) OR. REV. STAT. § 161.275 (1977); (11) WASH. REV. CODE ANN. 9A.16.070 (1977).

States which have not codified defenses have reached different results with respect to which test to use on entrapment. California, Alaska, and Michigan have adopted the objective test. People v. Barraza, 23 Cal. 3d 675, 591 P.2d 947, 153 Cal. Rptr. 459 (1979); Grossman v. State, 457 P.2d 226 (Alaska 1969); People v. Turner, 390 Mich. 7, 210 N.W. 2d 336 (1973). Tennessee and North Carolina accept the subjective view. People v. Jones, 598 S.W. 2d 209 (Tenn. 1980); State v. Stanley, 288 N.C. 19, 215 S.E. 2d 589 (1975).

The section is intended, however, to preclude the courts from modifying, other than for constitutional reasons, defenses that have been codified.

The Committee does not believe that a partial codification of defenses creates any difficulties regarding the creation or modification of defenses not codified. A similar approach was employed by Congress in enacting the Federal Rules of Evidence, where the rules governing privilege were left to case law development. *See* F. R. Evid. 501. The Supreme Court recognized the validity of this "partial codification" approach in *Trammel* v. *United States*, 100 S.Ct. 906 (1980), when it modified the then-existing spousal testimonial privilege.

§ *722—Insanity*

This section defines the insanity defense to a Federal criminal prosecution, substantially restating the current law of nine out of the 10 Federal circuits that have recently addressed the issue. *See* discussion of current law at 55 *supra*. Subsection (a) provides that a defendant is legally insane if, as a result of a mental disease or defect, the defendant lacks substantial capacity to appreciate the wrongfulness of the alleged conduct or to conform the conduct to the law's requirements.

Subsection (b) provides that an abnormality manifested primarily by repeated criminal or otherwise antisocial conduct does not constitute a "mental disease or defect." The purpose of this provision is to exclude from the coverage of the insanity defense the so-called psychopath, sociopath or anti-social personality.

The Model Penal Code (*see* section 4.01(2)) and the Brown Commission (*see Final Report* section 503) excluded such an abnormality when that abnormality was manifested *only* by repeated criminal or otherwise antisocial conduct. The Committee substituted "primarily" for "only" in order to avoid the instance of a defense psychiatrist simply finding another symptom manifesting the abnormality, thereby allowing the insanity defense to be pursued.

The Committee recognizes that the insanity defense is currently the subject of considerable debate. *See., e.g.*, Hearings on Reform of the Federal Criminal Laws Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee and Before the Senate Judiciary Committee, 93d Cong., 1st sess. through 96th Cong., 1st sess., at 6363–6429, 6447–6507, 7004–78, 7083–7120. However, the Committee believes that any changes in a doctrine so firmly established in American criminal law should be made only after a complete and thorough study by Congress. By including the current insanity defense in the proposed code, the Committee is not expressing the opinion that the defense is the most appropriate manner of dealing with crime that is the product of a mental disorder. Rather, the Committee is ensuring that any changes in the defense will, in the future, be accomplished through legislative study and action, rather than by judicial fiat. The formulation of the insanity defense that is included in this section is supported by the American Bar Association. *See* statement of William Greenhalgh, on behalf of the American Bar Association, Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. (1980).

The codification of this formulation of the insanity defense does not, of course, affect in any manner the ability of a defendant to introduce evidence of mental condition or a mental disorder to disprove the existence of a required state of mind.

§ *723—Intoxication*

This section sets out the circumstances under which intoxication is a defense to a Federal criminal prosecution. Subsection (a), consistent with current Federal law, provides that self-induced intoxication is a defense if such intoxication negates an intentional or knowing state of mind or a specific intent or motive required for the offense. The Committee realizes that voluntary intoxication is thus, theoretically, a defense to every crime, since conduct must always be knowing or intentional. See discussion at 33–34 *supra*. However, the Committee believes that although intoxication may sometimes render a person unaware of the existence of a circumstance or of the probability of a result, only in the rarest situation will a person be unaware of the basic nature of that person's conduct. For example, a drunk who is strangling another may not be aware that it is a person being squeezed or that death will result, but the drunk is certainly aware that he or she is squeezing something. Thus, while the intoxication may be such as to provide a defense to murder, it would not provide a defense to manslaughter.

Subsection (b) follows the common law in treating involuntary intoxication in the same manner as insanity. This section restates the test for insanity set out in section 722 of the proposed code except that, instead of a mental disease or defect, it is the defendant's involuntary intoxication at the time of the commission of the offense that causes the defendant to lack substantial capacity to appreciate the wrongfulness of the conduct or to conform that conduct to the law's requirements. Both the Brown Commission (*see Final Report* section 502(3)) and the Model Penal Code (*see* section 2.08(4)) have provisions similar to this subsection.

§ *724—Mistake of fact or law*

This section provides a defense to a Federal criminal prosecution where the defendant, as a result of ignorance or a mistake concerning a matter of fact or law, lacked any state of mind required for the offense.

Current law is confusing as to whether or not such mistakes constitute a defense to a crime. Confusion also exists about whether certain kinds of states of mind constitute a mistake of "fact", of "legal fact" (such as the validity of a divorce), or of "law". All previous legislative proposals derived from the work of the Brown Commission adopt the analysis used in section 724, which focuses attention on whether the requisite state of mind existed rather than on what kind of mistake the defendant made.

§ *725—Reliance upon official misstatement*

This section provides that under certain circumstances a mistake regarding the legality of the defendant's conduct may constitute a defense if the mistake resulted from the defendant's reasonable reliance upon an official misstatement of the law. Current Federal case law recognizes that due process may bar the Government from prosecuting a person who has relied upon official Government statements that in essence endorse the action. Both the Brown Commission (*see Final Report* section 609) and the Model Penal Code (*see* section 2.04)

recommended an official misstatement defense, and a number of States have codified such a defense.[1]

The affirmative defense provided by section 725 is available if the defendant can prove the existence of two circumstances by a preponderance of the evidence. First, the defendant must in good faith have believed that the conduct in question did not violate the law. This carries forward cases such as *United States* v. *Painter*, 314 F.2d 939, 943 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963), which provide that even reasonable reliance upon an official misstatement will not excuse criminal conduct if the actor is bent on wrongdoing and does not honestly believe that the conduct was lawful. Second, the defendant's belief must be based on reasonable reliance upon an Act or concurrent resolution of Congress, the decision of a Federal court, an administrative order or grant of permission from a Federal Government agency, or an official interpretation of a person or body charged by law with the interpretation or enforcement of the law defining the offense. The provision for official grants of permission is intended to reach such matters as the granting of a parade permit or an on the spot oral grant of permission. However, it must be clear that permision, and not just a casual legal opinion, was given. When a defendant is relying upon an official interpretation of the law, the interpretation must have been made by a public servant or Government body charged with the enforcement or interpretation of the law in question, and must have been made by that public servant or body in an official capacity. *See* W. LaFave & A. Scott, *Criminal Law* 367–68 (1972). Thus, one cannot defend on the basis of a casual, social consultation with one's friend, who happens to be an Assistant United States Attorney, nor could one rely upon an opinion of a member of the White House staff, unless it was apparent that the President had authorized that particular interpretation. However, reliance upon the statement of an official, even if the official is the President, is not sufficient; the reliance must be reasonable.

Whether the defendant has reasonably relied may depend upon a number of circumstances. *See generally* W. LaFave & A. Scott, *Criminal Law* 365–69 (1972). For example, if the official statement is "fairly outrageous," it would be unreasonable to rely upon it. *See United States* v. *Barker*, 546 F.2d 940, 957 (D.C. Cir. 1976) (Merhige, J., separate opinion). Reasonable reliance may require further inquiry. *See United States* v. *Lansing*, 424 F.2d 225, 227 (9th Cir. 1970). Reliance upon a lower court decision may be less reasonable when one is not a party. *See United States* v. *Calamaro*, 137 F. Supp. 816–20 (E. D. Pa. 1956), *rev'd on other grounds*, 256 F.2d 182 (3d Cir.), *aff'd*, 354 U.S. 531 (1957). Relying upon official advice may be more reasonable when the offense involved in *malum prohibitum* than when the offense is *malum in se*. See Model Penal Code section 2.04, Comment at 138–39 (Tent. Draft No. 4, 1955). Thus, for example, it would not be reasonable for a defendant to rely upon the

[1] ALA. CODE § 13A–2–6(b) (1977 Special Pamphlet); ARK. STAT. ANN. § 41–206(3) (1977); COLO. REV. STAT. § 18–1–504(2) (1978); CONN. GEN. STAT. ANN. § 53a–6(b) West 1958); HAWAII REV. STAT. § 702–220 (1976); ILL. ANN. STAT. ch. 38, § 4–8(b) (Smith-Hurd 1972); KAN. STAT. ANN. § 21–3203(2) (1974); KY. REV. STAT. § 501.070(3) (1975); ME. REV. STAT. ANN. tit. 17–A, § 52(4)(B) (1980 Pamphlet); MO. ANN. STAT. § 562.03.(2)(2) (Vernon 1979); MONT. REV. CODES ANN. § 94–2–103(4) (1947); N.H. REV. STAT. ANN. § 626:3 (1974); N.Y. PENAL LAW § 15.20(2) (McKinney 1975); N.D. CENT. CODE § 12.1–05–09 (1975); TEX. PENAL CODE § 8.03(b) (Vernon 1974); UTAH CODE ANN. § 76–2–304(2) (1978).

representation of an official that murder was lawful, even if that official were the President. Reasonability must be determined in accordance with the actor's situation. What may be reasonable for a private citizen may be unreasonable for a public official or a lawyer.

§ *726—Duress*

This section establishes an affirmative defense of duress under certain circumstances. Section 122(c) of the proposed code requires that the defendant prove, by a preponderance of the evidence, the facts establishing duress.

Subsection (a)(1) provides that it is an affirmative defense to a prosecution for a felony other than murder or manslaughter that the defendant was compelled to act by threat of imminent death or serious bodily injury to the defendant or a third person. This is similar to current law. *See* discussion at 63–64 *supra*.

Subsection (a)(2) provides that duress amounting only to force or threat of force is an affirmative defense to a prosecution for a misdemeanor or an infraction.

Subsection (a)(3), like current law, requires that the force or threat be such as to render a person of reasonable firmness incapable of resisting the force or threat.

Subsection (b)(1), consistent with current law, makes the affirmative defense of duress unavailable to a defendant charged with a crime requiring a state of mind other than negligence, where that defendant knowingly entered the situation where the compulsion was exerted and *recklessly* disregarded the risk that he or she would be compelled to do the act charged. Subsection (b)(2) provides that the affirmative defense is also unavailable to a defendant charged with a crime requiring a negligent state of mind, where that defendant knowingly entered the situation and *negligently* disregarded such a risk.

§ *727—Protection of persons*

Section 727 permits the use of self-defense and defense of third persons under certain circumstances. Once the defendant submits sufficient evidence to support a reasonable belief that the defense exists, the prosecution must prove the nonexistence of the defense beyond a reasonable doubt (*see* section 122(b) of the proposed code).

Subsection (a), which substantially restates current law, provides that a person may use or threaten nondeadly force if circumstances require it in order to protect the actor from the danger of imminent use of unlawful force by another person.

Subsection (b) also substantially restates current law and permits an actor to use deadly force as protection from the risk of death or serious bodily injury. Subsection (b) does not require retreat from the dangerous situation, but retreat is a circumstance to be considered in determining whether deadly force was needed. *See* Devitt & Blackmar, *Federal Jury Practice and Instructions* section 43.21 (1970).

Since the defense limits the use of force to the use of such force "as was required under the circumstances", the Committee does not believe that any provision regarding the use of excessive force is necessary. Excessive force is, by definition, more than is required under the circumstances. Similarly, the Committee does not believe it is necessary to refer to "reasonable" force, since the question of whether

the force was "required" will be determined objectively, i.e., from the point of view of a reasonable person. Subjective considerations will only be involved if the defendant alleges a mistake regarding the necessity of force. See section 729 of the proposed code and discussion at 64–65 *supra* and 83 *infra.*

Subsection (c) permits someone to defend a third person by using or threatening any level of force if the third person would have been permitted under subsection (a) or (b) to use such force or threat.

Subsection (d)(1) provides that an individual may not use force or threats to resist arrest or other performance of duty by a law enforcement officer acting under color of law. This subsection alters current Federal law, which permits reasonable force to be used to resist an unlawful arrest. However, subsection (d)(1) also provides as an exception that one may use nondeadly force or threats to resist an arrest by an officer using excessive force. The Brown Commission's *Final Report* (section 603(a)) also permits an actor to resist, by force or threat of force, against excessive force by a law enforcement officer.

Subsection (d)(2) provides that the defense is unavailable if the actor was the initial aggressor or voluntarily entered into mutual combat. The subsection also provides that an actor may not claim the defense if the actor intentionally provoked another person to use unlawful force in order, in turn, to cause bodily injury to that other person. These provisions are based upon current law and the Brown Commission's *Final Report* (*see* section 603(b)).

There are 2 exceptions to the general rule set forth in subsection (d)(2). One who is engaged in mutual combat,[1] is the initial aggressor, or intentionally provoked the attack, may use force or threats: (1) to resist another's clearly excessive use of force in return; and (2) where the person has withdrawn from the confrontation and has taken steps which would reasonably notify the other of the withdrawal, and the other person continues to use or threaten unlawful force. These exceptions are based upon current law.

Subsection (d)(3), which is drawn from the Model Penal Code (*see* section 3.09), provides that the defense of protection of persons is unavailable if the defendant erroneously believes that another's force or conduct is unlawful, and that belief is the result or the defendant's ignorance or mistake about the proposed code or any other criminal law.

Subsection (e) provides that words alone are not enough to provoke an attack. Provocation occurs only with conduct that is reasonably calculated to produce combat likely to result in death or bodily injury, and such conduct causes an attack by another person.

§ *728—Protection of property*

Section 728 describes those situations in which an actor may use force to protect property. Like current law, section 728 distinguishes between nondeadly and deadly force. *See* discussion at 66–67 *supra.*

Subsection (a) carries forward current law and provides that one who has custody or possession of real or personal property can use such nondeadly force or threats as are required under the circumstances

[1] The term "mutual combat" is used to mean any physical struggle or fight entered into willingly by both parties. It is not intended to connote a requirement that the fight involve the use of arms.

to protect that property against trespass, unlawful taking, or damage. Current law regarding the use of deadly force to protect property is unclear. The Brown Commission (*see Final Report* section 607(2)(c)), the Model Penal Code (*see* section 3.06(3)(d)), and 36 States have endorsed such a defense in certain circumstances. Memorandum to House Committee on the Judiciary from the American Law Division, Congressional Research Service, Library of Congress (October 16, 1979). Subsection (b) provides that one may use deadly force to protect property when: (1) the actor was in possession or control of, or privileged to be in, a dwelling or place of work; (2) the deadly force was necessary to protect against arson, burglary, or robbery, or to prevent the perpetrator from fleeing with the fruits of the crime after committing a robbery or burglary; and (3) the use of nondeadly force would have exposed anyone other than the perpetrator to a substantial danger of serious bodily injury.

§ *729—Special rule for mistakes relating to certain defenses*

Subsection (a) provides that the existence of the defenses of duress, protection of persons, and protection of property is to be determined on the basis of the facts as the defendant believed them to be, even though that belief may be mistaken. *See* pp. 64–65 *supra.*

Subsection (b) provides a limitation on this rule. If the offense for which the defendant is being prosecuted requires only recklessness as to a result, and if the actor is reckless regarding the facts which if true would give rise to the defense, then the defense is to be determined according to the facts as they actually were, and not as the defendant believed those facts to be. Further, if the offense requires only negligence as to a result, and if the defendant is negligent (or reckless) regarding the facts which if true would give rise to the defense, then the defense is to be determined according to the facts as they actually were, and not as the defendant believed those facts to be.

§ *730—Definitions for subchapter*

This section defines "deadly force" and "serious bodily injury" for the purposes of the subchapter on defenses. "Deadly force" means force used with the intent to cause, or with reckless disregard for a substantial risk that such force will cause, death or serious bodily injury, if such force is actually capable of producing death or serious bodily injury. "Serious bodily injury" means bodily injury involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Subtitle II—Offenses

Chapter II—Attempt and Conspiracy

§ *1101—Attempt*

This section sets forth the requirements for conviction of a person for an attempt to commit a crime. The proposed code continues the current law practice of punishing an attempt only where an attempt is specifically mentioned in the description of the offense. The Committee believes that the creation of a "general" attempt provision would drastically increase the types of conduct which are subject to Federal criminal jurisdiction. To the degree that Federal criminal laws are

auxilliary to State criminal law enforcement, such an expansion would significantly alter the balance of Federal-State relations. In addition, the Federal criminal laws are primarily regulatory in nature, and an attempt to commit a regulatory crime does not carry the same moral culpability as an attempt to commit a common law crime. A blanket prohibition of such attempts would not, therefore, be appropriate. The creation of a general attempt provision is opposed by such groups as the Business Roundtable, *see* Letter from John Tabor, Special Counsel for The Business Roundtable, to Hon. Robert F. Drinan, et. al., (April 24, 1979), and the American Civil Liberties Union, *see* Statement of John Shattuck, on behalf of the American Civil Liberties Union, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. (1980).

The Committee looked at a number of factors in determining whether to apply the attempt provision to a particular offense. The Committee gave primary consideration to whether current Federal law punishes an attempt. The Committee also considered the following: (1) Does the offense involve first amendment related activities? The Committee was reluctant to punish inchoate crime when free speech and related issues were involved, since no governmental interest is actually harmed if the crime is not completed. (2) Does the substantive offense itself involve inchoate behavior? The Committee saw little sense in punishing such conduct as "attempted bribery", since the bribery offense itself prohibits the offer or solicitation of a bribe. (3) Is the offense *malum in se* (i.e., morally wrong), or *malum prohibition* (i.e., wrong merely because it is prohibited by law)? Since the punishment of an attempt is justified on the ground that a person who tries and fails is as culpable as a person who tries and succeeds, it is frequently inappropriate to punish an attempt when the conduct indicates no moral blameworthiness on the part of the actor.

Subsection (a) provides that a person may be convicted of an attempt (where attempt is made a crime) if that person (1) has a specific intent that the crime be committed, and (2) intentionally takes a substantial step toward the commission of the crime. The first requirement (specific intent) parallels that of common law and current Federal law. The Committee rejected, as a radical and unjustified departure from current law, the suggestion of the Brown Commission's *Final Report* (*see* section 1001), and to a lesser degree the Model Penal Code (*see* section 5.01), that a person be liable for an attempt when that person merely has the states of mind required for the commission of the completed offense.

The second requirement (the substantial step) clarifies the current law of attempt. The law has traditionally required that the actor enter the "zone of perpetration" by engaging in conduct that goes beyond "mere preparation." A "substantial step" is defined by the Brown Commission as "any conduct strongly corroborative of the firmness of the actor's intent to complete the commission of the crime." Brown Commission, *Final Report* section 1001 (1971). *See also United States* v. *Mandujano*, 499 F.2d 370 (5th Cir. 1974).

A person guilty of an attempt is guilty of an offense of the same grade as the crime that was the goal of the attempt. This treatment

of the punishment of attempt is consistent with current Federal law. This approach is also in general conformity with the recommendations of the Brown Commission, *Final Report* section 1101(3), and the Model Penal Code, section 5.05(1). Some States have rejected this approach. *See* Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. Pa. L. Rev. 1497, 1509 n. 40 (1974). The Committee expects the sentencing guidelines required by the proposed code to make appropriate distinctions among the various types of attempts. *See id.* at 1506–07.

Subsection (b) sets forth the affirmative defense of abandonment and provides that a defendant may avoid liability for an attempted crime by abandoning the criminal effort early enough to avoid completion of the crime, or by abandoning the criminal effort at any point and preventing commission of the crime. Such an abandonment must demonstrate a "voluntary and complete renunciation" of the criminal intent—i.e., it is insufficient that the defendant abandoned the attempt because of outside interference or merely as part of a plan to delay the crime or substitute objectives. Modern law is divided regarding the existence, and extent, of a defense of abandonment. *See* W. LaFave & A. Scott, *Criminal Law* 449 (1972). The abandonment defense is included in the proposed code because the Committee believes that it can serve as an incentive to persons planning criminal actions to abandon those plans before carrying them to fruition.

Subsection (c) provides that legal or factual impossibility is not a defense to an attempted crime. This reverses the common law rule, which provided a defense for legal, but not factual, impossibility. The common law distinction has led to much confusion and unsound results. *See* W. LaFave & A. Scott, *Criminal Law* section 60 (1972). The Committee believes that more appropriate results can be achieved by analyzing attempts without resort to an "impossibility" defense. For example, if the conduct and results intended by the defendant, under the circumstances as the defendant believed they would be, would not constitute a crime if consummated, then the defendant must be acquitted for lack of "intent to commit a crime", without reference to any defense of "legal impossibility." On the other hand, when the "legal impossibility" goes to a question of circumstance (e.g., the defendant believing the property being purchased is stolen when in reality it is not), the defendant may be convicted. The Committee also believes that cases of true factual impossibility (e.g., the proverbial witch doctor sticking pins in a voodoo doll and being tried for attempted murder) may lead to criminal liability but are best handled through prosecutorial discretion and sentencing discretion.

Subsection (d)(1), restating the rule that ignorance of the law is no excuse, provides that an "intent that the offense be committed" does not require that the defendant realize that the conduct is prohibited. Similarly, subsection (d)(2) provides that no state of mind need be proved with regard to whether the defendant's conduct constitutes a substantial step towards commission of the offense. The defendant must simply intend that any conduct or results required for the offense occur, and believe that any circumstances required for the offense will occur. The Committee believes that subsection (a) would be interpreted in this manner even in the absence of subsection (d), but wishes to ensure that no misinterpretation occur.

§ *1102—Conspiracy*

This section sets forth the requirements for conviction of a conspiracy to commit an offense. It carries forward a portion of current 18 U.S.C. 371. (The remainder of section 371 is carried forward in section 1705 of the proposed code.)

Subsection (a) restates the current law elements of conspiracy: (1) an agreement between at least two people to commit a crime; (2) a specific intent on the part of each that the crime be committed; and (3) an "overt act" on the part of at least one person in furtherance of the agreement. Conspiracy is classified at one level below the most serious offense which the parties conspired to commit.

In requiring an agreement between at least two people, the Committee endorses the common law and current Federal law requirement of a bilateral conspiracy. The Committee rejects the suggestion of the Model Penal Code (*see* section 5.03) and the Brown Commission's *Final Report* (*see* section 1001) that conspiracy law be changed so as to permit a conspiracy conviction when only one of the parties involved actually intended that a crime be committed.

The requirement of "conduct in furtherance of the intended crime" is intended to ensure that there be corroboration of the agreement sufficient to demonstrate the intention of the parties to follow through with the agreement.

By codifying the offense of conspiracy, the Committee does not intend to preclude use of rules developed by the courts to ensure appropriate application of the law of conspiracy. Examples of such rules are: (1) "Wharton's Rule" ("[W]hen to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a nature that it is aggravated by a plurality of agents, cannot be maintained." 2 Wharton, *Criminal Law* section 1604 (12th ed. 1932)); (2) the "Rule of Inconsistency", which prevents conviction of a conspirator in certain circumstances where the coconspirators have been acquitted. *See* Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 972–74 (1959); and (3) the rules governing the duration of a conspiracy. *See generally* W. LaFave & A. Scott, *Criminal Law* 482–86 (1972).

Subsection (b) sets forth a new affirmative defense of abandonment. The affirmative defense requires that the actor voluntarily and completely renounce the conspiracy and prevent the achievement of all of the objectives of the conspiracy. The Committee believes that this defense is an appropriate means of providing a conspirator with the incentive to thwart the consummation of a conspiracy. See the discussion of the abandonment defense in connection with "attempt" at 85 *supra*.

By enacting the new affirmative defense of renunciation, the Committee does not intend to alter judicial application of the current law concept of withdrawal, whereby a conspirator can avoid liability for the crimes that are the object of the conspiracy (but not for the conspiracy itself), commence the running of the statute of limitation, and prevent the operation of the coconspirator exception to the hearsay rule, by withdrawing from the conspiracy and communicating such withdrawal to all coconspirators in such a manner as to permit them sufficient time to abandon the conspiracy. *See Hyde*

v. *United States*, 225 U.S. 347, 369 (1912); *United States* v. *Parnell*, 581 F.2d 1374, 1379 (10th Cir. 1978); *Glazerman* v. *United States*, 421 F.2d 547, 551-52 (10th Cir. 1977); *United States* v. *Borrelli*, 336 F.2d 376, 388–90 (2d Cir. 1964); *Oreas* v. *United States*, 261 F.2d 257 (5th Cir. 1919). *See generally* W. LaFave & A. Scott, *Criminal Law* 486–88 (1972).

Subsection (c)(1), restating the rule that ignorance of the law is no excuse, provides that an "intent that a crime be committed" does not require that the defendant realize that the conduct is prohibited. The defendant must simply intend that any conduct or results required for the crime occur, and believe that any circumstances required for the crime will exist. The Committee believes that subsection (a) would be interpreted in this manner even in the absence of subsection (c), but wishes to ensure that no confusion occur.

Subsection (c)(2) similarly provides that no state of mind need be proved with regard to the circumstance that one of the coconspirators intentionally engaged in conduct in furtherance of the intended crime.

Subsection (d) provides for certain exclusions from the application of conspiracy law. These exclusions fall into four categories: crimes that themselves constitute conspiracies (sections 1502 and 1705 of the proposed code); crimes that already reach the constitutional limits on the prohibition of speech, thus raising serious constitutional questions concerning punishment of a conspiracy to engage in such conduct (sections 1316(a)(3), 1317(a)(1), and 2731(a)(1) of the proposed code); crimes where conspiracies are most likely not punishable under current law (section 1711 of the proposed code); and crimes where punishment of conspiracy might punish trivial, harmless conduct (section 1742 of the proposed code).

Subsection (e) provides that there is Federal jurisdiction over a conspiracy where there would be Federal jurisdiction over the object crime. Extraterritorial Federal jurisdiction over conspiracy is set forth in section 111(c) of the proposed code.

Subsection (a), as previously noted, classifies the offense at one level below the most serious crime that is an objective of the conspiracy. Thus, a conspiracy to commit a class C felony is punishable as a class D felony. The general conspiracy provision of present Federal law (18 U.S.C. 371) provides a flat 5 year punishment for conspiracy to commit a felony regardless of how serious, or how trivial, is the crime which is the objective of the conspiracy. Thus, under 18 U.S.C. 371, a conspiracy to commit a two year felony or to commit a capital felony would be punishable by 5 years imprisonment.

The general conspiracy provision of present Federal law, however, has been supplemented on an ad hoc basis by the inclusion of a number of specific conspiracy provisions. *See, e.g.*, 18 U.S.C. 1201 (kidnaping).

The Committee, in choosing to classify conspiracies at one class below the most serious object crime, considered the recommendations of the Model Penal Code (*see* section 5.05) and the Brown Commission (*see Final Report* section 1004(6)), both of which classified conspiracy at the same level as the most serious crime that was the objective of the conspiracy. However, both proposals also included exceptions that allow a court to "mitigate" the level of punishment, and the practical effect of those provisions was to leave the exceptions as large as the rule.

The Committee also looked to the experiences of the States on the classification of conspiracy. The various States take one of three basic approaches: (1) classify conspiracy at one level below the most serious object crime (15 States); (2) classify conspiracy at the same level as the most serious object crime (16 States); (3) provide for a uniform classification of conspiracy (similar to 18 U.S.C. 371) (14 States).

The Committee chose to follow a rule that evaluated the seriousness of the crime of conspiracy by looking toward the object of the conspiracy, but that punished the inchoate or incomplete crime less severely. Where the conspiracy is successful—i.e., where the objective crime is completed—the conspirators will be guilty of the object crime and therefore punishable at the higher level.

§ 1103—Definition for chapter

This section provides that the phrase "voluntary and complete renunciation" does not include decisions merely to postpone or delay the intended crime or to substitute an objective or victim of the crime.

Chapter 13—Offenses Involving National Defense

Subchapter I—Treason and Related Offenses

Current Law

The ability of the Congress to define and punish the crime of treason is circumscribed by article III, section 3 (the treason clause) of the Constitution, which provides that:

> Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court.
>
> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

A proper interpretation of the treason clause requires an awareness of the English history of treason, for as noted by Professor J. Willard Hurst, the leading expert on the law of treason in the United States, "the treason clause of the United States Constitution was written, debated, and adopted by men whose ideas regarding the policy and historical implications of the law of treason were derived from English law." J. Hurst, *The Law of Treason in the United States* 15 (1971).

The terms of the treason clause of the Constitution are derived from the English Statute of Treasons, 25 Edw. III, stat. 5, ch. 2 (1352) (reprinted in *Cramer* v. *United States*, 325 U.S. 1, 16 n. 22 (1945)). This law was intended to clarify the scope of high treason by restricting the definition of the offense to the three major categories of levying war against the king, adhering to the enemies of the king, and compassing or imagining the death of the king. Abrams, *Threats to the President and the Constitutionality of Constructive Treason*, 12 Colum. J. L. & Soc. Prob. 351, 372 (1976). The statute also required proof of an overt act, and it gave Parliament the power to declare new forms of treason.

The provision on compassing or imagining the king's death proved to be a vehicle by which English courts developed a doctrine of "constructive treason" and expanded the offense. Since the offense consisted of compassing or imagining the king's death, the statute punished thought. Since thought was the gist of the offense, the overt act requirement could be satisfied by spoken or written words alone, without any kind of corroborative conduct. *Id.* at 374.

The framers of the Constitution were well aware of the English history of treason. *See generally* J. Hurst, *The Law of Treason in the United States* ch. 2, 3, 4 (1971). Indeed, as Mr. Justice Jackson noted, the treason clause of the Constitution was drafted "by a Convention whose members almost to a man had themselves been guilty of treason under any interpretation of British law." *Cramer* v. *United States*, 325 U.S. 1, 14 (1945). A consequence of this is that the framers adopted what has been called a "restrictive definition" of treason in order to limit the offense. *See* J. Hurst, *The Law of Treason in the United States* ch. 4 (1971); *Cramer* v. *United States*, 325 U.S. 1, 23–24 (1945).

The limitation of the offense is evident in two omissions from the Constitution's definition of treason. First, article III, section 3 does not bring forward and adopt to a republic the compassing the king's death provision in the statute of 25 Edward III. Article III, section 3 also prescribes the minimum evidence necessary to show treason—a confession in open court or testimony from at least two witnesses to the *same* overt act. *See Cramer* v. *United States*, 325 U.S. 1, 20 (1945). *See also id.* at 76 (Douglas, J. dissenting). Finally, by the use of "only" and by failing to include an analog to that part of the statute of 25 Edward III which gave Parliament the power to declare other forms of treason, article III, section 3 of the Constitution forecloses enlargement of the offense, such as by a doctrine of "constructive treason."

The treason provision of current law (18 U.S.C. 2381) defines treason substantially in the language of the Constitution and thus carries forward the "restrictive definition" of treason adopted by the framers of the Constitution. Current law provides that "[w]hoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States, is guilty of treason . . ."

While the "owing allegiance" language used in 18 U.S.C. 2381 does not appear in the treason clause of the Constitution, that language probably does not add to the constitutional definition of treason. The gist of the offense of treason is betrayal, a breach of the bond of allegiance. *See* Abrams, *Threats to the President and the Constitutionality of Constructive Treason*, 12 Colum. J.L. & Soc. Prob. 351, 370 (1976); Brown Commission, *Working Papers* 420 (1970); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820) ("owing allegiance" language surplusage) (per Marshall, C. J.).

§ 1301—Treason

Section 1301 restates in modern terminology the present Federal law of treason. No substantive change is intended.

Subsection (a) makes it a class A felony for someone who owes allegiance to the United States to (1) adhere to the enemies of the United States and intentionally give them aid and comfort, or (2) levy war against the United States with intent to overthrow the government.

In order for there to be a violation of either subsection (a)(1) (the "aid and comfort" branch) or subsection (a)(2) (the "levying war" branch), the actor must know that he or she owes allegiance to the United States. This appears to be consistent with present law, which requires that the prosecution negate any contention that the actor reasonably believed that he or she did not owe allegiance to the United States. The district court's instructions to the jury in the case of *Kawakita* v. *United States*, 96 F. Supp. 824, 847 (S.D. Cal.), *aff'd*, 190 F.2d 506 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952), required that the prosecution negate the defendant's contention that the defendant honestly believed that at the time of the alleged treasonous conduct he no longer owed allegiance to the United States. *See Kawakita* v. *United States*, 343 U.S. 717, 722 (1952). The author of the paper on treason that appears in the *Working Papers* of the Brown Commission reads the Supreme Court's opinion as approving that instruction. *See* Brown Commission, *Working Papers* 426 (1970). The Senate Judiciary Committee's Report disagrees, arguing that the Supreme Court merely quoted the trial court's instructions without approval. That Report also indicates disagreement with the trial court's instructions. *See* Senate Rep. No. 96-553, at 183 (1980). In any event, the only judicial interpretation on point is that the district court in *Kawakita*.

Under subsection (a)(1), the "aid and comfort" branch of the offense, the actor must knowingly adhere to the enemies of the United States and intentionally give those enemies aid and comfort. The term "enemy" means foreign enemy. *United States* v. *Greathouse*, 26 F. Cas. 18 (C.D.N.D. Cal. 1863) (No. 15,254) (Civil War rebels not enemies). *See* Ruddy, *Permissible Dissent or Treason?*, 4 Crim. L. Bull. 145, 151 (1968). The language of subsection (a)(1) is consistent with present law, which requires a specific intent to betray the United States. The Supreme Court has explained the specific intent and conduct elements of the "aid and comfort" branch of treason this way:

> A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, *if there is no intent to betray*, there is no treason. . . .

Cramer v. *United States*, 325 U.S. 1, 29 (1945) (emphasis added). *See Kawakita* v. *United States*, 343 U.S. 717, 736 (1952); Ruddy *Permissible Dissent or Treason?*, 4 Crim.L.Bull. 145, 155–57 (1968).

The "levying war" branch requires the specific intent to overthrow the government of the United States. This is also consistent with present law. Professor J. Willard Hurst notes that:

> as a matter of practical construction, the crime of treason by levying war has been restricted here, and perhaps in England, to the offense described by the literal meaning of the words: a direct effort to overthrow the government, or wholly to supplant its authority in some part or all of its territory.

J. Hurst, *The Law of Treason in the United States* 199 (1971). *See* Loane, *Treason and Aiding the Enemy*, 30 Mil. L. Rev. 43, 54–58 (1965).

Subsection (b) restates the proof requirement of the treason clause of the Constitution. No alteration in the Constitutional requirement is intended.

Subsection (c) carries forward that part of 18 U.S.C. 2381 that renders defendants convicted of treason incapable of holding Federal office for life.

Subsection (d), consistent with current law, provides for extraterritorial jurisdiction over the crime of treason. The concept of extraterritoriality does not appear in the treason clause of the Constitution, but extraterritoriality would not appear to expand the Constitutional definition of treason. If the gravamen of the offense is a breach of allegiance, it should not matter where the breach occurred. The Supreme Court, in language somewhat broader than necessary to dispose of the issue then being decided, has indicated that it rejects "the suggestion that an American citizen living beyond the territorial limits of the United States may not commit treason against them." *Kawakita* v. *United States*, 343 U.S. 717, 733 (1952) (the Court also noted that the Constitutional Convention rejected a treason clause with some territorial limitations).

§ 1302—Armed rebellion or insurrection

Section 1302 carries forward the provisions of 18 U.S.C. 2383. This offense largely overlaps the "levying war" branch of the treason offense, which is defined in section 1301(a)(2) of the proposed code. Insofar as section 1302 overlaps the treason offense, the provisions of the treason clause of the Constitution are applicable to section 1302.

Subsection (a) makes it an offense knowingly to engage in armed rebellion or insurrection against the United States with intent to: (1) overthrow, destroy, supplant, or change the form of government of the United States; (2) sever a State's relationship with the United States; or (3) oppose the execution of any law of the United States. The principal difference between the offense in section 1302 and the treason offense defined in section 1301(a)(2) of the proposed code pertains to the "owing allegiance" requirement. The offense in section 1301(a)(2) requires that the actor owe allegiance to the United States. There is no such requirement in section 1302. However, if a person who owes allegiance to the United States is charged with an offense under section 1302, that person would be entitled to the protection of the proof requirements of the treason clause of the Constitution. This is also the result reached under present law. *United States* v. *Greathouse*, 26 F. Cas. 18 (C.C.N.D. Cal. 1863) (No. 15,254).

Subsection (b) increases the penalty of 18 U.S.C. 2383 and classifies the offense as a class B felony if the actor intended to overthrow the government of the United States or to sever a State's relationship with the United States. The offense is a class C felony if the actor's intent was to oppose the execution of the laws of the United States. This approach is similar to the approach taken in the bill passed last Congress by the Senate and in the bill recommended this Congress by the

Senate Judiciary Committee. *See* Senate Rep. No. 96-553, at 187-88 (1980).

Subsection (c) carries forward that part of 18 U.S.C. 2383 that renders defendants convicted of rebellion and insurrection incapable of holding Federal office.

Subsection (d) provides for extraterritorial jurisdiction if the actor owes allegiance to the United States. This provision carries forward the reach of 18 U.S.C. 2383.

SUBCHAPTER II—SABOTAGE AND RELATED OFFENSES

Current law

1. *Sabotage.*—Chapter 105 of title 18 now contains the principal sabotage provisions of current law. The targets of such offenses are defined in 18 U.S.C. 2151 by means of lengthy listings of entities protected by the sections which follow. "War material," for example, is defined to include arms, armament, ammunition, livestock, forage, forest products and timber, stores of clothing, air, water, food, foodstuffs, fuel, supplies, and munitions. Also included are "all articles, parts or ingredients, intended for, adapted to, or suitable for the use of the United States or any associate nation, in connection with the conduct of war or defense activities." The term "national defense material" includes those same items as well as "all other articles of whatever description and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States in connection with the national defense or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting" of any of these items or parts of them.

The phrase "war premises" is defined to cover all places (e.g., buildings, grounds, and mines) where war materials are "produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported" (including machines and appliances which are located on such premises). Additionally, "forts, arsenals, navy yards, camps, prisons or other installations of the Armed Forces of the United States or any associate nation" are included. "Associate nations" means nations "at war with any nation with which the United States is at war". "National defense premises" is defined in the same manner except that associate nation installations are not covered.

"War utilities" and "national defense utilities" are similarly defined by list to include the following: railroads, railways, electric lines, roads, rail fixtures, canals, locks, dams, wharfs, piers, docks, bridges, buildings structures, engines, machines, mechanical contrivances, cars, vehicles, boats, aircraft, airfields, airplanes, and air fixtures, "or any other means of transportation whatsoever" whereon or whereby war material (or national defense material) or any troops of the United States (or an associate nation in the case of war utilities) are being or may be transported. Also included are air-conditioning systems, dams, reservoirs, aqueducts, water and gas mains and pipes, electric light or power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures, wireless stations and structures associated therewith that are used to supply air, gas, water, light,

heat, power, or facilities of communication to war and national defense premises or to the Armed Forces of the United States (or associate nations in the case of war utilities).

Sabotage offenses committed either during wartime or during a declared national emergency are covered by 18 U.S.C. sections 2153 and 2154. The former covers willful injury, destruction, contamination, or infection of war material, premises, or utilities, and requires an intent to "injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on war or defense activities" or a "reason to believe" that the act may have that effect. The offense is not "void for vagueness." *United States* v. *Bishop*, 555 F.2d 771 (10th Cir. 1977); *United States* v. *Achtenberg*, 459 F.2d 91 (8th Cir. 1972), *cert. denied*, 409 U.S. 932 (1972). Under *Bishop*, there may be a "notice" problem where the declared national emergency is too distant in time from the act constituting the offense, but this is unlikely to remain a problem following implementation of the National Emergencies Act (Pub. L. No. 94-412). *See* 50 U.S.C. 1621 *et seq.*

Section 2154 covers those who, with the same intent or reason to believe, willfully make, construct, or cause to be made or constructed in a defective manner, "any war material, war premises or war utilities, or any tool, implement, machine, utensil or receptable used or employed in making, producing, manufacturing, or repairing any such war material, war premises or war utilities. . . ."

Specific intent to injure or interfere with the war effort need not be proved under either section 2153 or section 2154. *See Schmeller* v. *United States*, 143 F.2d 544 (6th Cir. 1944); *United States* v. *Achtenberg*, 459 F.2d 91 (8th Cir.), *cert. denied*, 409 U.S. 932 (1972).

Sections 2155 and 2156 of title 18 prohibit the same type of acts when committed at times other than war or national emergency with the intent to injure, interfere with, or obstruct the national defense of the country. However, they include no "reason to believe" clause. The absence of a definition for the term "national defense" in 18 U.S.C. 2155 has been held not to create a vagueness problem, nor was the section found to be overbroad given its intent requirements. *United States* v. *Melville*, 309 F. Supp. 774 (S.D.N.Y. 1970). The court in *Melville* urged adoption of the espionage definition for the term "national defense" taken from *Gorin* v. *United States*, 312 U.S. 19, 29 (1941): "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."

In order to constitute an offense, the making of defective war material must be such as to interfere with the normal functioning of the product, *Schmeller* v. *United States*, 143 F.2d 544 (6th Cir. 1944), and the supplying of material which is defective (and is known to be so) but which is not intentionally mismanufactured may not constitute an offense under 18 U.S.C. 2156. *See United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir.), *cert. denied*, 329 U.S. 742 (1946).

In addition, 18 U.S.C. 2152, which primarily covers trespass and obstruction of naval facilities, includes the offense of injuring, destroying, or willfully interfering with "any of the works or property or material of any submarine mine or torpedo or fortification or harbor defense system owned or constructed or in process of construction by the United States. . . ."

Section 1362 of title 18 punishes acts of sabotage directed at communications systems operated or controlled by the United States or used or intended to be used for military or civil defense functions. Covered offenses are the willful or malicious injury or destruction of such properties, interference with such systems, and obstruction, hindrance, or delay of transmissions. These sections which include the requirement of an "intent to injure," are the most recent of the congressional enactments on this subject. The section includes an exception in the case of labor activity where the facility is not operated or controlled by the United States and where there is no damage to systems intended for use in military or civil defense functions.

Section 2276 of title 42 prohibits tampering with certain atomic energy information by removal, concealment, alteration, mutilation, or destruction of "any document, writing, sketch, photograph, plan, model, instrument, appliance, or note involving or incorporating Restricted Data . . . ." Such data is defined at 42 U.S.C. 2014(y) to mean all data concerning: "(1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy . . . ." In order to be punishable under this section, the conduct must be "with intent to injure the United States or with intent to secure an advantage to any foreign nation." The intent language is adopted from the espionage provisions of current law (*see* 18 U.S.C. 793 and 794).

Also relevant to sabotage is 47 U.S.C. 606(b), which proscribes wartime obstruction of interstate or foreign communication by radio or wire. Such conduct must be knowing and willful. This criminal provision is part of the section conferring upon the President wartime powers over communications. The constitutionality of such conferred powers has been upheld. *Dakota Cent. Telephone Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163 (1919). While subsection (b) does not relate specifically to those conferred powers, the punishment provided in subsection (h) is worded in terms of disobedience to the authority granted the President under the entire section.

2. *Anchorage regulations.*—Sections 191 and 192 of title 50 of the United States Code provide that the Secretary of Transportation (with approval of the President) may make rules and regulations to govern the anchorage and movement of vessels in the territorial waters of this country. Such authority is conferred when the President declares a national emergency to exist "by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States." The law includes authority to inspect vessels and to seize them for appropriate purposes (e.g., to prevent damage to person or property, or to "secure the observance of the rights and obligations of the United States"). The President is also granted authority to issue rules and regulations relating to anchorage and movement of foreign-flag vessels in such emergency conditions, and to institute measures to "safeguard against destruction, loss of injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities . . . ."

The section distinguishes between violators who are owners, masters or crew members, and "other persons." The former are subjected to

forfeiture possibilities and violation does not require a specified state of knowledge. Other persons, however, are guilty of an offense only when their acts are knowing. The constitutionality of section 192 has been upheld. *United States* v. *Gray*, 207 F. 2d 237 (9th Cir. 1953).

3. *Military service.*—The Military Selective Service Act of 1948 provides penalties for refusal to register or serve in the armed forces as well as for refusal to comply with other requirements of the Act, including reporting for physical examination. The prohibition is found at 50 U.S.C. (App.) 462(a).

Pursuant to 50 U.S.C. App. 462(d), "no person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering . . . unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such person does perform his duty to register, whichever shall first occur." It has been held that there must be an intent to evade the purpose of the law and not merely a failure to report on time. *Silverman* v. *United States*, 220 F.2d 36 (8th Cir. 1955). The essential elements of the requisite intent are (1) knowledge of the requirements of the law and (2) deliberate non-compliance. *United States* v. *Klotz*, 500 F.2d 580, *cert. denied*, 503 F.2d 1056 (8th Cir. 1974); *United States* v. *Boucher*, 509 F.2d 992 (8th Cir. 1975). Reliance on advice of counsel as to the likelihood of successfully defending a criminal prosecution will not negate the specific intent requirement. *United States* v. *Jacques*, 463 F.2d 653 (1st Cir. 1972).

Pursuant to 50 U.S.C. App. 462(a), knowing failure to perform any duty required under the Act is prohibited. Section 456(j) of title 50, appendix, provides for the ordering of alternative civilian work in the case of conscientious objectors. Compulsory service, registration, and alternative service have been upheld against constitutional challenge. *See, e.g., United States* v. *Bigman*, 429 F.2d 13 (9th Cir. 1970), *cert. denied*, 400 U.S. 910 (1970) (registration); *United States* v. *Owens*, 415 F.2d 1308 (6th Cir. 1969), *cert. denied*, 397 U.S. 997 (1970) (induction); *O'Connor* v. *United States*, 415 F.2d 1110 (9th Cir. 1969), *cert. denied*, 397 U.S. 968 (1970) (civilian work). *But see Rostker* v. *Goldberg*, Civ. No. 71–1480 (E.D. Pa. July 18, 1980) (three judge court) (section 3 of the Military Selective Service Act is unconstitutional on the grounds that its application only to males violates the fifth amendment guarantee of equal protection).

The Military Selective Service Act also covers offenses involving fraudulent efforts to thwart the purposes of the law. Specifically, section 462 includes offenses such as: (1) knowing failure or neglect by persons administering the Act to perform their duties under the Act; (2) knowingly making "of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction enrollment, or muster" by anyone administering the Act; (3) knowingly making "any false statement or certificate regarding or bearing upon a classification" or in support of any request for a particular classification, for service under the Act; (4) knowingly transferring or delivering to another, "for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant" to the Act; (5) possessing a certificate

not duly issued to the possessor "with the intent that it be used for any purpose of false identification or representation"; (6) forging, altering, knowingly destroying or mutilating "or in any manner chang[ing] any such certificate or any notation duly and validly inscribed thereon"; (7) photographing, printing, or in any manner making or executing any engraving, photograph, print or impression in the likeness of any such certificate "with intent that it be used for any purpose of false identification or representation"; (8) knowingly possessing a forged, counterfeited, altered, reproduced or falsely made certificate; and (9) knowingly violating or evading requirements under the Act "relating to the issuance, transfer, or possession of such certificates."

In a false statement prosecution it has been held that there was no legislative intent to require a showing of proximate cause (of improper classification); only materiality need be shown. In addition, punishment for that offense does not violate due process on vagueness grounds. *United States* v. *Kamber*, 458 F.2d 918 (7th Cir.), *cert. denied*, 407 U.S. 910 (1972). Pursuant to section 462, possession of a certificate not issued to the possessor is to be deemed sufficient evidence to establish an intent to use it for the purpose of false identification or representation, unless an explanation sufficient to satisfy the jury can be presented. Such shifting of the evidentiary burden has been found constitutional in light of the rational connection between the fact proved and the ultimate fact presumed. *Robinson* v. *United States*, 401 F.2d 523 (5th Cir. 1968). *But see Ulster County Court* v. *Allen* 442 U.S. 140 (1979).

Section 462(a) also punishes one who "knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title . . .", and prohibits knowing hinderance or interference with the administration of the Act (or such attempts) "by force or violence or otherwise." Counseling must involve more than just sympathy or approval. To survive a first amendment challenge, the charge must allege direct advocacy and incitement to imminent illegal action. *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969). Cf. *Bond* v. *Floyd*, 385 U.S. 116 (1966) (Georgia State legislator's admiration of draft card burning did not violate 50 U.S.C. 462(a) and was protected under the first amendment). *See generally Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). This section, unlike 18 U.S.C. 2388(a), is not limited in application to wartime. One court has found the "or otherwise" prohibition relating to hinderance or interference constitutionally infirm with reference to conduct privileged under the first amendment because it provides insufficient notice of that which is prohibited. *United States* v. *Baranski*, 484 F.2d 556 (7th Cir. 1973). However, other courts have upheld convictions under the section, finding that the "or otherwise" language was not intended to cover privileged forms of expressive behavior. *Turchick* v. *United States*, 561 F.2d 719 (8th Cir. 1977). One such case, for example, upheld a conviction for destruction of records by pouring blood on them. *United States* v. *Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied sub nom. Berrigan* v. *United States*, 397 U.S. 909 (1970).

Willful obstruction of recruitment or enlistment during wartime, to the injury of the "recruiting or enlistment service" of the United States, is punishable under 18 U.S.C. 2388(a). Words as well as acts have been held sufficient to demonstrate an attempt to persuade others to decline enlistment or refuse conscription—notwithstanding the first amendment. *See, e.g., Schenck* v. *United States*, 249 U.S. 47 (1919); *Debs* v. *United States*, 249 U.S. 211 (1919); *Frohwerk* v. *United States*, 249 U.S. 204 (1919). The words need not actually have thwarted the enlistment or recruitment. *Wessels* v. *United States*, 262 F. 389 (5th Cir. 1919), *cert. denied*, 253 U.S. 485 (1920); *Reeder* v. *United States*, 262 F. 36 (8th Cir. 1919), *cert. denied*, 252 U.S. 581 (1920); *Heynacher* v. *United States*, 257 F. 61 (8th Cir.), *cert. denied*, 250 U.S. 674 (1919); *Rhuberg* v. *United States*, 255 F. 865 (9th Cir. 1919).

4. *Mutiny, insubordination, and desertion.*—Willfully causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the Armed Forces during wartime is a crime under 18 U.S.C. 2388(a). Whether the statements made tended to produce the forbidden consequences has been held to be a jury question, *Pierce* v. *United States*, 252 U.S. 239 (1920), but there is no need to show that the accused actually brought about insubordination, refusal of duty, or disloyalty. *Butler* v. *United States*, 138 F.2d 977 (7th Cir. 1943). Where first amendment issues are at stake, direct incitement to imminent illegal action is required. *See Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

Section 2387 of title 18 prohibits (1) advising, counseling, urging, or in any manner causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty, and (2) distributing written or printed material which advises, urges, or counsels such behavior. Unlike 18 U.S.C. 2388, however, section 2387 is not restricted in application to wartime. A first amendment attack on application of the section in peacetime was unsuccessful. *Dunne* v. *United States*, 138 F.2d 137 (8th Cir.), *cert. denied*, 320 U.S. 790 (1943). The section also requires that the actor "intend to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States."

One court has said that "the purpose of the statute is to punish civilians, not subject to military discipline, for procuring or aiding the desertion of persons in the military or naval services and thus to help keep intact the military and naval command." *United States* v. *Williams*, 59 F. Supp. 300, 301 (W.D.N.Y. 1945).

The second paragraph of 18 U.S.C. 1381 penalizes harboring, concealing, protecting, or assisting any person who may have deserted, knowing him to be a deserter. Refusal to "give up and deliver" the deserter to an officer authorized to receive him is punishable in like manner. The person harbored or assisted must be shown to have actually deserted and the accused must have known it, but it is not necessary that such person have been adjudicated a deserter. *Dickey* v. *United States*, 404 F.2d 882 (5th Cir. 1968); *Breeze* v. *United States*, 398 F.2d 178 (10th Cir. 1968).

5. *Aiding a prisoner of war or an enemy alien.*—Lending assistance to fugitive prisoners of war or enemy aliens is punishable under 18 U.S.C. 757. Specifically, this section punishes "whoever procures the escape of any prisoner of war held by the United States or any of its allies, or the escape of any person apprehended or interned as an

enemy alien by the United States or any of its allies, or advises, connives at, aids, or assists in such escape, or aids, relieves, transports, harbors, conceals, shelters, protects, holds correspondence with, gives intelligence to, or otherwise" assists such persons following their escape. The conduct must be undertaken with knowledge that the individual was a prisoner of war or enemy alien.

The application of 18 U.S.C. 757 is not limited to periods of war. Therefore facts surrounding an escape from internment after hostilities have ceased could give rise to the offense. See discussion in *Ludecke* v. *Watkins*, 335 U.S. 160 (1948). Assisting the escape of military personnel of belligerent nations interned here during conflicts in which this country is neutral is made a misdemeanor under 18 U.S.C. 756.

§ *1311—Sabotage*

This section carries forward in modified form the provisions of several sections of present titles 18, 42, and 47 of the United States Code, including 18 U.S.C. 2153, 2154, 2155, 2156, 1362; 42 U.S.C. 2276; and 47 U.S.C. 505.

Subsection (a) makes it an offense for someone, acting with intent to impair the ability of the United States or an associate nation to engage in war, knowingly to damage certain property or to deliver certain property that has been damaged. The property involved is: (1) property used in the national defense, (2) a public facility (which is defined in section 2504 (relating to general provisions for subchapter) of the proposed code) used in the national defense, or (3) any facility engaged in furnishing significant defense materials or producing significant raw materials necessary to support a national defense or mobilization program.

Section 1311 reaches the same type of conduct that is made criminal under current law. The requirement of a specific intent is derived from 18 U.S.C. 2155 and 2156, which are the most recent statutes on this subject, and provides protection against potential abuses from a general and broad statute. *See* Senate Rept. No. 96–553 at 198 (1980). In addition, the specific intent requirement will help the provision withstand potential constitutional challenges.

A primary difference between this section (and its companion provision in section 1312 (relating to impairing military effectiveness) of the proposed code) and current law is in the definition of protected property. Current law sets forth a long, confusing, and often duplicative list of protected property. *See, e.g.*, 18 U.S.C. 2151 (defining "war material," "war premises," "war utilities," "national defense material, premises and utilities"). The Committee accepted the recommendations of the Brown Commission and created a generalized definition of the categories of property. This generalized approach allows flexibility in covering property that may be essential or of direct significance to the defense of the United States, but which are not owned by the military. *See* Brown Commission, *Final Report* section 1105(3), comment at 82 (1971).

The second departure from current law is to make the grading of this offense more rational. Punishment for a violation of this section depends on two factors: first, the nature of the international situation—i.e., whether the country is at war or peace, or whether there is a national defense emergency (which is defined in section 1320 (relating to definitions for subchapter) of the proposed code) and second, the degree of damage done to the Nation's ability to defend itself militarily. *See generally* 50 U.S.C. 1541–47 (enacted by the War Powers Resolution Act, Pub. L. No. 93–148). Thus, subsection (b) classifies the offense as an A felony if the conduct occurs during wartime and causes a significant impairment of a major weapons system or means of defense. The offense is classified as a B felony if: (1) the conduct occurs during wartime and less significant damage results; or (2) the conduct occurs during a time of national defense emergency. Finally, the offense is classified as a C felony if the conduct occurs at a time other than wartime or national defense emergency.

Subsection (c) provides that there is extraterritorial Federal criminal jurisdiction if the actor is a national (as that term is defined in 8 U.S.C. 1101) of the United States or the property affected is Federal in nature. This coverage is based upon the protective and the nationality principles of international law.

§ *1312—Impairing military effectiveness*

This section creates a form of lesser included offense to sabotage. Subsection (a) prohibits the conduct described in section 1311, but does not require that the actor have the specific intent to impair the military effectiveness of the United States. Rather, it requires only that the actor be reckless with respect to whether the conduct will impair the ability of the United States or an associate nation (which is defined in section 1320 (relating to definitions for subchapter) of the proposed code) to engage in war.

This section, by requiring recklessness as to the result, is consistent with the recommendation of the Brown Commission. *Final Report* section 1105, 1106 (1971). Whether this approach carries forward current law is open to dispute. The most relevant court decision on this question is *Schmeller* v. *United States*, 143 F.2d 544 (6th Cir. 1944), which can be interpreted two ways. The Justice Department claims that the case justifies the reckless standard. The American Civil Liberties Union argues that the case requires at least a knowing standard, citing the language that "wilfully means with design, and does not require an evil intent except that the defendant shall have purposefully or intentionally failed to obey the statute, having knowledge of the facts." *Id.* at 553. The Committee adopts the view of the Justice Department. *But cf. United States* v. *Melville*, 309 F. Supp. 774, 780 (S.D. N.Y. 1970) (upholding the constitutionality of 18 U.S.C. 2155 because the statute required a specific intent).

Section 1312(b) classifies the offense at one level below that applicable to a violation of section 1311 (relating to sabotage), because of the reduced level of culpability involved in this offense.

Subsection (c) provides for extraterritorial jurisdiction where the actor is a United States national (as that term is defined in 8 U.S.C. 1101) or where the property involved belongs to the United States. This coverage is based upon the protective and the nationality principles of international law. There is also Federal jurisdiction over the offense if the offense is committed within the general or special jurisdiction of the United States. *See* section 111(b) (relating to Federal jurisdiction) of the proposed code.

§ *1313—Violation of anchorage regulations during war or national emergency*

Section 1313 makes it an offense to violate section 2 (relating to seizure and forfeiture of vessel) of title II of the Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes", approved June 15, 1917 (50 U.S.C. 192), and grades the offense as a class D felony.

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, the section requires that the actor engage in the conduct prohibited by the cross referenced act in the circumstances and with the results and states of mind required by that provision. The use of "violates" ensures that this section incorporates not only the exact provisions of the referenced statutes, but also any judicial interpretations of those provisions.

§ *1314—Avoiding military or alternative service*

This section carries forward part of 50 U.S.C. App. 462, which proscribes certain conduct that violates the selective service laws, including failure to register, report for, and submit to, induction; failure to report for a physical examination; and failure to report a change of address or to carry one's selective service card. Current law, however, is awkwardly drafted and fails to distinguish between conduct violating less significant regulations and conduct that seriously jeopardizes the integrity of the selective service system.

Subsection (a) makes it an offense for someone who has a duty to register or report for military service, be inducted into military service, or perform alternative service, to fail to perform such duty with the intent to avoid military or alternative service. The requirement that the actor engage in conduct with a specific intent carries forward current law. *United States* v. *Jacques*, 463 F.2d 653 (1st Cir. 1972); *United States* v. *Boardman*, 419 F.2d 110 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); *Silverman* v. *United States*, 220 F.2d 36 (8th Cir. 1955).

Subsection (b) makes the offense a class D felony during war or a national defense emergency (a term defined in section 1320 (relating to definitions for subchapter) of the proposed code) and a class E felony if the offense is under paragraph (2), (3) or (4) of subsection (a) at any other time. Subsection (b)(2) also provides that an offense under paragraph (a)(1) is a class E felony if the conduct constituting the offense occurs during a time when persons are being inducted into the military. Subsection (b)(3) provides that an offense which occurs under circumstances other than those listed in subsection (b)(1) or (2) is a class C misdemeanor. Thus, the effect of subsection (b)(3) is to grade as a class C misdemeanor the failure to register for military service when there is no lawful authority to induct persons into the military service. This grading reflects the view that non-registration, when induction is not authorized, is of a less serious nature than the other offenses defined by this section. The present law penalty is the equivalent of a class D felony.

The Committee decided to classify the offense on the basis of whether or not the United States was at war, viewing a wartime violation of this section as presenting a greater risk to national security. The use of the terms "war" and "national defense emergency" means that the section will reach Congressionally declared wars and situations involving substantial armed conflict prior to a Congressional declaration of war (but in combination with the provisions of the National Emergencies Act, such coverage would last no more than six months).

Subsection (c) provides a defense for persons who have registered for miltary service and who have been found qualified for alternative service, but who refuse to perform such service because of bona fide religious belief. This defense is applicable only where the prosecution is for a failure or refusal to report for or perform alternative service. By specifically setting forth this defense, the Committee does not mean to affect any judicially created defenses to prosecutions for failing or refusing to register for military service, to report for or submit to an examination to determine fitness for military or alternative service, or to report for and submit to induction. *See* section 721 (relating to nature and effect of defense) of the proposed code. The Supreme Court has held that first amendment guarantees provide a defense if the requisite circumstances exist. *Gillette* v. *United States*, 401 U.S. 437 (1971); *Welsh* v. *United States*, 398 U.S. 333 (1970); *United States* v. *Seeger*, 380 U.S. 163 (1965).

Subsection (d) provides for extraterritorial jurisdiction where the actor is a United States national (as that term is defined in 8 U.S.C. 1101). This provision is based upon the nationality principle of international law. There is also Federal jurisdiction over the offense if it is committed within the general or special jurisdiction of the United States. *See* section 111(b) (relating to Federal jurisdiction) of the proposed code.

§ *1315—Fraud with respect to military or alternative service*

Subsection (a) makes it an offense for someone to use fraud with intent to: (1) avoid or delay the performance of alternative service; or (2) impair a proper determination of the existence or nature of a person's military or alternative service obligation. This carries forward those provisions of 50 U.S.C. App. 462 which proscribe the use of false statements or other deceptive practices to "knowingly hinder or interfere with" military or alternative service. This section also carries forward part of 18 U.S.C. 2388, which requires that the defendant's act "willfully obstruct the recruiting or enlistment service". The Committee narrows the scope of these two current law provisions by eliminating conduct that may be protected by the first amendment (*e.g.*, "counsels" in 50 U.S.C. 462(a)). The Committee concluded that these changes obviated the need to require a specific intent to hinder, interfere with, or obstruct the military service. The term "fraud" is defined in section 101 (relating to general definitions) of the proposed code.

Subsection (b) grades the offense as a class D felony if the offense is committed during a time of war or national defense emergency and a class E felony in any other case. *See* discussion of section 1314 (relating to avoiding military or alternative service) *supra*.

Subsection (c) sets forth a defense if the fraud concerned a fact that was not material. This materiality requirement is derived from

current law. *United States* v. *Kamber*, 458 F.2d 918 (7th Cir. 1971), *cert. denied*, 407 U.S. 910 (1972).

Subsection (d) provides for extraterritorial Federal jurisdiction where the actor is a United States national (as defined in 8 U.S.C. 1101). This provision is based upon the nationality principle of international law. Pursuant to section 111(b) (relating to Federal jurisdiction) of the proposed code, there is Federal jurisdiction over an offense under this section if the offense is committed within the general or special jurisdiction of the United States.

§ *1316—Wartime impairment of military service obligations*

Section 1316 prohibits certain conduct that impairs military service obligations. Current law proscribes conduct that obstructs or interferes with the raising of armies by the United States (50 U.S.C. 462; 18 U.S.C. 2388). Current law, however, is constitutionally suspect because it prohibits not only acts of force and violence, but also legitimate draft counseling. Section 1316 attempts to rectify this problem.

Subsection (a) makes it a class D felony to engage in certain conduct which, during a war or national defense emergency, impairs military service obligations. The conduct includes: (1) the use of physical force or violence to obstruct military recruitment or induction; (2) the use of force, threats, intimidation, or fraud with intent to influence a public official concerning that official's duties pertaining to military recruitment or induction; and (3) intentionally inciting others to engage in conduct that violates section 1314 (relating to avoiding military or alternative service) of the proposed code in circumstances rendering it likely that such violation will occur.

The Supreme Court, in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), held that the Constitution requires that a criminal offense proscribing the incitement of criminal acts be limited to incitement intended to cause the immediate commission of a crime, occurring under circumstances that make it likely that the incitement will imminently bring about the crime incited. Section 1316(a)(3) is based on and is intended to reflect the constitutional requirements enunciated in *Brandenburg*.

Subsection (b) provides for extraterritorial jurisdiction where the actor is a United States national (as that term is defined in 8 U.S.C. 1101). This provision is based upon the nationality principle of international law. There is also Federal jurisdiction over the offense if it is committed within the general or special jurisdiction of the United States. *See* section 111(b) (relating to Federal jurisdiction) of the proposed code.

§ *1317—Inciting or aiding mutiny, insubordination, or desertion*

Current law prohibits willfully causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of military duty (18 U.S.C. 2388(a)); acts intended to affect adversely the loyalty, morale, or discipline of the armed forces, conduct causing insubordination, disloyalty, mutiny, or refusal of duty (18 U.S.C. 2387); and enticing or procuring any person to desert the armed forces (18 U.S.C. 1381).

Subsection (a) makes it an offense for anyone, with the intent to bring about mutiny or desertion by a member of the armed forces, knowingly to (1) incite others to engage in mutiny, desertion, or refusal of duty, or (2) aid others to mutiny or desert. Subsection (a)(1), which is slightly narrower than current law, is based upon and is intended to reflect the Constitutional requirements enunciated in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). Subsection (a)(2) deals with aiding others who commit the offense. This provision is necessary because section 501 (relating to accomplices) of the proposed code does not apply to the violations of the Uniform Code of Military Justice.

Subsection (b) provides that the offense is a class C felony if committed during a war; a class D felony if it involves an insubordination by 10 or more individuals, or a mutiny; and a class E felony in any other case.

Subsection (c) provides for extraterritorial jurisdiction when the actor is a United States national (as that term is defined in 8 U.S.C. 1101). This provision is based upon the nationality principle of international law.

§ *1318—Hindering apprehension of deserters*

Section 1318 carries forward the provisions of current Federal law outlined in the discussion of section 1317 of the proposed code. Subsection (a) makes it a class E felony intentionally to try to prevent the discovery, apprehension, prosecution, conviction, or punishment of persons charged with, or being sought for, desertion from the armed forces. This offense parallels the description of the offense found in section 1711 (relating to hindering law enforcement) of the proposed code.

Subsection (b)(1) provides a bar to prosecution when the person who allegedly deserted has been acquitted of the charge. Subsection (b)(2) provides a defense when the person alleged to be, or sought as, a deserter did not actually desert. Current law provides that there is no criminal liability unless the person harbored or assisted actually deserted and the defendant knew of the desertion. *Breeze* v. *United States*, 398 F.2d 178, 197–204 (10th Cir. 1968); *Dickey* v. *United States*, 404 F.2d 882 (5th Cir. 1968).

Subsection (c) limits the meaning of the term "to conceal" to exclude an express refusal to relinquish possession of, or reveal the contents of, a document, record, or object. See discussion in relation to section 1711, *infra* at 148.

Subsection (d) provides an affirmative defense when the actor warned the alleged deserter solely in an effort to bring such person into compliance with the law.

Subsection (e) provides that it is not a defense that any record or document altered or destroyed would have been legally privileged or inadmissible in evidence.

Subsection (f) provides for extraterritorial jurisdiction where the actor is a United States national (as that term is defined in 8 U.S.C. 1101). This provision is based upon the nationality principle of international law. There is also Federal jurisdiction over the offense if it is committed within the general or special jurisdiction of the United States. *See* section 111(b) (relating to Federal jurisdiction) of the proposed code.

§ *1319—Aiding escape or hindering apprehension of a prisoner of war or an enemy alien*

This section carries forward, with modifications, the provisions of current 18 U.S.C. 757, which deals with facilitating the escape of, and harboring, fugitive prisoners of war or interned enemy aliens.

Subsection 1319(a)(1) makes it a class D felony intentionally to aid the escape of a prisoner of war or an interned enemy alien. Subsection (a)(2) makes it a class D felony to harbor or conceal; provide a weapon, money, transportation, or disguise to; or to warn of impending discovery or apprehension of an escaped prisoner of war or an interned enemy alien; or to alter, destroy, or mutilate a record or other object and thereby conceal such object and thereby intentionally interfere with or hinder discovery of the escaped prisoner of war or enemy alien.

Subsection (a)(2)(D) refers to conduct whereby the actor "conceals" a record, document or other object. Subsection (b) limits the meaning of the term "conceals", as used in subsection (a)(2)(D), to exclude an express refusal to relinquish possession of, or reveal the contents of, the record, document or other object. This is necessary in order to protect privileged information. See discussion in relation to section 1711, *infra* at 148.

Subsection 1319(c)(1) provides an affirmative defense where the actor warned the prisoner or enemy alien solely in an effort to bring that prisoner or enemy alien into compliance with the law.

Subsection (c)(2) provides a bar to prosecution where the person aided was not a prisoner of war or enemy alien.

Subsection (d) provides that it is not a defense to prosecution that any record or document altered or destroyed would have been legally privileged or inadmissible.

Subsection (e) provides for extraterritorial jurisdiction where the actor is a United States national (as that term is defined in 8 U.S.C. 1101). This provision is based upon the nationality principle of international law. There is also Federal jurisdiction over the offense if the offense is committed within the general or special jurisdiction of the United States. *See* section 111(b) (relating to Federal jurisdiction) of the proposed code.

§ *1320—Definitions for Subchapter*

Section 1320 defines the terms "associate nation" and "national defense emergency" for the purposes of subchapter II (relating to sabotage and related offenses) of chapter 13 of the proposed code.

The term "associate nation" is defined to mean a nation that is at war with a foreign power with which the United States is at war. This definition restates 18 U.S.C. 2151. "Foreign power" is defined in section 1507 (relating to definitions for subchapter) of the proposed code to mean a foreign government or foreign political party, a significant foreign political faction or military force, or an international organization. The terms "foreign government" and "international organization" are defined in section 101 (relating to general definitions) of the proposed code.

The term "national defense emergency" is defined to mean a national emergency proclaimed in accordance with title II of the National Emergencies Act, 50 U.S.C. 1621, *et. seq.*, where that national emergency involves military combat operations undertaken in connection with an actual or imminent war or armed attack by a foreign power against the United States or the armed forces of the United States.

SUBCHAPTER III—ESPIONAGE AND RELATED OFFENSES

Current Law

The most important espionage provisions of existing law are 18 U.S.C. 793 and 794, which punish the collection of national defense information of any description and its transmission to foreign powers in war or peace (18 U.S.C. 793(a)–(c); 18 U.S.C. 794 (a), (b)). In addition, those provisions proscribe conduct which, while not itself espionage, could lead to compromise of national defense secrets (18 U.S.C. 793 (d), (e), and (f)). Sections 793 and 794 have not been modified substantially since their enactment as sections 1 and 2 of title I of the Espionage Act of 1917.

Other statutes are more restricted in application. They are:

(i) 50 U.S.C. 783 (b), (c), and (d) and 18 U.S.C. 798, which protect only information that in accordance with security procedures developed during World War II, has been "classified," i.e., affirmatively designated by the executive for restricted dissemination in the interest of national security. Section 783 of title 50 covers any material which has been so classified, while 18 U.S.C. 798 is concerned with the products and methods of the cryptographic system and communications involving intelligence and counterintelligence. Section 783 of title 50 applies to communication, by government employees or employees of government-controlled corporations, to foreign agents or members of certain communist organizations. The other statutes generally apply to the communication of the specified classified information to any person not authorized to receive it. Sections 2274, 2275, and 2277 of title 42 cover "restricted data" under the Atomic Energy Act.

(ii) 18 U.S.C. 795, 796, and 797, which prohibit the unauthorized obtaining of uncensored pictorial representations of military installations, particularly by aerial reconnaissance. Enacted in 1938, they were designed to supplement 18 U.S.C. 793 and 794.

(iii) 18 U.S.C. 799, which punishes violations of NASA security regulations.

(iv) 50 U.S.C. App. 3 (c) and (d), which are wartime provisions, dating from 1917, designed to ensure effective censorship of communications with foreign countries.

18 U.S.C. 793 and 794.—The core provisions of the espionage laws are 18 U.S.C. 793 and 794.[1] Section 793 contains six substantive subsections (subsections (a) through (f)), and a conspiracy subsection (subsection (g)); section 794 has two substantive provisions, (subsections (a) and (b)), and a conspiracy subsection, (c).

Sections 793(a)–(f)(1) and sections 794 (a) and (b) were, with modifications to be discussed below, initially enacted as sections 1(a)–(e) and 2 (a) and (b) of title I of the Espionage Act of 1917; conspiracy was dealt with in section 4. Sections 1(a)–(e) and 2(a) of the

[1] For further discussion of the present law of espionage, *see* Bank, *Espionage: The American Judicial Response: An In Depth Analysis of the Espionage Laws and Related Statutes*, 21 AM. U. L. REV. 329 (1972); Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973); HALPERN & HOFFMAN, FREEDOM VS. NATIONAL SECURITY 236–89 (1977).

Espionage Act were derived in turn from sections 1 and 2 of the Defense Secrets Act of 1911, the first statute to make espionage a peacetime offense and a violation of the civil laws. Previously, espionage was exclusively a wartime offense, violative of the Articles of War and punishable only by court-martial or military commission. Spying remains an offense under the Uniform Code of Military Justice. *See* 10 U.S.C. 906; *Ex parte Quirin*, 317 U.S. 1 (1942). Since the proposed code does not affect prosecutions under the Uniform Code of Military Justice (*see* section 101(9) (relating to general definitions) of the proposed code), prosecutions under 10 U.S.C. 906 are not affected by this legislation.

Section 793(a) punishes entry or overflight of various facilities related to national defense "for the purpose of obtaining information respecting the national defense" with "intent or reason to believe" that such information is to be used "to the injury of the United States, or to the advantage of any foreign nation." The list of protected facilities is now all-inclusive. In the Defense Secrets Act of 1911, only places of direct military significance were enumerated. The expansion occurred in the Espionage Act of 1917, 40 Stat. 217 and only a few items are later additions.

The requirement that the offender act with a "purpose of obtaining information respecting the national defense" was brought forward from the Defense Secrets Act of 1911, while the elements of intent or reason to believe that the information was to be used to the injury of the United States or another country's advantage were added by the Act of 1917. This was done to ensure that only those acting with a criminal intent would be punishable, since some clauses of section 1 of the 1911 Act were susceptible to entirely innocent violation. *See* House Rept. No. 65–30, at 10 (1917,) accompanying an earlier version of the 1917 Act; *see also* 46 Congressional Record 2029–30 (1911).

In *Gorin* v. *United States*, 312 U.S. 19, 29–30 (1941), the Supreme Court held that although intent to injure the United States and intent to secure an advantage to a foreign nation might sometimes differ, Congress intended each to be an independent alternative, so that proof of intent to confer a benefit on a foreign country would support a conviction without proof of injury to the United States or intent to effect such injury.

The Court in *Gorin* held that what is now 18 U.S.C. 794 was not void for vagueness because "the obvious delimiting words in the statute are those requiring intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." In that context it held that "national defense" had a "well understood connotation", and described the phrase as "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Id.* at 28. The Court stated that the relationship of the information to the national defense must be direct and rational, and must be determined by the jury from examination of the material and expert testimony as to its significance. *Id.* at 31–33.

The Court further stated that the Espionage Act was designed to protect only "secrets," and not matters made public by the defense establishment. A subsequent lower court decision added that the statute cannot cover information which the services had made public or had

never sought to keep secret, that collection of material from lawfully accessible sources and its communication within the United States could not be illegal, and that a prohibition on transmission of such data abroad in peacetime would be "to the last degree fatuous." *United States* v. *Heine*, 151 F.2d 813, 816 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946), *Cf. Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975) (Classified information not deemed to be in the public domain "unless there has been official disclosure of it").

Section 793(b) prohibits the acquisition of objects relating to the national defense, with the same purpose and intent or reason to believe required by subsection (a), by taking, copying, or other means. This provision was also derived from the Defense Secrets Act of 1911, although that Act presupposed that the actor had committed a trespass forbidden by what is currently subsection (a). The Espionage Act of 1917 eliminated this element, rendering each offense independent. *See Gorin* v. *United States*, 312 U.S. 193 (1941); *Boeckenhaupt* v. *United States*, 392 F.2d 24, 28 (4th Cir.), *cert. denied*, 392 U.S. 896 (1968). All provisions of the 1911 Act were integrated and all underwent changes similar to those subsections (a) and (b) underwent in 1917. Thus, what is now subsection (c) overlaps subsection (b) to some extent, but only because subsection (c) was originally aimed at the recipient of objects relating to national defense, who had not perpetrated the forbidden trespass and taking, but received information from one who had done so. Subsection 2 of the Act of 1911, which became 2(a) of the 1917 Act and is now 18 U.S.C. 794(a), punishes communication to a foreign power. It also required that the actor either have committed the forbidden trespass and taking, or have knowingly received the information from one who had, or have been guilty of a breach of trust in violation of section 1 of the 1911 Act.

Section 793(c) covers receipt of material taken in violation of the chapter 37 of title 18 United States Code. It requires the same "purpose" as section 793(a) and the *mens rea* of "knowing or having reason to believe" that the material has been wrongfully obtained. Section 793(c) also punishes conspiring to receive information. This is a carryover from the 1911 Act and probably an anachronism in view of the later-added conspiracy subsection, 18 U.S.C. 793(g).

Subsections (d) and (e) of section 793 both prohibit "willful" communication of specified types of materials relating to the national defense, or of information which the actor has reason to believe could be used to the injury of the United States or the advantage of a foreign nation, and the "willful" retention of both categories of material. The source provision in section 1 of the Defense Secrets Act covered only communication of the specified items in breach of a fiduciary duty by an official; section 1(d) of the 1917 Act added the prohibition against willful retention of such material in the face of a lawful demand and expanded the offense to cover persons in unlawful as well as lawful possession. In 1950, section 793(d) was split into sections 793 (d) and (e), the former covering those in lawful possession and the latter those whose possession was unlawful. The requirement for a demand was retained in section 793(d) but was dispensed with under new section 793(e) because the government might not know to whom the demand should be directed and because, unlike the case of a person

in rightful possession, a demand was unnecessary to render continued possession unauthorized. *See* Senate Rep. No. 81–2369 at 89 (1950); *New York Times Co.* v. *United States*, 403 U.S. 713, 737–39 (1971) (White, J., concurring).

The 1950 amendments also added a new category of protected information to the items previously enumerated in 18 U.S.C. 793(d). They protect "information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." The punctuation of the section and the legislative history make it clear that the *scienter* phrase, "which information the possessor has reason to believe," modifies only the addition to the statute, so that in a prosecution concerning the enumerated items previously covered by the statute, including the documents, notes, and photographs, it is not necessary to prove that the individual had the requisite "reason to believe." Senate Rep. No. 81–2369 at 8–9 (1950); House Rep. No. 81–3112 at 52 (1950); *New York Times* v. *Sullivan*, 403 U.S. 713, 737–40 (White, J., concurring) (1971).

The present wording of 18 U.S.C. 793 (d) and (e), punishing one who "communicates, delivers, or transmits" originated with the Espionage Act of 1917, and has survived without intervening changes. The meaning of that phrase has been a matter of substantial dispute. *See, e.g., New York Times* v. *Sullivan*, 403 U.S. 713, 720–22, 733–39, 745, 759 (1971). By reenacting these provisions without change, the Committee intends that current law be continued as it may be construed by the courts in light of the legislative history. The Committee neither approves nor disapproves of any interpretations that may have been urged in the courts, legal publications, or other sources.

Subsections (c) through (f), unlike subsections (a) and (b), do not require an intent to injure or to give an advantage, but only an awareness of the significance of the information. They are principally prophylactic measures, aimed at deterring conduct that might expose material to foreign eyes rather than at active espionage on behalf of foreigners.

Section 793(f)(1) punishes a loss of defense information resulting from "gross negligence." Section 793(f)(2), which was added in 1948, punishes the failure to report such a loss.

In 1950, subsection (g) added an offense of conspiracy to violate section 793, if accompanied by an overt act. It was made punishable to the same degree as the completed offense. In addition, subsections (b), (c), (d), and (e) of section 793 explicitly make an attempt to perpetrate the forbidden acts an offense of equal gravity to the completed offense.

Section 794(a) prohibits communication of national defense information to a foreign nation with intent or reason to believe that such information will be used to the injury of the United States or the advantage of a foreign power. The offense is distinguishable from treason in terms of *scienter* and therefore does not require proof under the constitutional "two witness rule" applicable to treason cases. *See United States* v. *Drummond*, 354 F.2d 132, 152 (2d Cir. 1965), *cert. denied*, 384 U.S. 1013 (1966). Through section 2(a) of the 1917 Act, the statute

is derived from section 2 of the Act of 1911. The Act of 1917 added the element of hostile intent, mentioned above.

Section 794(b) (section 2(b) of the Act of 1917) punishes any espionage activity on behalf of a wartime enemy. Apparently it was believed that an intent to convey useful military information to the enemy implied a desire to injure the United States and assist the enemy, thus rendering unnecessary an explicit statement of the intent such as that employed in sections 2(a) and 1(a) and (b). This section does not reflect a grading distinction between collecting and transmitting information which had been employed in sections 1 and 2 of the 1911 Act and carried forward in sections 1 and 2(a) of the Act of 1917, but treats all facets of espionage activity with equal severity.

The section covers "any information which might be useful to the enemy." In particular, it specifies troop and ship movements, reflecting concern about the need to protect the ships carrying American troops to European battlefields. *See* 54 Congressional Record 3605 (1917). The section punishes an individual who "collects, records, publishes, or communicates" such information.

Section 794(c) carries forward section 4 of title I of the Espionage Act of 1917. Pursuant to that section, conspiracy to violate subsections (a) or (b) is punished as severely as is the completed offense. Inasmuch as espionage is generally carried on by rings, rather than by individuals, persons who have collected information in violation of section 793 would potentially be punishable under section 794(c), which, pursuant to section 794(a), provides for higher penalties for communicators.

18 U.S.C. 795–97.—These provisions were enacted in 1938. The Sino-Japanese War had been underway for several years, and certain incidents, such as the attack on *The Panay*, threatened the United States with immediate involvement. The airplane had become commonplace, tourists were everywhere, and journalists and photographers were scouring the Pacific Theater to satisfy public curiosity aroused by the war. Concern that there were also spies in the area, or that innocently obtained and published sketches or photos could be used by Japanese intelligence, led the War and Navy Departments to request this legislation. Contrary to sections 793(a) and (b) and section 794(a), no "hostile intent" was required to be proved. These sections were explicitly intended to supplement sections 793(a) and (b) and section 794(a). House Rep. No. 70–71 (1938).

These sections are noteworthy in that they involve peacetime censorship. The assignment of authority to the President to designate restricted areas followed the example of the Espionage Act, title I, sections 1 and 6. No reported prosecutions under these laws exist.

42 U.S.C. 2274, 2275, and 2277.—On August 1, 1946, almost one year after the bombing of Hiroshima, the Atomic Energy Act became law. The Act attempts to balance the need for dissemination of information necessary for the development of peaceful uses of atomic energy and weapons development against the necessity of preventing dissemination of weapons information to foreign powers. To effect this latter objective, the Act defines a category of information, "Restricted Data," in 42 U.S.C. 2014 and prohibits the unauthorized communication or receipt of such data by 42 U.S.C. 2274 and 2275, respectively, and in section 2277.

Section 2274(a) punishes an actor who communicates such data with "intent to injure the United States" or to "secure advantage to a foreign nation." Subsection (b) punishes an individual who communicates such data without such specific intent but with "reason to believe" that the information "will be utilized" to the injury of the United States or the advantage of a foreign nation.

Section 2277 punishes a present or former member or employee of the Atomic Energy Commission, the Armed Forces, or any government agency or contractor or licensee, who knowingly communicates restricted data, without the intent or belief required by section 2274, to any unauthorized person. The section also covers conspiracy to commit an unauthorized communication or receipt.

Sections 2274, 2275 and 2277 can be violated by attempts and conspiracies as well as by the completed act of communicating or receiving. Unlike 18 U.S.C. 793(g) and 794(c), there is no requirement for conviction of conspiracy that an overt act be perpetrated. *Rosenberg* v. *United States*, 346 U.S. 273, 304–05 n.2 (1953) Frankfurter, J., dissenting).

18 U.S.C. 798.—In the 1930's, the United States succeeded in breaking the Japanese naval code, enabling it to monitor Japan's secret communications clandestinely until a retired government official disclosed the monitoring in his memoirs. The Japanese then developed a more difficult code, which the United States was unable to break until 1942, too late to prevent the attack on Pearl Harbor, but in time to contribute to the decisive victory at Midway. These episodes led Congress to conclude that it is important to conceal penetration of foreign communications systems, and, conversely, to protect the security of United States communications systems from exposure in peacetime. *See* Senate Rep. No. 81–111 (1950); House Rep. No. 81–1895 (1950).

Section 798 prohibits the knowing and willful communication, furnishing, transmitting, or otherwise making available to any unauthorized person of any classified information concerning communication intelligence. The phrase "communications intelligence" is defined to mean all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients. The section was said to be necessary because "under the Espionage Act of 1917, unauthorized revelation of information of this kind can be penalized only if it can be proven that the person making the revelation did so with an intent to injure the United States." House Rep. No. 81–1895 at 2 (1950). Section 798 establishes criminal penalties without requiring such proof but seeks only to protect a "small category of classified matter . . . which is both vital and vulnerable to an almost unique degree." *Id.* No reported prosecutions under this section exists, and it has not been judicially determined whether the government's evidentiary burden is merely to establish that the information communicated was classified information of the specified type, or whether it is also essential to establish, as under 18 U.S.C. 793 and 794, that the information in fact related to the national security, i.e., that it was properly classified. The uncertainty lies in the meaning of "classified information," which is defined in the section to mean information that, at the time of a violation, "is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution." The phrase "for reasons of national security" may be read either as referring solely to the classifier's motives, or to the objective circumstance that the national security interests required or permitted the clasification. The latter interpretation appears to be the one intended by Congress. *Id.* at 3; Brown Commission, *Working Papers* 456 n.26 (1970).

In a somewhat opaque manner, section 798 also punishes anyone who "uses . . . [such information] in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States." This potentially applies to an official who threatens to expose secret information in order to blackmail the government into giving the official a promotion, paying unwarranted expense accounts, or forgiving misconduct. The intent language differs from, but parallels, the phrases "injury to the United States" and "advantage to any foreign nation" used in section 793, but adds the additional requirement that benefit to a foreign government must be accompanied by "detriment to the United States".

In 1945, when this legislation was initially proposed, Congress had scheduled an investigation of the Pearl Harbor disaster, in which the exchange of coded communications between the several departments of the government and the military and naval forces played a part. Concern that this statute would permit the executive to block such investigation led to the enactment of subsection (c). *See* 91 Congressional Record 10047–50 (1945). Subsection (c) provides that the section does not apply to supplying a committee of the House or Senate, or a joint committee of Congress, with information it has requested.

50 U.S.C. 783(a)–(d).—Section 783 of title 50 is part of the Internal Security Act of 1950. That Act is a complex series of provisions designed to deal with what Congress described in section 781 as the existence of a "world-wide Communist movement" that uses espionage, infiltration, and subversion to achieve its ends.

Section 783(a) punishes a conspiracy to perform any act which would substantially contribute to the establishment of a totalitarian dictatorship in the United States, the control of which would be in the hands of foreigners.

Section 783(b) prohibits any Federal employee, or any employee of corporations whose stock is owned in whole or part by the United States or any department or agency thereof, from knowingly, and without prior authorization, communicating classified material to either a foreign agent or a member of specified Communist organizations.

Subsection (c) is the converse provision, prohibiting foreign agents or members of specified Communist organizations from receiving classified material from any Federal officer without having obtained prior permission. The statute has been held to include the Communist Party of the United States. *See Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961). *See also National Council of American-Soviet Friendship* v. *Subversive Activities Control Board*, 322 F.2d 375 (D.C. Cir. 1963); *American Committee for Protection of Foreign Born* v. *Subversive Activities Control Board*, 331 F. 2d 53 (D.C. Cir. 1964), *vacated on other grounds*, 380 U.S. 503 (1965).

Attempts to violate subsections (b) and (c) are explicitly dealt with in the subsections themselves.

The conduct punished by section 783(b) is arguably covered by 18 U.S.C. 793(d), if not by 18 U.S.C. 794(a). The principal distinction is that, as a result of judicial interpretations, the actual relevance of the information to the national defense need not be proved to the jury in a section 783 case as it would have to be under sections 793 or 794, the courts finding that Congress intended to hold employees of the United States—the limited class to which this section is addressed—to a more rigorous standard. *See Scarbeck* v. *United States*, 317 F.2d 546, 558–60 (D.C. Cir. 1962), *cert. denied*, 374 U.S. 856 (1963). *See generally Gorin* v. *United States*, 312 U.S. 19 (1941): *United States* v. *Rosenberg*, 108 F. Supp. 798, 807–08 (S.D. N.Y.). *aff'd*, 200 F.2d 666 (2d Cir. 1952), *cert. denied*, 345 U.S. 965 (1953). This obviates the need of the government to disclose at trial the very information it seeks by the law to protect. An equally important distinction is that 18 U.S.C. 793 and 794 deal with information relating to the "national defense," whereas 50 U.S.C. 783 speaks of material that has been restricted in the interest of "national security," a seemingly somewhat broader concept.

§ *1321—Espionage*

Subsection (a) makes it an offense to violate 18 U.S.C. 794 (section 201 of the Espionage and Sabotage Act of 1954), which is reenacted as section 362 in title II of the bill.

Subsection (b) makes it a class A felony to violate sections 224a and 225 of the Atomic Energy Act of 1954 (42 U.S.C. 2274(a) and 2275) (relating to communication or receipt of "restricted data").

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsection (a) requires that the actor engage in the conduct prohibited by section 201 of the Espionage and Sabotage Act of 1954 (presently 18 U.S.C. 794) in the circumstances and with the results and states of mind required by that provision of law. Subsection (b) requires that the actor engage in conduct prohibited by sections 224 a and 225 of the Atomic Energy Act of 1954 (presently 42 U.S.C. 2274 (a) and 2275) in the circumstances and with the results and states of mind required by those provisions of law. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced statutes, but also any judicial interpretations of those provisions.

§ *1322—Disseminating national defense information*

Section 1322 makes it a class C felony to violate: (1) section 361 of title II of the bill, which reenacts 18 U.S.C. 793 (section 18 of the Subversive Activities Control Act of 1950), or (2) section 224(b) of the Atomic Energy Act of 1954, which penalizes the communication of restricted data.

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by section 18 of the Subversive Activities Control Act of 1950 (presently 18 U.S.C. 793) or section 224(b) of the Atomic Energy Act of 1954 (42 U.S.C. 2274(b)) in the circumstances and with the results and states of mind required by those provisions. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced statutes, but also any judicial interpretations of those statutes.

§ *1323—Disseminating classified information*

Section 1323 makes it a class C felony to violate: (1) section 366 of title II of the bill, which reenacts 18 U.S.C. 798, or (2) section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)).

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by what is presently 18 U.S.C. 798 (and which is reenacted in section 366 of the bill) or by section 4(b) of the Subversive Activities Control Act of 1950 in the circumstances and with the results and states of mind required by those provisions. The use of "violates" insures that this section incorporates not only the exact provisions of the referenced statutes, but also any judicial interpretations of those statutes.

§ *1324—Receiving classified information*

This section makes it a class C felony to violate section 4(c) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(c)).

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by section 4(c) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(c)) in the circumstances and with the results and states of mind required by that provision. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced statute, but also any judicial interpretations of that statute.

§ *1325—Failing to register as a person trained in a foreign espionage system*

This section makes it a class D felony to violate section 2, or a rule issued pursuant to section 5, of "An Act to require the registration of certain persons who have knowledge of or have received instruction or assignment in the espionage, counterespionage, or sabotage service or tactics of a foreign government or foreign political party, and for other purposes" (50 U.S.C. 851).

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by section 2 (or by a rule issued pursuant to section 5) of the act cited in the section, in the circumstances and with the result and states of mind required by section 2 (or by a rule issued pursuant to section 5) of the act cited in the section. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced statutes, but also any judicial interpretations of those statutes.

§ *1326—Failing to register as, or acting as, a foreign agent*

Subsection (a) makes it an offense: (1) for an agent of a foreign principal to fail to register with the Attorney General; (2) for any-

one to violate sections 4(a) or 5 of the Foreign Agents Registration Act of 1938; (3) for a Federal or District of Columbia public servant to act as an agent of a foreign principal, or (4) for anyone to act as an agent of a foreign government (other than as a diplomatic or consular officer or attaché) without previously notifying the Secretary of State.

Subsection (a)(1) carries forward without substantial change sections 2 and 7 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612, 618). Section 2 establishes the requirement that agents of a foreign principal register with the Attorney General. Section 7 provides criminal penalties for a failure to register.

Subsection (a)(2) uses the term "violates", a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsection (a)(2) requires that the actor engage in the conduct prohibited by sections 4(a) or 5 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 614(a), 615, or 617) in the circumstances and with the results and states of mind required by those provisions. The use of "violates" is intended to ensure that this subsection incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

Subsection (a)(3) carries forward the first paragraph of 18 U.S.C. 219.

Subsection (a)(4) carries forward without substantial change current 18 U.S.C. 951, which provides for punishment of persons who act as agents for foreign governments without first notifying the Secretary of State.

Subsection (b) defines the terms "agent of a foreign principal" and "foreign principal", for the purposes of this section, by incorporating the definitions of those terms from the Foreign Agents Registration Act of 1938.

Subsection (c) makes the offense a class D felony in instances (1). (2) and (4) above, and a class E felony in instance (3) above.

Subsection (d) provides an exception for the employment of special government employees. This brings forward the provisions of the second paragraph of present 18 U.S.C. 219.

SUBCHAPTER IV—MISCELLANEOUS NATIONAL DEFENSE RELATED OFFENSES

§ *1331—Atomic energy offenses*

Subsection (a) makes it an offense to violate sections 57, 92, 101, 108, 223, or 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

Subsection (a) uses the term "violates", a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsection (a) requires that the actor engage in the conduct prohibited by the referenced sections, in the circumstances and with the results and states of mind required by the referenced sections. The use of "violates" is intended to ensure that subsection (a) incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

Subsection (b) provides that an offense under subsections (a)(1), (2), (3), or (4) is a class A felony if committed with intent to injure the United States and a class C felony in any other case. An offense under subsection (a)(5) is a class B felony if committed with intent

to injure the United States and a class E felony in any other case. An offense under subsection (a)(6) is a class A felony.

CHAPTER 15—OFFENSES INVOLVING INTERNATIONAL AFFAIRS

SUBCHAPTER I—OFFENSES INVOLVING FOREIGN RELATIONS

Current Law

1. *Attacking a foreign power.*—It is an established principle of international law that neutral states are not only authorized to act to prevent their territory from becoming a base of operations against another nation, they are obligated to do so. *See* 2 Whitman, *Digest of International Law* 174 *et seq.* (1963). 18 U.S.C. 960 addresses acts that might interfere with United States neutrality and serves to enforce that obligation of international law. That section, first enacted in 1794 as part of the so-called "Neutrality Laws", has remained essentially unchanged. The section punishes anyone who, within this country, "knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in" military expeditions or enterprises against a foreign entity with which the United States is at peace. The prohibition applies regardless of the citizenship of the individual engaging in the conduct, for it is the utilizaton of United States territory as a launching point that is the heart of the offense.

In *Wiborg* v. *Unied States*, 163 U.S. 632, 647 (1896), the Supreme Court discussed the purpose of the law: "The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency." *See also United States* v. *Lumsden*, 28 F. Cas. 1013 (D. Ohio 1856) (No. 15,641); *Charge to Grand Jury—Neutrality Laws*, 30 F. Cas. 1021 (C.C.D. Ohio 1851) (No. 18,267). Two years later a district court concluded that the purpose of the neutrality laws was "to prohibit acts and preparations on the soil or waters of the United States, not originating from a due regard for commercial interests, but of a nature distinctively hostile in a material sense to a friendly power, engaged in hostilities, and calculated or tending to involve this country in war, whether an incidental or indirect commercial profit does or does not result from them." *United States* v. *The Laurada*, 85 F. 760, 769–70 (D. Del. 1898), *aff'd*, 98 F. 983 (3d Cir. 1900), *aff'd*, 183 U.S. 694 (1901).

The meaning of the terms "military expedition" and "enterprise" as they are used in 18 U.S.C. 960 is to be found in their ordinary meanings. The Court concluded that the accepted definition of the former would be

> a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and that a military "enterprise" is a martial undertaking, involving the idea of a bold, arduous, and hazardous attempt. The word "enterprise" is somewhat broader than the word "expedition" and although the words are synonymously used it would seem that

under the rule that its every word should be presumed to have some force and effect, the word "enterprise" was employed to give a slightly wider scope to the statute.

Wiborg v. *United States*, 163 U.S. 632, 650 (1896). *See also United States* v. *Nunez*, 82 F. 599 (C.C.S.D. N.Y. 1896). Accordingly, it may be argued that something short of an outright attack by military troops may constitute a violation of 18 U.S.C. 960.

But in *United States* v. *Ybanez*, 53 F. 536, 537 (C.C.W.D. Tex. 1892), the charge to the jury under the predecessor statute to 18 U.S.C. 960 included the following instruction:

> Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was, in its character, military; or, in other words, it must have been shown, by competent proof, that the design, the end, the aim, and the purpose of the expedition or enterprise were some military service—some attack or invasion of another people or country, state or colony, as a military force.

The term "enterprise" was broadly construced in *United States* v. *Sander*, 241 F. 417, 418 (S.D.N.Y. 1917), to include the sending of a spy to a foreign country to gain information for a third country, but the court emphasized in that case that the knowledge gained through the agent was "for the use of . . . military and naval authorities in their military operations . . . ." Other cases have suggested that the force involved must be "organized" into a fighting force, thus leaving an individual free to go abroad for the purpose of fighting for a given cause. *United States* v. *Tauscher*, 233 F. 597 (S.D.N.Y. 1916).

The statute requires that the conduct in question occur in this country. But this too has been subject to interpretation. In *United States* v. *Murphy*, 84 F. 609, 614 (D. Del. 1898), the court said that

> it is sufficient that the military enterprise shall be begun or set on foot within the United States; and it is not necessary that the organization of the body as a military enterprise shall be completed or perfected within the United States. Nor is it necessary that all of the persons composing the military enterprise should be brought in personal contact with each other within the limits of the United States; nor that they should all leave those limits at the same point. It is sufficient that by previous arrangement or agreement, whether by conversation, correspondence or otherwise, they become combined and organized for the purposes mentioned and that by concerted action, though proceeding from different portions of this country, they meet at a designated point, either on the high seas or within the limits of the United States.

2. *Conspiracy against a foreign power.*—Section 956 of Title 18 punishes conspiracy within the United States "to injure or destroy specific property situated within a foreign country and belonging to a foreign government" with which the United States is at peace. The section also covers conspiracy to injure railroads, canals, bridges or public utilities in such a country requiring that the conspirators must commit an act in the United States "to effect the object of the conspiracy." Any charge under this law must specify the property targeted.

In *United States* v. *Elliott*, 266 F. Supp. 318 (S.D.N.Y. 1967), the defendants were prosecuted under this section for conspiring to destroy a railroad bridge in Zambia in order to profit from the ensuing copper shortage. In this case, the only reported decision involving a prosecution under 18 U.S.C. 956, the court upheld the validity of the section against the contention that the term "at peace" rendered it void for vagueness. The defendants also argued that the statute was violative of due process in that it attached criminal liability to a conspiracy in a situation in which the government was not empowered to punish the substantive crime. To this the court responded that

> [c]oncededly, the territorial limitations inherent in common law concepts of jurisdiction raises some question as to the power of the United States to punish acts committed in a foreign state. However, even if we agree that the substantive offense—destruction of a bridge in Zambia—could not be punished by the United States, we find that the formation in the United States of a conspiracy to do so can be firmly prohibited nevertheless. The crime of conspiracy is separate and distinct from the substantive offense. The conspiracy is a separate crime completed when the agreement is made. . . . The modern jurisdictional concept of weighing the relevant interests concerned . . . further demonstrate the clear propriety that the United States attach criminal liability to conspiracies such as are here alleged.

Id. at 322–23 (citations omitted). The defendants also pointed out that there had been no prosecutions under the law since its promulgation in 1917. This, they said, rendered it void for desuetude. The court said: "The function of the statute before us . . . to punish acts of interference with foreign relations . . . of the United States . . . is as vibrantly vital today as when it was passed." *Id.* at 326. The court found no problem of notice nor "selective prosecution", and hence concluded with a quotation from Shakespeare that: "The law hath not been dead, though it hath slept." *Id.*

In upholding the validity of the statute, the court in *Elliott* cited *United States* v. *Peace Information Center*, 97 F. Supp. 255, 260–61 (D.D.C. 1951), to demonstrate Federal power over this aspect of foreign affairs. In that case the court held that "[t]he power over external relations of the United States is extensive. It authorizes the Federal Government to deal with all phases of this subject. It comprises not only authority to regulate relations with foreign countries, but also to prohibit any disturbance or interference with external affairs. The Conrgess has legislated in respect to many topics in this broad field. For example . . . conspiracy to destroy property belonging to a foreign government is punishable as a crime."

3. *Entering or recruiting for a foreign armed force.*—Accepting or exercising a commission to serve a foreign nation is now covered by 18 U.S.C. 958. In order to constitute an offense under that section the commission must be to serve in war against an entity with whom the United States is at peace and it must be accepted or exercised within this country. The section only has application to American citizens.

Section 959 of title 18 of the United States Code covers the offense of joining the armed forces of a foreign entity. This section makes criminal the acts of enlisting or entering in such service as well as hiring or "retaining" another to enlist or "go beyond the jurisdiction of the United States with intent to be enlisted or entered." The conduct must occur within the United States, but unlike section 958 there is no requirement that the foreign nation be at war. As stated by the Supreme Court in *Gayon* v. *McCarthy*, 252 U.S. 171, 177 (1920), the word "retain" is used in this section

> as an alternative to "hire" and means something different from the usual employment with payment in money. One may be retained, in the sense of engaged, to render a service as effectively by a verbal as by a written promise, by a prospect for advancement or payment in the future as by the immediate payment of cash.

See also United States v. *Blair-Murdock*, 228 F. 77 (N.D. Cal. 1915), *rev'd on other grounds*, 241 F. 217 (9th Cir. 1916), *cert. denied*, 244 U.S. 655 (1916).

The statute specifically exempts from its application citizens of wartime allies of this country who recruit other non-citizens. Also exempted are non-citizens only transiently in this country who either enlist themselves or other non-citizens to serve on board a vessel of a foreign nation which is in the United States and which nation is at peace with the United States. Nothing in 18 U.S.C. 959 would prohibit an individual from going abroad to enlist. *Wiborg* v. *United States*, 163 U.S. 632 (1896); *United States* v. *Nunez*, 82 F. 599 (C.C.S.D.N.Y. 1896); *United States* v. *O'Brien*, 75 F. 900 (C.C.S.D.N.Y. 1896).

4. *Disclosing a foreign diplomatic code or communication.*—Section 952 of title 18 now makes it a crime for a government employee who by virtue of that employment has gained access to official diplomatic codes or material prepared in such code to willfully publish it or furnish it to another without authorization. Disclosure of matter in the process of transmission between any foreign government and its mission here is also prohibited. The section is far narrower in scope than 18 U.S.C. 798, part of the Espionage Act of 1917, prohibiting disclosure of classified communications data.

The statute was passed following publication in 1929 of code breaking procedures by Herbert O. Yardley, a former director of the section of the State Department which was charged with breaking the diplomatic codes of other countries. Revelations regarding efforts to break Japanese codes resulted not only in embarrassment to United States-Japanese relations, but also resulted in alleged tightening of cryptographic security measures by the Japan government. Edgar & Schmidt, *The Espionage Statutes and Publications of Defense Information*, 73 Colum. L. Rev. 929, 1060 (1973). *See also* 77 Congressional Record 5333 (1933).

The section addresses two distinct problems: (1) it serves to fulfill our obligations as a host to representative of foreign sovereigns, and (2) it is designed to deter disclosure of the fact that this country has compromised the security precautions of another country—the value of such penetrations being virtually nullified by their disclosure.

There have been no reported cases under this section.

5. *Engaging in an unlawful international transaction.*—Several provisions of Federal law currently provide criminal penalties for violations of regulations relating to international transactions.

The United Nations Participation Act of 1945 (22 U.S.C. 287(c)) provides that the President may, by order, take appropriate actions in response to a call by the United Nations Security Council for measures (pursuant to Article 41 of the United Nations Charter) to effectuate the Council's decisions. The President may "to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction of the United States." Criminal penalties are provided for those willfully violating, evading, or attempting to violate or evade such presidential steps.

Section 441 of title 22 authorizes the President to issue a proclamation that a state of war exists between two foreign nations when the President considers it necessary for the security of this country or its citizens. The Neutrality Act of 1939 provides (at 22 U.S.C. 447) that after such a proclamation it shall be "unlawful for any person within the United States to purchase, sell, or exchange bonds, securities, or other obligations of the government of any state named in such proclamation . . . or to make any loan or extend any credit . . . to any such government, political subdivision or person." Renewal or adjustment of indebtedness existing at the time of the proclamation is exempted.

The Arms Export Control Act provides the President with authorization (at 22 U.S.C. 2778) "to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services." Persons who engage in the business of manufacturing, exporting, or importing defense articles or defense services designated by the President . . . shall register with the United States Government agency charged with the adminstration of this section and shall pay a registration fee. . . ." The section penalizes willful violations of any of the provisions of the section or regulations issued thereunder. Congressional delegation of power in the area of arms export and import has been upheld as constitutional. *Samora* v. *United States*, 406 F.2d 1095 (5th Cir. 1969). Regulations under this section have also been upheld. *United States* v. *Stone*, 452 F.2d 42 (8th Cir. 1971). In order to find a defendant guilty of exporting proscribed articles under this section, the Government must prove that the actor voluntarily and intentionally violated a known legal duty: "the willfulness requirement is satisfied if the defendant's act or failure to act is voluntary and purposeful, and if committed with the specific intent to do or fail to do what he knows is lawful." *United States* v. *Lizarraga*, 541 F.2d 826, 828 (9th Cir. 1976). *See also United States* v. *Davis*, 583 F.2d 190 (5th Cir. 1978).

The Trading With The Enemy Act provides (at 50 U.S.C. App. 3(a)) that it shall be unlawful "for any person in the United States, except with the license of the President . . . to trade or attempt to

trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy." In *United States* v. *Leiner*, 143 F.2d 298, 300–01 (2d Cir. 1944), the court said: "We agree that Congress did not mean to make it a crime to trade with a person, not in fact an 'enemy', even though the accused had cause to believe that he was; the statute was aimed at protecting the nation, not at punishing persons, however ill-disposed, who did it no harm."

Under 50 U.S.C. App. 5(b) (see also 12 U.S.C. 95(a)) the President is authorized during time of war or a declared national emergency to "investigate, regulate or prohibit" financial transactions (to include currency, securities and precious metals) and regulate transactions involving foreign property interests. This authority includes the power to freeze assets. Challenges to the Trading With The Enemy Act as an unconstitutional delegation of power by the Congress to the Executive have been unsuccessful, *United States* v. *Yoshida International, Inc.*, 526 F.2d 560 (C.C.P.A. 1975); *Teague* v. *Regional Comm'r of Customs, Region II*, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969), as have other attacks on its constitutionality. *See, e.g., Veterans and Reservists for Peace in Vietnam* v. *Regional Comm'r of Customs, Region II*, 459 F.2d 676 (3d Cir.), *cert. denied*, 409 U.S. 933 (1972); *Nielsen* v. *Sec'y of Treasury*, 424 F.2d 833 (D.C. Cir. 1970); *Richardson* v. *Simon*, 420 F. Supp. 916 (E.D. N.Y. 1976), *aff'd*, 560 F.2d 500 (2d Cir. 1977), *appeal dismissed*, 435 U.S. 939 (1978).

Section 2405(b) of title 50 appendix, part of the Export Administration Act of 1969, punishes willful exportation contrary to any provisions, regulations or licenses of that Act or "with knowledge that such exports will be used for the benefit of any country to which exports are restricted for national security or foreign policy purposes." The constitutionality of this section has been upheld. *United States* v. *Brumage*, 377 F. Supp. 144 (E.D.N.Y. 1974).

6. *Violating neutrality by causing departure of a vessel or aircraft.*—During a war in which the United States is a neutral nation, 18 U.S.C. 963 authorizes the President to detain armed vessels "until the owner or master, or person having charge of such vessel, shall furnish proof satisfactory to the President . . . that the vessel will not be employed to cruise against or commit or attempt to commit hostilities" upon an entity with which the United States is at peace. Proof may also be demanded that the vessel will not be sold or delivered to a belligerent nation within the jurisdiction of the United States or upon the high seas. Taking such a vessel out of port without authorization violates this section. Forfeiture is provided for upon conviction. An exception is provided for vessels entering United States ports as "public vessels."

Section 964 of title 18 prohibits sending out of the United States a war vessel "with any intent or under any agreement or contract that such vessel will be delivered to a belligerent nation" (or with "reasonable cause to believe" that the vessel will be used in the service of such a nation).

During a war in which the United States is a neutral nation, 18 U.S.C. 965 requires those in charge of vessels to provide to customs a statement under oath, prior to departure, whether any part of the cargo is to be delivered to other vessels in port or transshipped on the high seas and the kind and quantities of articles and the entity to whom the delivery is to be made. Cargo owners, shippers, and consignors must also file statements. Taking a vessel out of port, or attempting to do so, without satisfying these requirements is an offense under this section.

Section 966 of title 18 provides authority for the collector of customs to detain a vessel when that vessel attempts to leave port without clearance or when it is believed that false information has been supplied. Taking, or attempting to take, a vessel out of port in defiance of such detention violates 18 U.S.C. 966.

Under 18 U.S.C. 967 the President may forbid departure of a vessel "whenever there is reasonable cause to believe that such vessel is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship, tender, or supply ship of a foreign belligerent nation in violation of the laws, treaties, or obligations of the United States under the law of nations." Taking, or attempting to take such a vessel out of port or from the United States without authorization violates this section.

§ 1501—Attacking a foreign power

This section substantially carries forward 18 U.S.C. 960, which prohibits assisting or preparing a "military or naval expedition or enterprise" against a foreign nation with which the United States is at peace. Subsection (a) makes it a class E felony to launch or carry on a "military venture against a foreign power" with reckless disregard for the fact that the United States is not at war with that foreign power. The term "foreign power" is defined in section 1507 (relating to definition for subchapter) of the proposed code to mean a foreign government (a term defined in section 101 of the proposed code), a foreign polticial party, a significant foreign political faction or military force, or an international organization (a term defined in section 101 of the proposed code).

Subsection (b) defines "military venture against a foreign power" to mean a manned or unmanned warlike attack on the territory of the foreign power; on the inhabitants of, or property in, the territory of the foreign power; or on a vessel or aircraft of the foreign power. The terms "vessel" and "aircraft" are defined in section 101 of the proposed code. The term "manned or unmanned warlike attack" covers modern technological instruments of war and acts of terrorism directed against a foreign power. Because a "warlike attack" is necessary, section 1501 does not reach spying activities carried on from the United States against a foreign power. Furthermore, subsection (b) explicitly excludes from the definition of "military venture against a foreign power" the conduct of an individual who leaves the United States with intent to enter the armed forces of a foreign power. The definition avoids the limitations associated with the phrase "expedition or enterprise" used in current law.

Subsection (c) provides for Federal jurisdiction if the military venture is launched from or organized in the United States.

§ *1502—Conspiracy against a foreign power*

This section carries forward 18 U.S.C. 956, which prohibits conspiracies to injure the property of a foreign government or other specified property (a canal, bridge, railroad or public utility), when the property injured is located in a foreign country.

Subsection (a) makes it a class E felony for 2 or more persons, with reckless disregard for the fact that the United States is not at war with a foreign power, to conspire to damage or destroy property belonging to that foreign power or a public facility located within the jurisdiction of that foreign power, or to conspire to kill, injure or kidnap a foreign official. The term "foreign power" is defined in section 1507 of the proposed code to mean a foreign government (defined in section 101 of the proposed code), a foreign political party, a significant foreign political faction or military force, or an international organization (defined in section 101 of the proposed code). The term "public facility" is defined in section 2504(b)(1) of the proposed code to mean a facility of public or government communication, transportation, energy supply, water supply, or sanitation; a facility of a police, fire, or public health agency; a facility designed for use, or used, as a means of national defense; and any property, structure or apparatus used in connection with or in support of any such facility. The term "foreign official" is defined in section 101 of the proposed code.

The conspiracy aspects of section 1502 are parallel to the provisions of section 1102 (relating to conspiracy) of the proposed code. *See* pp. 86–88 *supra.* A bilateral agreement is required, and subsection (b), like section 1102(b), provides an affirmative defense of "voluntary and complete renunciation". Subsection (c) defines "voluntary and complete renunciation" as section 1102(c) defines that term. It should be noted that the offense described in section 1102 is not applicable to the offense described in this section. See section 1102(d) of the proposed code.

§ *1503—Entering or recruiting for a foreign armed force*

This section substantially restates 18 U.S.C. 958 and 959. Subsection (a) makes it a class E felony for someone in the United States to enlist in, or agree to enter, a foreign power's armed forces. Subsection (a) also prohibits someone in the United States from inducing another person to enter or agree to enter the armed forces of a foreign power. The term "foreign power" is defined in section 1507 of the proposed code.

Subsection (b)(1) provides an affirmative defense to citizens of a foreign power at war with a foreign power with which the United States is also at war. Subsection (b)(2) provides an affirmative defense to a prosecution for inducing another where the actor is a citizen of the foreign power and is recruiting persons who are not United States citizens.

Subsection (c) provides an affirmative defense where the person induced to enlist is a citizen of the foreign power whose military the person has joined, if that foreign power is not at war with the United States. In the case of a prosecution for inducing another, the person doing the inducing must be a citizen of the foreign power whose military the person recruited has joined, and that foreign power must not be at war with the United States.

§ *1504—Disclosing a foreign diplomatic code or communication*

This section carries forward 18 U.S.C. 952 and is intended to protect the confidentiality of diplomatic communications.

Subsection (a) makes it a class E felony to communicate a code, information prepared in code, or information intercepted while being transmitted between a foreign government and its diplomatic mission in the United States, if the access to the code or information was obtained by a Federal public servant. The term "foreign government" is defined in section 101 of the proposed code to mean the government of a foreign country, irrespective of recognition by the United States. The term "public servant" is defined in section 101 to mean an officer or employee of a government, or a person authorized to act for or on behalf of a government or serving a government as an adviser or consultant. Section 101 excludes District of Columbia public servants from the term "Federal public servant".

The offense described in section 1504 is classified as an E felony, a reduction from the current law penalty, which would be the equivalent of a C felony in the proposed code. The Committee believes that the principal interest protected by section 1504, maintaining good foreign relations, is adequately protected by classifying the offense as an E felony. Disclosures which threaten national security are dealt with in chapter 13, subchapter III (espionage and related offenses) of the proposed code. The bill passed by the Senate last Congress and the bill reported this Congress by the Senate Judiciary Committee both take the same approach to the classification of the offense. *See* Senate Rep. 96–533, at 247 (1980).

Subsection (b) provides for extraterritorial Federal jurisdiction. This provision is based upon the territorial principle, protective principle and nationality principle of international law.

§ *1505—Engaging in an unlawful international transaction*

Subsection (a) makes it a class E felony to violate: section 5(b) of the United Nations Participation Act of 1945 (relating to economic and communications sanctions of the United Nations Security Council) (22 U.S.C. 287c(b)); section 7(c) of the Neutrality Act of 1939 (relating to transactions involving securities of nations declared by the President to be at war with each other) (22 U.S.C. 447(c)); section 38(c) of the Arms Export Control Act (relating to export and import of defense articles and services) (22 U.S.C. 7778(c)); section 16 of the Trading with the Enemy Act (relating to offenses) (50 U.S.C. App. 16); and section 6(b) of the Export Administration Act of 1969 (relating to export of prohibited goods and technology to certain nations) (50 U.S.C. App. 2405(b)).

Subsection (b) makes it a class C felony for someone to violate section 206(b) of the International Emergency Economic Powers Act (50 U.S.C. App. 1705(b)).

This section uses the term "violates", a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by the referenced sections, in the circumstances and

with the results and states of mind required by those sections. The use of "violates" insures that this section incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

§ *1506—Violating neutrality by causing departure of a vessel or aircraft*

This section carries forward 18 U.S.C. 961, 962, 963, 964, 965, 966, and 967; 22 U.S.C. 445, 461, 462; and section 456 of the Neutrality Act of 1939.

Subsection (a) makes it a class D felony for anyone, during a war in which the United States is neutral, to cause a vessel or an aircraft to depart the United States: (1) if that vessel or aircraft is subject to a detention order issued under, or has no clearance order required by, Federal law controlling the delivery of military materials to belligerent foreign powers, or (2) if that vessel or aircraft is capable of service as a warship or warplane and may be used by a belligerent foreign power. The terms "vessel", "aircraft", and "foreign power" are defined in section 101 of the proposed code.

Subsection (b) designates the following components of the offense described in subsection (a) as questions of law: whether the legal requirements for issuing a detention order have been met; whether clearance is required by Federal law; and whether a Federal law is designed to restrict or control the delivery of military materials. Thus, the court will decide such questions (*see* section 121 (relating to effect of question of law) of the proposed code).

§ *1507—Definition for subchapter*

This section defines the term "foreign power" as used in the subchapter to mean: a foreign government (which is defined in section 101 of the proposed code) or a foreign political party; a significant foreign political faction or military force; and an international organization (which is defined in section 101 of the proposed code). This definition is drawn from 18 U.S.C. 11, 1116(b) and 22 U.S.C. 611.

SUBCHAPTER II—OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

Current Law

1. *Unlawfully entering the United States as an alien.*—Unlawfully entering the United States as an alien involves four distinct offenses currently found in 8 U.S.C. 1325 and 1326:[1] first, entry into the United States at any time or place other than as designated by immigration officials (8 U.S.C. 1325(1)); second, entry involving eluding examination and inspection by immigration officials (8 U.S.C. 1325 (2)); third, entry pursuant to a false or misleading representation or concealment of a material fact (8 U.S.C. 1325(3)); and fourth, entry after deportation (8 U.S.C. 1326). Unlawful entry is grounds

[1] 18 U.S.C. 1546 prohibits the use or attempted use of forged, counterfeit, altered or falsely made "immigrant or nonimmigrant visa, permit, or other document required for entry into the United States." However, the section focuses upon the integrity of the official documents rather than upon unlawful entry into the United States. While entry with counterfeit documents would violate both 8 U.S.C. 1325 and 18 U.S.C. 1546, the more severe penalties authorized for section 1546 would suggest that tampering with official documents is considered the more serious offense.

for deportation under 8 U.S.C. 1251 as well as for prosecution under 8 U.S.C. 1325 and 1326.

The entry that violates 8 U.S.C. 1325 is defined in 8 U.S.C. 1101(a)(13). Entry requires more than physical presence within the United States. One who attempts to deceive immigration officials at a point of entry within the United States, but who is never free from restraint, has never "entered" the United States for purposes of section 1325. *United States* v. *Oscar*, 496 F.2d 492 (9th Cir. 1974). On the other hand, where an alien was caught after scaling obstacles at a point of entry, he was found to have entered the United States other than at a place designated by immigration officials in violation of 8 U.S.C. 1325(1). *United States* v. *Martin-Plascencia*, 532 F.2d 1316 (9th Cir.), *cert. denied*, 429 U.S. 894 (1976). Eluding inspection or examination requires some measure of success. Unsuccessfully attempting to deceive immigration officials at a point of entry is not sufficient to establish a violation of 8 U.S.C. 1325(2). *United States* v. *Oscar*, 496 F.2d 492 (9th Cir. 1974). Violation of 8 U.S.C. 1325(2) is not a continuing offense and the statute of limitations begins to run when the alien fails to present him or herself for inspection and examination upon entry. *United States* v. *Rincon-Jimenez*, 595 F.2d 1192 (9th Cir. 1979). The misrepresentation and concealment covered by 8 U.S.C. 1325(3) have been found to include the concealment of an intent to dissolve a sham marriage after entry. *Lutwak* v. *United States*, 344 U.S. 604 (1953) (conspiracy to violate 8 U.S.C. 1325 and 18 U.S.C. 1546); *United States* v. *Rubenstein*, 151 F.2d 915 (2d Cir.), *cert. denied*, 326 U.S. 766 (1945). The "sham marriage" cases frequently involve charges more serious than entry violations. *See, e.g.*, *United States* v. *Pantelopoulos*, 336 F.2d 421 (2d Cir. 1964) (false statement under 18 U.S.C. 1001); *Rocha* v. *United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961) (charges under 8 U.S.C. 1325 and 18 U.S.C. 1546 and 371).

Section 1326 of title 8 prohibits entry, attempted entry, or presence in the United States of any alien who has previously been "arrested and deported or excluded and deported," unless the Attorney General has consented to reentry. For purposes of 8 U.S.C. 1326, and presumably 8 U.S.C. 1325, once alienage has been established its continuance may be inferred until a change in status has proven. *Farrell* v. *United States*, 381 F.2d 368 (9th Cir. 1967). There is a split among the circuits as to whether an alien charged under 8 U.S.C. 1326 may attack the validity of the alien's earlier deportation. *Compare United States* v. *Gonzalez-Parra*, 438 F.2d 694 (5th Cir.), *cert. denied*, 402 U.S. 1010 (1971); *Arriaga-Ramirez* v. *United States*, 325 F.2d 857 (10th Cir. 1963); *United States* v. *Bruno*, 328 F. Supp. 815 (W.D.Mo. 1971); *with United States* v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); *United States* v. *Bowles*, 331 F.2d 742 (3d Cir. 1964); *United States* v. *Heikkinen*, 221 F.2d 890 (7th Cir. 1955). *See also United States* v. *Pereira*, 574 F.2d 103 (2d Cir.), *cert. denied*, 439 U.S. 847 1978). The arrest called for by the section need not be actual physical restraint; the issuance of a valid warrant of deportation is sufficient. *United States* v. *Wong Kim Bo*, 466 F.2d 1298 (5th Cir. 1972); *United States* v. *Farias-Arroyo*, 528 F.2d 904 (9th Cir. 1975). Moreover, "deportation" occurs with the issuance of such a warrant followed by the alien's departure, even if the alien's departure is voluntary and under-

taken without knowledge of issuance of the warrant. *Arriaga-Ramirez* v. *United States*, 325 F.2d 857 (10th Cir. 1963). Since the section proscribes both reentry and presence, the statute of limitations does not begin to run as long as the alien remains in the United States after reentry. *United States* v. *Bruno*, 328 F. Supp. 815 (W.D. Mo. 1971). No specific intent is required for violation of 8 U.S.C. 1326. *Pena-Cabanillas* v. *United States*, 394 F.2d 785 (9th Cir. 1968); *United States* v. *Bruno*, 328 F. Supp. 815 (W.D. Mo. 1971).

2. *Smuggling an alien into the United States.*—Section 1324(a)(1) of title 8 prohibits bringing or landing an alien within the United States unlawfully. Although the section might suggest otherwise, knowledge of the alien's illegal status in the United States is an essential element of the offense defined in 8 U.S.C. 1324(a)(1). *United States* v. *Bunker* 532 F.2d 1262 (9th Cir. 1976); *United States* v. *Boerner*, 508 F.2d 1064 (5th Cir. 1975); *Bland* v. *United States*, 299 F.2d 105 (5th Cir. 1962). The conduct prohibited includes bringing an alien into the United States in a private vessel, *United States* v. *Boerner*, 508 F.2d 1064 (5th Cir. 1975); *Campbell* v. *United States*, 47 F.2d 70 (5th Cir. 1931), a private aircraft, *Bland* v. *United States*, 299 F.2d 105 (5th Cir. 1962), a private automobile, *United States* v. *Bunker*, 532 F.2d 1262 (9th Cir. 1976); *United States* v. *Harding*, 432 F.2d 1218 (9th Cir. 1970), or shepherding an alien into the United States on foot, *Carranza-Chaidez* v. *United States*, 414 F.2d 503 (9th Cir. 1969), or aboard a commercial aircraft, *United States* v. *Washington*, 471 F.2d 402 (5th Cir.), *cert. denied*, 289 U.S. 762 (1973). Early case law suggests that while the "attempt" proscribed requires actual entry, *Ito* v. *United States*, 64 F.2d 73 (9th Cir.), *cert. denied*, 289 U.S. 762 (1933). Entry into the territorial waters of the United States is sufficient. *Middleton* v. *United States*, 32 F.2d 239 (5th Cir. 1929), entry is not required for conspiracy to violate the subsection. *Ito* v. *United States*, 64 F.2d 73 (9th Cir.), *cert. denied*, 289 U.S. 762 (1933).

3. *Hindering discovery of an alien unlawfully in the United States.*—Sections 1324(a)(2) and 1324(a)(3) of title 8 outlaw transportation of illegal aliens within the United States and harboring illegal aliens. In order to establish a violation of 8 U.S.C. 1324(a)(2) the Government must establish that (1) the accused transported an alien within the United States; (2) the alien had not been lawfully admitted or was not of lawful status; (3) the accused knew that the alien's last entry was within 3 years; and (4) the accused acted willfully in furtherance of the alien's violation of the immigration laws. *United States* v. *Gonzalez-Hernandez*, 534 F.2d 1353 (9th Cir. 1976). *See also United States* v. *Herrera-Medina*, 609 F.2d 376 (9th Cir. 1979); *United States* v. *Madrid*, 510 F.2d 554 (5th Cir.), *rev'd on other grounds*, 517 F.2d 937 (5th Cir. 1975) (*en banc*). While the employment exemption provided in the case of harboring does not apply to the transportation proscription, the transportation prohibited includes only that "in furtherance of such violation of law", which requires a direct and substantial relationship between the transportation and its furtherance of the alien's unlawful presence in the United States. *United States* v. *Moreno*, 561 F.2d 1321 (9th Cir. 1977). Neither the transportation of an alien from an area in the United States which that alien is entitled to work into an area where that alien is not entitled to be, *United States* v. *Orejel-Tejeda*, 194 F. Supp. 140 (N.D. Cal. 1961), nor a foreman's transporting of alien employees as part of the foreman's ordinary and required duties to transport employees generally, *United States* v. *Moreno*, 561 F.2d 1321 (9th Cir. 1977), constitute a violation of 8 U.S.C. 1324(a)(2).

Violation of 8 U.S.C. 1324(a)(3) requires knowledge of the illegal status of the alien harbored. *United States* v. *Lopez*, 521 F.2d 437 (2d Cir. 1975). Despite its historical development, the harboring proscription is available only where the conduct of the accused is limited to usual and normal incidents of employment. *See United States* v. *Herrera*, 584 F.2d 1137 (2d Cir. 1978) (exemption not available to massage parlor operators whose alarm system rang once to warn of immigration officers and twice to warn of police investigating prostitution). The subsection covers not only harboring and concealing but the type of "shielding from detection" which occurs when an employer attempts to assist the flight of alien employees from immigration officers by intermingling them with departing customers. *United States* v. *Cantu*, 557 F.2d 1173 (5th Cir. 1977). The places of prohibited concealment, harboring or shielding include not only buildings but public places as well. *See United States* v. *Winnie Mae Mfg. Co.*, 451 F. Supp. 642 (C.D. Cal. 1978); *United States* v. *Cantu*, 557 F.2d 1173 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

4. *Unlawfully employing an alien.*—Section (6)(f) of the Farm Labor Contractor Registration Act of 1963, as amended, 88 Stat. 1655 (1974), 7 U.S.C. 2045(f), requires farm labor contractors to "refrain from recruiting, employing, or utilizing, with knowledge, the services of any person, who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment." Section 9(c) of the Act, 88 Stat. 1657, 7 U.S.C. 2048(c), provides for criminal penalties for violations of the Act.

5. *Fraudulently acquiring or improperly using evidence of citizenship.*—Current prohibitions against fraudulent acquisition and improper use of evidence of citizenship are principally contained in chapter 69 of title 18 which includes provisions outlawing: (1) the willful failure of officials charged with accounting for money received in citizenship, naturalization or registration procedures to do so, 18 U.S.C. 1421; (2) solicitation, agreement or receipt of additional fees in connection with citizenship, naturalization or registration procedures, 18 U.S.C. 1422; (3) misuse of evidence of citizenship or naturalization, 18 U.S.C. 1423; (4) impersonation of another or use of the documentation of another in naturalization or citizenship proceedings, 18 U.S.C. 1424; (5) unlawfully procuring citizenship or naturalization, 18 U.S.C. 1425; (6) reproduction, forgery or counterfeiting of naturalization papers or sale, disposition or possession

of such papers, 18 U.S.C. 1426; (7) sale of naturalization or citizenship papers, 18 U.S.C. 1427; and (8) failure to surrender canceled naturalization certificates, 18 U.S.C. 1428.

Much of the conduct proscribed in chapter 69 of title 18 may also involve violation of more general criminal provisions covering perjury, 18 U.S.C. 1621, and false statements, 18 U.S.C. 1001, 1015.

6. *Fraudulently acquiring or improperly using a passport.*—Specific prohibitions against fraudulent acquisition and improper use of a passport are currently contained in chapter 75 of title 18. 18 U.S.C. 1541 prohibits unlawful issuance of a passport.

False statements in application for or use of a passport are violations of 18 U.S.C. 1542. The mental state required for conviction is that the act of falsification be done voluntarily and intentionally and with the specific intent to do something the law forbids. *United States* v. *Winn*, 577 F.2d 86 (9th Cir. 1978). However, once a passport has been obtained in such a manner, *any* intentional use of that passport, whether or not the use was fraudulent or dishonest, is proscribed. *Browder* v. *United States*, 312 U.S. 335 (1941). Where the falsification involves the use of a name other than the one frequently used by the accused, the courts seem to have experienced some difficulty in determining the application of the section. *Compare United States* v. *Cox*, 593 F.2d 46 (6th Cir. 1979), *with United States* v. *Winn*, 577 F.2d 86 (9th Cir. 1979). *See also United States* v. *Gabriner*, 571 F.2d 48 (1st Cir. 1978). The cases may be distinguished on the basis of impersonation as opposed to the lawful adoption of a new name, but the case law is too sparse to determine whether a conflict exists or the cases are reconcilable.

Forgery or use of a forged passport, and use of the passport of another, are prohibited by 18 U.S.C. 1543 and 1544 respectively.

Section 1545 of title 18 prohibits the violation of any safe conduct or passport duly obtained and issued under authority of the United States.

Section 1546 of title 18 covers fraud and misuse of visas, permits and other documents required for entry into the United States. While there may be some question as to whether passports are encompassed within the phrase "documents required for entry into the United States," it is clear that the use of forged, counterfeit or fraudulently obtained passport to acquire entry documents or in connection with entry documents is a violation. *United States* v. *Diogo*, 320 F.2d 898 (2d Cir. 1963); *United States* v. *Lozano*, 511 F.2d 1 (7th Cir.), *cert. denied*, 423 U.S. 850 (1975). As noted earlier (*see* p. 125 *supra*), the section has been used to prosecute those who seek entry by means of a sham marriage. Although there may be some doubt as to whether a mere statement of marital status is a sufficiently false statement upon which to base a prosecution, the cases generally involve statements which contain more substantial falsehoods. *United States* v. *Diogo*, 320 F.2d 898 (2d Cir. 1963); *United States* v. *Lozano*, 511 F.2d 1 (7th Cir), *cert. denied*, 423 U.S. 850 (1975); *United States* v. *Sarantos*, 455 F.2d 877 (2d Cir. 1972). The section is not limited to aliens; a citizen who impersonates another in order to enter the United States is also susceptible to punishment under the section, *United States* v. *Knight*, 514 F.2d 1286 (5th Cir. 1975). The section has extraterritorial application so that acts of counterfeiting, forgery or false statements committed outside of the United States in connection with entry into the United States are covered. *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968).

§ *1511—Unlawfully entering the United States as an alien*

This section carries forward 8 U.S.C. 1325 and 1326.

Subsection (a) prohibits aliens from intentionally entering the United States at times and places other than those designated for entry, intentionally avoiding examination by an immigration officer, knowingly misrepresenting a material fact to obtain entry to the United States, knowingly entering the United States after having been previously deported, or knowingly using a forged or counterfeit document to enter the United States.

Subsection (b) classifies the offenses as: (1) a class D felony if the actor knowingly uses an entry document, such as an immigrant or nonimmigrant visa or an alien registration receipt card, if such document is counterfeited or forged or has been issued to another individual (in accordance with 18 U.S.C. 1546); (2) a class E felony in the case of an offense under subsection (a)(4) (knowingly entering after previously being deported) and in the case of a second or subsequent offense under subsection (a)(1) (intentionally entering at a time or place other than designated, (a)(2) (intentionally avoiding examination), or (a)(3) (knowingly misrepresenting a material fact to obtain entry); and (3) a class B misdemeanor in any other instance.

Subsection (c) provides a defense to a prosecution under subsection (a)(4) (knowingly entering after previously being deported) that (1) the Attorney General, before the alien's reembarkation at a place outside of the United States or before the alien's application for admission from foreign contiguous territory, expressly consented to the alien's reapplying for admission to the United States; or (2) the alien had previously been deported under an order of exclusion and was not required by Federal law to obtain the advance consent of the Attorney General.

There is no extraterritorial jurisdiction over this offense or over an offense described in sections 1512 or 1513 of the proposed code. Conduct committed abroad that would be an offense under this section or sections 1512 or 1513 would constitute an attempt to commit an offense within the United States, for which section 111(c)(4) of the proposed code provides Federal jurisdiction.

§ *1512—Smuggling an alien into the United States*

This section substantially restates 8 U.S.C. 1324, 1327 and 1328. Subsection (a) punishes a person who brings into the United States an alien not admitted for entry by an immigration officer or not lawfully entitled to enter the United States.

Subsection (b) makes the offense a class E felony if the offense is committed because of the payment of, or an agreement to pay, anything of value or if the actor knows that the alien intends to engage in felonious conduct in the United States. In the latter situations, the offense is a class C felony. This classification scheme modifies present law, which provides for higher penalties when the offense involves bringing an alien into the United States "for the purpose of prostitution, or for any other immoral purpose" (*see* 8 U.S.C. 1328).

§ *1513—Hindering discovery of an alien unlawfully in the United States*

This section restates 8 U.S.C. 1324. Subsection (a) prohibits (1) harboring or shielding from detection an alien who is unlawfully within the United States, or (2) transporting an alien unlawfully in the United States, if done with reckless disregard for the fact that the actor knows that the alien has been in the United States less than 3 years.

Subsection (b) classifies the offense as: (1) a D felony if committed because of payment of, or an agreement to pay, anything of value, or if the alien intends to engage in felonious conduct within the United States; (2) an E felony if committed with intent to aid the alien's employment; and (3) an A misdemeanor in all other instances. This classification scheme modifies present law, which provides for the equivalent of a class D felony penalty.

Subsection (c) provides that merely employing an alien does not constitute harboring under this section. This provision is brought forward from 8 U.S.C. 1324(a).

§ *1514—Unlawfully employing an alien*

This section makes it a class E felony for a farm labor contractor, someone who has failed to obtain a certification under the Farm Labor Contractor Registration Act of 1963 (7 U.S.C. 2041 *et seq.*), or someone whose certificate under that Act has been revoked, to violate section 6(f) (relating to refraining from recruiting, employing, or utilizing the services of an unlawfully admitted alien or alien not authorized to accept employment) of that Act.

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101. Pursuant to that definition, this section requires that the actor engage in the conduct proscribed by section 6(f) of the Farm Labor Contractor Registration Act of 1963 (7 U.S.C. 2045(f)), in the circumstances and with the results and states of mind required by that provision of law. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced section of the Farm Labor Contractor Registration Act of 1963, but also any judicial interpretations of the referenced section.

§ *1515—Fraudulently acquiring or improperly using evidence of citizenship*

This section carries forward 8 U.S.C. 1185 and 18 U.S.C. 1015, 1423, 1424, and 1425. Subsection (a) makes it a class D felony for someone knowingly: (1) to use fraud to obtain naturalization, the documents necessary to provide permanent residence in the United States, or evidence of naturalization or citizenship; (2) to use written evidence of United States naturalization or citizenship that was unlawfully obtained; (3) to use written evidence of United States naturalization or citizenship that was issued to someone else; (4) to fail to surrender within 60 days a cancelled certificate of naturalization or citizenship; or (5) to sell or dispose of a declaration of intention to become a citizen or a certificate or other documentary evidence of naturalization or citizenship.

The term "fraud" as used in subsection (a)(1) is defined in section 101 (relating to general definitions) of the proposed code.

Subsection (b) provides for extraterritorial jurisdiction over the offense. This provision is based upon the territorial and protective principles of international law. *See United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir. 1968).

§ *1516—Fraudulently acquiring or improperly using a passport*

This section restates 18 U.S.C. 1542, 1543, and 1544.

Subsection (a) makes it a class D felony knowingly: (1) to use fraud to obtain the issuance of a passport; (2) to use a passport that was unlawfully obtained; or (3) to use a passport issued for another person's use.

Subsection (b) provides for extraterritorial jurisdiction over the offense. This provision is based upon the territorial and protective principles of international law. This provision also carries forward curren' law, *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir. 1968).

§ *1517—Definitions for subchapter*

This section defines "United States", "passport", "nonimmigrant visa", "immigration officer", "immigrant visa", "entry", "border crossing identification card", "application for admission", "alien", and "citizen" for the purposes of subchapter II. Nothing in the definition of the term "alien" is intended to affect Indian treaty rights. 8 U.S.C. 1359.

CHAPTER 17—OFFENSES INVOLVING GOVERNMENT PROCESSES

SUBCHAPTER I—OBSTRUCTION OF GOVERNMENT

Current Law

1. *Physical interference.*—Current offenses prohibiting interference with government functions by physical means can be classified into 2 groups. The first prohibits any interference with certain specified functions: 18 U.S.C. 231 (law enforcement officers and firefighters engaged in official duties incident to a civil disorder), 18 U.S.C. 1501 (authorized person serving process), 18 U.S.C. 1502 (extradition agents), 18 U.S.C. 1509 (exercise of rights or performance of duties under a court order), 18 U.S.C. 1701 (passage of U.S. mail), and 18 U.S.C. 3056 (Secret Service agents). The second group prohibits only forcible interferences. Within title 18 these include 18 U.S.C. 111 (various law enforcement officers), 18 U.S.C. 372 (conspiracy to use force, intimidation or threat to prevent a person from holding Federal office or from performing duties of Federal office), and 18 U.S.C. 2231 (searches and seizures under a warrant). Interferences with the performance of duties by government employees under specific laws are prohibited outside of title 18; the United States Cotton Standards Act (7 U.S.C. 51 et seq.), the United States Grain Standards Act (7 U.S.C. 71 et seq.), the Animal Welfare Act (7 U.S.C. 2131 et seq.), the Cotton Statistics and Estimates Act (7 U.S.C. 471 et seq.), the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Eggs Products Inspection Act (21 U.S.C. 1031 et seq.), the Age Discrimination in Employment Act (29 U.S.C. 621 et seq.), the Civil Rights Act of 1964 (42 U.S.C. 2000a et seq.), laws relating to the enrollment, registry, or licensing of ves-

sels, or of title 50 of the Revised Statutes of the United States (46 U.S.C. 251 et seq. passim), and the Submarine Cable Act (47 U.S.C. 21 et seq.).

The actual meaning and scope of the term "forcible" is not clear. Reported cases interpreting 18 U.S.C. 111 have included assaults, even of the most minor nature, within its prohibitions. *See, e.g., United States* v. *Frizzi*, 491 F.2d 1231 (1st Cir. 1971) (spitting); *United States* v. *Bamberger*, 452 F.2d 696 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972) (mere touching or slight force); *United States* v. *Heliczer*, 373 F.2d 241 (2d. Cir.), *cert. denied*, 388 U.S. 917 (1967) (attempted kicking); *Carter* v. *United States*, 231 F.2d 232 (5th Cir.), *cert. denied*, 351 U.S. 984 (1956) (driving automobile at increasing speed while law enforcement officer was precariously perched and struggling to maintain hold). Threats of assault are prohibited as "forcible", but only if the threat is of the immediate use of force and is coupled with an ability to inflict harm. *See, e.g., United States* v. *Cunningham*, 509 F.2d 961 (D.C. Cir. 1975); *United States* v. *Bamberger*, 452 F.2d 696 (2d Cir.), *cert. denied*, 405 U.S. 1043 (1971). Section 111 has been interpreted as not prohibiting interference by deception, *Long* v. *United States*, 199 F.2d 717 (4th Cir. 1952), nor mere threats of assault, without a present ability to inflict injury, *United States* v. *Cunningham*, 509 F.2d 961 (D.C. Cir. 1975). Presumably, 18 U.S.C. 111 would also not prohibit a refusal to unlock a door when officers demand entry. *United States* v. *Cunningham*, 509 F.2d 961 (D.C. Cir. 1975), citing *District of Columbia* v. *Little*, 339 U.S. 1 (1950) (construing District of Columbia law prohibiting interference with officers, but not requiring that interference be forcible).

The requirement of 18 U.S.C. 111 that the officer be engaged in, or that the interference be because of, the performance of official duties does not require that the officer be acting within the lawful scope of the officer's authority. It is sufficient if the officer is acting within the scope of what the officer is employed to do, and not out on a "frolic of his own." *United States* v. *Martinez*, 465 F.2d 79 (2d Cir. 1972). *See also United States* v. *Heliczer*, 373 F.2d 241, 245 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967); *United States* v. *Ferrone*, 438 F.2d 381 (3d Cir.), *cert. denied*, 402 U.S. 1008 (1971). However, when the unlawful activity involved is an unlawful arrest, there is a common law right, recognized by the Supreme Court in *John Bad Elk* v. *United States*, 177 U.S. 529 (1900), to use reasonable force to resist the arrest. This right, however, has been subject to erosion by some recent decisions. For example, it does not apply when the arrest is only derivatively unlawful. Thus, there is no right to use reasonable force to resist arrest where there is probable cause, but such probable cause is dependent upon illegally seized evidence. *United States* v. *Moore*, 483 F.2d 1361 (9th Cir. 1973). Third parties may not invoke the illegality of another's arrest to justify interfering with that arrest. *United States* v. *Heliczer*, 373 F.2d 241 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967). More recently, the Second Circuit, narrowing its previous statements in *Heliczer* and in *United States* v. *Ulan*, 421 F.2d 787 (2d Cir. 1970), has refused to recognize the right in the case of an arrest pursuant to a warrant, *United States* v. *Beyer*, 426 F.2d 773 (2d Cir. 1970), and has suggested that the right may not exist at all if the officer's authority is apparent, *United States* v. *Martinez*, 465 F.2d 79 (2d Cir. 1972) (*dictum*). Similarly, the Seventh Circuit, in *dictum*, has questioned the continued validity of the *John Bad Elk* case. *United States* v. *Simon*, 409 F.2d 474 (7th Cir.), *cert. denied*, 396 U.S. 829 (1969).

2. *Fraudulent interference.*—In addition to making it a crime to conspire to commit any substantive offense against the United States, 18 U.S.C. 371 contains a separate provision, not connected to any substantive offense, of conspiring "to defraud the United States, or any agency thereof in any manner or for any purpose." Initially, prosecutions under the "defraud" provision of 18 U.S.C. 371 were limited to conspiracies to deprive the Government of property or money by misrepresentation. Gradually, however, the Courts have expanded the interpretations of the language so as to include any conspiracy to interfere with a Federal Government function by dishonest means. For a detailed history of the expansion of the interpretation of 18 U.S.C. 371, *see* Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959). The principal gloss placed upon 18 U.S.C. 371 stems from the holding in *Haas* v. *Henkel*, 216 U.S. 462 (1910). In that case, the indictment charged that certain speculators in the cotton market had conspired with an employee of the Department of Agriculture to obtain from him information as to the state of the cotton crop in the country, which information it was the function of the Department to publish in a report. The conspirators were alleged to have bribed the employee to obtain this information in advance of its publication, thereby defrauding the United States by obstructing and impairing it in the exercise of its function of "promulgating fair, impartial and accurate reports concerning the cotton crop." *Id.* at 478. The Supreme Court sustained the validity of the indictment and the conviction. In commenting on the fact that the indictment did not charge that there was any pecuniary loss to the United States, the Court observed:

> But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, or obstructing, or defeating the lawful function of any department of Government.

Id. at 479.

In *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924), the Court again gave the section an expansive construction, noting that:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the over-reaching of those charged with carrying out the governmental intention.

In more recent years, the statute has been applied successfully in a variety of contexts. For example, in *Glasser* v. *United States*, 315 U.S. 60 (1942), the Court sustained a conviction of Assistant

United States Attorneys assigned to prosecute violations of the liquor laws who solicited bribes from persons either charged or about to be charged with such an offense in exchange for unlawfully influencing their cases. By such conduct the United States was defrauded of its right to be honestly and fairly represented in its courts of law.

In *Lutwak* v. *United States*, 344 U.S. 604 (1953), the Court upheld a conspiracy conviction under section 371 involving a scheme in which veterans were solicited to enter into sham marriages with aliens in order to effect their entry into the United States in contravention of the immigration quota system.

In *United States* v. *Peltz*, 433 F.2d 48 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971), the court affirmed the defendant's conspiracy conviction to defraud the United States, where the conspiracy was based on a scheme under which he was able to profit on stock transactions through the use of confidential information received from an employee of the Securities and Exchange Commission as to pending investigatory proceedings against various corporations.

In *United States* v. *Johnson*, 337 F.2d 180 (4th Cir. 1964), *cert. denied sub nom. Edlin* v. *United States*, 385 U.S. 846 (1966), the convictions of savings and loan officers were affirmed where a conspiracy was found between themselves and a Member of Congress pursuant to which the Member of Congress improperly sought to exert influence upon the Department of Justice in connection with pending indictments.

In *United States* v. *Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958), the conspiracy conviction of corporate officers was sustained, based on a scheme to obstruct the Department of the Treasury in its collection of revenue through the use of false and inconsistent statements.

In *United States* v. *Thompson*, 366 F.2d 167 (6th Cir.), *cert. denied sub nom. Campbell* v. *United States*, 385 U.S. 973 (1966), members of a county council were convicted of conspiracy to defraud the United States in the solicitation of a kickback from the architects on a county hospital project which received Federal financing.

In *United States* v. *Levinson*, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969), the defendants' conviction was upheld for conspiracy to defraud the United States based on a scheme to secure Federal loan guarantees by submitting false documents, thereby depriving the United States of the proper administration of its veteran's housing program.

In *Dennis* v. *United States*, 384 U.S. 855 (1966), the Court sustained the convictions of union officers of a Communist-affiliated labor union for filing false affidavits with the National Labor Relations Board in regard to this affiliation. As a result, the defendants fraudulently obtained services for the union from the N.L.R.B. Although the defendants sought to raise a defense that the underlying statute requiring them to indicate their Communist Party membership and affiliation was unconstitutional, the Court rejected the defense and stated the "governing principle" that "a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate, and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional." *Id.* at 867.

In *Hunsaker* v. *United States*, 279 F.2d 111 (9th Cir.), *cert. denied*, 364 U.S. 819 (1960), the defendants were convicted of conspiracy to defraud the United States by acquiring, transporting, and offering for sale quantities of gold in excess of that permitted under official gold regulations.

In *Curley* v. *United States*, 130 F. 1 (1st Cir.), *cert. denied*, 195 U.S. 628 (1904), the defendants were convicted of conspiracy to defraud the United States by having one of them impersonate the other in taking the civil service examination in order to procure a position as a letter carrier.

In *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), a Watergate case, the defendants were convicted under 18 U.S.C. 371 of using deceit, craft, trickery, and dishonest means to defraud the United States by interfering with and obstructing the lawful governmental functions of the Central Intelligence Agency, the Federal Bureau of Investigation, and the Department of Justice. The conspiracy was furthered by attempting to induce the CIA to provide financial assistance to those under investigation for the Watergate burglary, by attempting to get the CIA to interfere with the Watergate investigation being conducted by the FBI, and by obtaining information concerning the investigation from the FBI and the Department of Justice. In so doing, the defendants conspired to defraud the United States of its right to have its officials and agencies transact their business honestly, impartially, and free from corruption or undue influence or obstruction.

A final example of a prosecution for a fraudulent scheme which has as a purpose (generally in furtherance of a scheme to obtain property from another source) the obstruction of a legitimate function of the Federal Government is *United States* v. *Aloi*, 449 F. Supp. 698 (E.D.N.Y. 1977). There, 18 U.S.C. 371 was used to charge the defendants with a conspiracy to defraud the United States by obstructing the Department of Health, Education, and Welfare from properly administering and distributing Federal funds under medical assistance programs and of depriving the Federal Government of the State of New York's honest participation in such programs through a scheme to prevent elimination of podiatric services from the New York State medicaid program by bribery of a State legislator with respect to a pending legislative proposal.

As illustrated in part by the cases just described, the various ways in which courts have held a Government function may be obstructed under 18 U.S.C. 371 are virtually endless. The courts have, however, placed limitations on the coverage of 18 U.S.C. 371 when the effect of the defendant's fradulent activity on the impairment of a Government function is speculative or attenuated.

For example, in *United States* v. *Kaiser*, 179 F. Supp. 545 (S.D. Ill. 1960), the court held the relationship between a conspiracy to embezzle toll money at a bridge and the obstruction of a Government function too attenuated to support a conviction under 18 U.S.C. 371. The only connection with a Federal function was the fact that in the enabling legislation passed by Congress to permit construction of the bridge the hope was expressed that, if ever the tolls collected succeeded in fully paying for the cost of the bridge, the bridge would be toll free.

Courts have also restricted the scope of 18 U.S.C. 371 where the means used to obstruct a Government function do not partake of fraud

or trickery. For example, in *Hammerschmidt* v. *United States*, 265 U.S. 182 (1924), the Court reversed the conviction of the defendant, who had been charged under the section with urging persons subject to the Draft Act to refuse to register for conscription, on the ground that the section punished only obstruction of governmental functions by dishonest means and did not extend to "open defiance" of a governmental purpose to enforce its laws. Similarly, it has been stated that mere failure to disclose taxable income would not constitute a means of obstruction prohibited by this section. *United States* v. *Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958).

Professor Goldstein of Yale Law School has suggested that reported cases under current 18 U.S.C. 371 can be divided into six categories:

1. Agreements to interfere with the administration of official duties, initiated by corrupt officials themselves, or by others' corrupting Government officials so that they will act for their personal gain and against the interests of the United States. Though false statements may incidentally be involved, the main thrust is bribery or a similar device used to corrupt.[1]

2. Agreements to use practices recognized as frauds at common law, such as false statements or impersonnations, by persons dealing with the Government in arm's-length business relationships, in order to obtain money, property, contracts or benefits provided by law.[2]

[1] Grunewald v. United States, 353 U.S. 391 (1957); Haas v. Henkel, 216 U.S. 462 (1910); Crawford v. United States, 212 U.S. 183 (1909); Connelly v. United States, 249 F. 2d 576 (8th Cir. 1957); Joyce v. United States, 153 F. 2d 364 (8th Cir.), *cert. denied*, 328 U.S. 860 (1946); Braatelien v. United States, 147 F. 2d 888, (8th Cir. 1945); United States v. Harding, 81 F. 2d 563 (D.C. Cir. 1936); Langer v. United States, 76 F. 2d 817 (8th Cir. 1935); Browne v. United States, 290 F. 870 (6th Cir. 1923); Stager v. United States, 233 F. 510 (2d Cir. 1916); Tyner v. United States, 23 App. D.C. 324 (D.C. Cir. 1904); United States v. Cohen, 113 F. Supp. 955 (S.D.N.Y. 1953); United States v. McConnell, 285 F. 164 (E.D. Pa. 1923); *In re* Runkle 125 F. 996 (C.C.S.D.N.Y. 1903); United States v. Greene, 115 F. 343, 353 (E.D. Ga. 1902); United States v. Van Leuven, 62 F. 62 (N.D. Iowa 1894).

[2] This category includes (a) the obtaining of Government contracts by misrepresentation or by collusion among bidders: Houston v. United States, 217 F. 852 (9th Cir. 1914), *cert. denied*, 238 U.S. 613 (1915); McGregor v. United States, 134 F. 187 (4th Cir. 1904); United States v. Union Timber Prod. Co., 259 F. 907 (W.D. Wash. 1919); (b) inducing payment for defective or substandard goods delivered to the Government: Nye & Nissen v. United States, 336 U.S. 613, 615, 617 (1949); United States v. Samuel Dunkle & Co., 184 F. 2d 894 (2d Cir. 1950), *cert. denied*, 340 U.S. 930 (1951); Minnisohn v. United States 101 F. 2d 477 (3d Cir. 1939); Wolf v. United States, 283 F. 885 (7th Cir.), *cert denied*, 260 U.S. 743 (1922); Keane v. United States, 272 F. 577 (4th Cir. 1921); (c) inducing payment for work not done at all, or for padded cost items or for other "fraudulent" claims: United States v. Walter, 263 U.S. 15 (1923); United States v. Benson, 70 F. 591 (9th Cir. 1895); United States v. Reichert, 32 F. 142 (C.C.D. Cal. 1887); United States v. United States Brokerage & Trading Co., 262 F. 459 (S.D.N.Y. 1919); United States v. Carlin, 259 F. 904 (E.D. Pa. 1917); United States v. Newton, 52 F. 275 (S.D. Iowa 1892); United States v. Adler, 49 F. 736 (S.D. Iowa 1892); United States v. Dennee, 25 F. Cas. 818 (C.C.D. La. 1877) (No. 14,948); (d) inducing payment of money or property by the Government for reasons which did not qualify the defendants as proper recipients under the applicable statute or regulations: Green v. United States, 28 F. 2d 965, 968 (8th Cir. 1928); Falter v. United States, 23 F. 2d 420 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928); United States v. Weinberg, 129 F. Supp. 514 (M.D. Pa.), *aff'd*, 226 F. 2d 161 (3d Cir. 1955), *cert. denied*, 350 U.S. 933 (1956); United States v. Atlanta Journal Co., 185 F. 656 (C.C.N.D. Ga. 1911), *appeal dismissed*, 229 U.S. 605 (1912); United States v. Whalan, 28 F. Cas. 531 (D. Mass. 1868) (No. 16,669); (e) presenting false affidavits in support of applications for land under the homestead law; Hyde v. United States, 225 U.S. 347 (1912); United States v. Barber, 219 U.S. 72 (1911); United States v. Biggs, 211 U.S. 507 (1909); Dealy v. United States, 152 U.S. 539 (1894); Chaplin v. United States, 193 F. 879 (9th Cir.), *cert. denied*, 225 U.S. 705 (1912); United States v. Wells, 192 F. 870 (2d Cir.), *cert. denied*, 225 U.S. 714 (1912); Richards v. United States, 175 F. 911 (8th Cir. 1909), *cert. denied*, 218 U.S. 670 (1910); United States v. Raley, 175 F. 159 (D. Ore. 1908); Jones v. United States, 162 F. 417 (9th Cir.), *cert. denied*, 212 U.S. 576 (1908); United States v. Black, 160 F. 431 (7th Cir. 1908); Ware v. United States, 154 F. 577 (8th Cir.), *cert. denied*, 207 U.S. 588 (1907); United States v. Doughten, 186 F. 226 (C.C.E.D. Wash. 1911); United States v. Robbins, 157 F. 999 (D. Utah 1907); United States v. Burkett, 150 F. 208 (D. Kan. 1907); United States v. Brace, 149 F. 874 (N.D. Cal. 1907); United States v. Peuschel, 116 F. 642 (S.D. Cal. 1902); United States v. Owen, 32 F. 534 (D. Or. 1887).

3. Agreements to steal or "convert" money or property of the Government or its instrumentality.[3]

4. Agreements to defeat the administration of justice in the Federal courts or in administrative agencies, either through bribery, perjured testimony or the obtaining of bail by false statements.[4]

5. Agreements to deprive the Government of taxes or customs duties—by means of false tax returns or by smuggling or secreting goods or by mislabeling them so that taxable items appear to be nontaxable.[5]

6. Agreements to defraud by interfering with a lawful function of Government, usually in ways similar to those set out above, but where the charge is cast principally in terms of "interference" or "obstruction."[6]

Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 436–38 (1959).

§ 1701—Obstructing a Government function by physical action

This section carries forward a number of current law provisions that prohibit physical interference with the performance of various func-

[3] Reynolds v. United States, 67 F. 2d 216 (9th Cir. 1933); Cagle v. United States, 3 F. 2d 746 (6th Cir. 1925).

[4] Glasser v. United States, 315 U.S. 60 (1942); United States v. Manton, 107 F. 2d 834 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940); Outlaw v. United States, 81 F. 2d 805 (5th Cir.), *cert. denied*, 298 U.S. 665 (1936); Cendagarda v. United States, 64 F. 2d 182 (10th Cir. 1933); Asgill v. United States, 60 F. 2d 780 (4th Cir. 1932); Tyson v. United States, 54 F. 2d 26 (5th Cir. 1931), *cert. denied*, 285 U.S. 551 (1932); United States v. Sager, 49 F. 2d 725 (2d Cir. 1931); Eddington v. United States, 24 F. 2d 50 (8th Cir. 1928); Henry v. United States, 15 F. 2d 624 (9th Cir. 1926), *cert. denied*, 274 U.S. 737 (1927); Radford v. United States, 129 F. 49 (2d Cir. 1904). *See also* Joyce v. United States, 153 F. 2d 364 (8th Cir.), *cert. denied*, 328 U.S. 860 (1946); Braatelien v. United States, 147 F. 2d 888 (8th Cir. 1945).

[5] United States v. Hirsch, 100 U.S. 33 (1879); United States v. Goldstein, 135 F. 2d 359 (2d Cir. 1943); United States v. Harrison, 121 F. 2d 930 (3d Cir.), *cert. denied*, 314 U.S. 661 (1941); Jelke v. United States, 255 F. 264 (7th Cir. 1918); Browne v. United States, 145 F. 1 (2d Cir. 1905), *cert. denied*, 200 U.S. 618 (1906); United States v. Olmstead, 5 F. 2d 712 (W.D. Wash. 1925); United States v. Orr, 223 F. 220 (D.R.I. 1915); United States v. Shevlin, 212 F. 343 (D. Mass. 1913); United States v. Stamatopoulos, 164 F. 524 (C.C.E.D.N.Y. 1908); *In re* Calicott, 4 F. Cas. 1051 (C.C.N.D.N.Y. 1868) (No. 2311); United States v. Whalan, 28 F. Cas. 531 (D. Mass. 1868) (No. 16,669). Lisansky v. United States, 31 F. 2d 846 (4th Cir.), *cert. denied*, 279 U.S. 873 (1929). Several cases might be listed within this category in which, although the fraud involved has been made a substantive offense the discussion is in terms of conspiracy to defraud. *See, e.g.*, United States v. Johnson, 319 U.S. 503 (1943); Becher v. United States, 5 F. 2d 45 (2d Cir. 1924), *cert. denied*, 267 U.S. 602 (1925).

[6] In addition to *Curley, Haas, Hammerschmidt* and *Klein, see* Bridges v. United States, 346 U.S. 209, 212–13 (1953) (false statement); Lutwak v. United States, 344 U.S. 604 (1953) (misrepresentations); Fiswick v. United States, 329 U.S. 211 (1946) (false statements and nondisclosures); Schino v. United States, 209 F. 2d 67 (9th Cir. 1953), *cert. denied*, 347 U.S. 937 (1954) (bribery); Heald v. United States, 175 F. 2d 878 (10th Cir.), *cert. denied*, 338 U.S. 859 (1949) (false statements); Berenbeim v. United States, 164 F. 2d 679 (10th Cir. 1947), *cert. denied*, 333 U.S. 827 (1948) (false statements and other misrepresentations); Canella v. United States, 157 F. 2d 470 (9th Cir. 1946) (bribery); Joyce v. United States, 153 F. 2d 364 (8th Cir.), *cert. denied*, 328 U.S. 860 (1946) (inducing farmers to file false bankruptcy petitions, thereby interfering with the administration of the Frazier-Lemke amendment to the Bankruptcy Act); Hillis v. United States, 97 F. 2d 710 (9th Cir. 1938) (false statement); Miller v. United States, 24 F. 2d 353 (2d Cir.), *cert. denied*, 276 U.S. 638 (1928) (bribery); Horwitz v. United States, 5 F. 2d 129, 130 (1st Cir. 1925) (concealment of contraband from customs); Rumely v. United States, 293 F. 532 (2d Cir.), *cert. denied*, 263 U.S. 713 (1923) (concealment of assets to prevent their seizure by the Alien Property Custodian); Hamburg-American Steam Packet Co. v. United States, 250 F. 747 (2d Cir.), *cert. denied*, 246 U.S. 662 (1918) (false shipping manifests); Curley v. United States, 130 F. 1 (1st Cir. 1904), *cert. denied*, 195 U.S. 628 (1904) (impersonation); Palmer v. Colladay, 18 App. D.C. 426 (D.C. Cir. 1901) (false statements); United States v. O'Toole, 101 F. Supp. 123 (D.R.I. 1951) (forgery and misrepresentations); United States v. Kendzierski, 54 F. Supp. 164 (E.D.N.Y. 1944) (false statements); United States v. Rhoads, 48 F. Supp. 175, 176 (D.D.C. 1942) (delaying production of war material); United States v. Furer, 47 F. Supp. 402, 405 (S.D. Cal. 1942) (depriving Government of competitive bidding on government contracts; bribery of employee of general contractor not classed as an officer of the United States within the meaning of the bribery statute); United States v. Soeder, 10 F. Supp. 944 (W.D. Mo. 1935) (misrepresentations); United States v. Terranova, 7 F. Supp. 989 (N.D. Cal. 1934) (failure of government sub-contractors to pay minimum wages); United States v. Fung Sam Wing, 254 F. 500 (N.D. Cal. 1918) (misrepresentations in violation of Chinese Exclusion Laws); United States v. Morse, 161 F. 429 (C.C.S.D.N.Y. 1908), *aff'd*, 174 F. 539 (2d Cir. 1908), *cert. denied*, 215 U.S. 605 (1909) (false statements and misapplication of funds); United States v. Stone, 135 F. 392 (D.N.J. 1905) (misrepresentations).

tions by Federal public servants. The Committee has replaced the current law offenses with a number of specific offenses that address the type of interference employed. Threats against Federal public servants are covered under subchapter VI of chapter 17. Fraudulent interferences, where covered by current law, are governed by various fraud offenses in the proposed code. Assaults on Federal public servants are, in general, covered by chapter 23. Section 1701 is designed to deal with interference by physical means not amounting to an assault.

A number of current law offenses prohibit *any* interference with the government functions, and are carried forward in section 1701: 18 U.S.C. 1501 (obstruction of court process service), carried forward in section 1701(a)(1); 18 U.S.C. 1502 (obstruction of the duties of an extradition agent), now section 1701(a)(2); 18 U.S.C. 1509 (obstruction of the exercise of rights or performance of duties under a court order), restated in section 1701(a)(3); 18 U.S.C. 1701 (interference with the passage of the mails), now section 1701(a)(4); and 18 U.S.C. 3056 (obstruction of Secret Service agents in the performance of protective functions), carried forward in section 1701(a)(6).

A number of other current law provisions prohibit only "forcible" interference. *See*, e.g., 18 U.S.C. 111 and 2231. It is unclear to what degree these offenses cover physical obstruction short of assault. For example, current law prohibits driving an automobile away at increasing speed while a law enforcement officer is precariously perched and struggling to maintain a hold. *Carter* v. *United States*, 231 F.2d 232 (5th Cir. 1956), *cert. denied*, 351 U.S. 984 (1956). However, current law does not prohibit failing to unlock a door to permit entry of an officer. *United States* v. *Cunningham*, 509 F.2d 961, 963 (D.C. Cir. 1975).

The Committee is concerned that a section which too broadly prohibits interference by physical obstruction could punish very trivial conduct. Because the scope of current law is unclear and other sections of the proposed code cover all serious interferences, the Committee decided to limit further coverage of nonassaultive physical interference to the most important of law enforcement functions—the making of an arrest and the prevention of serious crimes.

Subsection (a) makes it a class A misdemeanor knowingly to use physical interference and thereby intentionally to obstruct or impair: (1) the service or execution of process or a writ; (2) the performance of duties by an extradition agent; (3) the exercise of rights or the performance of duties under a court order; (4) the passage of the mail; (5) the execution of an arrest, or the prevention by a law enforcement officer of a felony or violent misdemeanor which is about to occur; or (6) the performance of protection duties by the Secret Service.

Subsection (b)(1) defines "protection duties" to mean those duties that the Secret Service is authorized to perform by paragraphs (1), (2), and (3) of section 5310 of the proposed code. Section 5310 is a reenactment of present law (18 U.S.C. 3056). Subsection (b)(2) provides that no state of mind need be proven about the fact that the protection duties are authorized by section 5310.

Subsection (c) provides a defense to interference with the making of an arrest where the arrest is illegal *and* in bad faith, and where the interference poses no significant risk of harm to any person. This is

most likely a narrower defense than current Federal law provides. Although current Federal case law has not addressed the question of nonassaultive interference with an unlawful arrest, it does permit a defense to a prosecution for assault when the officer was assaulted in order to resist an unlawful arrest. *John Bad Elk* v. *United States*, 177 U.S. 529 (1900). See, however, discussion at 132–33, *infra*, regarding erosion of this principle.[1]

Subsection (d)(1) provides for Federal jurisdiction (1) where the process or orders is that of a Federal court; (2) where the law enforcement officer is a Federal law enforcement officer; or (3) if a United States extradition agent, the United States mail, or the Secret Service is involved, anywhere within the general jurisdiction of the United States. Subsection (d)(2) provides for extraterritorial jurisdiction under subsection (a)(1) if the writ or process is of a United States court and the actor is a United States national; under subsection (a)(2) if the actor is a United States national; under subsection (a)(3) if the court is a United States court and the actor is a United States national; under subsection (a)(5) if the law enforcement officer is a Federal law enforcement officer and the actor is a United States national; and under subsection (a)(6) in all instances. The first 5 bases of extraterritorial jurisdiction are supported by the protective and nationality prinicples of international law. The sixth basis is justified, in part, by the passive personality principle of international law.

The offense is classified as an A misdemeanor because of the minor nature of the interference involved. As indicated above, other parts of the proposed code deal with more serious forms of interference.

§ *1702—Impersonating an official*

This section in part carries forward current 18 U.S.C. 912, 913, and 915. Portions of those sections prohibiting the obtaining of property of another through impersonation are carried forward in section 2531 of the proposed code.

Subsection (a) makes it a class E felony to impersonate a Federal public servant, or a foreign official, and assert the authority of such official or public servant, with the intent to alter the course of conduct of the person to whom the impersonation is made. The requirement of an act asserting the pretended authority is taken from case law interpretations of current law. *See United States* v. *Rosser*, 528 F.2d 652 (D.C. Cir. 1976). The "specific intent" requirement is derived from the United States Supreme Court's interpretation of "intent to defraud," as it appeared in 18 U.S.C. 912 prior to 1948. *United States* v. *Lepowitch*, 318 U.S. 702 (1943). The 1948 codification of title 18 deleted the "specific intent" from 18 U.S.C. 912, and courts have

[1] Recent penal code revisions provide that the unlawfulness of an arrest by a law enforcement officer acting under color of authority is irrelevant to criminal liability for resistance. ARIZ. REV. STAT. § 13–2508 (1956) (Supp. 1979); ARK. STAT. ANN. § 41–2803 (1947) (Supp. 1979); CONN. GEN. STAT. ANN. § 53a–167a (West 1958) (Supp. 1979); DEL. CODE tit. 11, § 1257 (1979); HAWAII REV. STAT. § 710–1026 (1976) (Supp. 1979); ILL. ANN. STAT. ch. 38, § 31–1 (Smith-Hurd 1961) (Supp. 1979); KY. REV. STAT. § 520.090 (1970) (Supp. 1978); MASS. GEN. LAWS ANN. ch. 268, § 10 (West 1970) (Supp. 1979); MO. ANN. STAT. § 575.150 (Vernon 1979); MONT. CODE ANN. § 45–3–108 (1979); NEV. REV. STAT. § 28–904 (1943) (Supp. 1979); N.H. REV. STAT. ANN. § 642:2 (1974) (Supp. 1979); N.J. STAT. ANN. § 2C:29–2 (West 1980); OR. REV. STAT. § 162.315 (1977); S.D. CODIFIED LAWS ANN. § 22–11–4 (1979); TEX. PENAL CODE ANN. § 38.03(b) (Vernon 1974) (Supp. 1979).

differed in interpreting the meaning of this deletion. The Committee decided to follow those courts that continue to require a specific intent. *See, e.g., United States* v. *Randolph*, 460 F.2d 367 (5th Cir. 1967). *Contra, United States* v. *Witman*, 459 F.2d 451 (9th Cir.), *cert, denied*, 409 U.S. 863 (1972).

Subsection (b) provides, in accordance with current Federal law, that it is not a defense that the pretended capacity or authority did not, or could not, exist. *United States* v. *Barnow*, 239 U.S. 74 (1915) (construing the predecessor to 18 U.S.C. 912); *Thomas* v. *United States*, 213 F.2d 30 (9th Cir. 1954).

Subsection (c)(1) provides for Federal jurisdiction where the pretended capacity or authority is that of a Federal public servant or of a foreign official. The terms "public servant" and "foreign official" are defined in section 101 of the proposed code. Subsection (c)(2) provides for extraterritorial jurisdiction where the pretended capacity or authority is that of a Federal public servant. This provision is based upon the protective principle of international law.

§ *1703—Obstructing a Government inspection by fraud*

This offense is part of a series of new offenses designed to punish conduct currently punishable by 18 U.S.C. 371 (to the degree it relates to conspiracies to defraud the government) and 18 U.S.C. 1001 (statements or entries generally). To the extent that the new offense would cover conduct which is neither a conspiracy (i.e., performed by an individual) nor a false statement (e.g., a trick or scheme not involving a concealment), the offense is an expansion of current law.

Subsection (a)(1) makes it a class E felony to use fraud and thereby obstruct or impair the performance of a legal duty by a government inspector or examiner. Subsection (a)(2) similarly prohibits the obstruction or impairment of a government audit or investigation. Subsection (b) provides that no state of mind need be proved about the circumstance that the inspection, examination, audit or investigation is required or authorized by law. Subsection (c)(1) provides for Federal jurisdiction where the inspector's or examiner's duty is imposed by Federal law. Subsection (c)(2) provides for Federal jurisdiction, in the case of an audit or investigation, where the audit or investigation is authorized by the Inspector General Act of 1978, or by various Acts of Congress establishing Inspector General offices in Federal agencies. Special provision was made for the Inspection General functions because of a concern by the Committee that, in light of the specific references in the Inspector General Act to audits and investigations, such functions might not be interpreted as within the meaning of the terms inspection and examination.

§ *1704—Obtaining a Government authorization by fraud*

This offense is part of a series of new offenses designed to punish conduct currently punishable by 18 U.S.C. 371 (to the degree it relates to conspiracies to defraud the government) and 18 U.S.C. 1001 (statements or entries generally). To the extent that the new offense would cover conduct which is neither a conspiracy (i.e., performed by an individual) nor a false statement (e.g., a trick or scheme not involving a concealment), the offense is an expansion of current law.

Subsection (a) makes it a class E felony to use fraud and thereby obtain an authorization required by law for operating a business or profession. Subsection (b) provides that no state of mind need be proved about the circumstance that the authorization is required by law. Subsection (c) provides for Federal jurisdiction (including extraterritorial jurisdiction) where the license is required by Federal law.

§ *1705—Conspiracy to fraudulently obstruct a government function*

This section brings forward that portion of 18 U.S.C. 371 that prohibits conspiracies to defraud the United States. Subsection (a) makes it a class D felony for two or more persons, with intent to obstruct or impair a government function, to agree to use fraud, if one of those persons intentionally engages in any conduct in furtherance of the intended obstruction or impairment. Subsection (b) provides for Federal jurisdiction if the government function involved is a Federal Government function.

Section 1705 is somewhat narrower than current 18 U.S.C. 371 in that it employs the term "fraud" (defined in section 101 of the proposed code) and thereby requires an element of misrepresentation or deception. The Committee believes that, in view of other, specific offenses in the proposed code, an offense with the scope of current 18 U.S.C. 371 would be overly broad and vague. Professor Goldstein of Yale Law School argues that the current offense is no longer necessary, and carries a significant potential for abuse:

> When [18 U.S.C. 371] was first adopted in 1867, the federal criminal code was in a primitive state. It contained only a handful of substantive crimes, and experience with them was limited. For a long time, for example, the reach of the false-statement and false-claims statutes was not at all clear. Laws dealing specifically with various types of frauds, such as those on the mail or on the revenue, or with particular methods of obstructing justice, were not enacted until later. And the detailed network of statutes designed to reach the corruptible government official had not yet come into existence. With the activities of the federal government fast outstripping the ability of Congress to fashion criminal statutes to guard federal processes, it was hardly unexpected that federal prosecutors would search for an appropriate catch-all category into which they could fit such conduct as they (and perhaps the prevailing mores) deemed to be deserving of punishment. . . .
>
> But times have changed. The problem today is not one of gaps in the criminal code but of overlapping offense categories which multiply the sanctions that can be imposed for a single course of antisocial conduct. The gaps have been filled and filled again, through enactment of specific criminal statutes. This open-end crime remains on the books nevertheless, and not only as the vestigial remnant of another day. Quite the contrary. Contours molded by almost a century of decision are not so easily lost. The vigor of "conspiracy to defraud the United States," at least as measured quantitatively, continues unabated.

> But where its primary function once was to reach conduct not covered elsewhere in the criminal code, it now serves its original function in very limited fashion. Its main significance today is in the field of tactics. Given the choice, a prosecutor will invariably choose to proceed under the statute which affords him the maximum flexibility in framing his charge and presenting his proof. The addition of the conspiracy count (already described as the prosecutor's "darling") of the loosely defined concept of fraud makes conspiracy "to defraud the United States" peculiarly attractive to the prosecutor and particularly subversive of principles deeply rooted in our criminal law.

Goldstein, *Conspiracy to Defraud the United Sttaes*, 68 Yale L.J. 405, 440–41 (1959) (footnotes omitted).

Because of concerns such as those expressed by Professor Goldstein, the Committee has drafted specific offenses to prohibit conduct that would correctly be prosecuted under 18 U.S.C. 371. These include sections 1703 (obstructing a Government inspection by fraud), 1704 (obtaining a Government authorization by fraud) and 1754 (trading in special influence), and new jurisdictional bases for section 2531 (theft) of the proposed code.

The Committee believes that the conduct proscribed by current 18 U.S.C. 371 is thus adequately covered by section 1705 and other sections of the proposed code. This becomes apparent upon examination of the six categories of offenses outlined by Goldstein (*see* pp. 136–37 *supra*): Agreements to interfere with the administration of official duties are prohibited, in all imaginable forms, by subchapter VI of the chapter 17 of the proposed code. Agreements to use fraud in dealings with the United States in order to obtain money, property, contracts or benefits provided by law are prohibited by section 2531 of the proposed code. Similarly, section 2531 would proscribe agreements to steal or "convert" money or property of the Government or its instrumentality. Agreements to defeat the administration of justice through bribery, perjured testimony, or the obtaining of bail by false statements are prohibited by subchapters II and IV of chapter 17 of the proposed code. Agreements to deprive the government of taxes or customs duties are covered by chapter 19 of the proposed code. Agreements to interfere with a lawful function of the government, for the most part, fit into one or more of the five other categories. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 439 (1959).

The cases noted in the current law discussion regarding fraudulent interferences, at 133–35 *supra*, provide more specific examples of how offenses prosecuted under 18 U.S.C. 371 would be reachable by sections of the proposed code. *Glasser* would be prosecutable under section 1751 (bribery) of the proposed code; *Lutwak*, section 1511 (unlawfully entering the United States as an alien) of the proposed code; *Peltz*, sections 1756 (speculating on official action or information) and 2561 (securities offenses) of the proposed code; *Johnson*, sections 1754 (trading in special influence) and 1760 (compensation to Federal public servants and others in matters affecting the Government) of the proposed code; *Dennis*, sections 1705 (conspiracy to fraudulently obstruct a Government function) and 1742 (false statements) of the proposed code; *Thompson*, section 2522 (extortion) of the proposed code; *Levinson*, sections 1742 (false statements) and 2531 (theft) of the proposed code; *Dennis*, sections 1705 (conspiracy fraudulently to obstruct a Government function) and 1742 (false statements) of the proposed code; *Curley*, sections 1705 (conspiracy fraudulently to obstruct a Government function) and 1742 (false statements) of the proposed code); and *Haldeman*, sections 1711 (hindering law enforcement), 1729 (obstruction of official proceedings by fraud), and 1741 (perjury) of the proposed code. *Hunsaker* would no longer be prosecutable, since the sections prohibiting the trading in gold have been repealed. In addition, the *Dennis* situation is somewhat moot, since the affidavits filed by the defendants in that case are no longer required by law.

Thus, the Committee is satisfied that a conspiracy offense that is confined by the use of the defined term "fraud" will more than adequately serve the purposes of protecting Federal Government functions from obstruction and interference.

SUBCHAPTER II—OBSTRUCTION OF LAW ENFORCEMENT

Current Law

Current Federal law concerning the hinderance of law enforcement functions is more reflective of the common law than of the approach of modern codes. Conduct which the Model Penal Code prohibits as "Hindering Apprehension or Prosecution" (section 242.3), "Aiding Consummation of Crime" (section 242.4), and "Compounding" (section 242.5) is punishable under current law through the concept of liability as an accomplice after the fact (18 U.S.C. 3) and the offense of misprision of a felony (18 U.S.C. 4), both of which derive from the common law. In addition, a number of provisions of Federal law prohibit specific types of interference with law enforcement functions: escape, flight to avoid prosecution, failure to appear as a defendant, and bringing contraband into a correctional institution.

Pursuant to 18 U.S.C. 3, an accessory after the fact may be punished by imprisonment for one-half the maximum term and a fine of one-half the maximum fine prescribed for the punishment of the principal. An accessory after the fact is defined as one who "knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment." Unlike the common law, one can be convicted under Federal law of being an accessory after the fact to a misdemeanor. *United States* v. *Chapman*, 3 F. Supp. 900 (S.D. Ala. 1931). Although the prosecution must prove that an offense has been committed by the principal, *United States* v. *Neal*, 102 F.2d 643, 645–46 (8th Cir. 1939), it is not necessary that the principal have been convicted. *United States* v. *Walker*, 415 F.2d 530 (9th Cir. 1969).

One can be convicted of being an accessory after the fact when one conceals evidence of a crime. *Neal* v. *United States*, 114 F.2d 1000 (8th Cir. 1940), *cert. denied*, 312 U.S. 679 (1941). It has been suggested, however, that false oral statements cannot be sufficient in themselves to support a conviction under 18 U.S.C. 3. *United States* v. *Prescott*, 581 F.2d 1353 (9th Cir. 1978) (*dictum*).

Much attention has been devoted to the question of the required nature of the evidence concealed or destroyed in order to sustain a conviction under 18 U.S.C. 3. *See* Brown Commission, *Working Papers* 553 (1970); Senate Rep. No. 96-553 at 297 n.34 (1980); Testimony of John Shattuck on behalf of the American Civil Liberties Union, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 1st sess. (1980). The discussion has focused upon the appropriate interpretation of *United States* v. *Neal*, 102 F.2d 643 (8th Cir. 1939). In *Neal*, the defendant was accused of assisting the principal (his brother) to escape conviction by concealing evidence. Prior to the discovery of the evidence, the police had already determined the identity of the principal, and were looking for him. The concealment of the evidence could not have affected the determination of the principal's identity or his apprehension. The actual holding of *Neal* is thus quite limited: under such circumstances, the prosecution must prove that the evidence is relevant to the principal's guilt or innocence of the crime alleged. This result is quite logical. If the evidence concealed was unrelated to the crime alleged, its suppression cannot have assisted the principal to avoid conviction. The applicability of this holding to other circumstances, however, is unclear. It is unknown whether the concealed evidence must be relevant to guilt or innocence where the alleged aid is in escaping apprehension.

Unfortunately, no court, subsequent to *Neal*, has clarified this issue. Thus, a broad reading of *Neal* would require that, regardless of whether the principal was aided in escaping discovery, apprehension, or conviction, the evidence concealed must have been relevant to the guilt or innocence of the principal. A narrow reading would require only that the evidence be relevant to the particular function alleged to have been obstructed. Neither reading of *Neal*, however, supports the argument that *Neal* proscribes a conviction under 18 U.S.C. 3 where the evidence concealed or destroyed is privileged or inadmissible at trial for reasons other than irrelevance.

Pursuant to 18 U.S.C. 4, one who "conceals and does not as soon as possible make known" the commission of a felony to a judge or law enforcement officer, if that person knows that the felony has been committed, may be punished by up to 3 years imprisonment, a $500 fine, or both. Decisions under this provision have made clear that the word "conceals" is not to be regarded as surplusage, but must be interpreted as requiring some affirmative act of concealment. The elements of the offense are that the principal committed a felony, that the defendant had full knowledge of the commission of the felony, that the defendant failed to notify authorities, and the defendant took affirmative steps to conceal the crime of the principal. *Lancey* v. *United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966). *See also United States* v. *Johnson*, 546 F.2d 1225 (5th Cir. 1977); *United States* v. *Daddano*, 432 F.2d 1119 (7th Cir.), *cert. denied*, 402 U.S. 905 (1970); *Bratton* v. *United States*, 73 F.2d 795 (10th Cir. 1934); *United States* v. *Farrar*, 38 F.2d 515 (D. Mass.), *aff'd*, 281 U.S. 624 (1930). However, there is some authority that oral false statements can constitute concealment for the purposes of 18 U.S.C. 4. *United States* v. *Hodges*, 566 F.2d 674 (9th Cir. 1977) (*per curiam*).

Three provisions of current law are closely related to liability as an accessory after the fact and to the offense of misprison of a felony. 18 U.S.C. 792 prohibits harboring or concealing a person who the actor knows, or has reason to know, has committed espionage. 18 U.S.C. 1071 prohibits harboring or concealing a person knowing that a warrant has been issued for that person's arrest. 18 U.S.C. 1072 prohibits harboring or concealing a prisoner who has escaped from the custody of the Attorney General. Although no case law exists interpreting the term "conceals" in 18 U.S.C. 792 and 1072, the term in 18 U.S.C. 1071 has been construed not to include oral false statements to law enforcement officers. *United States* v. *Magness*, 456 F.2d 976 (9th Cir. 1972); *United States* v. *Foy*, 416 F.2d 940 (7th Cir. 1969).

Failing to appear as a defendant in a criminal trial, following release by the court, is currently prohibited by 18 U.S.C. 3150. In a prosecution under this section, it is not sufficient merely to prove that the defendant failed to appear as required. The failure must be "willful." *United States* v. *Reed*, 354 F. Supp. 18 (W.D. Mo. 1973). However, it is not necessary for the Government to prove that the defendant actually knew he or she was required to be in court at a specific time, but merely that the defendant was aware of a necessity to appear. *United States* v. *Hall*, 346 F.2d 875 (2d Cir.), *cert. denied*, 382 U.S. 910 (1965), was decided under the predecessor offense to section 3150, which allowed a thirty day "grace period" to a defendant released on bail. The Court held that it was not necessary to prove that the defendant knew that bail had been forfeited and that he had to appear within 30 days. The Court found it sufficient to establish "willfulness" that the defendant knew he had to appear in court and fled the jurisdiction to avoid trial. In *United States* v. *DePugh*, 434 F.2d 548 (8th Cir. 1970), *cert denied*, 401 U.S. 978 (1971) the defendant had been granted a new trial, but became a fugitive before receiving notice of the date for the court appearance. The Court found that the deliberate avoidance of future appearances was sufficient to support a conviction. *See also United States* v. *Bright*, 541 F.2d 471 (5th Cir.), *cert. denied*, 430 U.S. 935 (1976); *United States* v. *Cohen*, 450 F.2d 1019 (5th Cir. 1971); *United States* v. *Bourassa*, 411 F.2d 69 (10 Cir.), *cert. denied*, 396 U.S. 915 (1969).

Escape from the custody of the Attorney General is currently prohibited by 18 U.S.C. 751. In order to prove a violation of 18 U.S.C. 751 the prosecution must prove that the defendant (1) was in custody of the Attorney General (or of a Federal law enforcement officer, or pursuant to Federal court process); (2) as a result of a conviction (or of a lawful arrest, or according to the laws of the United States); and (3) escaped from custody knowing that the acts would result in leaving physical confinement without permission. A specific "intent to avoid confinement" is not an element of the offense. *United States* v. *Bailey*, 444 U.S. 394 (1980). Custody of the Attorney General has been interpreted to include furloughs, work release, halfway houses, hospitals, and various other forms of custody which do not involve constant, or even direct, supervision. *See United States* v. *Lyons*, 609 F.2d 1338 (9th Cir. 1979); *United States* v. *Hollen*, 393 F.2d 479 (4th Cir. 1968); *United States* v. *Jones*, 569 F.2d 449 (9th Cir.), *cert. denied*, 436 U.S. 908 (1978); *United States* v. *Cluck*, 542 F.2d 728 (8th Cir.), *cert. denied*, 429 U.S. 986 (1976).

When an escape is from the custody of a law enforcement officer pursuant to arrest, the prosecution must prove, as an element of the offense, that the arrest was lawful. The fact that an officer may believe that the arrest is lawful, i.e., that the officer is acting in good faith, is not sufficient to fulfill this requirement. *United States* v. *McKim*, 509 F.2d 769 (5th Cir. 1975).

The Supreme Court has recently recognized a defense to a charge of escape based upon duress or necessity. Without delineating the actual requirements for the defense, the Court indicated that under certain circumstances one charged with a violation of 18 U.S.C. 751 may defend on the grounds of coercive jail conditions. The Court did not indicate how immediate or serious the dangers must be in order to give rise to the defense. However, the Court did hold that a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity has lost its coercive force is an essential element of the defense. *United States* v. *Bailey*, 444 U.S. 394 (1980).

The introduction of contraband into correctional facilities is governed by three current law offenses. 18 U.S.C. 1791 prohibits the introduction into, or removal from, a prison of anything whatsoever, if such introduction or removal is contrary to rules issued by the Attorney General. The constitutionality of this delegation of power to the Attorney General has been upheld by the Third Circuit. *United States* v. *Berrigan*, 482 F.2d 171, 182 (3d Cir. 1973).

18 U.S.C. 1792 makes it illegal to take into a prison "or from place to place therein" any firearm, weapon, explosive, or any lethal or poisonous gas, or any other substance or thing designed to kill, injure, or disable any prison employee or inmate. Section 1792 has been construed not to prohibit mere possession of the mentioned items, but to require some movement within the prison. *United States* v. *Jasper*, 523 F.2d 395 (10th Cir. 1975), *cert. denied*, 423 U.S. 1075 (1976).

42 U.S.C. 261 proscribes the introduction of contraband into hospitals where addicts and other drug dependent persons are being treated.

18 U.S.C. 1073 prohibits travel in interstate or foreign commerce with intent to avoid (1) prosecution or detention after conviction for a felony under the laws of the jurisdiction from which the person fled; (2) giving testimony in a criminal trial involving such a crime; or (3) service of process or contempt proceedings for failure to attend and testify in a State proceeding involving a criminal investigation.

18 U.S.C. 1074 parallels the first two provisions of 18 U.S.C. 1073 except that its application is limited to offenses involving the damaging of buildings or vehicles by fire or explosion. Since such offenses would generally constitute felony arson, there is considerable overlap between the sections.

Both sections 1073 and 1074 have a special venue provision that requires that any prosecution for the offenses occur in the Federal judicial district in which the underlying State offense was committed. In addition, no prosecution can be brought under 18 U.S.C. 1073 except upon the formal approval in writing of the Attorney General or an Assistant Attorney General.

§ *1711—Hindering law enforcement*

This section is derived primarily from 18 U.S.C. 3 (accessory after the fact). It adopts the approach of many modern criminal codes and

treats the giving of aid to a person who has committed a crime as an obstruction of law enforcement rather than as a form of accessorial liability for the underlying crime itself. The section also carries forward 18 U.S.C. 792 (involving harboring persons believed to have committed espionage), 1071 (involving concealing persons for whom an arrest warrant has been issued) and 1072 (involving concealing escaped prisoners).

Subsection (a) prohibits intentionally hindering the apprehension, punishment, or conviction of someone charged with a crime by means of (1) harboring or concealing that person, (2) providing that person with a weapon, disguise or other means of avoiding capture, (3) warning that person of impending apprehension, or (4) interfering with a record or other document. There must be a causal connection between the conduct (e.g., a warning) and the hindering of apprehension. The Committee believes that this requirement of a causal connection appropriately carries forward the ruling of *United States* v. *Neal*, 102 F.2d 643 (8th Cir. 1939). *See* discussion at 144 *supra*.

This section is somewhat broader than current Federal law, since current Federal law requires that the principal be guilty of a crime and that the accessory be aware of that guilt. *See United States* v. *Neal*, 102 F.2d 643, 645–46 (8th Cir. 1936). *Cf. United States* v. *Barlow*, 470 F.2d 1245 (D.C. Cir. 1972) (distinguishing accomplice liability under 18 U.S.C. 2 (principals) from that under 18 U.S.C. 3 (accessory after the fact)). However, the subsection does require that an offense have been committed, and that the actor be aware of the commission of the offense and the fact that the other person is being sought.

This section does not make it an offense to attempt to hinder law enforcement. To permit prosecutions of such an attempt would reverse the result of *United States* v. *Neal*, 102 F.2d 643 (8th Cir. 1939), in that it would permit conviction of a person who intended to hinder law enforcement, but destroyed or concealed evidence that was incapable of obstructing the apprehension, conviction or punishment of another. In addition, since the principal predecessor of this section—18 U.S.C. 3—is not an offense but rather a form of accomplice liability, attempt is inapplicable under current law.

Subsections (a)(1) and (4), by requiring that any concealment be accomplished by an act, exclude omissions to act. This is in accord with current interpretations of concealment as used in 18 U.S.C. 1071 (concealing person from arrest) and in related offenses, such as 18 U.S.C. 4 (misprison of felony). *See United States* v. *Foy*, 416 F.2d 940 (7th Cir. 1969); *United States* v. *Shapiro*, 113 F.2d 891 (2d Cir. 1940). *See also* discussion at 148 *infra*. The Committee intends that the term "conceals" not encompass the situation where there is a false oral statement unaccompanied by any other conduct. This interpretation carries forward current Federal law. *See United States* v. *Magness*, 456 F.2d 976 (9th Cir. 1972).

Subsection (b) classifies the offense on the basis of the seriousness of the crime for which the person is sought. The offense is classified as: (1) a D felony if the other person's crime is a class A, B, or C felony and the actor knows the general nature of the conduct constituting the crime, or is reckless with regard to the general nature of the conduct; (2) an E felony if the other person's crime is a class D

felony and (a) the actor knows, or is reckless with regard to, the general nature of the conduct constituting the crime, or (b) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt of, anything of pecuniary value; and (3) an A misdemeanor in any other instance.

Subsection (c) provides that no state of mind need be proven with respect to the circumstance that the crime of the person whose apprehension has been hindered is of a given class.

Subsection (e) provides an affirmative defense where the person sought for the crime was warned solely to induce the person to comply with the law.

Subsection (f) provides that it is not a defense that a concealed object would have been privileged or otherwise inadmissible as evidence. This ensures that decisions regarding privilege and related issues are decided in the courts and not by individuals taking it upon themselves to determine the appropriate administration of justice. Inasmuch as the Committee does not believe that *United States* v. *Neal*, 102 F.2d 643 (8th Cir. 1939), is in any manner concerned with the issue of whether evidence is privileged (*see* discussion at 144 *supra.*), it does not intend by the provision to alter current law.[1] However, the Committee does believe that concerns regarding prosecution for a refusal to disclose privileged information, e.g., communications to a lawyer or priest, are genuine. Therefore, to ensure that questions of privilege are resolved in court, and to prevent the forced, premature revelation of privileged material, subsection (d) provides that an express refusal to relinquish an object, or to reveal its contents, does not constitute concealment. Thus, while a person may not destroy, alter, or conceal the existence of a piece of evidence, the person need not relinquish it except when required to do so by a warrant or subpoena (in which case a failure to relinquish could constitute a contempt or other crime).

Subsection (g) provides for Federal jurisdiction, including extraterritorial jurisdiction, where the crime for which the person is being sought is a Federal crime. This provision is based upon the protective principle of international law.

§ *1712—Misprision of a felony*

This section carries forward 18 U.S.C. 4 (misprision of felony). It supplements section 1742 (false statements) of the proposed code since it covers oral false statements and provides for felony grading when serious crimes are thereby concealed.

Subsection (a) prohibits a person from engaging in any act and thereby knowingly concealing the commission of a felony from appropriate authorities. The term "act" is defined in section 101 and does not include a simple possession or an omission to act. This is in accord with current Federal law. *See Bratton* v. *United States*, 73 F.2d 795, 797 (10th Cir. 1936); *United States* v. *Johnson*, 546 F.2d 1225 (5th Cir. 1977).

Subsection (b) classifies this offense in the same manner as section 1711(b) classifies the hindering law enforcement offense.

[1] The Senate Judiciary Committee, to the contrary, has expressed an opinion that the comparable provision in the Senate legislation to reform Federal criminal laws (S. 1722 of the 96th Congress) reverses *Neal*. SENATE REP. No. 96-553 at 297 n. 24 (1980).

Subsection (c) provides that in a prosecution under this section, no state of mind need be proven about the circumstance that the crime which is concealed is a felony or is of a given class.

Subsection (d) provides an affirmative defense where the defendant learned of the commission of a felony through a privileged communication (e.g., an attorney through privileged communication with a client). Subsection (e) provides for Federal jurisdiction, including extraterritorial jurisdiction, whenever the felony concealed is a Federal offense. This provision is based upon the protective principle of international law.

§ *1713—Aiding consummation of an offense*

This section, like section 1711 of the proposed code, is derived from current 18 U.S.C. 3 (accessory after the fact). Subsection (a) prohibits assisting another to dispose of the fruits of a crime and classifies the offense at one level below the class of the crime assisted. Subsection (b) provides for Federal jurisdiction when the crime assisted is a Federal crime.

§ *1714—False implication of another*

Subsection (a) makes it a class A misdemeanor to make a statement falsely accusing another of a crime, when that statement is given under circumstances that render taking a written or recorded statement impractical. The general policy of the proposed code is to encourage the taking of written statements and to discourage trials based solely upon evidence of one person's word against another's. However, there are situations where oral false statements are very serious and where the taking of a written statement would be impractical. This section was drafted in order to cover such situations.

Subsection (b) provides that it is not necessary to prove a state of mind about the existence of circumstances that make taking a written or recorded statement impractical.

The Committee believes that both written and electronically recorded statements preserve evidence and alert the actor to the seriousness of the situation. Therefore, subsection (c) treats written and simultaneously electronically recorded statements, if recorded with the knowledge of the actor, in the same manner.

Subsection (d) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the law enforcement officer is a Federal law enforcement officer. This provision is based upon the protective principle of international law.

§ *1715—Failing to appear as a defendant*

This section carries forward 18 U.S.C. 3150 (penalties for failure to appear). Subsection (a)(1) prohibits a person released under chapter 63 of the proposed code from failing to appear in court, with reckless disregard for the fact that the person was required to appear by the terms of release under chapter 63. Subsection (a)(2) prohibits a person who has been convicted from failing to surrender for service of sentence with reckless disregard for the fact that the person was required to surrender by a court order. The reckless state of mind as used in subsection (a)(1) and (2) appears to be the best possible approximation of the willfulness requirement of current Federal law. *See United States* v. *DePugh*, 434 F.2d 548 (8th Cir. 1970), *cert. denied*,

401 U.S. 978 (1971); *United States* v. *Hall*, 346 F.2d 875 (2d Cir. 1965).

Subsection (b) classifies the offense according to the offense with which the defendant is charged and according to whether the defendant has been convicted. The offense is classified as (1) a D felony if the person was released in connection with a charge of a class A, B, C, or D felony or while awaiting sentence, pending surrender for service of sentence, or pending review of sentence after conviction of any crime; (2) an E felony if the person was released in connection with a charge of a class E felony; and (3) an A misdemeanor in any other instance. While this classification scheme is similar to the penalty structure of current law, subsection (b) makes more distinctions than does current law.

Subsection (c) provides that in a prosecution under this section no state of mind need be proven about the circumstance that the crime is of a given class or that the release was under chapter 63 of the proposed code.

Subsection (d) provides an affirmative defense that the defendant's failure to appear was due to uncontrollable circumstances not caused by the defendant's own behavior. This is new to current Federal law and is based upon a recommendation of the Brown Commission (*see Final Report* section 1305(3)).

§ *1716—Escape*

This section carries forward, without substantive change, 18 U.S.C. 751 (prisoners in custody of institution or officer).

Subsection (a) makes it an offense to knowingly escape from official detention or to fail to return to official detention following temporary leave. Subsection (b) classifies the offense as (1) a D felony if the actor was in detention as a result of an arrest for a felony or pursuant to a conviction for an offense, and (2) an A misdemeanor in any other instance. This distinction reflects current law.

Subsection (c)(1) provides a defense for escape from custody (other than custody in a detention facility) where the custody was illegal and in bad faith, and where no substantial risk of harm was created by the escape. This provision is narrower than current Federal law, which provides that the legality of the arrest is an element of the offense, *United States* v. *McKim*, 509 F.2d 769 (5th Cir. 1975).

Subsection (c)(2) provides an affirmative defense, which is new to Federal law, where the "escape" constitutes a failure to return from leave, if the failure is due to circumstances beyond the defendant's control and the defendant did not contribute to the creation of those circumstances.

The Committee decided not to codify any defense to justify escape where the prisoner's life or safety was endangered by prison conditions. Such a defense was implicitly approved by the United States Supreme Court in *United States* v. *Bailey*, 444 U.S. 394 (1980). *See also United States* v. *Bryan*, 591 F.2d 1161 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 1013 (1980); *United States* v. *Michelson*, 559 F.2d 567 (9th Cir. 1977); *People* v. *Lovercamp*, 43 Cal. App. 3d 823 (1974). The Committee, by not codifying such a defense, does not intend to preclude further judicial development of such a defense. The Committee, moreover, does not believe that further development of such a defense is precluded by the codification of the duress defense in section 726

of the proposed code. Since the threats and dangers involved are not created with the purpose of causing the defendant to engage in criminal conduct, the Committee believes the defense is more accurately a "necessity" defense. *See* W. LaFave & A. Scott, *Criminal Law* section 50 n.2 (1972).

Subsection (d) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the escape is from Federal custody. This provision is based upon the protective principle of international law.

§ *1717—Providing or possessing contraband in prison*

This section carries forward without substantial change 18 U.S.C. 1791 (traffic in contraband articles), a portion of 42 U.S.C. 261 (penalties for introducing prohibited articles and substances into hospitals), and part of 18 U.S.C. 1792 (mutiny, riot, dangerous instrumentalities prohibited).

Subsection (a)(1) prohibits providing an inmate of a detention facility with contraband or introducing contraband into a detention facility. Subsection (a)(2) prohibits an inmate of a detention facility from possessing contraband. Subsection (a) rejects the approach of current Federal law, which specifically prohibits taking certain objects from a detention facility. Such an approach is unnecessary when an inmate is involved. The inmate can be prosecuted for possession, because the inmate would have to possess the object, either directly or indirectly (as an accomplice), before the object could be taken outside the facility. In the case of a noninmate, removing something from a prison does not constitute nearly the threat to prison discipline or safety as that the introduction of prohibited items constitues. Because protecting prison safety and discipline is the underlying rationale for this section, there seems to be little reason to punish the noninmate for removing an object whose presence in the prison is prohibited.

Subsection (a) modifies current law in two other respects. First, it prohibits possession, by an inmate, of any of the proscribed contraband. Mere possession is not prohibited by current law. *See* discussion at 146 *supra*. In view of this expansion, however, the Committee has limited the criminal offense to contraband which is a weapon, drug, currency, or other object which threatens the security of the detention facility or the life, health or safety of a person. The Committee believes that the introduction and possession of nondangerous contraband can adequately be controlled through prison disciplinary procedures. This provision conforms with the recommendations of the Joint Task Force on American Bar Association Standards Relating to the Legal Status of Prisoners. American Bar Association, *Legal Status of Prisoners* standard 23–6.1, comment at 29 (4th tent. draft 1980).

Subsection (b) grades the offense according to the nature of the contraband involved, ranging from a class C felony if the contraband is a firearm to a class B misdemeanor if the contraband is a dangerous object prohibited by a rule. Subsection (c) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the detention facility is a Federal detention facility. This provision is based upon the protective principle of international law.

§ *1718—Flight to avoid prosecution or appearance as a witness*

This section carries forward, without substantive change, 18 U.S.C. 1073 (flight to avoid prosecution or giving testimony) and 1074 (flight

to avoid prosecution for damaging or destroying any building or other real or personal property). Subsection (a) prohibits interstate flight to avoid prosecution for a state felony or appearance as a witness. Subsection (b) classifies the offense as a D felony where the defendant has already been convicted of the State crime, and an E felony otherwise.

Subsection (c) provides that it is not a defense to a prosecution under this section that the testimony that would have been given, or any record, document, or other object that would have been produced, would have been legally privileged or would have been inadmissible in evidence.

Subsection (d)(1) provides that, before a prosecution can be brought under this section, the Attorney General or an Assistant Attorney General must certify that the prosecution is approved. The certification function cannot be delegated. Subsection (d)(2) provides an exception to the certification requirement where the State crime involved the use of fire or explosion to damage or destroy any building or vehicle. Subsection (d)(1) and (2) carry forward current law.

Subsection (e) provides for Federal jurisdiction if a State or United States boundary is crossed in the commission of the offense.

§ *1719—Definitions for subchapter*

This section defines "official detention" for the purposes of the subchapter on obstruction of law enforcement. The definition covers most institutional detention and detention by law enforcement officers, but excludes release pending proceedings, and release on probation or parole.

SUBCHAPTER III—OBSTRUCTION OF JUSTICE

Current Law

The current law regarding obstructions of justice is found primarily in 18 U.S.C. 201 and in chapter 73 of title 18.

Bribery of witnesses, whether to influence testimony or attendance, is prohibited by 18 U.S.C. 201(d) and (e). The "unlawful rewarding" of witnesses is prohibited by subsections (h) and (i). The discussion of 18 U.S.C. 201 in relation to bribery of public officials, at 185–88 *infra*, is applicable to these provisions.

Sections 1503 and 1505 of title 18 are parallel provisions protecting the integrity of court (section 1503) and Congressional and agency (section 1505) proceedings. Each prohibits threats against witnesses and retaliating against witnesses. Similar protections for court officers is provided by 18 U.S.C. 1503. Tampering with evidence in order to avoid compliance with a civil investigative demand under the Antitrust Civil Process Act (chapter 34 of title 15, United States Code) is prohibited by 18 U.S.C. 1505.

In addition, both 18 U.S.C. 1503 and 1505 prohibit impeding, or "endeavoring" to impede or interfere with proceedings by "threats or force, or by any threatening letter or communication." Finally, both sections prohibit, as a residual clause, "corruptly . . . influenc[ing], obstruct[ing], or imped[ing] or endeavor[ing] to impede the due and proper administration" of justice or of the law under which the proceeding or Congressional inquiry is being conducted.

This latter provision has been the subject of conflicting interpretations. Some courts have applied the *ejusdem generis* rule, requiring the conduct in question to be of a nature similar to that conduct proscribed in earlier paragraphs and clauses of the section. *See, e.g.*, *United States* v. *Metcalf*, 435 F.2d 754 (9th Cir. 1970); *United States* v. *Essex*, 407 F.2d 214 (6th Cir. 1969). Other courts have refused to apply the *ejusdem generis* rule, and consider *any* conduct obstructing the administration of justice within the ambit of 18 U.S.C. 1503. *See, e.g.*, *United States* v. *Howard*, 569 F.2d 1331 (5th Cir.), *cert. denied sub. nom. Ritter* v. *United States*, 439 F.2d 834 (1978). *See also United States* v. *Walasek*, 527 F.2d 676 (3d Cir. 1975). The residual clause has been interpreted to prohibit the destruction or alternation of evidence. *See, e.g.*, *United States* v. *Walasek*, 527 F.2d 676 (3d Cir. 1975); *Bosselman* v. *United States*, 239 F. 82 (2d Cir. 1917); *United States* v. *Simmons*, 444 F. Supp. 500 (E.D. Pa. 1978), *aff'd*, 591 F.2d 206 (3d Cir. 1979); *United States* v. *Presser*, 187 F. Supp. 64 (N.D. Ohio 1960), *aff'd*, 292 F.2d 171 (6th Cir. 1961), *aff'd by an equally divided court*, 371 U.S. 71 (1962); *United States* v. *Siegel*, 152 F. Supp. 370 (S.D.N.Y. 1957); *United States* v. *Solow*, 139 F. Supp. 812 (S.D.N.Y. 1956). In this regard it has been held that while it is not necessary that the evidence destroyed or altered be material to the proceeding in a legal sense, the evidence must bear a "reasonable relationship" to the subject matter of the inquiry. *United States* v. *Siegel*, 152 F. Supp. 370, 374 (S.D.N.Y. 1957).

Success of the obstruction is not required for a conviction under 18 U.S.C. 1503 or 1505. *See, e.g.*, *Knight* v. *United States*, 310 F.2d 305 (5th Cir. 1962). Rather, it has been held that the word "endeavor" reaches conduct so inchoate that it would not constitute an attempt. *United States* v. *Osborn*, 385 U.S. 323 (1966).

The proceeding is explicitly required by 18 U.S.C. 1505 to be pending at the time of the alleged obstruction or attempted obstruction. The term "due administration of justice" in 18 U.S.C. 1503 has been interpreted similarly to require that the proceeding be pending at the time of the alleged violation. *United States* v. *Baker*, 494 F.2d 1262 (6th Cir. 1974); *United States* v. *Metcalf*, 435 F.2d 754 (9th Cir. 1970). *See also Pettibone* v. *United States*, 148 U.S. 197 (1893).

The requirement that the "due administration of justice" be impeded has also been held to exclude from the purview of 18 U.S.C. 1503 mere omissions to act. *Rosner* v. *United States*, 10 F.2d 675 (2d Cir. 1926).

Congress enacted 18 U.S.C. 1510 in 1967 to protect witnesses from improper influence in cases where proceedings were not yet pending. *See United States* v. *San Martin*, 515 F.2d 317, 320 (5th Cir. 1975). The section prohibits interfering, by means of bribery, misrepresentation, or threat, with the communication of information regarding a criminal offense to a law enforcement officer. Unlike 18 U.S.C. 1503 and 1505, the offense does not cover retaliation, but only prospective efforts to influence a potential informant. *Id.* Success, however, is not required, *United States* v. *Carzoli*, 447 F.2d 774 (7th Cir.), *cert. denied*, 419 U.S. 1107 (1975). The offense has been interpreted to require knowledge that the potential recipient is a Federal criminal investigator, *United States* v. *Lippman*, 492 F.2d 314 (6th Cir. 1974), *cert. denied*, 404 U.S. 1015 (1971), and a specific intent to obstruct justice.

United States v. *Carleo*, 576 F.2d 846 (10th Cir.), *cert. denied*, 439 U.S. 850 (1978). *See also United States* v. *Lippman*, 492 F.2d 314 (6th Cir. 1974) *cert. denied*, 419 U.S. 1107 (1975). The offense is not applicable to communications between accomplices. *United States* v. *Cameron*, 460 F.2d 1394, 1401 (5th Cir. 1972).

The written communications with grand or petit jurors with intent to influence the jurors in relation to a matter pending before the jury is prohibited by 18 U.S.C. 1504. The section does not prohibit communications consisting merely of a request to appear before a grand jury.

Picketing or parading in or near a courthouse or a building occupied by a judge, juror, witness, or court officer, if done with the intent to interfere with the administration of justice, or to influence the judge, juror, witness or court officer in the performance of such person's duties, violates 18 U.S.C. 1507. A similar State statute was upheld against constitutional challenge in *Cox* v. *Louisiana*, 379 U.S. 559 (1965). Demonstrations and the use of a sound truck in such areas for the same purpose are also prohibited.

Any effort to listen to or record the deliberations of a grand or petit juror, except when done by a juror in order to better perform such juror's duties, is made unlawful by 18 U.S.C. 1508.

§ *1721—Witness bribery and graft*

This section carries forward those portions of 18 U.S.C. 1503 (influencing or injuring officer, juror or witnesses generally) and 1505 (obstruction of proceedings before departments, agencies, and committees) which prohibit "corruptly" influencing witnesses in judicial, agency, and Congressional proceedings.

Subsection (a) (1) makes it a class C felony for a person, with intent to influence or reward another person, to offer or give anything of value to the other person with regard to the other person's testimony in an official proceeding; withholding testimony (or a record, document, or other object) from an official proceeding; violating section 1725 (tampering with physical evidence), 1731 (criminal contempt), 1732 (failure to appear as a witness), or 1733 (refusing to produce information) of the proposed code; or evading legal process summoning that person to appear as a witness or to produce a record, document or other object. Subsection (a) (2) makes it a class C felony for someone to accept anything of value with the motive to be rewarded or influenced or with the knowledge that the gift is intended to so reward or influence. The terms "anything of value" and "official proceeding" are defined in section 1730 of the proposed code.

Subsection (b) precludes two defenses: (1) that proceedings were not pending; and (2) that the testimony or evidence to have been presented would have been privileged or otherwise inadmissible. The first defense alters current federal law, which requires that proceedings be pending. *See* discussion at 153 *supra*.

Subsection (c) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the witness' testimony is to be in a Federal official proceeding. The provision relating to extraterritoriality is based upon the protective principle of international law.

§ *1722—Informant bribery and graft*

This section carries forward that portion of 18 U.S.C. 1510 (obstructions of criminal investigations) which prohibits the use of

bribery to obstruct the communication to a criminal investigator of information relating to a violation of the law.

Subsection (a) (1) makes it a class C felony to offer or give anything of value to a person in order to influence or reward that person with regard to that person's hindering, delaying, or preventing the communication to a law enforcement officer of information regarding an offsense. The payment is prohibited, of course, whether made directly or indirectly, as, for example, through a go-between. Subsection (a) (2) makes it a class C felony to accept or solicit anything of value with the motive of so hindering, delaying or preventing, or with the knowledge that it is given with the intent to reward or influence the person with regard to that person's so hindering, delaying or preventing.

Subsection (b) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the information is to be conveyed to a Federal public servant and involves a Federal offense. The provisions relating to extraterritoriality is based upon the protective principle of international law.

§ *1723—Tampering with a witness or an informant*

Subsection (a) (1) and (2) carry forward parts of current 18 U.S.C. 1503 (influencing or injuring officer, juror or witnesses generally) and 1505 (obstruction of proceedings before departments, agencies and committees). Both section 1503 and section 1505 proscribe attempts to influence a witness in the discharge of the witness' duties in a judicial proceeding (18 U.S.C. 1503) or in an agency or Congressional proceeding (18 U.S.C. 1505), by the use of force, threats, or other corrupt means. Subsections (a) (1) and (2) make it a class D felony to use physical force, threat, intimidation, or fraud with intent to (1) influence the testimony of another person in an official proceeding, or (2) cause or induce another person to withhold testimony (or a record, document, or other object) from an official proceeding; violate section 1725 (tampering with physical evidence), 1732 (failure to appear as a witness), 1733 (refusing to produce information), or 1734 (refusing to testify) of the proposed code, or evade legal process summoning the other person to appear as a witness (or to produce a record, document, or other object) in an official proceeding.

Subsection (a) (3) carries forward current 18 U.S.C. 1510 (obstruction of criminal investigations), which prohibits misrepresentation, intimidation, force, or threats of force to obstruct "the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator." Subsection (a) (3) prohibits the use of force, threat, intimidation, or fraud with intent to hinder, delay, or prevent the communication to a law enforcement officer of information relating to an offense or a possible offense.

The terms "physical force", "fraud", and "violate" are defined in section 101 of the proposed code. The term "official proceeding" is defined in section 1730 of the proposed code.

Subsection (b) provides an affirmative defense to a prosecution for seeking to influence another's testimony where the actor engaged solely in lawful conduct, and the actor's purpose was to induce the witness to testify truthfully.

Subsection (c) provides Federal jurisdiction, including extraterritorial jurisdiction, when (1) the official proceeding in which the testi-

mony is to occur is a Federal official proceeding or (2) the offense to which the information relates is a Federal offense and the information is to be communicated to a Federal law enforcement officer. The provision relating to extraterritoriality is based upon the protective principle of international law.

§ 1724—Retaliating against a witness or informant

Subsection (a)(1) of this section carries forward portions of 18 U.S.C. 1503 (influencing or injuring officer, juror or witnesses generally), 1505 (obstruction of proceedings before departments, agencies, and committees) and 1510 (obstruction of criminal investigations). Sections 1503 and 1505 prohibit injuring any witness in "his person or property on account of his attending or having attended" an official proceeding. Section 1510 prohibits injuring any person "in his person or property on account of the giving by such person or by any other person of any information" regarding a Federal crime to a criminal investigator.

Subsection (a)(1) prohibits intentionally injuring a person or damaging a person's property with the intent to punish any person for acting as a witness in an official proceeding or for giving information regarding a crime to a law enforcement officer. Subsection (a)(2) parallels subsection (a)(1) where the injury was not damage to tangible property but instead was economic loss to a person or a person's business or profession. It is unclear to what degree such injury would be prohibited by current Federal law.

Conduct consisting of public criticism is exempted from subsection (a)(2) in order to make clear that the offense is not intended to preclude economic action taken against a person because of matters revealed in testimony, as opposed to the giving of testimony itself. For example, the offense is not intended to prevent a union from advocating a boycott of a particular manufacturer's goods because the manufacturer revealed unfair labor practices at a Congressional hearing.

Subsection (b) classifies the offenses as an E felony when the injury is to a person or tangible property and as an A misdemeanor otherwise. Subsection (c) provides for Federal jurisdiction, in the case of witnesses, when the official proceeding is a Federal official proceeding, and in the case of informants, when the information concerns a Federal crime and was given to a Federal law enforcement officer.

§ 1725—Tampering with physical evidence

This section is derived from current 18 U.S.C. 1503 (influencing or injuring officer, juror or witnesses generally) and 1505 (obstruction of proceedings before departments, agencies, and committees). Section 1503 punishes a person who "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice"; section 1505 prohibits such conduct in proceedings before United States agencies and Congress. Both sections have been interpreted to prohibit the destruction of evidence. *See* discussion at 153 *supra*.

Subsection (a) makes it a class E felony for someone, with intent to impair an object's integrity or availability for use in a pending official proceeding, to alter, destroy, or mutilate a record, document, or

other object or to engage in any act and thereby conceal a record, document or other object. Subsection (a) also prohibits attempts. The requirement that the concealment result from affirmative conduct comes from current case law. *See Rosner* v. *United States*, 10 F.2d 675 (2d Cir. 1926). The requirement that the official proceeding be pending at the time the evidence is destroyed comes from current Federal law. *See* discussion at 153 *supra*.

Subsection (b) provides an affirmative defense when the object destroyed would not have been material to the official proceeding. Subsection (c) provides, however, that inadmissibility is not otherwise a defense.

Subsection (d) defines "conceals", with respect to a record, document, or other object, to exclude an express refusal to relinquish possession of, or reveal the contents of, such record, document, or other object. This is necessary in order to protect privileged information. *See* discussion at 148 *supra*.

Subsection (e)(1) defines the term "material" for the purposes of this section. The definition is taken from current law, which developed primarily in perjury prosecutions. A falsification, omission, concealment, forgery, alteration, or other misleading matter is material, regardless of the admissibility of the statement or the object under the Federal Rules of Evidence, if: (1) in a grand jury proceeding, the misleading matter has a natural tendency to influence, impede, or dissuade the grand jury from pursuing an investigation; or (2) in any other proceeding, the misleading matter is capable of influencing the person to whom such matter is presented, on the issue before that person. Subsection (e)(2) provides that whether a matter is material is a question of law. Thus, the question of materiality will be decided by the court (*see* section 121 of the proposed code).

Subsection (f) provides for Federal jurisdiction when the official proceeding is a Federal official proceeding.

§ 1726—Communicating with a juror

This section carries forward current 18 U.S.C. 1504 (influencing juror by writing). Subsection (a) makes it a class B misdemeanor to communicate with a juror with intent to influence that juror. Current law is slightly broadened to cover indirect communications with the juror (e.g., communications with the juror's family with the expectation that such communication will be made known to the juror).

Subsection (b) provides an affirmative defense where the communication is a request to appear before a grand jury. Subsection (c) provides Federal jurisdiction when the juror is a Federal juror.

§ 1727—Monitoring jury deliberations

This section carries forward current 18 U.S.C. 1508 (recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting). Subsection (a) makes it a class B misdemeanor for anyone to record deliberations of a jury or for a nonjuror to listen to such deliberations. Subsection (b) provides a defense where a juror is taking notes in order to assist in the performance of his or her duties as a juror. Subsection (c) provides for Federal jurisdiction when the jury is a Federal jury.

§ *1728—Demonstrating to influence a judicial proceeding*

This section carries forward, in large part, 18 U.S.C. 1507 (picketing or parading), which prohibits demonstrations intended to influence judges, jurors, witnesses or court officers, if conducted "in or near" the courthouse or "in or near" such person's residence. The Committee believes that due process of law requires that persons involved in the administration of justice be protected from community pressures, which are sometimes generated by publicity or political concerns. The Committee has drafted this offense in a manner that balances these fifth amendment concerns with the first amendment guarantees of free speech. Because of the first amendment concerns involved, the Committee has slightly narrowed the current-law offense. Since court officers perform only ministerial duties, and are therefore not likely to be influenced in such duties, demonstrations to influence such persons are no longer covered. The current vague reference to "in or near" the courthouse or residence is replaced with a requirement that the conduct be within 30 meters (approximately 100 feet) of such building. A requirement has been added that the demonstrators be warned that the conduct is an offense, unless they are inside the building.

Subsection (a) makes it a class B misdemeanor for someone, with intent to influence a judge, juror, or witness in the performance of that person's duties in an official proceeding, knowingly to picket or demonstrate (1) in a courthouse, (2) on the grounds of, or within 30 meters of, a courthouse, after being advised that such conduct is unlawful, or (3) in or on the grounds of a building used by a judge, juror or witness, or within 30 meters of such a building (after being advised that such conduct is an offense).

Subsection (b) provides a defense for demonstrations within 30 meters of a courthouse when they are peaceable and nondisruptive and occur more than one-half hour before or after the proceedings in question. Subsection (c) provides for Federal jurisdiction when the judicial proceeding is a Federal judicial proceeding.

§ *1729—Obstruction of official proceeding by fraud*

This section carries forward, in part, the omnibus clauses of 18 U.S.C. 1503 ("Whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice . . .") and 18 U.S.C. 1505 ("Whoever corruptly . . . influences, obstructs, or impedes, or endeavors to influences, obstruct or impede the due and proper administration of the law under which [a] proceeding is being had before [a] department or agency of the United States or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress . . ."). The reach of these sections under current law is unclear. Some circuits have interpreted the omnibus clauses according to the rule of *ejusdem generis*, limiting the clauses to conduct similar to that proscribed in the rest of the section. *See, e.g., United States* v. *Metcalf*, 435 F.2d 754 (9th Cir. 1970); *United States* v. *Essex*, 407 F.2d 214 (6th Cir. 1969). Other courts have interpreted the clause to prohibit *any* interference. *See, e.g., United States* v. *Howard*, 569 F.2d 1331 (5th Cir.), *cert denied sub nom. Ritter* v. *United States*, 439 U.S. 834 (1978).

Section 1729 is part of the Committee's effort to prohibit specific frauds and obstructions of justice. Subsection (a) makes it a class D felony to interfere by fraud with the due administration of justice, the due administration of a law under which an official proceeding is being conducted, or the Congressional power of inquiry. The Committee intends to continue current case law interpretations of the term "due administration".

The term "fraud" is broadly defined in section 101 of the proposed code. Thus, it is possible that some quite appropriate behavior could fall within the statute's prohibition. For example, an attorney, in closing argument, may omit some facts favorable to the opposing party. This would literally be fraud within the definition of that term in section 101 ("omitting a material fact with intent to mislead"), and the attorney would certainly be intending to influence the outcome of the proceedings. Similarly, a witness who invoked a fifth amendment privilege against self-incrimination might be concealing a material fact from the jury. The conduct in both examples would not be criminal under present Federal law, which requires that the interference be "corrupt".

Subsection (b), therefore, provides a defense where the actor was asserting constitutional rights, or where the actor was an attorney ethically representing a client's interests. The Committee intends that the applicable professional codes of ethics determine what representations are ethical.

Subsection (c) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the proceeding is a Federal proceeding. The provision for extraterritoriality is based on the protective principle of international law.

§ *1730—Definitions for subchapter*

This section defines "anything of value" and "official proceeding" for the purposes of the subchapter on obstruction of justice.

The definition of "anything of value" in this section modifies the definition of that term in section 101 by excluding certain things. Excluded from the general definition of "anything of value" (for the purposes of this subchapter) are: (1) witness fees provided for by statute; and (2) travel and subsistence fees, and fees for preparing and presenting an expert opinion, paid to a witness by the party calling the witness.

The term "official proceeding" is defined in this section to mean a proceeding before: (1) a judge or court of the United States ("court of the United States" is defined in section 101 of the proposed code), a United States magistrate, a bankruptcy judge, or a Federal grand jury; (2) the Congress; and (3) a Federal government agency, if that proceeding is authorized by law. The term "government agency" is defined in section 101 of the proposed code.

SUBCHAPTER IV—CONTEMPT OFFENSES

Current Law

Contempt, broadly defined, is disobedience or disrespect of a government body or official. Government entities are empowered to punish contempt in order to ensure that government proceedings are orderly and that government orders are effective. Under current law,

there are separate statutes prohibiting certain forms of contempt for numerous administrative, legislative, and judicial entities.

Included within the broad category of all contempt offenses is the crime of contempt of court. The power invested in a judge to punish contempt of court is awesome. The only sentence foreclosed by 18 U.S.C. 401, the current federal contempt of court statute, is one of death. Moreover, many procedural safeguards that are afforded to all other criminal defendants are not extended to defendants charged with contempt of court. Thus, the court can impose a sentence of up to six months imprisonment and a fine (within certain limits) on a "misbehaving" defendant without providing a jury trial. *Cheff* v. *Schanckenberg*, 384 U.S. 373, 380 (1966) (Clark J., plurality) (court, acting pursuant to its supervisory powers, holds that "sentences exceeding six months (for criminal contempt) may not be imposed by federal courts absent a jury trial or waiver thereof."); *Frank* v. *United States*, 395 U.S. 147 (1969) (defendant not entitled to a jury trial where the punishment for criminal contempt was 3 years probation); *Muniz* v. *Hoffman*, 422 U.S. 454 (1975) (defendant labor union not entitled to a jury trial despite a $10,000 fine); *Douglas* v. *First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976) (an individual defendant is entitled to a jury trial in a criminal contempt case where a fine of more than five hundred dollars is imposed); *United States* v. *Seale*, 461 F.2d 345, 352–56 (7th Cir. 1977) (to determine whether a sentence exceed six months the court should aggregate consecutive punishments for criminal contempt). Furthermore, the fifth amendment right of indictment by a grand jury does not apply to a criminal contempt offense. *Green* v. *United States*, 356 U.S. 165, 183–87 (1958). It has also been held that the double jeopardy clause of the fifth amendment does not prohibit a summary citation for contempt followed by a prosecution for another substantive offense directly arising out of the same conduct. *United States* v. *Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971).[1] In addition, unlike the entire remaining area of criminal law where a defendant is entitled to have a trial before an impartial judge, a defendant in a summary contempt proceeding will have guilt determined the sentence imposed by the judge who has been offended.

The basic Federal contempt of court statute is 18 U.S.C. 401, which empowers a court of the United States to punish: "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; and (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command." Under current law, four basic elements are required for conviction under section 401(1): (1) intentional conduct, (2) constituting misbehavior, (3) which causes an actual and material disruption or obstruction of the

[1] The court in *Rollerson* specifically limited its holding to the facts of that case, in which the defendant had been summarily cited for contempt, on the view that such a "contempt proceeding did not amount to a separate hearing or proceeding of the kind which invokes the double jeopardy clause." United States v. Rollerson, 449 F. 2d 1000, 1004–05 (D.C. Cir. 1971). Where the contempt is not dealt with summarily, however, the constitutional protection against double jeopardy prohibits successive prosecutions for contempt and for another substantive offense arising out of the same conduct. United States v. United States Gypsum Co., 404 F. Supp. 619, 624–25 (D.D.C. 1975). The Senate Judiciary Committee comment upon the contempt section of the Senate Criminal Code bill, S. 1722, overstates the limited holding of *Rollerson*, SENATE REP. No. 96–553 at 345 (1980).

administration of justice, (4) within the court's presence or near thereto. *United States* v. *Seale*, 461 F.2d 345, 366–67 (7th Cir. 1972); *United States ex rel Robson* v. *Oliver*, 470 F.2d 10 (7th Cir. 1972).

Misbehavior is defined as "conduct inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel, or spectator." *United States* v. *Seale*, 461 F.2d 345, 366 (7th Cir. 1972). Furthermore, one must know that one is misbehaving in order to be convicted for contempt. There is disagreement among the circuits, however, on the question of whether one must have a purpose to subvert the administration of justice to be convicted of violating section 401(1). *See Eighth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1977–78*, 67 Geo. L. J. 317, 556 (1978). The Second Circuit Court of Appeals has indicated that one must have an intent to obstruct the administration of justice: "To warrant a conviction in criminal contempt, the contemnor's conduct must constitute misbehavior which rises to the level of an obstruction of and an imminent threat to the administration of justice, and it must be accompanied by the intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice." *In re Williams*, 509 F.2d 949, 960 (2d Cir. 1975).

The Seventh Circuit, on the other hand, does not require an intent to subvert the administration of justice in order to support a conviction for contempt: a conviction will be sustained if one who engages in a volitional act that constitutes misbehavior "knows or should reasonably be aware that his conduct is wrongful," *United States* v. *Seale*, 461 F.2d 345, 368 (7th Cir. 1972).[2] The Court in *Seale* also noted that in borderline cases an individual should not be found to have the requisite intent unless the court has issued a prior warning that the objectionable conduct is considered to be contumacious. The statute has also been construed to require an act in the "vicinity" of the court to distinguish contempt from obstruction of justice. *Nye* v. *United States*, 313 U.S. 33, 48–52 (1941).

Section 401(2) is similar to section 401(1) except that the former applies only to officers of the court acting in official transactions. The term "officers of the court" includes marshals, bailiffs, court clerks, and court reporters but not attorneys. *Cammer* v. *United States*, 350 U.S. 399, 405–08 (1956). Furthermore, there is no explicit requirement in section 401(2) that the misbehavior obstruct the administration of justice.

The elements of an offense under section 401(3) are a deliberate disobedience or resistance to a court order of which the defendant had knowledge. Section 401(3) is phrased in terms of disobedience to a "lawful" court order. Despite the wording of this section, the invalidity of a court order is generally not a defense in a criminal contempt proceeding alleging its disobedience. *United States* v. *United Mine Workers*, 330 U.S. 258, 293–94 (1947). The rationale behind this rule is that one who does not believe that a court order is valid has recourse in the appellate process and should not be able personally to decide what

[2] The Brown Commission did not propose a modification in the language of 18 U.S.C. 401 and thereby sought to "perpetuate the judicial construction of [its provisions] which has occurred over the years." BROWN COMMISSION, FINAL REPORT § 1341, comment at 121 (1971).

court orders to obey. When the opportunity for effective review is absent, however, the invalidity of a judicial order has been considered to be a defense to a contempt conviction for its violation. *United States* v. *DiMauro*, 441 F.2d 428, 436 (8th Cir. 1971); *United States* v. *Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972) (*dictum*). Furthermore, if the court is without jurisdiction to enter the order, disobedience of that order will not give rise to a conviction for contempt. *In re Sawyer*, 124 U.S. 200, 221–22 (1888).

Under 18 U.S.C. 401 the court has authority to punish contempt of court by fine or imprisonment "at its discretion". Reviewing courts occasionally will reduce sentences imposed by trial courts if they find an abuse of discretion. *See United States* v. *Bukowski*, 435 F.2d 1094, 1110 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971).

Current law on contempt of Congress is contained in 2 U.S.C. 192. This section prohibits refusals by witnesses to testify or to produce evidence. The offense is a misdemeanor. Contrary to the situation in proceedings regarding contempt of court, the question or evidence refused must have been "pertinent" to the inquiry before a person can be convicted of contempt of Congress. Prosecutions under section 192 can only be commenced following a certification by the presiding officer of the offended House. *See* 2 U.S.C. 194.

Failures to appear before agencies, and to produce subpoenaed documents, are prohibited in various sections of the United States Code. In many cases, a failure to respond is punishable by contempt, but only after a court orders compliance. *See, e.g.*, 7 U.S.C. 87f(b); 15 U.S.C. 78u. In at least one instance, failure to respond constitutes a misdemeanor without intervening court order. *See, e.g.*, 43 U.S.C. 104.

Introduction to subchapter

Subchapter IV divides the current contempt power of the courts into two categories. First, section 1731 continues the courts' power over criminal contempt. Second, sections 1732, 1733, 1734, and 1735 make into criminal offenses certain conduct that the Committee considered to be particularly harmful to the administration of justice, and which is currently punishable as contempt. The Committee attempted to define those offenses in a manner that addresses the true harm against which they are directed. In addition, the Committee developed defenses to prevent potential abuses, a potential which, it should be noted, exists in present Federal law as well. Finally, because the proposed code treats the activity covered in sections 1732 through 1735 as criminal offenses, traditional due process guarantees will apply to prosecutions under those sections.

Since current law does not punish contempt as a crime and a contemnor suffers none of the collateral consequences of a conviction for a crime, the Committee has been reluctant to classify contemnors as felons. In general, the Committee believes that the consequences of a conviction for a class A misdemeanor are sufficient to deter contempt of court.

§ *1731—Criminal contempt*

Subsection (a) restates, in the manner of current 18 U.S.C. 401, the types of contempt that are punishable with criminal sanctions: misbehavior in the court's presence or so near as to be disruptive; misbehavior of an officer of the court in an official transaction; and disobedience

of a lawful writ, process, or order. Subsection (a) also provides that the maximum penalty for criminal contempt is 5 days imprisonment and a $500 fine.

Subsection (b) provides bars to punishment under this section where the court order disobeyed was: (1) an invalid order and the alleged contemnor took reasonable and expeditious steps to obtain judicial review of the order, or a judicial decision with respect to a stay of the order, and was unsuccessful in obtaining such review or decision; or (2) a constitutionally invalid order.

Subsection (c) provides that a punishment for contempt under this section does not bar subsequent prosecution for any offense other than an offense described in subchapter IV of chapter 17. Subsection (c) further provides that any person who is convicted in a subsequent prosecution is entitled to have credited towards any fine or imprisonment imposed for the subsequent offense any fine paid or time spent in confinement under this section for the same transaction.

Subsection (d) provides that this section does not affect the civil contempt powers of a Federal court—i.e., those contempt powers used to secure compliance with an order, rather than to punish disobedience to the order.

Section 1731 places two new limitations upon the power of a Federal court. First, a person may not be punished for disobeying a constitutionally invalid order, or an otherwise invalid order when the alleged contemnor was unable to obtain judicial review of the order before having to disobey the order. The Committee does not believe that this limitation will encourage disobedience to a court order, since the vast majority of such orders are valid, and any person who disobeys a court order will be doing so at the person's own risk. Second, the court may not impose a prison sentence of more than 5 days or a fine of more than $500. The Committee believes that this limitation is appropriate in view of the separate penalties provided in subsequent sections for serious forms of contempt.

It has been suggested that the contempt power of the Courts may be "inherent" and that Congress may lack the ability to limit that power. Brown Commission, *Working Papers* 642–45 (1970). As noted by the Supreme Court, although the lower Federal courts would not exist but for legislation creating them, and are therefore limited to the powers granted by Congress, "[c]ertain implied powers must necessarily result to our courts of justice, from the nature of their institution. . . . To fine for contempt, imprison for contumacy, enforce the observance of orders are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute . . . ." *United States* v. *Hudson*, 11 U.S. (7 Cranch.) 32, 34 (1812).

The Supreme Court, however, has clearly acknowledged the ability of Congress to limit these contempt powers, regardless whether they be originally derived from legislation. In *Nye* v. *United States*, 313 U.S. 33 (1941), the Court rejected its earlier statements in *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402 (1918) that the predecessor of 18 U.S.C. 401 did not expand or limit the pre-existing contempt power of the courts:

> The inaccuracy of that historic observation has been plainly demonstrated. Frankfurter & Landis, *Power of Congress over*

Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010. Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck impeachment proceedings. Congress was intent on curtailing that power. The two sections of the Act of March 2, 1831 [enacting the predecessors to 18 U.S.C. 401, 1503] when read together, as they must be, clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined. That the previously undefined power of the courts was substantially curtailed by that Act was early recognized . . . .

313 U.S. at 47–48. As noted, the Court's opinion was in the context of a statute creating a criminal offense, the predecessor of 18 U.S.C. 1503, which covered conduct previously punishable as contempt. The Court went on to say that if the contempt powers were given a broad meaning, "[t]he result will be that the offenses which Congress designated as true crimes under § 2 of the Act of March 2, 1831 will be absorbed as contempts wherever they may take place. We cannot by the process of interpretation obliterate the distinctions which Congress drew." Id. at 49–50. *See also United States* v. *Wilson*, 421 U.S. 309, 315 n. 6 (1975).

The Committee believes that the approach taken in this subchapter is analogous to the action taken by the Congress in the Act of March 2, 1831. The subchapter fashions criminal offenses to prohibit much conduct currently punishable as contempt. The Committee interprets *Hudson* only to require that Congress not divest the courts of the ability to enforce their orders. Under the approach of this subchapter, courts remain able to enforce their orders and process through civil contempt (which is the preferred method of obtaining compliance, *Shillitani* v. *United States*, 384 U.S. 364, 371 n. 9 (1966)), through the general contempt powers provided in section 1731 of the proposed code, and by compelling a prosecution under this subchapter pursuant to the procedures provided in section 1736 of the proposed code. The Committee believes that these abilities more than adequately fulfill the constitutional requirements.

§ *1732—Failing to appear as a witness*

This section carries forward current 18 U.S.C. 401, to the extent that section 401 punishes failure to appear as a witness pursuant to subpoena or other court order, as well as various other current law sections involving failure to respond to a subpoena (e.g., 2 U.S.C. 192 (refusal of witness to testify or produce papers)).

Subsection (a) makes it a class A misdemeanor to fail to comply with an order to appear at a specified time and place as a witness in an official proceeding, an order to remain at a specified place where the actor is to appear as a witness in an official proceeding, or an order to be sworn (or to make an equivalent affirmation) as a witness in an official proceeding. The term "official proceeding" is defined in section 1737 of the proposed code.

Subsection (b) provides an affirmative defense (1) when the failure to appear was due to circumstances to which the defendant did not contribute, or (2) when the actor voluntarily complies with the order before the proceedings are substantially affected by the actor's non-

compliance. The Committee believes that the latter defense provides an incentive to alter an inappropriate course of conduct and thereby prevents serious disruption of an official proceeding.

Subsection (c) provides for Federal jurisdiction, including extraterritorial jurisdiction, if the official proceeding is a Federal official proceeding. The provision for extraterritoriality is based on the protective principle of international law.

§ *1733—Refusing to produce information*

This section carries forward current 18 U.S.C. 401 to the extent that it punishes failure to comply with an order to produce evidence, as well as various other current law sections involving failure to respond to an order to produce information (e.g., 2 U.S.C. 192 (refusal of witness to testify or produce papers)).

Subsection (a) makes it a class A misdemeanor (1) to fail to comply with an order to produce a pertinent record, document, or other object in an official proceeding conducted under the authority of Congress (or either House of Congress) or (2) to fail to comply with an order to produce a record, document, or other object in any other official proceeding. The pertinency requirement is taken from present Federal law (2 U.S.C. 192).

Subsection (b)(1) provides affirmative defenses to a prosecution under this section where (1) the actor was legally privileged to refuse to produce the record, document, or other object, (2) the failure to produce the information was due to circumstances to which the defendant did not recklessly contribute, or (3) the actor voluntarily complied with the order before the actor's failure to do so substantially affected the proceeding. Subsection (b)(2) provides an affirmative defense to a prosecution under subsection (a)(2) where the record, document, or other object was not material to the official proceeding. Section 1737(b) of the proposed code defines "material" for the purposes of this section.

The affirmative defense regarding materiality and privilege are new. The Committee does not believe it appropriate to punish a person for refusing to produce information where there was an erroneous finding that the information was material or was not privileged. It should be noted that, without these affirmative defenses, the actor would never be able to test such a finding. The Committee also does not believe that the existence of these affirmative defenses will encourage disobedience to court orders, since such disobedience will be at the actor's own risk.

Subsection (c) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the official proceeding is a Federal official proceeding. The provision for extraterritoriality is based on the protective principle of international law.

Subsection (d) provides that, in a prosecution under subsection (a)(1), it is a question of law (as to which no state of mind need be proven) whether a record, document, or other object was pertinent or whether an official proceeding is conducted under the authority of Congress (or either House of Congress).

§ *1734—Refusing to testify*

This section carries forward current 18 U.S.C. 401, to the extent that section 401 punishes failure to comply with an order to testify,

as well as various other current law sections involving failure to comply with an order to testify (*e.g.*, 2 U.S.C. 192) (refusal of witness to testify or produce papers).

Subsection (a)(1) makes it an offense for someone, in an official proceeding conducted under the authority of Congress (or either House of Congress), to refuse to answer a pertinent question after the presiding officer has directed the actor to answer and advised the actor that the refusal to answer the question might subject the actor to criminal penalties. The pertinency requirement is taken from present Federal law (2 U.S.C. 192). Subsection (a)(2) makes it an offense for someone, in any other official proceeding, to refuse to answer a question after a court of the United States (or, in a proceeding conducted before a United States magistrate or bankruptcy judge, after the presiding officer) has directed the actor to answer and advised the actor that the refusal to answer the question may subject the actor to criminal prosecution.

Subsection (b) classifies the offense as an E felony if committed after a grant of immunity, and as a A misdemeanor in any other case. The Committee believes that the harm to the Government is greater in the former case, because the Government has done everything within its power to convince the person to testify, and because the person does not have a lawful basis for refusal.

Subsection (c)(1) provides an affirmative defense to a prosecution under this section where the actor was legally privileged to refuse to answer the question. Subsection (c)(2) provides an affirmative defense to a prosecution under subsection (a)(2) where the answer to the question would not have been material to the official proceeding. Section 1737(b) defines "material" for the purposes of this section.

The Committee does not believe it appropriate to punish a person for refusing to answer a question where there was an erroneous finding that the answer to the question was material or was not privileged. It should be noted that, without these affirmative defenses, the actor would never be able to test such a finding. The Committee also does not believe that the existence of these affirmative defenses will encourage disobedience to court orders, since such disobedience will be at the actor's own risk.

Subsection (c)(3) provides a defense to a prosecution under this section where the defendant voluntarily complied with the order before the defendant's failure to do so substantially affected the proceeding.

Subsection (d) provides that in a prosecution under subsection (a)(1), it is a question of law (as to which no state of mind need be proven) whether an official proceeding is conducted under the authority of Congress (or either House of Congress) or whether a grant of immunity was lawful.

Subsection (e) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the official proceeding is a Federal official proceeding. The provision for extraterritoriality is based on the protective principle of international law.

§ *1735—Disobeying a judicial order*

This section carries forward current 18 U.S.C. 401, to the extent that section 401 prohibits failure to comply with certain court orders. Subsection (a) prohibits disobeying or resisting a temporary restraining order, preliminary injunction, or final order other than an order for the payment of a fine. The offense is a class A misdemeanor, except that the court may assess any fine deemed appropriate.

Subsection (b) provides a defense when the order in question was constitutionally invalid, or was otherwise invalid and the actor did not have a reasonable opportunity to seek review of the order.

Subsection (c) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the order is of a court of the United States. The provision for extraterritoriality is based on the protective principle of international law. The term "court of the United States" is defined in section 101 of the proposed code.

§ *1736—Certification for prosecution of offenses under sections 1732 through 1735*

Current law requires certification by Congress prior to a prosecution for contempt of Congress. Although it appears that criminal contempts of court have on occasion been prosecuted by indictment, Rule 42 of the Federal Rules of Criminal Procedure requires that the court give notice to the defendant prior to the prosecution of the defendant for criminal contempt. (The only exception provided for by Rule 42 is where the contempt occurs in the presence of the court and the judge certifies that the judge saw or heard the conduct constituting the contempt, in which case the judge may proceed summarily. Section 1731 of the proposed code permits the judge to proceed summarily.)

Thus, contempt proceedings under current law appear to be largely in the control of the court. Since the conduct proscribed by all of the offenses in subchapter IV of the proposed code (i.e., sections 1732–35) would be considered contempt under current law, the Committee believes it appropriate to apply the certification requirement to all subchapter IV offenses.

Subsection (a)(1) requires that, before a person can be prosecuted under sections 1732–35 of the proposed code for activity before a court of the United States, the judge (or a majority of the judges on a multi-judge court) must certify the case to the United States attorney to be considered for possible prosecution. An exception to the certification requirement occurs where the prosecution is under section 1735 and the United States or a Government agency is a party to the matter in which the order issues. Subsection (a)(2) provides that where a certification includes a recommendation for prosecution, the United States attorney must institute prosecution or bring the matter before the grand jury for the grand jury's action.

Subsection (b)(1)(A) requires that, before a person can be prosecuted under section 1732 or 1733 of the proposed code for activity before a grand jury, a judge must certify the case to the United States attorney to be considered for possible prosecution. Subsection (b)(1)(B) requires that, before a person can be prosecuted under section 1734 for activity before a grand jury, the judge whose direction has allegedly been disobeyed (or any other judge if that judge is no longer serving) must certify the case to the United States attorney to be considered for possible prosecution. Subsection (b)(2) provides that where a certification includes a recommendation for prosecution, the United States attorney must institute prosecution or bring the matter before the grand jury for the grand jury's action.

Subsection (c)(1) requires that, before a person can be prosecuted under section 1732, 1733, or 1734 of the proposed code for activity before a United States magistrate or a bankruptcy judge, a judge of the United States district court must certify the case to the United States attorney to be considered for possible prosecution. Subsection (c)(2) provides that where a certification includes a recommendation for prosecution, the United States attorney must institute prosecution or bring the matter before the grand jury for the grand jury's action.

Subsection (d) requires that, before a person can be prosecuted under section 1732, 1733 or 1734 of the proposed code for activity before Congress, the facts of the violation must be reported to either House (or to the Speaker of the House or the President of the Senate if the Congress is not in session). If the appropriate House so directs, the Speaker of the House or the President of the Senate shall certify the statement of facts to the appropriate United States attorney, who must bring the matter before the grand jury for the grand jury's action.

Subsection (e) provides that a failure to comply with the certification requirement is a bar to prosecution.

It has been suggested that the certification requirement may violate the constitutional separation of powers doctrine. *See* Statement of Phillip Heymann, Assistant Attorney General, Hearings on Revision of Federal Criminal Laws before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 1st sess. (1980). This argument is based on the premise that the decision to prosecure lies solely in the hands of the executive branch, subject only to due process and equal protection limitations. *See United States* v. *Nixon*, 418 U.S. 683, 693 (1974) (*dictum*); *United States* v. *Cox*, 342 F.2d 167 (5th Cir.), *cert. denied sub nom. Cox* v. *Hauberg*, 381 U.S. 935 (1965). *Cf. Confiscation Cases*, 74 U.S. (7 Wall.) 454, 461 (1868) (dictum, interpreting statutory authority and limitations). However, some courts have expressly avoided determining whether such discretion would exist if Congress explicitly precluded discretion. *See Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375, 382 (2d Cir. 1973) ("It is therefore unnecessary to decide whether, if Congress were by explicit direction and guidelines to remove all prosecutorial discretion with respect to certain crimes or in certain circumstances we would properly direct that a prosecution must be undertaken."); *Powell* v. *Katzenbach*, 359 F.2d 234, 235 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966) ("We will assume, without deciding, that where Congress has withdrawn all discretion from the prosecutor by special legislation, a court might be empowered to force prosecutions in some circumstances.") Contempt is a unique offense. Under current law, the court is empowered to initiate a contempt prosecution on its own, without concurrence of the prosecutor, and can appoint an attorney to prosecute the case. Fed. R. Crim. P. 42(b). *See McNeill* v. *United States*, 236 F.2d 149, 153 (1st Cir.), *cert. denied*, 352 U.S. 912 (1956); *In re Fletcher*, 216 F.2d 915, 917 (4th Cir. 1954), *cert. denied*, 348 U.S. 931 (1955). The offenses in this subchapter were fashioned by the Committee in order to ensure that a person charged with a serious contempt be afforded the procedural protections which are given to a person charged with a crime. The Committee has not changed the basic nature of the contempt offenses. They remain affronts against the court. The Committee therefore believes that it is both appropriate, and constitutional, to allow the offended court compel a prosecution, and to bar a prosecution to which the offended court objects. Further, because of the limitations placed on the general criminal contempt power in section 1731 of the proposed code, permitting a court to compel a prosecution under the criminal provisions of this subchapter may be constitutionally required. Absent such a provision, the ability of courts to enforce their orders and process would be seriously hampered. See discussion at 163–64 *supra*.

The certification requirements of this section parallel the certification requirements of 2 U.S.C. 194, which requires the United States Attorney to present the contempt to a grand jury when Congress certifies the contempt. This provision of current law has never been subjected to constitutional challenge, even though the same "separation of powers" problem exists as in this section.

The certification provisions of section 1736 are essentially identical with those advocated by the Brown Commission, *Final Report* section 1349 (1971).

§ *1737—General provisions for subchapter*

Subsection (a)(1) defines "official proceeding" to mean: (1) a proceeding before a judge or "court of the United States" (a term which is defined in section 101 of the proposed code), a United States magistrate, a bankruptcy judge, or a Federal grand jury; (2) a proceeding before Congress; (3) a Federal proceeding in which a "court of the United States" is authorized by law to order attendance or the production of information and does so order; (4) a proceeding before an "authorized agency" (a term defined in subsection (a)(2)); and (5) a proceeding which otherwise is made expressly subject to this subchapter.

Subsection (a)(1)(C) refers to those agencies empowered to issue orders to attend their proceedings, but whose orders are not enforceable by contempt proceedings unless a court first orders compliance with the order. *See*, *e.g.*, 7 U.S.C. 499m, regarding subpoena power of the Secretary of Agriculture. Subsection (a)(1)(C), by requiring court orders in such proceedings, does not change this practice. The current law provisions regarding the subpoena powers of such agencies are amended in section 722 of title II of this Act to provide that in the case of a refusal to obey a subpoena, the issuing agency may seek a court order compelling such attendance, disobedience of which order is punishable pursuant to this subchapter.

Subsection (a)(1)(D) refers to proceedings before "authorized agencies", which, according to the definition of subsection (a)(2) are those agencies the disobedience of whose subpoenas are directly subject to the sanctions of this subchapter without a prior court order. In such a case, current law provides for criminal punishment of a failure to obey the subpoena. The Committee is only aware of one current law provision in which criminal prosecutions are the exclusive method of enforcing subpoenae: 43 U.S.C. 104 provides that refusing to obey a subpoena of the District Land Offices of the Department of the Interior is punishable by a fine of $200, 90 days imprisonment, or both. In order to conform with subsection (a)(2), this provision is amended in section 722 of title II of this Act to provide that a failure to obey the sub-

poena of a District Land Office is punishable pursuant to this subchapter.

In current law, a number of provisions state that agency subpoenae may be enforced both through criminal prosecutions and through contempt proceedings following a court order. *See e.g.*, 7 U.S.C. 87f (Federal Grain Inspection Service); 15 U.S.C. 78u (Securities Exchange Commission). Current law is unclear regarding whether an intervening court order compelling attendance is a prerequisite to a criminal prosecution. The Committee is aware of only one reported prosecution under the criminal provisions of these laws. In *United States* v. *Becker*, 259 F.2d 869, 870 (2d Cir. 1958), *cert. denied*, 358 U.S. 929 (1979), the defendant was convicted of "willfully and knowingly neglect[ing] to produce certain of the books and papers called for by a summons served upon him by a special agent of the Internal Revenue Service" in violation of 27 U.S.C. 7210. However, the statement of the case does not set out the procedures followed prior to the criminal prosecution. A number of cases hold that a good faith challenge to an agency subpoena cannot be the basis of a criminal prosecution, but do not answer the question of what procedure must precede such a prosecution. *See Reisman* v. *Caplan*, 375 U.S. 440, 446–47 (1964) ("It is true that any person summoned who 'neglects to appear or to produce' may be prosecuted under [26 U.S.C.] 7210 . . . However, this statute on its face does not apply where the witness appears and interposes good faith challenges to the summons. It only prescribes punishment where the witness 'neglects' either to appear or to produce. We need not pass on the coverage of this provision in light of the facts here."); *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U.S. 375, 387 (1938) ("Section 307(c) [of the Federal Power Act, 16 U.S.C. 825f] also provides that any person who willfully fails or refuses to attend and testify, or produce books and papers, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor. . . . The qualification that the refusal must be 'willful' fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court before obedience is compelled."); *Casey* v. *Federal Trade Comm'n*, 578 F.2d 793, 797 (9th Cir. 1978); *Atlantic Richfield Co.* v. *Federal Trade Comm'n*, 546 F.2d 646, 648–49 (5th Cir. 1977); *First National City Bank* v. *Federal Trade Comm'n*, 538 F.2d 937, 938 (2d Cir. 1976); *Anheuser-Busch, Inc.* v. *Federal Trade Comm'n*, 359 F.2d 487, 490 (8th Cir. 1966). In view of this lack of clarity, the Committee does not believe that it is in a position to determine which of the agencies in this group should be granted the power to issue subpoenae, the disobedience to which would constitute a criminal offense without an intervening court order. Therefore, section 722 of title II of this Act amends such provisions of the laws granting the agencies subpoena powers as provide for enforcement through contempt to provide for punishment pursuant to this subchapter in the case of disobedience to a court order for compliance. The provisions for criminal prosecution are not amended, and courts remain able to interpret those provisions according to their original legislative intent. However by virtue of subsections (a)(1)(C) and (a)(2), Congress can in the future designate an agency as an "authorized agency" simply by providing that disobedience to a subpoena of the agency is punishable pursuant to this subchapter.

Subsection (a)(3) defines "official proceeding before Congress" to mean an authorized inquiry before either House of Congress, any joint committee of Congress, or any committee or subcommittee of either House of Congress.

Subsection (b) provides that for the purposes of subchapter IV (contempt offenses), a statement or object is material, regardless of the admissibility of the statement or object under the rules of evidence, if: (1) in a grand jury proceeding, such statement or object has a natural tendency to influence, impede, or dissuade the grand jury from pursuing such grand jury's investigations; or (2) in any other proceeding, such statement or object is capable of influencing the person to whom such statement or object is presented on the issue before such person.

Subsection (c) provides that for the purposes of subchapter IV, it is a question of law whether a matter is material and whether the actor is legally privileged. Thus, such issues are to be determined by the court (*see* section 121 of the proposed code). The provisions of subsection (c) are taken from current Federal case law regarding perjury. *See* p. 172 *infra.*

SUBCHAPTER V—PERJURY, FALSE STATEMENTS, AND RELATED OFFENSES

Current Law

1. *Perjury.*—Perjury is traditionally the making of a false material statement under oath. There are currently two major Federal perjury offenses, 18 U.S.C. 1621 and 18 U.S.C. 1623. Section 1623, enacted in 1970, relates to perjury committed in Federal court or grand jury proceedings. Section 1621 applies to any false statement under oath.

Both offenses require that the false statement be material. Federal Courts of Appeal have generally defined materiality, when used in connection with perjury, to mean that which " 'has a natural tendency to influence, impede, or dissuade a grand jury from pursuing its investigation,' " *United States* v. *Collins*, 272 F.2d 650 (2d Cir. 1959), *cert. denied*, 362 U.S. 911 (1960), or, with regard to other proceedings that which is " 'capable of influencing the tribunal on the issue before it.' " *Fraser* v. *United States*, 145 F.2d 145 (6th Cir. 1944), *cert. denied*, 324 U.S. 842 (1945), quoting *Blackmon* v. *United States*, 108 F.2d 572, 573 (5th Cir. 1940). *See also United States* v. *Fayer*, 573 F.2d 741 (2d Cir.), *cert denied*, 439 U.S. 831 (1978); *United States* v. *Anfield*, 539 F.2d 674 (9th Cir. 1976); *United States* v. *Lardieri*, 497 F.2d 317 (3d Cir. 1974); *United States* v. *Masters*, 484 F.2d 1251 (10th Cir. 1973).

It appears the Supreme Court has never defined materiality in connection with perjury. It has, however, defined the term in other connections. With regard to omissions in the context of securities laws, the Court has stated "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976). This definition is not as narrow as might appear. The Supreme Court stated with regard to the test:

> This standard is fully consistent with *Mills'* general description of material as a requirement that "the defect have a significant *propensity* to affect the voting process." *It does not require proof of a substantial likelihood that disclosure*

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> *of the omitted fact would have caused the reasonable investor to change his vote.* What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.

Id. (second emphasis added.)

The *TSC Industries* test has also been applied in the context of disputes arising under the Immigration and Naturalization Act. In *Castaneda-Gonzales* v. *Immigration and Naturalization Service*, 564 F.2d 417, 431 (D.C. Cir. 1977), the court stated,

> Typically, "materiality" is applied as an objective test of the significance of a fact to the transactions under consideration. Under that test a misrepresentation is generally deemed material if it is shown that the correct facts would have had a bearing on the action of a decision maker.

In a footnote, the *Castaneda-Gonzales* court noted that this test has been applied in the context of the Federal securities laws, the law of torts, and the law of contracts. *Id* at 431 n.29. *See also Ivey* v. *United States Dep't. of Housing and Urban Development*, 428 F.Supp. 1337 (N.D.Ga. 1977) (applying the definition in the context of the Truth in Lending Act). Whether the Supreme Court would apply the *TSC Industries* test in a perjury case is, of course, unknown.

Current Federal law is clear that the question of materiality in a perjury case is one of law, to be decided by the court. *See, e.g., Vitello* v. *United States*, 425 F.2d 416 (9th Cir. 1969), *cert. denied*, 400 U.S. 822 (1970). *See also Sinclair* v. *United States*, 279 U.S. 263, 298 (1929) ("materiality of what is falsely sworn, when an element in the crime of perjury is one for the court").

One apparent difference between 18 U.S.C. 1621 and 18 U.S.C. 1623 is that, while section 1621 requires only that a person not believe a statement to be true, section 1623 requires that the statement in fact be false. This difference is reinforced by an interpretation of section 1621 in *United States* v. *Remington*, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952), to permit prosecution under an indictment charging the defendant with making an objectively true statement which he believed was false. (This interpretation was dicta; Remington's conviction was reversed for lack of instruction on the necessity of corroborative evidence. By requiring corroborative evidence (the so-called, but misnamed, "two witness rule"), the court considerably ameliorated the effect of its conclusion that a perjury prosecution was possible for an objectively true statement.)

Nonetheless, this difference between 18 U.S.C. 1621 and 1623 is probably more apparent than real. Although the conclusion of the *Remington* court would seem in consonance with the literal language of section 1621, the Supreme Court, in *Bronston* v. *United States*, 409 U.S. 352 (1973), rejected a literal reading of the section. *Bronston* holds that a perjury conviction cannot be based on a literally true, though misleading by implication, unresponsive answer. Some Courts of Appeals have interpreted *Bronston* to mean that a prosecution is not possible for a literally true statement. In *United States* v. *Cook*, 489 F.2d 286 (9th Cir. 1973), the court stated: "Fairly interpreted, *Bronston* stands for the precept that a perjury conviction cannot be based on answers which are literally true, even though false information is conveyed by implication." *Id.* at 287. Similar statements have been made, in dicta or holding, by the Fifth, Seventh, First, and Eighth Circuit Courts of Appeals. *See United States* v. *Vesags*, 586 F.2d 101, 104 (8th Cir. 1978); *United States* v. *Laikin*, 583 F.2d 968, 970 (7th Cir. 1978); *United States* v. *Kehoe*, 562 F.2d 68 n.2 (1st Cir. 1977); *United States* v. *Plyman*, 551 F.2d 965, 966 (5th Cir. 1977); *United States* v. *Williams*, 536 F.2d 1202 (7th Cir. 1976); *United States* v. *Makris*, 483 F.2d 1082 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974). No cases reject the broad interpretation of *Bronston*. (The Third Circuit appears to have accepted the broad reading, but limited it by noting that where the question is ambiguous, the falsity of the answer to be judged according to the meaning of the question as understood by the defendant. *United States* v. *Long*, 534 F.2d 1097, 1101 (3d Cir. 1976).)

An additional issue in current law regarding the falsity of statements in the question of the culpable state of mind required regarding the falsity in order to sustain a conviction of perjury. According to Professor Perkins, perjury in the common law stressed the falsity of the oath, not the statement under oath. Thus, "In perjury . . ., since the requirement is not that the testimony be untrue but that the oath be false, the witness who testifies without having any idea whether his statement is true or false, is not merely taking a chance. He is committing perjury whichever way it may turn out to be. It has been characterized as perjury even if the witness believed his statement to be true, if he realized that he had no knowledge one way or the other." R. Perkins, *Criminal Law* 460 (2d ed. 1969) (footnotes omitted). At another point, Perkins quotes a Pennsylvania case: "The testimony assigned as perjury must be false, . . . with knowledge of its falsity (or given recklessly) . . . ." *Id.* at 456.

Early Federal cases appeared to stress the "false oath" approach, and would perhaps, therefore, have only required recklessness were the issue presented in that form. *See, e.g., United States* v. *Richards*, 149 F. 443 (D. Neb. 1906); *United States* v. *Atkins*, 24 F. Cas. 885 (D. Mass. 1856) (No. 14,474). Many of these cases, however, also relied upon a belief that a true statement could be the subject of a perjury prosecution. In addition, a literally reading of 18 U.S.C. 1621 ("which he does not believe to be true") would suggest a reckless standard. However, to the degree that these interpretations rely upon 18 U.S.C. 1621 in not requiring falsity, they are seriously undermined by *Bronston*.

While modern case law in Federal courts never actually addresses the sufficiency of recklessness, in decisions before and after *Bronston*, courts continually speak in terms of a requirement of knowledge. *See*, regarding 18 U.S.C. 1621, *United States* v. *Sweig*, 441 F.2d 114, 117 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971) ("The accused's knowledge of the falsity of his statements at the time he made those statements is essential to a perjury conviction under 18 U.S.C. § 1621"); *Beckanstin* v. *United States*, 232 F. 2d 1, 4 (5th Cir. 1956) (requiring that the statement be made with intent to deceive, and be willfully, deliberately, knowingly and corruptly false); *United States* v. *Laurelli*, 187 F.

Supp. 30 (M.D. Pa. 1960), *aff'd*, 293 F.2d 830 (3d Cir. 1961) (requiring that the defendant believed what he swore to was false, and had the intent to deceive). *See*, regarding 18 U.S.C. 1623, *United States* v. *Dudley*, 581 F. 2d 1193 (5th Cir. 1978) (requiring that defendant testified with knowledge of the falsity, and stating that offense is a specific intent crime, requiring an intent to conceal facts, to mislead, or to impede the proceedings); *United States* v. *Crippen*, 570 F. 2d 535, 537 (5th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) ("The essence of the crime of false swearing is the defendant's knowledge at the time of his testimony that it is untrue."). *Contra*, *United States* v. *Strassi*, 443 F. Supp. 661, 666 (D.N.J. 1977), *aff'd*, 583 F.2d 122 (3d Cir. 1978) (concluding that the knowledge requirement of section 1623 applies to the making of the statements, not to their falsity; citing for the conclusion [1970] U.S. Code Cong. & Ad. News 4024; *United States* v. *Slawik*, 548 F. 2d 75, 87 (3d Cir. 1977); and *United States* v. *Lardieri*, 497 F.2d 317 (3d Cir. 1974), none of which actually support the court's conclusion).

The significant differences between sections 1621 and 1623 are not in the substantive areas discussed above, but are rather in matter of proof. Current Federal law requires proof by two witnesses or one witness plus independent corroboration for conviction under section 1621. *Weiler* v. *United States*, 323 U.S. 609 (1945). This rule is derived from the common law. The justification of the rule has been explained by the Supreme Court:

> Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon an oath against an oath. The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

Weiler v. *United States*, 323 U.S. 606, 609 (1945). However, Congress, in enacting 18 U.S.C. 1623, explicitly disavowed the application of any special "proof" rules to prosecutions for the offense.

Another difference between the sections is that section 1621, unlike section 1623, does not permit a perjury conviction to be based on the making of two inconsistent statements under oath unless the prosecution can prove which statement is false. This is a corollary of the rule requiring one witness plus corroboration. *See United States* v. *Buckner*, 118 F. 2d 468 (2d Cir. 1941). Section 1623 provides that falsity of a statement can be proved by evidence of two inconsistent statements. However, the section also provides that it is a defense to a prosecution based on inconsistent statements that the defendant believed each statement to be true at the time the statement was made.

The final significant difference between the current law offenses is that section 1623, unlike section 1621, provides for a defense of "recantation" or "retraction." Thus, if a defendant admits the falsity of a previously made statement in the same proceeding, before the proceeding is substantially affected and before it becomes apparent that the falsity will be exposed, the defendant will not be held liable.

In addition to 18 U.S.C. 1623 there are a large number of statutes scattered throughout the United States Code dealing with perjury in one way or another and providing diverse penalties. Thus, a false sworn statement making a claim for United States Government life insurance is said to be "perjury" with a two-year maximum prison penalty (38 U.S.C. 787). Filing a false sworn affidavit in an application to the Coast Guard for a certificate of service as an able bodied seaman, which is also termed "perjury," carries a sentence of imprisonment not to exceed one year (46 U.S.C. 672(d)). Title 18 itself contains an offense declaring that a false statement to obtain Federal employees' compensation is "perjury" and is to be penalized by imprisonment for not more than one year (18 U.S.C. 1920). Other statutes merely say that specific sworn false statements are deemed perjury and that violators are to be "subject to all the pains and penalties of perjury under the statutes of the United States" (16 U.S.C. 364), or subject to be "punished as provided by section 1621 of Title 18" (8 U.S.C. 1357(b)) or, in the most obscure form, "subject to the punishment provided therefor by section one hundred and twenty-five of the Act of March fourth, nineteen hundred and nine, entitled 'An Act to codify, revise and amend the penal laws of the United States'."

In addition to the prohibitions against perjury, current law also prohibits, in 18 U.S.C. 1622, the subornation of perjury. However, one cannot be convicted of an offense under section 1622 unless the perjury has actually been committed. *United States* v. *Tanner*, 471 F. 2d 128 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972).

2. *False statements.* Section 1001 of title 18 of the United States Code is the Federal false statement offense of general applicability. It applies to written and, to an uncertain degree, to certain oral false statements made to a government official, but not under oath. In addition, there are more than one hundred and fifty specific false statement statutes and regulations dealing with particular Federal agencies. These are scattered throughout the United States Code as well as the Code of Federal Regulations, and provide widely divergent penalties for similar acts. They include the following:

1. 7 U.S.C. 15b
2. 7 U.S.C. 85
3. 7 U.S.C. 87b
4. 7 U.S.C. 270
5. 7 U.S.C. 473
6. 7 U.S.C. 503
7. 7 U.S.C. 511i
8. 7 U.S.C. 953
9. 7 U.S.C. 1156
10. 7 U.S.C. 1373
11. 7 U.S.C. 1380o
12. 7 U.S.C. 1903
13. 7 U.S.C. 2015
14. 8 U.S.C. 1182
15. 8 U.S.C. 1185
16. 8 U.S.C. 1252
17. 8 U.S.C. 1306
18. 8 U.S.C. 1325
19. 8 U.S.C. 1357
20. 11 U.S.C. 205
21. 12 U.S.C. 630
22. 12 U.S.C. 631
23. 12 U.S.C. 1457
24. 12 U.S.C. 1730
25. 12 U.S.C. 1847
26. 13 U.S.C. 213
27. 13 U.S.C. 221
28. 15 U.S.C. 50
29. 15 U.S.C. 645
30. 15 U.S.C. 714m
31. 15 U.S.C. 1173
32. 15 U.S.C. 1611
33. 15 U.S.C. 1717
34. 15 U.S.C. 1825
35. 16 U.S.C. 776b
36. 16 U.S.C. 831t

37. 16 U.S.C. 916e
38. 17 U.S.C. 116(d)
39. 17 U.S.C. 506
40. 18 U.S.C. 152
41. 18 U.S.C. 287
42. 18 U.S.C. 288
43. 18 U.S.C. 289
44. 18 U.S.C. 542
45. 18 U.S.C. 545
46. 18 U.S.C. 550
47. 18 U.S.C. 954
48. 18 U.S.C. 1001
49. 18 U.S.C. 1003
50. 18 U.S.C. 1005
51. 18 U.S.C. 1006
52. 18 U.S.C. 1007
53. 18 U.S.C. 1008
54. 18 U.S.C. 1010
55. 18 U.S.C. 1011
56. 18 U.S.C. 1012
57. 18 U.S.C. 1013
58. 18 U.S.C. 1014
59. 18 U.S.C. 1015
60. 18 U.S.C. 1016
61. 18 U.S.C. 1017
62. 18 U.S.C. 1018
63. 18 U.S.C. 1019
64. 18 U.S.C. 1020
65. 18 U.S.C. 1021
66. 18 U.S.C. 1022
67. 18 U.S.C. 1026
68. 18 U.S.C. 1027
69. 18 U.S.C 1158
70. 18 U.S.C. 1542
71. 18 U.S.C. 1546
72. 18 U.S.C. 1712
73. 18 U.S.C. 1722
74. 18 U.S.C. 1732
75. 18 U.S.C. 1919
76. 18 U.S.C. 1920
77. 18 U.S.C. 1922
78. 18 U.S.C. 2072
79. 18 U.S.C. 2073
80. 18 U.S.C. 2386
81. 18 U.S.C. 2424
82. 19 U.S.C. 1436
83. 19 U.S.C. 1581
84. 19 U.S.C. 1919
85. 19 U.S.C. 1975
86. 19 U.S.C. 2316
87. 19 U.S.C. 2349
88. 20 U.S.C. 1087
89. 21 U.S.C. 333
90. 21 U.S.C. 843
91. 21 U.S.C. 1041
92. 22 U.S.C. 1203
93. 22 U.S.C. 2778
94. 25 U.S.C. 399
95. 26 U.S.C. 7206
96. 26 U.S.C. 7207
97. 26 U.S.C. 7214
98. 26 U.S.C. 7232
99. 26 U.S.C. 7241
100. 26 U.S.C. 7303
101. 26 U.S.C. 9012
102. 29 U.S.C. 439
103. 29 U.S.C. 461
104. 29 U.S.C. 666
105. 30 U.S.C. 49e
106. 30 U.S.C. 689
107. 31 U.S.C. 1052
108. 33 U.S.C. 931
109. 33 U.S.C. 990
110. 33 U.S.C. 1319
111. 33 U.S.C. 1368
112. 35 U.S.C. 25
113. 38 U.S.C. 787
114. 39 U.S.C. 6419
115. 40 U.S.C. 883
116. 42 U.S.C. 263
117. 42 U.S.C. 408
118. 42 U.S.C. 1383
119. 42 U.S.C. 1395nn
120. 42 U.S.C. 1713
121. 42 U.S.C. 1857c–8
122. 42 U.S.C. 1973i
123. 42 U.S.C. 2000b–3
124. 42 U.S.C. 2000c
125. 42 U.S.C. 3426
126. 42 U.S.C. 3611
127. 42 U.S.C. 3792
128. 42 U.S.C. 4912
139. 42 U.S.C. 5157
130. 42 U.S.C. 6928
131. 45 U.S.C. 359
132. 46 U.S.C. 58
133. 46 U.S.C. 83i
134. 46 U.S.C. 229e
135. 46 U.S.C. 231
136. 46 U.S.C. 403
137. 46 U.S.C. 643
138. 46 U.S.C. 820
139. 46 U.S.C. 838
140. 46 U.S.C. 839
141. 46 U.S.C. 1171
142. 46 U.S.C. 1276

143. 47 U.S.C. 220
144. 49 U.S.C. 20
145. 49 U.S.C. 322
146. 49 U.S.C. 917
147. 49 U.S.C. 1021
148. 49 U.S.C. 1118
149. 49 U.S.C. 1472
150. 49 U.S.C. 1725
151. 50 U.S.C. 210
152. (a) 50 U.S.C. 855
153. (b) 50 U.S.C. App. 12
154. 50 U.S.C. App. 1191(c)(5)(A)
155. 50 U.S.C. App. 1193(h)
156. 50 U.S.C. 1215

Section 1001 punishes three offenses: (1) falsifying, concealing, or covering up a material fact by trick, scheme, or device; (2) making an oral statement or representation which is false, fictitious or fraudulent; and (3) making or using false writings or documents. For each of the offenses, the prosecutor must show that the defendant acted "knowingly and willfully," and that the false statement related to a matter "within the jurisdiction of any department or agency of the United States."

Although the word "material" is mentioned only in reference to the first offense, most courts have held that materiality is an element of all section 1001 violations. *See, e.g.*, *United States* v. *Johnson*, 530 F.2d 52 (5th Cir.), *cert. denied*, 429 U.S. 833 (1976); *Gonzales* v. *United States*, 286 F.2d 118, 120 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961). The Second Circuit has rejected the majority view and held that materiality is a necessary element only for the first category of prohibited activity (i.e., falsification, concealment, or cover up by trick, scheme, or device). *United States* v. *Silver*, 235 F.2d 375, 377 (2d Cir.), *cert. denied*, 352 U.S. 880 (1956).

The standard for determining whether a statement is "material" has been variously stated in terms of whether it has a natural tendency to influence, or is capable of influencing, the decision of the tribunal in making a required determination, *See, e.g.*, *Blake* v. *United States*, 323 F.2d 245 (8th Cir. 1963); *Gonzales* v. *United States*, 286 F.2d 118 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961), or whether the falsification is calculated to induce action or reliance by an agency of the United States. *See United States* v. *Parten*, 462 F.2d 430 (5th Cir.), *cert. denied*, 409 U.S. 983 (1972); *United States* v. *East*, 416 F.2d 351 (9th Cir. 1969). The test is the intrinsic capability of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances. *See United States* v. *Quirk*, 167 F. Supp. 462 (E.D. Pa. 1958); *Brandow* v. *United States*, 268 F.2d 559, 565 (9th Cir. 1959).

The history of section 1001 demonstrates a continual expansion of the scope of the offense.

The predecessor to section 1001 was passed during the Civil War to criminalize frauds perpetrated on the United States resulting in pecuniary loss to the government. Act of March 2, 1863, ch. 47, 12 Stat. 696 (1863). In 1934, as the number of Federal agencies increased, Congress amended the statute to include false statements within the jurisdiction of these Federal agencies, even if there was no pecuniary loss to the government. Act of June 18, 1934, ch. 587, section 35, 48 Stat. 996 (1934). In 1948, the statute was divided: false or fraudulent claims made upon the government were treated in 18 U.S.C. 287, while false statements were dealt with in 18 U.S.C. 1001. Act of June 25, 1948,

ch. 645, 62 Stat. 683, 698, 749 (1948). However, the penalties remained the same for both offenses; as a result, false statements that present no great threat to the government are penalized as severely as frauds resulting in monetary loss. *See United States* v. *Bramblett*, 348 U.S. 503 (1955); *United State* v. *Gilliland*, 312 U.S. 86 (1941); Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 Va. L. Rev. 451 (1977).

Many Federal courts have expressed concern about the apparent breadth of 18 U.S.C. 1001, particularly since its penalty (5 years imprisonment and/or $10,000 fine) is greater than that for perjury under 18 U.S.C. 1621 (5 years imprisonment and/or $2,000). *See, e.g.*, *United States* v. *Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972):

> If . . . section 1001 were read literally, virtually any false statement, sworn or unsworn, written or oral, made to a Government employee could be penalized as a felony. Thus read, section 1001 would swallow up perjury statutes and a plethora of other Federal statutes proscribing the making of false representations in respect of specific agencies and activities of the Government.

Some of these courts have ruled that Congress never intended that the section be given its literal meaning. Thus, it has been held that oral statements during a criminal investigation are not within the jurisdiction of an agency that does not have the power to finally dispose of the results of the investigation. *See Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967); *United States* v. *Stark*, 131 F. Supp. 190 (D.Md. 1955). *See also United States* v. *Moore*, 185 F.2d 92 (5th Cir. 1950) (holding that inquiry made by Department of Labor to determine whether it has jurisdiction is not a matter within the jurisdiction of the Department). A statement that is merely an "exculpatory no" has been excluded from the reach of the offense. *See United States* v. *Bush*, 503 F.2d 813 (5th Cir. 1974); *United States* v. *Paternostro*, 311 F.2d 298 (5th Cir. 1962); *United States* v. *Davey*, 155 F. Supp. 175 (S.D. N.Y. 1957). One court has held that the offense does not apply where the agency is seeking admissions rather than investigating. *See United States* v. *Stoffey*, 279 F.2d 924 (7th Cir. 1960). While one court has excluded involuntary statements, *United States* v. *Stark*, 131 F. Supp. 190 (D.Md. 1955), another has limited the application of the offense to situations where there is a legal obligation to respond, *United States* v. *Levin*, 133 F. Supp. 88 (D.Colo. 1953). Most courts have been particularly concerned with the effect of the false statement on the functioning of the agency in question. *See United States* v. *Bedore*, 455 F.2d 1109, 1111 (9th Cir. 1972):

> [S]ection 1001 was not intended to reach all false statements made to governmental agencies and departments, but only those false statements that might support fraudulent claims against the Government, or that might pervert or corrupt the authorized functions of those agencies to whom the statements were made. Typical . . . are false reports of crime made to federal law enforcement agencies that may engender groundless federal investigations. . . .
>
> The statute was not intended to embrace oral, unsworn statements, unrelated to any claim of the declarant to a privilege from the United States or to a claim against the United States, given in response to inquiries initiated by a federal agency or department, except, perhaps, where such a statement will substantially impair the basic functions entrusted by law to that agency.

See also Friedman v. *United States*, 374 F.2d 363 (8th Cir. 1967); *United States* v. *Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957).

Despite the concern expressed by some courts, however, other courts have given section 1001 its literal interpretation. *See, e.g., United States* v. *Adler*, 380 F.2d 917 (2d Cir. 1967), *cert. denied*, 389 F.2d 1006 (1967).

Courts are somewhat divided over the issue of the state of mind required for a violation of 18 U.S.C. 1001. The section requires that the offense be committed "knowingly and willfully." The Fifth Circuit has interpreted this term to require an "intent to deceive", *United States* v. *Lange*, 528 F.2d 1280 (5th Cir. 1976), but not an "intent to defraud." *United States* v. *Godwin*, 566 F.2d 976 (5th Cir. 1978). The Third Circuit has stated that an "evil motive" is required, *United States* v. *Weiler*, 385 F.2d 63 (3rd Cir. 1967), while the Fifth Circuit has said that it is not, *Corcoran* v. *United States*, 229 F.2d 295 (5th Cir. 1956). Other courts have simply required knowledge of the falsity of the statement, and incorporated in that requirement the concept of "willful blindness". *United States* v. *Egenberg*, 441 F.2d 441 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971); *United States* v. *Clearfield*, 358 F. Supp. 564 (E.D. Pa. 1973). See discussion at 35–36 *supra*.

3. *Government records.* A number of offenses currently found in various titles of the United States Code are concerned with improper handling of Government records. The basic provision is 18 U.S.C. 2071 which covers all Government records; that section is overlapped by 18 U.S.C. 1506, which deals specifically with judicial records, and 18 U.S.C. 641, involving theft or embezzlement of Government records.[1]

18 U.S.C. 2071 punishes someone who willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys or, with intent to do so, takes and carries away, any record, proceeding, map, book, paper, document, or other thing filed or deposited with any clerk or officer of a court of the United States or in any public office, or with any judicial or public officer of the United States. It also punishes someone who, having the custody of any such record, etc., willfully and unlawfully conceals, removes, mulilates, obliterates, falsifies, or destroys the same.

The term "willfully" in this section has been construed to require some knowledge by the defendants that their actions are in violation of law, but not to require proof of any evil motive, so that a belief in the moral correctness of the conduct does not immunize the person performing it from criminal liability. *See United States* v. *Moylan*, 417 F.2d 1002, 1004–05 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *United States* v. *Cullen*, 454 F.2d 386, 390–92 (7th Cir. 1971); *United States* v. *Simpson*, 460 F.2d 515, 518 (9th Cir. 1972). These cases all arose in the context of prosecutions of persons for destroying records of the Selective Service System in which knowledge of the law was conceded.

[1] 18 U.S.C. 641 and 1506 are also carried forward, in part, in subchapter IV (relating to theft related offenses) of chapter 25 of the proposed code.

The purpose of 18 U.S.C. 2071 has been held to be to prevent conduct that deprives the Government of the use of its records. Because of this purpose, the section has been construed as not extending to the act of photocopying Government documents without authority, where the documents themselves were not removed from the premises or altered in any way. It has been noted, however, that the act of photocopying might be sufficient to constitute the offense of theft under 18 U.S.C. 641. *United States* v. *Rosner*, 352 F. Supp. 915, 919–922 (S.D.N.Y. 1972), *aff'd and remanded for resentencing*, 485 F.2d 1213 (2d Cir. 1973).

18 U.S.C. 1506 punishes someone who, *inter alia*, feloniously steals, takes away, alters, falsifies, or otherwise avoids any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect.

§ *1741—Perjury*

This section carries forward current 18 U.S.C. 1621 and 1623 and various other specific perjury sections throughout the United States Code. Subsection (a) makes it a class D felony to make, under oath or equivalent affirmation, a material false statement, or to affirm a previously made material false statement. (The term "material" is defined for the purposes of this section in section 1745(b)(2) of the proposed code.) The requirement of materiality is derived from the common law. R. Perkins, *Criminal Law* 461–63 (1969); J. Miller, *Criminal Law* 471–72 (1934). The section carries forward the current Federal law requirement that the defendant know (or be willfully blind concerning) the falsity of the statement. By declining to make it a crime to attempt perjury, the Committee endorses the view of current Federal law that the making of a true statement under oath does not constitute perjury, even where the defendant believes the statement to be false. *See* pp. 173–174 *supra*.

The concept of sworn testimony is so basic to the judicial function that there is a temptation to say that one who intends any falsity, while under oath, should be subject to severe criminal sanction. However, the Committee believes that, in determining the propriety of a broad perjury offense, the deterrent effect of punishing true statements made with the belief that they are false must be weighed against the inhibiting effect of confronting witnesses with potential prosecutions that would be based solely upon question of states of mind—not provable by direct evidence—and therefore very difficult to defend. The Committee believes that perjury prosecutions should not, and cannot, be the primary means of flushing out the truth. As Chief Justice Burger has stated,

> One consideration of policy overshadowed all others during the years when perjury first emerged as a common-law offense: "that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying." A leading 19th century commentator, quoted by Dean Wigmore, noted that the English law "throws every fence around a person accused of perjury," for "the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges, of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure: and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission,—such as publicity, cross-examination, the aid of a jury, etc.; and on the infliction of a severe, though not excessive punishment, wherever the commission of the crime has been clearly proved."

Bronston v. *United States*, 409 U.S. 352, 359 (1973) (citations omitted).

Subsection (b) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the statement is made in a Federal official proceeding. The provision for extraterritoriality is based on the protective principle of international law.

§ *1742—Making a false statement*

This section carries forward, in part, current 18 U.S.C. 1001 (statements or entries generally) and the myriad other offenses in the United States Code which prohibit false statements. Subsection (a)(1) makes it an offense for someone, in a government matter (as defined in section 1745 of the proposed code), to: (1) knowingly make a false material written or recorded statement; (2) omit information from such a statement, thereby cause a material portion of that statement to be misleading or conceal a material fact, and thereby intentionally create a false impression in that statement; (3) submit, with intent to mislead, a material writing or recording that is false, forged, or lacking in authenticity; (4) submit, with intent to mislead, a specimen or other object that is misleading in a material respect; or (5) use a trick, scheme or device with intent to mislead in a material respect.

The Committee believes that when a person is making a statement to a government agency, it should be sufficient to justify criminal liability that the person is aware, or is willfully blind concerning the fact that, the statement is false. When, however, the conduct is less clearly defined, such as the use of a trick, scheme or device, the Committee believes that it is important to require an intent to mislead so that a person will have sufficient notice of the conduct prohibited. Moreover, there may be instances where a person may properly cause reliance on, for example, a forged document in order to prove a matter to which the forgery is relevant (e.g., ineligibility for a Federal benefit). Absent the requirement of an intent to mislead in subsection (a)(1)(C), the person would be violating this section.

Subsection (a)(2) makes it an offense for an agent of a credit institution to engage in any of the activity described in subsection (a)(1) with intent to deceive or harm the government or a person. Subsection (a)(3) makes it an offense for someone to engage in any of the activity described in subsection (a)(1) with respect to a statement intended to influence the action of a credit institution.

Subsection (b)(1) classifies the offense as an E felony if the statement is made in the course of an audit or investigation authorized by the Inspector General Act of 1978, or by other Acts of Congress creating Inspector General offices, and as an A misdemeanor in all other cases. Subsection (b)(2) provides for a special $100,000 fine for orga-

nizations violating this section, notwithstanding the ordinary $25,000 limit on fines for misdemeanors.

Subsection (c) provides that no state of mind need be proved regarding the fact that an audit or investigation is authorized by the laws establishing Inspector General offices.

Subsection (d) defines "recording", as used in this section, to mean a simultaneous recording made by electronic device with the knowledge of the actor.

Subsection (e) provides Federal jurisdiction, including extraterritorial jurisdiction, (1) when the government matter is a Federal Government matter; (2) when the government matter is not Federal, but the statement is that the declarant is a United States citizen (*see* 18 U.S.C. 911); and (3) when the credit institution is a national credit institution (*see* 18 U.S.C. 1005, 1006). The provision for extraterritoriality is based on the protective principle of international law.

Section 1742 does not cover oral false statements. Current case law is divided on whether oral false statements are prohibited by 18 U.S.C. 1001. *Compare United Staates* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), *with Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967). *See* Note, *Prosecution for False Statements to the Federal Bureau of Investigation—The Uncertain Law*, 29 Syracuse L. Rev. 763 (1978); Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 Va. L. Rev. 451 (1977).

The Committee believes that there are two compelling reasons for not punishing simple oral false statements. First, proof in such cases frequently involves the word of one person against another regarding what was said. Such "swearing contests" have long been considered undesirable. Second, a failure to punish oral false statements will encourage the government's use of written or recorded statements which constitute better records and superior evidence in trial. The inclusion of recorded statements is based on the Committee's belief that a recording documents a statement similarly to a writing.

The Committee realizes, however, that there are certain cases where punishment of oral false statements is neither inappropriate nor difficult. For example, where it is impractical to obtain a written statement, the societal interest in prosecuting the crime may outweigh the concerns about "swearing contests". Thus, the Committee punishes oral false statements in section 1712 (misprision of a felony), section 1714 (false implication of another) and section 1744 (false statements about emergencies). The Committee believes that these provisions, in conjunction with the coverage of written and recorded statements under this section, are more than adequate to serve the legitimate needs of law enforcement. In addition, where false statements produce an undesired result, the result provides corroboration of the false statement. False statements with undesired results are also more serious than simple false statements. Thus, the proposed code defines "fraud" is essentially the same terms as those used in the prohibitions of section 1742, but includes oral false statements as fraud. The proposed code then specifies particular frauds which have undesired results as crimes. *See, e.g.*, section 1516 (fraudulently acquiring or improperly using a passport), section 1729 (obstruction of official proceedings by fraud), and section 2531 (theft). The Committee believes that this approach is consistent with the efforts of those courts

that have attempted to assess false statements according to the significance of the interference with government functions. *See* pp. 178–79 *infra*.

Consistent with this approach, the general offense of making a false statement is classified as an A misdemeanor. The Committee believes that serious conduct currently prosecuted under the felony provisions of 18 U.S.C. 1001 will be prosecutable under the various fraud sections of the proposed code. However, false statements submitted during the course of an audit or investigation authorized by the Inspector General Act of 1978, or by other Acts of Congress creating Inspector General offices, are classified as E felonies. The Committee determined that such statements should be punishable as felonies for two reasons: First, persons subjected to Inspector General audits and investigations are generally public servants, or persons administering federally supported programs. The Committee believes that such persons should be held to a higher standard in matters related to the administration of Government programs than should other citizens. Second, the Committee recognizes that many statements made in an audit or investigation occur after the conduct, such as embezzlement, which constitutes that actual harm to the Government. In such a case it may be very difficult to prove the crime which occurred earlier. Allowing felony punishment for this narrow class of false statements will better protect the integrity of Government programs without creating an overbroad, felony false statement offense.

The Committee's approach to the false statement offense is supported by the American Bar Association, *see* statement of William Greenhalgh, Chairperson, Committee on Criminal Code Revision, American Bar Association, Hearings on Revision of the Federal Criminal Code Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 1st sess. (1980); the Business Roundtable, Letter from John K. Tabor, Esq., Purcell & Nelson, on behalf of the Business Roundtable, to O. Eric Hultman, Chief Legislative Assistant to Senator Strom Thurmond (May 9, 1979); and the American Civil Liberties Union, *see* statement of John Shattuck on Behalf of the American Civil Liberties Union, Hearings on Revision of Federal Criminal Code Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 1st sess. (1980). The approach is the same as that advocated by the Brown Commission (*Final Report* section 1353).

§ *1743—Tampering with a government record*

This section carries forward parts of 18 U.S.C. 641 (theft of government records), 1506 (theft or alteration of records affecting the validity of judgments) and 2071 (concealment, removal or mutilation of court records), as well as various nontitle 18 offenses prohibiting the alteration of government records. Subsection (a) makes is a class E felony to alter, destroy, mutilate, conceal or remove a government record with the intent to impair the ability of the government to use the information contained in the record.

The Committee was concerned that an offense prohibiting the mutilation, removal or concealment of government records was potentially overbroad in two respects. First, such an offense might be used to punish minor mutilations which did not, in fact, interfere in any manner with the government's ability to function. Secondly, such an offense could be used to prosecute whistle-blowers who, for example,

take a photocopy of a nonclassified government record without in any manner interfering with the government's access to the information. The Committee believes that requiring an intent to impair the ability of the government to use the information contained in the record is the best way to deal with the overbreadth problem.

Subsection (b) permits the court to disqualify from Federal office for up to 5 years anyone convicted of committing this offense while a Federal public servant. This carries forward the provisions of 18 U.S.C. 2071 (concealment, removal, or mutilation generally). The current section does not indicate how long the disqualification may last. The Committee, consistent with the policy established in sections 8121 and 8122 of the proposed code, has placed a 5 year limitation on the disqualification. *See* pp. 581–86 *infra*.

Subsection (c) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the government record is a Federal government record. The provision for extraterritorial jurisdiction is based upon the protective principle of international law.

§ *1744—False statements about emergencies*

This section penalizes "false alarms" and is one of the specific offenses drafted by the Committee to prohibit serious oral false statements. This is a modification of a Brown Commission recommendation, *Final Report* section 1354 (1971).

Subsection (a) makes it a class A misdemeanor to cause a false alarm of emergency to be transmitted to an organization that deals with such an emergency. Subsection (b)(1) provides for Federal jurisdiction when the offense occurs in the special jurisdiction of the United States, or where the organization is a Federal organization. Subsection (b)(2) provides for extraterritorial jurisdiction when the organization is a Federal organization and the actor is a United States national (as that term is defined in 8 U.S.C. 1101). This provision is based upon the protective and nationality principles of international law.

§ *1745—General provisions for subchapter*

Subsection (a) defines "national credit institution", "credit institution record", "government matter", "government record", "statement", and "official proceeding" for the purposes of subchapter V of the proposed code (relating to perjury, false statements, and related offenses).

The phrase "jurisdiction of a government agency", as used in the definition of "government matter", is intended to include the investigative jurisdiction of agencies. The Committee believes that the exclusion of such jurisdiction by the Eighth Circuit in *Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967), was prompted by a concern regarding the very broad scope of the literal language of 18 U.S.C. 1001, a concern shared by many other courts. See discussion at 178–79 supra. The Committee believes that, in view of the limitation of the false statement offense to written statements, and the revised penalty levels, such artificial distinctions are no longer appropriate.

Subsection (b) sets forth various proof rules regarding prosecutions under the subchapter. Subsection (b)(1) modifies the common law rule, applicable to current Federal perjury prosecutions (except those under 18 U.S.C. 1623) that a conviction for perjury must be supported by the

testimony of two persons, or one person with corroboration. The subsection provides that contradiction by the testimony of one person, absent corroboration, is insufficient proof of falsity. The Committee believes that continuing this rule in this form is a necessary and appropriate means of ensuring that perjury prosecutions do not become "swearing contests," in which a jury must base a verdict entirely upon its judgment of the credibility of one witness compared to another. The Committee does not believe that the requirement of corroboration places any undue burden upon the prosecution in such cases. The modification of the rule in subsection (b) will permit convictions where proof of falsity rests on circumstantial evidence and/or admissions of the accused. *See* Model Penal Code section 2.08.20, comment at 134–38 (Tent. Draft No. 6, 1957)

Subsection (b)(2) sets forth rules for determining materiality which are taken from current Federal case law. In a prosecution for perjury (section 1741) or for false statements (section 1742), a falsification, omission, concealment, forgery, alteration, or other misleading matter is material, regardless of the admissibility of the statement or object containing such matter under the rules of evidence, if: (1) in a grand jury proceeding, the misleading matter has a natural tendency to influence, impede, or dissuade the grand jury from pursuing the grand jury's investigations; or (2) in any other proceeding, government matter, or credit institution record, such misleading matter is capable of influencing the person to whom such misleading matter is presented on the issue before such person.

Subsection (b)(3) reverses the common law rule that a perjury conviction may not be based on the making of two inconsistent statements, unless the prosecution can prove which one is false. The common law rule currently applies to Federal perjury prosecutions (except those under 18 U.S.C. 1623). The Committee believes that it is only logical to conclude from two irreconcilably inconsistent statements that one or the other is false. *See* Brown Commission, *Final Report* section 1351.

Subsection (b)(4) provides that the issue of whether a statement is material is a question of law, as to which no state of mind need be proven. Thus, the court will decide questions of materiality (*see* section 121 of the proposed code). This carries forward current law. *See* discussion at 172 *supra*.

Subsection (c) provides a new defense to a prosecution for perjury that the actor retracted the false statement before the statement substantially affected the proceeding, and before it became apparent to the actor that the falsity would be exposed. The Committee believes that justice can best be served by encouraging witnesses to correct false statements, and that this defense will provide an incentive for defendants to do so. Such an offense currently appears in 18 U.S.C. 1623.

SUBCHAPTER VI—OFFICIAL CORRUPTION AND INTIMIDATION

Current Law

1. *Bribery and illegal gratuities.*—Current Federal law regarding bribery and the unlawful rewarding of public servants consists primarily of 18 U.S.C. 201 (c), (d), (f) and (g). Other related offenses are

located throughout the Federal laws.[1] Both the bribery and unlawful rewarding offenses—the latter are termed "graft" in the Senate criminal code recodification bill, and "illegal gratuities" by many courts—address the acceptance by, or giving to, public officials of benefits relating to their performance of official duties. The proscribed gift in the case of both offenses is "anything of value."

Two important differences are apparent between the bribery and unlawful rewarding offenses. First, 18 U.S.C. 201 (c) and (d) address only future acts by the public official; 18 U.S.C. 201 (f) and (g) address past and future acts. The second difference is more significant, since it differentiates the crimes where future acts are involved: 18 U.S.C. 201 (c) and (d) require that the giving or receiving be "corruptly," and "with intent to influence"; 18 U.S.C. 201 (f) and (g) proscribe giving or receiving "otherwise than as provided by law for the proper discharge of official duty . . . for or because of" the act of the public servant.

The actual meaning of these phrases has been the subject of considerable litigation. Unfortunately, no clear consensus has evolved. Two cases highlight this problem. In *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966), the court noted that 18 U.S.C. 201(b) requires a specific intent, while 18 U.S.C. 201(f) requires only a general intent. In a later decision in the same case, the court reemphasized this concept:

> Although criminal intent is a necessary element for conviction under the gratuity counts, no specific intent is required In this case, . . . the payments were received by the auditors "otherwise than as provided by law for the proper discharge of official duty," . . . . In measuring intent, it matters not whether the payments were made because of economic duress, a desire to create a better working atmosphere, or appreciation for a speedy and favorable audit.

United States v. *Barash*, 412 F.2d 26, 29 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969).

In *United States* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974), the court reached a different conclusion. Although lengthy, the discussion reflects the difficulty regarding these offenses:

> The requisite intent to constitute accepting a bribe is to accept a thing of value "corruptly" under section (c)(1); the comparable intent under the gratuity section (g) is to accept a thing of value "otherwise than as provided by law for the proper discharge of official duty." On the face of the statute the two comparative clauses are not equivalents. Congress did not use the same language in defining criminal intent for the two offenses. "Corruptly" bespeaks a higher degree of criminal knowledge and purpose than does "otherwise than as provided by law for the proper discharge of official duty." It appears entirely possible that a public official could accept

[1] *See, e.g.*, 7 U.S.C. 85 (grain inspectors), 7 U.S.C. 473c–1 and –2 (cotton samplers), 7 U.S.C. 511i(d) and 511k (tobacco inspectors), 18 U.S.C. 152 (bankruptcy proceeding), 18 U.S.C. 217 (officers or employees of Department of Agriculture engaged in adjusting farm indebtedness), 18 U.S.C. 1912 (officers or employees of U.S. engaged in inspecting vessels), 19 U.S.C. 1620 (*re* customs informers), 21 U.S.C. 90 (meat inspectors), 33 U.S.C. 447 (navigation inspectors) and 46 U.S.C. 239(i) (witnesses in marine casualty investigations).

> a thing of value "otherwise than as provided by law for the proper discharge of official duty," and at the same time not do it "corruptly." Congress obviously wished to prohibit public officials accepting things of value with either degree of criminal intent; it did so, but it legislated a difference in the requisite criminal intent and correspondingly in the penalties attached.
>
> There is more, on the face of the statute itself, relevant to criminal intent. . . . To accept a thing of value "*in return for:* (*1*) *being influenced* in [the] performance of any official act" (section (c)(1), emphasis supplied) appears to us to imply a higher degree of criminal intent than to accept the same thing "for or because of any official act performed or to be performed" (section (g)). Perhaps the difference in meaning is slight, but Congress chose different language in which to express comparable ideas. The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved: the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.
>
> Our conclusion is reinforced when the two clauses . . . are transposed in each section to be read consecutively. To accept a thing of value "corruptly . . . in return for being influenced in his performance of any official act" evidences a higher degree of criminal intent than to accept the same thing of value "otherwise than as provided by law for the proper discharge of official duty . . . for or because of any official act performed or to be performed by him." When [the] clauses . . . are thus considered together in each section, the bribery section (c)(1) obviously prescribes a criminal intent different from, and of a higher degree than that specified in the illegal gratuity statute.

Id. at 71–72 (emphasis in original).

Unfortunately, the court in *Brewster* never actually explains just *what* the required criminal intent is. In a lengthy footnote, the *Brewster* court distinguishes the Second Circuit cases such as *Barash* by indicating that those cases did not involve elected officials. *Id.* at 72–73 n.26. It would appear strange, however, to conclude that Congress intended the language involved to mean one thing when applied to elected officials, and something else when applied to other officials. For further discussions of the intent differences between bribery and unlawful rewarding, *see United States* v. *Harary*, 457 F.2d 471 (2d Cir. 1972); *United States* v. *Arthur*, 544 F.2d 730 (4th Cir. 1976); *United States* v. *Umans*, 368 F.2d 725 (2d Cir.), *cert. dismissed*, 389 U.S. 80 (1966); *United States* v. *Irwin*, 354 F.2d 192 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

A serious difficulty arising from the lack of clarity in these current law offenses is the impossibility of determining at what point gifts made not for the purpose of influencing an action to be performed, but merely to cultivate a general "goodwill" on the part of the public servant, become illegal gratuities. *Compare United States* v. *Alessio*, 528 F.2d 1079 (9th Cir. 1976). *cert. denied*, 426 U.S. 948 (1976), *with United States* v. *Arthur*, 544 F.2d 730 (4th Cir. 1976).

In addition to these differences regarding intent and the type of acts for which payment is made, there are two other differences between bribery and unlawful rewarding. First, 18 U.S.C. 201 (f) and (g) are broader than 18 U.S.C. 201 (b) and (c) in that they reach the offering or soliciting of anything of value by former as well as present public officials. However, subsections (f) and (g) are narrower than subsections (b) and (c) in that the offense under (f) and (g) is committed only if the payment is made to the public official directly.

Section 201(b) is, of course, violated even though the official offered a bribe is not corrupted or the objective of the bribe cannot be obtained. *See United States* v. *Jacobs*, 431 F.2d 754 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). While a specific intent to influence official action must be shown, it is not an element of the offense that the briber knew that the person to whom the bribe was offered was a Federal rather than State official. *See United States* v. *Jennings*, 471 F.2d 1310 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973). With respect to the solicitation or demand of a bribe by a public official, 18 U.S.C. 201(c) is violated even though the official did not have authority to make a final decision, provided that the official's advice and recommendation would be influential. *See United States* v. *Heffler*, 402 F.2d 924 (3d Cir. 1968), *cert. denied sub nom. Cecchini* v. *United States*, 394 U.S. 946 (1969).

Under current law, bribery of State and local officials can be prosecuted under the Travel Act (18 U.S.C. 1952) which prohibits travel in interstate commerce, or the use of facilities in interstate commerce to promote "unlawful activities." Unlawful activities is defined to include bribery in violation of local laws. However, the same conduct is frequently prosecutable under the Hobbs Act, 18 U.S.C. 1951, as extortion under color of official right. See discussion at 292–93, *infra*.

2. *Bribery-related offenses.*—A number of current law offenses punish conduct involving improper payments to public servants which do not, for various reasons, amount to bribery. Federal employees are prohibited by 18 U.S.C. 203 from soliciting or receiving compensation for services "in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission. . . ." The making of such payment to a Federal employee is also prohibited by the section. The offense is not applicable to representation in judicial proceedings. A conscious purpose to violate the law is not necessary for a conviction under 18 U.S.C. 203, but it must be shown that the public servant had "knowledge of the nature or purpose of the receipt" of the payment while being in one of the classes of persons prohibited from doing so. *United States* v. *Johnson*, 419 F.2d 56, 60 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970); *United States* v. *Podell*, 519 F.2d 144 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975); *United States* v. *Quinn*, 141 F. Supp. 622, 627 (S.D.N.Y. 1956).

Under 18 U.S.C. 203 it has been held that the agreement to receive, and the receipt of, the forbidden compensation state distinct offenses even when both are committed as part of the same transaction. *See Burton* v. *United States*, 202 U.S. 344, 377–78 (1906).

Legislative history and case law do not resolve one question regarding 18 U.S.C. 203. It remains unclear whether the phrase "before any department, agency, court-martial [etc]" qualifies the nature of the services rendered, so that the offense would require the actual appearance in some manner of the public servant "before" the agency, or whether it qualifies the phrase "matter in which the United States . . . has a direct and substantial interest," in which case the offense would cover any services provided regarding any nonjudicial proceeding in which the United States has an interest.

Section 205 of title 18 provides for punishment of any officer or employee of the United States in the executive, legislative, or judicial branch of government who, other than in the proper discharge of duties, "(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any [compensation] in consideration of assistance in the prosecution of such claim, or (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, [etc.] in which the United States is a party or has a direct and substantial interest." The section excludes from its coverage certain "special government employees," essentially part-time employees. However, the exclusion does not apply to matters in which these employees themselves are concerned in their official capacity. The phrase "acting as an agent" in 18 U.S.C. 205 has been interpreted broadly as not confined to the common law concept of a person having the power to affect the legal relations of the agent's principal. *See United States* v. *Sweig*, 316 F. Supp. 1148, 1156–57 (S.D. N.Y. 1970).

As is apparent, 18 U.S.C. 203 and 205 contain broad areas of overlap. There are, however, certain differences. Section 203 applies to any services rendered for compensation and it includes Members of Congress, but excludes Court proceedings. Section 205, on the other hand, applies to acting as an agent or attorney regardless of compensation, excludes members of Congress, but includes court proceedings.

Members of Congress are prohibited from practicing in the Court of Claims by 18 U.S.C. 204.

Officers and employees of the executive branch, of independent agencies, and of the District of Columbia are prohibited from receiving compensation for their services as Government employees from any source other than their salaries by 18 U.S.C. 209. Section 209 also provides for punishment of any person who makes any contribution to, or in any way supplements the salary of, such employees under circumstances in which the employee would be prohibited from receiving the compensation by that section. The section does not apply to "special government employees" (essentially part-time) or to employees serving without compensation. There is also an exception allowing an officer or employee of the executive branch to continue to participate in a bona fide pension, retirement, or similar plan maintained by a former employer.

Section 209 has rarely been utilized and differs from 18 U.S.C. 203 and 205 primarily by prohibiting only payment for governmental services; payments and gifts for non-governmental services are not covered.

3. *Use of force or threats to influence public servants.*—The use of force, or threats of force, to influence or retaliate against public servants is currently prohibited by a number of sections of title 18. For the most part, however, the current law offenses encompass other conduct directed at public servants, such as assaults on public servants which are not motivated by the public servant's performance of duties. The pertinent portions of 18 U.S.C. 111 prohibit forcible conduct and threats of forcible conduct directed at specified public servants because of the public servant's performance of duties. This section is discussed more fully at 131–33 *supra*, and 255–58 *infra*. Section 372 of title 18 prohibits conspiracies to prevent "by force, intimidation, or threat," any person from accepting or holding Federal office, or from discharging any duties thereof, or to induce "by like means" any officer of the United States to leave the place where the duties of such officer are required to be performed, or to injure the property of a Federal officer in order to interfere with the discharge of duties by the officer. Efforts to influence, intimidate, or impede jurors and court officers in the performance of their duties "corruptly" or by threats, are prohibited by 18 U.S.C. 1503. In addition to these general offenses, interferences with specific public servants are prohibited in offenses outside of title 18. *See, e.g.*, 7 U.S.C. 87c, prohibiting interferences with inspectors under the Grain Standards Act. *See also* discussion at 131, *supra*, and 256, *infra*.

Threats against the President and potential successors are prohibited in 18 U.S.C. 871. This offense has been interpreted as reaching only true threats as distinct from utterances that would lead a reasonable person to interpret them as a joke or mere political hyperbole. *See, e.g., Watts* v. *United States*, 394 U.S. 705 (1969); *Alexander* v. *United States*, 418 F.2d 1203 (D.C. Cir. 1969). A conditional threat, however, may be sufficient. *See United States* v. *Moncrief*, 462 F.2d 762 (9th Cir. 1972). Given a true threat, nearly all courts that have considered the issue, notwithstanding the expression by the Supreme Court of "grave doubts" as to the correctness of the interpretation, *see Watts* v. *United States*, 394 U.S. 705, 707 (1969),[1] have determined that the requisite state of mind ("knowingly and willfully) is established by proof that the maker of the threat comprehended its meaning and voluntarily and intentionally uttered the words as a declaration of apparent determination to carry out the threat; proof of an actual intent to carry the threat into execution is not ordinarily required. *E.g., United States* v. *Compton*, 428 F.2d 18 (2d Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971); *Roy* v. *United States*, 416 F.2d 874 (9th Cir. 1969); *United States* v. *Hart*, 457 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 861 (1972); *United States* v. *Rogers*, 488 F.2d 512 (5th Cir. 1974), *rev'd on other grounds*, 422 U.S. 35 (1976); *United States* v. *Lincoln*, 462 F.2d 1368 (6th Cir.), *cert. denied*, 409 U.S. 952 (1972). The Fourth Circuit, however, in *United States* v. *Patillo*, 438 F.2d 13 (4th Cir. 1971) (*en banc*), held that if the threat is uttered with no communication to the President intended, proof of actual intent to carry out the threat is necessary to establish the requisite willfulness.

[1] Justices Marshall and Douglas, concurring in Rogers v. United States, 422 U.S. 35, 41–48 (1975), indicated their belief that the *dictum* in *Watts* is sound.

4. *Misuse of official information.*—A number of current law offenses punish the misuse of official information.

Officers of the United States concerned in the collection or disbursement of the revenues of the United States are prohibited by 18 U.S.C. 1901 from carrying on any trade or business in the funds or debts of the United States, or in any public property of either. Strictly speaking, the use of inside information is not an element of this offense, although it would probably be present in any violation that would be prosecuted.

An employee of the United States, or an agent of the United States, who comes into possession of information which might affect the market value of crops grown within the United States and which is required by law to be withheld from the public until a particular time, and who speculates in crop commodities using that information, violates 18 U.S.C. 1902.

Similar speculation in commodities, or in organizations handling commodities, by persons involved in the administration of the Federal Crop Insurance Corporation or in the administration of Federal laws relating to crop insurance, is prohibited by 18 U.S.C. 1903. A similar prohibition is applied to persons involved in the administration of the laws dealing with taxes on sugar by 26 U.S.C. 7240.

Speculation in sugar by persons connected with the administration of the Sugar Act of 1948 is prohibited by 7 U.S.C. 1157.

Persons connected with the Small Business Administration are prohibited from investing in companies receiving loans from the Small Business Administration by 15 U.S.C. 645(b)(4).

Finally, conduct involving improper speculation on information received due to a Government position is frequently prosecutable under the conspiracy to defraud the Government branch of 18 U.S.C. 371. *See Haas* v. *Henkel*, 216 U.S. 462 (1910). *See* also discussion of 18 U.S.C. 371 at 133–37 *supra*.

§ *1751—Bribery*

The offenses of bribery, and the unlawful rewarding of public servants (called "illegal gratuities" by many courts), are currently proscribed primarily by 18 U.S.C. 201 (c), (d), (f), and (g)). Both offenses govern the acceptance by, or giving to, public officials of benefits relating to their performance of official duties. Both offenses proscribe the giving of "anything of value."

The Committee does not believe that the receiving of minor gifts (such as plaques or certificates) or "good-will" gifts should be prohibited by a bribery statute. In general, the receipt of such gifts should be controlled by regulations of a particular government agency. Where such gifts are improper (e.g., implicitly demanded by the public servant or given to the public servant with an expectation that official conduct will be altered), the offense of extortion under color of official right (section 2522 of the proposed code) is applicable. The Committee has therefore replaced the current bribery statute with two offenses, one prohibiting the receipt of gifts intended to influence a particular action prior to that action (section 1751) and one prohibiting the receipt of gifts intended to reward an action following the performance of that action (section 1752).

Subsection (a) makes it an offense to: (1) offer anything of pecuniary value to a public servant with intent to influence that public servant regarding a particular official action or the violation of a particular legal duty; or (2) solicit or receive a gift because of an official action to be taken, or a public duty to be violated, or to solicit or receive a gift that the recipient knows is being given in order to influence the recipient.

The term "anything of pecuniary value" is defined in section 1762 of the proposed code (relating to general provisions for the subchapter). "Official action", which is also defined in section 1762, refers to the discretionary functions of a public servant.

Subsection (c)(1) provides for Federal jurisdiction when the official duties involved are those of a Federal, State or local public servant. Subsection 1751(c)(2) provides for extraterritorial jurisdiction when the official action or legal duty involved is that of a Federal public servant. This provision is based upon the protective principle and, in part, the passive personality principle of international law.

Currently, jurisdiction for Federal bribery prosecutions of State and local officials is derived from the Travel Act (18 U.S.C. 1952). However, the Travel Act requires interstate travel or the use of facilities in interstate commerce. Because the Committee is eliminating this requirement, and in order to preserve the balance between State and Federal interests, subsection (b)(1) requires certification by the Attorney General or Assistant Attorney General either that the State authorities were informed of, and acquiesced in, the Federal prosecution prior to the charges, or that there were no pending State prosecution regarding the conduct at the time of the charges, and the State did not appear likely to undertake such a prosecution. Alternatively, the Attorney General may personally certify that a Federal prosecution is required by the interests of justice. In addition, the State authorities must be informed by the Department of Justice of the Federal prosecution at least 24 hours before the return or making public of an indictment. See discussion of certification regarding extortion at 300–02 *infra*.

A violation of this section is graded a class C felony, the highest penalty of any section of this subchapter. The Committee believes that the conduct proscribed by this section is the most serious of any of the conduct governed by this subchapter.

§ *1752—Graft*

This section, along with section 1751 (relating to bribery) carries forward 18 U.S.C. 201, and a portion of 18 U.S.C. 1952. *See* discussion in analysis of section 1751 of the proposed code, *supra*.

Section 1752(a) makes it an offense to (1) offer anything of pecuniary value to a public servant with intent to reward that public servant regarding a particular official action or the violation of a particular duty, or (2) solicit or receive a gift because of action taken, or an official duty violated, or to solicit or receive a gift that the recipient knows is being given in order to reward the recipient. The term "anything of pecuniary value" is defined in section 1762 of the proposed code (relating to general provisions for the subchapter). "Official action," which is also defined in section 1762, refers to the discretionary functions of a public servant.

Subsection (b) requires that, prior to a prosecution of a State or local public servant, the Attorney General (or an Assistant Attorney General designated by the Attorney General) certify either that the State authorities were informed of, and acquiesced in, the Federal prosecution prior to the charges, or that there was no pending State prosecution regarding the conduct at the time of the charges, and the State did not appear likely to undertake such a prosecution. Alternatively, the Attorney General may personally certify that a Federal prosecution is required by the interests of justice. In addition, the State authorities must be informed by the Department of Justice of the Federal prosecution at least 24 hours before the return or making public of an indictment. See discussion of certification relating to extortion at 300–02 *infra*.

Subsection (c)(1) provides for Federal jurisdiction when the official duties involved are those of a Federal, State or local public servant. Subsection 1751(c)(2) provides for extraterritorial jurisdiction when the official action or legal duty involved is that of a Federal public servant. This provision is based upon the protective principle and, in part, the passive personality principle of international law.

A violation of this section is classified as an E felony. This is consistent with the penalties provided by sections 1753 (relating to trading in Government assistance), 1754 (relating to trading in special influence), 1755 (relating to trading in public office), 1757 (relating to tampering with a public servant), 1758 (relating to retaliating against a public servant), 1759 (relating to acts affecting personal financial interest), and 1760 (relating to compensation to Federal public servants and others in matters affecting the Government). The Committee believes that each of these sections proscribes equally serious conduct.

§ *1753—Trading in Government assistance*

This section carries forward certain aspects of current 18 U.S.C. 203, 205, and 209.

Subsection (a) makes it an offense to offer or give a public servant anything of pecuniary value with intent to obtain, or because of, advice or other forms of assistance concerning a matter which is to become subject to the public servant's official duties. It does not require any intent to influence the public servant in the performance of those duties. Subsection (a) also prohibits public servants from receiving anything of value given in the circumstances described above.

The term "anything of pecuniary value" is defined in section 1762 of the proposed code. "Official action," which is also defined in section 1762, refers to the discretionary functions of a public servant.

Subsection (b) provides for Federal jurisdiction over an offense under this section if the public servant is a Federal public servant.

A violation of this section is graded a class E felony. This is consistent with the penalties provided by sections 1752 (relating to graft), 1754 (relating to trading in special influence), 1755 (relating to trading in public office), 1757 (relating to tampering with a public servant), 1758 (relating to retaliating against a public servant), 1759 (relating to acts affecting personal financial interest), and 1760 (relating to compensation to Federal public servants and others in matters affecting the Government). The Committee believes that each of these sections proscribes equally serious conduct.

§ *1754—Trading in special influence*

This section is a companion to sections 1751 (relating to bribery), 1752 (relating to graft), and 1753 (relating to trading in Government assistance). It is based in part on 18 U.S.C. 203 and 205, but it is primarily new to Federal law.

Subsection (a) makes it an offense to offer or pay anything of pecuniary value to another person in order to cause the second person to exercise "special influence" on a public servant. Subsection (a) also prohibits a person from soliciting or receiving a payment of anything of pecuniary value when motivated by a desire to cause that person to exercise "special influence" on a public servant. The term "anything of pecuniary value" is defined in section 1762 of the proposed code (relating to general provisions for the subchapter).

Subsection (b) defines "special influence" as influence due to marriage, kinship, or position as a public servant or party official.

Subsection (c) requires that, prior to a prosecution of a State or local public servant, the Attorney General (or an Assistant Attorney General designated by the Attorney General) certify either that the State authorities were informed of, and acquiesced in, the Federal prosecution prior to the charges, or that there were no pending State prosecutions regarding the conduct at the time of the charges, and the State did not appear likely to undertake such a prosecution. Alternatively, the Attorney General may personally certify that a Federal prosecution is required by the interests of justice. In addition, the State authorities must be informed by the Department of Justice of the Federal prosecution at least 24 hours before the return or making public of an indictment. See discussion of certification relating to extortion at 300–02 *infra*.

Subsection (d)(1) provides for Federal jurisdiction when the offense is committed within the special jurisdiction of the United States, or when the official duties involved are those of a Federal, State or local public servant. Subsection (d)(2) provides for extraterritorial jurisdiction when the official action or legal duty involved is that of a Federal public servant. This provision is based upon the protective principle of international law.

A violation of this section is classified as an E felony. This is consistent with the penalties provided by sections 1752 (relating to graft), 1753 (relating to trading in Government assistance), 1755 (relating to trading in public office), 1757 (relating to tampering with a public servant), 1758 (relating to retaliating against a public servant), 1759 (relating to acts affecting personal financial interest), and 1760 (relating to compensation to Federal public servants and others in matters affecting the Government). The Committee believes that each of these sections proscribes equally serious conduct.

§ *1755—Trading in public office*

This section carries forward 18 U.S.C. 210, 211, and 599. (The second paragraph of 18 U.S.C. 211 is reenacted as a misdemeanor in Title II of the legislation.)

Subsection (a) makes it an offense to offer to pay anything of pecuniary value to another person in order to obtain assistance by a public servant in securing employment as a public servant. Subsection (a) also prohibits any person from soliciting or receiving a payment

of anything of pecuniary value, if that person knows that the payment is motivated by a desire to obtain assistance from a public servant in securing employment as a public servant. The term "anything of pecuniary value" is defined in section 1762 of the proposed code.

Subsection (b) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the employment sought is that of a Federal public servant. This provision is based upon the protective principle of international law.

A violation of this section is classified as an E felony. This is consistent with the penalties provided by sections 1752 (relating to graft), 1753 (relating to trading in Government assistance), 1754 (relating to trading in special influence), 1757 (relating to tampering with a public servant), 1758 (relating to retaliating against a public servant), 1759 (relating to acts affecting personal financial interest), and 1760 (relating to compensation to Federal public servants and others in matters affecting the Government). The Committee believes that each of these sections proscribes equally serious conduct.

§ *1756—Speculating on official action or information*

This section has no precise counterpart is existing law. It generalizes from a number of existing offenses that prohibit specific employees, in limited situations, from using inside information acquired while in Government service for precuniary gain. *See* 18 U.S.C. 1901, 1902, and 1903; 7 U.S.C. 1157; 15 U.S.C. 645(b)(4); and 26 U.S.C. 7240. In addition, some conduct prohibited by this section is now punishable, if a conspiracy exists, under 18 U.S.C. 371. *See, e.g.*, *Haas* v. *Henkel*, 216 U.S. 462 (1910).

Subsection (a) makes it an offense for a public servant, for a period of up to one year after termination of public service, to use "inside information" (i.e., information obtained solely because of the actor's capacity as a public servant) in an effort to gain pecuniarily by acquiring an interest in property or in an enterprise that would be affected by the inside information. Subsection (a) also prohibits such persons from supplying the information to someone else with intent to aid that person to use it in such circumstances. The term "official action" is defined in section 1762 of the proposed code. The term refers to the discretionary functions of a public servant.

Subsection (b) provides for Federal jurisdiction, including extraterritorial jurisdiction, if the public servant is a Federal public servant or the agency from which the information is obtained is a Federal agency. This provision is based upon the protective principle of international law.

A violation of this section is classified as an A misdemeanor. The Committee believes that the conduct prohibited by this section is less serious than that proscribed by the other sections in this subchapter and therefore has made it a less serious offense.

§ *1757—Tampering with a public servant*

Section 1757, along with section 1701 and chapter 23, subchapters I and II of the proposed code, carries forward a number of current law offenses prohibiting forcible interference with the performance of duties by certain public servants. *See, e.g.*, 18 U.S.C. 111.

Subsection (a)(1) makes it an offense to use physical force, a threat, or intimidation with intent to influence a public servant in the per-

formance of an official action or legal duty. The term "official action" is defined in section 1762 of the proposed code and refers to the discretionary functions of a public servant.

Subsection (a)(2) makes it an offense to communicate (1) threats of violence against the President or Vice President under circumstances in which the threat may reasonably be understood as an expression of serious purpose or (2) false information that such an act of violence is imminent under circumstances in which the information is likely to be believed. This subsection carries forward current law (18 U.S.C. 871), including exclusion of such threats when they are purely rhetorical, i.e., unlikely to be believed. *Watts* v. *United States*, 394 U.S. 705, 707 (1969); *United States v. Patillo*, 431 F.2d 293 (4th Cir. 1970), *aff'd en banc* 438 F.2d 13 (1971); Note, *Threats to the President and the Constitutionality of Constructive Treason*, 12 Colum. J.L. & Soc. Prob. 351 (1967).

Subsection (b) provides an affirmative defense to a prosecution under subsection (a)(1) when the actor was threatening lawful conduct with intent to compel the public servant to act properly.

Subsection (c) provides Federal jurisdiction for subsection (a)(1) when the public servant is a Federal public servant and for subsection (a)(2) when the offense occurs within the general or special jurisdiction of the United States. Subsection (d) provides for extraterritorial jurisdiction when the public servant is a Federal public servant. This provision is based upon the protective principle of international law.

A violation of this section is classified as an E felony. This is consistent with the penalties provided by sections 1752 (relating to graft), 1753 (relating to trading in government assistance), 1754 (relating to trading in special influence), 1755 (relating to trading in public office), 1758 (relating to retaliating against a public servant), 1759 (relating to acts affecting personal financial interest), and 1760 (relating to compensation to Federal public servants and others in matters affecting the Government). The Committee believes that each of these sections proscribes equally serious conduct.

§ *1758—Retaliating against a public servant*

This section carries forward current law (18 U.S.C. 111 and numerous other sections in various titles of the United States Code, *see* discussion of current law of assault at 255–58 *infra*) that prohibits threats, intimidation, and assaults against a public servant "because of" the performance of official duties or status as a public servant. It is closely related to section 1757 of the proposed code, which prohibits causing bodily injury to any person, or damage to the property of any person, as punishment for the actions of a public servant, or for such public servant's status as a public servant.

Subsection (a) makes it an offense to cause bodily injury to any person, or to damage any person's property, as punishment for the actions of a public servant or for such public servant's status as a public servant.

Subsection (b) provides for Federal jurisdiction, including extraterritorial jurisdiction, when the public servant is a Federal public servant. This provision is based upon the protective principle of international law.

A violation of this section is classified as an E felony. This is consistent with the penalties provided by sections 1752 (relating to graft), 1753 (relating to trading in government assistance), 1754 (relating to trading in special influence), 1755 (relating to trading in public office), 1757 (relating to tampering with a public servant), 1759 (relating to acts affecting personal financial interest), and 1760 (relating to compensation to Federal public servants and others in matters affecting the Government). The Committee believes that each of these sections proscribes equally serious conduct.

§ *1759—Acts affecting personal financial interest*

This section carries forward current law (18 U.S.C. 208) using the format and style of the proposed code. The Committee does not intend to change current law in any respect.

Subsection (a) makes it an offense for a public servant or a Federal Reserve Bank director, officer, or employee personally and substantially to participate in an official action relating to a matter in which that person, or a "related person", has a financial interest. Subsection (b) defines "related person" for the purposes of the section. The term "official action" is defined in section 1762 of the proposed code and refers to the discretionary functions of a public servant.

Subsection (c)(1) provides a bar to prosecution where the actor notified the appropriate officials, made a full disclosure of the actor's financial interest, and received in advance a written determination that the actor's financial interest was not so substantial as to be likely to affect the integrity of the actor's services. Subsection (c)(2) provides a bar to prosecution where a general rule published in the Federal Register exempts the financial interest involved from the prohibitions of this section because the interest is too remote or inconsequential to affect the integrity of the actor's services.

Subsection (d) provides that, for the purposes of subsection (c), the Board of Governors of the Federal Reserve System is the Government official responsible for the appointment of class A and B directors of Federal Reserve Banks.

Subsection (e)(1) provides for Federal jurisdiction where the actor is a Federal public servant in the Executive Branch or an independent agency or a District of Columbia public servant. Subsection (e)(2) provides for federal jurisdiction where the actor is a Federal Reserve Bank director, officer, or employee and the offense is committed within the general or special jurisdiction of the United States.

A violation of this section is classified as an E felony. This brings forward current law, and is consistent with the penalties provided by sections 1752 (relating to graft), 1753 (relating to trading in Government assistance), 1754 (relating to trading in special influence), 1755 (relating to trading in public office), 1757 (relating to tampering with a public servant), 1758 (relating to retaliating against a public servant), and 1760 (relating to compensation to Federal public servants and others in matters affecting the Government). The Committee believes that each of these sections proscribes equally serious conduct.

§ *1760—Compensation to Federal public servants and others in matters affecting the Government*

This section carries forward current law (18 U.S.C. 203), using the format and style of the proposed code. The Committee does not intend to change current law in any respect.

Subsection (a) makes it an offense for a public servant to receive compensation for any services rendered in connection with any matter in which the United States is a party or has a substantial interest. Subsection (a) also prohibits any person from offering compensation for that purpose.

Subsection (b) provides a bar to prosecution for special Government employees, unless (1) the special Government employee is personally and substantially involved in the disposition of the matters, or (2) the matter is pending before the department or agency in which the special Government employee is serving and the special Government employee has been so serving for more than 60 days.

Subsection (c) provides for Federal jurisdiction when the public servant is a Federal or District of Columbia public servant.

A violation of this section is classified as an E felony. This brings forward current law, and is consistent with the penalties provided by sections 1752 (relating to graft), 1753 (relating to trading in Government assistance), 1754 (relating to trading in special influence), 1755 (relating to trading in public office), 1757 (relating to tampering with a public servant), 1758 (relating to retaliating against a public servant), and 1759 (relating to acts affecting personal financial interest). The Committee believes that each of these sections proscribes equally serious conduct.

§ *1761—Foreign corrupt practices offense*

This section provides that whoever violates section 104(a) (relating to foreign corrupt practices by domestic concerns) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78–dd–2(a)) commits a class D felony.

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, the section requires that the actor engage in the conduct prohibited by section 104(a) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78–dd–2(a)) in the circumstances and with the results and states of mind required by that provision of law. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced section, but also any judicial interpretations of those provisions.

§ *1762—General provisions for subchapter*

Subsection (a) provides definitions for certain terms used in the subchapter. The term "anything of pecuniary value" is defined as any instrument of economic advantage, or any other property worth more than $100. The terms "political compromise" and "political support" are excluded from the definition to preclude the application of the subchapter's offenses to political "log-rolling" and the making of campaign promises.

The definition of "political party official" is self-explanatory.

The term "official action" is defined as the discretionary actions of a public servant.

Subsection (b) precludes as a defense to a prosecution under any section in this subchapter that the recipient of a bribe or illegal gift lacked the authority to perform the official action in question.

SUBCHAPTER VII—POSSE COMITATUS OFFENSE

Current Law

Posse comitatus was defined at common law as everyone over the age of 15 upon whom a sheriff could call for assistance in preventing any type of civil disorder. 1 W. Blackstone, *Commentaries* 343–44 (18 3). The Posse Comitatus Act (18 U.S.C. 1385) makes it a felony "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully [to] use any part of the Army or Air Force as a posse comitatus or otherwise".

As originally proposed, the Act would have applied to all of the armed services. *See* 7 Congressional Record 3586 (1878) (remarks of Rep. Kimmel). The final versions of the Act, however, mentioned only the Army, probably because the Act was a rider to an Army appropriations bill. Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev. 85, 98 (1960). The reference to the Air Force was added in 1956 to take account of the creation of a separate Department of the Air Force. *Id.* at 96. Navy Department regulations direct Navy and Marine Corps personnel to comply with the Act. Secretary of Navy Instruction 5820.7 (May 15, 1974). *See United States* v. *Walden*, 490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974). The peacetime Coast Guard appears not to be covered by the Act. *See Jackson* v. *State*, 572 P.2d 87 (Alaska 1977).

The precise scope of the Posse Comitatus Act has not yet been discussed by the Supreme Court. However, the Eighth Circuit, in *United States* v. *Casper*, 541 F.2d 1275 (8th Cir. 1976), has held that in application the Act prohibits the use of armed forces personnel by civilian law enforcement officers in any manner that would result in the military personnel subjecting citizens to an exercise of military power which is regulatory, proscriptive, or compulsory in nature, either at the time or prospectively.

No one has been charged or prosecuted under the Posse Comitatus Act since its enactment. *See* Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703, 716–17 (1976). The judicial application of the Act appears to have been limited primarily to three types of cases. The first type involves a challenge to the court's jurisdiction. *See id.* at 717–18; *Chandler* v. *United States*, 171 F.2d 921 (1st Cir. 1948), *cert denied*, 336 U.S. 918 (1949) (arrest of United States national in Germany, and transportation of that national to trial, by the Army).

The second type of case involves an attempt to exclude evidence on the theory that the government's evidence has been tainted by a violation of the Act and is therefore inadmissible. *See. e.g.*, *Hildebrand* v. *State*, 507 P.2d 1323 (Okla. Crim. App. 1973); *Hubert* v. *State*, 504 P.2d 1245 (Okla. Crim. App. 1972); *Burns* v. *State*, 473 S.W.2d 19 (Tex. Crim. App. 1971). These attempts have not been successful, the courts avoiding the question of excluding the evidence by finding no violation of the Act.

The third type of case involves a challenge to an indictment. The aftermath of the occupation of Wounded Knee resulted in three significant discussions of the Act—in *United States* v. *Banks*, 383 F. Supp. 368 (D.S.D. 1974), *United States* v. *Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974), *appeal denied*, 510 F. 2d 808 (8th Cir. 1975), and

United States v. *Red Feather*, 392 F. Supp. 916 (D.S.D. 1975), are significant. Although the military activities in question are identical, the courts in *Banks* and *Jaramillo* found those activities to be in violation of the Act, while the court in *Red Feather* found those activities to be permissible.

The *Banks* and *Jaramillo* courts, in finding that the civilian officials did employ part of the Army or Air Force to enforce the law, concluded that there was insufficient evidence of the lawfulness of the Government conduct to justify submission to the jury of counts alleging violations of 18 U.S.C. 231(a)(3), which prohibits interfering with a law enforcement officer in the *lawful* performance of duties incident to a civil disorder. Despite the rebuttable presumption that law enforcement officials are lawfully engaged, the *Banks* court dismissed the charges, finding that "the posse comitatus matter was, and is, inextricably intertwined in the question of sufficiency of the evidence." *United States* v. *Banks*, 383 F. Supp. 368, 376 (D.S.D. 1974). It based its decision on the participation of the military in repairing the armored personnel carriers which were lent to the civilian authorities.

Faced with identical facts, the *Jaramillo* court found "that the furnishings of . . . materiel, standing alone, is not a violation of 18 U.S.C. 1385" and concluded that "it is the use of military personnel, not materiel, which is proscribed by 18 U.S.C. 1385." *United States* v. *Jaramillo*, 380 F. Supp. 1375, 1376 (D. Neb. 1974). The court was unaware as to whether the civilian authorities would have effected the same course of action without the military presence. These two cases serve to illustrate the confusion regarding the Act and the problems which are a result of its mechanical application.

The *Red Feather* court granted a motion of the United States *in limine* to bar defendants from introducing evidence concerning military involvement during the Wounded Knee occupation. The court stated that the Act was aimed to prevent the "direct active use of Army or Air Force personnel and does not mean the use of Army or Air Force equipment or materiel" and concluded that "Congress did not intend to make unlawful the involvement of federal troops in a passive role in civilian law enforcement activities. Passive roles included are the mere presence of military personnel under orders to report the necessity for military investigation, preparation of contingency plans to be used if military intervention is ordered, advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics, presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment and to maintain such material or equipment, aerial photographic reconnaissance flights and other activity. *United States* v. *Red Feather*, 392 F. Supp. 916, 921, 925 (D.S.D. 1975).

Certain military activities, although otherwise prohibited by the Posse Comitatus Act, are permissible if expressly authorized by statute, and accompanied by a presidential proclamation. *See* 10 U.S.C. 331–36. These permissible military actions are specifically defined and are generally restricted to instances involving civil disorders, disasters and threats to federal property. 32 CFR pts. 215, 501, 809.

There is some suggestion that the Posse Comitatus Act has no extraterritorial application, although the cases upon which that conclusion rests involve special circumstances. *Chandler* v. *United States*,

171 F. 2d 921 (1st Cir. 1948), and *Gillars* v. *United States*, 182 F. 2d 962 (D.C. Cir. 1950), both involved the use of military forces overseas during the occupation of a foreign country. *United States* v. *Cotton*, 471 F. 2d 744 (9th Cir. 1973), involved the rejection of challenge to the court's jurisdiction under *Ker* v. *Illinois*, 119 U.S. 436 (1886), and *Frisbie* v. *Collins*, 342 U.S. 519 (1952).

§ *1771—Use of armed services as posse comitatus*

This section carries forward the provisions of 18 U.S.C. 1385, 1201(f), 1116(d), and 112(f).

Subsection (a) makes it a class E felony to use any part of the Army, Navy, Air Force, or Marine Corps as a posse comitatus or otherwise to execute the laws. This modifies present law (18 U.S.C. 1385), which refers only to the Army and Air Force. The Committee's action is consistent with the present policy of the Navy Department, which precludes the use of Navy and Marine Corps personnel in violation of 18 U.S.C. 1385, see *in supra.* The Committee sees no reason, for the purposes of this section, to distinguish the Army and Air Force, on the one hand, from the Navy and Marine Corps.

Present law contains exceptions permitting the use of the military forces—"in cases or under circumstances expressly authorized by the Contitution or Act of Congress". The Committee has deleted the Constitutional exception as unnecessary. *See Note, Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 Yale L.J. 130, 143, 150 (1973); Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703, 712–13 (1976).

Subsection (b) carries forward the Act of Congress exception and sets forth exceptions to subsection (a). Subsection (b) authorizes the Attorney General to request assistance from the Army, Navy, Air Force or Marine Corps for the purpose of investigating an offense described in subchapter I (relating to homicide offenses), II (relating to assault offenses), or III (relating to kidnapping and related offenses) of chapter 23 of the proposed code when the victim of the offense is (1) the President, President-elect, or the Vice President; (2) if there is no Vice President, the officer next in the order to succession to the office of President, the Vice President-elect, or any individual acting as President under the Constitution and laws of the United States; or (3) a federally protected foreign individual". The term "federally protected foreign individual" is defined in section 101 of the proposed code.

There is no extraterritorial jurisdiction over this offense. *See generally* Siemer & Effron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act*, 54 St. John's L. Rev. 1 (1979).

Chapter 19—Offenses Involving Revenue

SUBCHAPTER I—INTERNAL REVENUE OFFENSES

Current Law

This subchapter incorporates by reference the more serious offenses from the Internal Revenue Code of 1954 (title 26 of the United States Code) pursuant to a policy determination that felonies should be collected in the proposed code. The offenses themselves are not

changed other than by minor variations in classification to conform with the bill's penalty structure. The states of mind required for conviction under these current law provisions are retained together with existing case law explication. Some misdemeanor provisions are also cross-referenced into the subchapter because they relate to a cross-referenced felony, such as tax evasion (26 U.S.C. 7201) and failure to file (26 U.S.C. 7203).

Generally speaking, the felony offenses of the Internal Revenue Code involving an "evasion" of a tax or posing a serious interference to enforcement of the tax laws are—

26 U.S.C. 7201 (tax evasion provisions);

26 U.S.C. 7202 (willful failure to collect or truthfully account for any tax) (e.g., withheld social security and income taxes);

26 U.S.C. 7214 (offenses by officers or employees of the United States);

26 U.S.C. 7206 (fraud and false statements);

26 U.S.C. 7212 (attempts to interfere with the administration of the internal revenue laws);

The misdemeanor offenses which either complement the above or are related include—

26 U.S.C. 7203 (failure to file return);

26 U.S.C. 7204 and 7205 (failure to give true withholding statements by employers to employees and failure to give true withholding information by employees to employers);

26 U.S.C. 7215 (failure to establish a trust fund account or make deposits into such an account when required by other tax laws) (*see* 26 U.S.C. 7512));

In addition, the proposed code incorporates by reference 12 felony violations of tax laws relating to the illegal manufacture, sale, or transportation of alcohol and tobacco. As with the cross-referenced income tax provisions, these alcohol and tobacco offenses are unchanged except for minor variations in the penalties to conform with the proposed code's penalty structure. Case law construction of these provisions is meant to be carried forward. The provisions cross referenced include—

26 U.S.C. 5601(a) (punishes anyone committing any of 15 listed offenses, the principal of which is the possessing of an unregistered still and engaging in the business of a distiller without giving the required bond; also covered are unlawful production, use, purchase, receipt or concealment of distilled spirits);

26 U.S.C. 5602 (punishes anyone engaging in the business of a distiller with intent to defraud the United States of any tax on the spirits one distills);

26 U.S.C. 5603(a) (punishes anyone who fails to keep or who falsifies required records relating to distilled spirits with intent to defraud the United States);

26 U.S.C. 5607 (punishes unlawful conduct concerning any denatured, distilled spirits withdrawn free of tax);

26 U.S.C. 5661(a) (punishes failure to pay any tax imposed on wine with intent to defraud the United States);

26 U.S.C. 5671 (punishes the evasion of a tax on beer under 26 U.S.C. 5051 or 5091, or to the defrauding of the United States involving records required by the law);

26 U.S.C. 5604(a) (punishes 19 enumerated crimes, including transportation or possession of liquor not bearing the required stamp, the emptying of containers without destroying the stamp, and reused alterations or forgery of stamps or labels);

26 U.S.C. 5605 (punishes the violation of 26 U.S.C. 5291, which involves the requirement to furnish a correct return showing the disposition of any distilled spirits or substance used in their manufacture);

26 U.S.C. 5608 (punishes fraudulent claims for or obtaining of any distilled spirits that have been shipped for export with intent to defraud the United States);

26 U.S.C. 5682 (punishes destruction of any lock or seal which may be placed on a building, tank, vessel, or apparatus by an authorized Internal Revenue Service agent);

26 U.S.C. 5691(a) (punishes the carrying on, *inter alia*, of the business of a brewer, wholesale or retail dealer in liquor, or wholesale or retail dealer in beer and willfully failing to pay the special tax required by law);

26 U.S.C. 5762(a) (punishes 6 crimes relating to tobacco products committed with intent to defraud the United States).

§ 1901—Tax evasion

This section provides that whoever violates certain specified sections of the Internal Revenue Code of 1954 (title 26 of the United States Code) commits an offense.

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsections (a) and (b) require that the actor engage in the conduct prohibited by certain specified sections of the Internal Revenue Code of 1954 (title 26 of the United States Code) in the circumstances and with the results and states of mind required by those provisions of law. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those provisions.

The most serious tax evasion offenses are incorporated in subsection (a), which makes it an offense to violate the following sections of the Internal Revenue Code of 1954: 7201 (the basic tax evasion statute, relating to attempt to evade or defeat any title 26 tax), 7202 (relating to willful failure to collect or pay over tax), or 7214 (relating to offenses by officers and employees of the United States.

Subsection (b) covers less serious tax evasions. Subsection (b)(1)(A) makes it an offense to violate section 7206 of the Internal Revenue Code of 1954 (26 U.S.C. 7206), which prohibits fraud and false statements in returns, statements or other documents, the concealment of property, or the withholding, falsification or destruction of records.

Subsection (b)(1)(B) makes it an offense to violate 7212 of the Internal Revenue Code of 1954 (26 U.S.C. 7212), which prohibits attempts to interfere with the administration of the internal revenue laws.

A violation of subsection (a) is a class D felony, which substantially carries forward the penalty provided by current law. Subsection (a) also leaves unchanged the mandate of 26 USC 7214 that offenders who are United States employees be dismissed from office.

Because subsection (b)(2)(A) proscribes conduct that is less serious than that prohibited by subsection (a), it is graded as a class E felony, one level below that of subsection (a).

Subsection (b)(2)(B), as does current law, distinguishes between two kinds of conduct on the basis of the seriousness of the conduct. A violation of subsection (b)(1)(B) is a class A misdemeanor if only threats of force are used to accompish the offense. Any other conduct that violates subsection (b)(1)(B) is a class E felony.

§ *1902—Disregarding a tax obligation*

This section provides that whoever violates certain specified sections of the Internal Revenue Code of 1954 (title 26 of the United States Code) commits an offense. These specified sections govern criminal tax violations less serious than those incorporated by section 1901 of the proposed code.

The term "violates" as used this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsections (a), (b), and (c) require that actor engage in the conduct prohibited by the specified sections of the Internal Revenue Code of 1954 (title 26 of the United States Code) in the circumstances and with the results and states of mind required by those provisions of law. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of these provisions.

Subsection (a)(1) makes it an offense to violate section 7203 of the Internal Revenue Code of 1954 (26 U.S.C. 7203) (relating to a willful failure to file a return, supply information, or pay a tax).

Subsection (a)(2) makes it an offense to violate section 7204 of the Internal Revenue Code of 1954 (26 U.S.C. 7204) (relating to willfully furnishing a fraudulent statement or failing to make a required statement).

Subsection (b) makes it an offense to violate section 7205 of the Internal Revenue Code of 1954 (26 U.S.C. 7205) (relating to a fraudulent withholding of an exemption certificate or a failure to supply information).

Subsection (c) makes it an offense to violate section 7215 of the Internal Revenue Code of 1954 (26 U.S.C. 7215) (relating to offenses with respect to collected taxes).

Consistent with the penalty provided by current law, conduct that violates subsection (a) is a class A misdemeanor. The Committee decided that it was appropriate to make a violation of subsection (b) a class B misdemeanor, in light of the minor fine provided by current law. A violation of subsection (c), following current law, is a class A misdemeanor.

§ *1903—Alcohol and tobacco tax offenses*

This section provides that whoever violates certain specified sections of the Internal Revenue Code of 1954 (title 26 of the United States Code) relating to alcohol and tax offenses, commits an offense.

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsections (a) and (b) require that the actor engage in the conduct prohibited by the specified sections of the Internal Revenue Code of 1954 (title 26 of the United States Code) in

the circumstances and with the results and states of mind required by that provision of law. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those provisions.

Subsection (a) makes it an offense to violate any of the following sections of the Internal Revenue Code of 1954: 5601(a) (relating to criminal penalties with respect to distilling, rectifying, and distilled and rectified products), 5602 (relating to penalty for tax fraud by distiller), 5603(a) (relating to penalty relating to records, returns, and reports), 5607 (relating to penalty and forfeiture for unlawful use, recovery, or concealment of denatured distilled spirits, or articles), § 5661(a) (relating to penalty and forfeiture for violation of laws and regulations relating to wine), 5671 (relating to penalty and forfeiture for evasion of beer tax and fraudulent noncompliance with requirements), or 5604(a) (relating to penalties relating to stamps, marks, brands, and containers).

Subsection (b) makes it an offense to violate any of the following sections of the Internal Revenue Code of 1954: 5605 (relating to penalty relating to return of materials used in the manufacture of distilled spirits, or from which distilled spirits may be recovered), 5608 (relating to penalty and forfeiture for fraudulent claims for export drawback or unlawful relanding), 5682 (relating to penalty for breaking locks or gaining of access), 5691(a) (relating to penalties for nonpayment of special taxes relating to liquor), or 5762(a) (relating to criminal penalties with respect to cigars, cigarettes, and cigarette papers and tubes).

A violation of subsection (a) is a class D felony, consistent with current law. A violation of subsection (b) is a class E felony. This generally accords with current law.

SUBCHAPTER II—SMUGGLING

Current Law

Subchapter II of chapter 19 of the proposed code covers four different types of smuggling offenses. These offenses are currently dealt with in chapter 27 of title 18 of the United States Code. In addition, several customs or smuggling-related offenses are proscribed in title 19, of the United States Code. The basic smuggling provisions currently found in title 18 are in section 545, which defines four different offenses:

(1) Knowingly and willfully, with intent to defraud the United States, smuggling or clandestinely introducing into the United States merchandise which should have been invoiced; [1]

(2) Knowingly and willfully, with intent to defraud the United States, making out, passing, or attempting to pass through a

[1] The word "smuggle" and the phrase "clandestinely introduce" mean substantially the same thing, that is, acts which surreptitiously or by concealment or fraud avoid customs and introduce goods into the United States. Olais-Castro v. United States, 416 F.2d 1155 (9th Cir. 1969); United States v. Claybourn, 180 F. Supp. 448 (S.D. Cal. 1960). Further, they encompass all such action, regardless of whether it is accomplished for personal or commercial use. United States v. Hall, 559 F.2d 1160 (9th Cir. 1977), *cert. denied,* 435 U.S. 942 (1978).

It is not necessary that the merchandise involved be subject to duty, since adequate reporting of merchandise coming into the country is a necessary prerequisite for the enforcement of the customs laws. United States v. Kurfess, 420 F.2d 1017 (7th Cir.), *cert. denied,* 400 U.S. 830 (1970).

The phrase, "merchandise which should have been invoiced" has been construed to mean goods which were required to be lawfully entered and declared. United States v. Richardson, 588 F.2d 1235, 1238 (9th Cir. 1978) (importation of laetrile).

customhouse any false, forged or fraudulent invoice or other document or paper;

(3) Fraudulently or knowingly importing or bringing into the United States any merchandise contrary to law; [2] and

(4) Fraudulently or knowingly receiving, concealing, buying, selling, or in any manner facilitating the transportation, concealment or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law.[3]

Additionally, the section provides for forfeiture of merchandise introduced into the United States in violation of the section.

Section 541 of title 18 makes punishable effecting the entry of dutiable articles under declarations of less than the true weight, measure, quality or value or otherwise paying less than the amount of duty legally due.

Section 542 of title 18 makes punishable effecting the entry or introduction of merchandise by any false or fraudulent document, written or verbal statement,[4] practice or appliance, whether or not the United States is thereby deprived of any lawful duties; and the commission of any willful act or omission whereby the United States may be deprived of lawful duties accruing upon merchandise referred to in a false or fraudulent document or statement.

Section 543 of title 18 makes punishable action by a revenue officer admitting to entry any dutiable article upon payment of less than the amount legally due.

Section 544 of title 18 makes punishable the relanding without entry of merchandise withdrawn for exportation, without payment of the duties thereon or with intent to obtain a drawback or other allowance given on exportation.[5]

Section 546 of title 18 makes punishable activities by the owner of a vessel or a person on board a vessel in the smuggling of merchandise into a foreign country when a penalty or forfeiture for such smuggling is provided by that country for violation of the laws of the United States respecting customs revenue.

[2] The phrase "contrary to law" has been construed as unqualified, and when taken in its natural meaning, to mean contrary to any law, including provisions not found in the section itself. Callahan v. United States, 285 U.S. 515 (1932); Keck v. United States, 172 U.S. 434 (1899). A conviction may be had under this provision without showing that the defendant actually knew the provisions of the specific law contrary to which the goods were imported. Babb v. United States, 252 F.2d 702 (5th Cir.), *cert. denied,* 356 U.S. 975 (1958).

[3] The section applies equally to commercial as well as non-commercial importers. Current v. United States, 287 F.2d 268 (9th Cir. 1961). Concerning the meaning of "contrary to law," see footnote 2 *supra.*

[4] The statement must, of course, be material. United States v. Rose, 570 F. 2d 1358 (9th Cir. 1978); United States v. Ven-Fuel, Inc., 602 F. 2d 747 (5th Cir. 1979). On the other hand, the concealment of extraneous evidential facts not proper to be included in an invoice, account or bill of lading, but which, if brought to the attention of the customs official would have excited suspicion and induced institution of a special inquiry, is not a violation. *See* United States v. Salen, 235 U.S. 237 (1914). Also the mere intention to bring merchandise to a port of entry and there enter it by fraudulent practices will not justify a conviction if frustrated before it is brought within United States jurisdiction. Mata v. United States, 19 F. 2d 484 (1st Cir. 1927).

This section also expressly does not apply to introduction of articles into the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnson Island or Guam.

[5] This section also expressly does not apply to relanding in the Virgin Islands, American Samoa, Wake Island. Midway Islands, Kingman Reef, Johnson Island or Guam.

Persons punishable include persons involved, afforded, having a connecting relationship, an active or real part, marked interest or regard arising through personal relationship to the matter under consideration. Winkler v. United States, 372 F. 2d 74 (5th Cir. 1967).

Section 547 of title 18 makes punishable the receiving and depositing of any merchandise in a building upon the boundary of the United States and carrying the merchandise through the same in violation of law.

Section 552 of title 18 makes punishable officers of the United States who aid in the importation of certain obscene, treasonous or threatening books, writings, pictures, and the like, or aiding in the importation of articles of indecent or immoral use or tendency.

In addition to the foregoing, 18 U.S.C. 1462 contains a proscription against the importation of obscene publications, pictures or recordings, and drugs and other items to be used for indecent or immoral purposes. Section 1915 of title 18 contains a proscription directed to officers of the United States against compromising or abating customs duties or penalties or relieving any person, vessel, vehicle, or merchandise from such duties or penalties without lawful authority therefor.

Title 19 of the United States Code contains various penal provisions which are closely akin to the general offense of smuggling but present special situations to be covered. The following is a brief digest of the most relevant of such provisions:

Section 283 of title 19 makes punishable the failure of an owner or other interested person to report, make entries and pay duties on "saloon stores" or supplies purchased at a foreign port for use or sale on board a vessel when the vessel first arrives at a port in the United States.

Section 1436 of title 19 makes punishable the failure to report or enter a vessel arriving in the United States from a foreign port or place, when that vessel had on board merchandise the importation of which into the United States is prohibited, or spirits, wines or other alcoholic liquors.

Section 1464 of title 19 makes punishable the failure of a master or person in charge of a sealed vessel, as defined in 19 U.S.C. 1463, to deliver the vessel to the proper officers of the customs or to unlade merchandise at other than the port of destination, or dispose of merchandise by sale or otherwise.

Section 1465 of title 19 makes punishable the failures of a master or a conductor to file a manifest of a vessel or railway car arriving from a foreign contiguous country, including a listing of repairs, merchandise, supplies or equipment purchased in a foreign country, for use in the United States.

Section 1586 of title 19 makes punishable the master of any vessel that arrives from a foreign port who allows merchandise to be unladen before receiving a permit to unlade in the United States; allowing the unlading on the high seas adjacent to the customs waters of the United States of merchandise the importation of which is illegal or which consists of alcoholic liquors to be unladen for transshipment and introduction into the United States in violation of law, or to be placed in or received on a vessel of the United States or one owned by United States citizens, residents or corporations. This section contains other provisions prohibiting unlading and transshipment of certain merchandise.

Section 1708 of title 19 makes punishable a citizen of the United States or master or member of the crew of certain vessels of 500 net

tons or less of the United States who, with intent to defraud, procures alcoholic beverages destined for the United States not covered by importation certificates, to be laden upon such vessel in any foreign port or outside the United States.

§ *1911—Smuggling*

This section, along with sections 1912 and 1913 of the proposed code, carries forward provisions of chapter 27 of title 18 (relating to customs offenses).

Subsection (a)(1) punishes a person who knowingly introduces into the United States an object whose introduction is prohibited absolutely, or is prohibited conditionally and all the conditions have not been met. This subsection carries forward the second paragraph of 18 U.S.C. 545. The prohibition referred to in subsection (a)(1) can be either a statutory prohibition or a prohibition in a rule issued pursuant to law. Subsection (a)(1) requires that the introduction be knowing, and that the actor also know that there is either an absolute or a conditional prohibition against introduction. "Introduce" is defined in section 1914(2) and "object" is defined in section 1914(3) of the proposed code. This section covers attempted smuggling. The predecessor section to 18 U.S.C. 545 was held by the Supreme Court in *Keck* v. *United States*, 172 U.S. 434, 444 (1899), not to reach attempts.

Subsection (a)(2) prohibits evading, in whole or in part, the assessment or payment of a customs duty. This subsection carries forward 18 U.S.C. 541 and 543.

Subsection (a)(3) prohibits evading the examination by the Government of an object being introduced into the United States. This subsection, along with section 1913 of the proposed code (relating to receiving smuggled property), carries forward 18 U.S.C. 545.

Subsection (a)(4) prohibits using fraud with intent to mislead the Federal Government as to a matter material to the purpose of an examination by the Federal Government of an object being introduced into the United States. This subsection carries forward 18 U.S.C. 542.

Subsection (b)(1) sets forth the penalty scheme for smuggling. Under current law, all customs offenses are felonies. However, the Committee decided that it was more appropriate to classify each offense according to the value and nature of the object introduced. "Value" is defined in section 1914(4) of the proposed code (relating to general definitions). Section 1914(4)(C) of the proposed code sets forth the method for determining value under this section. The value of the goods or the duty owed will be aggregated if several objects are introduced into the United States at the same time. This classification scheme is consistent with the approach followed by the Brown Commission. (*See Final Report section* 1411 (1971)).

If the value of either the smuggled object or the duty owed upon it is more than $500, or if the object is obscene material, an offense under this section is classified as a D felony. Section 1911 reaches the importation of obscene material because the importation of such material is prohibited by 19 U.S.C. 1305(a). The term "obscene material" is defined in section 2743(d) of the proposed code (relating to transferring or exhibiting obscene material).

Regardless of the value of the object or the duty owed upon it, if the object introduced is prohibited because it may cause bodily injury

or property damage, the offense is a class E felony. "Bodily injury" is defined in section 101 of the proposed code (relating to general definitions).

If the value of the object or the duty owed is between $100 and $500, the offense is a class A misdemeanor. A typical offense of this class would be committed by a tourist returning to the United States who fails accurately to declare purchases abroad. The Committee views this sort of conduct as deserving of a lesser penalty.

In any other case in which duty would have been owed, the offense is a class B misdemeanor. Any other violation of this section is a class C misdemeanor.

Subsection (b)(2) provides that no state of mind need be proved with regard to any circumstance relating to the classification of the offense.

The Committee determined that there is a substantial controversy over the proper use of statutory presumptions and *prima facie* inferences. Hearings on H.R. 6869 before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st and 2d sess., Serial No. 52, at 2491 (1979) (testimony of Professor Paul F. Rothstein). The rules concerning the application of evidentiary presumptions have been changing. *See Ulster County Court* v. *Allen*, 442 U.S. 140 (1979); Rothstein, *Development and Trends in Evidence*, New York L.J., Oct. 31, 1979, at 1, col. 1. The Committee has decided, therefore, not to reenact the presumption in 18 U.S.C. 545. The Committee, however, does not intend to preclude the judicial evolution of appropriate constitutional presumptions on a case by case basis. Such determinations will very likely be similar to the existing statutory rule.

§ *1912—Trafficking in smuggled property*

This section, along with sections 1911 and 1913 of the proposed code, carries forward provisions of chapter 27 of title 18 (relating to customs offenses). Section 1912 is directed toward the person who profits from conduct prohibited by section 1911 of the proposed code (relating to smuggling) by trafficking in property smuggled into the United States.

Subsection (a) is violated if an actor knowingly traffics in an object that has been unlawfully introduced into the United States in violation of section 1911 of the proposed code. The term "introduce" is defined in section 1914(2) and the term "object" is defined in section 1914(3) of the proposed code (relating to general definitions). The term "traffic" is defined in section 2715(3) of the proposed code to mean to "transfer or otherwise dispose of to another as consideration for anything of value; or obtain control of with intent to transfer or dispose of as consideration for anything of value."

Subsection (b) provides that no state of mind need be proved with regard to the circumstance that the object was introduced in violation of section 1911 of the proposed code. In other words, the actor need not know that the introduction of the object violated a particular provision of the law. The actor must know, however, that the object was unlawfully introduced.

The Committee decided that the penalties for smuggling (section 1911 of the proposed code) should be equally applicable to trafficking in smuggled property because both types of conduct are equally serious. Therefore, subsection (a) punishes a violation of section 1912 pursuant to the classification scheme established in section 1911(b)(1) of the proposed code.

§ *1913—Receiving smuggled property*

This section also carries forward provisions of chapter 27 of title 18 (relating to customs offenses). In particular, this section and section 1911(a)(3) of the proposed code carry forward 18 U.S.C. 545.

Subsection (a) is violated if an actor knowingly buys, receives, possesses, or obtains control of an object unlawfully introduced into the United States in violation of section 1911 (relating to smuggling) of the proposed code. The terms "introduce" and "object" are defined in section 1914 of the proposed code.

Subsection (a) classifies a violation of this section at one class below a violation of section 1911 of the proposed code. This reflects the Committee's evaluation that the culpability of the receiver is less than that of the actual smuggler or trafficker.

Subsection (b) provides that no state of mind need be proved with regard to the circumstance that the object was introduced in violation of section 1911 of the proposed code. In other words, the actor need not know that the introduction of the object violated a particular provision of the law, but the actor must know that the object was unlawfully introduced.

Subsection (c) provides that it is a defense to prosecution under this section that the defendant's conduct was done with intent to transfer the object to the Customs Service. *See* section 2532 of the proposed code, which provides a similar defense to receiving stolen property.

The Committee decided not to reenact the evidentiary presumption in 18 U.S.C. 545. *See* the discussion of this issue at 209 *supra.*

§ *1914—Definitions for subchapter*

This section defines the terms "customs territory of the United States," "introduce," "object," "value," and "traffic" for the purposes of the subchapter on customs and related offenses.

Paragraph (1) of this section defines the term "customs territory of the United States" to mean the States of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

Paragraph (2) of this section defines the term "introduce" to mean import, reimport, transport, land, reland, or bring into the United States from any place outside the United States, or into the customs territory of the United States from any place outside the customs territory of the United States but within the United States.

Paragraph (3) of this section defines the term "object" to include any article, good, ware, and merchandise, whether animate or inanimate.

Paragraph (4) of this section defines the term "value", when used with respect to—

(A) property that is a security interest, a lien, or any other interest in property that is obtained through the extension of credit, to mean the fair cash value at the time of the offense to the person deprived of such security interest, lien, or other interest;

(B) property that is a guarantee or insurance of a loan or mortgage, to mean the maximum potential liability of the insuror or guarantor at the time of the offense; and

(C) any other property, to mean the aggregate value in terms of fair cash value at the time and place the offense is committed.

Paragraph (5) of this section defines the term traffic to have the same meaning the term has in section 2715 of the proposed code (relating to general provisions for subchapter).

SUBCHAPTER III—CONTRABAND CIGARETTES

Current Law

Congress in 1978 added a new chapter to title 18 (chapter 114) which sets forth four offenses pertaining to trafficking in contrabrand cigarettes. Pub. L. No. 95–575, 92 Stat. 2463–65 (Nov. 2, 1978). First, 18 U.S.C. 2342(a) punishes anyone who knowingly ships, transports, receives, possesses, sells, distributes, or purchases contraband cigarettes. The term "contraband cigarettes" is defined in 18 U.S.C. 2341(2) to mean a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp or other indication to be placed on the cigarette package to evidence the payment of the taxes, and which are in the possession of any person other than a member of one of four specified classes of exempted persons.

Second, 18 U.S.C. 2344(b) punishes knowing violations of a rule or regulation issued pursuant to 18 U.S.C. 2346, which authorizes the Secretary of the Treasury to prescribe rules and regulations to carry out the provisions of chapter 114.

Third, 18 U.S.C. 2344(b) punishes knowing violations of rules or regulations issued pursuant to 18 U.S.C. 2343(a), which authorizes the Secretary of the Treasury to prescribe rules and regulations relating to keeping records of transactions involving cigarettes by persons who ship, sell, or distribute any quantity of cigarettes in excess of 60,000 in a single transaction.

Fourth, 18 U.S.C. 2342(b) punishes anyone who knowingly makes any false statement or representation with respect to the information required to be kept in the records of persons who ship, sell, or distribute any quantity of cigarettes in excess of 60,000 in a single transaction.

§ *1921—Trafficking in contraband cigarettes*

This section carries forward 18 U.S.C. 2342(a) and 2344(a). It makes the transportation, possession, or distribution of cigarettes that are declared contraband by Public Law 95–575 a class D felony.

The term "contraband cigarettes" is defined in section 621 of the Criminal Code Revision Act of 1980, which carries forward the definition of that term in 18 U.S.C. 2341(2).

§ *1922—Unlawful conduct relating to contraband cigarettes*

This section carries forward current 18 U.S.C. 2342(b) and 2344(b). Subsection (a)(1) makes it a class E felony knowingly to make a false statement or representation regarding certain information currently required by 18 U.S.C. 2343 to be recorded by a person who ships, sells, or distributes more than 60.000 cigarettes in a single transaction. Section 2343 of title 18 is carried forward in chapter 71

of title II of the Criminal Code Revision Act of 1980. The term "cigarettes" is defined in section 621 of the Criminal Code Revision Act of 1980.

Subsection (a)(2) makes it a class E felony to violate section 624 of the bill. Section 624 of the bill carries forward 18 U.S.C. 2343 and 2346.

Subsection (b) provides that no state of mind need be proved with regard to the circumstance that the information is required to be kept by chapter 71 of title II of the Criminal Code Revision Act of 1980. In other words, it is sufficient to constitute a violation of this section that the actor knowingly makes a false statement or representation regarding this information.

§ *1923—Forfeiture of cigarettes*

This section carries forward 18 U.S.C. 2344(c) and provides that cigarettes involved in a violation of this subchapter are subject to seizure and forfeiture pursuant to the provisions of section 5845(a) of the Internal Revenue Code of 1954 (relating to seizure, forfeiture, and disposition of firearms).

Chapter 21—Offenses Involving Individual Rights

Subchapter I—Offenses Involving Civil Rights

Introduction

This subchapter brings forward the provisions of the sections setting forth the major civil rights offenses. The earliest of these, presently 18 U.S.C. 241 and 242, date from the Reconstruction Era, being derived from section 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27. The other major civil rights offenses brought forward in this subchapter are 18 U.S.C. 245 and 42 U.S.C. 3631, both of which were enacted by the Civil Rights Act of 1968.

§ *2101—Interfering with civil rights*

This section brings forward 18 U.S.C. 241 and part of 18 U.S.C. 242. Section 241 makes it an offense for two or more persons to conspire to injure, oppress, threaten or intimidate a citizen in the free exercise or enjoyment of, or because that citizen has exercised, a right or privilege secured or protected by the Constitution or laws of the United States. Section 241 also makes it an offense for two or more persons to go in disguise on the highway or upon another person's premises with intent to prevent or hinder the other person's free exercise or enjoyment of any right or privilege secured or protected by the Constitution or laws of the United States. Section 242 makes it an offense for someone acting under color of law willfully to (1) deprive an inhabitant of a State, territory or district of any right, privilege or immunity secured or protected by the Constitution or laws of the United States, or (2) subject someone to different punishment because the person is an alien or because of the person's race or color.

Both 18 U.S.C. 241 and 242 have been sustained against Constitutional challenges. *Screws* v. *United States*, 325 U.S. 91 (1945) (predecessor to section 242); *United States* v. *Guest*, 383 U.S. 745 (1966) (section 241).

Section 2101 combines the general prohibitions of 18 U.S.C. 241 and 242 into one section. In doing so, section 2101 deletes the concerted

action requirement of section 241, deletes certain language in sections 241 and 242 as unnecessary, standardizes the victim designation, and standardizes the phrasing of the rights involved.

In section 2101, the Committee has brought forward the specific intent requirement of sections 241 and 242 as the courts have interpreted that requirement. The specific intent requirement for section 242 was enunciated in *Screws* v. *United States*, 325 U.S. 91 (1945). In *Screws*, section 242 was challenged on the ground that the section did not provide reasonable notice of the prohibited conduct. It was argued that the phrase "rights, privileges, or immunities secured or protected by the Constitution" would encompass due process rights. Since those rights are broad and changing and often turn upon the particular facts of the situation, a person could not know with sufficient certainty the range of rights that are constitutional or that would be found to be constitutional in an after-the-fact determination.

The Supreme Court, however, found that the section was not unconstitutionally vague. The term "willfully" was read to mean that the actor had a specific intent to violate an established constitutional right of the victim. *Screws* v. *United States*, 325 U.S. 91, 103 (1945). Thus, a person could not be heard to complain that he or she did not know that the section prohibited the type of conduct that he or she had engaged in.

In defining the "willfulness" requirement of section 242, the Supreme Court indicated that the specific intent required involved more than an actual purpose of unconstitutionality. The Court stated:

> when they [defendants] act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting, they are not punished for violating an unknowable something. . . .
>
> The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees.

Screws v. *United States*, 325 U.S. 91, 105, 106 (1945). *See United States* v. *Ehrlichman*, 546 F.2d 910, 921 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). *See also United States* v. *McClean*, 528 F.2d 1250, 1255 (2d Cir. 1976).

In *United States* v. *Guest*, 383 U.S. 745 (1966), the Supreme Court held the specific intent requirement of 18 U.S.C. 242 applicable to 18 U.S.C. 241. The Court indicated, however, that the specific intent requirement of section 241 was automatically satisfied by proof of a conspiracy, since conspiracy by its nature requires knowledge of the criminal objective.

Both 18 U.S.C. 241 and 242 have been given a broad reach in terms of the rights they encompass. This broad reach is illustrated by cases decided under section 241, which have held that section 241 protects such important interests as:

> The right to be free from slavery or involuntary servitude, except as punishment for crime—*Smith* v. *United States*, 157 F. 721 (8th Cir. 1907), *cert. denied*, 208 U.S. 618 (1908);

the right to be free from an unlawful search and seizure—*see, e.g., United States* v. *Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States* v. *Liddy*, 542 F.2d 76 (D.C. Cir. 1976) (rejecting a contention that the section was limited to situations in which the victim was aware of the injury, threat or intimidation at the time the injury, threat or intimidation occurs);

the right to remain in the official custody of the United States marshal—*Logan* v. *United States*, 144 U.S. 263 (1892);

the right freely to report violations of Federal law without retaliation—*Motes* v. *United States*, 178 U.S. 458, 462–63 (1900);

the right to testify at proceedings held under authority of Federal law—*United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974);

the right to travel interstate—*United States* v. *Guest*, 383 U.S. 745 (1966);

the right to vote in Federal elections—*see, e.g., United States* v. *Classic*, 313 U.S. 299 (1941); *United States* v. *Saylor*, 322 U.S. 385 (1944); *see also United States* v. *Anderson*, 481 F.2d 685, 698, 701 (4th Cir. 1973), *aff'd on other grounds*, 417 U.S. 211 (1974) (right to vote in State election also covered); and

the right to assemble and petition the government for redress of grievances—*United States* v. *Cruikshank*, 92 U.S. 542 (1875).

The Supreme Court has indicated that sections 241 and 242 protect, in addition to constitutionally-secured rights, rights that are secured by civil provisions of the United States Code. In *United States* v. *Johnson*, 390 U.S. 563 (1968), the Court sustained the prosecution under section 241 of a person who had interfered with blacks in their access to public accommodations covered by the Civil Rights Act of 1964. The Court construed the exclusive injunctive relief remedy of that Act to bar criminal actions only against proprietors or owners of public accommodations (those subject to the Act) and not to foreclose criminal prosecutions against outsiders who assault blacks for exercising their right to equality in public accommodations. The Court reaffirmed the language of *United States* v. *Price*, 383 U.S. 787, 801 (1966), that section 241 must be accorded "a sweep as broad as its language." *United States* v. *Johnson*, 390 U.S. 563, 565 (1968). Since section 242 contains virtually identical language with regard to the constitutional rights encompassed, it would appear that any Federal statute creating a civil right that is not tied exclusively to a civil remedy may be the basis for a prosecution under 18 U.S.C. 241 or 242.

Section 2101 brings forward 18 U.S.C. 241 and part of 18 U.S.C. 242 in a unified, general civil rights provision that is intended to cover violations of constitutional or other Federal rights not covered by the more specific civil rights offenses described in sections 2102–05 of the proposed code.

Section 2101 standardizes the victim designations of current law. Section 241 refers to "citizens" and section 242 refers to "inhabitants" (which is the equivalent of "person" in the proposed code). The Committee has used "person", which is defined in section 101 of the proposed code. While this somewhat expands the reach of 18 U.S.C. 241 (see the definition of "person" in section 101 of the proposed code),

the Committee believes that the focus of the provision should be on the nature of the right, privilege or immunity involved, rather than on the status of the victim as a citizen or noncitizen. If the person has a right, privilege or immunity secured or protected by the Constitution, then section 2101 is applicable.

Section 2101 also standardizes the phrasing of the rights covered by adopting a slightly modified version of the formulation of 18 U.S.C. 242, which refers to "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." The Committee's modification makes no change of substance. The Committee intends to carry forward existing law under 18 U.S.C. 241 and 242 with respect to the scope of the rights encompassed by section 2101 of the proposed code and to permit the courts to continue the judicial process of refining Federal rights which has taken place over the past century.

Subsection (a)(1) prohibits a person acting under color of law from intentionally engaging in any conduct and thereby recklessly depriving another person of a right, privilege, or immunity secured by the Constitution or laws of the United States. This carries forward 18 U.S.C. 242 within the constitutional parameters set in *Screws* v. *United States*, 325 U.S. 91 (1945). The *Screws* case requires that the actor "act in open defiance or in reckless disregard of a constitutional requirement." *Id.* at 105. Subsection (a)(1) requires that the actor intentionally engage in conduct and be aware of, and disregard, a risk that the conduct intentionally engaged in will deprive another of a federally-protected right. Moreover, the risk must be of such a magnitude that disregarding it constitutes a gross deviation from a reasonable standard of care.

Subsection (a)(2) makes it a crime for someone intentionally to injure, oppress, threaten or intimidate another person in the free exercise or enjoyment of, or because that other person has exercised, a right, privilege or immunity secured by the Constitution or laws of the United States. Subsection (a)(2) brings forward 18 U.S.C. 241. While the conspiracy language of section 241 is not brought forward, a conspiracy to violate subsection (a)(2), as well as subsection (a)(1), can be prosecuted under section 1102 (conspiracy) of the proposed code. The Committee perceived no reason to limit subsection (a)(2) to situations where two or more people act pursuant to an agreement. If a person, acting alone, intentionally injures or intimidates another in the free exercise of a federally-protected right, then that person should be subject to criminal penalties.

Subsection (a)(2) does not specifically bring forward the language of the second paragraph of 18 U.S.C. 241 (going in disguise upon the highway). The second paragraph, archaic in origin, appears to be redundant, adding nothing to the coverage of the first paragraph of section 241. The Committee believes that subsection (a)(2), as drafted, adequately covers the situations encompassed by both the first and second paragraphs of section 241.

Subsection (b) classifies the offense as: (1) an A felony if the actor intends to produce bodily injury and recklessly causes the death of another; (2) a C felony if the actor intentionally causes bodily injury to another; and (3) an A misdemeanor in any other instance. Pres-

ently, a violation of 18 U.S.C. 241 carries a basic penalty that is the equivalent of a class C felony, but the penalty becomes the equivalent of a class A felony "if death results." Similarly, 18 U.S.C. 242 provides a basic penalty equivalent to a class A misdemeanor, but the penalty becomes the equivalent of a class A felony "if death results".

Subsection (b) modifies the penalty structure of current law by using three levels of punishment instead of two and by requiring a *mens rea* in order to impose the higher penalties. (Both sections 241 and 242 impose the higher penalties when death "results," without regard to whether the defendant intended, knew, or was reckless or negligent about the death.) This approach is consistent with, and derived from, the Civil Rights Act of 1968, which established three levels of punishment for 18 U.S.C. 245 and 42 U.S.C. 3631.

Subsection (c) provides that whether a right, privilege, or immunity is secured by the Constitution or laws of the United States is a question of law (as to which no state of mind need be proven). Pursuant to section 121 of the proposed code, the court will determine whether a right, privilege or immunity is secured by the Constitution or laws of the United States. Thus, section 2101 requires distinct findings before a defendant can be convicted. First, the court must find, as a matter of law, that the conduct alleged in the indictment or information constitutes a deprivation of (or an injury, oppression, threat or intimidation directed at the free exercise or enjoyment of) a right, privilege, or immunity secured by the Constitution or laws of the United States. If the court finds that such a right, privilege or immunity is involved, then the jury (or the court acting as the trier of fact) must make other findings. The jury must find that the defendant engaged in the conduct intentionally—i.e., that it was the defendant's conscious objective to engage in the conduct. The jury must also find that the defendant acted in reckless disregard of the constitutional right, privilege, or immunity involved.

The approach of section 2101, requiring distinct findings by the court and the jury, parallels the approach of present Federal law. As noted in *United States* v. *Ehrlichman*, 546 F.2d 910, 921 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), present law requires two determinations:

> The first is a purely legal determination. Is the constitutional right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that federal right? If both requirements are met, even if the defendant did not in fact recognize the unconstitutionality of his act, he will be adjudged as a matter of law to have acted "willfully"—*i.e.*, "in reckless disregard of constitutional prohibitions or guarantees" [quoting from *Screws* v. *United States*, 325 U.S. 91, 106 (1945)].

§ *2102—Interfering with civil rights under color of law*

This section is designed to provide specific prohibitions against official misconduct involving violence to, or restraints of, the person. Like

18 U.S.C. 242, it affords Federal protection against officials who misuse their position to commit crimes while acting under color of law and in so acting deprive another of a federally secured right. The purpose of this provision is to carry forward the effect of current law while simplifying and clarifying the offense. All of the activity reached under section 2102 of the proposed code is presently reached under 18 U.S.C. 242.

Section 242 was challenged in *Screws* v. *United States*, 325 U.S. 91 (1945). It was argued that the phrase "right secured or protected by the Constitution or laws of the United States" was unconstitutionally vague because due process rights are broad and changing and often turn on the particular facts of the situation. The Supreme Court, however, found that the term "willfully" as it was construed saved the section from being one which prohibited unknowable wrongs. The Court interpreted willfully to require that the actor have a specific intent to violate an established constitutional right of the victim. The Court noted that "when they [defendants] act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite." *Screws* v. *United States*, 325 U.S. 91, 105 (1945).

Although the specific intent requirement read into 18 U.S.C. 242 is eliminated from section 2102 of the proposed code, the Committee avoids vagueness in section 2102 by identifying certain serious criminal conduct which, when committed by persons acting under color of law, violates constitutional rights and by specifying the prohibited conduct with particularity. Thus, for example, section 2102 provides that someone who under color of law assaults or murders an individual is subject to Federal criminal penalties.

The phrase "and thereby deprives another of a right, privilege, or immunity secured by the Constitution or laws of the United States" requires that infringement of a Federal right in fact result from the conduct. Subsection (c) provides that no state of mind need be proved as to this result. It is expected that where the other elements of the offense are present a constitutional deprivation would be the result since the use of unauthorized or unjustified force by a person acting under color of law is itself a deprivation of liberty without due process of law. *See United States* v. *Stokes*, 506 F.2d 771 (5th Cir. 1975); *United States* v. *Fleming*, 526 F.2d 191 (8th Cir. 1975), *cert. denied*, 423 U.S. 1082 (1976).

Subsection (a) makes it an offense for someone, under color of law, to engage in conduct that would violate certain specified sections of the proposed code, if Federal jurisdiction under those sections existed. This formulation incorporates by reference all of the components of the referenced offense except the jurisdictional bases. Thus, the prosecution must show that the defendant, under color of law, engaged in the conduct, under the circumstances, and with the results and states of mind required by the referenced section. The phrase "conduct which would violate a section listed in subsection (b) except for the fact that Federal jurisdiction under that section does not otherwise exist" means only that it is not necessary for the prosecution to prove one of the jurisdictional bases set forth in the referenced section. Any special provision (e.g., a defense or an affirmative defense) applicable to the referenced offense is also applicable to a prosecution under section 2102. The *mens rea* required as to the prohibited acts is that which

is specified in the incorporated sections. The fact that the actor was acting under "color of law" is a circumstance. Since the section does not specify any state of mind as to this circumstance, the actor must know that he or she was acting under color of law. *See* section 302(b) of the proposed code.

The term "color of law" is not defined in the proposed code. The Committee intends to carry forward the meaning given that term under current law. *See, e.g., United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966); *United States* v. *Classic*, 313 U.S. 299, 325–26 (1941). *See also* Senate Rep. No. 96–553, at 467 (1980).

Subsection (b) lists 15 offenses described in chapter 23 (offenses involving the person) of the proposed code. These offenses are murder (section 2301 of the proposed code), manslaughter (section 2302 of the proposed code), maiming (section 2311 of the proposed code), aggravated battery (section 2312 of the proposed code), battery (section 2313 of the proposed code), aggravated assault (section 2314 of the proposed code), terrorizing (section 2315 of the proposed code), communicating a threat (section 2316 of the proposed code), kidnapping (section 2321 of the proposed code), aggravated criminal restraint (section 2322 of the proposed code), criminal restraint (section 2323 of the proposed code), aggravated criminal sexual conduct (section 2331 of the proposed code), criminal sexual conduct (section 2332 of the proposed code), sexual abuse of a minor (section 2333 of the proposed code), and sexual abuse of a ward (section 2334 of the proposed code).

Although case law establishes that deprivations of property rights such as those protected by sections 2521–23, 2531–34, and 2542 of the proposed code—*see, e.g., United States* v. *Fruit*, 507 F.2d 195 (6th Cir. 1974) (property destruction) (section 241 case); *Brown* v. *United States*, 204 F.2d 247 (6th Cir. 1953) (extortion); *United States* v. *McClean*, 528 F.2d 1250 (2d Cir. 1976) (extortion); *United States* v. *Senak*, 477 F.2d (7th Cir.), *cert. denied*, 414 U.S. 856 (1973) (extortion); *United States* v. *O'Dell*, 462 F.2d 224 (6th Cir. 1972) (extortion)—may also constitute constitutional violations, the Committee did not include these offenses in those listed in section 2102. Property deprivations, and other personal deprivations—e.g. illegal searches, *United States* v. *Liddy*, 542 F.2d 76 (D.C. Cir. 1976), deprivations of federal voting rights, *United States* v. *Classic*, 313 U.S. 299 (1941)—not covered by the referenced sections, can be prosecuted under section 2101 where an intent to deprive the victim of the protected interest is present. *See United States* v. *McClean*, 528 F.2d 1250 (2d Cir. 1976).

Section 2102 is classified at the same level as the referenced offense involved. In this way the gravity of the offense is reflected in the punishment. Thus a person convicted under section 2102 for conduct constituting murder as defined in section 2301 of the proposed code will be subject to A or B felony-level punishment, while a person convicted under section 2102 for conduct constituting battery as defined in section 2312 of the proposed code will be subject to A or C misdemeanor-level punishment.

§ *2103—Interfering with a Federal benefit*

Forcible intereference with the exercise of specified rights is punished by 18 U.S.C. 245. The exercise of some rights is protected against

any forcible interference, while the exercise of other rights is protected against forcible interference that is racially motivated or that is based upon color, religion, or national origin. Section 245 was enacted in order to increase protection for civil rights workers and to make more effective the prosecution of civil rights violators by providing language more specific than the language of 18 U.S.C. 241 and 242. *See e.g.*, Senate Rep. No. 90–721 (1968), reprinted in [1968] U.S. Code Cong. & Ad. News 1837, 1839.

Section 2103 carries forward 18 U.S.C. 245(b)(1), (b)(4)(B), and (in part) (b)(5). Section 245(b)(1) makes it an offense for someone, by force or threat of force, willfully to injure, intimidate, or interfere with any person because that person is or has been (or in order to intimidate any other person or class of persons from)—

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as poll watcher, or any legally authorized election official in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States; or

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance.

Section 245(b)(4)(B) makes it an offense for someone, by force or threat of force, willfully to injure, intimidate, or interfere with any person because that person is or has been (or in order to intimidate any other person or class of persons from) affording another person or class of persons the opportunity to engage in, inter alia, any of the activities described in 18 U.S.C. 245(b)(1)(A) through (E). Section 245(b)(5) provides similarly with regard to citizens who are "aiding or encouraging" other persons to engage in the activities described in 18 U.S.C. 245(b)(1)(A) through (E).

Subsection (a) makes it an offense to use physical force or threat of physical force and thereby to injure, intimidate or interfere with another person because that person is or has been, or with intent to intimidate any person from, engaging in certain specified activities. The specified activities are:

(1) Applying for, participating in, or enjoying a benefit, privilege, service, program, facility, or activity provided by, administered by, or wholly or partly financed by the United States;

(2) Applying for or enjoying employment, or a perquisite of employment, by a Federal agency;

(3) Serving as a juror (grand or petit) in Federal court;

(4) Voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in a primary, general, or special election;

(5) Affording others the opportunity, to participate, or protection in order to participate, in any of the above activities; and

(6) Aiding or encouraging others to participate in any of the above activities.

Present law reaches the last two activities (affording and aiding) when the assistance is to enable people to participate in the activities free of discrimination based on race, color, religion, or national origin. It seemed anomalous to the Committee that direct participation in the specified activities was protected from forcible interference no matter what the motivation for the interference, while affording and aiding is protected from forcible interference only when that interference is discriminatorily motivated.

Subsection (b) brings forward in altered form the punishment scheme of present law. Present law provides a basic penalty for the offense (imprisonment for one year), with an enhancement where "bodily injury results" and where "death results". Where bodily injury results, the maximum penalty becomes imprisonment for 10 years; where death results, the maximum penalty becomes imprisonment for any term of years or for life. No culpability is required as to the bodily injury or the death. Thus, where bodily injury or death results, the higher punishment is applicable, whether the person convicted intended the result, knew that the result would occur, was reckless or negligent about the result, or had no state of mind at all about the result.

Subsection (b) classifies the offense as an A felony if the actor intends to produce bodily injury and recklessly causes death; as a C felony if the actor intentionally causes bodily injury; and as an A misdemeanor in any other instance.

§ 2104—Unlawful discrimination

Section 2104 carries forward 18 U.S.C. 245(b)(2), (b)(4)(A), and (in part) (b)(5), and 42 U.S.C. 3631. Section 245(b)(2) makes it an offense for someone, by force or threat of force, willfully to injure, intimidate, or interfere with any person because of that person's race, color, religion, or national origin and because that person is or has been—

(A) enrolling in or attending a public school or public college;

(B) participating in or enjoying a benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision of a State;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision of a State, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grant or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air; or

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house,

theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the above establishments or within the premises of which is physically located any of the above establishments, and (ii) which holds itself out as serving patrons of such establishments.

Section 245(b)(4)(A) makes it an offense for someone, by force or threat of force, willfully to injure, intimidate, or interfere with any person because that person is or has been (or in order to intimidate any other person or class of persons from) participating, without discrimination on account of race, color, religion or national origin, in, inter alia, any activity described in 18 U.S.C. 245(b)(2)(A) through (F). Section 245(b)(5) provides similarly with regard to citizens who are "aiding or encouraging" other persons to engage in, inter alia, the activities described in 18 U.S.C. 245(b)(2)(A) through (F).

Section 3631 of title 42 of the United States Code makes it an offense for someone, by force or threat of force, willfully to injure, intimidate, or interfere with any person because of that person's race, color, religion, sex or national origin and because that person is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings. Section 3631(b) punishes forcible interference with persons who are affording another person or class of persons the opportunity to participate in any of the above activities, services, organizations, or facilities.

Section 3631(c) punishes forcible interference with citizens who are "aiding or encouraging" other persons to participate in any of the above activities, services, organizations, or facilities.

Subsection (a) makes it an offense to use physical force or threat of physical force and thereby intentionally to interfere with another person (1) because of that person's race, color, sex, religion, or national origin and because that person is or has been, or with intent to intimidate any person from, engaging in certain specified activities; or (2) because that person is or has been, or with intent to intimidate any person from, affording another person the opportunity to participate in the specified activities on a nondiscriminatory basis or aiding another person to participate in the specified activities on a nondiscriminatory basis.

The specified activities are:

(1) Applying for, participating in, or enjoying a benefit privilege, service, program, facility, or activity provided or administered by a State or locality;

(2) Applying for or enjoying employment, or a perquisite of employment, by a State or local government agency;

(3) Serving as a juror (grand or petit) in a State or locality;

(4) Enrolling in or attending a public school or college;

(5) Applying for or enjoying the goods, services, privileges, facilities or accommodations of—

(a) an establishment providing lodging to transient guests;
(b) a restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility that serves the public and that is principally engaged in selling food or beverages for consumption on the premises;
(c) a gasoline station;
(d) a motion picture house, theater, concert hall, sports area, stadium, or other place of exhibition or entertainment that serves the public; or
(e) any other establishment that serves the public, that is located within the premises of an establishment described in this subparagraph or that has located within its premises such an establishment, and that holds itself out as serving patrons of such an establishment;

(6) Applying for or enjoying the services, privileges, facilities or accommodations of a common carrier utilizing any kind of vehicle;

(7) Traveling in or using a facility of interstate commerce;

(8) Applying for or enjoying employment, or a perquisite of employment, by a private employer, or joining or using the services or advantages of a labor organization, hiring hall, or employment agency; and

(9) Selling, purchasing, renting, financing, or occupying a dwelling; contracting or negotiating for the sale, purchase, rental financing or occupation of dwelling; or applying for or participating in a service, organization or facility relating to the business of selling or renting dwellings.

Present law proscribes forcible interference with the specified activities where the actor is motivated by the other person's race, color, religion, or national origin. Present law also proscribes forcible interference with the specified activity described in number 9 above when the actor is motivated by the other person's sex. Subsection (a) modifies present law by proscribing forcible interference with all of the specified activities when the actor is motivated by the other person's sex. The term "sex" refers to the person's gender, the physical characteristics of being a male or female, and not to sexual practices or preferences. This is consistent with the judicial interpretations of the term "sex" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a)(1), holding that the term does not encompass homosexuality. *See DeSantis* v. *Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979).

Subsection (b) alters slightly the punishment scheme of present law. Present law provides a basic penalty for the offense (imprisonment for one year), with an enhancement where "bodily injury results" and where "death results". Where bodily injury results, the maximum penalty becomes imprisonment for 10 years; where death results, the maximum penalty becomes imprisonment for any term of years or for life. No culpability is required as to the bodily injury or the death. Thus, where bodily injury or death results, the higher punishment is applicable, whether the person convicted intended the result, knew that the result would occur, was reckless or negligent about the result, or had no state of mind at all about the result.

Subsection (b) classifies the offense as an A felony if the actor intends to produce bodily injury and recklessly causes death; as a C felony if the actor intentionally causes bodily injury; and as an A misdemeanor in any other instance.

Subsection (c) brings forward the "Mrs. Murphy defense" found presently in 18 U.S.C. 245(b)(5). The subsection provides a defense to a prosecution under subsection (a)(1)(E)(i) where (1) the defendant was the proprietor of an establishment that provided lodging to transient guests; (2) the establishment was located within a building containing not more than five rooms for rent; and (3) the building was used by the proprietor as the proprietor's residence.

Subsection (d) defines "dwelling" for the purposes of section 2104 to mean any building or structure, or portion of a building or structure, which is occupied as, or designed or intended for occupancy as, a residence by one or more families. The term also includes any vacant land that is offered for sale or lease for the construction or location thereon of any such building or structure. Subsection (d) brings forward without change the definition of dwelling applicable to 42 U.S.C. 3631 (see 42 U.S.C. 3602(b)).

§ 2105—Interfering with speech or assembly related to civil rights activities

Section 2105 carries forward 18 U.S.C. 245(b)(5) and 42 U.S.C. 3631(c). Section 245(b)(5) makes it an offense for someone, by force or threat of force, willfully to injure, intimidate or interfere with any citizen because that citizen is or has been (or in order to intimidate any other citizen from) "participating lawfully in speech or peaceful assembly" opposing a denial of the opportunity to participate (without discrimination based on race, color, religion or national origin) in an activity described in 18 U.S.C. 245(b)(1)(A) through (E) or (b)(2)(A) through (F). Section 3631(c) of title 42 of the United States Code provides similarly where the speech or assembly is directed at the denial of the opportunity to participate (without discrimination based on race, color, religion or national origin) in an activity, service, organization, or facility described in 42 U.S.C. 3631(a).

Subsection (a) makes it an offense for someone knowingly to use physical force or threats of physical force and thereby intentionally interfere with another person because that person is or has been (or with intent to intimidate that person or any person from) participating in speech or assembly opposing a denial of the opportunity to participate in certain specified activities. The specified activities are those described in sections 2103 and 2104 of the proposed code.

The Committee, with the support of the Justice Department, has modified present law somewhat. Present law refers to participating "lawfully" in speech or assembly. Subsection (a) does not use "lawfully". The victim's conduct prior to the use of physical force or threats is irrelevant unless that conduct justifies the use of physical force in self-defense or in defense of property. In such instances, of course, the defenses described in sections 727 and 728 of the proposed code would be applicable.

Subsection (b) brings forward in altered form the punishment scheme of present law. Present law provides a basic penalty for the

offense (imprisonment for one year), with an enhancement where "bodily injury results" and where "death results". Where bodily injury results, the maximum penalty becomes imprisonment for 10 years; where death results, the maximum penalty becomes imprisonment for any term of years or for life. No culpability is required as to the bodily injury or the death. Thus, where bodily injury or death results, the higher punishment is applicable, whether the person convicted intended the result, knew that the result would occur, was reckless or negligent about the result, or had no state of mind at all about the result.

Subsection (b) classifies the offense as an A felony if the actor intends to produce bodily injury and recklessly causes death; as a C felony if the actor intentionally causes bodily injury; and as an A misdemeanor in any other instance.

§ *2106—Deprivation of relief benefit*

Section 2106 carries forward the provisions of 18 U.S.C. 246. That section, which was amended in 1976, makes it an offense for someone directly or indirectly to deprive any person, on account of political affiliation, race, color, sex, religion or national origin, of any employment, position, work, compensation, or other benefit provided for or made possible, in whole or in part, by any Act of Congress appropriating funds for work relief or relief purposes.

Subsection (a) makes it a class A misdemeanor for someone knowingly to threaten to deprive, or to engage in any conduct and thereby deprive, any person of any employment, position, work, compensation or other benefit because of political affiliation, race, color, sex, religion, or national origin.

Subsection (b) provides for Federal jurisdiction when the employment, position, work, compensation, or other benefit is provided for or made possible, in whole or in part, by an Act of Congress appropriating funds for work relief or relief purposes.

§ *2107—Strikebreaking*

Section 2107 brings forward the provisions of 18 U.S.C. 1231. Subsection (a) makes it a class A misdemeanor for someone to use physical force or threats of physical force and thereby intentionally obstruct or interfere with (1) peaceful picketing by employees in the course of a bona fide labor dispute affecting wages, hours, or conditions of labor; or (2) the exercise by employees of rights of self-organization or collective bargaining. Present law carries a maximum punishment of imprisonment for 2 years (the equivalent of a class E felony in the proposed code). The Committee has reduced the level of punishment.

Subsection (b) provides for Federal jurisdiction when a person has moved across a State or United States boundary in connection with the commission of the offense.

SUBCHAPTER II—OFFENSES INVOLVING POLITICAL RIGHTS

1. *Obstructing elections and registration.*—Under current Federal law, an obstruction or an impairment of an election for Federal office by way of election fraud is generally prosecuted under the provisions of 18 U.S.C. 241. This provision, enacted originally in 1870

to enforce the rights guaranteed under the fourteenth and fifteenth amendments to the United States Constitution, prohibits two or more persons from conspiring to "injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States. . . ."

As noted by the Fourth Circuit in *Anderson* v. *United States*, 481 F.2d 498–99 (1973), *aff'd*, 417 U.S. 211 (1974), 18 U.S.C. 241 is not a narrow provision. Rather, the offense is of an "inclusive nature" and has a broad sweep encompassing " 'any right or privilege secured . . . by the Constitution or laws of the United States'. . . . Nor is the sweep of that statute confined to rights expressly defined in the Constitution; included among the rights 'secured' thereby are those judicially determined to be fundamental and embraced by implication within the Equal Protection Clause of the Fourteenth Amendment. *United States* v. *Guest* [382 U.S. 745 (1963)] at 755–756 . . . . Right of suffrage 'is a civil right of the highest order,' *Oregon* v. *Mitchell* [400 U.S. 112 (1970)] (Douglas, J. dissenting and concurring) . . . ." (Some citations omitted). *See also Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886); *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965).

Under 18 U.S.C. 241 the Government has successfully prosecuted conspiracies to stuff a ballot box with forged ballots, *United States* v. *Saylor*, 322 U.S. 385 (1944); *United States* v. *Nathan*, 238 F.2d 401 (7th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957); *United States* v. *Skurla*, 126 F. Supp. 713 (W.D. Pa. 1954), to impersonate qualified voters, *Crolich* v. *United States*, 196 F.2d 879 (5th Cir. 1952), *cert. denied*, 344 U.S. 830 (1952), to alter legal ballots, *United States* v. *Clark*, 19 F. Supp. 981 (W.D. Mo. 1937), to prevent voters from voting, *United States* v. *Wilson*, 72 F. Supp. 812 (W.D. Mo. 1947), *aff'd sub nom. Klein* v. *United States*, 176 F.2d 184, *cert. denied*, 338 U.S. 870 (149), to fail to count votes and to alter the votes counted, *Walker* v. *United States*, 93 F.2d 383 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938), to discriminate on account of race, *Ex parte Yarbrough*, 110 U.S. 651 (1884); *United States* v. *Mosley*, 238 U.S. 383 (1915); *United States* v. *Classic*, 313 U.S. 299 (1941), and to cast illegal absentee ballots, *United States* v. *Chandler*, 157 F. Supp. 753 (S.D.W. Va. 1957); *Fields* v. *United States*, 228 F.2d 544 (4th Cir. 1955), *cert. denied*, 350 U.S. 982 (1956); *United States* v. *Weston*, 417 F.2d 181 (4th Cir. 1969), *cert denied*, 396 U.S. 1062 (1970).

Courts have held that under 18 U.S.C. 241 the election fraud conspiracy need not be directed towards depriving a specific individual or citizen his right to vote. Rather, when an election fraud is perpetrated, the right of a citizen generally to have his vote tallied honestly and to have such vote undiluted by fraud, will have been abused. As stated by the Court of Appeals in the case of *United States* v. *Nathan*, 238 F.2d 401, 407 (7th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

> [I]t is immaterial that the defendants were without knowledge of the constitutional rights of citizens. When they acted in concert to pollute the ballot box they acted in reckless disregard of such rights and must be held to the consequences.

In addition, for a violation of 18 U.S.C. 241 to occur, there need not be a specific intent to change the results of a Federal election. The Supreme Court in *Anderson* v. *United States*, 417 U.S. 211 (1974), found that even though the principal motive of a conspiracy was to influence the outcome of a local election, the fact that in doing so the defendant also cast votes for Federal candidates provided the requisite intent to injure the rights of voters in a Federal election. The Court noted,

> That petitioners may have had no purpose to change the outcome of the Federal election is irrelevant. The specific intent required under § 241 is not the intent to change the outcome of a Federal election, but rather the intent to have false votes cast and thereby to injure the rights of all voters in a Federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots.

Id. at 226.

It is not clear whether or not the provisions of section 241 would apply if only State or local elections were involved in the election fraud conspiracy. Older Federal cases had found that votes cast for Federal elections needed to be involved for a violation to occur. *See Steedle* v. *United States*, 85 F.2d 867 (3d Cir. 1936). The Supreme Court in *Anderson*, however, "intimate[d] no views" on the question of "whether a conspiracy to cast votes for candidates for state or local office, as opposed to candidates for Federal office, is unlawful under section 241." *Id.* at 228. Although the Supreme Court did not address the issue, the Fourth Circuit in *United States* v. *Anderson*, 481 F.2d 685 (1973), *aff'd*, 417 U.S. 211 (1974), stated that when State action is present in election fraud conspiracies involving only state or local elections, that is, where there is "connivance" of election officials or those acting under color of state law, such state action brings the dilution of one's vote and injury to the elective franchise under the protections of the Equal Protection Clause of the Fourteenth Amendment. *See also United States* v. *Stollings*, 501 F.2d 954 (4th Cir. 1974).

Three other offenses in current law address conduct which may obstruct or impair the lawful conduct of a Federal election. Section 594 of title 18, United States Code, prohibits anyone from intimidating threatening, or coercing any person for the purpose of interfering with such person's right to vote, or not to vote, for any candidate in a Federal election. Section 595 of title 18, United States Code, prohibits administrative employees of Federal agencies from using their official authority to interfere with or affect an election for Federal office. Finally, 18 U.S.C. 593 prohibits the interference by the armed forces in any elections in a State.

The bribery of voters at a Federal election has been found not to be proscribed specifically by the current provisions of 18 U.S.C. 241. *United States* v. *Bathgate*, 246 U.S. 220 (1918). The act of bribing a voter, or accepting a bribe for one's vote is, however, specifically prohibited by the provisions of 18 U.S.C. 597.

The provisions of 18 U.S.C. 597, it should be noted, arguably apply only to general elections, and not to primaries. This was the scope of

the offense prior to the Federal Election Campaign Act of 1971, Pub. L. 92–225. The Federal Election Campaign Act of 1971, and its 1974 and 1976 amendments (Pub. L. No. 93–433, 88 Stat. 1263 (1974) and Pub. L. No. 94–283, 90 Stat. 475 (1976), had added definitions applicable to this provision which included primary elections within the term "election" (18 U.S.C. 591(b)). The definitions in 18 U.S.C. 591, however, were repealed in 1979 by the Federal Election Campaign Act Amendments of 1979, Pub. L. 96–187, 93 Stat. 1367.

In addition to the vote buying and selling prohibitions at 18 U.S.C. 597, section 11(c) of the Voting Rights Act of 1965 (42 U.S.C. § 1973i (c)), provides for punishment of anyone who "pays or offers to pay or accepts payment either for registration to vote or for voting" in Federal elections, including primary elections.

With respect to registrations, this provision also prohibits (1) the giving of false information as to one's name, address or period of residence in the voting district in order to establish eligibility to register to vote; and (2) conspiring with another to encourage his false registration to vote.

2. *Use of Federal funds to interfere with political rights.*—Under 18 U.S.C. 598, no one may use any appropriation made by Congress for work relief, or for increasing employment by means of loans or grants for public works projects, for the pupose of intefering with a person's right to vote at a Federal election.

In addition to this narrow restriction concerning relief appropriations, 18 U.S.C. 600 broadly prohibits any direct or indirect promise of "employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress" as a reward, consideration or favor for "any political activity" or political support or opposition to a candidate in a Federal election or primary. Since this provision applies to any political activity or to support or opposition to a candidate, it would apparently apply to one's voting for or against a candidate in an election. The provision, using the specific language "consideration, reward or favor" apparently is directed at using Federal benefits as inducements to voting or political activity, rather than specifically at coercions or restraints upon the exercise of one's right to vote in a Federal election.

As noted in the discussion of the provisions relating to interfering with Federal elections, 18 U.S.C. 594 prohibits anyone from intimidating, threatening or coercing any person for the purpose of interfering with such person's right to vote or not to vote in a Federal election; and 18 U.S.C. 595 prohibits administrative employees of Federal agencies from using their official authority to interfere with or affect an election for Federal office.

Section 601 of title 18, U.S.C., as amended in 1976 by Public Law 94–453, 90 Stat. 1516, prohibits anyone from attempting to cause any person to make a political contribution by means of the denial or deprivation, or the threat of denial or deprivation, of any employment, position or work in or for a Federal agency or entity, or that of any State or subdivision of a State, or the benefit of any program of the United States or any State, if such employment, position, work, compensation or benefit is Federally funded in whole or in part.

The current provisions of Federal law which concern the coercion of political contributions from Federal employees also include 18 U.S.C. 606, which prohibits any officer or employee of the United States, or any person receiving compensation for services from the United States, from discharging, promoting, or degrading, or changing official rank or compensation of any Federal officer or employee, or promising to do so, for making or failing to make any political contribution.

In addition to the criminal offenses, the provisions of the so-called "Hatch Act", 5 U.S.C. 7324(a), generally prohibit any employee in the executive branch from using his official authority or influence to interfere with or affect the result of an election, and from taking an active part in political management or in political campaigns. This provision has consistently been interpreted to prohibit the solicitation of political contributions by Federal employees in the executive branch from other such Federal employees, *see, e.g., In re Taylor*, 1 Pol. Act, Rep. 8 (C.S.C. No. F–989–41) (July 15, 1941); *In re Tolbert*, 1 Pol. Act. Rep. 11 (C.S.C. No. F–994–41) (July 10, 1941); *In re Flood*, 1 Pol. Act. Rep. 531 (C.S.C. No. F–1268–1277–51) (Aug. 24, 1951); *In re Murphy*, 1 Pol. Act. Rep. 572 (C.S.C. No. F–1318–51) (Mar. 14, 1951). The solicitation of political contributions by supervisors and other such officers from subordinate employees is considered a serious offense, *In re Doster*, 3 Pol. Act. Rep. 94 (C.S.C. No. F–1963–72) (Feb. 2, 1972), since it often carries with it the implication of coercion. *See, e.g., In re Murphy*, 1 Pol. Act. Rep. 572 (C.S.C. No. F–1318–51) (Mar. 14, 1951); *In re Patterson*, 2 Pol. Act. Rep. 10 (C.S.C. No. S–3–41) (Oct. 10, 1941); *In re Wild*, 2 Pol. Act. Rep. 721 (C.S.C. No. S–258–64) (Apr. 25, 1964).

3. *Political contributions by Federal public servants.*—As discussed above, the "Hatch Act" provisions of Federal law, 5 U.S.C. 7324 have been interpreted to prohibit executive branch employees from soliciting political contributions from fellow workers. Violations of the "Hatch Act" may result in removal from the service or suspension for a certain time.

In addition to those restrictions, all Federal officers and employees, persons receiving a salary for services from the United States, and Members of and candidates to Congress are currently prohibited by 18 U.S.C. 602 from soliciting a political contribution from any officer or employee of the United States. This provision, as amended in 1979, prohibits Federal employees and Members of and candidates to Congress from "knowingly" soliciting political contributions from any other Federal employee, officer, or person receiving salary for services from the United States Treasury. Inadvertent solicitations of Federal employees, therefore, such as when part of a general fund raising campaign aimed at the general public reaches a Federal employee, were not intended to constitute violations of this provision. As stated in the House Report on the Federal Election Campaign Act Amendments of 1979, amending 18 U.S.C. 602, "In order for a solicitation to be a violation of this section, it must be actually known that the person who is being solicited is a federal employee. Merely mailing to a list will no doubt contain names of federal employees

[and] is not a violation of this section." House Rep. No. 96–422 at 25 (1979).

Unlike the section prior to the amendments contained in the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96–187, 93 Stat. 1339 (1980), the current 18 U.S.C. 602 prohibits only the "solicitation" of political contributions from other Federal employees and does not prohibit the "receipt" of such contributions. Therefore, candidates, Members of Congress, and employees who are not otherwise prohibited (such as employees of the House of Representatives) may apparently receive unsolicited political contributions from Federal employees. As stated in the House Report on this measure, "The provision prohibiting receipt of contributions by Federal employees has been eliminated." House Rep. No. 96–422 at 25 (1979).

The intent of the prohibition on solicitations, as discussed by its sponsors, was to prevent Federal employees from being "subject to any form of 'political assessment.'" 125 Congressional Record S19,099 (daily ed. Dec. 18, 1979) (remarks of Sen. Hatfield). Since the section is directed to protecting employees who because of their employment and positions may be subject to coercion, it is not intended to apply to solicitation of Members of Congress. *Id.* This interpretation is consistent with the interpretation of the predecessor to 18 U.S.C. 602 which as noted in the resolution adopted by the House in the 63d Congress, 2d Session (1913), "should not be construed to prohibit one Senator or Member of Congress from soliciting campaign contributions from another Senator or Member of Congress." *See* 6 Cannon's Precedents of the House of Representatives, section 401 (1935).

Section 603 of title 18, as amended by the Federal Election Campaign Act Amendments of 1979, permits Federal employees to make voluntary, unsolicited political contributions to other Federal officers and employees, including Members of Congress, as long as the recipient Federal official is not the employer or the employing authority of the contributor.

Prior to January 8, 1980, the effective date of the Federal Election Campaign Act Amendments of 1979, all officers and employees of the Federal Government were prohibited from making political contributions to any other Federal officer, employee, or Member of Congress, including the authorized campaign committee of a Member, regardless of whether the contribution was voluntarily made or whether the recipient Federal official was the contributor's employer or employing authority. *See* 18 U.S.C. 607 (1976). Although in practice there was no strict enforcement of this provision, this restriction on Federal employees had been in effect since the enactment of the "Pendleton Act" in 1883, 22 Stat. 403. Similar prohibitions had been in effect prior to 1883 from an 1876 appropriations law, Act of August 15, 1876, ch. 287, 19 Stat. 169. The constitutionality of such restrictions on political contributions by Federal employees had been upheld by the Supreme Court in the cases of *United States* v. *Wurzbach*, 280 U.S. 396 (1930), and *Ex parte Curtis*, 106 U.S. 371 (1882).

Under the current 18 U.S.C. 603, however, Federal employees are only prohibited from making political contributions to their "boss",

that is, to other Federal officers, employees, or Members of Congress who are the "employer or employing authority" of the contributor. Employees in the executive branch of Government can lawfully make political contributions, therefore, to the reelection campaign of a Member of Congress. Such employees, however, may be prohibited from contributing to the reelection campaign of the President since the President as the chief executive, may technically be considered the ultimate "employing authority" of employees of the executive branch of Government.

With respect to congressional employees, the House Report on the Federal Election Campaign Act Amendments of 1979 explained that political contributions would be barred from a Member's staff to that Member, and from committee staff to the chair of that committee. Persons employed by the minority of a committee are also barred from contributing to the ranking minority member of the committee, as well as the chair. House Rep. No. 96–422 at 26 (1979).

As of this writing, each House of Congress has passed legislation revising 18 U.S.C. 603. The House passed H.R. 6702, which significantly rewrites section 603, *see* House Rep. No. 96–816 (1980), on March 10, 1980. The Senate passed H.R. 6702 in an amended form on September 9, 1980, and as amended by the Senate the legislation would change only one word in section 603. *See* Senate Rep. No. 96–922 (1980); 126 Congressional Record S–12308 (daily ed., September 9, 1980).

In addition to the criminal prohibition regarding political contributions by Federal employees, employees of an executive agency of the Federal Government are subject to another proscription on political contributions, 5 U.S.C. 7323, which provides that "an employee in an Executive agency (except one appointed by the President, by and with the consent of the Senate) may not . . . give a political contribution to an employee, a Member of Congress, or an officer of the armed services." Explanations of permissible political activities by Federal employees from the former Civil Service Commission, now Office of Personnel Management, have stated that "An employee may make a financial contribution to a political party or organization", *Federal Employees Political Participation* 3 (GC–46, 1972), and that "An employee does not violate the law by making a political contribution to a political organization," *Political Activity Information* 2 (GC–36, 1975). *See also* 5 C.F.R. section 733.111(8) (1980).

The term "political organization" in these explanations and regulations might arguably be broad enough to include a political committee which supports a Federal candidate. If so, Federal employees could contribute to a Member's principal campaign committee under this statutory provision without a violation of 5 U.S.C. 7323, even though contributions to a candidate's authorized political committee are, for purposes of the Federal election campaign laws, generally considered to be contributions to that candidate. *See* 2 U.S.C. 441a (a) (7) and 18 U.S.C. 603(b).

4. *Excess campaign expenditures and contributions.*—Expenditure limitations under Federal law are now only applicable to those candidates who receive public funds from the United States Treasury for their campaign. In the case of candidates receiving Federal "matching"

funds for the presidential primaries, 26 U.S.C. 9035 provides that such candidates may not knowingly incur qualified campaign expenses in excess of the limitations set by the Federal Election Campaign Act, which are $10 million for the primary, not to exceed in any one State the greater of 16¢ times the voting age population of the State or $200,000 (2 U.S.C. 441a(b)(1)(A)). A candidate may also not use personal funds or those of the candidate's immediate family in the campaign in excess of $50,000 (26 U.S.C. 9035).

Candidates in the general Presidential election who receive public funding may not incur campaign expenses in excess of the amounts provided to them from public funds as stated in 26 U.S.C. 9004. 26 U.S.C. 9012(a).

Other criminal penalties which are provided at 26 U.S.C. 9012 and which are applicable to candidates receiving public financing include penalties for the acceptance of private campaign contributions other than as specifically provided by law; the unlawful use of public funds received; the making of false statements to the Federal Election Commission; giving or accepting any kickbacks or illegal payments in connection with campaign expenses; the making of excessive unauthorized campaign expenditures; and the unauthorized disclosure of information.

§ *2111—Obstructing an election*

Paragraph (1) makes it a class E felony for someone knowingly to engage in any conduct and thereby obstruct or impair the conduct of a Federal election. This carries forward various current provisions regarding obstruction of elections, such as 18 U.S.C. 593, 594 and 42 U.S.C. 1973i, 1973j(a).

Paragraph (2) makes it a class E felony for someone to offer, make, or agree to make a significant payment (defined in section 2118 of the proposed code) to or on behalf of another person with intent to influence that person's voting, refraining from voting, or voting for or against a candidate in a Federal election. Paragraph (3) makes it a class E felony for someone to solicit, accept, or agree to accept a significant payment because of the actor's voting, refraining from voting, or voting for or against a candidate in a Federal election. Paragraphs (2) and (3) carry forward 18 U.S.C. 597 and 42 U.S.C. 1973i(c).

§ *2112—Obstructing registration*

Paragraph (1) makes it a class E felony for someone knowingly to engage in any conduct and thereby obstruct or impair the lawful conduct of registration to vote in a Federal election. This carries forward a number of provisions in present law regarding the obstruction of registration for elections, such as 42 U.S.C. 1973j(a), 1973aa–3.

Paragraph (2) makes it a class E felony for someone to offer, make, or agree to make a significant payment (defined in section 2118 of the proposed code) to or on behalf of another person with intent to influence that person's registering to vote in a Federal election. Paragraph (3) makes it a class E felony for someone to solicit, accept, or agree to accept a significant payment because of the actor's registering to vote in a Federal election. Paragraphs (2) and (3) carry forward the provisions of 42 U.S.C. 1973i(c).

Paragraph (4) makes it a class E felony for someone to give false information with intent to establish the actor's eligibility to vote in a Federal election. This also carries forward the provisions of 42 U.S.C. 1973i(c).

§ 2113—Manipulating a Federal benefit for a political purpose

This section carries forward certain parts of 18 U.S.C. 598, 599 and 600. Subsection (a) makes it a class E felony for someone, with intent to interfere with, restrain, or coerce another person in the exercise of the right to vote in an election, knowingly to (1) grant or threaten to grant to any other person, (2) withhold or threaten to withhold from any other person, or (3) deprive or threaten to deprive any other person of, the benefit of a program or a government contract.

Subsection (b) provides for Federal jurisdiction where the program is a Federal or a federally supported program and where the government contract is a Federal Government contract.

§ 2114—Manipulating employment or other benefits for political contribution

This section carries forward 18 U.S.C. 601 with changes extending the coverage of that provision. Subsection (a) makes it a class A misdemeanor for someone knowingly to (1) grant or threaten to grant to any other person, (2) withhold or threaten to withhold from any other person, or (3) deprive or threaten to deprive any other person of, any government work, payment or benefit and thereby to cause any person to make a political contribution. Section 601 covers the deprivation and threatened deprivation of work, payment, or benefit.

Subsection (b) defines the term "government work, payment, or benefit" to mean (1) any employment, position, or work in or for any government agency of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position, or work or (2) any payment or benefit of a program of the United States, a State, or a political subdivision of a State.

Subsection (c) provides for Federal jurisdiction where the government work, payment or benefit is Federal or federally-supported.

§ 2115—Misusing authority over personnel for a political purpose

This section, which restates 18 U.S.C. 606, makes it a class A misdemeandor for someone, with intent to punish, reward, or influence any person with respect to giving, withholding, or neglecting to make a political contribution, knowingly to (1) promote, fail to promote, demote, or discharge, (2) recommend the promotion, nonpromotion, demotion, or discharge of, or (3) change in any manner, or promise or threaten to change, the official position or compensation of, another Federal public servant.

§ 2116—Soliciting a political contribution as a Federal public servant

This section carries forward, in modified form, 18 U.S.C. 602 and 603. Subsection (a) makes it a class A misdemeanor for a Federal public servant knowingly to (1) solicit a "significant political contribution" from another person who the actor knows is a Federal public servant or (2) make a "significant political contribution", in response to a solicitation, to another person who the actor knows is a Federal public servant. This narrows present law by permitting unsolicited contributions, even to one's employee. However, unlike current law, it does not permit Federal employees to make contributions to other Federal employees in response to a solicitation. The term "significant political contribution" is defined in section 2118(5) of the proposed code.

Subsection (b) provides that section 2116 does not apply if the public servant soliciting the contribution (or making the contribution in response to a solicitation) and the public servant solicited (or receiving the contribution) are Members of Congress, Members-elect, or candidates for Congressional office. This also clarifies present law, which, read literally, does not exempt Members of Congress from the prohibitions against solicitation even where the person solicited is a member of Congress.[1]

§ 2117—Excess campaign expenditures and contributions

This section provides that whoever violates sections 9042 or 9012 of the Internal Revenue Code of 1954 (title 26 of the United States Code), commits a class E felony. The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited the referenced sections of the Internal Revenue Code of 1954, in the circumstances and with the results and states of mind required by the referenced sections. The use of "violates" is intended to ensure that section 2117 incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

§ 2118—Definitions for subchapter

This section defines six terms used in the subchapter describing offenses involving political rights. Paragraph (1) defines "election" to mean a primary, general, or special election for public office. This definition would, of course, include run-off elections. Paragraph (2) defines "Federal election" to mean an election held in whole or in part to nominate or elect and candidate for President or Vice President, or a Member of Congress. The coverage of sections 2111 and 2112 would thus include obstruction or impairment of registration or balloting with regard to a candidate for local office, if the same election involves a Federal office, even where there is no interference with the Federal part of the election. Paragraph (3) defines "candidate" to mean an individual who seeks nomination for election, or election, to public office.

Paragraph (4) defines "political contribution" to mean anything of value given or solicited with knowledge that such thing of value is to be used to assist a candidate in seeking nomination or election to office. Paragraph (5) defines "significant political contribution" to mean a contribution as defined in section 301(8) of the Federal Election Campaign Act of 1971. Paragraph (6) defines "significant payment" to mean an expenditure as defined in section 301(9) of the Federal Election Campaign Act of 1971.

SUBCHAPTER III—OFFENSES INVOLVING PRIVACY

Current Law

1. *Eavesdropping.*—Intercepting a private communication by means of an eavesdropping device without the prior consent of a party to

[1] As of this writing, there is under consideration a Committee amendment to conform this section with the Federal Election Campaign Amendments Act of 1979, Pub. L. No. 96–187.

the communication, or disclosing to another or using the contents of such private communication is currently generally prohibited by 18 U.S.C. 2511, enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351, 82 Stat. 197. It has been held that Congress has the power under the Commerce Clause to prohibit willful interception of oral communications on the premises of a business whose operations affect interstate commerce, *United States* v. *Duncan*, 598 F.2d 839 (4th Cir. *cert. denied*, 100 S. Ct. 148 (1979); but absent some proof of a Federal nexus, a conviction under the broad prohibition against intercepting wire or oral communications may not stand. *United States* v. *Burroughs*, 564 F.2d 1111 (4th Cir. 1977); *United States* v. *Hubbard*, 474 F. Supp. 64 (D.D.C. 1979).

However, the provisions of 18 U.S.C. 2511 have withstood various constitutional challenges. *See, e.g., United States* v. *Burroughs*, 564 F.2d 1111 (4th Cir. 1977); *United States* v. *Perkins*, 383 F. Supp. 922 (N.D. Ohio 1974) (the Federal nexus is the right of privacy protected at least by the ninth amendment, if not also by the fourth and fifth amendments); *United States* v. *Horton*, 601 F.2d 319 (7th Cir. 1979), *cert denied*, 444 U.S. 937 (1979) (provisions authorizing electronic surveillance and use of recorded conversation not an equal protection violation; *United States* v. *Hodge*, 539 F.2d 898 (6th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (consensual interceptions do not violate the fourth amendment); *United States* v. *Goldstein*, 532 F.2d 1305 (9th Cir. 1976), *cert. denied sub nom. Roberts* v. *United States*, 429 U.S. 960 (1976) (interception by private parties not violative of fourth amendment); *United States* v. *Santillo*, 507 F.2d 629 (3rd Cir. 1975) *cert. denied sub nom. Brichert* v. *United States*, 421 U.S. 968 (1975) (warrantless recording of telephone conversation by participant government agent not a violation of the fourth amendment); *United States* v. *Edelson*, 581 F.2d 1290 (7th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (terms "criminal," "tortious" and "injurious act" as used in the section are not constitutionally vague).

Section 2511 is composed of two major subsections, with the first describing the offense and jurisdictional base and the second setting forth exceptions to its prohibition. These exceptions generally involve persons operating under court order, certain employees of the Federal Government, and employees of a communications common carrier performing authorized duties.

Section 2511(1) generally prohibits, unless specifically authorized pursuant to 18 U.S.C. 2516 *et seq.*, (1) willful interception of wire or oral communications; (2) the use of devices to intercept any oral communication when (a) it is transmitted through wire or the intercepting device transmits communication by radio, (b) the actor knows that the device or any part thereof has been sent through the mail or interstate commerce, (c) the illicit endeavor takes place on the premises of a business which affects interstate or foreign commerce or involves information relating to the operations of such a business, or (d) the act takes place in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (3) willful disclosure or use of information if the actor knows it was obtained in violation of this section.

The definition of "wire communication" in 18 U.S.C. 2510 helps define the Federal jurisdictional base. A "wire communication" is "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications." The term "oral communication" is defined to mean any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception, under circumstances justifying such expectation. Senate Rep. No. 90–1097 (1968), reprinted in [1968] U.S. Code Cong. & Ad. News 2112. This definition of oral communication reflected prior existing law. Neither the person's subjective intent nor the place where the communication was uttered are necessarily controlling factors. Instead *all* facts and circumstances must be evaluated; different methods of determining whether an oral communication fit this definition have been used. For example, in *United States* v. *McIntyre*, 582 F.2d 1221 (9th Cir. 1978), the court followed *Katz* v. *United States*, 389 U.S. 347 (1967), which held that the Fourth Amendment's ban on unreasonable searches and seizures protects the privacy of a communication if the parties have a justifiable expectation of not being overheard. The court in *McIntyre* thus held that one's subjective expectation must be objectively reasonable to meet the current law definition of "oral communication."

Central to the meaning of 18 U.S.C. 2511 is the term "intercept," which is defined in 18 U.S.C. 2510(4) as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Thus, "pen registers" are not within the purview of the definition because they do not acquire the contents of a communication. *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977) *see* discussion at 568–69 *infra*. Telephones furnished to a subscriber or user by a communications common carrier that are used in the ordinary course of business are not included in the term "device" as defined by 18 U.S.C. 2510(7).

Certain exceptions to the prohibitions of 18 U.S.C. 2511(1) are set forth in 18 U.S.C. 2511 (2). Section 2511 (2) (a) (i) permits employees of a communications common carrier to intercept communications in the course of employment. This exception is frequently used to investigate subscribers using "blue boxes" to evade payment for long distance calls. *United States* v. *Goldstein*, 532 F.2d 1305 (9th Cir., *cert. denied sub nom. Roberts* v. *United States*, 429 U.S. 960 (1976); *United States* v. *Manning*, 542 F.2d 685 (6th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); *United States* v. *Savage*, 564 F.2d 728 (5th Cir. 1977) (dictum). Additionally, 18 U.S.C. 2511 (2) (a) (ii) authorizes employees of communications common carriers to provide information, facilities or technical assistance, *inter alia*, to persons authorized by law to conduct electronic surveillance.

Section 2511(2) (b) authorizes employees of the Federal Communications Commission to monitor communications during the nor-

mal course of authorized duties. Section 2511(2)(c) authorizes a person acting under color of law to intercept a wire or oral communication where the person is a party to the communication or has permission of one of the parties. *United States* v. *Mendoza*, 574 F.2d 1373(5th Cir.), *cert. denied*, 439 U.S. 988 (1978); *United States* v. *Craig*, 573 F.2d 455 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). *See United States* v. *White*, 410 U.S. 745 (1971). Section 2511(2)(d) permits a person not acting under color of law to intercept a communication where such person is a party to the communication or where one of the parties has given prior permission for the interception. This exception is not applicable where the communication is intercepted for the purpose of committing a criminal or tortious act. *See*, *e.g.*, *Smith* v. *Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir. 1973) (a party to a conversation is privileged to record it); *United States* v. *Turk*, 526 F.2d 654 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976).

Section 2511(2)(e) specifically authorizes officers of the United States to conduct electronic surveillance in the normal course of official duties under the provisions of the Foreign Intelligence Surveillance Act of 1978. Section 2511(2)(f) states that the provisions of that Act shall govern the collection of foreign intelligence information and the interception of domestic wire and oral communications.

Finally, the standards by which communications personnel may divulge or publish information regarding any interstate or foreign communication by wire or radio are governed by 47 U.S.C. 605.

Section 605 generally provides that, except as authorized or permitted by chapter 119 of title 18, no person receiving, assisting in receiving, transmitting or assisting in transmitting any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception (1) to any person other than the addressee, or the addressee's agent or attorney; (2) to a person employed or authorized to forward such communication to its destination; (3) to the proper accounting or distributing officer of the various communication centers over which the communications may be passed; (4) to the master of a ship under whom the actor is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority.

In addition, section 605 prohibits a person not authorized by the sender from intercepting any radio communication and divulging or publishing the existence, contents, substance, purport, effect, or meaning of such intercepted communication. "Person" does not include a law enforcement officer acting in the normal course of duties. *United States* v. *Hall*, 488 F.2d 193 (9th Cir. 1973). Unless entitled to do so, no person is permitted to receive or assist in receiving any interstate or foreign radio communication for personal benefit or for the benefit of another not entitled to it. No person who has received any intercepted radio communication or who has become acquainted with its contents, substance, purport, effect, or meaning, may use it for personal benefit or for the benefit of another not entitled to do so. Section 605 does not

apply to radio broadcasts or transmission by amateurs or others for the use of the general public or which relate to ships in distress.

Section 605 has withstood constitutional challenge. *See*, *e.g.*, *Elkins* v. *United States*, 266 F.2d 588 (9th Cir. 1959), *vacated on other grounds*, 364 U.S. 206 (1960); *Massengale* v. *United States*, 240 F.2d 781 (6th Cir. 1957), *cert denied*, 354 U.S. 909 (1957). *See Weiss* v. *United States*, 308 U.S. 321, 327 (1939) ("as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions, there is no constitutional requirement that the scope of . . . [section 605] be limited so as to exclude intrastate communications" (footnote omitted)). The mere doing of an act prohibited by section 605 is insufficient to support a conviction; the act must be done willfully and knowingly. *United States* v. *Gris*, 247 F.2d 860 (2d Cir. 1957) It does appear that to violate section 605, an unauthorized person must both intercept and divulge information. *See*, *e.g.*, *Bufalino* v. *Michigan Bell Tel. Co.*, 404 F.2d 1023 (6th Cir. 1968), *cert denied*, 394 U.S. 987 (1969); *Smith* v. *Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir. 1973); *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); *United States* v. *Gruber*, 39 F. Supp. 291 (S.D.N.Y. 1941). In *Benanti* v. *United States*, 355 U.S. 96, 100 n. 5 (1957), the Supreme Court raised but left unanswered the question of whether the section is violated by an interception of a communication and a divulgence of its fruit without divulging the existence or contents of the communication.

2. *Trafficking in and possessing an eavesdropping device.*—Section 2512 of title 18 generally prohibits, unless specifically permitted elsewhere in Chapter 119 of title 18 of the United States Code, (1) sending any device through the mail or in interstate or foreign commerce, if the actor knows or has reason to know that the device's design renders it "primarily useful for the purpose of the surreptitious interception of wire or oral communications;" (2) manufacturing, assembling, possessing, or selling any device, if the actor knows or has reason to know that its design is as described in (1) above, and that the device or a component will be or has been sent through the mail or through interstate or foreign commerce; or (3) placing an advertisement of a device in a publication, if the actor knows or has reason to know that the device's design is as described in (1) above, or of any other device if the advertisement promotes its use for the purpose of the "surreptitious interception of wire or oral communications," if the actor knows or has reason to know that the advertisement will be sent through the mail or transported in interstate or foreign commerce.

It has been held that this provision is not unconstitutionally vague and ambiguous, *United States* v. *Novel*, 444 F.2d 114 (9th Cir. 1971) (appeal from conviction under subsection 2512(1)(a)), and that it is within the power of Congress to legislate concerning intrastate sale and possession of items affecting interstate commerce. *United States* v. *Reed*, 489 F.2d 917 (6th Cir. 1974) (possession and sale of an instrument under subsection (1)(b)).

Subsection (1)(b) is narrowly drawn so as to not prohibit the production, distribution, and possession of electronic equipment designed

for regular use in various non-surreptitious circumstances. *United States* v. *Schweihs*, 569 F.2d 965 (5th Cir. 1978). If such equipment is purchased specifically for use in covert eavesdropping, it is proscribed by section 2512 if design characteristics render it primarily useful for that purpose. *Id.* Thus, possession of devices such as the martini olive transmitter, the spike mike, the infinity transmitter, and the microphone, disguised as a wristwatch, picture frame, cuff link, tie clip, foundation pen, stapler, or cigarette pack would be prohibited. *United States* v. *Bast*, 495 F.2d 138 (D.C. Cir. 1974). In addition, equipment not primarily useful for surreptitious interception may not be advertised in such a way as to be promoted for such illicit use. *Id.*

While unusual, it is not unprecedented for Congress to prohibit the advertising of a product even though the product has not been prohibited *per se*. For example, Congress has restricted the advertising of cigarettes on radio and television. *Id.*

3. *Intercepting correspondence.*—The interception of correspondence sent through the mail is currently prohibited by 18 U.S.C. 1702. This section has been found to be a constitutional exercise of Congressional authority over the mail. *United States* v. *McCready*, 11 F. 225 (C.C.W.D. Tenn. 1882); *United States* v. *Bullington*, 170 F. 121 (C.C. N.D. Ala. 1908); *Biggs* v. *United States*, 318 F. Supp. 212 (N.D. Fla. 1980), *aff'd on other grounds*, 438 F. 2d 1180 (5th Cir. 1971). It is designed to protect the mails from obstruction and meddlesome prying. *United States* v. *Ashford*, 530 F. 2d 792 (8th Cir. 1976); *United States* v. *Grieco*, 187 F. Supp. 597 (S.D.N.Y. 1960). The protection of the mail extends to that which has not been delivered to the addressee or authorized agent, even though the postal service has relinquished possession of the matter. *United States* v. *Brusseau*, 569 F. 2d 208 (4th Cir. 1977); *United States* v. *Wade*, 364 F. 2d 931 (6th Cir. 1966); *Maxwell* v. *United States*, 235 F. 2d 930 (8th Cir. 1956), *cert. denied*, 352 U.S. 943 (1956); *United States* v. *Murry*, 588 F. 2d 641 (8th Cir. 1978).

Even a "c/o" (care of) addressee may be convicted of obstructing correspondence or prying into the secrets of another, if such addressee has the requisite "evil" intent, *United States* v. *Ashford*, 530 F.2d 792 (8th Cir. 1976). Similarly, a person who opens correspondence that is properly delivered, but intended for a deceased person, may be convicted, *United States* v. *Ross*, 374 F.2d 97 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967). A mail "cover" or "watch" (where postal authorities inspect what senders have made public on the face of the letters) is not prohibited. *United States* v. *Costello*, 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); *United States* v. *Schwartz*, 283 F.2d 107 (3d Cir. 1960), *cert. denied*, 364 U.S. 942 (1961); *Canaday* v. *United States*, 354 F.2d 849 (8th Cir. 1966); *Cohen* v. *United States*, 378 F.2d 751 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967).

§ 2121—Eavesdropping

This section carries forward, without substantive change. the provisions of 18 U.S.C. 2511 (relating to interception and disclosure of wire or oral communications).

Subsection (a)(1) makes it a class D felony for someone intentionally to intercept a private communication by means of an eavesdropping device, knowing that no party to the communication has consented to the interception. Subsection (a)(2) makes it a class D felony for someone to disclose the contents of a private communication, knowing that the contents were obtained in violation of subsection (a)(1).

The terms "contents," "eavesdropping device," "intercept," and "private communication" are defined in paragraphs (2), (3), (4), and (6), respectively, of section 2126 of the proposed code. The definition of "private communication" is based on that of "oral communication" currently set forth in 18 U.S.C. 2510(2).

Current law (18 U.S.C. 2511(2)) contains certain exemptions from its coverage. With one exception, section 2121 carries forward these exemptions as "bars to prosecution." The use of "bar to prosecution" is consistent with the scheme of bars and defenses used by the Committee throughout all of the proposed code. In addition, the Committee believes that this is appropriate way to carry forward current law.

The first exemption of current law is set forth in subsection (b)(1) as a bar to prosecution. It provides that an agent of a communications common carrier may intercept or disclose private communications, if (a) its facilities are used to transmit private communications, the interception or disclosure was made in the normal course of employment, and (b) the interception or disclosure is a necessary incident to (i) the rendition of the carrier's service; (ii) the discovery of theft of the carrier's service; or (iii) mechanical or service quality control checks.

Current law (18 U.S.C. 2511(2)(a)(i)) permits a communications common carrier to intercept or disclose a private communication to protect the "rights or property" of the carrier. The Committee believes that this language is too broad and ambiguous, and has slightly narrowed it to permit the carrier to investigate the discovery of theft of its service.

The second exemption of current law is set forth in subsection (b)(2) as a bar to prosecution. Subsection (b)(2) provides that a communications common carrier, or its agent, that assists a law enforcement officer in intercepting a private communication, shall not be prosecuted, provided that the law enforcement officer's interception has been approved or authorized by a court pursuant to subchapter II of chapter 65 of title 18. Subchapter II relates to the interception of communications.

A third exemption of current law is set forth in subsection (b)(3) as a bar to prosecution and provides that an agent of the Federal Communications Commission may intercept or disclose a private communication transmitted by radio if the officer, employee, or agent is (1) acting in the normal course of employment and (2) discharging the Commission' monitoring responsibilities pursuant to chapter 5 of title 47 of the United States Code. The term "agent" is defined in section 101 (relating to general definitions) of the proposed code. The term "communications common carrier" is defined in section 2126 of the proposed code.

A fourth exemption in 18 U.S.C. 2511 is set forth in subsections (a)(1) and (2), as part of the definition of the offense. Pursuant to those

subsections, it is not a crime to intercept a private communication if the actor has the consent of a party to the communication.

The Committee has not carried forward the language of 18 U.S.C. 2511(2)(d) that provides that consent to an interception is vitiated if a person is not acting under color of law and intercepts the communications for the purpose of committing any criminal or tortious act or any other injurious act. The Committee found this language to be vague. Further, an interception for a criminal purpose can be prosecuted separately as an attempt to commit a criminal act. Finally, the Committee believes that once one of the parties to the communication consents to the interception, the consent of the other party becomes irrelevant. Any torts or crimes that occur during an interception of a private communication are more appropriately governed by separate provisions of the law.

A final bar to prosecution under this section is set forth in section 2126(b) of the proposed code. Section 2126(b) carries forward 18 U.S.C. 2520, which provides a "complete defense" to any civil or criminal action for interception of oral communications if the actor in good faith relied on a court order authorizing the interception. Section 2126(b), consistent with the scheme used in this subchapter and with the general scheme of defenses and bars used throughout the proposed code, carries forward this "complete defense" as a bar to prosecution. Thus, the Government is barred from prosecuting an actor whose conduct conforms with a court order obtained under subchapter II of chapter 65 (relating to the interception of communications) of the proposed code. By carrying forward this provision of current law, the Committee in no way adversely affects the uncodified defense of lawful authority, which is generally applicable throughout the proposed code.

§ 2122—Trafficking in an eavesdropping device

Section 2122 carries forward the provisions of 18 U.S.C. 2512. Subsection (a) makes it a class E felony for someone intentionally (1) to produce, manufacture, import, or traffic in an eavesdropping device, knowing that the design of the device renders the device primarily useful for surreptitious interception of private communication; or (2) to advertise an eavesdropping device, knowing that the design of the device renders the device primarily useful for surreptitious interception, or knowing that the advertising promotes the use of the device for surreptitious interception of private communications.

Use of the word "advertise" slightly broadens the coverage of current law (18 U.S.C. 2512), which punishes someone who "places in any newspaper, magazine, handbill, or other publication any advertisement . . ." relating to eavesdropping devices. The Committee believes that the term "advertises" is more appropriate because it covers all modern practices.

The terms "eavesdropping device," "intercept," and "private communication" are defined in paragraphs (3), (4), and (6), respectively, of section 2126(a) of the proposed code.

Current law (18 U.S.C. 2512) contains certain exemptions to its coverage. This section carries forward these exemptions as "bars to

prosecution." Use of the phrase "bar to prosecution" is consistent with the scheme of bars and defenses used throughout all of the proposed code. In addition, the Committee believes that this is the appropriate way to carry forward current law.

The first exemption is carried forward as a bar to prosecution in subsection (b)(1), which provides that a communications common carrier, or its agent, may commit the acts proscribed by subsection (a)(1) or (2) if it is acting within the normal course of its business. The term "communications common carrier" is defined in section 2126(a)(1) of the proposed code.

The second exemption is carried forward in subsection (b)(2), which provides that it is a bar to prosecution if the actor is a person acting under a Federal, State, or local government contract, and in the normal course of the government's activities.

A final bar to prosecution under this section is set forth in section 2126(b) of the proposed code. Section 2126(b) carries forward 18 U.S.C. 2520, which provides a "complete defense" to any civil or criminal action for interception of oral communications if the actor in good faith relied on a court order authorizing the interception. Section 2126(b), consistent with the scheme used in this subchapter and with the general scheme of defenses and bars used throughout the proposed code, carries forward this "complete defense" as a bar to prosecution. Thus, the government is barred from prosecuting an actor whose conduct conforms with a court order obtained under subchapter II of chapter 65 (relating to the interception of communications) of the proposed code.

Subsection (c) provides for Federal jurisdiction where (1) the offense takes place within the special jurisdiction of the United States; (2) the eavesdropping device is sent through the mail, or is moved across a State or United States boundary in the commission of the offense; or (3) in the commission of the offense, the advertisement is sent through the mail, is moved across a State or United States boundary, or is transmitted by a communications facility that operates in interstate or foreign commerce.

The latter two jurisdictional grounds carry forward current law. The first jurisdictional ground is new to Federal law, but is consistent with the Committee's decision to assert jurisdiction over an area of particular Federal responsibility, rather than to assimilate a State or local law pursuant to section 2761 (relating to violating State or local law in an enclave) of the proposed code.

The Committee has decided that, since the offense of trafficking does not in itself involve an invasion of privacy, a violation of this section should be classified as an E felony, one grade below that of section 2121 (relating to eavesdropping) of the proposed code.

§ 2123—Possessing an eavesdropping device

Section 2123 carries forward the provisions of 18 U.S.C. 2512 which relate to possession of an eavesdropping device.

Section 2123(a) makes it an offense to possess an eavesdropping device with intent that the device be used to commit an offense under

sections 2121 or 2122 of the proposed code. The term "eavesdropping device" is defined in section 2126(a)(3) of the proposed code.

Current law contains certain exemptions to its coverage, 18 U.S.C. 2312(2). This section carries forward these exemptions as "bars to prosecution." Making such exemptions "bars to prosecution" is consistent with the scheme of bars and defenses used throughout all of the proposed code. In addition, the Committee believes that this is the appropriate way to carry forward current law.

The first exemption is carried forward as a bar to prosecution in subsection (b)(1), which provides that a communications common carrier, or its agent, may commit the acts proscribed by subsection (a)(1) or (2) if it is acting within the normal course of its business. The term "communications common carrier" is defined in section 2126(a)(1) of the proposed code.

The second exemption is carried forward in subsection (b)(2), which provides that it is a bar to prosecution if the actor is a person acting under a Federal, State, or local government contract, and within the normal course of the government's activities.

A final bar to prosecution under this section is set forth in section 2126(b) of the proposed code. Section 2126(b) carries forward 18 U.S.C. 2520, which provides a "complete defense" to any civil or criminal action for interception of oral communications if the actor in good faith relied on a court order authorizing the interception. Section 2126(b), consistent with the scheme used in this subchapter and with the general scheme of defenses and bars used throughout the proposed code, carries forward this "complete defense" as a bar to prosecution. Thus, the government is barred from prosecuting an actor whose conduct conforms with a court order obtained under subchapter II of chapter 65 of the proposed code (relating to the interception of commnications).

Section 2123(c) provides for Federal jurisdiction where (1) the offense occurs within the special jurisdiction of the United States; or (2) the eavesdropping device is sent through the mails, or is moved across a State or United States boundary, in the commission of the offense.

The latter ground carries forward the current law set forth in 18 U.S.C. 2512. The first ground is new to Federal law, but is consistent with the Committee's determination to assert jurisdiction over an area of particular Federal responsibility, rather than to assimilate a state or local law pursuant to section 2761 of the proposed code (relating to violating State or local law in an enclave).

An offense under this section is classified as an A misdemeanor. This reflects the Committee's judgment that possession, because of its inchoate nature, is less serious than trafficking (section 2122) and eavesdropping (section 2121) and consequently should be punished less severely.

§ *2124—Intercepting correspondence*

This section carries forward 18 U.S.C. 1702, which makes it an offense to intercept mail matter before it has been delivered "with design to obstruct the correspondence or pry into the business or secrets of another."

Section 2124(a)(1) makes it an offense for someone intentionally to intercept private correspondence, knowing that neither the sender nor the intended recipient has consented to the interception. Section 2124(a)(2) makes it an offense for someone intentionally to use, or to disclose, the contents of private correspondence, knowing that the contents were obtained in violation of subsection (a)(1).

Pursuant to subsection (a), it is not a crime to intercept private correspondence if the actor has the consent of either the sender or the intended recipient. This is consistent with section 2121 of the proposed code (relating to eavesdropping), which also permits the interception of a private communication if one of the parties to the communication has consented.

The terms "contents," "intercept," and "private correspondence" are defined in paragraphs (2), (4), and (5), respectively, of section 2126(a) of the proposed code (relating to general provisions for the subchapter). Since this section is designed to protect legitimate privacy interests, subsection (a)(5) of section 2126 provides that "private correspondence" means "mail other than a post card, postal card, newspaper, magazine, circular, or advertising matter. . . ." The Committee believes that neither the sender nor the intended recipient of such items has any reasonable expectation of privacy in them. Thus, while such items are considered "mail," and fall within the jurisdictional reach of subsection (c), the interception or disclosure of the contents of such items does not constitute an offense under subsection (a).

Subsection (b) sets forth a bar to prosecution under this section if (1) the private correspondence is transmitted over the facilities of a communications common carrier; (2) the actor is either the carrier or its agent, and (3) the actor is engaged in monitoring for mechanical or service quality control checks, supervisory service observing, or any other activity that is necessarily incident to the carrier's rendition of service or relates to discovering any theft of the carrier's service. This bar to prosecution is new to Federal law. The Committee believes that entities such as telegraph companies, should be protected in similar circumstances to communications common carriers described in sections 2121(b), 2122(b), and 2123(b), (relating to eavesdropping, trafficking in an eavesdropping device, and possessing an eavesdropping device, respectively). Nothing in this section affects the authority of United States Customs officers to search mail or its equivalent. *United States* v. *Ramsay*, 431 U.S. 616 (1978).

Subsection (c) provides for Federal jurisdiction if the private correspondence is mail. This is consistent with the reach of current law (18 U.S.C. 1702).

The Committee has classified a violation of this section as an E felony. It is the Committee's judgment that the conduct punished by this section is not as serious as that prohibited by section 2121 of the proposed code (relating to eavesdropping) and that therefore, it should be graded one class lower than an offense under that section.

§ *2125—Revealing private information submitted for a Government purpose*

This section provides that whoever violates certain specified sections of the United States Code relating to the disclosure of confidential

information commits an offense. These sections proscribe the disclosure of information submitted to the Government by private parties expecting the information to remain confidential. They are found both in and outside of title 18. Section 2125 incorporates all provisions of current law that penalizes this type of disclosure at the felony level.

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsections (a), (b), and (c) require that the actor engage in the conduct prohibited by the provisions of law listed below in the circumstances and with the results and states of mind required by those provisions of law. The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those provisions.

Subsection (a) makes it an offense for someone to violate any of the following statutes: section 10 of the Agricultural Adjustment Act (relating to administration); section 361 of the Agricultural Adjustment Act of 1938 (relating to application of subpart); section 15(c) (relating to confidential information) or section 15(d) (relating to government publications) of the Agricultural Marketing Act; section 214 of Title 13 (relating to wrongful disclosure of information); section 16(b)(4) of the Small Business Act (relating to offenses and penalties); section 8 of the Bretton Woods Agreement Act (relating to penalty for unlawful disclosures); section 7240 (relating to officials investing or speculating in sugar) of the Internal Revenue Code of 1954; section 1302 of the Second War Powers Act of 1941 (relating to penalty for unlawful disclosure); or section 571 (relating to speculation in stocks or commodities affecting crop insurance) of title II of the bill.

Subsection (b) makes it an offense for someone to violate section 7213(a) of the Internal Revenue Code of 1954 (title 26 of the United States Code) (relating to Federal employees and other persons).

Subsection (c) makes it an offense for someone to violate section 570 (relating to disclosure of crop information and speculation thereon) of title II of the bill.

Those provisions of current law that penalize such disclosures at the misdemeanor level are unaffected by this section. *See, e.g.*, 18 U.S.C. 1905, relating to punishment for disclosure of confidential information generally. The Committee expresses no opinion about the interpretation of section 1905 in light of the disclosure of information required by the Freedom of Information Act. *See generally Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979).

A violation of this section is either a class C, D, or E felony, depending on the penalty set forth in the corresponding section of current law.

§ 2126—General provisions for subchapter

This section contains general provisions applicable to the offenses defined in sections 2121, 2122, 2123, and 2124 of the proposed code (relating to offenses against privacy).

Subsection (a) contains definitions of terms used in these sections. Subsection (a)(1) carries forward current law (18 U.S.C. 2510(10)) in its definition of "communications common carrier" by incorporating section 3(h) of the Communications Act of 1934.

Subsection (a)(2) defines "contents," when used with respect to a communication, to mean information in the communication itself. The term also includes information that concerns the existence, substance, purport, or meaning of the communication, and the identity of a party to the communication. This definition is similar to that of current law (18 U.S.C. 2510(8)).

Subsection (a)(3) defines "eavesdropping device" to mean an electronic, mechanical, or other device that can be used to intercept a private communication. The definition excludes telephone or telegraph instruments and facilities (or any associated equipment) used by a subscriber or user in connection with service of a communications common carrier acting in the usual course of the carrier's business and used in a manner for which the device or apparatus was designed. This definition is similar to that of an "electronic, mechanical, or other device" in current law (18 U.S.C. 2510(5)), but has been modified in two ways. First, because it is redundant, the Committee has eliminated current laws reference to a hearing aid or other device to correct hearing. Second, current law specifically excluded from its coverage an apparatus used by a communications common carrier or by a law enforcement officer. Since sections 2121(b) and 2126(b) of the proposed code bar the government from prosecuting a communications common carrier or a law enforcement official under certain circumstances, the Committee believes this exclusion is unnecessary.

Subsection (a)(4) defines "intercept" to mean the acquisition of the contents of a communication, either in the course of its transmission to a party to the communication, or before the intended recipient has received the communication. The term includes acquisition by simultaneous transmission or by registering sound by an electronic, mechanical, or other device in a manner that will permit the reproduction of such sound. Although it modifies current law slightly, this definition substantially carries forward the definition set forth in 18 U.S.C. 2510(4).

Subsection (a)(5) defines "private correspondence" to mean a communication, other than speech, sent by a person who exhibits an expectation, under circumstances reasonably justifying that expectation, that such communication is not subject to being intercepted, opened, or read until received by the intended recipient. The term includes mail other than post cards, newspapers, magazines, circulars, and advertising matter because the Committee believes that there is no reasonably justifiable expectation that such items will not be intercepted or read prior to delivery to the intended recipient. This definition is patterned after that of "oral communication" in current law (18 U.S.C. 2510(2)).

Subsection (a)(6) defines "private communication" to mean any message, or attempt to convey a message, between or among two or more persons, under circumstances reasonably justifying an expectation of privacy, whether or not the message is actually received. This definition is based on that of "oral communication" in current law (18 U.S.C. 2510(2)). Although the Committee does not carry forward

current law's distinction between "wire communication" (defined in 18 U.S.C. 2510(1)) and "oral communication" (defined in 18 U.S.C. 2510(2)), it is the "aural acquisition" of a wire communication to which current law refers (18 U.S.C. 2510(4)). Thus, present law extends only to oral communication over the wire (such as a telephone call), and such communications are encompassed within the definition of "private communication" in subsection (a)(6).

Subsection (b) sets forth a bar to prosecution for conduct authorized by court order, applicable to prosecutions for offenses under sections 2121, 2122, and 2123. This bar to prosecution carries forward an exemption in current law (18 U.S.C. 2520) and is more fully discussed in the analysis of those sections.

CHAPTER 23—OFFENSES INVOLVING THE PERSON

SUBCHAPTER I—HOMICIDE OFFENSES

Current Law

The common law of England at first recognized only one criminal homicide offense. Later, however, the English courts divided the offense into two separate crimes—murder and manslaughter. Murder was defined to be the killing of another person with "malice aforethought," and manslaughter was defined to be the unlawful killing of another person without "malice aforethought."[1] In either instance, the death had to occur within a year and a day after the fatal blow was struck.[2]

The phrase "malice aforethought" was a term of art that came to encompass—

(1) an intent that the act cause death or grievous bodily harm to any person (whether or not the intended victim was the person actually killed), *see* W. LaFave & A. Scott, *Criminal Law* 528–29 (1972);

(2) conduct indicating a "depraved heart"—i.e., a wanton and willful disregard of an unreasonable risk of death or grievous bodily harm. *Id.* There is some uncertainty as to whether the test was subjective (i.e., whether the actor was aware of, but disregarded, the risk) or objective (i.e., whether a reasonable person would have perceived the risk). It has been suggested, however, that the difference was more theoretical than practical. Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701, 708–13 (1937).

[1] *See generally* W. LaFave & A. Scott, Criminal Law §§ 67–69 (1972); R. Perkins, Criminal Law 28–82 (2d ed. 1969); Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701, 1261 (1937).

At common law, "person" was a human being who was born alive. *See* R. Perkins, Criminal Law 29 (2d ed. 1969). The proposed code will not change the common law in this respect. *See* Brown Commission, Final Report § 1601, Comment at 174 (1971).

[2] *Id.* at 28. It has been suggested that the year and a day rule was developed because the level of medical knowledge created problems in proving causation and that, with advances in medical knowledge, the rule no longer serves a useful purpose. W. LaFave & A. Scott, Criminal Law 266–67 (1972). Nonetheless, it appears that the rule is still applied in many jurisdictions. *Id.*; R. Perkins, Criminal Law 29 (2d ed. 1969).

(3) an intent to commit any felony (the "felony/murder" rule), *see* W. LaFave & A. Scott, *Criminal Law* 528–29 (1972).[3]

Manslaughter at common law was divided into two kinds—voluntary and involuntary. The distinction was not related to the punishment (which was the same for both) but was a factual distinction. Voluntary manslaughter was homicide committed in the "heat of passion" upon adequate provocation. The provocation must have been such as to cause a reasonable person to lose normal self-control; words alone would not constitute such provocation. The heat of passion must have been sudden, and the person must have acted before there had been a reasonable opportunity for the passion to cool. *Id.* at 571–82 (1972).

Involuntary manslaughter was of two kinds. First, a killing by negligence. The negligence necessary was more than simple negligence and was sometimes referred to as "gross" or "criminal" negligence. The second kind of involuntary manslaughter was a killing during the commission or attempted commission of an unlawful act (other than a felony) that was *malum in se* (the "misdemeanor/manslaughter" doctrine). R. Perkins, *Criminal Law* 73–79 (2d ed. 1969).

American States began at the end of the 18th century to vary the English common law scheme by legislation. The purpose behind the legislation was to limit the category of instances in which capital punishment could be imposed. *Id.* at 88; Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701, 703 (1937); W. LaFave & A. Scott, *Criminal Law* 563 (1972). This was attained by dividing murder into classes, usually two, with capital punishment imposed for murder in the higher degree. The legislation generally defined the high-

[3] It is sometimes said that malice forethought also encompassed an intent to resist a law enforcement officer in the execution of that officer's duties. However, it appears that this really was not a separate basis for inferring intent because the cases involved conduct that implied an intent to cause death or grievous bodily harm, indicated a "depraved heart," or involved an intent to commit a felony. W. LaFave & A. Scott, *Criminal Law* §§ 61–62 (1972); R. Perkins, *Criminal Law* 45–46 (2d ed. 1969).

The felony murder rule has been abandoned in England, where the rule originated. English Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1. Ohio has abandoned the rule, Ohio Rev. Code Ann. § 2901.05, 2901.01 (Page 1975). However, "despite the generality of the rule in the United States and the frequency with which it is deemed applicable to even accidental homicide, principled argument in its defense is hard to find." Model Penal Code § 201.2. Comment at 37 (Tent. Draft No. 9, 1959).

Professors LaFave and Scott suggest that

> it is arguable that there should be no such separate category of murder. The rationale of the doctrine is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended. Yet it is a general principle of criminal law that one is not ordinarily criminally liable for bad results which differ greatly from intended results.

W. LaFave & A. Scott, Criminal Law 560 (1972). Professors LaFave and Scott note Mr. Justice Holmes' criticism of the doctrine. Holmes, in *The Common Law*, cites an example of someone who, in order to steal some chickens, shoots into a chickenhouse and by accident kills someone whose presence in the chickenhouse could not have been suspected.

> Holmes suggests that the fact that the defendant happened to be committing a felony when he shot is an illogical thing to fasten onto to make the accidental killing a murder, for the fact that the shooting is felonious does not increase the likelihood of killing people. If the object of the [felony-murder] rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.

Id. at 560–61, citing O. Holmes, The Common Law 58 (1881).

grade offense to be (1) homicide that is premeditated and deliberate, (2) homicide committed in a certain way (by poison, lying in wait, or torture), and (3) homicide committed during the perpetration or attempted perpetration of certain felonies. The legislation defined the lower grade offense to cover all other murders. Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701, 703–06 (1937).

Federal provisions dealing with homicide fall into three groups. First, those that define the homicide offenses (murder and manslaughter); second, those that in essence serve to confer Federal jurisdiction and that, by implication, incorporate the definitions set forth in the first group;[4] and third, those that provide for enhanced penalties if death results during the commission of certain other offenses.[5] The latter are not really homicide provisions, but classification provisions—they attach more serious penalties to certain criminal conduct if that conduct results in death to someone.

The basic Federal provision defining murder is 18 U.S.C. 1111, which adopts the common law definition of murder—the unlawful killing of another with "malice aforethought." It divides murder into two degrees. First degree murder is

> every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed.

Second degree murder is "any other murder."

"Malice aforethought," which is an element of both first and second degree murder, *Beardslee* v. *United States*, 387 F 2d 280, 290–92 (8th Cir. 1967), means "an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but 'malice aforethought' does not necessarily imply any ill will, spite or hatred towards the individual killed", E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* section 43.05 (2d ed. 1970). Because the element of malice involves the actor's state of mind, it must be inferred by the jury from circumstantial evidence. *Stevenson* v. *United States*, 162 U.S. 313, 320 (1896); *United States* v. *Celestine*, 510 F. 2d 457, 459 (9th Cir. 1975).

The characteristic that distinguishes first degree murder from second degree murder is premeditation. Premeditation is an element of first degree murder, but not of second degree. *Beardslee* v. *United States*, 387 F.2d 280, 291 (8th Cir. 1967). Premeditation and malice are not synonymous. E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* section 43.05 (2d ed. 1970). Premeditation "requires a period of time in which the accused coolly deliberates, or thinks the matter over before acting. . . . Any interval of time between the forming of the specific intent to kill, and the execution of that intent, which is of sufficient duration for the accused to be fully conscious and mindful of what he intended willfully to set about to do, is sufficient to justify a finding of premeditation." *Id. See Government of Virgin Islands* v. *Lake*, 362 F.2d 770, 776 (3d Cir. 1966).

The basic provision defining manslaughter is 18 U.S.C. 1112, which divides the offense into two categories—voluntary manslaughter and involuntary manslaughter. Voluntary manslaughter is defined to be an unlawful killing without malice that occurs "upon a sudden quarrel or heat of passion." Involuntary manslaughter is defined to be an unlawful killing without malice that occurs "in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death."

The characteristic that distinguishes murder from manslaughter is the element of malice. Malice is required under 18 U.S.C. 1111 in order for a killing to be murder; malice is not required under 18 U.S.C. 1112 for a killing to be manslaughter. Manslaughter is a lesser included offense within second degree murder. *United States* v. *Celestine*, 510 F.2d 457, 460 (9th Cir. 1975); *Belton* v. *United States*, 382 F.2d 150, 155 (D.C. Cir. 1967).

Voluntary manslaughter, as defined in 18 U.S.C. 1112, appears to be substantially the same as common-law voluntary manslaughter.

The involuntary manslaughter provision of 18 U.S.C. 1112 has two parts. The first part—"commission of an unlawful act not amounting to a felony"—has been held to require that the act, by its nature, be dangerous to life. *United States* v. *Pardee*, 368 F.2d 368, 373–74 (4th Cir. 1966). Involuntary manslaughter may also occur by committing a lawful act that might produce death "without due caution and circumspection." It appears that this requires (1) gross negligence—that is, a wanton or reckless disregard for human life—and (2) actual knowledge that the conduct threatened the life of another or knowledge of circumstances that would lead a reasonable person to recognize the threat to life. *Id.; United States* v. *Escamilla*, 467 F.2d 341 (4th Cir. 1972).

Whether an accidental killing is second degree murder, manslaughter or no crime at all depends upon the actor's degree of negligence. The actor's conduct may be so reckless as to permit a jury to conclude that the person acted with malice, and thus the conduct would be second degree murder. The actor's conduct may not be as reckless as that but may be such as to permit a jury to conclude that the person acted with the gross negligence required for manslaughter. Finally, the actor's negligence may not be serious enough to be found "gross"; if so, the actor's conduct would not constitute either second degree murder or manslaughter. *Thomas* v. *United States*, 419 F.2d 1203, 1205 (D.C. Cir. 1969); *United States* v. *Dixon*, 419 F.2d 288, 291–94 (D.C. Cir. 1969) (concurring opinion of Leventhal, J.) (this

[4] *See, e.g.*, 18 U.S.C. 351 (killing a member or elect-member of Congress); 18 U.S.C. 1114 (killing certain Federal law enforcement officers); 18 U.S.C. 1116 (killing certain foreign diplomatic officials); 18 U.S.C. 1751 (killing the President or one of the line of presidential succession); 7 U.S.C. 2146 (killing certain Department of Agriculture inspectors); 21 U.S.C. 675 (killing certain Federal drug enforcement officials); 42 U.S.C. 2000e–13 (killing Equal Employment Opportunity Commission employees); 49 U.S.C. 1472(k)(1) (murder or manslaughter within the special aircraft jurisdiction of the United States).

[5] *See, e.g.*, 18 U.S.C. 34 (destruction of aircraft, motor vehicles or their facilities where death results); 18 U.S.C. 245 (civil rights violations where death results); 18 U.S.C. 844 (explosives offenses where death results); 18 U.S.C. 1992 (train wrecking where death results); 18 U.S.C. 2113 (bank robbery where death results); 42 U.S.C. 3631 (civil rights offenses where death results).

case and *Thomas* involve a District of Columbia Code provision that is substantially similar to 18 U.S.C. 1112).

There is another section, 18 U.S.C. 1115, that in essence defines a specialized form of manslaughter. It concerns conduct on board ship and provides felony punishment for a ship's officer or "other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed. . . ." The section appears not to have been used in recent years.

Present Federal law does not contain a negligent homicide offense, other than possibly 18 U.S.C. 1115 (it is unclear what "neglect" in that provision means). There is language in 18 U.S.C. 1112, the manslaughter provision, which could be interpreted to encompass negligent homicide. That section defines involuntary manslaughter to be an unlawful killing without malice that occurs "in the commission . . . without due caution and circumspection, of a lawful act which might produce death." However, as noted above, this has been held to require both gross negligence (i.e., wanton or reckless disregard for human life) and actual knowledge that the conduct threatened the life of another or actual knowledge of circumstances that would lead a reasonable person to recognize the threat to human life. *United States* v. *Pardee*, 368 F. 2d 368, 373–74 (4th Cir. 1966); *United States* v. *Escamilla*, 467 F. 2d 341 (4th Cir. 1972).

It is unclear, as noted above, what "neglect" means in 18 U.S.C. 1115. It is also unclear whether that section of current law is more appropriately treated as imposing a reckless standard or a negligent standard as the proposed code uses those terms. *See* section 301 (d) and (e) of the proposed code. In any event, the Committee believes that 18 U.S.C. 1115 is not an appropriate basis upon which to provide for a negligent homicide provision with the jurisdictional reach of the murder and manslaughter offenses of the proposed code, particularly in light of the fact that 18 U.S.C. 1115 appears not to have been used. Consequently, the Committee has not included a negligent homicide offense in the proposed code.[6]

§ *2301—Murder*

This section carries forward the coverage of 18 U.S.C. 1111, the basic Federal murder provision. Section 1111 defines murder to be "the unlawful killing of a human being with malice aforethought." For grading purposes, section 1111 divides murder into two degrees. First degree murder is (1) a murder committed "by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing"; (2) a murder committed during the commission, or attempted commission, of arson, rape, burglary, and robbery (the "felony-murder" doctrine); and (3) a murder "perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed" (the "transferred intent" doctrine). Second degree murder is "any other murder".

Consistent with the approach taken by the Brown Commission (*see Final Report* section 1601 (1971)) and by the Model Penal Code (section 210.2), the proposed code does not distinguish between first and second degree murder; it also does not use the traditional terms "malice aforethought" and "premeditation." The concept of malice, as used in 18 U.S.C. 1111, includes an intent to cause death or grevious bodily harm to another person, as well as an intent to act in wanton disregard of the consequences of life. Subsection (a) therefore reaches the conduct presently prohibited by section 1111.

Subsection (a) makes it an offense for someone (1) knowingly to engage in conduct that causes the death of another; (2) under circumstances manifesting extreme indifference to the life of an individual, knowingly to engage in conduct and thereby recklessly cause the death of another; or (3) to violate certain specified sections of the proposed code if during the offense the actor or another person knowingly engages in any conduct and thereby causes the death of someone other than one of the participants in the underlying offense (the "felony-murder" rule). The specified offenses are those in sections 2331 (relating to aggravated criminal sexual conduct), 2501 (relating to arson), 2511 (relating to criminal entry, if committed with reckless disregard for the fact that the property is a dwelling in which an individual is present),[1] and 2521 (relating to robbery).

The term "violates" as used in subsection (a) (3) is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsection (a) (3) requires that the actor engage in the conduct prohibited by the section specified in the circumstances and with the results and states of mind required by the section specified. The use of "violates" is intended to ensure that this subsection incorporates the exact provisions of the referenced sections.

While subsection (a) (3) of section 2301 is identical to present Federal law in the offenses to which the felony murder doctrine applies, the proposed code modifies that doctrine in two ways. First, consistent with the approach of the Brown Commission (*see Final Report* section 1601(c) (1971)), the felony murder doctrine is not applicable if the person whose death is caused is a perpetrator of the underlying offense. For example, A and B rob X and attempt to flee. A law enforcement officer arrives on the scene, gives chase, and under circumstances reasonably justifying the use of deadly force, shoots and kills B. The felony murder doctrine of subsection (a) (3) would not hold A liable for the death of B; under current law, A would be liable. The Committee believes, in the words of Professors LaFave and Scott, that "it is not justice (though it may be poetic justice) to hold the felon liable for murder on account of the death, which the felon did not intend, of a co-felon willingly participating in the risky venture." W. LaFave & A. Scott, *Criminal Law* 552 (1972) (footnote omitted).

[6] Whether the conduct constituting "negligent homicide" should be criminally punished has generated considerable debate. *See, e.g.*, G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 122–24 (2d ed. 1961); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 137 (1947); Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401, 416–17 (1968); Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 747–51 (1937); Note, *Negligent Homicide or Manslaughter: A Dilemma*, 41 J. CRIM. L. 183 (1950).

[1] The criminal entry provision in section 2511 of the proposed code is broader than common-law burglary in two important respects. First, common-law burglary is limited to an entry of a dwelling; section 2511 of the proposed code applies to the entry of any building, as well as to the entry of a vehicle. Second, common-law burglary is limited to entries that occur at night; section 2511 of the proposed code applies to any entry, no matter what time of day the entry takes place. *See* R. PERKINS, CRIMINAL LAW 192, 200–05, 207–08 (2d ed. 1969).

The Committee believes that the common law offense of burglary was directed principally at protecting persons—someone is likely to be present in a dwelling at night. Therefore, the Committee has carried forward 18 U.S.C. 1111's application of the felony-murder rule to burglary by providing that the felony murder rule in section 2301 applies to an offense described in section 2511 of the proposed code if that offense was committed with reckless disregard for the fact that the property involved in that offense is a dwelling in which an individual is present.

The second modification of the felony murder doctrine is set forth in subsection (d) and is discussed *infra*.

A violation of this section is classified as an A felony except if the actor was compelled to commit the offense by threat of imminent death or serious bodily harm to the actor or another person. If these circumstances amounting to duress, as defined in section 726 of the proposed code. In such a case the violation of this section is classified as a B felony.

Subsection (b) provides that in a prosecution under this section, it is not necessary for the Government to prove a state of mind with regard to the fact that (1) in a prosecution pursuant to subsection (a)(3), the circumstances under which the defendant acted manifested extreme indifference to the life of an individual; (2) the conduct proscribed by subsection (a)(3) occurred during the commission of an underlying offense as specified in that subsection; (3) the conduct referred to in subsection (a)(3) caused the death of any person other than one of the participants in the underlying offense; or (4) the circumstances under which the offense was committed would give rise to the defense of duress, as that defense is set forth in section 726 of the proposed code.

Subsection (c) provides a defense to a prosecution under subsection (a)(1) where the death of the other person was caused under circumstances, for which the defendant was not responsible, that caused the defendant to lose self-control and that would be likely to cause an ordinary person to lose self-control to the same extent. A successful assertion of this defense, however, does not relieve the actor of criminal liability. Instead, it converts the actor's conduct from murder to manslaughter, as set forth in section 2302(a)(2) of the proposed code. This is consistent with the approach of present Federal law (18 U.S.C. 1112) that defines voluntary manslaughter to be the unlawful killing of another person without malice "upon a sudden quarrel or heat of passion."

Subsection (d) provides a defense to a prosecution under subsection (a)(3) (the felony murder rule) where the death was not a reasonably foreseeable consequence of the underlying offense or of the particular circumstances in which the underlying offense was committed. This is a slight modification of the present Federal felony murder doctrine, which provides a defense based upon the foreseeability of the death of the other person. The approach of this subsection is similar to that taken by the Brown Commission (see *Final Report* section 1601(c)(1971)).

Subsection (e)(1) carries forward the jurisdictional reach of present Federal law with some modifications. There is Federal jurisdiction over murder if:

(1) the offense occurs within the specified jurisdiction of the United States (this carries forward 18 U.S.C. 1111);

(2) the victim is

(a) a Member or Member-elect of Congress (this carries forward 18 U.S.C. 351(a));

(b) the President, the Vice-President, the President-elect, the Vice-President-elect, or, if there is no Vice-President, the person next in the order of succession to the Presidency, or any person who is serving as President under the Constitution and laws of the United States (this carries forward 18 U.S.C. 1751(a));

(c) a Federal judge, juror, law enforcement officer, probation officer, or employee of an official detention facility as defined in section 1719 of the proposed code, if such person was engaged in the performance of official duties (this carries forward 18 U.S.C. 1114 in an expanded manner; present law does not include probation officers);

(d) a federally protected foreign individual, a term that is defined in section 101 of the proposed code (this carries forward 18 U.S.C. 1116);

(3) the offense is committed by transmitting a dangerous weapon (a term defined in section 2725 of the proposed code) through the mail (this carries forward 18 U.S.C. 1716);

(4) the offense is committed in Indian country by or against an Indian (this carries forward 18 U.S.C. 1153);

(5) the offense is committed because of the payment to the murderer of anything of pecuniary value, and the use of mail or a facility in interstate commerce or travel in interstate commerce occurs in connection with the offense. This jurisdictional basis is new, and is solely designed to create Federal jurisdiction over murder-for-hire operations which occur in connection with crime of an organized nature.

Subsection (e)(2) provides for extraterritorial jurisdiction over murder if the victim is a person described in (2) (a), (b), or (d) above. This carries forward the jurisdictional reach of current law relating to federally protected foreign individuals (18 U.S.C. 1116). The provision for extraterritorial jurisdiction where the victim is someone described in (2) (a) and (b) above is new to Federal law. The extraterritoriality provisions of subsection (e)(2) are based upon the protective and the passive personality principles of international law. The provision of extraterritorial jurisdiction when the victim is a federally protected foreign individual is, to some extent, based upon the universality principle of international law, and fulfills obligations of this country under the United Nations "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons."

§ *2302—Manslaughter*

This section carries forward current Federal law punishing manslaughter (18 U.S.C. 1112). Section 1112 defines manslaughter as "the unlawful killing of a human being without malice." For purposes of grading, section 1112 distinguishes between voluntary manslaughter, which occurs "upon a sudden quarrel or heat of passion," and involuntary manslaughter, which occurs "in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution or circumspection, of a lawful act which might produce death". It has been held that the "unlawful act not amounting to a felony" must be an act that by its nature is dangerous to life. *United States* v. *Pardee*, 368 F.2d 368, 373–74 (4th Cir. 1966). The phrase "without due caution and circumspection" appears to require (1) gross negligence (i.e., a wanton or reckless disregard for life) and (2) actual knowledge that the conduct threatened the life of another or knowledge of circumstances that would lead a reasonable person to recognize the threat to life. *United States* v. *Pardee*, 368 F.2d

368 (4th Cir. 1966); *United States* v. *Escamilla*, 467 F.2d 341, 346 (4th Cir. 1972).

Subsection (a) makes it an offense for someone (1) knowingly to engage in conduct that recklessly causes the death of another, or (2) knowingly to engage in any conduct that would violate section 2301(a)(1) (relating to murder) of the proposed code but for the existence of circumstances giving rise to the "heat of passion" defense in section 2301(c) (relating to murder) of the proposed code.

The term "violates" as used in this subsection is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsection (a)(2) requires that the actor engage in the conduct prohibited by section 2301(a)(1) (relating to murder) of the proposed code in the circumstances and with the result and states of mind required by that section. The use of "violates" is intended to ensure that this section incorporates the exact provisions of the referenced section.

Section 2302, consistent with the approach of the Brown Commission (*see Final Report* section 1602, comment at 175 (1971)) and the Model Penal Code (*see* section 210.3), does not incorporate the misdemeanor-manslaughter rule of current Federal law. That rule, as noted above, has been restricted to encompass only those unlawful nonfelonious acts that are dangerous to life or are grossly negligent. *United States* v. *Pardee*, 368 F.2d 368, 373–74 (4th Cir. 1966); *United States* v. *Escamilla*, 467 F. 2d 341, 346 (4th Cir. 1972).

Subsection (b) provides that the offense described in subsection (a)(1) is a class D felony and the offense described in subsection (a)(2) is a class B felony. However, if the actor committed the offense because of a threat of imminent death or serious bodily harm to the actor or another person, which would constitute duress as defined in section 726 of the proposed code but for the exception in that section which relates to manslaughter, then the offense in subsection (a)(1) becomes a class E felony and the offense in subsection (a)(2) becomes a class C felony.

Subsection (c) provides that in a prosecution under this section, the Government need not prove a state of mind with respect to the fact that (1) circumstances exist which give rise to a defense under section 2301(c) (relating to murder) of the proposed code; or (2) the circumstances under which the offense is committed would give rise to a defense of duress pursuant to section 726 of the proposed code.

Subsection (d) provides for Federal jurisdiction over manslaughter to the same extent that section 2301(e) (relating to murder) of the proposed code provides for Federal jurisdiction over murder. See analysis of that section, *supra*.

§ 2303—General provisions for subchapter

Subsection (a) defines the term "law enforcement officer" for the purposes of subchapter I of chapter 23 of the proposed code to mean (1) a public servant authorized by law or by a Federal Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; (2) a public servant authorized by law to serve or execute search warrants or to make searches or seizures; (3) a public servant authorized to perform official duties under various

provisions of law governing Federal regulatory functions; and (4) a person serving as a probation officer under chapter 45 of the proposed code. The inclusion of probation officers is new to current law.

Subsection (b) provides that in a prosecution for an offense under the subchapter relating to homicide offenses, no state of mind need be proved with respect to the circumstance that the victim is authorized to perform official duties under a specified provision of law.

Subsection (c) defines the term "anything of pecuniary value" to mean anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; or any other property that has a value in excess of $100.

SUBCHAPTER II—ASSAULT OFFENSES

Current Law

1. *Generally.*—At common law, according to Blackstone, assault was, "an attempt or offer to beat another, without touching him"; battery was "the unlawful beating of another." 3 W. Blacktone, *Commentaries* *120–21. Perkins, on the other hand, prefers to use application of force rather than beating in his definition of battery. R. Perkins, *Criminal Law* 108 (2d ed. 1969). Mayhem, according to Blackstone, was "the violently depriving another of the use of such of his members as may render him less able in fighting." 4 W. Blackstone, *Commentaries* *205.

Blackstone distinguishes five types of offenses directed at a person's limbs or body: (1) threats and menaces of bodily hurt; (2) assaults; (3) batteries; and, (4) woundings "which consists in giving another some dangerous hurt and is only an aggravated species of battery;" and (5) mayhem. 3 W. Blackstone, *Commentaries* *120–21.

Several provisions of current Federal law specifically outlaw assaults, batteries, and maimings under certain circumstances. There are, however, many other provisions scattered throughout the United States Code criminalizing conduct threatening, menacing, assaulting, wounding or maiming persons other than oneself.

In title 18, section 111 outlaws forcible assaults against certain United States officers or employees; section 112 outlaws forcible assaults against certain foreign diplomatic and other official personnel; and sections 113 and 114 outlaw assaults and maimings within the special maritime and territorial jurisdiction of the United States. Other title 18 offenses include: a seaman laying violent hands upon a commanding officer, 18 U.S.C. 1655; a master flogging, without justification, a member of the crew, 18 U.S.C. 2191; anyone willingly opposing or obstructing a process server, 18 U.S.C. 1501; anyone injuring an officer, juror, or witness, 18 U.S.C. 1503; anyone forcibly assaulting or interfering with a person serving a search warrant, 18 U.S.C. 2231; anyone obstructing by force or injury a proceeding before a department, 18 U.S.C. 1505; anyone injuring any persons on account of giving information to a criminal investigation, 18 U.S.C. 1510; anyone assaulting with the intent to rob mail, 18 U.S.C. 2114; anyone interfering with commerce by threats or violence, 18 U.S.C. 1951; anyone conveying threats or false information concerning the killing, injury or intimidation of another by means of explosives, 18 U.S.C. 844(e); anyone mailing threatening communications, 18 U.S.C. 875 and 876; any-

one tampering with a witness or juror, 18 U.S.C. 1503 and 1505; anyone threatening the President, 18 U.S.C. 871; anyone assaulting a Member of Congress or President, 18 U.S.C. 351, 1751; and anyone violating Interstate Commerce Commission rules when injury results, 18 U.S.C. 834.

Outside of title 18, the array of assault-like offenses includes offenses relating to vessels, 46 U.S.C. 170, 413, 481, 526(m), 658, and 701; aboard aircraft, 49 U.S. 1472; against grain standard inspectors, 7 U.S.C. 87(e); against Federal Trade Commission employees, 19 U.S.C. 1341; against meat inspectors, 21 U.S.C. 675; against poultry product inspectors, 21 U.S.C. 454(c); against egg product inspectors, 21 U.S.C. 1041; against fishing boat inspectors, 16 U.S.C. 1857; against internal revenue officers, 26 U.S.C. 7212; involving a labor management program, 29 U.S.C. 162; involving age discrimination in employment, 29 U.S.C. 629; against persons engaged in official functions under Civil Rights Act, 42 U.S.C. 2000e–13; and offenses involving interference with the exercise of fair housing rights, 42 U.S.C. 3631.

Assault is an attempt to commit a battery.[1] It differs conceptually from other criminal law attempts in that closer proximity to the battery is required. This is sometimes phrased as a requirement that the attempt be coupled with the present ability to complete the battery. R. Perkins, *Criminal Law* 106–89 (2d ed. 1969); W. LaFave & A. Scott, *Criminal Law* 602–17 (1972).

Assault has at least two elements: the defendant's conduct and intent. In most jurisdictions it may involve the resulting mental apprehension of the victim. When an assault results in physical contact it is no longer an assault. It becomes a battery. A battery consists of these elements: (1) there must be application of physical force; (2) it must be unlawful; (3) and it must be to the person of another. According to commentators interpreting the common law crime of battery, it was cognizable whether committed intentionally or through criminal negligence. *Id.*

Aggravated battery or aggravated assault involves a statutory refinement of any of these elements or it may involve an added requirement regarding the intent of the defendant. There could be, thus, an aggravated battery statute prohibiting assault with intent to commit rape. Another type would be an aggravated battery statute prohibiting specified conduct, assault with a dangerous weapon, for instance. There also could be aggravated battery statutes addressing themselves to the amount of force applied or the extent of resulting injury, such as, aggravated battery where serious bodily injury results.

2. *Maiming.*—Maiming is the modern day counterpart of the common law offense of mayhem. Blackstone describes mayhem as "an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects," and defines it as "the violently depriving another of the use of such of his members as may render

[1] The crime of assault originally was confined to an attempt to commit a battery but has been combined in the majority of jurisdictions with the tort notion of assault and thus, reaches an additional situation where "an unlawful act . . . places another in reasonable apprehension of receiving an immediate battery." R. PERKINS, CRIMINAL LAW 117 (2d ed. 1969). If the first theory is used, an assault need not have a harmful effect on the other person. If the second theory is used, the purported assault must produce a mental apprehension of immediate physical peril.

him the less able in fighting . . . and therefore the cutting off, disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear, or nose, are not held to be mayhems at common law; because they do not weaken but only disfigure him." 4 W. Blackstone, *Commentaries* 188 (1803).

Today's mayhem statutes generally require specific intent and punish conduct producing disablement, dismemberment, and disfigurement regardless of impact upon ability for military service. *See* R. Perkins, *Criminal Law* 184–89 (2d ed. 1969); W. LaFave & A. Scott, *Criminal Law* 614–17 (1972). Under Federal law now in force, maiming is punishable in two situations: (1) when it occurs within the special maritime and territorial jurisdiction of the United States, under 18 U.S.C. 114, and (2) when it occurs aboard an aircraft within the special aircraft jurisdiction of the United States, 49 U.S.C. 1472(k). There has been only one recent reported case interpreting 49 U.S.C. 1472(k) and that confined it to a strict and literal interpretation. *United States* v. *Stone*, 472 F.2d 909 (5th Cir. 1973). Section 1472(k) requires "intent to maim or disfigure" and narrowly defines both the punishable conduct and the reachable physical harm to the victim.

3. *Aggravated assault and battery.*—There is no common law equivalent to an aggravated battery statute. The unlawful application of force to the person of another was a misdemeanor, a non-capital crime, called battery. *See* R. Perkins, *Criminal Law* 106–13 (2d ed. 1969); W. LaFave & A. Scott, *Criminal Law* 602–08 (1972). An attempt to commit a battery was also a misdemeanor; it was labeled assault. Modern statutes use the terms "assault and battery" and "assault" almost interchangeably. Often these terms are employed to cover offenses termed "battery" at common law.

Every battery includes an attempt and, thus, every battery involves an assault. Because of this there developed the practice of referring to "assault and battery," and eventually to "assault" to mean both the attempt and the complete battery. Many of the current Federal provisions speak of assault when the conduct they proscribe constitutes battery or aggravated battery.

The basic assault provision applicable to conduct occurring within the special maritime and territorial jurisdiction of the United States, 18 U.S.C. 113, contains the following aggravated battery provisions: (1) assault with a dangerous weapon, and with intent to do bodily harm; and (2) an assault resulting in serious bodily injury.[2] Outside of title 18, there are other provisions prohibiting aggravated assaults or batteries against various Federal officials or persons engaged in federally protected activities. Examples includes 21 U.S.C. 461 and 675, using a deadly or dangerous weapon to assault a poultry or a meat inspector.

The intent required for conviction under the several aggravated battery provisions under current law varies. Section 111 of title 18 has been held not to require that the defendant know the victim to be a Federal officer. *United States* v. *Feola*, 420 U.S. 671 (1975). For a con-

[2] *See also* 18 U.S.C. 2231, use of deadly weapon to forcibly assault, resist, or oppose a person authorized to execute or serve search warrants.

viction of forcible assault under that section there need be no showing of willful intent to do serious bodily harm. *United States* v. *Marcello*, 423 F. 2d 993 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970).

Except for the maiming provision and section 113(f) of title 18, enacted as part of Public Law 94–297, 90 Stat. 585 (1976), which extends to the special maritime and territorial jurisdiction of the United States and punishes assaults where serious bodily harm results, Federal law does not set punishments for aggravated assaults with permanent or serious injury that differ from the punishments set for any battery, whether or not the provision refers to it as "assault" or "physical injury." The older provisions, such as the cruelty to seamen and mutiny provisions are, thus, very similar to the more recent provisions. Section 2192 of title 18, for instance, which dates back to 1909 provides a maximum penalty of 5 years imprisonment and a $1,000 fine for flogging, beating or wounding a crew member, and section 351, enacted in 1971, sets the maximum penalty for assault against a Member of Congress where personal injury results at imprisonment for 10 years and a fine of $10,000. Section 351 sets a lesser punishment for a simple assault, presumably where no physical injury results, but it does not specify a punishment for a more serious or a maiming type injury.

4. *Assault and Battery.*—Battery is a lesser included offense of aggravated battery differing only from it by not requiring serious bodily injury or any other aggravating factor. The common law offense of battery does not require a bodily injury to the victim; the least touching, if unlawful, is sufficient to constitute a battery. Very few current Federal provisions punishing assaultive conduct specify any degree of physical injury to the victim. Some of those that do so have been examined in the preceding section on aggravated battery.

Section 113 of title 18 distinguishes assault resulting in serious injury; simple assault; and assault by striking, beating, or wounding. Assault by beating has been characterized as simple battery since it requires no degree of heightened severity or level of intent usually associated with aggravated battery. *United States* v. *Knife*, 592 F.2d 472 (8th Cir. 1978).

5. *Menacing.*—Menacing is reachable under an assault statute provided the statute is either worded or judicially interpreted to incorporate the tort concept of assault—that is, if it is seen to require a mental apprehension of imminent bodily harm on the part of the victim. Menacing differs from the traditional assault offense by requiring physical conduct. Normally a verbal threat coupled with present ability is sufficient for an assault.

Although there are early Federal cases approving the theory that an assault occurred when volitional conduct by the defendant produces in the intended victim apprehension of imminent physical harm, there seem to be no modern cases upholding a conviction under 18 U.S.C. 111 or 113 for assaults of this type. *Price* v. *United States*, 156 F. 950 (9th Cir. 1907); *United States* v. *Barnaby*, 51 F. 20 (C.C.D. Mont. 1892); *United States* v. *Salisbury*, 27 F. Cas. 930 (C.C.S.D. N.Y. 1843) (No. 16, 214) *United States* v. *Richardson*, 27 F. Cas. 798 (C.C.D.C 1837) (No 16, 155) *United States* v. *Myers*, 27 F. Cas. 43 (C.C.D.C. 1806) (No 15, 845). *But see United States* v. *Dupree*, 544 F.2d 1050 (9th Cir. 1976); *United States* v. *Bell*, 505 F.2d 539 (7th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975) (dicta in both cases stating the tort concept of assault is covered by 18 U.S.C. 113).

6. *Threats.*—As mentioned above, there are current Federal provisions prohibiting threats. Among them are: 18 U.S.C. 871 and 878, dealing with threatening the President or certain foreign dignitaries, and 18 U.S.C. 1951, interfering with commerce by threats and violence. There are also provisions prohibiting the conveyance of false information. Among them are 18 U.S.C. 35, maliciously conveying false information concerning certain crimes to be committed involving trains, aircraft, or vessels, and 49 U.S.C. 1472, regarding aircraft piracy. There are also provisions that join both types of offenses, e.g., 18 U.S.C. 844(e), conveying threats or false information concerning the killing or intimidation of another by means of explosives.

Section 35 of title 18, imparting false information about certain crimes, carries a civil punishment when it is shown that the defendant knew the information to be false. There are criminal penalties when it is further shown that the defendant, knowing the information to be false, "willfully and maliciously, or with reckless disregard for the safety of human life," conveyed the false information.

Section 844 of title 18 requires a showing of willful intent. Although there is no case law interpreting this requirement within the context of section 844(e), in the context of other provisions it has been held that it is sufficient to show that the act is done deliberately and knowingly with a bad purpose, and that it is unnecessary to show that the defendant was aware that he was breaking a particular law, *Tarrestad* v. *United States* 418 F.2d 1043 (8th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970). Section 871 of title 18 is discussed in connection with threatening public servants at 190 *supra*.

In addition, the following kinds of threats are now reachable under Federal law, regardless of whether the persons to whom the communication is directed is placed in fear:[2] (1) threat to kidnap or injure another, 18 U.S.C. 875 (with intent to extort: $5,000 or 20 years or both; no intent specified: $1,000 or 5 years or both); (2) mailing threat to kidnap, 18 U.S.C. 876–877 (no intent specified).

§ *2311—Maiming*

This section and sections 2312, 2313, and 2314 of the proposed code consolidate numerous current law offenses prohibiting assaults, batteries, and maimings. The consolidated offenses are divided into these four sections according to the seriousness of the conduct. Maiming is the most serious of the assault related offenses and is prohibited by this section.

Subsection (a) makes it an offense for someone knowingly to use physical force and thereby intentionally to inflict "permanent serious bodily injury" upon another. This definition makes maiming a somewhat broader offense than traditional mayhem, which required disfigurement. Subsection (a) also punishes attempts to commit the proscribed conduct. The term "physical force" is defined in section 101 of the proposed code.

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[2] For 18 U.S.C. 878, *see* United States v. Holder, 302 F. Supp. 296, 301 (D. Mont. 1969), *aff'd*, 427 F.2d 715 (9th Cir. 1970).

Subsection (b) defines the term "permanent serious bodily injury" for purposes of this section. The term means any serious bodily injury that is permanent or with respect to which there is a substantial probability that it will be permanent.

Subsection (c)(1) provides for Federal jurisdiction when (1) the offense occurs in the special jurisdiction of the United States (from current 18 U.S.C. 114); (2) the victim is a Member of Congress, the President, the Vice President, a person elected to such office or any person who is serving as President under the Constitution and laws of the United States (from current 18 U.S.C. 351, 1751); (3) the victim is a specified Federal public servant and the victim is engaged in the performance of duties or the offense is committed because of the victim's performance of such duties (from current 18 U.S.C. 111, et al.); (4) the victim is a "federally protected foreign individual", a term defined in section 101 of the proposed code (from current 18 U.S.C. 112); (5) the offense is committed by transmitting a dangerous weapon through the mail (from current 18 U.S.C. 1716); and (6) the offense is committed by or against an Indian in Indian country (from current 18 U.S.C. 1153). Subsection (c)(2) provides for extraterritorial jurisdiction when the victim is a Member of Congress, the President, the Vice President, or a federally protected foreign individual. See discussion of section 2301(e)(2) of the proposed code, at 253 *supra*.

A violation of this section is classified a C felony because of the seriousness of the conduct involved.

§ *2312—Aggravated battery*

This section and sections 2311, 2313, and 2314 of the proposed code consolidate numerous current law offenses prohibiting assaults, batteries, and maimings. The consolidated offenses are divided into these four sections according to the seriousness of the conduct.

Subsection (a) makes it an offense for someone (1) to knowingly use physical force and thereby recklessly cause serious bodily injury to another person; or (2) to use a dangerous weapon and thereby recklessly cause bodily injury to another person. The term "physical force" is defined in section 101 of the proposed code. The terms "serious bodily injury" and "dangerous weapon" are defined in section 2317 of the proposed code. "Serious bodily injury" is given the meaning set forth in section 2725(5)) of the proposed code.

Subsection (b) provides for Federal jurisdiction over this offense in the same circumstances as section 2311(c) of the proposed code provides for Federal jurisdiction over maiming. The current law derivation for these jurisdictional bases is the same as that for section 2311, with one exception: while maiming within the special jurisdiction of the United States is prohibited by 18 U.S.C. 114, assaults producing serious bodily injury or involving deadly weapons are prohibited by 18 U.S.C. 113.

A violation of this section is classified as a D felony, one class below the punishment for the more serious conduct proscribed by section 2311 (relating to maiming) of the proposed code.

§ *2313—Battery*

This section and sections 2311, 2312, and 2314 of the proposed code consolidate numerous current law offenses prohibiting assaults, batteries, and maimings. The consolidated offenses are divided into these four sections according to the seriousness of the conduct.

Subsection (a) makes it an offense for someone knowingly to use physical force and thereby recklessly cause bodily injury to another person. The term "physical force" is defined in section 101 of the proposed code.

Subsection (b) classifies the offense as a C misdemeanor if committed during the course of mutual combat and as an A misdemeanor otherwise.

Subsection (c) provides for Federal jurisdiction over battery in the same circumstances as section 2311(c) of the proposed code provides for Federal jurisdiction over maiming. This carries forward current law.

§ *2314—Aggravated assault*

This section and sections 2311, 2312, and 2313 of the proposed code consolidate numerous current law offenses prohibiting assaults, batteries, and maimings. The consolidated offenses are divided into these four sections according to the seriousness of the conduct.

Subsection (a) makes it an offense for someone knowingly to use physical force in a manner likely to cause serious bodily injury or a dangerous weapon in a manner likely to cause bodily injury to another person and thereby recklessly create a substantial risk of such injury to that person. The term "physical force" is defined in section 101 of the proposed code. The terms "serious bodily injury" and "dangerous weapon" are defined in section 2317 of the proposed code. "Serious bodily injury" is given the meaning set forth in section 2725(5) of the proposed code.

The Committee believes that the conduct described in subsection (a) is currently punishable as an assault. Most assaults are punishable under the proposed code as attempted violations of section 2312 (relating to aggravated battery) or section 2313 (relating to battery). The reckless creation of a risk of injury, however, is not proscribed by those sections because an attempted battery requires an intent to cause the injury. Because the Committee believes that the reckless creation of a risk of serious injury is deserving of punishment, it added this section to the proposed code.

Subsection (b) provides for Federal jurisdiction when (1) the offense occurs in the special jurisdiction of the United States; (2) the victim is a Member of Congress, the President, the Vice-President, a person elected to such office or any person who is serving as President under the Constitution and laws of the United States; (3) the victim is a specified Federal public servant and the victim is engaged in the performance of duties or the offense is committed because of the victim's performance of such duties; (4) the victim is a "federally protected foreign individual" (a term defined in section 101 of the proposed code); or (5) the offense is committed by transmitting a dangerous weapon through the mail. Subsection (b) also provides for extraterritorial jurisdiction when the victim is a Member of Congress, the President, the Vice President, or a federally protected foreign individual.

A violation of this section is classified as a D felony. The Committee believes that the conduct punished by this section is less serious than that punished by section 2311 of the proposed code (relating to maiming). This offense is therefore classified at one level below maiming.

§ *2315—Terrorizing*

This section and section 2316 of the proposed code (relating to communicating a threat) carry forward current law that prohibits certain threats. *See* p. 256 *supra.* Various types of threats are also prohibited in other sections of the proposed code. *See, e.g.*, section 1726 (relating to tampering with a public servant) and section 2523 (relating to blackmail).

Subsection (a) prohibits the knowing communication of (1) a threat to commit a crime of violence or other unlawful conduct endangering the life of an individual and (2) false information that such a crime or conduct is imminent, where such threat or false information causes sustained fear in any person, an evacuation, or any other serious public disruption.

Subsection (b) classifies this offense as a D felony where the threat prohibited by subsection (a)(1) causes a person to be in sustained fear that any person will be killed, sexually assaulted, kidnaped, or subjected to serious bodily injury. The offense is classified as an E felony in all other cases.

The term "serious bodily injury" is defined in section 2725(5) of the proposed code.

Subsection (c)(1) provides for Federal jurisdiction where: (1) the offense occurs within the special jurisdiction of the United States; (2) the threat is communicated to a "federally protected foreign individual" (defined in section 101 of the proposed code) (from 18 U.S.C. 878); (3) the threat is communicated through the mail or in interstate commerce, and is a threat to kidnap or injure any person (from 18 U.S.C. 875–77); (4) the threat is transmitted through a communication system and is to injure a person or destroy property by a destructive device (defined in section 2725 of the proposed code) (from 18 U.S.C. 844); (5) the threat is to damage a motor vehicle or aircraft used in interstate commerce (from 18 U.S.C. 35); or (6) the offense is committed by or against an Indian in Indian country unless the Indian committing the offense has already been punished by the tribe's local law, or a treaty provides that the tribe has exclusive jurisdiction. Subsection (c)(1) is intended to carry forward 18 U.S.C. 1152 without substantive change. Subsection (c)(2) provides for extraterritorial jurisdiction where the threat is communicated to a federally protected foreign individual. This provision is based upon 18 U.S.C. 112 and 878.

§ *2316—Communicating a threat*

This section and section 2315 (relating to terrorizing) of the proposed code carry forward current law prohibitions against certain threats. *See* p. 256 *supra.*

Subsection (a) prohibits the same types of threats and communications as does section 2315 (relating to terrorizing) when done with intent to alarm or harass another person. Subsection (b) classifies the offense as an A misdemeanor when the threat or information concerns a matter dangerous to the life of an individual, and as a B misdemeanor in all other cases.

Subsection (c) provides for Federal jurisdiction in the same circumstances as section 2315 of the proposed code provides for Federal jurisdiction over the offense of terrorizing. See discussion of that section, *supra.*

§ *2317—General provisions for subchapter*

Subsection (a)(1) provides an affirmative defense to prosecutions for battery, pursuant to section 2313 of the proposed code, where the victim consented to the actor's conduct. Subsection (a)(2) provides that a knowing, intelligent, and informed consent may be a defense to maiming (section 2311 of the proposed code), aggravated battery (section 2312 of the proposed code), aggravated assault (section 2314 of the proposed code) if the conduct and injury were reasonably foreseeable hazards of either (1) an athletic contest; or (2) a business or profession, or medical treatment, if the person giving the consent has been made aware of the risks involved prior to giving consent.

Subsection (b) provides general definitions for the subchapter. The definitions are of "dangerous weapon" and "serious bodily injury," and are self-explanatory.

Subsection (c) provides that in a prosecution for an offense under this subchapter, no state of mind need be proved with respect to the circumstance that the victim is authorized to perform official duties under a specified provision of law.

SUBCHAPTER III—KIDNAPING AND RELATED OFFENSES

Current Law

Under current Federal law, kidnaping is covered by several provisions. The basic provisions are 18 U.S.C. 1201 and 1202, commonly referred to as the Lindbergh Law. In addition, there are specific provisions with respect to kidnaping of the President or Vice President, 18 U.S.C. 1751, or of a Member of Congress or a Member-elect, 18 U.S.C. 351, and kidnaping during the course of a bank robbery or its aftermath, 18 U.S.C. 2113(e). There are also related provisions dealing with unlawful restraint in connection with cruelty to seamen, 18 U.S.C. 2191; mutiny, 18 U.S.C. 2192; shanghaiing sailors, 18 U.S.C. 2194; white slave traffic, 18 U.S.C. 2421 through 2423; and peonage and slavery, 18 U.S.C. 1581 through 1587.

Section 1201 of title 18 proscribes the unlawful seizure, confinement, inveigling, decoying, kidnaping, abduction, or carrying away and holding for ransom, reward or otherwise of any person, except a minor by the minor's parent(s). The section covers such actions when the victim is willfully transported in interstate or foreign commerce or when the act is committed within the special maritime and territorial jurisdiction of the United States or the special aircraft jurisdiction of the Nation. Failure to release the victim within 24 hours creates a rebuttable presumption of transportation in interstate or foreign commerce. The provision also reaches such action taken against a foreign official, an internationally protected person or an official guest. Identical penalties are provided for conspiracy to kidnap where any of the conspirators does any overt act to effect the purpose of the conspiracy. Attempted kidnaping of a foreign official, an internationally protected person or an official guest of the United States government is a less serious offense.

Until the section was amended in 1934, it prohibited holding for ransom or reward, but did not contain the language "or otherwise, except in the the case of a minor, by a parent thereof." *See Gooch* v.

United States, 297 U.S. 124, 126–27 (1936). While the original act did not define "ransom or reward" so as to limit its application to holding for pecuniary gain, the addition of "or otherwise" to the section has been interpreted by the Supreme Court to "make clear that a nonpecuniary motive [does] not preclude prosecution under the statute," *United States* v. *Healy*, 376 U.S. 75, 81 (1964), citing *Gooch* v. *United States*, 297 U.S. 124 (1936). In *Healy*, the Court upheld an indictment for kidnaping and air piracy where the appellees had kidnaped at gunpoint the pilot of a private plane and compelled him to transport them from Florida to Cuba, *United States* v. *Healy*, 376 U.S. 75, 76 (1964). In making its decision, the Court rejected the contention that a kidnaping "for ransom or reward or otherwise" within 18 U.S.C. 1201(a) had to be committed for the pecuniary gain of the person committing the crime. The *Gooch* Court applied the section to the interstate transportation of two police officers and the injuring of one of the officers by the defendant and a confederate to avoid the defendant's arrest by the officers.

The section has also been applied to situations such as the transportation of a victim across state lines to assault and "take indecent liberties" with her. *De Herrera* v. *United States*, 339 F.2d 587, 588 (10th Cir. 1964); the luring, decoying, kidnaping and inveigling of a woman across state lines and holding of her in involuntary servitude by threats, force and beatings, *Miller* v. *United States*, 123 F.2d 715 (8th Cir. 1941), *rev'd. on other grounds*, 317 U.S. 192 (1942); and the forcing of a driver at knife point to cross a bridge from West Virginia to Ohio so as to drop off his passenger closer to home. *Wheatley* v. *United States*, 159 F.2d 599 (4th Cir. 1946). The "ransom or reward or otherwise" language has also been held to encompass purposes of sexual gratification, *United States* v. *McBryar*, 553 F.2d 433 (5th Cir.), *cert. denied*, 434 U.S. 862 (1977), and use of a hostage to aid in an escape, *United States* v. *Walker*, 524 F.2d 1125 (10th Cir. 1975). In *Brooks* v. *United States*, 199 F.2d 336 (4th Cir. 1952), the section was applied to the seizure of a couple from the woman's home in North Carolina and the transportation of them into South Carolina where they were flogged, told to stop living together and making liquor, and instructed to attend church. In addressing this abduction by members of the Ku Klux Klan, the court of appeals rejected the contention that to violate the section the kidnaping had to be for ransom, reward or other benefit to the perpetrator of the crime. As these examples indicate, the section has been interpreted expansively to cover commission of the elements of the offense for a broad range of purposes.

The penalty provision of 18 U.S.C. 1201 has also been amended. Prior to 1972, the law provided for punishment "(1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." In *United States* v. *Jackson*, 390 U.S. 570 (1968), the Supreme Court declared the death penalty provision of the section unconstitutional as imposing an impermissible burden upon the exercise of the constitutional right to a jury trial under the sixth amendment and the right to plead not guilty under the fifth amendment. *Id.* at 572, 581, 585. Consistent with this holding, the language of the section was amended in 1972 to

eliminate the death penalty entirely from the possible punishments upon conviction under section 1201.

The 1972 amendment to the section also expanded the jurisdictional basis of 18 U.S.C. 1201. Prior to the amendment, the sole basis of jurisdiction was the transportation of the victim in interstate or foreign commerce. As amended, this jurisdictional base continued, but jurisdiction was also established where "the kidnaping occurs within the special maritime and territorial jurisdiction of the United States, or . . . in the special aircraft jurisdiction of the United States; or . . . the victim is a foreign official within the purview of section 1116 of title 18." See Senate Rep. No. 92–1105 (1972), reprinted in [1972] U.S. Code Cong. & Ad. News 4316, 4326. In 1972, the section was also amended to change the language from "knowingly" to transport the victim in interstate or foreign commerce to "willfully" to do so. This change did not prompt any comment in the legislative history. It may have been intended to suggest that the intent required by the section is only "knowing" or "willful" transporting of the victim rather than that coupled with a "knowing" or "willful" crossing of the State or national border. This is the interpretation adopted by the United States Court of Appeals for the Ninth Circuit in *United States* v. *Napier*, 518 F.2d 316, 318–19 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975), which stated:

> Thus, a violation of the statute occurs whenever he "willfully transports" his victim and, in so doing, travels in interstate commerce. It is the act of kidnaping which the Lindbergh Act proscribes. The requirement that the offender cross state lines merely furnishes a basis for the exercise of federal jurisdiction and does not constitute an element of the offense.

See also Eidson v. *United States*, 272 F.2d 684, 686–87 (10th Cir. 1959). *But see Wheatley* v. *United States*, 159 F.2d 599, 602 (4th Cir. 1946) ("the guilty knowledge applies not only to the forcible abduction but also to the interstate commerce feature of the offense").

In 1976, the section was extended to include internationally protected persons. The 1976 amendment also added a penalty provision with respect to attempted kidnaping of foreign officials, official guests or internationally protected persons. Where the victim is an internationally protected person, the 1976 amendment authorized the United States to exercise its jurisdiction over the offense regardless of where the offense was committed or what the nationality of the victim or offender is, so long as the alleged offender is within the United States. It further authorized requests for assistance from any Federal, State or local agency in the court of enforcement of the prohibitions against kidnaping or conspiring to kidnap such foreign persons.

In its present form, 18 U.S.C. 1201 does not determine when the taking and holding of a victim while the offender is engaged in other criminal activity becomes sufficient to justify a separate charge of kidnaping, and when it should be regarded as part of the underlying criminal act. The drafters of the Model Penal Code were particularly concerned with the confusion surrounding this point and the abusive prosecution of kidnaping which it may produce. Model Penal Code section 212.1, Comment at 13–15 (Tent. Draft No. 11, 1960). In addi-

tion to distorting criminal statistics, cumulative treatment of the kidnaping and the underlying offense may produce serious injustice, particularly where the kidnaping section is used to secure life imprisonment for conduct which is an integral part of an underlying offense for which such penalties are not available. *Id.*

As it is presently framed, the Federal kidnaping law also does not distinguish between degrees of culpability. The same language can be applied to the seizure and holding of a person for heinous purposes, and to "a youth who drives a girl across a State line and tries to neck with her, against her will, or youths who 'kidnap' another in a fraternity initiation." Brown Commission, *Working Papers* 854 (1970). The same penalties, up to life imprisonment, are available whatever the nature of the act.

Concern over this combining of relatively minor and major offenses under the general title of kidnapping has prompted several States to revise their kidnaping provisions into several grades of offenses with commensurate penalties. For example, under Pennsylvania law, unlawful abduction or restraint may constitute one of three separate offenses. The most severe, kidnaping, involves unlawful removal of another over a substantial distance or confinement of another in a place of isolation for a substantial period "to hold for ransom or reward, or as a shield or hostage," "to facilitate commission of any felony or flight thereafter," "to inflict bodily injury on or to terrorize the victim or another," or "to interfere with the performance by public officials of any governments or political function." 18 Pa. Cons. Stat. Ann. section 2901 (Purdon 1973). Unlawful restraint is committed if a person "knowingly . . . restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or . . . holds another in a condition of involuntary servitude." 18 Pa. Cons. Stat. Ann. section 2902 (Purdon 1979–80 Cum. Annual Pocket Part). False imprisonment is committed if a person "knowingly restrains another unlawfully so as to interfere substantially with his liberty." 18 Pa. Cons. Stat. Ann. section 2903 (Purdon 1973).

Illinois' statutory scheme provides for kidnaping, aggravated kidnaping, unlawful restraint, and forcible detention. Kidnaping involves a person "knowingly . . . [a]nd secretly confin[ing] another against his will, or . . . [b]y force or threat of imminent force carr[ying] another from one place to another with intent secretly to confine him against his will, or . . . [b]y deceit or enticement induc[ing] another to go from one place to another with intent secretly to confine him against his will." Confinement under this section includes confinement of a child under the age of 13 years against his will if such confinement is without the consent of his parent or legal guardian. Ill. Ann. Stat. ch. 38, section 10–1 (Smith-Hurd). Aggravated kidnapping is committed if a person "[k]idnaps for the purpose of obtaining ransom from the person kidnaped or from any other person," "takes as his victim a child under the age of 13 years," "inflicts great bodily harm or commits another felony upon his victim," "wears a hood, robe or mask or conceals his identity," or "commits the offense of kidnaping while armed with a dangerous weapon."

Aggravated kidnaping for ransom is a more serious offense than other aggravated kidnaping. Ill. Ann. Stat. ch. 38, section 10–2 (Smith-Hurd). Unlawful restraint is committed when a person "knowingly without legal authority detains another." Ill. Ann. Stat.

ch. 38, section 10–3 (Smith-Hurd). Forcible detention is defined as "hold[ing] an individual hostage without lawful authority for the purpose of obtaining performance by a third person of demands made by the person holding the hostage" where "the person holding the hostage is armed with a dangerous weapon" or "the hostage is known to the person holding him to be a peace officer or a correctional employee engaged in the performance of his official duties." Ill. Ann. Stat. ch. 38, section 10–5 (Smith-Hurd 1972). Many other States have grades of kidnaping-type offenses. *See* Colo. Rev. Stat. sections 18–3–301 and 18–3–302 (1978); Conn. Gen. Stat. Ann. sections 53a–92, 53a–92a, 53a–94, 53a–94a, 53a–95, and 53a–96 (West 1958); Kan. Stat. Ann. sections 21–3420, 21–3421, and 21–3424 (1974); Minn. Stat. Ann. sections 609.25, 609.255, and 609.265 (West 1964); Mont. Rev. Codes Ann. sections 45–5–301, 45–5–302 and 45–5–303 (1979); and Or. Rev. Stat. sections 163.225 and 163.235 (1977). Most of these states have separate provisions covering interference with the custody of children, committed persons, or both. *See, e.g.*, 18 Pa. Cons. Stat. Ann. sections 2904 and 2905 (Purdon 1973); Colo. Rev. Stat. Ann. section 18–3–304 (1978); Conn. Gen. Stat. Ann. sections 53a–97, 53a–98 and 53a–99 (West 1958); Kan. Stat. Ann. sections 21–3422, 21–3422a and 21–3423 (1974); Minn. Stat. Ann. section 609.26 (West 1964); Mont. Code Ann. section 45–5–304 (1979); and Or. Rev. Stat. sections 163.245 and 163.257 (1977). Most of these states have separate provisions covering interference with the custody of children, committed persons, or both. *See, e.g.*, Pa. Cons. Stat. Ann. tit. 18 sections 2904 and 2905 (Purdon); Colo. Rev. Stat. Ann. section 18–3–304; Conn. Gen. Stat. Ann. sections 53a–97, 53a–98 and 53a–99 (West); Kan. Stat. Ann. sections 21–3422, 21–3422a and 21–3423; Minn. Stat. Ann. section 609.26 (West); Mont. Code Ann. section 45–5–304; Or. Rev. Stat. sections 163.245 and 163.257.

In addition to 18 U.S.C. 1201, several other statutory provisions must be examined briefly to provide a full understanding of the present Federal statutory scheme with respect to kidnaping and similar offenses.

Section 1202 of Title 18 punishes anyone who "receives, possesses, or disposes of any money or other property, or any portion thereof, which has at any time been delivered as ransom or reward in connection with a violation of section 1201 . . . knowing the same . . . has been at any time delivered as such ransom or reward." As the companion provision to section 1201, section 1202 completes the general kidnaping provisions under the present Federal law. There are, in addition, several statutes dealing with kidnaping and related offenses in specific circumstances.

Section 1751 of title 18 proscribes the kidnapping of the President, President-elect, Vice President, Vice-President-elect, the officer next in line of succession to the presidency if there is no Vice-President, or anyone acting as President under the Constitution. Conspiracy to kidnap any of these individuals is also prohibited if action has been taken to effect the kidnaping. Similarly, 18 U.S.C. 351(b) provides for punishment for anyone who kidnaps a Member of Congress or Member-elect.

Section 2113(e) of title 18 punishes anyone who forces any person to accompany the actor, without the consent of such person, in committing a bank robbery or related crime, "or in avoiding or attempting to

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avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense." The death penalty portion of this section is like that invalidated in *United States* v. *Jackson*, 390 U.S. 570 (1968), and is subject to the same constitutional frailties. *See Pope* v. *United States*, 392 U.S. 651 (1968). See also *discussion at 433–35 infra.*

Section 2191 of title 18 proscribes, in part, imprisonment by the master or officer without justifiable cause of any member of the crew of any vessel of the United States on the high seas or any other waters within the admiralty and maritime jurisdiction of the United States. The pertinent part of 18 U.S.C. 2192 punishes any member of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, who "unlawfully confines the master or other commanding officer" of the vessel. Section 2194 of title 18 sets the punishment for shanghaiing sailors.

The Federal "White Slave Traffic" provisions are contained in 18 U.S.C. 2421 to 2423. Section 2421, the general provision, applies to knowing transportation in interstate or foreign commerce of any woman or girl for the purpose of prostitution or other immoral purpose, "or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute" or to engage in other immoral practices. It also prohibits the facilitating of such transportation. Section 2422 punishes persons who knowingly persuade, induce, entice or coerce a woman or girl to go from one place to another in interstate and foreign commerce for purposes of prostitution or other immoral activities, with or without her consent, and who knowingly cause such woman or girl to be transported as a passenger on a common carrier route in such commerce. Section 2433 punishes any person who transports, finances some or all of the transportation of, or otherwise causes or aids the movement of a minor in interstate or foreign commerce for purposes of prostitution or commercially exploited prohibited sexual conduct.

Chapter 77 of title 18 deals with peonage and slavery. Peonage means compulsory service in payment of a debt, real or alleged. *See Clyatt* v. *United States*, 197 U.S. 207, 215 (1905). It falls within the scope of involuntary servitude under the thirteenth amendment to the United States Constitution. *Taylor* v. *Georgia*, 315 U.S. 25, 29 (1942). Section 1581 of title 18 prohibits holding or returning a person to a condition of peonage, or arresting a person with the intent of placing him in or returning him to such a condition.

Section 1582 of title 18 punishes any master, factor or owner who prepares or sends a vessel from any place in the United States for the purpose of obtaining slaves from another country.

Section 1583 of title 18 punishes anyone who "kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave," or who "entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be made or held as a slave, or sent out of the country to be so made or held."

Section 1584 of title 18 proscribes the knowing and willful holding in involuntary servitude or sale into such condition of any person for

any term. It also prohibits bringing into the United States any person so held.

Section 1585 of title 18 punishes any United States citizen or resident who is a member of the crew or ship's company of any foreign vessel engaged in slave trade, or to anyone who is a member of the crew or ship's company of a vessel owned in whole or in part by or navigated for a citizen of the United States. It prohibits such persons from landing on any foreign shore and seizing any person to make him a slave, or decoying or forcibly bringing, receiving, confining, restraining or transporting any person as a slave on board such vessel. It further proscribes the sale, attempted sale or delivery for sale of any person as a slave.

Section 1586 of title 18 punishes any citizen or resident of the United States who voluntarily serves on a vessel used in the slave trade. Any captain, master or commander possessing slaves aboard any vessel in any body of water within the jurisdiction of the United States is punishable pursuant to 18 U.S.C. 1587.

Finally, 18 U.S.C. 1588 punishes any master, owner, or person having charge of any vessel transporting slaves from the United States.

§ 2321—Kidnaping

This section, along with section 2322, relating to aggravated criminal restraint, and section 2323, relating to criminal restraint, consolidates numerous current law offenses involving kidnaping and involuntary restraint. The consolidated offenses are divided into three offenses according to the level of seriousness. Kidnaping is the most serious of these offenses.

Subsection (a) makes it an offense to restrain another person with intent to (1) hold that person for ransom or reward; (2) use that person as a shield; or (3) secure compliance with a demand upon a government or a third person.

The Committee intends to include implicit demands within the kinds of demands prohibited. For example, the taking of a hostage by a person escaping from a crime is an implicit demand that no person interfere with the criminal's escape.

The term "to restrain" is defined in section 2324 of the proposed code.

Subsection (b) classifies a violation of this section as an A felony if the person restrained is not released voluntarily and in a safe place before trial, and as a B felony in all other instances.

Subsection (c) provides for Federal jurisdiction over an offense under this section if the offense occurs in the special jurisdiction of the United States or if the person restrained is (1) a person listed in section 2301(3)(1) (B) through (D) (relating to murder) (*see* discussion in analysis of that section, supra); or (2) a specified high level **Presidential appointee. This subsection also provides for Federal jurisdiction if, during the offense, the person restrained is moved** across a State or United States boundary, or if the offense is committed **by or against an Indian in Indian country. There is extraterritorial** Federal jurisdiction if the person restrained is a person described in section 2301(e)(1) (B) or (D) (relating to murder) (see discussion in analysis of that section, at 253 *supra.*)

§ *2322—Aggravated criminal restraint*

This section, along with section 2321 (relating to kidnaping) and section 2323 (relating to criminal restraint) consolidates numerous current law offenses involving kidnaping and involving restraint. The consolidated offenses are divided into three offenses according to the level of seriousness.

Subsection (a) makes it an offense to restrain another, or attempt to do so, (1) with reckless disregard for a risk of serious bodily injury (as defined in section 2725 of the proposed code) to the other person; (2) by secreting or holding the other person in a place where that person is not likely to be found; or (3) by holding the other person in involuntary servitude.

Subsection (b) makes it an offense to restrain a person by threatening the safety of another person.

The term "to restrain" is defined in section 2324 of the proposed code.

Subsection (c) provides for Federal jurisdiction in the same circumstances that section 2321 provides for Federal jurisdiction over kidnaping. *See* discussion in analysis of that section, *supra.*

A violation of this section is classified as a D felony. This is a lower grade than provided in section 2322, relating to kidnaping, which is the most serious of the consolidated kidnaping and involuntary restraint sections.

§ *2323—Criminal restraint*

This section along with sections 2321, relating to kidnaping, and 2322, relating to aggravated criminal restraint, is part of the consolidation and reorganization of Federal laws on kidnaping and involuntary restraint. The consolidated offenses are divided into three offenses according to the level of seriousness. This section covers the least serious of the offenses.

Subsection (a) makes it an offense to restrain a person against that person's will. This offense is therefore similar to the common law offense of false imprisonment. The term "to restrain" is defined in section 2324 of the proposed code.

Subsection (b) provides for Federal jurisdiction in the same circumstances that section 2321 of the proposed code provides for Federal jurisdiction over kidnaping. See discussion in analysis of that section *supra.*

A violation of this section is classified as an A misdemeanor, since it is the least serious of the consolidated offenses.

§ *2324—General provisions for subchapter*

Subsection (a) sets forth the definitions of the terms "to restrain" and "consent." "To restrain," which is the prohibited conduct or result in each of the offenses in the subchapter, means the non-consensual removal of a person from that person's home or place of business, or any other non-consensual and substantial confinement or movement of a person. "Consent" is in turn defined to exclude assent given by a person who is incompetent or under 14 years of age whose parent or guardian has not acquiesced.

Subsection (b) provides a defense to criminal restraint (section 2323 of the proposed code) and to aggravated criminal restraint involving the secreting of the person (section 2322(a)(2) of the proposed code)

that the restraining person was a parent or guardian of the person restrained, and the person restrained was under 18 years of age. This prevents the application of the kidnaping section to child custody disputes. The Committee believes that such matters are primarily of State concern, and should not be punished criminally by the Federal Government. However, the Committee has provided assistance to States in dealing with "parental kidnaping." *See* section 717 of title II of the legislation, which amends chapter 115 of title 28 of the United States Code and section 453 of the Social Security Act (42 U.S.C. 653).

Pursuant to these amendments, a new 28 U.S.C. 1738A requires that each State grant full faith and credit to custody determinations made by another State that are consistent with certain provisions in that section. Section 653 of title 42 (section 453 of the Social Security Act) is amended to permit the Federal Government to use the "Parent Locator Service" (presently used to find parents who are in default of their legal obligations to support their children) to locate parents who have absconded with their children in violation of a custody decree made consistently with subsection (a) of new 28 U.S.C. 1738A.

Subsection (c) of section 2324 provides for a Federal investigation for an offense under section 2321 (relating to kidnapping), section 2322 (relating to aggravated criminal restraint), or section 2323 (relating to criminal restraint) if the victim is not released within 24 hours. Subsection (c) replaces current 18 U.S.C. 1201(b), which creates a rebuttable presumption of interstate travel when a victim is not released within 24 hours. The primary purpose of this provision of current law is to allow Federal investigation prior to the establishment of evidence of Federal jurisdiction. Subsection (c) directly provides authorization for such investigation.

SUBCHAPTER IV—SEX OFFENSES

Current Law

The crime of rape, although very serious, is not a major Federal law enforcement problem. Federal jurisdiction over the offense extends only to the special maritime, territorial and aircraft jurisdiction of the United States and to Indian country. Thus, it was reported to the Subcommittee on Criminal Justice that during fiscal years 1974, 1975 and 1976 prosecutions under the principal Federal rape provision (18 U.S.C. 2031) involved a total of 42 defendants. Hearings on H.R. 14666 and Related Bills Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Congress, 2d sess., Serial No. 58, at 3 (1976) (statement of Roger A. Pauley on behalf of the Department of Justice). The FBI's Uniform Crime Reports for 1975 indicated that some 56,000 rapes were reported to law enforcement authorities.

Rape, therefore, is principally a State law enforcement problem, and in recent years a number of States have reformed their rape laws. Between 1976 and 1979 some 33 States amended or rewrote the definition of their rape offense or the rules pertaining to the prosecution of rape offenses. Twenty-one States no longer entitle the offense "rape". H. Feild & L. Bienen, *Jurors and Rape: A Study in Psychology and the Law* (1980). *See also* Bienen, *Rape III*, forthcoming in 6 Women's Rights L. Rep. (1980).

Federal law presently makes it a crime to commit "rape" within the special maritime and territorial jurisdiction of the United States (18 U.S.C. 2031), to commit an assault with intent to rape (18 U.S.C. 113), and to "carnally know" a female (other than one's wife) under the age of 16 (18 U.S.C. 2032). The term "rape" has been held to have its common law meaning. *See Williams* v. *United States*, 327 U.S. 711, 715 (1946); *Oliver* v. *United States*, 230 F. 971 (9th Cir.), *cert. denied*, 241 U.S. 670 (1916).

At early common law, rape consisted of unlawful sexual intercourse with ("carnal knowledge" of) a woman without her consent. R. Perkins, *Criminal Law* 152 (2d ed. 1969). Later on, however, the definition came to be "carnal knowledge of a woman *forcibly* and against her will." *Id.* at 161, quoting from Blackstone's *Commentaries* (emphasis added). The Federal law definition appears to be the later common law definition. *See Williams* v. *United States*, 327 U.S. 711, 715 (1946); *Mills* v. *United States*, 164 U.S. 644, 648–49 (1896).

It is difficult to speak of a single common law definition of the term because unfortunately, some of the features of the common law crime of rape vary from jurisdiction to jurisdiction. This misfortune is compounded by the fact that there are very few cases interpreting 18 U.S.C. 2031. It is therefore impossible to delineate the outer limits of the conduct prohibited by that provision. Whether an offender under 14 years old can perpetrate the crime [1] and whether a husband can be charged with accomplice liability,[2] are questions which cannot be answered since Federal law is silent and the common law does not have a uniform rule with regard to these features. Indeed, it is somewhat misleading even to talk about the common law crime of rape since all States have codified the crime and most codification expand upon the common law features.

There is also very little case law applying or interpreting the two other Federal provisions punishing sex offenses. Two points, however, deserve mention. First, 18 U.S.C. 2032 (punishing "statutory rape") sets the age of consent at 16 years. Force or lack of consent is not an element of the crime described in 18 U.S.C. 2032, which is complete upon the slightest penetration. Second, 18 U.S.C. 113(a) (punishing assault with intent to rape) requires a specific intent to have intercourse as an element of the crime. The touching of a woman's genitals or intimate parts will not sustain a conviction, absent proof that the defendant intended to have intercourse. *Oyamada* v. *United States*, 44 F.2d 564 (9th Cir. 1930).

The introduction of the force concept into the early common-law definition led to problems, for it suggested that the victim must offer utmost resistance. *See* R. Perkins, *Criminal Law* 161–62 (2d ed. 1969). law. *Laughlin* v. *United States*, 368 F. 2d 558, 559 (9th Cir. 1966), *cert. denied*, 386 U.S. 1041.

The role of the force element in a Federal rape prosecution is difficult to describe. The Supreme Court in *dictum* suggested that the prosecution must show absence of consent by the victim and use of force by the offender. *Williams* v. *United States*, 327 U.S. 711, 715 (1946). While this might seem to require a violent act against the person of the victim, it probably does not require that. To require physical violence would be inconsistent with the cases holding that there is a rape when the offender has sexual intercourse with an unconscious woman not his wife. *See* R. Perkins, *Criminal Law* 162–63 (2d ed. 1969).

[1] A male under the age of 14 was deemed incapable of committing rape under English common law. 4 W. BLACKSTONE, COMMENTARIES 195 (1813 ed.)

[2] A husband who aids, abets, or forces another to have intercourse with his wife can, in most jurisdictions, be guilty of rape. *See* Elliott v. State, 190 Ga. 803, 10 S.E. 2d. 843 (1940); People v. Damer, 28 Ill. 2d 464, 193 N.E. 2d 25 (1963).

Further, the Supreme Court itself has seemed to indicate that physical violence against the victim is not required. In *Mills* v. *United States*, 164 U.S. 644 (1897), the Court reversed a rape conviction because of improper instructions to the jury. The trial court had said that "all the force that need be exercised, if there is no consent, is the force incident to the commission of the act." The Court reversed, not because this instruction was wrong, but because the instruction was not a full enough explanation. The Court noted that the trial court's instruction was correct "in a case where the woman's will or resistance had been overcome by threats or fright, or she had become helpless or unconscious, so that while not consenting she still did not resist." *Id.* at 648. The Court reversed because the trial court applied its instruction too broadly—to situations where nonconsent was "no more than a mere lack of acquiescence." *Id.*

At common law, a rape victim's testimony was sufficient to sustain a conviction. 7 J. Wigmore, *Evidence* section 2031 (3d ed. 1940). The Report on the recodification legislation reported by the Senate Judiciary Committee suggests that present Federal law is unclear as to whether corroboration of the victim's testimony is necessary. Senate Rep. No. 96–553 at 594 (1980) ("Whether corroboration of the victim's testimony is required seems never to have been decided.")[3] On the contrary, however, Federal law is clear that corroboration is not required in a prosecution under 18 U.S.C. 2031, *United States* v. *Smith*, 303 F.2d 341 (4th Cir. 1962), or in a prosecution under 18 U.S.C. 2032 (the "statutory rape" provision), *United States* v. *Shipp*, 409 F.2d 864 (4th Cir. 1969), *cert. denied*, 396 U.S. 864 (1969).[4] The proposed code carries forward current Federal law and imposes no corroboration requirement.

Although the special territorial and maritime jurisdiction of the United States is the major basis of Federal jurisdiction for "rape", there are other areas where the United States exercises jurisdiction. Under 49 U.S.C. 1472(k), the offense of rape under 18 U.S.C. 2031 is made punishable when committed within the special aircraft jurisdiction of the United States. Likewise, under 18 U.S.C. 1152 the offense of rape as defined in 18 U.S.C. 2031 applies within Indian country when the offense is committed by a non-Indian against an Indian. Finally, under 18 U.S.C. 1153, the Major Crimes Act, any Indian who commits rape, assault with intent to rape, or "statutory rape" is guilty of an offense. The penalties and elements of these offenses are the same as under the three major Federal provisions.

[3] The Senate Report appears to be somewhat inconsistent. In describing the rape offense in the Senate Judiciary Committee's bill, the Senate Report indicates that its proposal does not require corroboration of the victim's testimony, which is "probably consistent with current Federal law under 18 U.S.C. 2031." SENATE REP. NO. 96–553 at 596 (1980).

[4] *See* McManus, *Analysis of the Subchapter on Sex Offenses in S. 1437, 95th Congress, as passed by the Senate* 45–46 (Feb. 1, 1978) (C.R.S. memorandum No. 78–27–A) ("Corroboration has never been a requirement of the federal law and the overwhelming majority of state jurisdictions have abandoned it.").

§ *2331—Aggravated criminal sexual conduct*

Present law (18 U.S.C. 2031) makes it a felony to commit rape within the special maritime and territorial jurisdiction of the United States. While the section does not define the term "rape", it has been held that the offense incorporates the common law offense of rape. *See Williams* v. *United States*, 327 U.S. 711, 715 (1946). Present law (18 U.S.C. 2032) also makes felonious the "carnally know[ing of] any female, not [the actor's] wife, who has not attained the age of sixteen years."

The Committee has decided to modernize and reform the definitions and classification of Federal sexual offenses. In drafting the provisions of the proposed code, the Committee has drawn upon recent State enactments, as well as upon the criminal code recodification bill pending in the Senate.

Subsection (a) (1) makes it a class B felony for someone knowingly to use physical force, or to threaten or place another person in fear of death, serious bodily injury or kidnaping, and thereby to engage in a sexual act with another person. Subsection (a) (2) makes it a class B felony for someone: (1) without the knowledge or consent of another person, knowingly to use a drug or intoxicant, or to engage in any other conduct and thereby substantially to impair the ability of the other person to appraise or control conduct; and (2) thereby intentionally to engage in a sexual act with the other person. Subsection (a) (3) makes it a class B felony for someone to engage in a sexual act with another person who has not attained the age of 12 years. Subsection (a) (3) (B) provides that no state of mind need be proved regarding the victim's age, and thus, a defendant is guilty of an offense under subsection (a) (3) if the victim's actual age is, for example, 11 years, even though the victim reasonably appeared to be older than that.

The term "serious bodily injury" is defined in section 2725 of the proposed code, and the term "sexual act" is defined in section 2335 of the proposed code.

Subsection (b) provides for Federal jurisdiction when (1) the offense is committed within the special jurisdiction of the United States, carrying forward 18 U.S.C. 2031 and 2032, or (2) the offense is committed in Indian country by or against an Indian, carrying forward 18 U.S.C. 1152 and 1153. "Indian country" is defined in section 114, relating to Indian country jurisdiction, of the proposed code.

§ *2332—Criminal sexual conduct*

Subsection (a) (1) makes it a class C felony knowingly to engage in a sexual act with someone who is not the actor's spouse, if the other person: (1) is incapable of understanding the nature of the conduct; (2) is physically incapable of resisting, or of declining the consent to, the sexual act; (3) is unaware that a sexual act is being committed; or (4) participates in the sexual act because of a mistaken belief that the actor is married to the other person. Subsection (a) (2) makes it an offense for someone knowingly to threaten another, or to place another person in fear, and thereby cause the other person to engage in a sexual act with the actor.

The terms "sexual act" and "spouse" are defined in section 2335 of the proposed code.

Subsection (b) provides for Federal jurisdiction if the offense is committed (1) within the special jurisdiction of the United States or (2) within Indian country by or against an Indian. This is the same jurisdictional scope provided in section 2331 (relating to aggravated criminal sexual conduct) of the proposed code and carries forward the provisions of 18 U.S.C. 2031, 1152, and 1153.

§ *2333—Sexual abuse of a minor*

Subsection (a) makes it an offense for someone knowingly to engage in a sexual act with another person who is not the actor's spouse, if that other person has not attained the age of 16 years, and is at least 5 years younger than the actor. The terms "spouse" and "sexual act" are defined in section 2335 of the proposed code.

Subsection (b) provides that a violation of this section is a class D felony if the actor has attained the age of 21 years and an A misdemeanor in any other case.

This section should be read in conjunction with section 2331(a) (3) (relating to aggravated criminal sexual conduct) of the proposed code, which makes it an offense for someone to engage in a sexual act with another person who is less than 12 years old. Where the victim is under the age of 12, the offense is a class B felony, no matter what the age differential between the victim and the defendant. Where the victim is at least 12 years of age but not yet 16 years of age, there is an offense under this section if the defendant is at least 5 years older than the victim and if the victim and the defendant are not married to each other. If the defendant is less than 5 years older than the victim, or if the defendant and the victim are married to each other, then section 2333 is not violated. There may, however, be an offense under section 2331 (e.g., if the defendant used force) or section 2332 (e.g., if the defendant used threats).

Subsection (c) provides an affirmative defense to a prosecution under this section if the defendant reasonably believed the other person to have attained the age of 16 years. This is in contrast to section 2331 (a) (3) of the proposed code, which makes the defendant criminally liable even if the defendant reasonably believed the victim to be older than 12 years.

Subsection (d) provides that, in a prosecution under this section, no state of mind need be proved with respect to the fact that the other person was at least 5 years younger than the actor.

Subsection (e) provides for Federal jurisdiction if an offense under this section is committed within the special jurisdiction of the United States or if the offense is committed in Indian country by or against an Indian. This is the scope of jurisdiction provided for the other sex offenses of the proposed code and carries forward the provisions of 18 U.S.C. 2031, 2032, 1152, and 1153.

§ *2334—Sexual abuse of a ward*

This section, which has no counterpart in present Federal law, is derived from the recommendation of the Brown Commission. *See Final Report* section 1646 (1971).

Subsection (a) makes it a class A misdemeanor for someone knowingly to engage in a sexual act with another person who is not the actor's spouse, if that other person is in official detention and if the

actor has custodial, supervisory or disciplinary authority over that other person. The terms "sexual act" and "spouse" are defined in section 2335 of the proposed code, and the term "official detention" is defined in section 1719 of the proposed code.

Subsection (b) provides for Federal jurisdiction if the offense is committed within the special jurisdiction of the United States or if the official detention is Federal official detention.

§ *2335—Definitions for subchapter*

This section defines two terms used in the subchapter on sex offenses. Paragraph (1) defines "sexual act" to mean conduct between human beings that consists of: (A) contact between the penis and the vulva or the penis and the anus, the contact occurring upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) the penetration, however slight, of the anal or genital opening of another by an object, with intent to arouse or gratify the sexual desire of any individual. Paragraph (2) defines "spouse" to mean a person: (A) to whom the actor is legally married and from whom the actor is not legally separated; or (B) who has attained the age of 16 years and who is living with the actor as though married.

Chapter 25—Offenses Involving Property

Subchapter I—Arson and Other Property Destruction Offenses

Chapter 25

Current Law

At common law, arson was the willful and malicious burning of the dwelling place of another, although the concept of dwelling place was gradually extended to include outbuildings within the curtilage and to barns. *See* 2 F. Wharton, *Criminal Law* section 388 (1951); 3 E. Coke, *Institutes of the Laws of England* *66–67. The gravamen of the offense was not conceived to be the destruction of property, but rather the endangerment of human life. *See United States* v. *Cardish*, 143 F. 640, 643 (E.D. Wis. 1906); A. Curtis, *The Law of Arson* section 3 (1936). No specific intent to destroy was necessary at common law, only an intent to burn, *id.* at section 63, and as an element of the offense an actual burning or charring of the property was required. *See* Annotation, *Burning as an Element of the Offense of Arson*, 1. A.L.R. 1163 (1919). Because the emphasis was on security of another person in that person's dwelling, it was not an offense at common law to burn one's own habitation, whether as owner or tenant. This was the rule regardless of whether the purpose was to injure or defraud another.

The principal statutory modification of the common law arson doctrine in this country has been the shift in emphasis from protection of life to protection of property. *See* 2 F. Wharton, *Criminal Law* section 400 (1951). Moreover, many other types of property besides dwellings have been included in statutory formulations of the offense. *See, e.g.*, Ill. Rev. Stat., ch. 38, section 21–1; Proposed Crim. Code Mass., ch. 266, section 1(5). These laws are usually keyed to a dollar amount relative either to the damage or the value of the property which is the object of the offense. Finally, many State statutes have made it a crime for a property owner to burn one's own property, provided it is done with an intent to defraud an insurance company or other person. *See* 2 F. Wharton, *Criminal Law* section 402 (1951).

The malicious destruction of the property of another, at common law, constituted the misdemeanor of "malicious mischief." Many English statutes increased the penalty when certain types of property were involved. R. Perkins, *Criminal Law* 331 (2d ed. 1969). The common law offense requires (1) physical injury which impairs utility or materially diminishes value to (2) property of another, (3) done with malice. (Id. at 331–34. Although courts have frequently interpreted "malice" in different manners, in general, "[t]he mens-rea requirement of malicious mischief is a property-endangering state of mind, without justification, excuse or mitigation." *Id.* at 339.

Existing Federal law covers a wide variety of situations. Two general offenses apply to the special maritime and territorial jurisdiction of the United States. Arson is prohibited by 18 U.S.C. 81. The offense protects buildings, structures, vessels, machinery or buildings, materials or supplies, military and naval stores, and any structural aids or appliances for navigation or shipping. The same property is protected from malicious mischief by 18 U.S.C. 1363.

The remaining Federal property destruction offenses do not, in general, differentiate between arson and more minor forms of property destruction. Most of these offenses depend upon the type of property involved to provide the Federal nexus. They may be grouped according to the principal interest they are designed to protect.

The mails or interstate or foreign commerce.—Section 844(i) of title 18 broadly covers the attempted or the actual malicious damage or destruction, by means of explosives, of any property used in or affecting commerce. This very broad jurisdictional base has been found to be a constitutionally permissible exercise of Congressional authority. *See, e.g., United States* v. *Schwanke*, 598 F.2d 575 (10th Cir. 1979) (dynamiting a building containing a cafe buying some supplies interstate); *United States* v. *Sweet*, 548 F.2d 198 (7th Cir.), *cert. denied*, 430 U.S. 969 (1977) (fire bombing a tavern covered even though *de minimus* effect on interstate commerce).

The injury or destruction, by fire or explosive, with the intent to prevent, obstruct, interfere with, or attempt to prevent, obstruct, or interfere with the exportation to foreign countries of articles from the United States is punished by 18 U.S.C. 1364.

A similar offense, 15 U.S.C. 1281, punishes the willful destruction of or injury to any property moving in interstate or foreign commerce in the possession of a contract or common carrier. Two other related offenses deal with the mails: 18 U.S.C. 1703 punishes destruction of mail or newspapers by postal employees, while 18 U.S.C. 1705 punishes destruction of letter boxes or other mail receptacles or the destruction of any mail deposited therein. Section 1703 applies only to postal employees. *United States* v. *Blierley*, 331 F. Supp. 1182 (W.D. Pa. 1971).

The Travel Act, 18 U.S.C. 1952, covers individuals who travel in or use any facility in interstate or foreign commerce, including the mail, with certain specific intents and thereafter commit arson in violation of the laws of the State in which the offense was committed or of the United States. This section is not constitutionally invalid as an attempt to enforce State laws. *Marshall* v. *United States*, 355 F.2d 999 (10th Cir.), *cert. denied*, 385 U.S. 815 (1966); *United States* v. *Nichols*, 421 F.2d 570 (8th Cir. 1970). There is no need to prove a violation of State law, *United States* v. *Prince*, 515 F.2d 564 (5th Cir.), *cert. denied sub. nom. Craft* v. *United States*, 423 U.S. 1032 (1975).

Facilities of commerce and transportation.—Section 32 of title 18 covers willfully setting fire to, destroying, damaging, disabling, or wrecking civil aircraft or aircraft parts, facilities and cargo. Placing any destructive substances in, upon, or in proximity of aircraft or facilities is also covered. Under 18 U.S.C. 33, it is an offense willfully to damage, disable, destroy, tamper with, or place explosives near motor vehicles, motor vehicle facilities, or motor vehicle cargo when coupled with the intent to endanger, or the reckless disregard for the safety of, anyone on board the vehicle.

Wrecking trains is prohibited by 18 U.S.C. 1992. The offense covers willful derailment, disablement or wrecking of trains, engines, motor units or railroad cars, or setting fire to or placing explosives near to tunnels, bridges, or other specified railroad facilities, if the objects of such acts are used, operated, or employed in interstate or foreign commerce. Proof of intent to wreck the train is not required if the intent to disable is shown. *United States* v. *Dreding*, 547 F.2d 471 (9th Cir. 1976), *cert. denied*, 429 U.S. 1108 (1977); *Stanley* v. *United States*, 245 F.2d 427 (6th Cir. 1957).

Property of the United States.—Malicious damage to or destruction of, by means of an explosive, any property owned, possessed, used, or leased by any branch or agency of the United States and any property of any institution receiving Federal financial assistance is prohibited by 18 U.S.C. 844(f). The constitutionality of this offense was sustained as applied to damage to property of a planned parenthood association receiving financial assistance from the former Department of Health, Education, and Welfare in *United States* v. *Brown*, 384 F. Supp. 1151 (E.D. Mich. 1974), *aff'd*, 557 F.2d 541 (6th Cir. 1977).

Willful damage to any property of the United States or to any property which has been, or is being, manufactured or constructed for the United States is punished by 18 U.S.C. 1361. Willful damage to communications facilities operated or controlled by the United States or used or intended to be used for military or civil defense functions is prohibited by 18 U.S.C. 1362.

Whoever tears, cuts, or otherwise injures any mail bag, or other "thing" used or designed for use in the conveyance of the mail with the intent to rob or steal the mail or render it insecure is punishable under 18 U.S.C. 1706. Willful injury to or destruction of United States property on land or water reserved as sanctuaries for birds, fish, or wild animals is prohibited by 18 U.S.C. 41.

Destruction of vegetation is prohibited by a number of current offenses: 18 U.S.C. 1852 punishes whoever cuts or wantonly destroys any timber growing on the public lands of the United States; 18 U.S.C. 1853 punishes unlawfully cutting or wantonly injuring or destroying any tree "growing, standing, or being upon" any land of the United States or Indian reservation; 18 U.S.C. 1854 covers cutting, chipping, chopping, or boxing any tree on United States lands for the purpose of obtaining pitch, turpentine, or other substance;[1] 18 U.S.C. 1855 covers willfully and without authority setting on fire any timber, underbrush, or grass or other inflammable material upon public lands of the United States or Indian reservations. To violate 18 U.S.C. 1853, no specific intent is required. *United States* v. *Lamb*, 150 F. Supp. 310 (N.D. Cal. 1957).

Additional offenses protect Federal lands: 18 U.S.C. 1857 punishes any person knowingly and unlawfully destroying any fence, hedge, or similar enclosure of lands of the United States; driving livestock upon such lands for the purposes of destroying the grass or trees or where the grass or trees may be destroyed; or knowingly permitting livestock to enter lands of the United States where grass or other property

[1] In *dicta*, the Supreme Court noted that knowledge of illegality of the act of extracting turpentine is not required by this section. Union Naval Stores Co. v. United States, 240 U.S. 284 (1916) (action for recovery of market value of turpentine and resin).

of the United States may be destroyed; 18 U.S.C. 1858 covers willfully destroying Government survey marks, willfully cutting down witness trees, or willfully defacing survey benchmarks.

National defense property.—Willful damage to or interference with harbor defense systems and mines, torpedoes, and fortifications is prohibited by 18 U.S.C. 2152. Damage to war materials, premises, or utilities with the intent to interfere with the carrying on, by the United States or one or more of its allies, of war or defense activities is prohibited by 18 U.S.C. 2153. Under 18 U.S.C. 2155, it is an offense to cause injury to national defense materials, premises or utilities where there is an intent to obstruct the national defense of the United States.[2]

Vessels.—A number of offenses protect vessels from injury: 18 U.S.C. 2196 covers crewman of merchant vessels who, by willful breach of duty or by reason of drunkenness, destroy or damage such vessel; 18 U.S.C. 2271 covers conspiracies to destroy vessels with intent to defraud an insurance underwriter; 18 U.S.C. 2272 covers owners who destroy vessels to defraud insurance underwriters; 18 U.S.C. 2273 covers the willful destruction of any United States vessel by a person employed on the vessel; 18 U.S.C. 2274 covers the willful causing or permitting of injury to or destruction of a vessel by its owner, master or person in charge or command; 18 U.S.C. 2275 covers tampering with, setting fire to, or placing bombs or explosives aboard vessels; 18 U.S.C. 2276 covers breaking and entering a vessel with intent to commit any felony or certain malicious damage to a vessel's anchor or moorings.

Property of foreign government or official.—Any willful injury, damage, or destruction to any real or personal property located in the United States and belonging to or utilized or occupied by any foreign government, international organization, foreign official, or official guest is punished by 18 U.S.C. 970.

§ *2501—Arson*

This section carries forward 15 U.S.C. 1281 and 18 U.S.C. 32, 33, 81, 844 (f) and (i), 970, 1153, 1361, 1364, 1992, 2153, and 2155. Subsection (a) makes it an offense knowingly to start a fire or set off an explosion and thereby to cause damage to (1) a public facility, (2) a building or public structure, or (3) a civil aircraft, railroad vehicle, motor vehicle, or vessel that is not a public facility (or equipment used in support of such aircraft, vehicle, or vessel). Requiring damage brings forward in modern form the common law requirement that "charring" occur. The terms "public facility" and "civil aircraft" are defined in section 2504(b) of the proposed code.

Subsection (b) classifies the offense as an A felony if the actor, while committing the offense, recklessly causes the death of another individual, as a B felony if the structure that is damaged is a dwelling or a public facility, and as a C felony in any other case. The term "public facility" is defined in section 2504(b) of the proposed code.

Subsection (c) provides for Federal jurisdiction over an offense described in this section where—

[2] These sections are carried forward as sabotage in subchapter II of chapter 13 of the proposed code, rather than in this subchapter. See discussion of current law at 92–3 *supra*.

the offense is committed within the special jurisdiction of the United States (see 18 U.S.C. 81);

the offense involves property of the United States or is subject to a security interest held by the United States (see 18 U.S.C. 1361);

the offense involves property of a foreign power (see 18 U.S.C. 970);

the offense involves property that is part of an interstate or foreign shipment or is moving in interstate or foreign commerce in the possession of a common contract carrier by railroad, motor vehicle, or aircraft (see 15 U.S.C. 1281, 18 U.S.C. 1364);

the offense involves property under the control of an organization receiving financial assistance from the United States (see 18 U.S.C. 844(f));

the offense involves civil aircraft or railroad vehicles (see 18 U.S.C. 32, 18 U.S.C. 1992);

the offense involves motor vehicles used for commercial purposes in interstate or foreign commerce and recklessly endangers human life (see 18 U.S.C. 33);

the offense involves public facilities used for national defense (see 18 U.S.C. 2153 and 2155);

the offense is committed by or against an Indian in Indian country (see 18 U.S.C. 1153).

The Committee has not brought forward the jurisdiction over arson currently provided in the Travel Act. The Committee is concerned that by merely requiring travel in, or the use of facilities in, interstate commerce, such jurisdiction provides overly broad Federal jurisdiction and carries the potential for undue Federal intervention in essentially local matters. Arson involving crime of an organized nature or schemes to defraud insurance companies remains punishable pursuant to section 2534 (executing a fraudulent scheme) and section 2705 (criminal conduct in aid of racketeering) of the proposed code.

Subsection (d) provides for extraterritorial jurisdiction when the offense involves property belonging to the United States. This provision is based upon the protective principle of international law.

§ *2502—Aggravated property destruction*

Subsection (a) makes it an offense for someone knowingly to engage in any conduct and thereby to cause damage to (1) a public facility, (2) property, where the damage causes a significant interruption or impairment of a function of a public facility, or (3) property with a value in excess of $500.

Subsection (b)(1) classifies an offense under subsection (a)(1) or (a)(2) as a D felony. Subsection (b)(2) classifies an offense under subsection (a)(3) as a D felony where the damage exceeds $100,000 or the property is vegetation or land in the public domain, National Park land, or land administered by the National Forest Service and is damaged by fire. The enhanced penalty for "forest fires" carries forward the felony provision of 18 U.S.C. 1855. The offense is an E felony in any other case. Subsection (c) provides that in a prosecution under section 2502, no state of mind must be proven with respect to the value of the damage.

Subsection (d) provides for Federal jurisdiction over an offense described in section 2502 when (1) a circumstance set forth in section 2501(c)(1) through (11) exists; (2) the property is mail (see 18 U.S.C. 1703); (3) the property is a submarine cable used in whole or in part for telegraphic or telephonic communication (see 47 U.S.C. 21); or (4) the property is a radio, telegraph, telephone, or cable line, station, or system, or similar means of communication used or intended to be used for military or civil defense functions (see 18 U.S.C. 1362). Subsection (e) provides for extraterritorial jurisdiction when the property belongs to the United States. This provision is based upon the protective principle of international law.

§ *2503—Property destruction*

Subsection (a) makes it an offense for someone knowingly to engage in any conduct and thereby to cause damage to property. Subsection (b) classifies the offense as an A misdemeanor if the property is mail, other than a newspaper, magazine, or advertising matter or circular, or if the damage exceeds $100, and as a B misdemeanor in any other instance. Subsection (c) provides that in a prosecution under section 2503, no state of mind need be proven concerning the value of the damage.

Subsection (d) provides for Federal jurisdiction over an offense described in section 2503 when a circumstance set forth in section 2501(c)(1) through (9) or 2502(d)(2) through (4) exists. Subsection (e) provides for Federal jurisdiction over an offense described in section 2503 when the offense is committed by a non-Indian against an Indian, or by an Indian against a non-Indian in Indian country, unless the Indian committing the offense has been punished by the local law of the tribe or treaty stipulations secure or may secure the exclusive jurisdiction over such offense to the Indian tribe. Subsection (d) is intended to carry forward 18 U.S.C. 1152 without substantive change. Subsection (f) provides for extraterritorial jurisdiction when the property involved belongs to the United States. *See* discussion of section 2501(d) of the proposed code *supra*.

§ *2504—General provisions for subchapter*

Subsection (a)(1) provides a defense to a prosecution for an offense set forth in subchapter I (relating to arson and other property destruction offenses) when the actor's conduct was consented to by all holders of a legal interest in all property damaged, or the actor reasonably believed that such consent existed.

Subsection (a)(2) provides a defense to a prosecution for an offense set forth in subchapter I (relating to arson and other property destruction offenses) when Federal jurisdiction is based upon section 2501(c)(10), where the facility was not operated or controlled by the United States and the offense occurred in the course of peaceful strike activity, or other peaceful concerted activities for the purposes of collective bargaining or other mutual aid and protection, which do not injure or destroy any line or system used or intended to be used for the military or civil defense functions of the United States. This carries forward the provisions of 18 U.S.C. 1362. The requirement that the activity be peaceful was substituted for the requirement in 18 U.S.C. 1362 that the activity be lawful in order to prevent a preclusion

of the defense merely because a strike was in violation of Federal labor laws.

Subsection (b) sets forth definitions for four terms used in this subchapter. Subsection (b)(1) defines "public facility" to mean (1) a facility of public or government communication, transportation, energy supply, water supply, or sanitation; (2) a facility of a police, fire, or public health agency; (3) a facility designed for use, or used, as a means of national defense; and (4) a part of such a facility or any property, structure, or apparatus used in connection with or in support of any such facility. This definition does not come directly from current law but has been drafted to clarify coverage carried forward from provisions such as 18 U.S.C. 844(i) (relating to any real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce), 18 U.S.C. 1361 (any property of the United States), and 18 U.S.C. 1362 ("any . . . means of communications operated or controlled by the United States . . . ."). Subsection (b)(2) defines the term "public structure" to mean a structure, whether or not enclosed, where persons assemble for purposes of an occupation, business, or profession or of government, education, religion, or entertainment.

Subsection (b)(3) defines the term "civil aircraft" to mean an aircraft other than an aircraft used only to serve a government, unless such aircraft so serving a government is transporting passengers or property for commercial purposes. This carries forward 18 U.S.C. 32.

Subsection (b)(4) defines the term "commercial purposes" to mean conveyance of persons or property for consideration or in connection with a business or other undertaking intended for profit. This carries forward 18 U.S.C. 33.

SUBCHAPTER II—CRIMINAL INTRUSION OFFENSES

Current Law

1. *Criminal entry offenses.*—There is presently no single provision that proscribes criminal entry on or into Federal property, vehicles or enclaves. Instead, several provisions, each of which is somewhat different in definition and punishment, currently exist with respect to different types of property in which there is some Federal interest. The common law offense of burglary, traditionally defined to be breaking and entering a human habitation in the night time to commit a felony, is not generally or specifically proscribed by existing Federal law other than through the Assimilative Crimes Act, 18 U.S.C. 13, which makes State crimes punishable as Federal crimes when committed within a Federal enclave situated within such State, or through the Major Crimes Act, 18 U.S.C. 1153, which provides that State law supplies the definition and punishment of burglary when committed by an Indian within Indian country located within such State.

Section 970(b) of title 18 makes it unlawful willfully and with intent to intimidate, coerce, threaten or harass, forcibly to thrust any part of oneself or any object within or upon premises or part of premises used or occupied for official business or for diplomatic, consular or residential purposes by a foreign government, foreign officials, official guest or international organization.

Section 2113(a) of title 18 makes it unlawful to enter or attempt to enter any federally insured bank, credit union, savings and loan association, or any building used in whole or in part as such an institution, with intent to commit therein any felony affecting such institution in violation of any statute of the United States, or any larceny. It is immaterial whether the premises entered were occupied at the time of such entry. *Cook* v. *United States*, 443 F.2d 370 (5th Cir. 1971). Further, prior knowledge that the building entered was a bank is not a prerequisite to a violation of this section. *United States* v. *Schaar*, 437 F.2d 886 (7th Cir. 1971). The belief that the bank entered was not federally insured is not a defense to this offense. *Lubin* v. *United States*, 313 F.2d 419 (9th Cir. 1963). This section does not embrace within its scope the taking of money or property from a bank in instances where the bank's consent has been obtained by trick, artifice, fraud, or false or fraudulent representation. *United States* v. *Rollins*, 383 F.Supp. 494 (S.D. N.Y. 1974). Proof of an attempted felony or larceny within the institution, while useful, is not necessary since the element which must be proved is only entering or attempting to enter with the intent to commit a felony or larceny. *Robinson* v. *United States Board of Parole*, 403 F.Supp. 638 (W.D. N.Y. 1975).

Section 2115 of title 18 makes it unlawful forcibly to break into or attempt to break into any post office or building used in whole or part as a post office with intent to commit therein any larceny or other depredation. If only part of the building is used as a post office, the entry, to be a violation of this section, must be into that part of the building. *United States* v. *Gibson*, 444 F.2d 275 (5th Cir. 1971); *Sorenson* v. *United States*, 168 F. 785 (8th Cir. 1909). Whoever, by violence enters a post office car, or any part of any car, steamboat or vessel assigned to the use of the mail service violates 18 U.S.C. 2116.

Section 2117 of title 18 makes it unlawful to break the lock or seal of any railroad car, vessel, aircraft, motortruck, wagon or other vehicle containing interstate or foreign shipments of property, or enter any such vehicle, with intent in either case to commit larceny therein. This section has been held not to cover offenses of entry into aircraft. *See United States* v. *Taylor*, 12 C.M.A. 44, 30 C.M.R. 44 (1960).

Finally, 18 U.S.C. 2276 makes it unlawful to break or enter any vessel upon the high seas or within the admiralty and maritime jurisdiction of the United States with intent to commit any felony.

2. *Criminal trespass offenses.*—There is similarly no single provision that proscribes criminal trespass upon Federal premises or property; instead, present provisions, each of which is somewhat different in definition and punishment, variously protect specific types of Federal property. The following is a brief description of those provisions that define offenses related to criminal trespass:

18 U.S.C. 1991 makes it unlawful within the exclusive jurisdiction of the United States willfully and maliciously to trespass upon or enter upon any railroad train, railroad car or railroad locomotive, with the intent to commit murder, robbery, unlawful violence against passengers or other enumerated persons on such train or in any car thereof, or any crime or offense against any person or property thereon.

Violation of this section, if the intent harbored was to murder or rob, is a felony; or if the intent was otherwise, is a misdemeanor.

18 U.S.C. 1165 makes it unlawful, without lawful authority or permission, willfully and knowingly to go upon any Indian land for the purpose of hunting, trapping or fishing thereon or to remove game, peltries or fish.

18 U.S.C. 1382 makes it unlawful to go upon any military reservation or enclave within the jurisdiction of the United States for any purpose prohibited by law or lawful regulation, or to reenter any such reservation or enclave after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof. In a prosecution for reentry after having been removed or ordered not to reenter, the purpose or intent entertained respecting the reentry is not an element of the offense. *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960).

18 U.S.C. 1863 makes it unlawful, without lawful authority or permission, to go upon any national forest land while it is closed to the public pursuant to lawful regulation. If the closure is not authorized, a trespass conviction cannot stand. *United States* v. *Gemmill*, 535 F.2d 1145 (9th Cir.), *cert denied sub. nom. Wilson* v. *United States*, 429 U.S. 982 (1976).

18 U.S.C. 2152 makes it unlawful wrongfully to trespass upon the works or property or material of any submarine mine or torpedo or fortification or harbor defense system owned or constructed or in the process of construction by the United States; or knowingly, willfully or wantonly to violate any regulation duly issued governing defensive sea areas and persons within the limits of such areas.

16 U.S.C. 146 makes it an offense unlawfully to intrude upon Wind Cave National Park, South Dakota. Although several sections of title 16 refer to persons who are trespassers on national parks and indicate that they are to be removed (*see*, *e.g.*, 16 U.S.C. 21, 41, 61, 91, 122 and 161, dealing with various parks), this section is unique in that it prescribes a permissible punishment for such trespass.

§ *2511—Criminal entry*

Sections 2511 and 2512 (criminal trespass) govern what at common law would be burglary. Since burglary has a distinct meaning at common law, the Committee decided not to continue use of that term in the proposed code. There is presently no general Federal crime of burglary.

Subsection (a) makes it an offense knowingly to enter or remain surreptitiously within a building or vehicle if the actor (1) knew that the building or vehicle was the property of another and (2) recklessly disregarded the fact that he or she was not privileged to enter or remain upon the property. The conduct must be coupled with the intent to engage in conduct on the premises which would constitute a Federal felony if Federal jurisdiction existed, or a theft.

Subsection (b) classifies the offense as a C felony when the offense is committed with reckless disregard for the fact that the property is a dwelling in which an individual is present, and as a D felony in any other instance.

Subsection (c) provides that in a prosecution for an offense described in section 2511, no state of mind need be proven concerning

the circumstance that the conduct intended would constitute (1) a Federal felony if Federal jurisdiction existed or (2) theft.

Subsection (d) provides for Federal jurisdiction over an offense described in section 2511 when (a) the offense is committed within the special jurisdiction of the United States; (b) the building is owned by, or is under the care, custody or control of, the United States; (c) the building contains a facility of a Federal Government agency (or, if the actor's entering or remaining was in a part of the building other than that in which the facility was located, the conduct intended would have affected the facility itself or something therein); (d) the building contains a national credit institution (or, if the entering or remaining was in another part of the building, the conduct intended would have affected the credit institution or something therein); (e) the vehicle contains mail or property that is moving in interstate or foreign commerce or is part of an interstate or foreign shipment, and the intent is to commit theft; or (f) the offense is committed by or against an Indian in Indian country.

Subsection (e) defines the term "theft", as used in section 2511, to mean conduct that would violate section 2531 (relating to theft) of the proposed code, if Federal jurisdiction existed.

§ *2512—Criminal trespass*

Section 2512 replaces numerous sections of current law that prohibit trespass upon selected Federal properties—e.g., fortifications, harbor defenses, etc. (18 U.S.C. 2152), Bull Run National Forest (18 U.S.C. 1862), and atomic energy facilities (42 U.S.C. 2278a). The only penalty for trespass in several of the National Parks is ejection.

Subsection (a) makes it an offense for someone, without privilege, knowingly to enter or remain within or on premises that are the property of another in three circumstances: (1) if the premises are a building or are so enclosed or secured as manifestly to exclude intruders; (2) if notice prohibiting trespass has been communicated to the actor by an authorized person or has been posted in a manner reasonably likely to come to the attention of intruders;[1] or (3) if the actor entered or remained with intent to engage in conduct on the premises which would constitute a Federal or State offense. Subsection (c) provides that in a prosecution for an offense under section 2512, no state of mind need be proven concerning the circumstance that the conduct intended would constitute a Federal or State offense. The term "premises" is defined in section 2514(1) of the proposed code.

Subsection (b)(1) classifies an offense under subsection (a)(1) as an A misdemeanor if the premises are a dwelling or Government premises that are continuously guarded and where display of visible identification of individuals is required while such individuals are on such premises. Subsection (b)(2) classifies an offense under subsection (a)(2) as a C misdemeanor. Subsection (b)(3) classifies an offense under subsection (a)(3) as a B misdemeanor.

Subsection (d) provides for Federal jurisdiction over an offense described in section 2512 when the offense is committed within the special jurisdiction of the United States, the premises are owned by

[1] This provision will carry forward that portion of 18 U.S.C. 1382 which prohibits entering a military reservation after an expulsion and order not to reenter. Such an expulsion and order clearly constitute communication of notice prohibiting trespass.

or are under the custody or control of the United States; the premises consist of a vehicle that contains mail, or property that is moving in interstate or foreign commerce or that constitutes a part of an interstate or foreign shipment; or the offense is committed by a non-Indian against an Indian, or by an Indian against a non-Indian in Indian country, unless (1) the Indian committing the offense has been punished by the local law of the tribe, or (2) treaty stipulations secure or may secure the exclusive jurisdiction over the offense to the Indian tribe. Subsection (d) is intended to carry forward 18 U.S.C. 1152 without substantive change.

§ *2513—Stowing away*

This section carries foward 18 U.S.C. 2199. Subsection (a) makes it a class A misdemeanor for anyone, without privilege and with intent to obtain transportation, knowingly to secrete him- or herself aboard a vessel or aircraft that is the property of another and to be aboard that vessel or aircraft when the vessel or aircraft leaves the point of embarkation.

Subsection (b) provides a defense to a prosecution for an offense described in section 2513 that the actor had the consent of the owner, charterer, master, or other person in command of the vessel or aircraft.

Subsection (c) provides for Federal jurisdiction when the offense is committed within the special jurisdiction of the United States or when the actor moves across a State or United States boundary during the commission of the offense.

§ *2514—Definitions for subchapter*

This section defines two terms used in subchapter II (relating to criminal intrusion offenses). Paragraph (1) defines the term "premises" to mean a building, a structure, other real property, or a vehicle. The inclusion of vehicle in the definition is intended to carry forward 18 U.S.C. 2117.

Paragraph (2) defines the term "dwelling" to mean a structure that is at least partially enclosed (or a separate part of such a structure) and that is designed for use, or used, in whole or in part, as an individual's permanent or temporary home or place of lodging.

SUBCHAPTER III—ROBBERY, EXTORTION AND BLACKMAIL

Current Law

1. *Robbery.*—At common law, robbery was the "[o]pen and violent larciny [sic] from the person . . . the felonious and forcible taking, from the person of another, of goods or money to any value by violence or by putting him in fear." Robbery is distinguished from other forms of larceny by the requirement that violence be done or that the victim be placed in fear. The value of the thing taken is immaterial to the offense. The taking need not be from the person of the victim nor need it be permanent; it is sufficient that the taking occur in the presence of the victim. The offense does not change if the thing taken is returned. The offense of robbery violates two protectible interests: the force or violence threatens personal integrity; the taking, property rights. 4 W. Blackstone, *Commentaries* *241–42. The United States Supreme Court has used substantially the same definition when called upon to construe the word robbery. In *Jolly* v. *United States*,

170 U.S. 402, 404 (1898), for instance, in which the question revolved around the elements necessary to sustain a conviction for robbery, the Court said:

> There are two distinct offen[s]es mentioned in the statute. One is the offen[s]e of robbery, the legal and technical meaning of which is well known. It is a forcible taking, or a taking by putting the individual robbed, in fear.

Accord, *Collins* v. *McDonald*, 258 U.S. 416, 420 (1922); *Deal* v. *United States*, 274 U.S. 277, 283 (1927).

Conduct constituting robbery is punishable under the following sections of current Federal law: 18 U.S.C. 1652, 1661, 1951, and 2111–14. Principal among them are 18 U.S.C. 2111–14 and 1951.

Taking anything of value from the person or presence of another by force and violence, or by intimidation, within the special maritime and territorial jurisdiction of the United States, is prohibited by 18 U.S.C. 2111. Courts interpreting this section or its predecessor suggest that no minimum value of the thing taken need be established for a successful prosecution, *United States* v. *Marshall*, 266 F.2d 92 (7th Cir. 1959); that larceny, as a lesser included offense, merges with robbery, *United States* v. *Belt*, 516 F.2d 873 (8th Cir. 1975), *cert. denied*, 423 U.S. 1056(1976); *United States* v. *Walking Crow*, 560 F.2d 386 (8th Cir. 1977), *cert. denied*, 435 U.S. 953(1978); and that burglary is a separate offense and may be prosecuted separately, *United States* v. *Belt*, 516 F.2d 873 (8th Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976); as may robbery of a national bank, *McGann* v. *United States*, 261 F.2d 956 (4th Cir. 1958), *cert. denied*, 358 U.S. 974 (1959).

"Whoever robs another of any kind or description of personal property belonging to the United States" commits an offense under 18 U.S.C. 2112. For a conviction under this section, the Government need not prove that the defendant knew that the property being taken was that of the United States, *United States* v. *Roundtree*, 527 F.2d 16 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976), but the property must actually belong to the United States. Thus, confiscated property belonging to law violators is not covered by the section. *Patmore* v. *United States*, 1 F.2d 8 (6th Cir. 1924). Asportation must have occurred, *United States* v. *Rivera*, 521 F.2d 125 (2d Cir. 1975), but it need not occur simultaneously with the violence or placing of the victim in fear, *Norris* v. *United States*, 152 F.2d 808 (5th Cir.), *cert. denied*, 328 U.S. 850 (1946).

The bank robbery provision of current law, 18 U.S.C. 2113, applies to various banks—"any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation"; credit unions—"any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration"; and savings and loan associations—"any Federal savings and loan association and any 'insured institution' as defined in section 401 of the National Housing Act, as amended, and any 'Federal credit union' as defined in section 2 of the Federal Credit

Union Act." The basic robbery provision of 18 U.S.C. 2113 is subsection (a), which punishes, among others:

> [w]hoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association. . . .[1]

The provision has been upheld as a legitimate exercise of the power of Congress. *United States* v. *Harris*, 530 F.2d 576 (4th Cir. 1976); *Clark* v. *United States*, 184 F.2d 952 (10th Cir. 1950), *cert. denied*, 340 U.S. 955 (1951). This section, unlike 18 U.S.C. 2111, punishes attempts. It has been held not to preempt, by virtue of the double jeopardy clause of the United States Constitution, subsequent State prosecution on the same set of facts. *State* v. *Ivory*, 578 S.W. 2d 62 (Mo. App. 1978). A Federal prosecution may follow entering a guilty plea leading to a State conviction, *United States* v. *Hoyland*, 264 F.2d 346 (7th Cir.), *cert. denied*, 361 U.S. 845 (1959), and a prior State acquittal, *United States* v. *Jakalski*, 267 F.2d 609 (7th Cir. 1959), *cert. denied*, 362 U.S. 936 (1960). The courts will permit separate prosecutions under the various subsections of 18 U.S.C. 2113 but may limit punishment to the maximum allowable under one subsection. *Keel* v. *United States*, 585 F.2d 110 (5th Cir. 1978).

Where a violation of 18 U.S.C. 2113(a) is alleged, intimidation alone is sufficient for prosecution; it is not necessary to allege and prove that the taking was by force and violence. *United States* v. *Jacquillon*, 469 F.2d 380 (5th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973). The provision is distinguished from extortion offenses in that it requires that the taking be trespassory—from the person or in the presence of the victims. In *United States* v. *Culbert*, 548 F.2d 1355 (9th Cir. 1977), *rev'd on other grounds*, 435 U.S. 371 (1978), evidence that a bank president was instructed by telephone to drop $100,000 at a specified location or suffer physical violence was held insufficient for conviction of attempted bank robbery under 18 U.S.C. 2113(a) without proof that the plan involved a trespassory taking from his presence or his person. *Accord*, *United States* v. *Howard*, 506 F.2d 1131 (2d Cir. 1974); *United States* v. *Marx*, 485 F. 2d 1179 (10 Cir. 1973), *cert. denied*, 416 U.S. 986 (1974). This provision has also been held not to cover obtaining money by false pretenses. *LeMasters* v. *United States*, 378 F.2d 262 (9th Cir. 1967). The provision does cover the taking of bank property from the custody of a bailee for hire. *United States* v. *Jakalski*, 237 F.2d 503 (7th Cir. 1956), *cert. denied*, 353 U.S. 939 (1957). Money in custody of a bank messenger was also held covered by the provision, *United States* v. *Fox*, 97 F.2d 913 (2d Cir. 1938). Although common law robbery, like all species of larceny, is a specific intent crime, R. Perkins, *Criminal Law* 265–66 (2d ed. 1969), in *United States* v. *Klare*, 545 F.2d 93 (9th Cir. 1976), *cert. denied*, 431

[1] Other provisions punish (1) entering such institutions or buildings housing them, with felonious intent (subsection (a), paragraph 2); (2) larceny of property of such institutions (subsection (b)); (3) receiving stolen goods knowing the goods to be property of such institutions (subsection c); and (4) assaulting or murdering a person or persons during commission of offenses against such institutions (subsections (d) and (e)).

U.S. 905 (1977), the court held that a specific intent is not required by 18 U.S.C. 2113(a). Voluntary intoxication is therefor not a defense.

"[W]hoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal or purloin such . . . or robs any such person of mail matter," violates 18 U.S.C. 2114. The courts have interpreted this provision to proscribe both assault with intent to rob and the completed offense (the robbery), but to require that punishment for one set of facts be limited to only one of the two. *Costner* v. *United States*, 139 F.2d 429 (4th Cir. 1943); *United States* v. *Smith*, 553 F.2d 1239 (10th Cir. 1977). The reach of the provision has been confined to Federal property associated with the Postal Service. *United States* v. *Fernandez*, 497 F 2d 730 (9th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States* v. *Rivera*, 513 F.2d 519 (2d Cir.), *cert denied*, 423 U.S. 948 (1975); *United States* v. *Reid*, 517 F.2d 953 (2d Cir. 1975). The term "rob" has been interpreted to carry with it the force of the common law definition, *Costner* v. *United States*, 429 (4th Cir. 1943).

The "Hobbs Act", 18 U.S.C. 1951, punishes "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." The term "robbery" is defined in 18 U.S.C. 1951(b)(1) as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining."

One of the essential elements of the offense is causing the obstruction of, delaying, or having an effect upon interstate or foreign commerce. Any measurable actual, or potential, effect will suffice. The act prohibits both direct and indirect interference with commerce. For a successful prosecution under the section, it is not necessary to show a connection with racketeering. *United States* v. *Culbert*, 435 U.S. 371 (1978). Thus the Hobbs Act can be used to prosecute virtually any robbery within the United States.

Another required element is that the effect on interstate or foreign commerce be accomplished by robbery, attempted robbery, conspiracy to rob, or extortion, attempted extortion, or conspiracy to extort. Where robbery is alleged as an element of the offense, the following common law elements must be shown, despite their not being mentioned in the statutory definition: (1) the specific intent to steal and permanently deprive the owner of property, (2) a taking, and (3) an asportation. *United States* v. *Nedley*, 255 F.2d 350 (3d Cir. 1958), held that where there is no taking and asportation there can be no conviction for robbery in violation of 18 U.S.C. 1951.

There are two piracy provisions in current Federal law, 18 U.S.C. 1652 and 1661, that refer to robbery. The former punishes a United States citizen who "commits any murder or robbery, or any act of

hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state, or on pretense of authority from any person", while 18 U.S.C. 1661 punishes someone who is "engaged in any piratical cruise or enterprise, or being of the crew of any piratical vessel, lands from such vessel and commits robbery on shore". There seem to be no reported twentieth century decisions under either of these provisions. The Supreme Court has, however, upheld the second of them as a proper exercise of Federal power under the commerce clause. *United States* v. *Coombs*, 37 U.S. 72 (1838).

2. *Extortion and blackmail.*—At common law, extortion was a type of official misconduct in which an officer, under color of office, corruptly collected an unlawful fee. R. Perkins, *Criminal Law* 367 (2d ed. 1969). The offense required that the officer know that neither he or she nor his or her office was entitled to the extorted proceeds. *Id.* at 371. Statutory extortion, sometimes known as blackmail, generally encompasses any unlawful obtaining of money or other valuables by threat, as well as the actual threat made with intent to extort. *Id.* at 372–73.

The term "blackmail" seems to have had its earliest use in connection with common law rents of feudal England that were "reserved in work, grain, or baser money, which were called *reditus nigri* or *black mail*," as contrasted with "*white*-rents, or *blanch farms*, *reditus albi*," payments that were "reserved in silver or white money." 1 W. Blackstone, *Commentaries* *42–43 (1803). Eventually the term was applied to the "tribute formerly exacted from farmers and small owners in the border counties of England and Scotland and along the Highland border, by freebooting chiefs, in return for protection and immunity from plunder". 1 Philological Society, *New English Dictionary on Historical Principles* 894 (1888). Today, the term is generally used to mean "to extort money from [a person] by threatening to reveal a discreditable secret". *Oxford English Dictionary* 281 (Supp. 1972).

The Hobbs Act, 18 U.S.C. 1951, one of the most used Federal extortion provisions, makes it an offense, "in any way or degree" to obstruct, delay, or affect commerce or the movement of any article or commodity in commerce, "by robbery or extortion" or to attempt or conspire to do so. Extortion is defined as the "obtaining of property from another with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right."

Courts have found the jurisdictional base of the Hobbs Act to be an extensive one. The Supreme Court has held that the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Proof of obstruction of interstate commerce requires only a showing that an act was committed which could have the likely effect of hindering commerce in any way. Because the Hobbs Act envisions a full application of Congress' commerce clause power, it is not necessary to show that the extortionate conduct had more than a minimal effect on commerce. *See United States* v. *Spagnolo*, 546 F.2d 1117 (4th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977); *United States* v. *Gupton*, 495 F.2d 550, 551 (5th Cir. 1974); *United States* v. *DeMet*, 486 F.2d 816, 822 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

Conviction under the "statutory extortion" provision of the Hobbs Act has been held to require proof that (1) fear was created in the victim's mind, (2) the fear was reasonable, and (3) the defendant, by making use of that fear, extorted money or property. *Callanan* v. *United States*, 223 F.2d 171, 175 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955). The victim's fear may be that of economic harm as well as physical injury, *Bianchi* v. *United States*, 219 F.2d 182, 189 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955), and the property extorted from the victim may include the right to solicit potential business, *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). Further, there is no requirement that the extortionist personally obtain any proceeds or direct benefit from the wrongful scheme. *United States* v. *Green*, 350 U.S. 415, 420 (1956).

The Supreme Court has construed the "statutory extortion" provisions of the Hobbs Act narrowly, however, in a case involving labor activities. In *United States* v. *Enmons*, 410 U.S. 396 (1973), the Court held that the Hobbs Act does not reach conduct by union members and officials during a collective bargaining dispute where the goal of the dispute is a legitimate union objective, such as seeking higher wages in return for services rendered to the employer. The Court viewed use of the phrase "wrongful use of actual or threatened force, violence, or fear," as pertaining only to instances where the alleged extortionist has no lawful claim to the sought-after property. Because union members have a lawful claim to higher wages, legally obtainable through collective bargaining, there can therefore be no wrongful taking. The Court relied on the use of the word "wrongful" in the definition of extortion, and on the legislative history, which in the Court's view, indicated no intent that the Act be applied to activities such as those at issue in *Enmons*.[2] The dissent took vigorous issue with the majority's analysis, claiming that "violence, whatever its precise objective, is a common device of extortion and is condemned by the Act." *Id.* at 418. The holding has to this date been applied only in the labor-management area.

Extortion committed under color of official right does not require that the public official solicit payments to perform or not perform duties which are related to the office held, but merely that the payments were induced because of the defendant's office. *United States* v. *Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Proof of overt duress is not necessary, *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir.) (*en banc*), *cert. denied*, 423 U.S. 1014 (1975); *United States* v. *Staszcuk*, 517 F.2d 53 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975); *United States* v. *Kenny*, 462 F.2d 1205 (3d Cir. 1972), *cert. denied*, 409 U.S. 914 (1973), and convictions of extortion under color of office are often obtained where the conduct is willingly engaged in by both the payor and the recipient. *United States* v. *Hathaway*, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976). It makes no difference whether the public official actively extorted money for official goods or services, or was merely the passive recipient of a bribe. *United States* v. *Butler*, 618 F.2d 411 (6th Cir. 1980).

[2] For a detailed explanation of the legislative history of the Hobbs Act and its predecessor, and of the *Enmons* decision and cases leading up to that decision, *see* Note, 14 B. C. INDUS. & COM. L. REV. 1291 (1973).

The use of the "under color of official right" provisions of the Hobbs Act to prosecute local officials for conduct which amounts to bribery is a recent development. The history of this development is carefully detailed in Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L. J. 1171 (1977). *See also* Stern, *Prosecution of Local Political Corruption under the Hobbs Act: The Unnecessary Distinction between Bribery and Extortion*, 3 Seton Hall L. Rev. 1 (1971). The use of the Hobbs Act permits Federal prosecutors to avoid the necessity of proving the more difficult requirements of the Travel Act (18 U.S.C. 1952), i.e. travel in interstate commerce or the use of the facilities in interstate commerce with intent to further the bribery. *Id.* at 9–10. In addition, use of the Hobbs Act has allowed prosecutors to obtain maximum sentences of 20 years, as opposed to 5 years under the Travel Act. The use of the Hobbs Act for this purpose has been criticized as inappropriate and as potentially an overextension of Federal jurisdiction. *See* Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L. J. 1171 (1977).

Other Federal extortion and blackmail offenses cover a variety of unlawful activities, including the extortionate collection of credit, the use of interstate travel and the mails to carry our extortionate activities, and extortion in Federal programs. Under 18 U.S.C. 894, "whoever knowingly participates in any way, or conspires to do so, in the use any extortionate means (1) to collect or attempt to collect any extension of credit, or (2) to punish any person for the nonrepayment thereof," commits an offense. "Extortionate means" is defined in 18 U.S.C. 891(7) as "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." In addition the statute allows, for the purpose of showing an implicit threat as a means of collection, evidence indicating "that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means." The provision has been upheld as a valid exercise of both the Congress' bankruptcy, *United States* v. *Fiore*, 434 F.2d 966, 968 (1st Cir. 1970), *cert. denied*, 402 U.S. 973 (1971), and commerce powers, *United States* v. *Perez*, 426 F.2d 1073, 1075 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971). Courts have found the commerce clause power to be properly exercised where a purely intrastate transaction is regulated so long as Congress has legitimately found that as a group such transactions may affect interstate commerce. *Id.* at 1078–81. The provision is not intended to cover only loansharking activities, but is aimed at extortionate means used to obtain all money owed to creditors, including gambling debts, *United States* v. *Keresty*, 465 F.2d 36, 39–41 (3d Cir.), *cert. denied*, 409 U.S. 991 (1972); *but see United States* v. *Robbins*, 510 F.2d 301 (6th Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976); and debts arising from the unauthorized use of defendant's credit cards, *United States* v. *Annerino*, 495 F.2d 1159, 1166 (7th Cir. 1974).

Any Federal officer or employee, or individual representing him- or herself as such, who, under color or pretense of office, commits or

attempts extortion commits an offense under 18 U.S.C. 872. Extortion is not defined in that section. Courts have held that the section should be strictly construed, *United States ex rel. Lotsch* v. *Kelly*, 86 F.2d 613, 615 (2d Cir. 1936), and that it generally contemplates coerced payment to public officials, *Daniels* v. *United States*, 17 F.2d 339 (9th Cir.), *cert. denied*, 274 U.S. 744 (1927); *United States* v. *Sutter*, 160 F.2d 754 (7th Cir. 1947). The section has been held to encompass a representation that an illegal payment would expedite issuance of a passport, *Martin* v. *United States*, 278 F. 913 (2d Cir. 1922), a threat of economic harm, *United States* v. *Miller*, 340 F.2d 421 (4th Cir. 1965), and soliciting and accepting things of value for the purpose of influencing a pending action, *Byrnes* v. *United States*, 327 F.2d 825 (9th Cir. 1964), *cert. denied*, 377 U.S. 970 (1964). In *Williams* v. *United States*, 168 U.S. 382 (1897), the Supreme Court noted that a threat to refuse to grant entry to the United States to a native United States citizen of Chinese descent, without an illegal payment by an interested party, constituted an offense under a predecessor provision to 18 U.S.C. 872, but reversed the conviction on other grounds.

"Whoever, under threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing" violates 18 U.S.C. 873. It is not necessary that the victim actually be a lawbreaker, that the defendant believe that the victim has broken the law, or that the defendant have reasonable grounds for such a belief. *Roberts* v. *United States*, 248 F. 873 (9th Cir.), *cert. denied*, 247 U.S. 522 (1918). It is necessary for the indictment to specify the law of the United States that served as the basis for the defendant's threat. *United States* v. *Holmes*, 110 F. Supp. 233 (S.D. Tex. 1953).

The "Federal Anti-Kickback Act", 18 U.S.C. 874, prohibits the use of "force, intimidation, or threat of procuring dismissal from employment, or . . . any other manner" in inducing "any person employed in the construction, prosecution, completion, or repair of any pubic building or work financed in whole or in part by loans or grants from the United States to give up any part of the compensation to which he is entitled under his contract of employment." The Supreme Court has held the predecessor of this provision to have had the purpose of insuring that workers on federally funded projects receive the full compensation to which they are entitled. *United States* v. *Carbone*, 327 U.S. 633 (1946). *See also Slater* v. *United States*, 562 F.2d 58 (1st Cir. 1976). The offense has been held not limited to employers, contractors, or subcontractors on public construction projects. *United States* v. *McGraw*, 47 F. Supp. 927 (N.D.N.Y. 1942). This provision has been used to prosecute a subcontractor's foreman empowered to hire and discharge, *United States* v. *Laudani*, 320 U.S. 543, 547 (1944), and union officials generally, *United States* v. *Alsup*, 219 F.2d 72 (5th Cir. 1955), *cert denied*, 348 U.S. 982(1955). However, full effect has not been given to the broad sweeping language of the provision. It is, for example, inapplicable to union officials who threaten to secure the discharge of any workers who fail to pay their union initiation fees, as required by a closed shop agreement. *United States* v. *Carbone*, 327 U.S. 633 (1946). The provision has also been held not to prohibit feesplitting between a laboratory and a referring physician. *United States* v. *Porter*, 591 F.2d 1048 (5th Cir. 1979).

The transmission, in interstate commerce, of any communication "containing any demand or request for a ransom or reward for the release of any kidnapped person" is prohibited by 18 U.S.C. 875(a). Similarly, 18 U.S.C. 875(b) prohibits transmitting in interstate commerce, with intent to extort any money or other thing of value from any person, any communication containing any threat to kidnap any person or any threat to injure the person of another. "Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another", absent the intent required by 18 U.S.C. 875(b), violates 18 U.S.C. 875(c). Under 18 U.S.C. 875(d) it is an offense if any person, "with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime." Conviction under 18 U.S.C. 875 requires proof only of the specific intent to extort, and not proof of a specific intent to injure or the ability to carry out the alleged threat. *United States* v. *Cooper*, 523 F.2d 8, 10 (6th Cir. 1975). Under an 18 U.S.C. 875(d) prosecution, it is not a defense to establish that the damaging allegations on which the threat is based are true. *United States* v. *Von Der Linden*, 561 F.2d 1340 (9th Cir. 1977), *cert. denied*, 435 U.S. 974 (1978).

The provisions of 18 U.S.C. 876 parallel, with regard to mail, the provisions of 18 U.S.C. 875. The courts have generally interpreted the mailing threatening communications section consistently with that relating to communications transmitted in interstate commerce: all that is required for conviction is that it be proven that the defendant committed a threat to writing, addressed the writing to the victim, and caused the writing to be mailed. *Petschl* v. *United States*, 369 F. 2d 769 (8th Cir. 1966); *United States* v. *Sirhan*, 504 F.2d 818 (9th Cir. 1974). It is immaterial that the defendant had no specific intent to injure the victim, *United States* v. *DeShazo*, 565 F.2d 893 (5th Cir.), *cert. denied*, 435 U.S. 953 (1978), or was not able to so injure the victim, *United States* v. *Chatman*, 584 F.2d 1358 (4th Cir. 1978). This section has been used successfully to prosecute a threat to destroy the intended victim's papers, *United States* v. *Marks*, 585 F.2d 899 (8th Cir. 1978), and to release pornographic photographs of the intended victim, *United States* v. *Zouras*, 497 F.2d 1115 (7th Cir. 1974).

Language in 18 U.S.C. 877 parallels, with regard to mailing threatening communications from a foreign country, language in 18 U.S.C. 875(d).

Under 18 U.S.C. 878(b), it is an offense to make an extortionate demand in connection with a threat to violate or an actual violation of 18 U.S.C. 112, 1116, or 1201 (relating to the assault, murder, and kidnapping of foreign officials, official guests, and internationally protected persons). The only reported decision under this provision seems to be one holding that an offense committed within the Chilean Consulate is cognizable under this provision although for other purposes such consulate is foreign soil. *United States* v. *Marcano Garcia*, 456 F. Supp. 1358 (D.P.R. 1978).

Under 18 U.S.C. 1952, the Travel Act, "whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to (1) distribute the proceeds of any unlawful activity; (2) commit any crime of violence to further any unlawful activity; or (3) otherwise, promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), or (3)," commits an offense. The provision defines "unlawful activity" as, *inter alia*, extortion in violation of the laws of the State in which the act was committed or of the United States. This provision is discussed more fully in connection with subchapter I of chapter 27 (relating to racketeering) of the proposed code, at 366–68 *infra*.

Under 18 U.S.C. 665, it is an offense for anyone to induce another to give up anything of value by threatening to procure the dismissal of the other, or to refuse to employ, or renew a contract of employment with, the other, in connection with a Comprehensive Employment and Training Act grant or contract.

Any revenue officer who is, *inter alia*, "guilty of extortion or willful oppression under color of law," or any such officer who, *inter alia*, "knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation or reward, except as by law prescribed for the performance of any duty," or "who demands, or accepts, or attempts to collect, directly or indirectly as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do", violates 26 U.S.C. 7214.

Anyone who carries on "picketing on or about the premises of any employer for the purpose of, or as part of any conspiracy or in furtherance of any plan or purpose for, the personal profit or enrichment of any individual (except a bona fide increase in wages or other employee benefits) by taking or obtaining any money or other thing of value from such employer against his will or with his consent" violates 29 U.S.C. 522.

It is an offense under 42 U.S.C. 2971f(b) for someone, by threat of procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract of employment under the Economic Opportunity Program, to induce any person to give up money or a thing of value to any person (including such grantee agency).

§ 2521—Robbery

This section carries forward a number of current law provisions prohibiting robbery and also applies the robbery offense to types of property that are currently protected against theft.

Subsection (a) makes it an offense for someone knowingly to use physical force or threaten or place another person in fear that any person other than the actor will imminently be subject to bodily injury, and thereby to take property from the person or presence of another with reckless disregard for the fact that the property is the property of another. Subsection (b)(1) classifies the offense as an A

felony if the actor, while committing the offense, recklessly causes the death of another person or forces any individual to accompany the actor without that individual's consent. Subsection (b)(2) classifies the offense as a B felony in any other instance. This classification scheme is derived from 18 U.S.C. 2113, the source of most Federal robbery prosecutions.

Subsection (c)(1) provides for Federal jurisdiction over an offense described in section 2521 when—

(1) the offense is committed within the special jurisdiction of the United States (see 18 U.S.C. 2111);

(2) the property involved is owned by the United States or is being manufactured or stored for the United States (see 18 U.S.C. 2112);

(3) the property involved is owned by a national credit institution (a term defined in section 1746 of the proposed code) (see 18 U.S.C. 2113);

(4) the property involved is mail (see 18 U.S.C. 2114, 2115);

(5) the property involved is part of an interstate or foreign shipment (see 18 U.S.C. 659);

(6) the offense was committed against a federally protected foreign individual (a term defined in section 101 of the proposed code) (see 18 U.S.C. 112); or

(7) the offense is committed in Indian coutry by, or against, an Indian (see 18 U.S.C. 1153); or

Subsection (c)(2) provides for extraterritorial jurisdiction when the victim is a federally protected foreign individual (a term defined in section 101 of the proposed code). This provision carries forward 18 U.S.C. 112 and 878.

The Committee has not brought forward the "affects commerce" jurisdiction of the Hobbs Act. The Committee is concerned that the Hobbs Act, as interpreted by the United States Supreme Court in *United States* v. *Culbert*, 435 U.S. 371 (1978), provides overly-broad Federal jurisdiction and carries the potential for undue Federal intervention in essentially local matters. While this limitation on current law jurisdiction thus prevents potential abuses of the expansive *Culbert* jurisdiction, it will not significantly change current practices. The United States Attorneys' Manual provides that the robbery provisions of the Hobbs Act should be applied only in "cases which involve organized crime activity or which are part of some wide-ranging scheme," and requires consultation with the appropriate section of the Criminal Division of the Department of Justice prior to the initiation of a Hobbs Act prosecution. Dept. of Justice, *United States Attorney's Manual* tit. 9 section 131.110. The volume of such prosecutions in current law is low. In 1975, 1976 and 1977, the total number of Federal non-bank and non-postal robbery prosecutions, a category including more than the Hobbs Act, was 71, 67 and 42 respectively. Administrative Office of United States Courts, *Annual Report* 253 (1977). Robberies involving organized crime and wide-ranging schemes would remain prosecutable under the proposed code pursuant to section 2705 (criminal conduct in aid of racketeering) of the proposed code. See discussion at 377–78 *infra*.

An example of a local matter that the Committee chose not to make subject to Federal robbery jurisdiction is pharmacy robbery. Various proposals to include such jurisdiction, *see* Hearings on H.R. 6869 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st & 2d sess., Serial No. 52, at 737 (1979) (testimony of Robert J. Bolger, President, National Association of Chain Drug Stores, Inc.), have been opposed by the Drug Enforcement Administration and the Department of Justice, *see* letter from Philip T. White, Acting Deputy Assistant Attorney General, to William E. Woods, National Association of Retail Druggists (June 4, 1980), reprinted in Hearings on Revision of Federal Criminal Law Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. (1980) ("We do not have the resources to investigate and prosecute such offenses nor do we believe that an adequate case for Federal intervention has been made out.").

§ *2522—Extortion*

This section carries forward a number of current provisions prohibiting extortion and also applies the extortion offense to types of property that are currently protected against theft. **Extortion is, of course, a form of theft.**

Subsection (a) makes it a class C felony for someone knowingly to threaten or place another person in fear that any person will be subjected to bodily injury or kidnapping or that any property will be damaged, and thereby wrongfully to obtain the property of another. Subsection (b) makes it a class D felony for someone knowingly to act under color of official right and thereby to obtain property of another. Subsections (a) and (b) carry forward both common-law and statutory extortion of current law.

Subsection (a) requires that the actor have the intent "wrongfully" to obtain the property of another. The Committee intends to carry forward the meaning of the term "wrongfully" as it is used in the current Hobbs Act, 18 U.S.C. 1951. This term has been interpreted by the Supreme Court to limit the Hobbs Act definition of extortion to the use of actual or threatened force, violence or fear in order to obtain illegitimate objectives. *United States* v. *Enmons*, 410 U.S. 396 (1973). Thus, in the context of labor disputes, the use of coercive measures to obtain wage increases from an employer would not constitute the "wrongful" obtaining of property, provided that labor furnished the employer with genuine services in exchange for the wages sought. *Id.* at 410. The use of the word "wrongful" does *not* exempt labor unions, labor officials, and other labor representatives from prosecution for extortion. This is clear from the Supreme Court's decision in *United States* v. *Green*, 350 U.S. 415 (1956), cited with approval in *United States* v. *Enmons*, 410 U.S. 396, 408 (1973), upholding a Hobbs Act indictment for using threats of violence to obtain wages for unwarranted and unneeded work. In *Green*, the union local and official were charged with using threats of force to persuade a contractor to hire union laborers to scout ahead of each of his bulldozers to warn of

approaching pitfalls. The employer did not want the laborers and saw no need for them. He had always done such work in the past without laborers. *United States* v. *Green*, 246 F.2d 155, 158 (7th Cir. 1957), *on remand from* 350 U.S. 415 (1956). Among the objectives the obtaining of which by coercive means would constitute extortion under the Hobbs Act are personal payoffs, wages for unwanted and superfluous services, or payments prohibited by Federal labor laws. *See United States* v. *Enmons*, 410 U.S. 395 (1973); *United States* v. *Green*, 350 U.S. 415 (1956); *United States* v. *Arambasich*, 597 F.2d 609 (7th Cir. 1979); *United States* v. *Nell*, 570 F.2d 1251 (5th Cir. 1978); *United States* v. *Daley*, 564 F.2d 645 (2d Cir. 1977); *United States* v. *Quinn*, 514 F.2d 1250 (5th Cir. 1975); *Bianchi* v. *United States*, 219 F.2d 182 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955); *United States* v. *Kemble*, 198 F.2d 889 (3d Cir.), *cert. denied*, 344 U.S. 893 (1925).

Moreover, Federal extortion law would be a very blunt instrument with which to prosecute incidents of violence. A minor assault in a picket line scuffle, for example, could only be prosecutable as extortion, a class C felony. As noted by the Secretary of Labor,

> [T]here is no more reason to make employee violence subject to the Federal Criminal Laws than there would be in making employer violence subject to these provisions. These isolated incidents of violence, which ordinarily could erupt in a tense strike situation, while not to be condoned, are far better dealt with by local authorities enforcing State and local laws.
>
> We are not convinced that State and local law enforcement officials are currently unable to deal with the problem of strike-related violence. . . .
>
> Our experience in two recent labor disputes in the coal and trucking industries bears out our conviction that the best way to cool labor strife quickly and effectively is to allow the situation to be handled at the local level. In both of these situations, the Federal Government was able to establish a constructive Federal presence under existing law.

Letter of January 16, 1980 to Hon. Benjamin Civiletti, Attorney General, from Hon. Ray Marshall, Secretary of the Treasury.

Based on testimony before the Subcommittee on Criminal Justice, the Committee is in agreement with the Secretary of Labor that no real evidence has been produced to show that States cannot adequately handle incidents of violence arising from labor disputes, nor that the limited resources of the FBI could be used to investigate such incidents more effectively than the resources of local and State law enforcement.

By thus limiting the Federal definition of extortion, the Committee is not condoning the use of violence for any purpose. Rather, this limitation embodies the Committee's judgment that the policing, through the criminal process, of such matters as local labor disputes is not an appropriate matter for the Federal Government. Although the Federal Government has expressed a significant interest in ensuring the proper conduct of labor-management relations as they affect interstate commerce, the Government already has a significant arsenal of weapons with which to attack unfair labor practices. The National

Labor Relations Board can suspend employment rights of persons engaging in violence in connection with labor activities. Section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C. 158(b)(1)). The NLRB can also seek a temporary injunction against unfair labor practices. Section 10(j) of the National Labor Relations Act (29 U.S.C. 160(j)).

Employers also have the ability to protect themselves through suits in Federal and State courts to enjoin labor activities involving fraud or violence, see section 4(i) of the Norris–LaGuardia Act (29 U.S.C. 104(i)), and for damages. To add to these remedies the ability of the Federal Government to prosecute in Federal court would be to impinge seriously upon a sphere of government activity—the enforcement of criminal laws—which is a very special preserve of the States.

The decision of the Committee to carry forward the current scope of the Hobbs Act as enacted by Congress and interpreted by the Supreme Court is thus in accordance with the underlying principle of H.R. 6915 not to expand Federal jurisdiction absent a showing of compelling need.[1]

The Hobbs Act has also been frequently used for prosecution of State and local officials for extortion under color of official right. Federal prosecution of local corruption carries a significant potential for undue Federal intervention in State affairs. Charles F. C. Ruff, former acting Deputy Attorney General, and current United States Attorney for the District of Columbia, has explained the danger of abuse:

> The principal justification for federal jurisdiction over offenses not impacting directly on primary federal interests is the need for investigative and prosecutorial facilities that can respond to modern, sophisticated, national or international crime beyond the reach of local police and district attorneys—a role characterized by an earlier writer as "auxiliary to state law enforcement." But once Congress has provided the statutory framework for that role, a substantial amount of criminal conduct capable of being dealt with by the states inevitably will end up being prosecuted in federal courts. Federal and state prosecutors have not been able to draw a line beyond which federal law enforcement agencies will serve only in advisory or supportive capacities; protection of informants, access to "buy money," and an understandable desire for personal and agency image enhancement continue to breed competition between federal and local law enforcement officers. Similar considerations lead to similar competition at the prosecutorial level, although, in theory, this form of combat is more controllable. . . .
>
> Although it is difficult to stand by while an offense goes unprosecuted if there is a jurisdictional predicate for action, the federal prosecutor should recognize that the existence of jurisdiction is not a mandate to federalize all forms of state crime but is, rather, intended to be auxiliary to state enforcement. . . .
>
> Granting that it is detrimental to the interests of the citizens of a state for their elected or appointed officials to breach the trust reposed in them, these interests would be served better by effective state enforcement than be reliance on the federal government for remedial action. There rarely will be the demand for such effective enforcement so long as an outside agency is available as an alternative. Further, when that agency acts there is a substantial risk, with potential impact on jury deliberations, that it will be viewed as an interloper, and that, even if successful in the individual posecution, the long term effect will be minimal because reform will not have come from within or from the demand of the electorate.

Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171, 1209–14 (1977).

The Committee recognizes that the Department of Justice currently attempts to exercise some control over prosecutions of local officials for extortion under color of official right. The United States Attorney's Manual requires that prosecutions for extortion under color of official right be referred to the Public Integity Section of the Criminal Division of the Department of Justice for consultation prior to the issuance of a complaint, the return of an indictment, or the filing of an information. Department of Justice, *United States Attorneys' Manual* tit. 9, section 131.030. However, there are no real administrative or judicial sanctions for a failure to follow these policies. As noted by Ruff,

> In a prosecutorial system that relies on ninety-four separate prosecutors to carry the burden of enforcement and that provides only minimal control over divergent policy judgments, whether a particular form of criminal activity is prosecuted may well depend more on where it takes place than on who engages in it or how serious is its impact on the community. . . . The Department of Justice is not one prosecutive agency but many. . . .
>
> In an effort to maintain some general control . . . the Department issues a manual containing instructions. . . .
>
> Across a broad range of issues, this system for centralizing policy and operational control over the day to day business of the Department is effective. . . . The procedures are not designed to and do not enable the Department to control the manner in which unsual and abnormally sensitive investigations and prosecutions are handled, or the manner in which individual assistant United States attorneys exercise their prosecutorial discretion. In such matters, the Department must depend on the judgment and managerial skills of the United States Attorneys and, to a lesser extent, to ad hoc supervision accomplished by direct intervention by the Assistant Attorney General or Deputy Assistant Attorney General.

[1] Of course, if coercive violence or threats of violence by labor are part of a significant and organized pattern of illegal activity, Federal prosecution may be possible under section 2701 (racketeering) or section 2704 (travel or transportation in aid of racketeering) of the proposed code. Similarly, antilabor violence by management which involves travel in interstate commerce may be prosecutable under section 2107 (strikebreaking) of the proposed code.

Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171, 1201–03 (1977).

Because of this delicate balance of State and Federal interests involved in prosecuting local corruption, subsection (c) provides a certification requirement for prosecutions involving State or local public servants acting under color of office. The certification must be made by the Attorney General or an Assistant Attorney General designated by the Attorney General, and this function may not be delegated. The certification must state either that the State authorities were informed of, and acquiesced in, the Federal prosecution prior to the charges, or that there were no pending State proceedings regarding the conduct at the time of the charges, and the State did not appear likely to undertake such a prosecution. Alternatively, the Attorney General may personally certify that a Federal prosecution is required by the interests of justice. In addition, the State authorities must be informed by the Department of Justice of the Federal prosecution at least 24 hours before the return or making public of an indictment.

The Committee does not believe that this certification requirement will place an inappropriate burden on the Department of Justice. The procedure is such that it will neither force premature revelations of Federal investigations, nor cause embarrassment to local prosecutors. No additional burden will be placed on the criminal division, since such prosecutions must currently be referred to the criminal division for consultation. Reviewing all cases involving local corruption should not place an onerous burden on an Assistant Attorney General, since a total of 267 State and local officials were indicted under such provision in 1979. Dept. of Justice, Public Integrity Section, *Annual Report* (1980). (Because of multi-defendant cases, of course, the actual number of indictments was much less). The certification requirement will not force the Assistant Attorney General to become intimately acquainted with the facts of the case, inasmuch as the certification involves only the question of State action and may be based on information supplied by others. The only exception will be where the Department uses the alternative certification, which must be personally made by the Attorney General, that the prosecution is required by the interests of justice. Such a certification will, of course, require familiarity with the case.

Subsection (d)(1) provides for Federal jurisdiction over an offense described in section 2522 under the same circumstances as section 2521(c) provides for Federal jurisdiction over robbery. Subsection (d)(1) also provides for Federal jurisdiction over an offense described in section 2522 when the offense is committed by a Federal public servant (see 18 U.S.C. 872); when the offense is committed by a person pretending to be a Federal public servant, a former Federal public servant, or a foreign official (see 18 U.S.C. 872, 912, 915); when the offense is committed to collect an "extension of credit" (a term defined in section 2706 of the proposed code) (see 18 U.S.C. 894); or when the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce (see 18 U.S.C. 1951).

Subsection (d)(2) provides for Federal jurisdiction over an offense described in section 2522(a)(1) of the proposed code (use of threats)

when the threat is transmitted through the mail or in interstate commerce (see 18 U.S.C. 875, 876, 877).

Subsection (e) provides for extraterritorial jurisdiction when the offense is committed against a federally protected foreign individual. *See* discussion of section 2521(c), at 297 *supra*.

§ *2523—Blackmail*

Subsection (a) makes it an offense for someone knowingly to threaten, or to place another person in fear, that any person will (1) engage in conduct constituting a Federal or State crime other than a crime described in section 2522 (extortion) of the proposed code; (2) accuse any person of a Federal or State crime; (3) procure the dismissal of any person from employment, or refuse to employ or renew a contract of employment of any person; (4) engage in any unlawful conduct and thereby subject any person to economic loss or to injury to such person's business or profession; (5) expose a secret or publicize an asserted fact, whether true or false, with intent to subject any person, living or dead, to hatred, contempt, or ridicule, or to impair such person's financial, professional, or business reputation; or (6) take or withhold official action as a public servant, or cause a public servant to take or withhold official action; and thereby intentionally to obtain property of another.

The terms "crime," "official action," and "public servant," which are used in subsection (a), are defined, respectively, in sections 101, 1760, and 101 of the proposed code.

Subsection (b) classifies the offense as—

a C felony if the property has a value that exceeds $100,000;

a D felony if—

the value of the property exceeds $5,000 but does not exceed $100,000,

regardless of the value, the property consists of a firearm, ammunition, or a destructive device (terms which are defined in section 2725 of the proposed code); a vehicle (a term defined in section 101 of the proposed code); a record or other document owned by, or under the care, custody, or control of, the United States; a counterfeiting or forging implement designed for the making of a written instrument of the United States ("counterfeiting or forging implement" is a term defined in section 2545 of the proposed code); a key or other implement designed to provide access to mail or to property owned by, or under the care, custody, or control of, the United States; or mail (other than a newspaper, magazine, circular, or advertising matter);

an E felony if the value of the property exceeds $500 but does not exceed $5,000;

an A misdemeanor if the value of the property exceeds $100 but does not exceed $500; and

a B misdemeanor in any other case.

Subsection (c) provides that, in a prosecution under section 2523, no state of mind need be proven as to any matter relating to the classification of the offense or as to the circumstance that the conduct threatened constitutes a Federal or State crime.

Subsection (d) provides a defense to a prosecution under section 2523 (other than to a prosecution under section 2523(a)(1)) that the

defendant (1) reasonably believed the actor's conduct to be justified and (2) intended solely to compel or induce the other person to take lawful and reasonable action to prevent or remedy the asserted wrong that prompted the actor's conduct. Thus, for example, threats made during a labor dispute which the actor believed justified as a means to gain a legitimate objective would not constitute blackmail. Similarly, a threat by a creditor to reveal a debtor's default in order to obtain payment of the debt would not be prohibited by this section. In the instance of a prosecution under section 2523(a)(2), subsection (d) further requires that the defendant reasonably believed the threatened accusation to be true.

Subsection (e), like section 2522(c) of the proposed code, provides a certification requirement for certain kinds of prosecutions. The kinds of prosecutions, which are set forth in subsection (e)(2), are: (1) prosecutions where the actor is a State or local official acting under color of office, and (2) prosecutions based upon placing another person in fear, where the fear involves State or local official action. The certification must state either that the State authorities were informed of, and acquiesced in, the Federal prosecution prior to the charges, or that there was no pending State prosecution regarding the conduct at the time of the charges, and the State did not appear likely to undertake such a prosecution. Alternatively, the Attorney General may personally certify that a Federal prosecution is required by the interests of justice. In addition, the State authorities must be informed by the Department of Justice of the Federal prosecution at least 24 hours before the return or making public of an indictment.

Subsection (f) provides for Federal jurisdiction over an offense described in section 2523 when a circumstance specified in section 2521(c) or section 2522(d)(1)(B) through (E) or 2522(d)(2) of the proposed code exists. In addition, subsection (f) provides for Federal jurisdiction when (1) the fear in subsection (a)(1) or (2) involves a Federal crime (see 18 U.S.C. 873); (2) the fear in subsection (a)(6) involves Federal official action ("official action" is a term defined in section 1762 of the proposed code) (see 18 U.S.C. 872); (3) the property is obtained by threatening or placing a person in fear in relation to any person's employment under a grant or contract of assistance pursuant to the Economic Opportunity Act of 1964 (see 42 U.S.C. 2971f); (4) the property is obtained by threatening or placing a person in fear that the actor will procure the dismissal from employment, or refuse to employ or renew a contract of employment, of any person under a grant or contract of assistance under the Comprehensive Employment and Training Act of 1973 (see 18 U.S.C. 665(b)); or (5) the property obtained consists of any part of the compensation of a person employed in the construction, completion, repair, or refurbishing of a Federal public building, Federal public work, or building financed in whole or in part by a loan or grant from the United States, and is obtained by threatening or placing any person in fear in relation to that person's employment (see 18 U.S.C. 874).

§ 2524—Definitions for subchapter

Section 2524 provides that the terms "counterfeiting or forging implement" and "written instrument" have the meanings set forth in section 2547 of the proposed code.

SUBCHAPTER IV—THEFT AND RELATED OFFENSES

Current Law

1. *Theft.*—Current Federal laws punish a wide range of larcenous behavior, each section having its own jurisdictional basis. The over 100 provisions prohibiting some form of theft employ a diverse group of sometimes overlapping and unclear terms to define the unlawful activity. These terms include, for example, "steal," "embezzle," "purloin," "retain," "misapply," "abstract," "take by device, scheme, or game," "use," "possess," and "secrete." All of these provisions address the wrongful taking of property, but exclude from their reach the theft of services, an offense set forth in many revised State criminal codes. As with other Federal criminal laws, the jurisdictional basis of each provision is part of the description of the offense and must be proven as an element of the crime charged.

A number of offenses prohibit the theft of property owned by or in the control or custody of the United States Government.[1] The Supreme Court has held that conviction under 18 U.S.C. 641, covering the stealing, purloining, or conversion of public money, property, or records, requires proof of scienter or intent to steal or convert the Government property. *Morissette* v. *United States*, 342 U.S. 246 (1952). Federal courts are in accord that the same section does not require proof that the defendant knew that the property which was unlawfully obtained belonged to the United States. *See, e.g., United States* v. *Speir*, 564 F.2d 934 (10th Cir. 1977), *cert. denied*, 435 U.S. 927 (1978); *United States* v. *Jermendy*, 544 F.2d 640 (2d Cir. 1976), *cert. denied*, 430 U.S. 909 (1977).

A second group of offenses involves the use of fraudulent means to obtain Federal property. The methods include false statements,[2] im-

[1] 18 U.S.C. 285 (taking or presentment of papers representing claims against the United States); 18 U.S.C. 641 (stealing, purloining, embezzlement, or conversion of public money, property, or records); 18 U.S.C. 642 (theft of items used for counterfeiting); 18 U.S.C. 658 (theft of property mortgaged or pledged to a United States farm credit agency or to a production credit association or a bank for cooperatives); 18 U.S.C. 1702, 1704, 1706–10, 1721 (theft of United States mail); 18 U.S.C. 1851–54 (theft of certain natural resources on United States property); 18 U.S.C. 2071 (concealment, removal, or mutilation of records and documents filed with Federal judicial and public officers); 18 U.S.C. 2233 (forcible rescue of property seized by a Federal officer pursuant to a revenue law, or by a search and seizure); 18 U.S.C. 2197 (theft or knowing possession of a license, certificate or document issued to vessels, officers, or seamen by the United States).

[2] 18 U.S.C. 286 (conspiracies to defraud the Government to obtain payment of fraudulent claims); 18 U.S.C. 287 (presenting false claims to Federal officers); 18 U.S.C. 288 (presenting false claims for postal losses, supporting such claims with false statements, or concealing material facts regarding claims); 18 U.S.C. 289 (submitting false statements concerning claims for veterans pensions); 18 U.S.C. 550 (filing false or fraudulent entries or claims for payment of refund of duties on the exportation of merchandise); 18 U.S.C. 914 (impersonating a Federal creditor, in order to transfer public stock or receive payment for a debt due); 18 U.S.C. 1002 (possessing false documents to enable another to obtain money from the United States); 18 U.S.C. 1003 (fraudulent demand for any public stocks of United States or having any pension, wage, or other debt paid by virtue of a false instrument); 18 U.S.C. 1006 (false statement made by individuals of enumerated Federal credit institutions; receiving property from such institutions with intent to defraud the United States); 18 U.S.C. 1007 (making false statements to secure payment of Federal Deposit Insurance Corporation claims or overvaluing a security so insured); 18 U.S.C. 1012 (receiving compensation with intent to defraud the Department of Housing and Urban Development); 18 U.S.C. 1712 (false returns made by Postal Service employees and officers to Federal officers for purpose of increasing compensation; inducement of others by Postal Service officers or employees to deposit mail at their offices so as to increase their compensation); 18 U.S.C. 1722 (submitting false evidence to Postal Service to secure second-class mail rates); 18 U.S.C. 1919 (making false statements to obtain unemployment compensation for Federal service under chapter 85 of 5 U.S.C.); 18 U.S.C. 1920 (making false statements to obtain Federal employees' compensation for partial disability, authorized by Ch. 81 of 5 U.S.C.) 18 U.S.C. 2073 (false entries made by Federal employees, officers, clerks and agents, in any record relating to their duties; making false reports by anyone charged with duty of receiving, holding, or paying moneys or securities for the United States).

personating public officials,[3] and other fraudulent activities, such as using the franking privilege for private purposes and receiving payments for missing persons under 5 U.S.C. 5561–68 or chapter 10 of title 37, United States Code.[4]

Other Federal offenses punish the embezzlement or misapplication of money owned by, or in the control or custody of the United States.[5] Embezzlement, which is not a common-law crime, has been defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Moore* v. *United States*, 160 U.S. 268, 269 (1895). The offense of embezzlement under 18 U.S.C. 641 has been held complete when the defendant wrongfully or intentionally misappropriates to personal use that Federal property which is lawfully in the defendant's possession. *United States* v. *Powell*, 294 F. Supp. 1353 (E.D.Va. 1968), *aff'd*, 413 F.2d 1037 (4th Cir. 1969).

Another group of offenses addresses irregularities in the use of an official position. These provisions generally punish the individual in a position of authority who fails to account for funds in that individual's care or control or who otherwise misuses or extracts Government funds or property.[6]

[3] 18 U.S.C. 912 (pretending to be a Federal officer or employee to demand or obtain anything of value); 18 U.S.C. 915 (falsely impersonating a foreign government official, with intent to defraud the United States by obtaining anything of value); 18 U.S.C. 663 (soliciting money or property, while representing that the money or property is being solicited for use of the United States).

[4] 18 U.S.C. 1719 (using the franking privilege for a private purpose); 18 U.S.C. 1720 (using cancelled postage stamps as payment of postage, or removing cancelling marks from a stamp); 18 U.S.C. 1723 (enclosing higher class mail in lower class matter to obtain lower postage rates); 18 U.S.C. 1921 (receiving Federal employees' compensation, pursuant to 5 U.S.C. 8107–13 and 8133, after a marriage of the employee or a dependent, which would otherwise reduce or terminate compensation); 18 U.S.C. 1923 (receiving payments fraudulently for missing persons pursuant to 5 U.S.C. 5561–68, or chapter 10 of 37 U.S.C.).

[5] 18 U.S.C. 153 (embezzlement from a debtor's estate); 18 U.S.C. 332 (debasing United States coinage, altering an official scale, or embezzling metals used for coins or coinage); 18 U.S.C. 641 (embezzlement of Federal records, money, or property); 18 U.S.C. 643 (receipt of public money by Federal agents, officers, or employees, which they are not entitled to retain as salary); 18 U.S.C. 644 (receipt by a bank official of unauthorized deposits of public money; using public deposits for a purpose not prescribed by law); 18 U.S.C. 645 (unlawful retention by a Federal court officer of money coming into such officers possession by virtue of such officer's office); 18 U.S.C. 646(a) (failure by a court officer to promptly deposit any money belonging to the registry of the court); 18 U.S.C. 647 (receiving a loan from a court officer where the recipient knows that the money belongs to the registry of the court); 18 U.S.C. 648 (misuse of funds entrusted to an individual by an Act of Congress); 18 U.S.C. 649 (failure to deposit Federal funds under one's control); 18 U.S.C. 650 (failure by a public depositary to keep all moneys safely deposited); 18 U.S.C. 651 (false certification by a disbursement officer to the General Accounting Office that a Federal creditor has been paid in full); 18 U.S.C. 652 (disbursement officer, who is required to pay any Federal clerk or employee pursuant to a Congressional appropriation, may not pay less than required in lieu of the lawful amount); 18 U.S.C. 653 (misuse of funds by a disbursing officer); 18 U.S.C. 654 (conversion by a Federal employee or officer of another's property to such employee or officer's own use by virtue of such employee or officer's office); 18 U.S.C. 657 (bank embezzlement); 18 U.S.C. 663 (embezzlement or conversion of money which has come into possession of the United States by solicitation as a gift); 18 U.S.C. 1023 (delivery of money to be used in the military or naval service to an authorized receiver, where the amount delivered was less than that for which a receipt was taken); 18 U.S.C. 1421 ("willful neglect" by a court officer to account for or pay over money received in citizenship, naturalization, or alien registration proceedings); 18 U.S.C. 1711 (misappropriation of postal funds by Postal Service officers or employees).

[6] 18 U.S.C. 1422 (demanding unauthorized fees or moneys in proceedings related to citizenship, naturalization, or alien registration); 18 U.S.C. 1901 (prohibits Federal officers charged with collection or disbursement of revenues from operating businesses in the Federal funds or property); 18 U.S.C. 1916 (Executive Branch employees may be employed only for services actually rendered for the purposes of the appropriation from which they were paid); 22 U.S.C. 1198 (failure of a consular officer to account properly for and return any United States citizen's property of which that officer has obtained custody); 26 U.S.C. 7214 (conspiracy to defraud the United States by a Federal officer or employee acting in connection with a Federal revenue law).

Several Federal offenses cover theft within the special jurisdiction of the United States.[7] Another group penalizes theft from specified Federal programs or federally-regulated institutions or organizations.[8]

Federal laws also prohibit theft of money or property which constitutes a part of interstate or foreign commerce.[9] For example, 18 U.S.C. 2312, the Dyer Act, prohibits the transportation in interstate or foreign commerce of a motor vehicle knowing the vehicle to have been stolen; 18 U.S.C. 2314, the National Stolen Property Act, pro-

[7] 18 U.S.C. 661 (any theft of property); 18 U.S.C. 1025 (obtaining anything of value from a person by means of fraud or false pretenses upon any waters within the special jurisdiction); 18 U.S.C. 2271 (conspiracy to destroy any vessel on the high seas or within the United States in order to collect insurance proceeds on the vessel or on goods aboard); 18 U.S.C. 2272 (vessel owner's causing destruction of the vessel to obtain insurance proceeds, upon high seas or within special maritime jurisdiction).

[8] 18 U.S.C. 655 (theft or concealment by bank examiners of property in possession of Federal Reserve System—member of F.D.I.C.-insured banks); 18 U.S.C. 656 (theft, misapplication, or embezzlement of Federal Reserve Bank funds by bank officers or employees); 18 U.S.C. 657 (embezzlement or misapplication of funds from Federal lending, credit, or insurance institutions); 18 U.S.C. 664 (theft or embezzlement of funds of an employee welfare or benefit plan established under title I of the Employee Retirement Income Security Act of 1974); 18 U.S.C. 665(a) (theft, embezzlement, misapplication, or obtaining by fraud of property or money obtained under the Comprehensive Employment and Training Act by individuals connected with agencies receiving financial assistance under the Act); 18 U.S.C. 874 (inducing a person employed on a public building or work project, or a federally-financed project, by means of force, to give up part of that person's compensation); 18 U.S.C. 1010 (making false statements, passing false instruments, or willfully overvaluing any security to obtain a loan to be used in a H.U.D. or Federal Housing Administration transaction); 18 U.S.C. 1161 (property of Indian tribal organizations); 18 U.S.C. 2113(b) money or insured property of federally-insured banks, credit unions, or savings and loan associations); 7 U.S.C. 2023 (unlawful acquisition, possession, or authorization to purchase food stamps); 15 U.S.C. 687e(e) (covers Small Business Administration-connected individuals who embezzle, make false entries, or fraudulently profit through an S.B.A. transaction); 15 U.S.C. 714m(b) (theft or embezzlement of Commodity Credit Corporation assets by anyone connected with the Corporation); 16 U.S.C. 831t(a) (general Federal penal laws relating to larceny, embezzlement, or conversion, apply to Tennessee Valley Authority property); 25 U.S.C. 50d (theft, embezzlement, misapplication, or fraudulently obtaining money or property which are the subject of a grant under the Indian Self-Determination and Education Assistance Act; covers individuals connected with or contract or grant recipients under that Act); 29 U.S.C. 501(c) (theft or embezzlement of property of a labor organization of which one is an officer or employee); 33 U.S.C. 990 (general Federal penal laws, relating to larceny, embezzlement, or conversion, apply to Saint Lawrence Seaway Development Corporation Act property); 38 U.S.C. 3501 (embezzlement or misappropriation of money, held in a fiduciary capacity, that has been paid under laws administered by the Veterans' Administration for the benefit of any minor, incompetent, or other beneficiary); 38 U.S.C. 3502 (fraudulent acceptance of payments of veterans benefits after one's right to receive them has ceased); 42 U.S.C. 1395nn(a)(4), 1396(h)(a)(4) (conversion of payments applied for under 42 U.S.C. 1395 *et seq.* and 1396 *et seq.*, respectively, for the use of another); 42 U.S.C. 408(e) conversion of Social Security benefits applied for and received for the use and benefit of another; 42 U.S.C. 2971f (theft, embezzlement, or misapplication of funds received under the Economic Opportunity Act of 1964); 42 U.S.C. 3220(b) (theft or embezzlement of funds by anyone connected with Administering the Public Works and Economic Development Act of 1965); 42 U.S.C. 3791 (theft, embezzlement, or fraudulent obtaining of funds or property from the Law Enforcement Assistance Administration, when given as a grant under the Omnibus Crime Control and Safe Street Act of 1968); 42 U.S.C. 1760(g) (theft, embezzlement, misapplication, and obtaining by fraud of funds or property from grants under the National School Lunch Act or the Child Nutrition Act of 1966).

[9] 18 U.S.C. 659 (theft of goods, baggage, express or freight moving in or constituting a shipment in interstate or foreign commerce; stealing from or defrauding a passenger on a carriage moving in interstate commerce); 18 U.S.C. 660 (taking money, securities, or property of a common carrier derived from or used in interstate commerce by an officer or manager of the firm or an employee riding on a carrier moving in interstate commerce): 18 U.S.C. 2312 (transportation in interstate or foreign commerce of motor vehicles known to have been stolen); 18 U.S.C. 2314 (transporting in interstate or foreign commerce any goods, securities or money worth $5,000 or more, where they were obtained by theft or fraud); 7 U.S.C. 13(a) (prohibits any futures commission merchant, or such merchant's agent, or employee, from stealing any money, securities, or property worth more than $100, which has been received to secure the trades or contracts of any customer); 7 U.S.C. 270 (conversion of agricultural products stored in a licensed warehouse); 15 U.S.C. 78jjj(c)(2) (theft, embezzlement, or fraudulent conversion, of any money, securities, or other assets of the Securities Investor Protection Corporation: prohibits any other fraudulent acts against the SIPC or a trustee); 15 U.S.C. 80a–36 (theft or embezzlement of money, securities, or assets of a registered investment company).

hibits transportation in interstate or foreign commerce of all goods worth $5,000 or more, which the defendant knows have been stolen, converted, or taken by fraud. The term "stolen" has been held not to be limited to common-law larceny, but to encompass all felonious takings which involve an intent to deprive an individual of the rights and benefits of ownership. *United States* v. *Turley*, 352 U.S. 407 (1957). There is no requirement under either 18 U.S.C. 2312 or 2314 that the defendant know, foresee, or intend that the instrumentalities of interstate commerce will be used in the commission of the offense, *United States* v. *Beil*, 577 F.2d 1313, (5th Cir. 1978), *cert. denied*. 440 U.S. 946 (1979). *United States* v. *Powers*, 437 F.2d 1160 (9th Cir. 1971). Similarly, under 18 U.S.C. 659, covering thefts from interstate or foreign carrier shipments, it is not necessary that the defendant know that the theft is from interstate commerce, it being sufficient that the defendant know the goods are stolen. *United States* v. *Tyers*, 487 F.2d 828 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974).

Two sections of Federal law address the unlawful use of money obtained from Federal election funds. First, 26 U.S.C. 9012(c) prohibits the knowing and willful use of authorization for use of any payments to eligible candidates from the Presidential Election Campaign Fund for any purpose other than to defray the qualified campaign expenses for which the payment was made, or to repay loans whose proceeds were used to defray such expenses. Second, 26 U.S.C. 9042(b) sets forth a similar prohibition with regard to funds obtained under the Presidential Primary Matching Payment Account Act.

2. *Receiving stolen property.*—The receipt of stolen property is covered in a number of current Federal offenses, each with a separate jurisdictional base. Some cover specific kinds of property (e.g., firearms) while others punish the receipt of any property under specified circumstances.

The receipt, concealment, or retention of embezzled, stolen, purloined or converted United States money, property, or records, with the intent to convert the property to one's use or gain, knowing that such money, property, or records had been wrongfully obtained is punished by 18 U.S.C. 641.

Knowledge that the property belonged to the United States or to a United States department or agency is generally not necessary for conviction. *United States* v. *Boyd*, 446 F.2d 1267 (5th Cir. 1971); *United States* v. *Speir*, 564 F.2d 934 (10th Cir. 1977), *cert. denied*, 440 U.S. 920 (1979). The offense does not require that title to the property rest in the United States, but merely that the Government hold a property interest in the wrongfully obtained property. *United States* v. *Maxwell*, 588 F.2d 568 (7th Cir. 1978), *cert. denied*, 444 U.S. 877 (1979).

Under 18 U.S.C. 659, it is an offense to buy, receive, or have in one's possession goods or chattels which have been embezzled or stolen from interstate or foreign shipments, knowing such items have been embezzled or stolen. It is irrelevant to the offense that the defendant personally stole the goods in question. *United States* v. *West*, 562 F. 2d 375 (6th Cir. 1977), *cert. denied*, 435 U.S. 922 (1978). Constructive possession of goods, as well as actual possession, is sufficient for conviction. *United States* v. *Casalinuovo*, 350 F. 2d 207 (2d Cir. 1965).

Similarly, 18 U.S.C. 2315 makes it unlawful for someone to receive stolen goods, securities, or money worth $500 or more, where the goods are moving as or constitute interstate or foreign commerce, knowing the property has been stolen, unlawfully converted, or taken. It is not necessary that the defendant transport the property in interstate or foreign commerce, *United States* v. *Gardner*, 516 F. 2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975), or knew that it was so transported, *United States* v. *Muncy*, 526 F. 2d 1261 (5th Cir. 1976), as long as the property was a part of interstate or foreign commerce at the time the offense was committed. *United States* v. *Pichany*, 490 F. 2d 1073 (7th Cir. 1973).

The purchase, receipt, or concealment of stolen or embezzled property within the special maritime and territorial jurisdiction of the United States, knowing the property to have been taken, stolen, or embezzled, violates 18 U.S.C. 662.

Someone who receives, conceals, stores, or pledges or accepts as security for a loan, stolen firearms or ammunition which move as or constitute interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen, violates 18 U.S.C. 922(j). It is essential to conviction that the goods be part of a movement in interstate commerce, that is, that there be a continuing relationship with interstate commerce at the time of the alleged unlawful act. *United States* v. *Ruffin*, 490 F.2d 557 (8th Cir. 1974).

The purchase, receipt, concealment, or unlawful possession of mail matter which has been "stolen, taken, embezzled, or abstracted," knowing that such mail matter has been unlawfully obtained, is punished by 18 U.S.C. 1708.

Someone who receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is part of, interstate or foreign commerce, knowing the property has been stolen, violates 18 U.S.C. 2313. This provision was enacted as part of the National Motor Vehicle Theft Act (the "Dyer Act"). Because an essential element of the crime is that the vehicle be in the stream of interstate commerce at the time of the offense, there is no violation of the Act if the stolen vehicle has "come to rest" in a particular State. *United States* v. *Hiscott*, 586 F. 2d 1271 (8th Cir. 1978).

Someone who receives, conceals, stores, barters, buys, sells, or disposes of any cattle, moving in or constituting a part of interstate or foreign commerce, knowing the cattle to have been stolen, violates 18 U.S.C. 2317.

The receipt of property, knowing such to have been stolen from a federally-insured bank, credit union, or savings and loan institution, in violation of 18 U.S.C. 2113(b), violates 18 U.S.C. 2113(c).

None of these provisions require a showing that the original theft was a common-law larceny; they apply to all felonious takings of property, with the intent to deprive the owner of the rights and benefits of ownership. *See, e.g.*, *Bergman* v. *United States*, 253 F. 2d 933 (6th Cir. 1958): *Cummings* v. *United States*, 289 F. 2d 904 (10th Cir.), *cert. denied*, 368 U.S. 850 (1961).

3. *Fraudulent schemes.*—Federal provisions covering schemes to defraud include 18 U.S.C. 1341, governing mail fraud, 18 U.S.C. 1343,

covering misuse of radio, wire, or television transmission in interstate commerce, and 18 U.S.C. 2314, penalizing the use of interstate travel to execute or conceal a fraudulent scheme.

The mail fraud and wire fraud provisions have each engendered similar bodies of case law. The essential elements of either offense are that a scheme to defraud be devised (a scheme, that is, in which the defendant participates), and that the requisite facility (i.e., the mails or a form of interstate or wire communication) be used to further the scheme. *Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Finkelstein*, 526 F. 2d 517 (2d Cir. 1975), *cert. denied sub nom. Scardino* v. *United States*, 425 U.S. 960 (1976). Courts have frequently noted that the use of the requisite facility is the "gist" of the offense. *See, e.g., Atkinson* v. *United States*, 344 F. 2d 97 (8th Cir.), *cert. denied*, 382 U.S. 867 (1965); *Milan* v. *United States*, 322 F. 2d 104 (5th Cir. 1963), *cert. denied sub nom. Kimball* v. *United States*, 377 U.S. 911 (1965); *Marvin* v. *United States*, 279 F. 2d 451 (10th Cir. 1960). Recently, however, some courts have stressed the fraudulent scheme, stating the use of the mails or transmission merely supplies the basis for Federal intervention. *United States* v. *Blassingame*, 427 F. 2d 329 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *United States* v. *Reid*, 533 F. 2d 1255 (D.C. Cir. 1976). It is not necessary to prove that the defendant actually used these facilities, or knew, or intended, that they be used; it is sufficient that such use was reasonably foreseeable or the defendant knowingly caused someone else to use them. *Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Rabbit*, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *United States* v. *Calvert*, 523 F.2d 895 (8th Cir.), *cert. denied*, 425 U.S. 911 (1975); *United States* v. *Blassingame*, 427 F. 2d 329 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *United States* v. *Conte*, 349 F. 2d 304 (6th Cir.), *cert. denied*, 382 U.S. 926 (1965). However, the specific intent to defraud must always be shown. *United States* v. *Payne*, 474 F. 2d 603 (9th Cir. 1973). Courts have long held that whether or not any person was in fact defrauded is not an element of the offense. *United States* v. *Schaffer*, 599 F. 2d 678 (5th Cir. 1979). Each mailing constitutes a separate count under 18 U.S.C. 1341. *Badders* v. *United States*, 240 U.S. 391 (1916).

The few cases brought under 18 U.S.C. 2314 have established, *inter alia*, that once a fraudulent scheme to induce a victim to part with money involves interstate travel, it is not necessary that the money itself travel in interstate commerce. *United States* v. *Scoratow*, 434 F. 2d 1288 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971), and that no specific intent to defraud a particular individual need be proven. *United States* v. *Kelly*, 569 F. 2d 928 (5th Cir.), *cert. denied*, 439 U.S. 829 (1978). It is required to show only that the defendant caused or induced another to travel in interstate commerce, rather than that the defendant knew, intended, or foresaw that such travel would occur. *Id.* Further, it is not necessary to prove actual defrauding, but only a scheme intended to defraud. *United States* v. *Hassel*, 341 F. 2d 427 (4th Cir. 1965).

The mail and wire fraud offenses have also played a role in prosecutions of local corruption in recent years, as a result of court interpretations that the prohibited scheme or artifice does not require the

obtaining of money or property or the infliction of economic loss, and may be applied where the scheme operates to defraud citizens of their right to a public servant's honest and faithful service. *See, e.g., United States* v. *Barrett*, 505 F. 2d 1091, 1103–05 (7th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975); *United States* v. *Mandel*, 591 F. 2d 1347, 1358–64, *aff'd on rehearing by an equally divided court en banc*, 602 F. 2d 653 (4th Cir. 1979), *cert. denied*, 100 S.Ct. 1647 (1980). It has been suggested that this use of the wire and mail fraud offenses carries a potential for inappropriate Federal intervention into areas of State and local concerns. *See* Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 Am. U. L. Rev. 63 (1978).

Under the Securities Investor Protection Act of 1978, 15 U.S.C. 78jjj(c)(1), whoever, "in connection with or in contemplation of any liquidation proceeding or direct payment procedure", uses any device, scheme or artifice to defraud, or engages in any act, practice or course of business which would operate as a fraud or deceit of any person, commits an offense.

Current Federal criminal laws do not specifically penalize pyramid sales schemes, although such enterprises (also known as multilevel distributorships) may technically be prosecuted under existing fraud provisions. Some States, by legislation,[10] regulation,[11] or case law,[12] have prohibited or severely restricted pyramid sales operations within their jurisdictions.

4. *Bankruptcy related offense.*—Various fraudulent acts against the debtor's estate which prevent estate assets from being equitably distributed among creditors are penalized by 18 U.S.C. 152. Among the acts penalized are concealing and transferring assets, making false oaths and claims, and bribery. The defendant must act "knowingly and fraudulently" and, in some instances, "with intent to defeat the provisions of title 11," i.e., the Bankruptcy Act.[13]

5. *Fraud in a regulated industry.*—Current law forbids certain acts relating to equity skimming in federally-insured mortgages of single or multiple family dwellings and modification in terms of insured mortgages covering multifamily projects, and frauds involving certain land sales.

A person violates 12 U.S.C. 1709–2 if that person, with intent to defraud, willfully engages in a pattern or practice of (1) purchasing one- to four-family dwellings which are the subject of a loan in default at time of purchase, or in default within one year subsequent to the purchase, if the loan is secured by a mortgage of deed or trust insured or held by the Secretary of Housing and Urban Development or guaranteed by the Veterans' Administration, or if the loan is made by the Veterans' Administration, (2) failing to make payments under the mortgage or deed or trust as the payments become due, and (3) applying or authorizing the application of rents from such dwellings for his own use. The provision applies to purchasers (except purchasers

[10] *See, e.g.*, CAL. PENAL CODE § 327 (1970); COLO. REV. STAT. § 6–1–105(q) (1973); GA. CODE ANN. §§ 106–1001 (1979).
[11] *See, e.g.*, WIS. ADM. CODE section Ag. 122 (1978).
[12] Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (1972).
[13] Ruled not unconstitutionally vague, this phrase has been held simply to mean that conduct must be willful. United States v. Lawson, 255 F. Supp. 261, 266 (D. Minn. 1966).

of only one such dwelling), beneficial owners under any business organization or trust purchasing such a dwelling, or officers, directors, or agents of any such purchaser.

A person violates 12 U.S.C. 1715z–4(b) if that person is an owner of a property which is security for a mortgage covering multi-family property, or a stockholder or corporation owning such property, a beneficial owner under any business organization or trust owning such property, or an officer, director, or agent of any such owner, and (1) willfully uses or authorizes the use of any part of the rents or other funds derived from property covered by such mortgage in violation of a regulation proscribed by the Secretary of Housing and Urban Development under 12 U.S.C. 1715z–4(a), or (2) if such a mortgage is determined to be exempt from the requirement of any such regulation or is not otherwise covered by such regulation, willfully and knowingly uses or authorizes the use, while such mortgage is in default, of any part of the rents or other funds derived from the property covered by such mortgage for any purpose other than to meet actual and necessary expenses arising in connection with such property (including amortization charges under the mortgage).

The Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.*, prohibits certain fraudulent activities in land development enterprises. Someone who willfully violates any provisions of the Act or the rules and regulations issued under them, or someone who willfully, in a statement of records filed under, or in a property report issued pursuant to, the Act, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein, violates 15 U.S.C. 1717. Under 15 U.S.C. 1703, it is unlawful for any developer or agent to use the mails or any interstate commerce facility to sell or lease any lot unless a statement of record with respect to the lot is in effect in accordance with 15 U.S.C. 1706; to sell or lease a lot unless a printed property report, meeting the requirements of 15 U.S.C. 1707, has been furnished to the purchaser or lessee before the latter signs any contract or agreement; to sell or lease a lot where any part of the statement of record or property report contained a false statement of a material fact or omitted to state a material fact required by 15 U.S.C. 1704–08; or to display or deliver to prospective purchasers or lessees any advertising or promotional material which is inconsistent with information required to be disclosed in the property report. In addition, it is illegal for the developer or agent, with respect to the sale or lease, or offer to sell or lease, to employ any device, scheme, or artifice to defraud; to obtain money or property by means of untrue statements or omissions of material facts; to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit on the purchaser, or to represent that certain facilities, such as roads, or utilities, will be provided or completed by the developer without so stipulating in the contract. Certain lots are exempted from the Act by 15 U.S.C. 1702 such as those in a subdivision containing less than 25 lots, cemetery lots, and, under certain conditions, real estate which is zoned for industrial or commercial development or restricted to such by officially recorded declarations of covenants, conditions, and restrictions. There are also additional exemptions from the registration and disclosure provisions of the Act.

Infringement of a copyright.—Someone who infringes a copyright willfully and for purposes of commercial advantage or private gain violates 17 U.S.C. 506. An infringer is defined in 17 U.S.C. 501(a) as "anyone who violates any of the exclusive rights of the copyright owner, as provided in 17 U.S.C. 106–18, or who imports copies or phonograph records into the United States in violation of 17 U.S.C. 602." The few prosecutions brought under the criminal provisions of the Act have generally dealt with extensive sound-recording and film piracy operations. 3M. Nimmer, *Nimmer on Copyright* section 15.01 (1979). It has been held under the predecessor provisions that proof of willfulness requires a showing that the defendant intentionally acted in violation of the law. *United States* v. *Wise*, 550 F.2d 1180 (9th Cir.), *cert. denied* 434 U.S. 929 (1977).

7. *Mutiny.*—A crew member of a United States vessel on the high seas, or on any other waters within United States admiralty and maritime jurisdiction, who unlawfully and with force, or by fraud or intimidation, usurps the command of such vessel from the master or other lawful commanding officer, or deprives such master or officer or authority and command on board, resists or prevents such master or officer from freely and lawfully exercising authority, or transfers this authority and command to someone not lawfully entitled to it, violates 18 U.S.C. 2193. The predecessor provisions have been held to cover a docked ship where striking seamen, acting to obtain recognition for their union, nonviolently disobeyed their captain's lawful orders to prepare the ship for departure. *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31 (1942).

§ *2531—Theft*

This section consolidates over 130 different current Federal theft offenses.

Subsection (a) makes it an offense for someone, with the intent to deprive another of property, knowingly to: (1) take and carry away property of another without authority from the other (common-law larceny); (2) make a use, disposition, or transfer of property of another without authority from the other (statutory embezzlement of traditional law); or (3) use fraud and thereby obtain property of another (common-law larceny by trick and statutory false pretenses of traditional law). "Fraud" and "property" are terms defined in section 101 of the proposed code. The definition of the term "property" in section 101, however, is modified for the purposes of section 2531 by subsection (e)(2)(A).

Subsection (b) classifies an offense under section 2531 as follows:

(1) a C felony when the property of which the other is intended to be deprived has a value that exceeds $100,000;

(2) a D felony when the property of which the other is intended to be deprived has a value that exceeds $3,000 but does not exceed $100,000; or regardless of the monetary value of the property, the property of which the other is intended to be deprived consists of a firearm, ammunition, or an explosive (terms defined in section 2725 of the proposed code); a vehicle (a term defined in section 101 of the proposed code); a record or other document owned by, or under the care, custody, or control of, the United States; an implement designed for the making

of a written instrument of the United States ("written instrument" is defined in section 2545 of the proposed code); a key or other implement designed to provide access to mail or to property owned by, or under the care, custody, or control of the United States; or mail (other than a newspaper, magazine circular, or advertising matter);

(3) an E felony if the property of which the other is intended to be deprived has a value that exceeds $500 but does not exceed $3,000;

(4) an A misdemeanor if the property of which the other is intended to be deprived has a value that exceeds $100 but does not exceed $500; and

(5) a B misdemeanor if the property of which the other is intended to be deprived has a value of $100 or less.

Classifying theft according to the value and type of property stolen has been the approach of the Brown Commission, *Final Report* section 1735 (1971) and the Model Penal Code, section 233.1 (1962).

Subsection (c)(1) provides that in a prosecution under section 2531, no state of mind need be proven as to any matter that pertains to the classification of the offense.

Subsection (c)(2)(A) provides, for the purposes of section 2531, two limitations upon the definition of "property" found in section 101 of the proposed code. First, subsection (c)(2)(A) excludes from the definition services in return for which the provider of the services does not ordinarily receive (and does not expect to receive) something of value. The Committee believes it appropriate not to make criminal those situations where the property "stolen" would ordinarily have been provided without cost—for example, where A tells her next-door neighbor that her father is dying in order to obtain a ride to the airport, when in fact A desires the ride to the airport in order to catch a plane to go on vacation.

The second limitation upon the definition of property for the purposes of section 2531 is that real property is not included in the definition, unless the actor acquires or transfers a legal interest in the real property other than through adverse possession. Thus, interference by a landlord with a tenant's leasehold would not constitute theft. The Committee believes that matters like landlord-tenant disputes should not be dealt with criminally.

Subsection (c)(2)(B) defines the term "to deprive" for the purposes of section 2531. That term is defined to mean: (1) a withholding of property, either permanently or under such circumstances that a significant portion of the property's economic value, or of the property's use or benefit, has been appropriated; (2) a withholding of property with intent to return the property only upon the payment of a reward or other compensation; or (3) a disposing of property, or a use or transfer of any interest in property, under circumstances that make unlikely the return of the property. This definition of the term "to deprive" is a modification of the Brown Commission definition (*see Final Report* section 1741(b)). The Committee developed this definition as a middle ground between those Federal theft cases that require an intent permanently to deprive, *see Ailsworth* v. *United States*, 448 F.2d 439, 442 (9th Cir. 1971) (*dictum*), and those Federal theft cases that merely require an intent to deprive for any period of time. *see Mitchell* v. *United States*, 394 F.2d 767, 770–71 (D.C. Cir. 1968).

Subsection (d) provides a defense to a prosecution under subsection (a)(1) or (a)(2) when the property was lost or misdelivered, unless the defendant failed to take readily available and reasonable measures to return the property to a person entitled to the property.

Subsection (e) provides for Federal jurisdiction over an offense described in section 2531 when—

(1) the offense is committed within the special jurisdiction of the United States (*see* 18 U.S.C. 661, 1025, 2271, 2272);

(2) the property belongs to, is being produced, manufactured, constructed, or stored for, or is subject to a security interest held by, the United States (*see, e.g.*, 18 U.S.C. 641, 914);

(3) the offense is committed by a Federal public servant acting under color of office (*see* 18 U.S.C. 654);

(4) the offense is committed by a person pretending to be a Federal public servant or a foreign official (*see* 18 U.S.C. 912, 915);

(5) the property has an aggregated value of at least $1,000 and is obtained through the use of one or more counterfeited, fictitious, altered, forged, lost, or stolen credit cards in a transaction affecting interstate or foreign commerce (*see* 15 U.S.C. 1644);

(6) the property is mail (*see* 18 U.S.C. 1708);

(7) the property is part of an interstate or foreign shipment, is in a pipeline system that extends across a State or United States boundary, or is in the possession of any common carrier for transportation in interstate or foreign commerce (*see* 18 U.S.C. 659);

(8) the property is moved across a State or United States boundary in the commission of the offense and (1) has a value of $5,000 or more, or (2) is an explosive, ammunition or a firearm (terms which are defined in section 2725 of the proposed code), or a vehicle (a term defined in section 101 of the proposed code) (*see* 18 U.S.C. 922(i) and (j), 2312, 2314–16);

(9) the property is owned by, or is under the care, custody, or control of, a "national credit institution" (a term defined in section 1745(a) of the proposed code) (*see, e.g.*, 18 U.S.C. 656, 657, 2113);

(10) the property is (1) owned by, or is under the care, custody, or control of, an Indian tribe that is subject to a Federal statute relating to Indian affairs, or (2) the subject of a grant, subgrant, contract, or subcontract pursuant to the Indian Self-Determination and Education Assistance Act or the Johnson-O'Malley Act and the offense is committed by an agent of a recipient of such a grant, subgrant, contract, or subcontract (*see* 18 U.S.C. 1163, 25 U.S.C. 450d);

(11) the property is owned by, or is under the care, custody, or control of, an employee benefit plan subject to a provision of title I of the Employee Retirement Income Security Act of 1974 (*see* 18 U.S.C. 664);

(12) the property is owned by, or is under the care, custody or control of, a trust fund established by an employer or established by an employee organization as defined in section 304 of the Employee Retirement Income Security Act of 1974, or by both, to provide a benefit to the members of an employee organization or to their families (new);

(13) the property is owned by, or is under the care, custody, or control of, a "labor organization" (as that term is defined in section 3(i) and (j) of the Labor-Management Reporting and Disclosure Act of 1950), and the offense is committed by a person connected in any capacity with, such organization (*see* 29 U.S.C. 501(c));

(14) the offense is committed by an agent or receiver of, or a person connected in any capacity with, a "small business investment company" (as that term is defined in the Small Business Investment Act of 1958), and the property is owned by, or is under the care, custody, or control of, such small business investment company (*see* 18 U.S.C. 657, 1006);

(15) the property consists of a note, bond, debenture, certificate of deposit, interest coupon, bill, draft, check, acceptance, obligation issued or guaranteed by the United States, a State, foreign government, or any political subdivision or instrumentality thereof, or other evidence of indebtedness, stock certificate, treasury stock certificate, transferable share, warrant, certificate of interest or participation in any profit-sharing agreement, preorganization certificate or subscription, investment contract, voting-trust certificate, certificate or receipt for, or warrant or right to subscribe to, purchase or sell any of the foregoing, or money, which is owned by, or under the care, custody, or control of an insurance company registered or doing business in the United States (new), or, if the property is held in a capacity regulated under the appropriate Federal law, any of the following: a broker, dealer, municipal securities dealer, transfer agent, clearing agent or participant in a clearing agency as those terms are defined in the Securities Exchange Act of 1934, sections 3(a)(4), (5), (23), (24), (25), and (30) (15 U.S.C. 78c(a)) (new); an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) (*see* 15 U.S.C. 80a–36, and 80a–48); an investment advisor, as defined in section 202(a)(1) of the Investment Advisors Act of 1940 (15 U.S.C. 80b–2) (new);

(16) the offense is committed by a "futures commission merchant" (as that term is defined in section 2(a) of the Commodity Exchange Act), or by an agent of such merchant, and (1) the property is that of a customer and is received by such merchant to margin, guarantee, or secure trades or contracts of any customer, or (2) the property has accrued to a customer as the result of trades or contracts (*see* 7 U.S.C. 13a.);

(17) the offense is committed by an agent of a common carrier riding in a vehicle of such carrier that is moving in interstate commerce, or by a president, director, officer, or manager of a common carrier; and the property is owned by, or under the care, custody, or control of such carrier, and is used in (or is derived from) such carrier's operation in interstate commerce (*see* 18 U.S.C. 660);

(18) the offense is committed by a trustee, custodian, marshal, or other court officer and the property consists of a part of the estate of a debtor by or against whom a petition has been filed under title 11 of the United States Code (*see* 18 U.S.C. 153);

(19) the property consists of a part of a grant, contract, or other form of assistance received (directly or indirectly) from the Law Enforcement Assistance Administration under title I of the Omnibus Crime Control and Safe Streets Act of 1968 (*see* 42 U.S.C. 3791);

(20) the property (1) consists of a "coupon" or an "authorization card" (as the those terms are defined in section 3 of the Food Stamp Act of 1964), or (2) is obtained by the use of such a coupon that has been obtained in violation of the rules governing the issuance of such coupon (*see* 7 U.S.C. 2023);

(21) the property consists of agricultural products stored or to be stored in a warehouse licensed under the United States Warehouse Act, and licensed receipts have been or are to be issued for such products (*see* 7 U.S.C. 270);

(22) the property consists of money paid under a law administered by the Veterans' Administration for the benefit of a minor, an incompetent, or another beneficiary, and the offense is committed by a fiduciary of such beneficiary (*see* 38 U.S.C. 3501);

(23) the property consists of money, a security, or another asset of the Securities Investor Protection Corporation or of any trustee appointed in connection with proceedings under the Securities Investment Protection Act (*see* 15 U.S.C. 78jjj(c)(2));

(24) the property is provided or insured under part B of title IV of the Higher Education Act of 1965 (*see* 20 U.S.C. 1087–4);

(25) the property consists of a payment or benefit provided pursuant to title XVII or XIX of the Social Security Act (*see* 42 U.S.C. 1395nn(a)(4), 1396h(a)(4));

(26) the property (1) consists of a "debit instrument" (as that term is defined in section 916(c) of the Electronic Fund Transfer Act), or (2) is obtained by the use of a "debit instrument" that has been obtained in violation of section 2531, that has been counterfeited in violation of section 2541 of the proposed code, or that has been forged in violation of section 2542 of the proposed code (*see* 15 U.S.C. 1693n(b));

(27) the property is the subject of a grant or other form of assistance under the National School Lunch Act or the Child Nutrition Act of 1966 (*see* 42 U.S.C. 1760(g));

(28) the property is the subject of a grant, contract, insurance, guarantee, subsidy, loan, or other form of benefit provided by a Federal or federally supported program, and the actor is an applicant for, or a recipient of, such benefit (new);

(29) the property is property of an organization or a unit of State or local government receiving benefits in excess of $10,000 per calendar year pursuant to a program under the laws of the United States involving a grant, contract, insurance, guarantee, subsidy, loan, or other form of Federal assistance, and is owned by, or is under the care, custody, or control of such program; and the offense is committed by an agent of, or by a person connected in any capacity with, such organization or unit of local government (new);

(30) the property is taken from a vehicle operated by a common carrier (or from a passenger on such a vehicle) and is moving in interstate commerce (*see* 18 U.S.C. 659);

(31) the property is obtained through a misrepresentation that the property is for the use of the United States (*see* 18 U.S.C. 663);

(32) the property has a value of $10,000 and the offense is committed in connection with the marketing of livestock in interstate or foreign commerce (*see* 18 U.S.C. 2316–17);

(33) the offense is committed by an agent of or a person connected in any capacity with an agency receiving financial assistance under the Economic Opportunity Act of 1964 or the Comprehensive Employment and Training Act of 1973; and the property is the subject of a grant or contract of assistance under that Act (*see* 18 U.S.C. 665(a), 42 U.S.C. 2703(a));

(34) the offense is committed by or against an Indian or Indian country and the property has a value of at least $100 (*see* 18 U.S.C. 1153)[1];

(35) the offense is committed by a non-Indian against an Indian, or by an Indian against a non-Indian in Indian country, unless the Indian committing the offense has been punished by the local law of the tribe, or treaty stipulations secure or may secure the exclusive jurisdiction over such offense to the Indian tribe (*see* 18 U.S.C. 1152). Subsection (e)(35) is intended to carry forward 18 U.S.C. 1152 without substantive change; or

(36) the property is airline tickets in excess of 100 in number or of $5000 in value (new).

The Committee has expanded current law by providing for Federal jurisdiction over an offense under section 2531 when any property with a value in excess of $10,000 is involved and when the offense is committed in connection with the marketing of livestock in interstate or foreign commerce. Current law (18 U.S.C. 2316–17) covers only cattle. Large scale livestock thefts having an interstate nexus are apparently a serious and growing problem in western States. Due to the interstate nature of livestock marketing activities, local law enforcement may be incapable of dealing with the problem. While the Committee has expanded current law to cover all property, the Committee has also narrowed current law by increasing the value of the property that must be involved. Current law requires the value to be at least $5,000. The Committee has raised that to $10,000.

The Committee has also expanded current law by adding new jurisdictional bases. Efforts to obtain Federal benefits by fraud are currently prosecuted, in general, under 18 U.S.C. 1001 (false statements), and related offenses. The Committee has classified the false statement offense (section 1742 of the proposed code) as a misdemeanor. This is consistent with the Committee approach to frauds, whereby false statements that produce bad results, such as a pecuniary loss to the Government, are to be prosecuted as specific frauds. Theft, by virtue of subsection (a)(3), is one of such specific frauds. Thus, by

[1] The Major Crimes Act, 18 U.S.C. 1153, provides for Federal jurisdiction over 14 serious offenses against the person or property of an Indian or other person in Indian country. One of the 14 crimes listed in current law is larceny. There is some division of judicial opinion as to whether the term "larceny" encompasses both theft and embezzlement. *Compare* United States v. Armata, 193 F. Supp. 624 (D. Mass. 1961), *with* United States v. Beard, 436 F.2d 1084, 1088–90 (5th Cir. 1971). The Committee has dealt with this matter by providing for Federal jurisdiction over theft of any type involving property worth more than $100.

adding the jurisdictional basis that the property is a benefit of a federally run or supported program and the actor is a recipient or applicant under the program, the Committee is not criminalizing any conduct which would not be punishable under current law.

Similarly, theft from federally supported programs by persons involved in the administration of the program must currently be prosecuted under 18 U.S.C. 371 (conspiracy to defraud the Government) or such fraudulent scheme provisions as 18 U.S.C. 1341 and 1342, since the property involved may have lost its identity as Federal Government property. The Committee has decided to protect the integrity of Government programs directly, by providing jurisdiction for embezzlement from programs receiving a significant amount of Federal funds.

The Committee added the new jurisdictional base pertaining to stocks and bonds (subsection (e)(15)) in order to provide a way for the Federal Government to reach organized criminal activity involving stolen and counterfeited corporate securities. *See* Hearings on Organized Crime—Securities Thefts and Frauds Before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, 93d Cong., 1st sess., Part I, at 1–9; Part II, at 123–36; and Part IV, at 516 (1973).

The Committee expanded the jurisdictional basis regarding property of the Federal Government to include property in which the Federal Government has a security interest. Some such property is protected in current law, *see* 18 U.S.C. 658. The Committee believes that there is a significant Federal interest in protecting property upon which the United States depends for the security of loans and mortgages. The jurisdictional basis for property of the Securities Protection Investment Corporation has been expanded from the current law by covering property of a trustee appointed in connection with proceedings under the Securities Investor Protection Act. The Committee believes that this expansion is appropriate in view of the fact that much property involved in proceedings under the Act is held in the hands of trustees, rather than by the Corporation.

Subsection (f) provides for Federal jurisdiction over an offense described in subsection (a)(3) (use of fraud to obtain property of another) when the property consists of: (1) any part of the compensation of a person employed in the construction, completion, repair, or refurbishing of a Federal public building, Federal public work, or building financed in whole or in part by a loan or grant from the United States, and is obtained or retained by fraud in relation to that person's employment (*see* 18 U.S.C. 874); or (2) funds under the Railroad Retirement Act of 1974 (*see* 45 U.S.C. 231l).

Subsection (g) provides for extraterritorial jurisdiction over an offense under section 2531 when (a) the actor is a United States national and (b) the property is owned by, or is under the care, custody or control of, the United States; is being produced, manufactured, constructed, or stored for the United States; or is subject to a security interest held by the United States. Subsection (g), in part, carries forward 18 U.S.C. 641, *United States* v. *Cotten*, 471 F.2d 744 (9th Cir. 1973), *cert. denied*, 411 U.S. 936 (1973), and is based upon the protective principle of international law.

§ *2532—Trafficking in stolen property*

This section sets forth a new offense involving stolen property that parallels the new offense of trafficking in smuggled property (section 1912 of the proposed code). The section is designed to distinguish between the trafficker (the professional fence) and the individual who buys or receives stolen property for personal use (who is dealt with in section 2533 of the proposed code).

Subsection (a) prohibits someone from knowingly trafficking in property stolen from another. Subsection (a) provides that an offense under this section is of the same class as an offense under section 2531 would be for the same property. Subsection (b) defines the term "traffic" to mean to transfer, or otherwise dispose of, to another as consideration for anything of value, or to obtain control with intent to transfer or dispose of as consideration for anything of value.

Subsection (c) provides for Federal jurisdiction over an offense under this section if—

there exists a circumstance set forth in section 2531(e) or (f) (relating to theft) of the proposed code;

the property is an interest bearing obligation of the United States;

the property has a value of at least $5,000 and, after having been stolen, is moved across a State or United States boundary before, or in connection with, the commission of the offense;

the property is ammunition, an explosive, a firearm, or a vehicle and, after having been stolen, is moved across a State or United States boundary before, or in connection with, the commission of the offense (the terms "ammunition", "explosive", and "firearm" are defined in section 2725 of the proposed code, and the term "vehicle" is defined in section 101 of the proposed code).

Subsection (d) provides for extraterritorial jurisdiction over an offense under this section when (a) the property is owned by, or is under the care, custody, or control of, the United States, is being produced, manufactured, constructed or stored for the United States, or is subject to a security interest held by the United States, and (b) the actor is a United States national. This provision is based on the protective and nationality principles of international law.

§ *2533—Receiving stolen property*

This section carries forward 18 U.S.C. 641, 644, 659, 662, 842(h), 922(j), 1024, 1163, 1660, 1708, 1854, 2113(c), 2197, 2312–2317. Section 2533, however, expands current law by providing for Federal jurisdiction over receiving stolen property in all instances in which section 2531 of the proposed code provides for Federal jurisdiction over theft.

Subsection (a) makes it an offense for someone knowingly to buy, receive, possess, or obtain control of property stolen from another. The offense is classified one class less than a theft of the same property would be classified under section 2531 of the proposed code. Persons convicted of both theft and receiving stolen property are not subject to multiple punishment for the same conduct. *See United States* v. *Trzcinski*, 553 F.2d 851, 853–55 (3d Cir.), *cert. denied*, 431 U.S. 919 (1977). Subsection (a) requires that the actor's state of mind about the fact that the property has been stolen be knowing.

The term "knowing" is defined in section 302(c) (relating to state of mind requirement for offenses described in this title) of the proposed code to include the concept of "willful blindness". See discussion at 35–6 *supra*. Thus, subsection (a) carries forward current law with respect to the state of mind required about the fact that the property has been stolen. *See United States* v. *Gallo*, 543 F.2d 361 (D.C. Cir. 1976); *United States* v. *Jacobs*, 475 F.2d 270 (2d Cir. 1973).

Subsection (b) provides a defense to a prosecution under section 2533 that the defendant bought, received, possessed, or obtained control of the property with intent to return the property to a person entitled to have the property.

Subsection (c) provides for Federal jurisdiction over an offense described in section 2533 if a circumstance set forth in section 2531 (e) or (f) or section 2532(c)(2) or (3) of the proposed code exists.

Subsection (d) provides for extraterritorial jurisdiction when (1) the actor is a United States national and (2) the property is owned by, or is under the care, custody, or control of, the United States; is being produced, manufactured, constructed, or stored for the United States; or is subject to a security interest held by the United States. This provision is based on the protective and nationality principles of international law.

§ *2534—Executing a fraudulent scheme*

This section carries forward 18 U.S.C. 1341, 1343, and 2314.

Subsection (a) makes it a class D felony for someone knowingly to (1) scheme to use fraud with intent to obtain property of another person or of a government, to cause economic loss to another person, or to deprive the citizens of a State or locality of the honest and faithful services of a public servant of such State or locality (see discussion at 310–11 *supra*.); and (2) engage in any conduct with intent to effectuate such scheme. Subsection (b) makes it a class E felony for someone knowingly to transfer (or to receive anything of value for) a right to participate in a pyramid sales scheme, or to receive compensation from a pyramid sales scheme.

By defining the offense in terms of the scheme to defraud, and describing the use of the mails, etc. as a jurisdiction basis (subsection (d), *infra*), the Committee has eliminated potential for abuse in prosecutions under this crime that arises because each mailing is a separate offense. See discussion at 310 *supra*. Under the Committee approach, each fraudulent scheme constitutes only one crime.

Subsection (c) defines, or modifies the definition of, four terms used in the section.

Subsection (c)(1) modifies the definition of "anything of value" (which is defined in section 101 of the proposed code) to exclude: (1) payment made for sales demonstration equipment; (2) material furnished on a nonprofit basis for use in making sales and not for resale; (3) time or effort spent in pursuit of sales or recruiting activities; (4) payment having an aggregate value of $100 or less when calculated on an annual basis; or (5) payment made primarily for the right to sell goods, services, or tangible or intangible property or to receive compensation based on the sale of goods, services or tangible or intangible property rather than for introduction of a person into participation in a plan or operation.

Subsection (c)(2) defines "compensation" to mean payment based on a sale or distribution made to a person who is a participant in a pyramid sales scheme or who, upon such payment, obtains the right to become a participant, but not to include any payment based on actual sales of goods, services or tangible or intangible property to persons who are not participants in the plan or operation or who purchase goods, services or tangible or intangible property in order to resell them.

Subsection (c)(3) defines "pyramid sales scheme" to mean a plan or operation, whether or not involving the sale or distribution of property, that includes a means of increasing participation in the plan or operation under which a participant, upon payment of anything of value, obtains a right to receive compensation (1) for the introduction of another person into participation in such plan or operation, where such other person is eligible to receive the same or similar right to receive compensation for the introduction of an additional person into participation; or (2) for such other person's introduction of an additional person into participation in such plan or operation, where such additional person is eligible to receive the same or similar right to receive compensation for the introduction of yet another person into participation.

Subsection (c)(4) defines "sale or distribution" to include a lease, rental, or consignment.

Subsection (d) provides for Federal jurisdiction over an offense described in section 2534 if, in furtherance of the scheme, the actor uses or causes the use of the United States mail; transmits or causes to be transmitted in interstate or foreign commerce any communication through wire, radio or television; or causes or induces another person to travel in or be transported in interstate or foreign commerce. There is also Federal jurisdiction if the scheme affects interstate or foreign commerce and involves the obtaining of insurance proceeds of $100,000 or more more through conduct which would violate section 2501 (relating to arson) of the proposed code if Federal jurisdiction existed under that section. The latter basis is new to Federal law.

§ *2535—Bankruptcy related offenses*

This section carries forward part of 18 U.S.C. 152. *See generally* 2A *Collier on Bankruptcy* ¶29.01 *et seq.* (14th ed. 1978).

Subsection (a) makes it an offense for a person, with intent to deceive a bankruptcy court or officer thereof or to defeat the purpose of title 11, knowingly to: (1) transfer, conceal, or receive property of an estate in a case under title 11; (2) transfer, conceal, or receive property of a debtor in contemplation of the filing of a petition subsequently filed under title 11; (3) alter, destroy, mutilate, conceal, make a false entry in, or withhold from a trustee or a bankruptcy court a document relating to the property or affairs of the debtor or the estate in a case under title 11 or a proceeding arising in or related to a case under title 11; or (4) offers, gives, agrees to give, solicits, accepts, or agrees to accept, anything of value because of acting or forbearing to act or having acted or forborne to act in a case under title 11 or a proceeding arising in or related to a case under title 11.

Subsection (a) requires that the actor have a specific intent. The actor must engage in the proscribed conduct "with intent to deceive a bankruptcy court or officer thereof" or "with intent to defeat the purpose of title 11". The language "with intent to deceive a bankruptcy court or officer thereof" is intended by the committee to carry forward the *scienter* requirement of each paragraph of 18 U.S.C. 152 which requires that the actor engage in the conduct "knowingly and fraudulently". The language "with intent to defeat the purpose of title 11" is intended by the Committee to bring forward, without change, the requirement in paragraphs (5) and (7) of 18 U.S.C. 152 that the actor engage in the conduct "with intent to defeat the provisions of title 11". *See Louisville Bank* v. *Radford*, 295 U.S. 555, 559 (1935). ("The essential features of bankruptcy law were: first, on the part of the debtor—a surrender of his property and its ratable distribution among his creditors; and second, on the part of the creditors—discharge of all claims against the debtor after distribution.")

Subsection (a)(1) carries forward the provisions of paragraphs (1), (5), and (7) of 18 U.S.C. 152. Current law has been modified, however, by deleting the requirement in paragraph (5) of 18 U.S.C. 152 that a "material" amount of property be involved. The Committee deleted the "material" requirement since

> "material" probably means no more than that the law will not consider trifles, *de minimus non curat lex*. It is difficult to see how any sum so small as not to be material could be considered as a part of a transaction to defeat the Bankruptcy Act.

2A *Collier on Bankruptcy* 1209 (14th ed. 1978). The "material" requirement, furthermore, is ambiguous because it is unclear to what sum the property must be material—the total estate or the dividends that creditors receive. *See* Levitt, *Federal Bankruptcy Act: Section Twenty-nine*, 11 Cornell L.Q. 300, 321–22 (1926).

Subsection (a)(2) carries forward paragraph (7) of 18 U.S.C. 152. Current law is clarified, however, by requiring that there be a filing of a petition under title 11 subsequent to the transfer, concealment, or receipt of property of a debtor. If a petition under title 11 were never filed, there would be no basis for an offense. The term "in contemplation" as used in subsection (a)(2) is intended to have the same meaning as "knowing", which is defined in section 301(c) (relating to definitions of states of mind) of the proposed code.

Subsection (a)(3) carries forward paragraphs (8) and (9) of 18 U.S.C. 152.

Subsection (a)(4) carries forward paragraph (6) of 18 U.S.C. 152. This bribery is not covered by sections 1721 (relating to witness bribery and graft), 1722 (relating to informant bribery and graft), 1751 (relating to bribery), 1752 (relating to graft) or 2555 (relating to commercial bribery) of the proposed code.

The conduct prohibited by paragraphs (2) and (3) of 18 U.S.C. 152 is carried forward in sections 1741 (relating to perjury) and 1742 (relating to making a false statement) of the proposed code. The conduct prohibited by paragraph (4) of 18 U.S.C. 152 is carried forward by section 2531 (e)(18) (relating to theft of property of the estate of a debtor) of the proposed code.

Subsection (b) classifies the offense as a D felony if the property involved has a value that exceeds $500 or if the offense is a violation of subsections (a)(3) or (a)(4). The offense is classified as an E felony in all other instances.

Subsection (c) provides that the concealment of property in violation of section 2535 is an offense that continues until the debtor is discharged or a discharge is denied. This carries forward the provisions of 18 U.S.C. 3284. Subsection (c) has the result of delaying the running of the statute of limitations for this offense under section 703(e)(2)(C) (relating to statute of limitations) of the proposed code.

§ *2536—Fraud in a regulated industry*

Subsection (a) makes it a class E felony for someone to violate section 912 of the Housing and Urban Development Act of 1970 (12 U.S.C. 1709–2) or section 239(b) of the National Housing Act (12 U.S.C. 1715z–4(b)). Subsection (b) makes it a class D felony for someone to violate section 1418 of the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1717). See discussion of these offenses at 311–12 *supra.*

The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in conduct prohibited by section 912 of the Housing and Urban Development Act of 1970, section 293(b) or the National Housing Act, or section 1418 of the Interstate Land Sales Full Disclosure Act in the circumstances and with the results and states of mind required by those provisions. The use of "violates" insures that this section incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

§ *2537—Criminal infringement of a copyright*

Section 2537 carries forward, with modification, the copyright infringement offense presently found in 17 U.S.C. 506. The modification of current law concerns the sentencing provision for record and film piracy, in which the sounds and images of copyrighted records and films are unlawfully duplicated. There has been an explosive growth in record and film piracy in recent years, depriving legitimate recording companies and motion picture studios of very large revenues. Record and film piracy has the effect of reducing the legitimate volume of sales and the payment of royalties to recording artists, actors and actresses, musicians, producers, directors, writers, composers, publishers, and other participants in the creative process. Reduced profits also deprive Federal, State and local governments of tax revenue.

Subsection (a) makes it an offense for someone to violate section 506(a) of title 17 of the United States Code. The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct required by section 506(a) of title 17 in the circumstances and with the results and states of mind required by section 506(a). The use of "violates" is intended to ensure that this section incorporates not only the exact provisions of section 506(a) of title 17, but also any judicial interpretation of that section.

Subsection (b)(1) classifies an offense under section 2537 as—

a D felony if the offense—

involves the reproduction or distribution, during any 180 day period, of at least 1,000 phonorecords, or copies infringing the copyright in one or more sound recordings;

involves the reproduction or distribution, during any 180 day period, of at least 65 copies infringing the copyright in one or more motion pictures or audiovisual works; or

involves a sound recording, motion picture, or audiovisual work, and is a second or subsequent offense under this section;

an E felony if the offense—

involves the reproduction or distribution, during any 180 day period, of more than 100 but less than 1,000 phonorecords, or copies infringing the copyright in one or more sound recordings;

involves the reproduction or distribution, during any 180 day period, of more than seven but less than 65 copies infringing the copyright in one or more motion pictures or audiovisual works; and

an A misdemeanor in any other instance.

Subsection (b)(2) provides that in a prosecution for an offense set forth in section 2537, no state of mind need be proven about any matter affecting the classification of the offense.

The classification scheme in section 2537 modifies current law, which provides the equivalent of class A misdemeanor punishment for any first offense and the equivalent of class E felony punishment for second and subsequent offenses and somewhat higher fines for record and film piracy. Subsection (b) provides greater penalties where the copyrights infringed involve records and movies. The Committee believes that increased penalties are necessary in light of the growth of record and film piracy. *See* Statement of the Motion Picture Association of America, Inc. and the Recording Industry Association of America, Inc., Hearings on Revision of Federal Criminal Laws before the Subcommittee on Criminal Justice. House Committee on the Judiciary, 96th Cong., 1st sess. (1980). When the offense involves criminal copyright infringement of a sound recording, motion picture, or audiovisual work, the offense is punished according to the magnitude of the conduct. Thus, for example, if 1,000 phonorecords or 65 films are unlawfully reproduced or distributed during any 180 day period, the offense is a class D felony. The quantity of copies required for a class D or class E offense under this subsection (b) may be composed of copies of different motion pictures or records which infringe a copyright. For example, production of 65 copies of motion pictures with different titles will qualify the offense as a class D felony.

The Committee considered this legislation at a time when video cassettes and video discs are beginning to appear on the market. In the future, pirated sound recordings may be embodied in video cassettes and video discs in which visual images have been added to the sounds of the copyrighted sound recording. As a technical matter, however, video cassettes and video discs are considered "audiovisual works" under the copyright law, not "phonorecords." To make clear

that the unauthorized reproduction and distribution of a copyrighted sound recording in the form of a video cassette or video disk is an offense covered by subsection (a), the Committee has included the word "copies" therein. The word "copies," as defined in section 101 of title 17 of the United States Code, includes video cassettes and video discs.

In order for the increased penalties to be effective in deterring record and film piracy, adequate enforcement efforts will be necessary. The Committee anticipates that, because of the increased penalties, the Department of Justice will be able to devote greater resources to the enforcement of these provisions and that adequate enforcement efforts will be forthcoming.

Subsection (c) (1) provides that the terms "sound recording", "motion picture", "audiovisual work", "phonorecord", and "copies" have the meanings given to those terms by section 101 of title 17. Subsection (c) (2) provides that the terms "reproduce" and "distribute" have the meanings given to those terms by section 106 of title 17.

§ *2538—Commandeering a vessel*

Section 2538 carries forward, with modifications, the provisions of Federal law relating to mutiny (18 U.S.C. 2193) which make it a felony for a member of the crew of a vessel, "unlawfully, and with force, or by fraud, or intimidation", to "usurp" command of the vessel from the lawful commander.

Subsection (a) makes it an offense for someone knowingly to use physical force, threat of physical force, or fraud and thereby to seize, or exercise control over, a vessel. (The term "vessel" is defined in section 101 of the proposed code.) Subsection (a) broadens current law because the subsection applies to any person, not just to a member of the crew of the vessel.

Subsection (a) classifies an offense described in section 2538 as a D felony if the defendant is a member of the crew of the vessel or if the offense is committed on the high seas, and as an E felony in any other instance. This modifies current law, which provides the equivalent of class C felony punishment for the offense. The Committee believes that the offense should provide for greater punishment when the offense is committed by a crew member or on the high seas because of the greater danger posed in such situations. The Committee believes that the classification scheme in section 2538 appropriately reflects the seriousness of the offense, a view supported by the Department of Justice.

Subsection (b) provides for extraterritorial jurisdiction over an offense described in section 2538 if the vessel is of United States registry.

§ *2539—Unauthorized use of a vehicle*

Section 2539 is new to Federal law. The section is intended to supplement the theft provision (section 2531 of the proposed code) by specifically dealing with "joyriding." When someone takes a vehicle belonging to another, the conduct will be theft under section 2531 if the owner of the vehicle is permanently deprived of the vehicle or is deprived of a substantial portion of the vehicle's value. The conduct will be covered by section 2539 if the deprivation is less than permanent or if something less than a substantial portion of the vehicle's value is taken away. Section 2539 is derived from, and patterned after, the recommendation of the Brown Commission (*see Final Report* section 1736).

Subsection (a) makes it an offense for someone knowingly to take, operate, or exercise control over an automobile, aircraft, motorcycle, motorboat, or other motor-propelled vehicle belonging to another person or to a government, without the consent of the other person or the government. The actor must know that consent is lacking.

Subsection (b) (1) classifies the offense as an E felony if the vehicle involved is an aircraft or if the value of the use of the vehicle and the cost of restoration exceed $500. (The term "aircraft" is defined in section 101 of the proposed code.) Subsection (b) (2) classifies the offense as an A misdemeanor in any other instance.

Subsection (c) provides a defense in the situation where the actor knows that consent is lacking but reasonably believed that the vehicle's owner would have consented had the owner known of the conduct upon which the prosecution is based, at or before the time the actor engaged in such conduct.

Subsection (d) provides for Federal jurisdiction in two circumstances: (1) when the offense occurs within the special jurisdiction of the United States; and (2) when the vehicle involved is the property of the United States.

§ *2540—Definitions for subchapter*

Subsection (a) defines 3 terms used in the subchapter. Subsection (a) (1) defines "written instrument" to have the meaning set forth in section 2546 (relating to definitions for subchapter) of the proposed code. Subsection (a) (2) defines "value" according to the type of property involved. "Value" means: (1) when used with respect to property that is a security interest, a lien or any other interest in property that is obtained through the extension of credit, the fair cash value at the time of the offense to the person deprived of such security interest, lien or other interest; (2) when used with respect to property that is a guarantee or insurance of a loan or mortgage, the maximum potential liability of the insurer or guarantor at the time of the offense; and (3) when used with respect to any other property, the aggregate value in terms of fair cash value at the time and place the offense is committed. In the latter instance, when the property which is the subject of the deprivation is an intangible right or interest (*see* definition of property in section 101 of the proposed code), the "value" is the value of the right or interest, not of the tangible property in which the right or interest resides. Subsection (a) (3) defines the term "stolen" to mean, when used with respect to property, that the property was obtained under circumstances in which such obtaining would be a violation of section 2531 of the proposed code if Federal jurisdiction existed.

Subsection (b) provides a bar to prosecution under sections 2531 (relating to theft), 2532 (relating to trafficking in stolen property), and 2533 (relating to receiving stolen property) of the proposed code when three conditions are met. The first condition is that the property be a government record (defined in section 1745 (relating to general provisions for subchapter) of the proposed code), or the information

contained in a government record, other than (1) a written instrument (as defined in section 2546 (relating to definitions for subchapter) of the proposed code); (2) information submitted to the Federal Government by persons other than Federal public servants in accordance with requirements of Federal law and protected from disclosure by Federal law, and Government records that contain such information; and (3) books, magazines, or similar publications prepared by a government or person for the purpose of commercial distribution. The second condition that must be met in order for the bar to apply is that the defendant have obtained or used the property primarily for the purpose of disseminating the property to the public. The third condition is that the property not be obtained by means of conduct that would violate section 2121 (relating to eavesdropping), 2124 (relating to intercepting correspondence), 2511 (relating to criminal entry), or 2512 (relating to criminal trespass) of the proposed code if Federal jurisdiction existed.

Here as elsewhere in the proposed code, the Committee has decided not to codify any evidentiary presumptions with respect to whether property was stolen. Thus, there are no evidentiary presumptions with respect to sections 2532 (relating to receiving stolen property) and 2533 (relating to trafficking in stolen property) of the proposed code. The Committee does not intend a result different from current law, but believes that matters of an evidentiary nature do not belong in the proposed code. Matters relating to the weight to be accorded to certain evidence are best left to development by case law and through the Federal Rules of Evidence. *See Ulster County Court* v. *Allen* 422 U.S. 140 (1979); Rothstein, *Developments and Trends in Evidence*, New York L.J., Oct. 31, 1979, at 1, col. 1.

SUBCHAPTER V—COUNTERFEITING, FORGERY, AND RELATED OFFENSES

Current Law

Counterfeiting and forgery are traditionally very similar offenses. The essence of each offense is the cheating of someone by means of passing a false writing. Counterfeiting, most frequently thought of in terms of currency, is traditionally the manufacture of whole bills or notes from engraving plates or printing equipment.

At common law, forgery was the fraudulent making of a false writing having apparent legal significance. Forgery would occur if one person signed another person's name without authority or if a negotiable instrument was altered. Traditional forgery has been expanded in some instances in current law to include endorsing an instrument with one's own signature but without the authority to make the endorsement. *See Gilbert* v. *United States*, 370 U.S. 650, 655–57 (1962). Counterfeiting at common law was the unlawful making of false money in the similitude of the genuine. R. Perkins, *Criminal Law* 340, 356 (2d ed. 1969).

In current Federal law the terms forgery and counterfeiting have been coupled in the same offenses with respect to particular types of writings. The universal circulation of paper money and the issuance of many types of documents by the Government has caused the distinction between the two crimes to be blurred. *Id.* at 358. Subchapter V of chapter 25 of the proposed code restores the distinction and by the parallel construction of the sections covers all offenses involving false writings. The overlap of the current offenses has created a problem of improperly drawn indictments, subsequent second prosecutions, and consequent double jeopardy problems. *See United States* v. *Sebastian*, 562 F.2d 211, 214 (2d Cir. 1977).

Current Federal provisions pertaining to counterfeiting and forgery, while found throughout the various titles of the United States Code, are primarily contained in title 18. The provisions cover a number of situations, including protection of Federal obligations and securities; protection of foreign obligations, securities, and tax stamps; protection of Federal documents and other writings of the United States; proscription of the use of counterfeited and forged documents to influence actions of Federal agencies; and proscription of the interstate transportation of counterfeited and forged securities and tax stamps. The principal current provisions are set out below.

The issuance or utterance of a false or fraudulent warehouse receipt, or the changing in any manner of an original receipt subsequent to issuance by a licensee, is prohibited by 7 U.S.C. 270.

Someone "who falsely makes, issues, alters, forges, or counterfeits any marketing certificate, or with fraudulent intent possesses, transfers, or uses any such falsely made, issued, altered, forged, or counterfeited marketing certificate", violates 7 U.S.C. 1379i.

The alteration of food stamp coupons is punished by 7 U.S.C. 2023.

The forging and counterfeiting of "any permit or evidence of permission to depart from or enter the United States" and the use, or furnishing to another for use, or "any false, forged, counterfeited . . . or altered permit", is proscribed by 8 U.S.C. 1185.

Someone "who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration or an alien registration receipt card", violates 8 U.S.C. 1306.

The alteration and falsification of "any of the coins coined at the mints of the United States, or any foreign coins which are by law made current or are in actual use of circulation as money within the United States," as well as the knowing possession, utterance (including attempts to utter), and importation of such coins, is prohibited by 18 U.S.C. 331.

A Federal Reserve Agent, or an employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, who issues or puts in circulation any Federal Reserve notes without complying with or in violation of the regulations for such issuance and circulation is subject to punishment under 18 U.S.C. 334. An officer of a national bank who delivers or countersigns any circulating notes of a national bank except in strict accordance with chapter 2 of title 12, U.S.C., also violates 18 U.S.C. 334.

A director, officer, agent, trustee, or agent of a trustee of a corporation created by act of Congress, the charter of which has expired, or any person having under his control the property of such corporation, who puts in circulation any bill, note, check, draft, or other security

purporting to have been made by such corporation shall be punished as provided by 18 U.S.C. 335.

Someone who falsely makes, counterfeits, or alters, "any obligation or other security of the United States", with intent to defraud, violates 18 U.S.C. 471.

The passing, uttering, publishing, importation, or possession of any obligation or security of the United States is punished by 18 U.S.C. 472.

The purchase, sale, exchange, transfer, receipt, or delivery of any obligation or security of the United States, "with the intent that the same be passed, published, or used as true and genuine" is prohibited by 18 U.S.C. 473.

The false making, altering, forging, or counterfeiting of "any bond, certificate, obligation, or other security of any foreign government, purporting to be or in imitation of any such security issued under the authority of such foreign government, or any treasury note, bill, or promise to pay, lawfully issued by such foreign government and intended to circulate as money" is proscribed by 18 U.S.C. 478.

The knowing possession or delivery of "any false, forged, or counterfeit bond, certificate, obligation, security, treasury note, bill, promise to pay, bank note, or bill issued by a bank or corporation of any foreign country", violates 18 U.S.C. 480.

The false making, altering, forging, or counterfeiting of "any bank note or bill issued by a[n authorized] bank or corporation of any foreign country, and intended by the law or usage of such foreign country to circulate as money", violates 18 U.S.C. 482.

The uttering, passing, or tendering in payment by the use of a bank note or bill that was the fruit of a violation of 18 U.S.C. 482 is prohibited by 18 U.S.C. 483.

Someone who places or connects together "different parts of two or more notes, bills, or other genuine instruments issued under the authority of the United States, or by any foreign government, or corporation, as to produce one instrument, with intent to defraud" violates 18 U.S.C. 484.

Someone who falsely makes, forges, or counterfeits "any coin or bar in resemblance or similitude of any coin of a denomination higher than five cents or any gold or silver bar coined or stamped at any mint or assay office of the United States, or in resemblance or similitude of any foreign gold or silver coin current in the United States or in actual use and circulation as money within the United States", violates 18 U.S.C. 485. The passing, uttering, publishing, selling, possessing, or importing of any such coin is also punished by 18 U.S.C. 485.

Someone who, except as authorized by law, makes, utters, or possesses, or attempts to utter or pass, "any coins of gold or silver or other metal, or alloys of metal, intended for use as current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design," violates 18 U.S.C. 486.

The false making, forging, or counterfeiting of "any coin in the resemblance or similitude of any of the minor coins coined at the mints of the United States" is proscribed by 18 U.S.C. 490. The passing, uttering, publishing, sale, importation, or possession of any such coin, with the intent to defraud any person is also proscribed by 18 U.S.C. 490.

The false making, forgery, counterfeiting, or alteration of "any note, bond, debenture, coupon, obligation, instrument, or writing in imitation, or purporting to be in imitation of, a note, bond, debenture, coupon, obligation, instrument, or writing, issued by" specified financial and housing institutions is punished by 18 U.S.C. 493. The passing, uttering, or publishing such documents is also punished by 18 U.S.C. 493.

Falsely making, altering, forging, or counterfeiting "any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States," as well as uttering or publishing as true, or possessing with the intent to utter or publish as true, any such writing knowing it to be of the prohibited character is prohibited by 18 U.S.C. 494. The knowing transmission to, or presentation of any such writing "at any office or to any officer of the United States" is also prohibited by 18 U.S.C. 494.

The false making, altering, forging, or counterfeiting of "any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving or enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money" violates 18 U.S.C. 495. The knowing utterance or publication as true of any such writing, with intent to defraud the United States, also violates 18 U.S.C. 495. Finally, the knowing transmission to, or presentation "at any office or officer of the United States," of any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, violates 18 U.S.C. 495. A forged endorsement was held to be a forged writing under a predecessor statute to 18 U.S.C. 495 in *Prussian v. United States*, 282 U.S. 675, 679 (1931).

Someone who forges, counterfeits, or falsely alters "any writing made or required to be made in connection with the entry or withdrawal of imports or collection of customs duties," or uses any such writing knowing that the writing is forged, counterfeited, or falsely altered, violates 18 U.S.C. 496.

Falsely making, forging, counterfeiting, or altering "any letters patent granted or purporting to have been granted by the President of the United States" violates 18 U.S.C. 497. In addition, passing, uttering, or publishing any such letters patent knowing them to be forged, counterfeited, or altered, also violates 18 U.S.C. 497.

Someone who forges, counterfeits, or falsely alters a certificate of discharge from the armed forces of the United States or uses, unlawfully possesses or exhibits such a certificate violates 18 U.S.C. 498.

Someone who falsely makes, forges, counterfeits, alters, or tampers with "any naval, military, or official pass or permit, issued by or under the authority of the United States," violates 18 U.S.C. 499. The use or possession of any such pass with the intent to defraud also violates 18 U.S.C. 499.

Someone who falsely makes, forges, counterfeits, engraves, or prints "any order in imitation of or purporting to be a blank money order or a money order issued by or under the direction of the Post Office Department or Postal Service" violates 18 U.S.C. 500. The forging or counterfeiting of "the signature or initials of any person authorized

to issue money orders upon or to any money order, postal note, or blank therefor provided or issued by or under the direction of the Post Office Department or Postal Service," as well as "any material signature or indorsement thereon, or any material signature to any receipt or certificate of identification thereof," also violates 18 U.S.C. 500. Finally, the false alteration, "in any material respect," of "any such money order or postal note," the passing, uttering, or publishing of "any such forged or altered money order or postal note," and the transmission or presentation of any such instrument, violates 18 U.S.C. 500.

Forging or counterfeiting "any postage stamp, postage meter stamp, or any stamp printed upon any stamped envelope, or postal card, or any die, plate, or engraving thereof," is prohibited by 18 U.S.C. 501. In addition, manufacture, knowing use or sale, or possession with intent to use or sell, of "any paper bearing the watermark of any stamped envelope, or postal card, or any fraudulent imitation thereof," is prohibited by 18 U.S.C. 501.

Someone who forges or counterfeits any postage stamp or revenue stamp of any foreign government, or who knowingly utters or uses any such stamp, violates 18 U.S.C. 502.

Forging or counterfeiting "any postmarking stamp, or impression thereof with intent to make it appear that such impression is a genuine postmark," and the knowing use or sale, or possession with the intent to use or sell, of "any forged or counterfeited postmarking stamp, die, plate, or engraving, or such impression thereof" is prohibited by 18 U.S.C. 503.

Forgery of "the signature of any judge, register, or other officer of any court of the United States or of any territory thereof;" forgery or counterfeiting of "the seal of any such court;" knowing concurrence in the use of any such forged or counterfeit signature or seal, "for the purpose of authenticating any proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit," all violate 18 U.S.C. 505.

Someone who falsely makes, forges, counterfeits, mutilates, or alters "the seal of any department or agency of the United States", violates 18 U.S.C. 506. In addition, someone who knowingly uses, affixes or impresses any such seal "to or upon any certificate, instrument, commission, document, or paper, of any description," violates 18 U.S.C. 506. Finally, someone who knowingly possesses any such seal, with the intent to defraud also violates 18 U.S.C. 506.

The false making, forging, counterfeiting, or altering of "any instrument in imitation of or purporting to be, an abstract or official copy or certificate of the recording, registry, or enrollment of any vessel, in the office of any collector of the customs, or a license to any vessel for carrying on the coasting trade or fisheries of the United States, or a certificate of ownership, pass, or clearance, granted for any vessel, under the authority of the United States, or a permit, debenture, or other official document granted by any collector or other officer of the customs by virtue of his office," violates 18 U.S.C. 507. The uttering, publishing or passing as true, as well as attempts so to do, of any of the proscribed items also violates 18 U.S.C. 507.

The false making, forging, counterfeiting, or altering of any "form or request provided by the Government for requesting a common carrier to furnish transportation on account of the United States or any department or agency thereof," is proscribed by 18 U.S.C. 508. The knowing passing, uttering, publishing, or selling of any such form or request is also proscribed by 18 U.S.C. 508.

Someone who possesses, "knowingly and with intent to defraud the United States, or any agency thereof," "any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money" violates 18 U.S.C. 1002.

Someone who "knowingly and fraudulently" demands or endeavors "to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, wages, gratuity, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority of instrument", violates 18 U.S.C. 1003.

The forging or counterfeiting of "any instrument, paper or document" for the purpose of influencing the action of the Federal Savings and Loan Insurance Corporation is prohibited by 18 U.S.C. 1008. The knowing uttering, publishing, or passing as true of any such instrument is also prohibited by 18 U.S.C. 1008.

The altering, forging, or counterfeiting of any instrument, paper, or document, as well as the knowing uttering, publishing, or passing as true of any such document, "for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department" is prohibited by 18 U.S.C. 1010.

The knowing use "for any purpose [of] any order, certificate of naturalization, certificate of citizenship, judgment, decree, or exemplification, unlawfully . . . made, or copies or duplicates thereof, showing any person to be naturalized or admitted to be a citizen," is proscribed by 18 U.S.C. 1423.

The false making, forging, altering, or counterfeiting of "any oath, notice, affidavit, certificate of arrival, declaration of intention, certificate or documentary evidence of naturalization or citizenship or any order, record, signature, paper or proceeding or any copy thereof, required or authorized by any law relating to naturalization or citizenship or registry of aliens," is proscribed by 18 U.S.C. 1426. In addition, the uttering, selling, disposing of, or using as true or genuine any of the specified items as well as the possession thereof with the intent to unlawfully use, is also proscribed by 18 U.S.C. 1426.

Someone who alters or falsifies "any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect," violates 18 U.S.C. 1506.

The false making, forging, counterfeiting, mutilating, or altering of "any passport or instrument purporting to be a passport," with the intent that such passport or instrument be used, is prohibited by 18 U.S.C. 1543. The willful and knowing use, or attempt to use, or the furnishing "to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport," are also prohibited by 18 U.S.C. 1543.

The knowing forgery, counterfeiting, altering, or false making of "any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States," is prohibited by 18 U.S.C. 1546. The knowing utterance, use, attempt to use, possession, obtaining, acceptance, or receipt of any such visa, permit, or document is also prohibited by 18 U.S.C. 1546.

The altering, forging, and counterfeiting of "any certificate, license, or document issued to vessels, or officers or seaman by any officer or employee of the United States authorized by law to issue the same", or by any person, violates 18 U.S.C. 2197. The unlawful possession or knowing use of any such certificate, license, or document also violates 18 U.S.C. 2197. Unauthorized printing of blank forms of such certificates or possession with intent unlawfully to use such blank forms also violates 18 U.S.C. 2197. Finally, transferring, or negotiating the transfer of any such altered, or counterfeited, stolen or blank forms of such certificates violates 18 U.S.C. 2197.

The transportation in interstate or foreign commerce of "any falsely made, forked, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited" violates 18 U.S.C. 2314. The transportation in interstate or foreign commerce, with fraudulent intent, of any traveler's check bearing a forged countersignature also violates 18 U.S.C. 2314. The "narrow view" of forgery is that the signature of another person must be placed on a writing for a forgery to be created. This view focuses upon the *false making* of the writing but has been criticized for not focussing upon the making of a *false writing*. R. Perkins, *Criminal Law* 341 (2d ed. 1969). Endorsements have been treated differently. A forged endorsement was held not to create a forged security under this section in *United States* v. *Simpson* 577 F. 2d 78, 80 (9th Cir. 1978). The "broad view" of forgery will find a forgery if the name executed on the instrument is that of a fictitious person, even if the party accepting the writing did not rely upon the writing but upon the utterer. This is the view of most circuits. *See Hall* v. *United States*. 372 F. 2d 603, 610 (8th Cir.). *cert. denied*, 387 U.S. 923 (1967); *Cunningham* v. *United States*, 272 F.2d 791, 794 (4th Cir. 1959). The Fifth Circuit has followed the narrow view of forgery, but held that the term "false making" broadens the rigorous concepts of forgery in prosecutions under this section. *United States* v. *Hagerty*, 561 F.2d 1197, 1199 (5th Cir. 1977) (upholding a conviction for uttering fictitious bank drafts). "Falsely made", however, does not mean merely containing false statements of fact, e.g. a false mileage report in a motor vehicle certificate of title. *United States* v. *Rudge*, 474 F. Supp. 360 (S.D. Iowa, 1979). Another, more recent, case has reached an opposite result with respect to a motor

vehicle certificate of title issued without a recitation of the existence of a lien. *United States* v. *Sparrow*, 614 F.2d 229 (10th Cir. 1980). This contradiction reflects the difficulty in analyzing whether a writing is forged or falsely made because, although properly issued, the issuance is based upon a fraudulent representation. (*Sparrow* appears to turn on a misreading of 18 U.S.C. 2314. *See* dissenting opinion of Circuit Judge McKay, *United States* v. *Sparrow*, 614 F.2d 229, 235–37 (10th Cir. 1980)).

Receiving, concealing, storing, bartering, selling, or disposing of "any falsely made, forged, altered, or counterfeited securities or tax stamps," and knowingly pledging or accepting as security for a loan "any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, which are a part of, or which constitute interstate of foreign commerce," knowing that such securities or tax stamps have been falsely made, forged, altered, or counterfeited is prohibited by 18 U.S.C. 2315.

The altering, forging, making, or counterfeiting, with intent to defraud, of "any stamp, coupon, ticket, book, or other device prescribed under authority of this title for the collection or payment of any tax imposed by this title," as well as the sale, lending, or possession of "any such altered, forged, or counterfeited stamp, coupon, ticket, book, or other device", is prohibited by 26 U.S.C. 7208(1). The fraudulent use, joining, fixing, or placing to, with or upon "any vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title . . . [of] any forged or counterfeited stamp, or the impression of any forged or counterfeited stamp, die, plate, or other article", is prohibited by 26 U.S.C. 7208(3)(C). Someone who willfully removes or alters the cancellation or defacing marks of any adhesive stamp, "with intent to use, or cause the same to be used, after it has already been used", violates 26 U.S.C. 7208(4)(A). Dealing in and possession of any such stamps is proscribed by 26 U.S.C. 7208(4)(B) and (C). The forging, alteration, or changing of any Selective Service System registration certificate, as well as the possession of a certificate so forged, altered, or changed, is prohibited by 50 U.S.C. App. 462(b).

§ 2541—Counterfeiting

Section 2541, section 2542 (relating to forgery) and section 2543 (relating to making, trafficking in, or possessing a counterfeiting or forging implement) of the proposed code carry forward offenses found in 12 titles of the United States Code, including 39 sections in title 18.

Subsection (a) makes it an offense for someone, with intent to defraud another person or a government, knowingly to make, conceal, utter or possess a counterfeit written instrument. Intent to defraud as an element of the offense is carried forward from the current statutes in order to convey not only an intent to deprive monetarily, but to deceive by the use of or falsely to invite reliance upon a written instrument. *United States* v. *Hester*, 598 F.2d 247, 248–49 (D.C. Cir. 1979); *United States* v. *Lewis*, 592 F.2d 1282 (5th Cir. 1979).

The term "counterfeit written instrument" is defined in section 2546(1) of the proposed code to mean a written instrument that is a likeness of, or purports to be, a genuine written instrument but is not

genuine, because such written instrument has been falsely made or manufactured.

There are three categories of written instruments (defined in section 2546(8) of the proposed code):

(1) A security, which is defined in section 2546(5) of the proposed code to include "obligations of the United States" (defined in section 2546(4) of the proposed code), other negotiable instruments, certificates of interest in tangible or intangible property, currency and stamps.

(2) A commercial paper or document, or other commercial instrument containing written or printed matter or its equivalent.

(3) A symbol or evidence of value, right, privilege, interest, claim, or identification that is capable of being used to the advantage or disadvantage of any person. Intended to be included in this term are passports, visas, seals, badges, official identification cards, medals and the trademarks of the Indian Arts and Crafts Board (18 U.S.C. 1158).

Subsection (b)(1)(A) classifies an offense described in section 2541 as a C felony if the counterfeit written instrument purports to be, or is, a likeness of a security of the United States or has an aggregate face value that exceeds $100,000. Subsection (b)(1)(B) classifies the offense as a D felony if the counterfeit written instrument (1) purports to be, or is, a likeness of a written instrument made or issued by or under the authority of the government (other than a security of the United States), a security of a national credit institution (which is defined in section 1745 (relating to general provisions for subchapter) of the proposed code) or of a corporation created by an act of Congress, the charter of which has expired; (2) has an aggregate face value greater than $3,000 but not greater than $100,000; or (3) is made, concealed, uttered, or possessed under circumstances that evince the making, or capacity for making, multiple copies. Subsection (b) classifies the offense as an E felony if the counterfeit written instrument is of an aggregate face value that exceeds $500 but does not exceed $3,000. Subsection (b) classifies the offense as an A misdemeanor in any other instance. The classification of the offense by value parallels the classification for theft offenses, section 2531 of the proposed code, and the approach taken by the Brown Commission, *Final Report*, section 1751, comment at 223–24 (1971). *See* Brown Commission, *Working Papers* 965–67 (1970). *See also* Model Penal Code section 224.1, comment (Tent. Draft No. 11, 1960).

Subsection (b)(2) provides that, in a prosecution for an offense described in section 2541, no state of mind need be proven with respect to any value used in determining the class of the offense.

Subsection (c) provides for Federal jurisdiction over an offense described in section 2541 when (1) the offense is committed within the special jurisdiction of the United States; (2) the written instrument purports to be, or is, a likeness of a written instrument made or issued by or under the authority of the United States (carrying forward 18 U.S.C. 471 (obligations and securities of the United States), 18 U.S.C. 496 (customs matters), 18 U.S.C. 497 (letters patent), 18 U.S.C. 498, 499 (military and naval passes and discharge papers), 18 U.S.C. 505 (seals of court); made or issued by or under the authority of a

foreign government, bank or corporation (carrying forward 18 U.S.C. 480, 482, 483); a security of a State or local government, or of a person other than an individual, and that security is moving in or is part of interstate or foreign commerce or has been shipped or transported in interstate or foreign commerce; a security of a corporation created by an act of Congress, the charter of which has expired (carrying forward 18 U.S.C. 335), a circulating note of a national credit institution (defined in section 1745 of the proposed code) (carrying forward 18 U.S.C. 334) or a security issued by a national credit institution (carrying forward 18 U.S.C. 493); or (3) the government intended to be defrauded is the United States Government (carrying forward 18 U.S.C. 494).

The Committee has expanded Federal jurisdiction in this area to cover the securities and obligations of domestic organizations, including State and local governments, when the counterfeit written instrument is moving in or constitutes part of interstate or foreign commerce or has been shipped or transported in interstate or foreign commerce. This expansion was designed to close the gaps in Federal counterfeiting jurisdiction being exploited by organized crime. See Hearings on Organized Crime—Securities: Thefts and Frauds (second series) Part 2 before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 93d Cong., 1st sess., at 123–273 (1973).

The Committee has also expanded Federal jurisdiction within the special jurisdiction of the United States. This change is a logical one, because at present, 10 sections (18 U.S.C. 478, 480, 482, 483, 485, 490, 494, 495, 497 and 499) are applicable within the special jurisdiction of the United States. Subsection (c)(1) provides for Federal jurisdiction when any offense described in section 2541 is committed within the special jurisdiction of the United States.

Subsection (d) provides for extraterritorial Federal jurisdiction when the written instrument purports to be, or is, a likeness of a written instrument made or issued by or under the authority of the United States. This provision is based upon the protective principle of international law. *See United States* v. *Birch*, 470 F.2d 808, 811–12 (4th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (upholding the exercise of extraterritorial jurisdiction in connection with the forgery or false use of a military pass under 18 U.S.C. 499).

§ 2542—Forgery

Subsection (a) makes it an offense for someone, with intent to defraud another person or government, knowingly to make, conceal, utter or possess a forged written instrument. A forged written instrument (defined in section 2546(3) of the proposed code) is a written instrument that is a likeness of, or purports to be, a genuine written instrument but is not genuine because such written instrument: (a) has been falsely altered, completed, signed, or endorsed; (b) contains a false addition or insertion; (c) is a combination of parts of 2 or more genuine written instruments; or (d) has been issued without authority or in violation of the law governing the issuance of such written instrument.

The phrase "falsely signed, completed or endorsed" carries forward the traditional meaning of a lack of genuineness in the instrument.

The Committee chose to also cover "false agency signatures" in which the actor executes his or her own signature and represents to have an authority that is exceeded or nonexistent. The signature is genuine, but strictly speaking the writing is false because the writing purports to speak for the principal but in fact does not. *See* R. Perkins, *Criminal Law* 346 (2d ed. 1969). Fake agency signatures were held not to have been within the congressionally intended definition of forgery by Mr. Justice Harlan in *Gilbert* v. *United States*, 370 U.S. 650, 659 (1962).

The last clause of the definition is also intended to incorporate in the forgery section writings that are issued in violation of the law (e.g., 18 U.S.C. 334, 335). Such instruments, genuine on their face, but having been issued unlawfully, are false. Because of the writing's essential lack of authority, the Committee chose to include this type of offense in the forgery section.

Subsection (b) classifies an offense described in section 2542 as a C felony if the forged written instrument purports to be, or is, a likeness of a security of the United States or has an aggregate face value that exceeds $100,000. Subsection (b) classifies the offense as a D felony if the forged written instrument (1) purports to be, or is, a likeness of a written instrument made or issued by or under the authority of a government (other than a security of the United States), or a security of a national credit institution (which is defined in section 1745 (relating to general provisions for subchapter) of the proposed code) or of a corporation created by an act of Congress, the charter of which has expired; (2) has an aggregate face value greater than $3,000 but not greater than $100,000; or (3) is made, concealed, uttered, or possessed under circumstances that evince the making, or capacity for making, multiple copies. Subsection (b) classifies the offense as an E felony if the forged written instrument is of an aggregate face value that exceeds $500 but does not exceed $3,000 and as an A misdemeanor in any other instance. The classification of the offense by value parallels the classification for theft offenses, section 2531 of the proposed code and the approach taken by the Brown Commission. *See Final Report* section 1751, Comment at 223–24 (1971), and *Working Papers* 965–67 (1970). *See also* Model Penal Code Section 224.1, Comment (Tent. Draft No. 11, 1960).

Subsection (b) (2) provides that, in a prosecution for an offense described in section 2542, no state of mind need be proven with respect to any value used in determining the class of the offense.

Subsection (c) provides for Federal jurisdiction over an offense described in section 2542 by cross reference to section 2541(c) (relating to counterfeiting) of the proposed code, which provides that Federal jurisdiction exists when (1) the offense is committed within the special jurisdiction of the United States; (2) the written instrument purports to be, or is, a likeness of a written instrument made or issued by or under the authority of the United States (carrying forward 18 U.S.C. 471 (obligations and securities of the United States), 18 U.S.C. 496 (customs matters), 18 U.S.C. 497 (letters patent), 18 U.S.C. 498, 499 (military and naval passes and discharge papers), 18 U.S.C. 505 (seals of court)); made or issued by or under the authority of a foreign government, bank or corporation (carrying forward 18 U.S.C. 480, 482, 483); a security of a State or local government, or of a person other than an individual, and that security is moving in or is part of interstate or foreign commerce or has been shipped or transported in interstate or foreign commerce; a security of a corporation created by an Act of Congress, the charter of which has expired (carrying forward 18 U.S.C. 335), a circulating note of a national credit institution (which is defined in section 1745 of the proposed code) (carrying forward 18 U.S.C. 334), or a security issued by a national credit institution (carrying forward 18 U.S.C. 493); or (3) the government intended to be defrauded is the United States Government (carrying forward 18 U.S.C. 494).

The Committee has expanded Federal jurisdiction in this area to cover the securities and obligations of domestic organizations, including State and local governments, when the forged written instrument is moving in or constitutes part of interstate or foreign commerce or has been shipped or transported in interstate or foreign commerce. This expansion was designed to close the gaps in Federal forgery jurisdiction being exploited by organized crime. See Hearings on Organized Crime—Securities: Thefts and Frauds (second series) Part 2, before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 93d Cong., 1st sess., at 123–273 (1973).

The Committee has also expanded Federal jurisdiction within the special jurisdiction of the United States. This change is a logical one, because at present, 10 sections (18 U.S.C. 478, 480, 482, 483, 485, 490, 494, 495, 497 and 499) are applicable within the special jurisdiction of the United States. Subsection (c) provides for Federal jurisdiction when any offense described in section 2542 is committed within the special jurisdiction of the United States.

Subsection (d) provides for extraterritorial Federal jurisdiction when the written instrument purports to be, or is, a likeness of a written instrument made or issued by or under the authority of the United States. This provision is based upon the protective principle of international law. *See United States* v. *Birch*, 470 F.2d 808, 811–12 (4th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (upholding the exercise of extraterritorial jurisdiction in connection with the forgery or false use of a military pass under 18 U.S.C. 499); *United States* v. *Fernandez*, 496 F.2d 1294 (5th Cir. 1974) (construing 18 U.S.C. 495 as having extraterritorial application).

§ 2543—Making, trafficking in, or possessing a counterfeiting or forging implement

Section 2543 carries forward 16 U.S.C. 718; 18 U.S.C. 474, 476, 477, 481, 487, 488, 500, 501, 503, 509, 1426, 1546, 2314, and 2315, and 26 U.S.C. 7208. Those sections prohibit the possession, use, or transportation of the various devices used for printing or engraving counterfeits or genuine written instruments without authority.

Subsection (a) makes it an offense for someone to make, conceal, traffic in or possess a counterfeiting or forging implement, with intent that such implement be used in making a counterfeit or forged written instrument or another counterfeiting or forging implement. The term "counterfeiting or forging implement" is defined in section 2546(2) of the proposed code to mean an engraving, plate, hub, stone,

paper, tool, die, mold, ink, photograph, negative or other implement or impression designed or suited for the making of a genuine or counterfeit or forged written instrument or another counterfeiting or forging implement. This definition brings forward current law by including all types of utensils that are used for making the written instruments that are the subject of counterfeiting and forging offenses.

Subsection (b) classifies the offense as a class C felony in the case in which the implement is designed or suited to make securities of the United States, or false written instruments of an aggregate value of more than $100,000. This generally carries forward the current penalties. The offense is a class D felony if the circumstances show that the implement can be used to make 3 or more copies of a written instrument or if the implement is designed or suited for making false instruments of an aggregate value of greater than $3,000 but less than $100,000. The offense is a class E felony in any other case. The value classifications parallel the classifications for theft offenses, section 2531, and the counterfeiting and forgery offenses of the proposed code. Subsection (b)(2) provides that, in a prosecution of an offense described in section 2543, no state of mind need be proven with respect to any value used in determining the class of the offense.

Subsection (c) provides for Federal jurisdiction over an offense described in this section when (1) the offense is committed within the special jurisdiction of the United States; (2) the written instrument, for which the implement (or the implement to be made) is designed or suited to make, is or purports to be, made or issued by or under the authority of or guaranteed by the United States, or is made or issued by or under the authority of a foreign government, bank or corporation; is a security of a State or local government or of a person other than an individual, and the implement is moving in or constitutes or is part of interstate or foreign commerce, or has been shipped or transported in interstate or foreign commerce; is a security of a corporation created by an Act of Congress, the charter of which has expired; a circulating note of a national credit institution; a security issued by a national credit institution and the offense is committed by an agent of such institution.

Subsection (d) provides for extraterritorial Federal jurisdiction when the written instrument, for which the implement (or the implement to be made) is designed or suited to make, is or purports to be made or issued by or under the authority of, or guaranteed by the United States. This provision is based on the protective principal of international law and carries forward current law. *United States* v. *Fernandez*, 496 F.2d 1294 (5th Cir. 1974) (construing 18 U.S.C. 495 as having extraterritorial application).

§ *2544—Trafficking in counterfeit labels for phonorecords, and copies of motion pictures and audiovisual works*

This section carries forward, in modified form, 18 U.S.C. 2318 and reaches record and film label counterfeiting, a form of record and film piracy (*see* discussion of section 2537 (relating to criminal infringement of a copyright) of the proposed code at 324–26 *supra.*). A record or film counterfeiter duplicates the package, graphics, and performance of the original work, leading consumers to believe that they are

buying a product emanating from a legitimate motion picture studio or recording company. The duplicate of the package and graphics may come close to the original in quality since high quality photographic reproduction and printing is now simply and inexpensively obtained. But since the duplication of the performance is technically much more difficult and expensive, the performance is usually technically inferior.

Subsection (a) makes it a class D felony for someone to traffic in counterfeit labels which are affixed, or designed to be affixed, to a phonorecord or to a copy of a motion picture or an audiovisual work. The counterfeit label must be affixed to the record or film when the record or film moves in interstate commerce in order that the offense be committed under current law. Record and film counterfeiters have been avoiding Federal jurisdiction by shipping the counterfeit labels unattached, shipping the discs, 8-track cartridges, or other containers separately, and then affixing the labels. Subsection (a) changes current law and refers to counterfeit labels which are "affixed or designed to be affixed". Thus, even though the counterfeit labels may be shipped unattached and separately, there is an offense under this section as long as those labels are designed to be affixed.

Current law (18 U.S.C. 2318) provides the equivalent of class A misdemeanor penalties for a first offense and class E felony penalties for a second offense. The Committee has changed current law to provide class D felony penalties for any violation. Record and film counterfeiting has been growing at an alarming rate. The Committee therefore decided to increase the penalty and to treat all violations (whether a first or subsequent offense) alike.

Subsection (b)(1) defines the term "counterfeit label" to mean an identifying label or container that appears to be genuine but is not. The term includes the entire package of a tape, video cassette, or sound recording—album covers, sleeves, jackets, containers, and so on. The term also includes simulated genuine labels that have not previously existed publicly. There are instances, for example, where a film counterfeiter has reproduced packages and distributed video tapes of a film not released to the public in that form. The definition of "counterfeit label" in subsection (b) would permit the prosecution of such activity under this section.

Subsection (b)(2) provides that the terms "phonorecord", "motion picture", and "audiovisual work" have the meanings given to those terms in section 101 of title 17 of the United States (relating to copyrights).

Subsection (c)(1) provides for Federal jurisdiction over an offense described in this section if the offense is committed within the special jurisdiction of the United States. This is new to Federal law. Subsection (c)(2) provides for Federal jurisdiction over an offense described in this section if the mail or a facility of interstate or foreign commerce is used in the commission of the offense. This carries forward 18 U.S.C. 2318 insofar as the use of interstate commerce facilities is concerned; the use of the mail is new. Subsection (c)(3) provides for Federal jurisdiction over an offense described in this section if the counterfeit label is affixed to, or encloses, or is designed to be affixed to or enclose, a copyrighted audiovisual work or motion picture, or a phonorecord of a copyrighted sound recording. This is new to current

law and permits Federal prosecution when the activity involves pre-1972 audiovisual works, motion pictures, or sound recordings.

§ 2545—Fraudulently acquiring or using identification; making or trafficking in forged or counterfeit identification

Current provisions of title 18 concerning the misuse of identification or false impersonation are very focused. A brief summary of most of the pertinent provisions follows:

Whoever manufactures, sells, or possesses any badge, identification card, or other insignia for the use of any Federal employee, or any colorable imitation thereof, or copies such badge, identification card, or insignia without authorization violates 18 U.S.C. 701.

Falsely and willfully representing onself as being a citizen of the United States is prohibited by 18 U.S.C. 911.

The use of an unlawfully issued certificate of naturalization or citizenship violates 18 U.S.C. 1423. Knowingly procuring, contrary to law, naturalization, or evidence of naturalization, citizenship or alienage violates 18 U.S.C. 1425. Falsely making, forging or counterfeiting certain documents relating to naturalization, citizenship or alienage violates 18 U.S.C. 1426. The unlawful sale of a certificate of naturalization or citizenship or other evidence of such status violates 18 U.S.C. 1427.

Willfully and knowingly making a false statement in an application for a United States passport, with intent to obtain such passport, violates 18 U.S.C. 1542. Use of a passport obtained by the use of false statements also violates 18 U.S.C. 1542. Forging or counterfeiting a passport or writing purporting to be a passport, or the use of such forgery or counterfeit, violates 18 U.S.C. 1543. Willfully and knowingly using a passport issued for another violates 18 U.S.C. 1544. Forging or counterfeiting visas or entry documents, or using such documents, is prohibited by 18 U.S.C. 1546.

Subsection (a) makes it a class D felony for someone, with intent to defraud another person or a government, knowingly to: (1) use fraud (as defined in section 101 of the proposed code) to obtain a written instrument evidencing identification, or capable of being used for evidencing identification; (2) use a written instrument evidencing identification, or capable of being used for evidencing identification, that has been fraudulently obtained; (3) use any written instrument evidencing identification, or capable of being used for evidencing identification, that has been issued for the use of another person; (4) make, conceal, utter, possess or traffic in a counterfeit or forged written instrument evidencing identification or capable of being used for evidencing identification; or attempts to do any of the foregoing acts.

This section enlarges jurisdiction over current law, which is limited essentially to offenses involving immigration and naturalization and the use of visas and passports. The use of false identification has been found to be an integral aspect of numerous criminal activities, such as government program fraud, illegal immigration, drug trafficking, securities fraud, forgery, and credit card fraud. *See* The Report of the Federal Advisory Committee on False Identification, *The Criminal Use of False Identification* (1976). "Existing Federal provisions are

ineffective as most identification documents are issued and regulated by the States. Many State laws punish only the *use* of a false identification document thereby leaving law enforcement officials without any way to proceed until an offense utilizing the false identification document has been completed. Further, although the problem of false identification is national in scope, the individual States are powerless to protect any but their own identification documents and are unable to control counterfeiting or criminal use of their own documents when such acts are carried out beyond their own borders." Letter from Assistant Attorney General for Legislative Affairs Patricia M. Wald to Speaker of the House Thomas P. O'Neill, Jr. (March 22, 1979).

Subsection (b) provides for Federal jurisdiction over an offense described in section 2545 when (1) the written instrument involved is, or purports to be, made or issued by or under the authority of the United States; (2) the actor moved across a State or United States boundary in the commission of the offense; or (3) the written instrument is moving in, constitutes, or is part of interstate or foreign commerce, or the United States mail, or has been shipped or transported in interstate or foreign commerce, or the mail. The Committee intends that this offense be limited to situations giving rise to a clear Federal interest.

Subsection (c) provides for extraterritorial Federal jurisdiction when the written instrument involved is, or purports to be, made or issued by or under the authority of the United States.

The Committee has been aware of the difficulties in applying the doctrine of collateral estoppel and the prohibition against double jeopardy in certain types of cases. Various offenses described in sections 1511 (relating to unlawfully entering the United States as an alien), 1515 (relating to fraudulently acquiring or improperly using evidence of citizenship), 1516 (relating to fraudulently acquiring or improperly using a passport), 1704 (relating to obtaining a government authorization by fraud), and 1742 (relating to making a false statement) of the proposed code may be lesser included offenses of offenses described in section 2545. The Committee, in adopting section 2545 as a separate offense to cover certain gaps in the law, intends to avoid multiple punishments for the same conduct or transaction. *See generally* Note, *Double Jeopardy: Multiple Prosecutions Arising From the Same Transaction*, 15 Am. Crim. L. Rev. 259 (1978).

§ 2546—Definitions for subchapter

Paragraph (1) defines the term "counterfeit written instrument" to mean a written instrument that is a likeness of or purports to be a genuine written instrument but is not genuine, because such written instrument has been falsely made or manufactured.

Paragraph (2) defines the term "counterfeiting or forging implement" to mean an engraving, plate, hub, stone, paper, tool, die, mold, ink, photograph, negative, or other implement or impression designed or suited for the making of a counterfeit or forged written instrument or another counterfeiting or forging implement.

Paragraph (3) defines the term "forged written instrument" to mean a written instrument that is a likeness of, or purports to be, a

genuine written instrument but is not genuine because such written instrument—

(A) has been falsely altered, completed, signed, or endorsed;
(B) contains a false addition thereto or insertion therein;
(C) is a combination of parts of two or more genuine written instruments; or
(D) has been issued without authority or in violation of the law governing the issuance of such written instrument.

Paragraph (4) defines the term "obligation of the United States" to mean a bond, certificate of indebtedness, national bank currency, Federal Reserve note, Federal Reserve bank note, coupon, United States note, Treasury note, gold certificate, silver certificate, fractional note, certificate of deposit, stamp, canceled stamp, postage meter stamp, stamped envelope, postal card, coin, gold or silver bar coined or stamped at a mint or assay office of the United States, or other representation of value of any denomination, issued pursuant to a Federal statute, except a bill, money order, check, or draft for money, drawn by or upon an authorized officer of the United States. This definition carries forward 18 U.S.C. 8.

Paragraph (5) defines the term "security" to mean (A) an obligation of the United States; (B) a circulating note, note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, money order, money order blank, traveler's check, airline ticket, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profitsharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, or certificate of interest in tangible or intangible property; (C) an instrument evidencing ownership of goods, wares, or merchandise; (D) a certificate for, receipt for, or warrant or right to subscribe to or purchase any of the rights or instruments described in subparagraph (A), (B), or (C) of this paragraph; (E) an obligation, banknote, bill, coin, or bar issued by a foreign government and intended by the law or usage of such government to circulate as money; (F) a security of a foreign government; (G) a postage stamp, tax stamp, or uncanceled stamp, whether or not demonetized, issued by a foreign government; or (H) any other written instrument commonly known as a security. The Committee added airline tickets to this definition as part of a consistent effort to counter frauds against the airline industry. *See* section 2531(e)(36) (relating to theft) of the proposed code.

Paragraph (6) defines the term "tax stamp" to mean a tax stamp, tax token, tax meter imprint, or any similar evidence of an obligation running to a government or of the discharge of such an obligation.

Paragraph (7) defines the term "utter" to mean to issue, authenticate, transfer, publish, traffic in, deliver, transmit, present, display, use, certify, or otherwise give currency to.

Paragraph (8) defines the term "written instrument" to mean (A) a security; (B) a commercial paper or document, or other commercial instrument containing written or printed matter or its equivalent; or

(C) a symbol or evidence of value, right, privilege, interest, claim, or identification that is capable of being used to the advantage or disadvantage of any person; but, except as used in section 2543 (relating to making, trafficking in or possessing a counterfeiting implement) of this title, does not include a written instrument that is the subject of a counterfeiting, forgery, or uttering offense described outside this title.

Paragraph (9) defines the term "written instrument issued under the authority of the United States" to include a warehouse receipt issued pursuant to the United States Warehouse Act (7 U.S.C. 241 *et seq.*) and an "authorization card" as defined in section 3(b) of the Food Stamp Act of 1964 (7 U.S.C. 2012(b)).

Paragraph (10) defines the term "traffic" to mean transfer, or otherwise dispose of, to another, as consideration for anything of value; or obtain control of with intent to so transfer or dispose.

SUBCHAPTER VI—NONGOVERNMENTAL BRIBERY

Current Law

The Anti-Kickback Statue of 1946 (Pub. L. No. 86–695, 41 U.S.C. 51 *et seq.*) prohibits the payment of any fee or compensation or granting of any gift of any kind by, or on behalf of, a subcontractor to any higher tier subcontractor or prime contractor holding a negotiated contract with the United States, or to any officer, partner, employee, or agent of such subcontractor or prime contractor, as an inducement for or acknowledgement of the award of any subcontract. The statute provides penalties for any person who knowingly makes or receives such fees, compensation, or gifts. "[T]he essential elements of the crime . . . are that the parties be within the class covered by the statute, . . . a contract [be] covered by the statute, . . . and an acceptance [be made] of a prohibited payment . . . with knowledge of its nature and purpose," *Howard* v. *United States*, 345 F.2d 126, 129 (1st Cir.), *cert. denied*, 382 U.S. 838 (1965). To sustain a conviction, it is not necessary to prove that the defendant know that the contract in question was covered by the statute (*see United States* v. *Grossman*, 400 F.2d 951, 954 (4th Cir.), *cert. denied*, 382 U.S. 982 (1968) and cases cited therein); that the contract which is the object of the prohibited payment was actually made (*Howard* v. *United States*, 345 F.2d 126 (1st Cir.), *cert denied*, 383 U.S. 838 (1965)); or that the United States suffered any loss as a result of the prohibited payment *Travers* v. *United States*, 361 F.2d 753, 755 (1st Cir.), *cert. denied*, 385 U.S. 834 (1966)).

Labor bribery is proscribed principally by 18 U.S.C. 1954 and 29 U.S.C. 186. Section 1954 outlaws any fee, commission, kickback, gift, loan or any other transfer of money or anything of value to influence certain persons involved with employee welfare benefit plans or pension plans. The prohibition extends to offers, solication, payments and receipts. Regular payments for goods or services provided by service plan employees are excepted.

Section 302 of the Taft-Hartley Act (29 U.S.C. 186) prohibits, subject to certain exceptions, the transfer of anything of value from "an employer, or association of employers," or certain of their agents to various employee and union representatives for the purpose of causing

such representatives directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or to an officer or employee of a labor organization with intent to influence the officer or employee in respect to any actions, decisions, or duties as a representative of employees or as such officer or employee.

The section has withstood constitutional challenges questioning its vagueness, *United States* v. *Lanni*, 466 F.2d 1102 (3d Cir. 1972), and its application to bribes paid under the guise of Christmas gifts, *United States* v. *Thompson*, 466 F. Supp. 18 (W.D. Pa.), *aff'd*, 588 F.2d 825 (3d. Cir. 1978) (assertion of restriction on religious freedom summarily dismissed). Conviction does not require proof of an evil or bad purpose. *United States* v. *Pecora*, 484 F.2d 1289 (3d Cir. 1973); *United States* v. *Gibas*, 300 F.2d 836 (7th Cir.), *cert. denied*, 371 U.S. 817 (1962); but rather simply a reckless disregard for the section's demands, which is satisfied by knowledge of the material facts. *United States* v. *Kaye*, 556 F.2d 855 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States* v. *Ricciardi*, 357 F.2d 91 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966); *United States* v. *Holt*, 333 F.2d 455 (2d Cir. 1964), *cert. denied sub nom. Rath* v. *United States*, 380 U.S. 942 (1965); *United States* v. *Keegan*, 331 F.2d 257 (7th Cir.), *cert. denied*, 379 U.S. 828 (1964); *United States* v. *Inciso*, 292 F.2d 374 (7th Cir.), *cert. denied*, 368 U.S. 920 (1961); *United States* v. *Alaimo*, 191 F. Supp. 625 (M.D. Pa. 1961). The courts have found that Congress intended the section to represent the exercise of its full powers under the Commerce Clause and recognized its application to cases where the effect on commerce was indirect. *See United States* v. *Ricciardi*, 357 F.2d 91 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966) (employees maintained furnaces which used fuel purchased locally but previously shipped in interstate commerce); *United States* v. *Kramer*, 355 F.2d 891 (7th Cir.), *cert. denied*, 384 U.S. 100 (1966) (construction of a road which led into an interstate highway); *United States* v. *Gibas*, 300 F.2d 836 (7th Cir. 1962) (intrastate pick-up and delivery of machinery previously or subsequently shipped in interstate commerce). The courts have also interpreted broadly the class of labor officials covered, *see United States* v. *Kaye*, 556 F.2d 855 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States* v. *Fisher*, 387 F.2d 165 (2d Cir. 1967), *cert. denied*, 390 U.S. 953 (1968); *United States* v. *Donovan*, 339 F.2d 404 (7th Cir. 1964), *cert. denied*, 380 U.S. 975 (1965); the kinds of things of value prohibited to be transferred, *see United States* v. *Schiffman*, 552 F.2d 1124 (5th Cir.), *cert. denied*, 434 U.S. 860 (1977) (reduced hotel rates); *United States* v. *Fisher*, 387 F.2d 165 (2d Cir. 1967), *cert. denied*, 390 U.S. 953 (1968) (building materials and equipment); *United States* v. *Thompson*, 466 F. Supp, 18 (W.D. Pa. 1978), *aff'd*, 588 F.2d 825 (3rd Cir. 1978) (cash Christmas gifts, although the court suggested that innocuous gifts such as a box of candy might not be covered); *United States* v. *Ferrara*, 458 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (commissions from coffee distributor to representative for coffee purchased by employer); *United States* v. *Pecora*, 484 F.2 1289 (3d Cir. 1973) (gifts and cash from sale of tickets and advertising at a testimonial dinner);

United States v. *Roth*, 333 F.2d 450 (2d Cir. 1964), *cert. denied*, 380 U.S. 942 (1965) (loans interest-free and made without collateral); and the ineffectiveness of passing the bribe through third parties, *United States* v. *Overton*, 470 F.2d 761, *cert. denied*, 411 U.S. 909 (1973) (2d Cir. 1972) (dividends from a public relations firm of which a union official was a shareholder and which had been established to exploit his union position); *United States* v. *Lanni*, 466 F.2d 1102 (3d Cir. 1972) (unearned salary of the defendant's girlfriend); *United States* v. *McMaster*, 343 F.2d 176 (6th Cir. 1964), *cert. denied*, 382 U.S. 818 (1965) (payments to a trucking company of which the union official was controlling shareholder); *Korholz* v. *United States*, 269 F.2d 897 (10th Cir. 1959), *cert. denied*, 361 U.S. 929 (1960) (employer payment of union officials loan obligations); *United States* v. *Pecora*, 484 F.2d 1289 (3d Cir. 1973) (payments through a testimonial dinner committee); *United States* v. *Ferrara*, 458 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (payments in the form of commissions from coffee distributor for sales to employer who would not otherwise have purchased).

Under the proper circumstances labor bribery may be covered by the Federal mail fraud provision (18 U.S.C. 1341), the Travel Act (18 U.S.C. 1952), and the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. 1961–68). *See United States* v. *Kaye*, F.2d 855 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977).

Bribery in sporting contests is proscribed by 18 U.S.C. 224. Depending upon the circumstances the same misconduct may also violate Federal mail fraud, 18 U.S.C. 1341, wire fraud, 18 U.S.C. 1343, Travel Act, 18 U.S.C. 1952, and internal revenue, 26 U.S.C. 7206(2), provisions. *See United States* v. *Walsh*, 544 F.2d 156 (4th Cir. 1976), *cert. denied sub nom. Bishop* v. *United States*, 429 U.S. 1093 (1977). Although 18 U.S.C. 224(c)(2) defines the contests covered as those involving "individual contestants," the cases indicate the section applies to horse racing as well as to those contests which only involve human participants. *United States* v. *Pinto*, 503 F.2d 718 (2d Cir. 1974). While the offense would ordinarily involve both participants and nonparticipants, the offense may be committed by contestants acting alone. *Id.* Section 224(b) makes it clear that the numerous State sports bribery statutes are not preempted.

The offer, solicitation, payment or receipt of kickbacks, bribes, rebates or other remuneration in connection with services funded under Medicaid and Medicare titles of the Social Security Act are prohibited by 42 U.S.C. 1395nn(b) and 1396h(b). Amendments in 1977 made it clear that the prohibitions were not to be construed narrowly. *Compare United States* v. *Hancock*, 604 F.2d 999 (7th Cir.), *cert. denied*, 100 S.Ct. 521 (1979), and *United States* v. *Weingarden*, 468 F. Supp. 410 (E.D. Mich. 1979); *with United States* v. *Zacher*, 586 F.2d 912 (2d Cir. 1978) and *United States* v. *Porter*, 591 F.2d 1048 (5th Cir. 1979). As with other specific corruption offenses, the misconduct which they cover may also be punishable under the federal mail fraud, 18 U.S.C. 1341, Travel Act, 18 U.S.C. 1952, and Racketeer Influenced and Corrupt Organizations, 18 U.S.C. 1961–68, provisions. *See United States* v. *Weingarden*, 468 F. Supp. 410 (E.D. Mich. 1979).

Under current Federal law there are a host of specific provisions which outlaw the corruption of commercial employees, officers or agents or the corruption of governmental employees, officers or agents for commercial purposes. Some have been discussed above. Others include 18 U.S.C. 215 (receipt of commissions or gifts for procuring loans from certain federally insured institutions), 18 U.S.C. 216 (receipt or charge of commissions or gifts for farm loan, land bank, or small business transactions), 49 U.S.C. 11904(a) (bribery of common carriers in order to cause discrimination against other consignees or consignors), and 49 U.S.C. 11907 (bribery of rail carriers). In addition, there are two provisions in chapter 11 of title 18 that lie somewhere in between bribery of public servants and commercial bribery. Section 212 of title 18 provides punishment for any officer or employee of a large group of enumerated banks who gives any loan or gratuity of value to a bank examiner; 18 U.S.C. 213 similarly prohibits the receipt of any loan or gratuity by a bank examiner from one of the designated banks.

Commercial bribery, when in violation of a bribery statute of the State in which the bribery occurs, is a Federal offense under the Travel Act (18 U.S.C. 1951) if travel in interstate commerce or the use of facilities in interstate commerce is involved. *Perrin* v. *United States*, 580 F.2d 730 (5th Cir. 1978), *cert. granted*, 440 U.S. 956 (1979).

Currently, Federal program bribery is outlawed either in connection with specific programs, e.g., 42 U.S.C. 1395nn(b), or by use of general corruption provisions such as 18 U.S.C. 371 (conspiracy to defraud the United States), 18 U.S.C. 1951 (use of extortion affecting interstate commerce), 18 U.S.C. 1952 (Travel Act), 18 U.S.C. 201 (bribery involving a person acting for or on behalf of the United States, or any department agency or branch thereof). *See United States* v. *Hathaway*, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975); *United States* v. *Thompson*, 366 F.2d 167 (6th Cir.), *cert. denied*, 385 U.S. 973 (1966).

These offenses, however, are not always adequate to permit prosecution of bribery in federally funded programs that are conducted other than by the Federal government. For example, 18 U.S.C. 201 has been held not applicable to a city employee working on a federally funded project. *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975). Section 371 of title 18 requires the existence of a conspiracy. Section 1951 of title 18 prohibits bribery only as extortion under color of official right, which ordinarily would require that the bribery involve a government official. Finally, 18 U.S.C. 1952 requires both that the bribery be prohibited by State law, and that interstate travel or the use of facilities in interstate commerce be involved.

§ *2551—Bribery of government contractors*

This section makes it a class E felony for someone to violate section 4 of the Act entitled, "An Act to eliminate the practice by subcontractors, under cost-plus-a-fixed-fee or cost reimbursable contracts of the United States, of paying fees or kickbacks, or of granting gifts or gratuities to employees of a cost-plus-a-fixed-fee or cost reimbursable prime contractors or of higher tier subcontractors for the purpose of securing the award of subcontracts or orders" (approved March 8, 1946, 60 Stat. 37 (41 U.S.C. 54)). The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by section 4 of the 1946 Act, in the circumstances and with the results and states of mind required by section 4. The use of "violates" insures that section 2551 incorporates not only the exact provisions of section 4 of the 1946 Act, but also any judicial interpretations of section 4.

§ *2552—Labor bribery*

This section carries forward, without substantial change, 18 U.S.C. 1954 and 29 U.S.C. 186(a)(4).

Subsection (a)(1) makes it a class E felony for someone, being an employer, knowingly to offer, give, or agree to give anything of pecuniary value to a labor organization, or to an officer or agent of a labor organization, with intent to influence or reward the recipient regarding the recipient's conduct in any transaction or matter concerning that labor organization. This carries forward 29 U.S.C. 186(a)(4) without substantial change.

Subsection (a)(2) makes it a class E felony for someone knowingly to offer, give, or agree to give anything of pecuniary value to: (1) an administrator, agent, or trustee of an employee benefit plan; (2) an employer or agent of an employer, any of whose employees are covered by an employee benefit plan; (3) an agent of an employee organization, any of whose members are covered by an employee benefit plan; or (4) a person who, or agent of an organization that, provides employee benefit plan services. Subsection (a)(2) further requires that the actor have the specific intent to influence or reward the recipient regarding the recipient's conduct relating to any transaction or matter concerning the employee benefit plan. Subsection (a)(2) carries forward 18 U.S.C. 1954 without substantial change.

Subsection (a)(3) makes it a class E felony for someone knowingly to offer, give, or agree to give anything of pecuniary value to an officer, agent, or trustee of a labor organization with intent to influence or reward the recipient regarding: (1) the admission of any person to membership or to a class of membership, or the issuance to any person of the indicia of membership or a class of membership, in the labor organization; (2) the work placement of any person by the labor labor organization; or (3) any transaction or matter concerning the expenditure, transfer, investment, or other use of the funds, money, securities, tangible property, or other assets of the labor organization. This is a new offense that makes criminal much conduct that is currently classified as an unfair labor practice under 29 U.S.C. 501(c).

Subsection (a)(4) makes it a class E felony for someone, being one of the recipients described in subsections (a)(1), (a)(2), or (a)(3), knowingly to solicit, accept, or agree to accept anything of pecuniary value from another that is given with the intent or motive described in the subsection in which the recipient is described. Subsection (a)(4) is the companion to subsections, (a)(1), (a)(2), and (a)(3), prohibiting anyone from soliciting or receiving the gifts proscribed in those subsections.

Subsection (b) sets forth definitions for 8 terms used in the section. Most of the definitions are taken, without substantial change, from present law involving labor unions.

§ *2553—Sports bribery*

This section carries forward 18 U.S.C. 224. Subsection (a) makes it a class D felony for someone, (1) with intent to affect the outcome, result, or margin of victory of a publicly exhibited sporting contest, knowingly to offer, give, or agree to give anything of pecuniary value to a participant, official, or other person associated with the contest, or (2) as a participant, official, or other person associated with the contest, knowingly to solicit, accept, or agree to accept anything of pecuniary value from another given with the intent described in subsection (a)(1).

Subsection (b) defines the term "publicly exhibited sporting contest" to mean, for the purposes of the section, a contest exhibited to the public involving human beings or animals, whether as individual participants or teams of participants, the occurrence of which is publicly announced in advance of the event.

Subsection (c) provides for Federal jurisdiction over an offense described in section 2553 when the offense is committed through the use in interstate or foreign commerce of any facility for transportation or communication.

§ *2554—Certain medical assistance program offenses*

This offense makes it a class D felony for someone to violate section 1877(b) of title XVIII of the Social Security Act or section 1909(b) of title XIX of the Social Security Act. The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by section 1877(b) of title XVIII or section 1909(b) of title XIX of the Social Security Act, in the circumstances and with the results and states of mind required by those sections. The use of "violates" insures that section 2554 incorporates not only the exact provisions of section 1877 (b) of title XVIII or section 1909(b) of title XIX of the Social Security Act, but also any judicial interpretations of those two sections.

§ *2555—Commercial bribery*

This section carries forward one part of the Travel Act (18 U.S.C. 1952), which prohibits travel in interstate commerce, or the use of facilities in interstate commerce, with the intent to engage in bribery, contrary to State law. The United States Supreme Court, in *Perrin* v. *United States*, 444 U.S. 37 (1979), decided that the Travel Act reference to bribery includes commercial bribery. This section is intended to carry forward that interpretation and also to carry forward 18 U.S.C. 214, 215, and 216, which prohibit various forms of bank bribery. The section expands the coverage of the latter provisions to all national credit institutions.

Subsection (a)(1) makes it an offense for someone knowingly to offer, give, or agree to give anything of pecuniary value to an agent or fiduciary of another person with intent to influence the agent or fiduciary in any matter concerning the affairs of the employer, principal, or beneficiary. Subsection (a)(2) makes it an offense for someone, as an agent or fiduciary of another person, knowingly to solicit, accept, or agree to accept anything of pecuniary value from a person other than the employer, principal, or beneficiary (1) because of being influenced in any matter concerning the affairs of the employer, principal, or beneficiary, or (2) that is given with the intent described in subsection (a)(1).

Subsection (b) classifies the offense as a D felony if the pecuniary value exceeds $1,000, as an E felony if the pecuniary value exceeds $100 but does not exceed $1,000, and as an A misdemeanor in any other instance. This modifies current law by increasing the penalties of 18 U.S.C. 214, 215, and 216, which are misdemeanors in all instances.

Subsection (c) provides for Federal jurisdiction over an offense described in section 2555 when (1) the actor moves across a State or United States boundary in the commission of the offense or the United States mail or a facility in interstate or foreign commerce is used in the commission of the offense, and (2) the conduct involved constitutes a violation of the bribery laws of the State in which the conduct occurs. Subsection (c)(2) provides for Federal jurisdiction when the employer, principal, or beneficiary is a national credit institution (as that term is defined in section 1745 of the proposed code) or a small business investment company (as that term is defined in section 103 of the Small Business Investment Act of 1958) (15 U.S.C. 662).

§ *2556—Government program bribery*

This section creates a new Federal offense. It is designed to alter the result of the decision in *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir. 1975), where the court held that administrators of federally funded programs are not necessarily Federal employees, to whom the bribery provisions of 18 U.S.C. 201 apply.

Subsection (a)(1) makes it a class E felony for someone knowingly to offer, give, or agree to give anything of pecuniary value to a person connected in any capacity with administering money or property derived by an organization, or a unit of State or local government, from a government program, with intent to influence such person in any action related to the administration of such program. Subsection (a)(2) makes it a class E felony for someone, being a person connected in any capacity with administering money or property derived by an organization, or a unit of State or local government, from a government program, knowingly to solicit, accept, or agree to accept anything of pecuniary value (1) because of being influenced in any action related to the administration of such program, or (2) that is given with the specific intent described in subsection (a)(1).

§ *2557—Definition for subchapter*

Subsection (b) provides for Federal jurisdiction over an offense described in section 2556 when the government program is a Federal or federally supported government program.

This section defines the term "anything of pecuniary value", as used in this subchapter to mean anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage, or any other property that has a value in excess of $100. Excluded from the definition of the term are bona fide salary, wages, fees, or other compensation paid in the usual course of business.

Current Law

1. *Securities offenses.*—Section 24 of the Securities Act of 1933 (15 U.S.C. 77x) prohibits the willful violation of any provision of the Act or rules and regulations of the Securities and Exchange Commission (SEC) promulgated under the Act, or the willful inclusion of any untrue statement of material fact or omission of material fact in a registration statement filed under the Act. Generally, the Securities Act is intended to protect investors in securities by requiring registration of securities with the SEC and to assure accuracy and completeness of any prospectus used in the sale of securities. Section 5 (15 U.S.C. 77e) prohibits the use of any means or instruments of interstate commerce or the mails to sell unregistered securities, to transmit a prospectus that does not meet the requirements of section 10 (15 U.S.C. 77j), or to offer to sell or buy any unregistered security, or security as to which the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8 (15 U.S.C. 77h). "In order to establish the essential elements of knowledge and willfulness . . ., the government was required to prove either that appellants knew, or that they deliberately closed their eyes to, the necessity for registering the . . . stock before selling it." *United States* v. *Rubinson*, 543 F.2d 951, 959 (2d Cir.), *cert. denied sub nom. Chester* v. *United States*, 429 U.S. 850 (1976).

Section 17(a) of the 1933 Act (15 U.S.C. 77q(a)) in the offer for sale of securities prohibits the use of interstate commerce of the mails to further a scheme to defraud, to obtain money or property by means of any untrue or omitted material fact, or to engage in any transaction that operates as a fraud upon the purchaser. "It is the perpetuation of the scheme to defraud which forms the gravamen or crux of the offense charged, and not the interstate character of the transaction, the latter element being necessary only to bring the offense within the jurisdiction of the United States. . . . Nor is it necessary to allege that the sales took place in interstate commerce in all instances, since the statute refers to such sales 'or by the use of the mails'. . . ." *United States* v. *Attaway*, 211 F. Supp. 682, 684 (W.D. La. 1962).

Section 17(b) of the 1933 Act (15 U.S.C. 77q(b)) prohibits the use of interstate commerce or the mails to circulate any communication which, though not offering a security for sale, describes a security for consideration received from an issuer, underwriter, or dealer, and fails to disclose the nature of the consideration.

Under section 2(7) of the 1933 Act (15 U.S.C. 77b(7)), the term "interstate commerce" as used throughout the Securities Act of 1933 includes commerce "between any foreign country and any State, Territory, or the District of Columbia."

Section 325 of the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*) prohibits the willful violation of any provision of the Act, or rule, regulation, or order issued under the act, or in the filing of a document required by the Act including an untrue, or omitting, a material fact (15 U.S.C. 77yyy). Section 306 (15 U.S.C. 77fff) prohibits the use of interstate commerce or the mails to sell any security not registered under the Securities Act of 1933 unless the security is issued under a qualified indenture or subject to other exceptions. Section 324 (15 U.S.C. 77xxx) prohibits a person offering, selling, or issuing a security from representing that any act or failure to act by the SEC means that the SEC has approved any trustee, indenture, or security, or that any act or failure to act by the SEC with regard to any statement or report filed with or examined by the SEC has the effect of a finding by the SEC that such statement or report is accurate.

Sections 32(a) and (c) (15 U.S.C. 78ff(a), (c)) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) provides for penalties for a person who willfully violates any provision of the Act (except the provisions concerning foreign corrupt practices and registration and regulation of brokers and dealers which carry different penalties) or any rule or regulation issued under the Act, or who willfully makes any false or misleading statement in any application, report, or document required to be filed under the Act.

Sections 7 (c) and (d) of the 1934 Act (15 U.S.C. 78g (c) and (d)) prohibit extensions of credit for the purchase of stock in violation of rules and regulations of the Board of Governors of the Federal Reserve System. Section 9(a) of the 1934 Act (15 U.S.C. 78i(a)) prohibits use of the mails or interstate commerce to manipulate securities prices by creating a false impression of the state of the market in a security. Section 10 of the 1934 Act (15 U.S.C. 78j) prohibits use of the mails or interstate commerce to effect, in contravention of SEC rules, a short sale or employ any stop-loss order with respect to a security registered on a national securities exchange; or to use any manipulative device in connection with the purchase or sale of any security. The law is unsettled whether placing intrastate telephone calls creates jurisdiction under section 10. *Compare Ingraffia* v. *Belle Meade Hospital, Inc.*, 319 F. Supp. 537 (E.D. La. 1970), *with Burke* v. *Triple A Machine Shop, Inc.*, 438 F.2d 978 (9th Cir. 1971).

Section 14(a) of the 1934 Act (15 U.S.C. 78n(a)) prohibits the solicitation of proxies in contravention of SEC rules or regulations. Section 16(a) of the 1934 Act (15 U.S.C. 78p(a)) requires the beneficial owner of more than ten percent of a registered security, and the directors and officers of the issuer of such securities, to file certain periodic reports. Section 16(c) of the 1934 Act (15 U.S.C. 78p(c)) prohibits certain short sales of securities by beneficial owners of more than ten percent of a security and by the officers and directors of the issuers of equity securities.

Under section 3(17) of the 1934 Act (15 U.S.C. 78c(17)) the term "interstate commerce" as used in the Securities and Exchange Act of 1934 includes commerce "between any foreign country and any State, and between any State and any place or ship outside thereof." However, section 30(b) of the 1934 Act (15 U.S.C. 78dd(b)) provides that the Act "shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent evasion of [the Act]."

Section 29 (15 U.S.C. 79z-3) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79 *et seq.*) prohibits the willful violation of any

provision of the Act or any rule, regulation, or order issued under the act (other than an order under section 11(b), (d), (e), or (f) (15 U.S.C. 79k(b), (d), (e), or (f)), or for the willful making of any false statement or entry in any application, report, document, account, or record filed or kept under the Act, or for the willful destruction of such record. The Public Utility Holding Company Act of 1935 regulates the activities and financing of gas and electric utility holding companies. Section 12(h) of the 1935 Act (15 U.S.C. 79*l*(h)) prohibits political contributions by registered holding companies. Section 17(a) of the 1935 Act (15 U.S.C. 79q(a)) requires officers and directors of registered holding companies to file with the SEC periodic statements of their holdings in such companies or subsidiaries thereof. Section 2(28) of the 1935 Act (15 U.S.C. 79b(28)) defines "interstate commerce" to include commerce "between any State and any place outside thereof."

Section 49 of the Investment Company Act of 1940 (15 U.S.C. 80a–48) prohibits the willful violation of any provision of the Act or of any rule, regulation, or order issued under the Act or the willful inclusion of an untrue statement, or willful omission of, a material fact in any registration statement, application, report, account, record or other document.

The Investment Company Act of 1940 regulates companies engaged in the business of investing, reinvesting, and trading in the securities of other companies. Section 7(a) of the Investment Company Act (15 U.S.C. 80a–7(a)) prohibits certain transactions by unregistered investment companies. Section 7(b) of the Investment Company Act (15 U.S.C. 80a–7(b)) prohibits transactions by depositors, trustees, and underwriters of unregistered investment companies in a security of the company. Section 7(c) of the Investment Company Act (15 U.S.C. 80a–7(c)) prohibits promoters of proposed investment companies, and section 7(d) (15 U.S.C. 80a–7(d)) prohibits foreign investment companies, from using the mails or interstate commerce to sell, in connection with a public offering, any preorganization certificate or subscription for such companies. Section 17(a) of the Investment Company Act (15 U.S.C. 80a–17(a)) prohibits certain transactions, such as stock purchases and loans, between persons affiliated with a registered company and a company controlled by the registered company. Section 17(d) of the Investment Company Act (15 U.S.C. 80a–17(d)) prohibits an affiliated person of a registered company from acting as principal to effect a joint or joint and several transaction with the registered company or a company controlled by it. Section 17(e) of the Investment Company Act (15 U.S.C. 80a–17(e)) prohibits any affiliated person of a registered investment company from acting as agent to accept any compensation (other than a regular salary or wages from such company) in transactions to or for such company, except in the course of such person's business as an underwriter or broker. *See United States* v. *Deutsch*, 451 F.2d 98, 112–13 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

Section 21 of the Investment Company Act (15 U.S.C. 80a–21) prohibits registered management companies from making loans contrary to the company's investment policies, or to any person who controls or is under common control with the company. Section 34 of the Investment Company Act (15 U.S.C. 80a–34) prohibits misrepresentation as to government approval of securities, and as to companies and persons registered under the Act.

Under section 2(18) of the Investment Company Act (15 U.S.C. 80a–2(18)) "interstate commerce" is defined to include commerce "between any foreign country and any State, or between any State and any place or ship outside thereof."

Section 217 (15 U.S.C. 80b–17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) provides punishment for any person who willfully violates the Act or any rule, regulation, or order issued thereunder. Section 206 of the Investment Advisers Act (15 U.S.C. 80b–6) prohibits investment advisors from using the mails or interstate commerce to engage in fraudulent transactions. "The language of section 206(1) clearly connotes intentional conduct." *Steadman* v. *Securities and Exchange Commission*, 603 F.2d 1126, 1134 (5th Cir. 1979), *cert. granted*, 100 S. Ct. 1849 (1980). Under section 202(a)(10) of the Investment Advisers Act (15 U.S.C. 80b–2(a)(10)) "interstate commerce" is defined to include commerce "between any foreign country and any State, or between any State and any place or ship outside thereof."

2. *Monetary offenses.*—Present monetary laws include section 127 of the Federal Deposit Insurance Act (12 U.S.C. 1957) and section 210 of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1059). (Both were enacted as part of the Bank Secrecy Act, Pub. L. No. 91–508).

Section 1957 of title 12, U.S.C., prohibits willful violations of 12 U.S.C. 1730d, 12 U.S.C. 1829b, or regulations issued under 12 U.S.C. 1951–59, in furtherance of any violation of Federal law punishable by imprisonment of more than one year. Sections 1730d and 1829b of title 12, U.S.C., authorize the Secretary of the Treasury to issue appropriate regulations with respect to insured savings and loan institutions, and for the maintenance of records by banks insured under 12 U.S.C. 1811–1832. Sections 1951–59 of title 12, U.S.C., provide for regulations for the maintenance of records by uninsured banks, uninsured institutions, and persons engaging in various finacial activities.

Violations of 31 U.S.C. 1051–1143 committed in furtherance of violation of Federal law or as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period are punishable under 31 U.S.C. 1059. Sections 1051–1143 require reports of domestic currency transactions, of exports and imports of monetary instruments, and of foreign transactions.

3. *Commodities exchange offenses.*—Present commodities exchange offenses include section 9 (b), (d), and (e) of the Commodity Exchange Act (7 U.S.C. 13 (b), (d), (e)) and the third sentence of the eleventh paragraph of section 25(a) of the Federal Reserve Act (12 U.S.C. 617).

Section 13(b) of title 7, U.S.C. prohibits manipulation of the price of any commodity in interstate commerce, cornering any such commodity, or making any false or misleading statement, or omitting, any material fact in any registration application or report filed with the Commodity Futures Trading Commission. Section 13(d) makes it an offense for any Commissioner, employee, or agent of the Commod-

ity Futures Trading Commission to participate in any transaction in commoditiy futures or any transaction commonly known as an "option," "privilege," "immunity," "bid," "offer," "put," "call," "advance guaranty," or "decline guaranty," or in any investment transaction in an actual commodity (except, in the case of an investment transaction in an actual commodity for use in, or as the product of, an individual's own farming or ranching operation). Section 13(e) imposes penalties upon the same persons, who with the intent to assist another person in a transaction described in section 13(d), impart information that has not been made public that has been acquired by virtue of their position.

Under 12 U.S.C. 617, corporations organized under 12 U.S.C. 611–31 are prohibited from engaging in commerce or trade in commodities except as specified in those sections, or to control or fix the price of any commodities. These corporations, commonly known as "Edge Act Corporations," are "organized for the purpose of engaging in international or foreign banking or other international or foreign financial operation . . . ." 12 U.S.C. 611.

4. *Antitrust offenses.*—Present criminal antitrust laws include sections 1, 2, and 3 of the Sherman Act (15 U.S.C. 1, 2, 3). Section 1 imposes penalties upon persons who make any contract or engage in any "combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." Notwithstanding the broad language of this provision, it has been held to outlaw only those contracts, combinations, and conspiracies that unreasonably restrain competition. *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). But, "however local its immediate object, a 'contract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce." *Gulf Oil Corporation* v. *Copp Paving Co.*, 419 U.S. 186, 195 (1974).

Section 2 imposes the penalties upon persons who monopolize or attempt to monopolize. Section 3 imposes penalties upon persons who make any contract or engage in any combination or conspiracy in restraint of trade in any Territory of the United States or the District of Columbia or between such jurisdiction and any other jurisdiction in the United States or elsewhere.

§ *2561—Securities offenses*

This section makes it a class D felony for someone to violate section 24 of the Securities Act of 1933 (15 U.S.C. 77x), section 325 of the Trust Indenture Act of 1939 (15 U.S.C. 77yyy), section 32(a) or (c) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a) or (c)), section 29 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z–3), section 49 of the Investment Company Act of 1940 (15 U.S.C. 80a–48), or section 217 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–17). The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by the referenced sections, in the circumstances and with the results and states of mind required by the referenced sections. The use of "violates" insures that section 2561 incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

§ *2562—Monetary offenses*

Subsection (a) makes it an offense for someone to violate section 127 of the Act entitled, "An Act to amend the Federal Deposit Insurance Act to require insured banks to maintain certain records, to require that certain transactions in United States currency be reported to the Department of the Treasury, and for other purposes", Act of October 26, 1970, Pub. L. No. 91–508, section 127, 84 Stat. 1118, 12 U.S.C. 1957, or section 210 of the Currency and Foreign Transactions Reporting Act of 1970, 31 U.S.C. 1059. The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by the referenced sections, in the circumstances and with the results and states of mind required by those sections. The use of "violates" insures that section 2562 incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

Subsection (b) classifies an offense described in section 2562 as a D felony if the offense is committed in furtherance of another Federal offense or if the offense involved more than $100,000 in a 12 month period, and as an E felony in any other instance.

§ *2563—Commodities exchange offenses*

This section makes it a D felony for someone to violate section 9(b), (d), or (e) of the Commodity Exchange Act (7 U.S.C. 13(b), (d), or (e)) or the third sentence of the eleventh paragraph of section 25(a) of the Federal Reserve Act (12 U.S.C. 617). The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by the referenced provisions, in the circumstances and with the results and states of mind required by those provisions. The use of "violates" insures that section 2563 incorporates not only the exact provisions of language of the referenced provisions, but also any judicial interpretations of those provisions.

§ *2564—Antitrust offenses*

This section makes it a class E felony for someone to violate section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, or 3). The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by sections 1, 2, or 3 of the Sherman Act, in the circumstances and with the results and states of mind required by those sections. The use of "violates" insures that section 2564 incorporates not only the exact provisions of sections 1, 2, or 3 of the Sherman Act, but also any judicial interpretations of those sections.

Chapter 27—Miscellaneous Offenses

Subchapter I—Racketeering

Current Law

1.—In general—"Racketeering" has been defined, in nonlegal terms, "a system of obtaining money or other advantage illegally, fraudu-

lently or undeservedly, usu[ally] with the outward consent of the victims," and "racketeer" as "one who extorts money or advantages by threats of violence or by blackmail or by threatened or actual unlawful interference with business or employment," and as "one who engages in a racket." *Webster's Third New International Dictionary* 1871 (1976). The federal racketeering statutes, however, lack the clarity and succinctness of such definitions. Although they are directed at ongoing criminal combinations—commonly known as "organized crime"—they do not clearly define racketeering or organized crime and their reach is apparently all-inclusive. Their basic approach concentrates on certain kinds of criminal ventures, including loansharking, gambling, prostitution, narcotics trafficking, and extortion that, by extensive or continuous horizontal or vertical integration, may be used to corrupt our economic and political life.

To combat racketeering, Federal law enforcement agencies have two methods, one traditional and the other modern, available to them. The traditional, and more difficult, method has been to prosecute perpetrators of the predicate offenses from which the economic power of the racketeers is derived and to prosecute their collaborators in crime under the conspiracy statute, 18 U.S.C. 371. The modern method is to prosecute under the racketeering statutes added to the United States Code by Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. 1961–68.

Some of the sections that reach substantive offenses associated with organized crime are 18 U.S.C. 1301, 1511, 1953 (gambling), 891–894 (loansharking), 1951 (extortion), 2421–24 (prostitution), 201 (bribery), 471–74 (highjacking), 2314, 2315 (interstate transportation of stolen property), 1461–65 (trafficking in pornography), 1341, 1343 (mail and wire fraud), 2341–46 (contraband cigarette trafficking), and 1501–1510 (obstructing Federal law enforcement); 21 U.S.C. 841, *et seq.* (narcotics trafficking); and 29 U.S.C. 186 (prohibiting certain offenses relating to unions and welfare and pension funds). The conspiracy provision is also a major weapon against organized crime. *See* Wessel, *The Conspiracy Charge as a Weapon Against Organized Crime*, 38 Notre Dame Law. 689 (1963). It rests on an assumption that group criminal activity is more socially harmful than individual endeavors.

In 1970, however, with the passage of the Organized Crime Control Act, a new tool was added to law enforcement weaponry against racketeering: the Racketeer Influenced and Corrupt Organizations chapter of title 18, the so-called RICO statute. These offenses attempt to reach organized crime figures indirectly, partly because it was thought constitutionally impermissible to criminalize a status, such as that of being a member of an organized crime syndicate, and partly because it was believed that most of the activities by which organized crime syndicates obtained footholds in a community were activities which did not necessarily extend beyond that community and thus, did not necessarily involve Federal jurisdiction. The assumption that seems to pervade the RICO provisions is that large crime syndicates indulge in certain kinds of criminal activity, derive vast sums from illegal sources, and ultimately use those funds to corrupt other organizations or to invest in legitimate sources of revenue.

The basic RICO substantive offense section is 18 U.S.C. 1962. It is divided into four units, each of which defines a specific crime. Subsection (a) prohibits laundering racketeering funds. It makes it unlawful for anyone "who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."[1] Subsection (b) is directed at using illegal means of gaining control of an "enterprise." It makes it unlawful for anyone "through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain directly or indirectly, any interest in or control of an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Subsection (c) condemns using unlawful means to conduct an "enterprise." It makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Subsection (d) makes it a crime "to conspire to violate any of the provisions of subsections (a), (b), or (c)."

Broad definitions are supplied for each of the key terms: "racketeering activity," "pattern of racketeering activity," "enterprise," and "unlawful debt," and courts have generally construed the provisions of the RICO statutes "liberally" despite the rule of strict construction. *See* p. 360–362, *infra*.[2] Harsh penalties and enhanced investigative tools[3] are provided by these statutes.

The constitutionality of the substantive offense sections of the RICO statute has been upheld against charges that they are vague, *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1976); *United States* v. *White*, 386 F. Supp. 882 (E.D. Wis. 1974); *United States* v. *Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States* v. *Scalzitti*, 408 F. Supp. 1014 (W.D. Pa. 1975), *appeal dismissed without opinion*, 556 F.2d 569 (3d Cir. 1977); *United States* v. *Stofsky*, 409 F. Supp. 609 (S.D. N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); violative of the ex post facto clause of the United States Constitution, *United States* v. *Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); violative of the double jeopardy clause of the United States Constitution, *United States* v. *Solano*, 605 F.2d 1141 (9th Cir.), *cert. denied*, 100 S. Ct. 677 (1979); *United States* v. *Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied sub nom. Millhouse* v. *United States*, 434 U.S. 1072 (1978); *United States* v. *Smith*, 574 F.2d (5th Cir.), *cert. denied*, 439 U.S. 931 (1978); and claims that the penalties constitute cruel and

[1] There is an exception: "A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer." 18 U.S.C. 1962(a).

[2] Section 904, title IX, Public Law 91–452, 84 Stat. 947, provided: "The provisions of this title shall be liberally construed to effectuate its remedial purpose."

[3] Section 1968 of title 18 permits the Attorney General to issue subpoenas in RICO cases in which certain conditions are met. Title V of the Organized Crime Control Act of 1970, Public Law 91–452, 84 Stat. 922, 933–934, provides means for the Attorney General to protect witnesses in organized crime investigations; Title X, 84 Stat. 922, 948–952, added section 3575–3578 to title 18, providing for increased sentences for dangerous special offenders.

unusual punishment in violation of the eighth amendment, *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1312 (1980); *United States* v. *Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979). There has also been considerable litigation concerning the interpretation of certain of the terms common to all of the subsections of 18 U.S.C. 1962.

"Racketeering activity" is defined in section 1961 (1) in terms of 24 Federal and 8 State substantive criminal offenses. The definition of "racketeering activity" requires that the defendant engage in conduct that is "chargeable" under special State laws or "indictable" under certain Federal laws. 18 U.S.C. section 1961(a). The exact meaning of the phrases "chargeable" and "indictable" is unclear. The two terms apparently have the same meaning. *See United States* v. *Davis*, 576 F.2d 1065, 1066–67 (3d Cir. 1978); *cf. United States* v. *Kaye*, 556 F.2d 855, 859–60 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977) (concluding that Congress made a mistake in using "indictable" as applied to Federal offenses). A "pattern of racketeering" requires at least two acts of racketeering activity, one of which occurred after October 15, 1970, and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketerring activity. "Enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"; the phrase "unlawful debt" is defined as any debt unenforceable in whole or in part under Federal or State law, because of usury laws, any debt incurred in relation to an illegal gambling business or to the business of lending money or a thing of value at a usurious rate at least twice the enforceable rate under State or Federal law.

The basis for Federal jurisdiction under RICO is the commerce power. However, the defendant's acts need not be proven to have affected interstsate or foreign commerce. It is sufficient that the enterprise be one that has affected commerce. In *United States* v. *Frumento*, 409 F. Supp. 136 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied sub nom. Millhouse* v. *United States*, 434 U.S. 1072 (1978), the court was faced with a claim that the Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes did not affect commerce. The court held that since all cigarettes sold in Pennsylvania came from outside the State, any activity affecting the sale of cigarettes in Pennsylvania affected interstate commerce. *Accord. United States* v. *Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979), *aff'd without opinion*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 1015 (1980); *United States* v. *Barber*, 476 F. Supp. 182 (S.D. W. Va. 1979). The use of State substantive offenses to define "racketeering activity" does not limit the Federal government to State statutes of limitations, *United States* v. *Davis*, 576 F.2d 1065, 1066–67 (3d Cir. 1978); *United States* v. *Forsythe*, 560 F.2d 1127 (3d Cir. 1978); *United States* v. *Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); or to State statutes specifically labeling the crimes mentioned in 18 U.S.C. 1961 (1), *United States* v. *Forsythe*, 560 F.2d 1127, 1137 (3d Cir. 1977) ("The test for determining whether the charged acts fit into the generic category of the predicate offense is whether the indictment charges a type of activity generally known or characterized in the proscribed category . . . ."). Acquittal in State courts on charges of predicate offenses does not bar a conviction under RICO using the same offense to establish the requisite pattern of

racketeering activity. *United States* v. *Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied sub nom. Millhouse* v. *United States*, 434 U.S. 1072 (1978).

Courts have disagreed on the proper construction of the required "pattern" of racketeering activity. The statutory definition is straightforward—commission of two acts of racketeering activities within ten years of one another; one of which is alleged to have taken place after the passage of the RICO statute. One court has held that to form a "pattern," the two acts must be related to one another. *United States* v. *Stofsky*, 409 F. Supp. 609 (S.D. N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). Some courts have set more stringent requirements, *United States* v. *Moeller*, 402 F. Supp. 49 (D. Conn. 1975) (acts must be separated in time and space); others have required only two separate acts of racketeering activity within the requisite time, *United States* v. *Witherspoon*, 581 F.2d 595 (7th Cir. 1978) (RICO prosecution based on a scheme to defraud the Veterans' Administration by false claims and certificates of attendance at a funded course in cosmetology; held that five separate mailings constituted at least two acts of racketeering as required by the statute and rejected the challenge that the single scheme constituted only one act). *Accord United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1976); *United States* v. *Scalzitti*, 408 F. Supp. 1015 (W.D. Pa. 1975), *appeal dismissed*, 556 F.2d 569 (3d Cir. 1977) (pattern requirements fulfilled both despite there having been only one victim and because of that fact; charge involved six incidents of wire fraud over four week period); *United States* v. *Palma*, 461 F. Supp. 778 (S.D. N.Y. 1978) (acts need not be related to one another).

The required relationship between the enterprise and the pattern of racketeering activity has also been the subject of litigation. Under 18 U.S.C. 1962, individuals are prohibited from gaining or maintaining control over an enterprise "through" a pattern of racketeering activity. Circuit courts have required that a nexus be established between the two before a conviction can be obtained. *United States* v. *Mandel*, 415 F. Supp. 997 (D. Md. 1976), *app. dismissed*, 550 F.2d 1001 (4th Cir. 1977), *aff'd in part, vacated and remanded in part*, 591 F.2d 1347 (4th Cir.), *aff'd en banc*, 602 F.2d 653 (4th Cir. 1979) (*per curiam*), *cert. denied*, 100 S. Ct. 1647 (1980); *United States* v. *Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied sub. nom. Hornstein* v. *United States*, 435 U.S. 951 (1978); *United States* v. *Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States* v. *Huber*, 503 F.2d 387 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1312 (1980). The only authority not requiring such a relationship is a district court opinion, *United States* v. *Stofsky*, 409 F. Supp. 609 (S.D. N.Y. 1973), *aff'd* 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), which may have been displaced by a subsequent decision of the circuit court. *See United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1312 (1980).

One of the most contested definitions in the RICO statute is that of "enterprise." Six circuits have held that an enterprise may consist of an illegal association, formed for the purpose of racketeering, as well as of a thoroughly licit association. *United States* v. *Provenzano*, 620

F.2d 985 (3d Cir. 1980); *United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. 1978), *cert denied*, 441 U.S. 933 (1979); *United States* v. *Elliot*, 571 F.2d 880 (5th Cir. 1978) *cert. denied sub nom. Hawkins* v. *United States*, 439 U.S. 953 (1978); *United States* v. *Altese*, 542 F.2d 104 (2d Cir. 1976), *cert denied sub nom. Napoli* v. *United States*, 429 U.S. 1039 (1977). One circuit has held to the contrary. *United States* v. *Sutton*, 605 F.2d 260 (6th Cir. 1979) (submitted for rehearing *en banc*, April 2, 1980). Another court has required that the enterprise exist for an economic purpose other than the commission of the predicate acts. *United States* v. *Anderson*, No. 79–1809 (8th Cir. Aug. 7, 1980). It has been held that the following are "enterprises" within the meaning of the RICO statute: a foreign corporation, *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1976); a group of corporations, *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1312 (1980); an informal as opposed to a formal organization, *United States* v. *Elliot*, 571 F.2d 880 (5th Cir. 1978), *cert denied sub nom. Hawkins* v. *United States* 439 U.S. 933 (1979); and a "group of individuals associated in fact with various corporations." *United States* v. *Thevis*, 474 F. Supp. 134, 137 (N.D. Ga. 1979). The following types of governmental units have been held to fulfill the "enterprise" requirement of the RICO statute: city police department, *United States* v. *Brown*, 557 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); State revenue office, *United States* v. *Frumento*, 563 F.2d (3d Cir. 1977), *cert. denied sub nom. Millhouse* v. *United States*, 434 U.S. 1072 (1978), city traffic court, *United States* v. *Vignola*, 464 F. Supp 1091 (E.D. Pa. 1979), *aff'd* 605 F.2d 1199 (3d Cir.), *cert. denied*, 100 S. Ct. 1015 (1980); state alcoholic beverage control commissioner, *United States* v. *Barber*, 476 F. Supp. 182 (S.D. W. Va.); and a State governor's office, *United States* v. *Sisk*, 476 F. Supp. 1061 (M.D. Tenn. 1979). On the other hand, the State of Maryland has been held not to constitute an "enterprise" for RICO purposes. *United States* v. *Mandel*, 415 F. Supp. 997 (D. Md. 1976), app. dismissed, 550 F.2d 1001 (4th Cir. 1977), *aff'd in part*, *vacated and remanded in part*, 591 F.2d 1347 (4th Cir.), *aff'd en banc after retrial*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980).

The courts have uniformly held that there is no need to show association with organized crime for a RICO conviction to be sustained. *United States* v. *Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied sub. nom. Grancich* v. *United States*, 423 U.S. 1050 (1976); *United States* v. *Elliot*, 571 F.2d 880 (5th Cir. 1978), *cert. denied sub nom. Hawkins* v. *United States*, 439 U.S. 953 (1978); *United States* v. *Mandel*, 415 F. Supp. 997 (D. Md. 1976), appeal dismissed, 550 F.2d 1001 (4th Cir. 1977), *aff'd in part*, *vacated and remanded in part*, 591 F.2d 1347 (4th Cir.) *aff'd en banc after retrial*, 602 F.2d 653 (4th Cir. 1979). *cert. denied*, 100 S. Ct. 1647 (1980); *United States* v. *Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979); *aff'd*, 605 F.2d 1199 (3d Cir.), *cert. denied*, 100 S. Ct. 1015 (1980); *United States* v. *Chovane*, 467 F. Supp. 41 (S.D. N.Y. 1979). In *Mandel*, the court noted: "To require proof beyond a reasonable doubt that a defendant was a member of 'organized crime,' with the highly subjective and prejudicial connotations of that term, would simply render the statute unenforceable, a result plainly not in the contemplation of Congress," *United States* v. *Mandel*, 415 F. Supp. 997, 1018 (D. Md. 1976), *appeal dismissed*, 550 F.2d 1001 (4th

Cir. 1977), *aff'd in part*, *vacated and remanded in part*, 591 F.2d 1347 (4th Cir. 1977), *aff'd en banc after retrial*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980).

2. Racketeering enterprise—As noted above, the offense set forth in 18 U.S.C. 1962(b) is the acquisition or maintenance of an interest or control of an enterprise "through a pattern of racketeering activity" or collection of an unlawful debt. In section 1962(c) the participation or conduct in the affairs of an enterprise "through a pattern of racketeering activity" or collection of unlawful debt, by a person employed by or associated with the enterprise, is proscribed. Subsection (b) may be used to prosecute the acquisition of control through a scheme to defraud. *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1976). Subsection (c) may be used to prosecute a criminal syndicate that corrupts a person within an enterprise in order to use that enterprise for illegal purposes. *United States* v. *Forsythe*, 560 F.2d 1127 (3d Cir. 1977) (bribery); *United States* v. *Grzywacz*, 603 F.2d 682. (7th Cir. 1979) (using police department for illegal payoffs). It cannot be used to prosecute persons who engage in criminal activity and who are associated with an organization if that association is only tangential to their criminal activities. *United States* v. *Dennis*, 458 F. Supp. 197 (E.D. Mo. 1978) (no RICO violation based on one employee's attempting to collect unlawful debt from another employee on premises of their joint employer).

Section 1962(b) prosecutions have involved allegations that the enterprise targeted for takeover or control was state,[4] a foreign corporation,[5] an illegal gambling business,[6] and a motorcycle gang.[7] Subsection 1962(c) of title 18 is aimed at anyone who, through employment or association with an enterprise, uses that enterprise to conduct unlawful activities of the type listed in section 1964.

RICO reaches the situation in which organized crime controls a business by corrupting someone in that business,[8] and it has been used

[4] Count 22 of the indictment against former Governor Marvin Mandel of Maryland charged that he conducted and participated in the affairs of the State of Maryland, an enterprise, through a pattern of racketeering activity. The court dismissed this count of the indictment on the basis of the legislative history of the RICO statute—particularly its silence on whether it sought to protect governmental entities from racketeering infiltration. It also invoked the principle of statutory construction known as *ejusdem generis* to limit the reach of "enterprise" to items of the same class, i.e., businesses and unions. United States v. Mandel, 415 F. Supp. 997 (D. Md.), appeal dismissed, 550 F. 2d 1001 (4th Cir. 1977), *aff'd in part, vacated and remanded in part*, 591 F.2d 1347 (4th Cir.), *aff'd en banc after retrial*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980).

[5] United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1976). A foreign corporation was held to be an enterprise within the definition of the statute on the basis of the courts interpretation of the legislative history of the act as clearly showing "that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises."

[6] In United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) a case dealing only with civil remedies, "enterprise" was held to include an illegal gambling business. A complaint alleged that the defendants, through a pattern of racketeering activity consisting, among other things of participating in an illegal gambling business, acquired or maintained interest in or control of an enterprise consisting of an illegal gambling business

[7] Eighteen members of California's Hell's Angels were prosecuted on RICO charges. New York Times, June 16, 1980, at 17, col. 2.

[8] In United States v. Field, 432 Supp. 55 (S.D. N.Y. 1977), this section was successfully used to prosecute a defendant charged with maintaining control of a union through demanding and accepting payments illegal under 29 U.S.C. 186(b), incorporated into RICO by 18 U.S.C. 1961(1)(C). Other examples include United States v. Forsythe, 560 F. 2d 1127 (3d Cir. 1977) (magistrates and constables accepting bribes were indicted as having been associated with a bail bond agency); United States v. Vignola, 463 F. Supp. 1091 (E.D. Pa. 1979), *aff'd*, 605 F. 2d 1199 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 1015 (1980) (employees of Philadelphia Traffic Court accepting bribes were held to have conducted that organization's affairs through a pattern of racketeering activity); United States v. Frumento, 409 F. Supp. 136 (E.D. Pa. 1976), *aff'd*, 563 F. 2d 1083 (3d Cir. 1977), *cert. denied sub nom.* Millhouse v. United States, 434 U.S. 1072 (1978) (employee accepting bribes); United States v. Rubin, 559 F. 2d 975 (5th Cir. 1977), *cert. denied*, 100 S. Ct. 133 (1980) (city police accepting bribes to protect illegal gambling, prostitution and bootlegging operations).

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when the enterprise consists entirely of a group of persons associated solely to engage in criminal conduct.[9] In the sense that it outlaws associating with an illegal de facto enterprise or association for the purpose of conducting the affairs of that illegal association, it is a conspiracy statute. *United States* v. *Hawes*, 529 F.2d 472 (5th Cir. 1976). In one case, *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979), the "enterprise was found to include both the legal and the illegal aspects of a restaurant that was doing business as such and simultaneously acting as a cover for illegal cocaine trafficking.

Subsection (d) of 18 U.S.C. 1962 punishes conspiracies. None of the other subsections requires either an agreement or concerted activity as does subsection (d). *United States* v. *Ohlson*, 552 F.2d 1347 (9th Cir. 1977). A conspiracy under subsection (d) does not merge with the substantive offense of a violation of subsection (a), (b), or (c), *United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980), and unlike conspiracy under 18 U.S.C. 371, an overt act is apparently not required to complete the offense, *United States* v. *Forsythe*, 429 F. Supp. 715 (W.D. Pa.), *rev'd on other grounds*, 560 F.2d 1127 (3d Cir. 1977). The constitutionality of these conspiracy provisions has been questioned. Bradley, *Racketeering, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 876–88 (1980).

3. Laundering racketeering proceeds—Section 1962(a) of title 18 of the United States Code makes it unlawful for any person who has received income, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal,[10] to use or invest such income, or the proceeds of such income, in any enterprise involving interstate or foreign commerce. This section thus punishes the investment of capital derived from racketeering activities. The statute does not specify the state of mind required and, therefore, conceivably reaches persons who, without a guilty mind, innocently receive racketeering money and reinvest it. The terms "proceeds," "act," and "immediate family" are not defined. *See* Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 Yale L.J. 1491 (1974). Under this statute, the prosecution must prove: (1) the commission of two acts of racketeering or one incident of the collection of an unlawful debt; (2) that the money invested was derived from such racketeering or collection; and (3) that the money was invested in a legitimate business. The prosecution may also be required to prove that the defendant had knowledge that the money being invested was derived from racketeering activities. *Id.*

4.—Loansharking—Current law treats offenses in the nature of loansharking in chapter 42 (sections 891–896) of title 18, and in the portions of section 1962 of title 18 that deal with the collection of an unlawful debt.

[9] United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (illegal gambling business); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied sub. nom.* Napoli v. United States, 429 U.S. 1039 (1977); (illegal gambling business); United States v. Castellano, 416 F. Supp. 125 (E.D. N.Y. 1975) (business of extending credit at usurious rates); United States v. McLaurin, 557 F. 2d 1064 (5th Cir. 1977), 1975) (arson of one building); United States v. McLaurin, 434 U.S. 1020 (1978) (a prostitution ring), *cert. denied sub. nom.* Bryant v. United States, 434 U.S. 1020 (1978) (a prostitution ring).

[10] The requirement of participation as a principal applies to both the pattern of racketeering activity and the collection of an unlawful debt. *See* Bradley, *Racketeering, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 869–70 (1980).

Section 891 defines an extortionate extension of credit as "any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." An extortionate means is defined as one involving "the use or the express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." To extend credit is defined as meaning "to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred." Repayment of an extension of credit is defined as including "the repayment, satisfaction, or discharge in whole or in part of any debt or claim acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit."

Section 892(b) provides a means of prima facie proof that an extension of credit was extortionate. The following elements must be shown: (1) unenforceability of the repayment of the extension of credit or performance of any promise given in consideration thereof, through civil judicial processes (a) in the jurisdiction within which the debtor resided or (b) in every jurisdiction in which the debtor was incorporated or qualified to do business; (2) an annual rate of 45 per centum interest, calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal; (3) reasonable belief of the debtor at the time of extension of credit that either (a) one or more extensions of credit by the creditor had been or were attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means or (b) the creditor had a reputation of using extortionate means to collect extensions of credit or to punish nonrepayment; and (4) upon the making of the extension of credit, the total extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100. It is clear that this is not the exclusive means of showing that the extension of credit was extortionate and that this description does not limit the means available to prosecutors to show that an extension of credit was extortionate. Subsection (c) provides that, in any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsections (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the creditor's reputation regarding collection practices in any community of which the debtor was a member at the time of the extension.

Section 893 of title 18 prohibits the willful advancing of money or property, whether as a gift, a loan, an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person,

with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit; section 894 prohibits the knowing participation in any way or the conspiracy in the use of any extortionate means to collect, attempt to collect any extension of credit, or to punish any person for the repayment of any extension of credit. Collection of extensions of credit by extortionate means may be proven by means similar to those provided for a prima facie case of making extortionate extensions of credit.

These provisions have been upheld by the United States Supreme Court as a valid exercise of the commerce power, *Perez* v. *United States*, 402 U.S. 146 (1971), and by various lower Federal courts as a proper use of the bankruptcy power, *United States* v. *Fiore*, 434 F.2d 966 (1st Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *United States* v. *Biancofiori*, 422 F.2d 584 (7th Cir.), *cert. denied*, 398 U.S. 912 (1970); *United States* v. *De Stafano*, 429 F.2d 344 (2d Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); and as not providing a bill of "pain and penalty" against a class without a finding of guilt at trial, *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied*, *sub nom. Santoro* v. *United States*, 409 U.S. 1063 (1972). The use of reputation evidence to prove a debtor's fear has been upheld as not violative of due process. *United States* v. *Bowdach*, 501 F.2d 220 (5th Cir. 1974), *cert. denied*, 420 U.S. 948 (1975). In a prosecution under these sections, there need be no showing that the individual defendant's conduct involved a nexus with interstate commerce. *United States* v. *Cheiman*, 578 F.2d 160 (6th Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979). Gambling debts have been held to be an extension of credit within the meaning of this chapter. *United States* v. *Czarnecki*, 552 F.2d 698 (6th Cir.), *cert. denied*, 431 U.S. 939 (1977). In *United States* v. *Briola*, 465 F.2d 1018 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973), it was held that there was an extension of credit when a bookie's employee called in a bet to his employer under a fictitious name. The Sixth Circuit does not agree with this holding. *United States* v. *Robbins*, 510 F.2d 301 (6th Cir.), *cert. denied*, 423 U.S. 1048 (1973). The offense is not confined to members of organized crime. *United States* v. *Andrino*, 501 F.2d 1373 (9th Cir. 1974) (applied to a person claiming to be a simple gambling enthusiast).

Section 896 of title 18 makes it clear that the chapter on extortionate credit transactions does not prempt state law.

5.—Travel Act—Under 18 U.S.C. 1952, known as the "Travel Act", interstate and foreign travel or transportation with intent to perform certain illegal or violent acts is prohibited if the defendant thereafter performs any of the specified acts.

This offense is aimed primarily at organized crime, but particularly those who are responsible for operating criminal ventures in one state while residing in another. S. Rep. No. 87–644 at 2–3 (1961). The courts have given it a broad reading but have restricted it in one important respect: the operation of an illegal enterprise that attracts out-of-state persons is insufficient for jurisdiction under the act. In *Rewis* v. *United States*, 401 U.S. 808 (1971), the Supreme Court reversed the

conviction under the Travel Act of a Florida couple who operated a gambling business in Florida that drew out-of-state players by interpreting the act as not applying to the situation because such was not the intention of the Congress that passed it. Where the victim of an extortion scheme had to travel interstate to obtain proceeds of illegal activity, the statute was held to apply even though neither the defendant nor any coconspirator traveled interstate. *United States* v. *Marquez*, 449 F.2d 89 (2d Cir. 1971), *cert. denied*, 405 U.S. 963 (1972).

The jurisdictional element in the Act is stated as follows: "whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail." The state of mind is expressed in terms of the intent that must accompany the travel or transportation: "with intent to (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity."

The only definition provided by the Act is that for "unlawful activity": "(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances . . . or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

This statute has been held constitutional against charges that it was beyond the Congressional authority under the commerce clause, *United States* v. *Zirpolo*, 288 F. Supp. 993 (D. N.J. 1968), *rev'd on other grounds*, 450 F.2d 424 (3d Cir. 1971); *United States* v. *Berddoll*, 412 F. Supp. 1308 (D. Del. 1976); *Spinelli* v. *United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969); *United States* v. *Barrow*, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *Marshall* v. *United States*, 355 F.2d 999 (9th Cir.), *cert. denied*, 385 U.S. 815 (1966); *United States* v. *Zizzo*, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965); *United States* v. *Gilstrap*, 389 F.2d 6 (5th Cir.), *cert. denied*, 391 U.S. 913 (1968); that it was impermissibly vague and, thus violated due process, *Spinelli* v. *United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969); *United States* v. *Barrow*, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *Marshall* v. *United States*, 355 F.2d 999 (9th Cir.), *cert. denied*, 385 U.S. 815 (1966); *United States* v. *Zizzo*, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965); *Turf Center, Inc.* v. *United States*, 325 F.2d 793 (9th Cir. 1963); *Bass* v. *United States*, 324 F.2d 168 (8th Cir. 1963); *Gilstrap* v. *United States*, 389 F.2d 6 (5th Cir.), *cert. denied*, 391 U.S. 913 (1968); and that it violated free speech; *United States* v. *Lookretis*, 385 F.2d 487 (7th Cir. 1967), *vacated on other grounds*, 390 U.S. 338 (1968).

Although the courts have recognized that the Act was directed at organized crime, they have not restricted its application to persons associated with organized crime syndicates, *United States* v. *Deardorff*, 343 F. Supp. 1033 (S.D. N.Y. 1971). Despite legislative history to the effect that organized crime was the target, courts have interpreted the

Act not to require that the defendant have knowledge that interstate travel will occur or the facilities of interstate commerce will be used. *United States* v. *McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 100 S. Ct. 65 (1979); *United States* v. *Hanson*, 428 F.2d 101 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); *United States* v. *Roselli*, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971); *United States* v. *Colacurcio*, 499 F.2d 1401 (9th Cir. 1974); *United States* v. *Faivre*, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1002 (1975); *United States* v. *Doolittle*, 507 F.2d 1368 (5th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States* v. *Prince*, 529 F.2d 1108 (6th Cir.), *cert. denied sub nom. Pandelli* v. *United States*, 429 U.S. 838 (1976). There is some division of opinion, however, on what may be termed incidental use of interstate facilities, i.e., use of checks that, for clearing purposes pass through interstate networks or use of mails not contemplated by the defendants or by persons other than the defendants or their coconspirators. The Second and Seventh Circuits take a more restrictive view than do the other circuits addressing the issue. *Compare United States* v. *Altobella*, 442 F.2d 310 (7th Cir. 1971); *United States* v. *McCormick*, 442 F.2d 316 (7th Cir. 1971); *United States* v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Marquez*, 449 F.2d 89 (2d Cir.), *cert. denied*, 405 U.S. 963 (1972); *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973) *with United States* v. *LaFaivre*, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1971); *United States* v. *Wechsler*, 392 F.2d 344 (4th Cir.), *cert. denied*, 392 U.S. 332 (1968); *United States* v. *Salsbury*, 430 F.2d 1045 (4th Cir. 1970).

Under this Act, the term "extortion," "bribery" and "arson" have been interpreted broadly and generically to include a single act, rather than a course of conduct, *United States* v. *Feudale*, 271 F. Supp. 115 (D. Conn. 1967), and all state offenses classifiable under those headings, *United States* v. *Michael*, 456 F. Supp. 335 (D. N.J. 1978), *aff'd*, 605 F.2d 1198 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 702 (1980).

The Act has been held to be applicable to commercial bribery, *Perrin* v. *United States*, 444 U.S. 37 (1979).

6. Criminal forfeiture—While forms of forfeiture were known to the English common law, their use was significantly circumscribed by the Magna Carta in 1215. 3 W. Holdsworth, *A History of English Law* 69 (3d ed. 1927) (The Crown renounced any claim to forfeiture on the ground of the commission of a felony). The Framers of our Constitution had a similar disdain for the use of *in personam* forfeiture. Article III, section 3 provides that:

> The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the life of the Person Attainted.

The aversion to the use of forfeiture carried over to the work of the First Congress, which enacted a provision in the criminal code that "no conviction shall work . . . any forfeiture of estate." Act of April 30, 1979, section 24, 1 Stat. 112 (1790). Subsequent Congressional

enactments authorized *in rem* forfeiture proceedings, but it was not until one hundred and eighty years later that Congress enacted an *in personam* forfeiture provision in 18 U.S.C. 1963.

Section 1963 provides that in addition to a possible prison term and a fine a person found in violation of section 1962 shall forfeit:

> (1) any interest [the defendant] has acquired or maintained in violation of section 1962, and any interest in, security of, claim against or property or contractural right of any kind affording a source of influence over any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of section 1962.

As one commentator has stated "unless [these forfeitures] are limited to the statute's language and purpose, they can threaten massive destruction of legitimately-acquired assets, a result Congress did not intend." Taylor, *Forfeiture under 18 U.S.C. section 1963—RICO's Most Powerful Weapon*, 17 Am. Crim. L. Rev. 379, 381 (1980) (forfeiture of General Motor's entire assets is possible under a literal reading of the statute); *see also* Bradley, *Racketeers, Congress and the Courts: Analysis of RICO*, 65 Iowa L. Rev. 837, 858 n. 114, 888–92 (1980).

One important question under the current statute is determining exactly what interests are forfeitable. Courts have held that because a union official held office pursuant to contract, the office was forfeitable. *See, e.g.*, *United States* v. *Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded on other grounds*, 439 U.S. 810 (1978) (forfeiture limited to currently held rights and can occur only after a finding that the union officer conducted the office through a pattern of racketeering). However, attempts by prosecutors to stretch the statute beyond the original intent have proven unsuccessful. In *United States* v. *Marubeni American Corp.*, 611 F.2d 763 (9th Cir. 1980), prosecutors argued that amounts due from a multimillion dollar contract allegedly obtained in violation of mail fraud and bribery statutes were forfeitable. The Ninth Circuit disagreed and struck the portion of the indictment that sought forfeiture. Similarly, the Northern District of Georgia has held that section 1963 does not reach property allegedly obtained through the fruits of racketeering income. *United States* v. *Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979). Obviously, the government cannot properly seek property belonging to the "heirs and assigns" of the defendant. *Id.* at 145. Similarly the government cannot seek forfeiture of a state office held by a defendant. *United States* v. *Mandel*, 415 F. Supp. 997, 1020–1022 (D. Md.), *supp. opinion*, appeal dismissed, 550 F.2d 1001 (4th Cir. 1977), *aff'd in part, vacated and remanded in part*, 591 F.2d 1341 (4th Cir.), *aff'd en banc after retrial*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980). (Maryland not an "enterprise"). Even if state office were construed by a court to be within the meaning of "interest" as used in this section, it would run counter to basic notions of federalism to allow removal from office based solely on a Federal law violation. *See United States* v. *Barber*, 476 F. Supp. 182, 189 (S.D. W. Va.) (forfeiture of office impractical, if not constitutionally impermissible). *See generally Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66, 107–08 (1861) (relating to the power of the Federal government to compel extradition).

Another problem presented by judicial construction of RICO has been the use of "associations in fact" to meet the definition of an "enterprise" within the meaning of 18 U.S.C. 1962. Under this theory, the "association in fact" takes on a quasi-legal aspect and is capable of directly or indirectly controlling assets and property, therefore, subject to forfeiture liability. At least one court has upheld the forfeiture of property of an "association in fact" enterprise which contributed to the pursuit of the racketeering goals. *United States* v. *Thevis*, 474 F. Supp. 134, 143 (N.D. Ga. 1979).

Section 1963 also authorizes the court to enter restraining orders in connection with property or interests that are subject to forfeiture. While the statute sets forth no standards for the evaluation of government applications under this section, the one court that has thoughtfully analyzed the issue has concluded that the government must show that (1) it has a high probability of success on the merits; (2) irreparable harm would occur in the absence of relief; (3) the issuance of an order would not harm the interests of other parties, and (4) the public interest favored such an order. *United States* v. *Mandel*, 408 F. Supp. 679, 682 (D. Md.) (later history not pertinent). Other courts that have not required such a showing have been forced to modify their original *ex parte* orders. *United States* v. *Thevis*, No. CR 78–180A (N.D. Ga. June 12, 1979) (order, dated August 3, 1979, restraining transfer of assets or payments to third parties, modified to permit payment of alimony payments on a monthly basis), 474 F. Supp. 134, 142 (N.D. Ga. 1979) (government abandons some of its forfeiture claims, and the court rejects others). Although two courts have dismissed claims that restraining orders adversely affect a defendant's sixth amendment rights and right to be presumed innocent, such claims have not been disposed of definitively. *United States* v. *Bello*, 470 F. Supp. 723 (S.D. Cal. 1979); *United States* v. *Scalzitti*, 408 F. Supp. 1014 (W.D. Penn. 1975), *appeal dismissed without opinion*, 556 F.2d 569 (3d Cir. 1977). In addition, courts have not yet confronted the problems this section causes with respect to the due process rights of third parties who hold an interest in the property subject to the forfeiture. *See generally Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 688, 690 (1974) (recognizing possible due process problems *vis-à-vis* third parties).

Finally, the courts have not definitively settled the issue of whether section 1963 forfeiture procedures are mandatory. One court has held that the court has no discretion with respect to remission or mitigation of forfeited property once there has been a determination that the defendant held an "interest" in an "enterprise". *United States* v. *L'Hoste*, 609 F.2d 796, 805–06 (5th Cir. 1980) (defendant ordered to forfeit an interest in certain stocks even though his wife held a community property interest in the stocks); *but cf. United States* v. *Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1312 (1980) (in dicta, the court assumed that the district court had discretion to avoid unconstitutionally harsh applications of 18 U.S.C. 1963(c)).

The constitutionality of the forfeiture provisions has been upheld. *United States* v. *Grande*, 620 F.2d 1026 (4th Cir. 1980).

§ *2701—Racketeering*

This section sets forth offenses of two different types. The first branch, in subsection (a)(1), relates to operating a racketeering syndicate and is new to Federal law.[1] The second branch, in subsection (a)(2), is derived from 18 U.S.C. 1962 (b) and (c).

Subsection (a)(1) makes it a class B felony for someone knowingly to organize, own, control, manage, direct, finance, or otherwise participate in a supervisory capacity in a "racketeering syndicate." This section is designed to reach the managers of crime syndicates and is not intended to reach incidental participants in a criminal enterprise.

There are several terms essential to a proper understanding of subsection (a)(1). The first is "racketeering activity", whose definition in section 2707 of the proposed code is largely drawn from 18 U.S.C. 1961. The term means certain kinds of criminal conduct (under both State and Federal laws) that is generally believed to be associated with organized criminal activity. The term "racketeering activity" is used in the definition of "racketeering syndicate", the organization or control of which is prohibited by subsection (a)(1).

The term "racketeering syndicate" is defined in section 2707 of the proposed code to mean an "enterprise" of five or more persons who engage, on a continuing basis, in conduct constituting a "pattern of racketeering activity" (other than certain felonious gambling activities). An "enterprise", in turn, is defined in section 2707 to mean a business or other similar business-like undertaking by an association of persons, and the term includes governments and government agencies. This definition is derived from 18 U.S.C. 1961, which has been construed broadly to include a combination of individuals associated with various corporations, *United States* v. *Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), as well as businesses (foreign and domestic, illegal as well as legal). *See, e.g., United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 429 U.S. 1039 (1979); *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1976); *United States* v. *Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States* v. *Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States* v. *Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom. Napoli* v. *United States*, 429 U.S. 1039 (1977). The Committee endorses this approach. However, for the reasons so aptly stated by the Court in *United States* v. *Anderson*, No. 79–1809 (8th Cir. Aug. 7, 1980), the Committee is concerned that the current definition could be interpreted to reach the mere joint participation by two persons in two predicate offenses. Thus, the Committee has required that an association be "business like" in order to constitute an enterprise.

The inclusion of governments and government agencies in the definition of "enterprise" carries forward court interpretations of "enterprise" under the current statute (18 U.S.C. 1961), those interpretations being based upon the explicit Congressional findings that organized crime uses its money and power to "subvert and corrupt our

[1] It may be argued that subsection (a)(1) replaces the dangerous special offender provisions of 18 U.S.C. 3575. Those provisions, which were originally enacted as part of the Organized Crime Control Act of 1970, permit a court to impose additional punishment upon a convicted defendant if the court finds that the defendant is a "dangerous special offender" as defined in 18 U.S.C. 3575(e). The purpose of the dangerous special offender sentencing provisions was to deter organized criminal activity by incapacitating the leadership of criminal organizations. For a variety of reasons, the dangerous special offender sentencing provisions have not proven to be effective. *See* Senate Rep. No. 96–553 at 795–97. 985–86 (1980).

However, subsection (a)(1) is broader than 18 U.S.C. 3575, which applies only when there has been a conviction. Subsection (a)(1), on the other hand, provides a separate and independent basis for prosecution.

democratic processes" and that its activities "threaten the domestic security and undermine the general welfare of the Nation and its citizens". *United States* v. *Grzywacz*, 603 F.2d 682, 690 (7th Cir. 1979) (Madison, Illinois Police Department is an "enterprise"). *See United States* v. *Brown*, 555 F.2d 407 (5th Cir. 1977) *cert. denied*, 435 U.S. 904 (1978) ("enterprise" includes a municipal police department); *United States* v. *Frumento*, 552 F.2d 534 (3d Cir. 1977), *cert. denied sub nom. Millhouse* v. *United States*, 434 U.S. 1072 (1978) (Pennsylvania Department of Revenue, Bureau of Cigarette's and Beverage Taxes is an "enterprise"); *United States* v. *Ohlson*, 522 F.2d 1347 (9th Cir. 1977) (California Bureau of Narcotic Enforcement and Narcotic Bureau of the San Francisco Police Department are "enterprises"); *United States* v. *Burnsed*, 566 F.2d 882 (4th Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978) (county police department vice squad is an "enterprise"). *Contra*, *United States* v. *Sutton*, 605 F.2d 260 (6th Cir. 1979) (submitted for rehearing *en banc* April 2, 1980). The Committee endorses current law interpretations given to "enterprise" with respect to the inclusion of governmental entities.

The definition of "racketeering syndicate" requires that the "enterprise" engage, on a continuing basis, in conduct constituting a "pattern of racketeering activity".[2] The term "pattern of racketeering activity" is defined in section 2707 to mean two or more separate acts of "racketeering activity", at least one of which occurred after the effective date of subchapter I of chapter 27 of the proposed code. The two acts must be interrelated by a common scheme or motive and not be isolated events. This definition is derived from existing case law. *See United States* v. *Stofsky*, 409 F. Supp. 609 (S.D. N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). *See also* Note, *The Future of Federal Prosecution of Organized Crime*, 47 Geo. Wash. L. Rev. 761, 770 (1979).

Finally, it should be noted that the definition of "racketeering syndicate" in section 2707 of the proposed code requires that the conduct constituting the "racketeering activity" be engaged in "on a continuing basis". The Committee has used this standard in lieu of a more determinate standard because of the diversity of potential fact situations. For example, a syndicate that plans a series of drug offenses may require the passage of many months to commit two acts of "racketeering activity", while a conspiracy to commit five bank robberies (which are acts of "racketeering activity") may be formulated and consummated within several weeks. Since the "on a continuing basis" standard was used in order to avoid artificial time constraints, the Committee intends that the standard not be applied in a mechanical way.[3]

Subsection (a)(2) makes it a class B felony for someone knowingly to engage in a "pattern of racketeering activity" and thereby to (1) acquire or maintain an interest in, or control of, an "enterprise," or (2) conduct or participate in the conduct of an "enterprise." This subsection is intended to make criminal conduct that threatens the

[2] Since the definition of "racketeering syndicate" in section 2707 requires both an "enterprise" and a "pattern of racketeering activity", the term "enterprise" involves more than a mere "pattern of racketeering activity." The Committee adopts the view of the court in Sutton v. United States, 605 F.2d 260 (6th Cir. 1979).

[3] Standards similar to "on a continuing basis" have been approved by the courts. *See* United States v. Cozetti, 441 F.2d 344, 348 (9th Cir. 1971) (rejecting a defendant's vagueness claim with respect to the term "business enterprise" as used in 18 U.S.C. 1952); United States v. Manfredi, 488 F.2d 588, 602–03 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); United States v. Kirk, 534 F.2d 1262, 1277 (8th Cir. 1976) (upholding the constitutionality of the term "continuing criminal enterprise" as used in 21 U.S.C. 848).

operation of legitimate organizations, such as corporations and governments, and to deal with conduct that is sufficiently organized and cohesive to constitute a criminal enterprise. In reading subsection (a)(2), it is important to keep in mind that for criminal liability to attach, there must be (1) a series of criminal acts of a specified type; (2) an interrelationship among those criminal acts; and (3) a result (i.e., the criminal, as a result of the criminal acts, must influence or control the operations of an "enterprise"). *See generally* Note, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 Vand L. Rev. 441, 479–80 (1980).

Subsection (a)(2)(A) essentially involves the takeover, or maintenance of, an "enterprise" through the use of criminal means. This offense is derived from 18 U.S.C. 1962(b), and the Committee intends to continue the judicial interpretations of the terms "acquires" and "maintains an interest" as those terms are defined in 18 U.S.C. 1961. The Committee intends, by the addition of the verb "controls", to reach persons who are without a legal interest in the "enterprise", but who have de facto control over the operations of the enterprise.

Subsection (a)(2)(B) consists of a prohibition against persons who, through engaging in a "pattern of racketeering activity," conduct (or participate in) an "enterprise". This subsection is aimed at persons who, through organized criminal activities, manipulate the conduct of legitimate and illegitimate enterprises. Therefore, there must be a nexus between the prohibited activity and the conduct of the enterprise. *See United States* v. *Nerone*, 563 F.2d 836, 851–52 (7th Cir. 1977) *cert. denied sub nom. Hornstein* v. *United States*, 435 U.S. 951 (1978); *United States* v. *Rubin*, 559 F.2d 975, 990 (5th Cir. 1977), *cert. denied*, 100 S. Ct. 133 (1980); *United States* v. *Campanale*, 518 F.2d 352, 363–64 (9th Cir. 1975), *cert. denied sub nom. Grarcich* v. *United States*, 423 U.S. 1050 (1976); *United States* v. *Scalzitti*, 408 F. Supp. 1014 (W.D. Pa. 1975) *appeal dismissed without opinion*, 556 F. 2d 569 (3d Cir. 1975).

Subsection (b) provides for Federal jurisdiction over an offense described in this section when the enterprise or racketeering syndicate is engaged in, or the activities of the enterprise or syndicate affect, interstate or foreign commerce. *See Perez v. United States*, 402 U.S. 146 (1971).

§ *2702—Laundering racketeering proceeds*

This section carries forward provisions of 18 U.S.C. 1962(a).

Subsection (a) makes it a class C felony for someone knowingly to use or invest proceeds from a "pattern of racketeering activity" and thereby to conduct, acquire or maintain an interest in, or establish, an "enterprise". The terms "pattern of racketeering activity" and "enterprise" are defined in section 2707 of the proposed code and have been discussed in connection with section 2701 of the proposed code. See pp. 371–72 *supra*. The term "proceeds" replaces the phrase "any income derived, directly or indirectly, from", which is used in 18 U.S.C. 1962(a). The term "proceeds" is meant to include money or other receipts derived from a pattern of racketeering.

Subsection (b) provides a defense when the proceeds were used to purchase securities of the enterprise on the open market without intent

to control or participate in the control of the enterprise (or to assist another person to do so), if the securities of the enterprise directly or indirectly held by the purchaser or members of the purchaser's immediate family in any pattern of racketeering activity after such purchase do not amount in the aggregate to one percent or more of the outstanding securities of any one class and do not confer, either in law or in fact, the power to elect one or more directors of the enterprise. This carries forward the exemption of current law (18 U.S.C. 1962(a)).

Subsection (c) provides for Federal jurisdiction over an offense described in section 2702 when the enterprise is engaged in, or affects, interstate or foreign commerce.

§ 2703—Loansharking

This section carries forward, in modified form, 18 U.S.C. 891–96.

Subsection (a) makes it an offense for someone knowingly to make or finance an "extortionate extension of credit". This carries forward 18 U.S.C. 892(a) and 893. The term "extortionate extension of credit" is defined in section 2707 of the proposed code to mean an "extension of credit" with respect to which the creditor and debtor understand, at the time of the extension of credit, that a delay in repayment or a failure to repay could result in the use of force or in threatening or placing any person in fear that any person will be subjected to bodily injury, kidnapping, or injury to reputation, or that any property will be damaged. This definition is substantially the same as the definition in current law (18 U.S.C. 891), and is used in order to carry forward current case-law interpretations of the term. *See, e.g., United States* v. *Annoreno*, 460 F.2d 1303, 1308–09 (7th Cir.), *cert. denied*, 409 U.S. 852 (1972); *United States* v. *Nakaladski*, 481 F.2d 289, 297 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973).

The term "extension of credit" is defined in section 2707 of the proposed code to mean a loan, a renewal of a loan, or a tacit or express agreement concerning the deferment of the payment or satisfaction of a debt or claim, whether acknowledged or disputed, valid or invalid. This definition is virtually identical with the provisions of 18 U.S.C. 891, and will thus perpetuate the judicial constructions of current law. *See, e.g., United States* v. *Schaffer*, 539 F.2d 653 (8th Cir. 1976).

The term "finances" as used in subsection (a)(1) is not defined. The Committee intends through the term "finances" to reach what currently is reachable under 18 U.S.C. 893 (financing extortionate extensions of credit). Thus, the term means the providing of money, or other item of property with a pecuniary value, to another person, knowing that the recipient will use the money or property in making an "extortionate extension of credit".

Subsection (a)(2) makes it an offense for someone knowingly to make or finance an "extension of credit" (1) having an aggregate value that exceeds $100 (including unpaid interest or similar charges and any other outstanding extensions of credit to the same debtor); (2) carrying a rate of interest that exceeds an annual rate of 45 percent; and (3) concerning which the repayment, or the performance of any promise given in return, would not be enforceable through civil judicial process against the debtor (a) in the jurisdiction within which the

debtor who is an individual resided at the time the extension of credit was made or (b) in every jurisdiction within which the debtor that is an organization was incorporated or qualified to do business at the time the extension of credit was made. This subsection sets forth a new offense derived from an evidentiary rule in 18 U.S.C. 892 (relating to making extortionate extensions of credit). Under current law, the prosecution, upon a showing of the above-described circumstances, has made a *prima facie* case that an extension of credit was extortionate. The Committee concluded that the existence of such circumstances, when coupled with the defendant's knowledge of them, was sufficient to create criminal liability. Subsection (a)(2), therefore, eliminates the requirement of current law that the prosecution demonstrate that the extension of credit was extortionate. Several recent State enactments appear to adopt a similar approach. *See* Mass. Gen. Laws Ann. ch. 271, section 49 (West); N.Y. Penal Law section 190.40 (McKinney 1979).

Subsection (a)(3) makes it an offense for someone knowingly to collect, or attempt to collect, by means of the use (or an express or implicit threat of the use) of violence or other criminal means of causing harm to the person, reputation, or property of any person, a repayment of an extension of credit that was made or financed unlawfully (i.e., in violation of subsection (a)(1) or (2)). This carries forward the provisions of 18 U.S.C. 894(a)(1). The term "repayment" is defined in section 2707 of the proposed code.

Subsection (a)(4) makes it an offense for someone knowingly to retaliate against any person for failing to repay an extension of credit made or financed in violation of subsection (a)(1) or (2) by subjecting any person to bodily injury, kidnapping, or injury to reputation, or by damaging property. This carries forward the provisions of 18 U.S.C. 894(a)(2).

Subsection (b) classifies an offense described in section 2703 as a C felony if the violation is of subsection (a)(1) or (a)(4), and as a D felony if the violation is of subsection (a)(2) or (a)(3). This classification system distinguishes between violations which inherently involve the use of violence or threats of violence (subsections (a)(1) or (a)(4)) and those that do not inherently involve violence or threats of violence (subsections (a)(2) or (a)(3)). While this classification scheme modifies current law, the Committee's approach is supported by the Department of Justice and is similar to the approach in the Senate Judiciary Committee's recodification bill. *See* Senate Rep. No. 96–553 at 813 (1979).

Subsection (c) provides that in a prosecution for an offense described in section 2703(a)(2)(C) or (a)(3), no state of mind need be proven as to the enforceability of the extension of credit.

The Committee has not reenacted those portions of 18 U.S.C. 894(b) relating to evidentiary matters in extortion prosecutions. The Committee does not intend to reach a result different from current law, but it believes that matters of an evidentiary nature do not belong in the proposed code. Matters relating to evidence and the weight to be accorded to certain evidence are best left to development by case law and the Federal Rules of Evidence. *See* pp. 209 *supra*. For a compilation of the current case law which the Committee intends to

carry forward, see Goldstock & Coennen, *Controlling the Contemporary Loanshark: The Law of Illicit Lending and the Problem of Witness Fear*, 65 Cornell L. Rev. 127 (1980).

§ 2704—Travel or transportation in aid of racketeering

This section is derived from 18 U.S.C. 1952(a), the "Travel Act". It provides that it is a Federal offense to travel in interstate or foreign commerce with the intent to further an enterprise that involves prostitution in violation of a state criminal law. This provision, when coupled with the coverage of organized criminal activity in section 2701, provides sufficient Federal jurisdiction, permit Federal investigation of large scale, organized prostitution violations. In section 2744 (relating to prohibited sexual conduct involving minors), the Committee has also provided for criminal penalties for the transportation of minors (i.e., persons under age 18) across state lines for certain prohibited purposes, including prostitution.

The Committee concluded that the primary law enforcement responsibility for offenses involving prostitution should be at the state and local level, as should questions involving the definition of such an offense. Because of the absence of a national consensus about prostitution, it would be virtually impossible to draft a Federal statute that takes into account local standards and practices. Moreover, state and local law enforcement officials have demonstrated a continuing ability to investigate and successfully prosecute locally based prostitution violators. Thus, Federal jurisdiction is necessary only where there is some evidence that a pattern of criminal conduct exists, and that it is beyond the reach of state and local law enforcement. This is the approach taken in section 2701 and 2704 of the proposed code. This approach takes into account the limited resources of federal law enforcement. By granting primary jurisdiction to state and local authorities, the proposed code gives prosecution of prostitution offenses the priority it deserves.

Subsection (a) makes it a class D felony for someone, with intent to further an unlawful activity, to knowingly travel in interstate or foreign commerce (or to use any facility in interstate or foreign commerce, including the mail) and (1) engage in conduct which would violate section 2301 (murder), 2302 (manslaughter), 2311 (maiming), 2312 (aggravated battery), 2313 (battery), 2314 (aggravated assault), 2315 (terrorizing), or 2316 (communicating a threat) of the proposed code if Federal jurisdiction existed under that section, or (2) further an unlawful activity described in subsection (b)(1) or (b)(2).

Subsection (b) defines the term "unlawful activity" as used in section 2704 to mean (1) any enterprise involving conduct that violates section 2741 (operating a gambling business) or any of the drug offenses (sections 2711–14) in the proposed code; (2) an enterprise involving prostitution offenses, or narcotics or controlled substances offenses in violation of the laws of the State in which such offenses are committed; or (3) any conduct which would violate section 1721 (witness bribery and graft), 1722 (informant bribery and graft), 1751 (bribery), 2501 (arson), or 2522 (extortion) or would violate a section of subchapter VI of chapter 25 of the proposed code (relating to nongovernmental bribery), if Federal jurisdiction existed for an offense under that section.

This section modifies current law somewhat. Current law (18 U.S.C. 1952(a)) permits Federal prosecution when there was interstate travel or the use of a facility in interstate commerce in order to further an "unlawful activity", where that "unlawful activity" was the State-law offense of arson, bribery, or extortion. This portion of current law is carried forward in section 2705 of the proposed code (relating to criminal conduct in aid of racketeering) to the extent that the conduct involves racketeering. Section 2704(a) is limited to those situations in which a crime of violence occurs in connection with the intent to further an "unlawful activity" that involves the State-law offenses of arson, bribery, or extortion. The Committee believes that this change will better protect the delicate balance between State and Federal law enforcement jurisdiction. It is inappropriate to invoke Federal jurisdiction over mere incidental use of interstate commerce, or of facilities in interstate commerce, in order to commit less complex extortions, arsons, or bribery schemes. Situations in which there is a substantial Federal interest can be prosecuted under the bribery offenses of the proposed code (which expand Federal jurisdiction) or as noted above, under section 2705 of the proposed code (related to criminal conduct in aid of racketeering).

The Committee has chosen to make the use of interstate commerce, or a facility in interstate commerce, a component of the offense and to require that the actor know that such use was involved. Proof of the actor's knowledge will be very easy; the requirement of knowledge is designed to ensure an element of contemporaneity or nexus between the travel or use of the facility in interstate commerce and the commission of the offense.

§ 2705—Criminal conduct in aid of racketeering

Section 2705 makes it an offense for someone knowingly to engage in conduct that would violate certain sections of the proposed code, if Federal jurisdiction under those sections existed, with reckless disregard for the fact that such conduct is in connection with any violation of section 2701 of the proposed code (relating to racketeering). The specified sections are 1721 (relating to witness bribery and graft), 1722 (relating to informant bribery and graft), 1751 (relating to bribery), 2501 (relating to arson), 2521 (relating to robbery), and any section set forth in subchapter VI of chapter 25 (relating to nongovernmental bribery). The offense described in section 2705 is classified at the same level as provided in the section of the proposed code that would have been violated had Federal jurisdiction existed.

This section replaces 18 U.S.C. 1951 (the "Hobbs Act") and 18 U.S.C. 1952 (the "Travel Act") to the extent that those statutes prohibit racketeering activity. The offense described in section 2705 reflects the Committee's belief that both the Hobbs and Travel Acts were originally designed to address racketeering activity, whether by labor unions or by organized crime. The Committee believes that attempting to reach racketeering activity through the broad jurisdiction bases of the Hobbs and Travel Acts creates too great a potential for undue Federal interference in criminal matters that are primarily of State concern. It is no answer to these concerns that the power has not been abused in the past, since the record of past administrations does not limit the actions of future administrations. Moreover, as discussed in

relation to extortion, *supra* at 300–302, the Department of Justice can exercise only limited control over the prosecutorial discretion of the largely independent United States attorneys.

It has been suggested that limiting Hobbs Act and Travel Act jurisdiction over robbery, arson, and blackmail to incidents involving racketeering may unduly hamper government prosecutions:

> Such a change would be inadvisable because if a statutory limitation, rather than prosecutive discretion, is used to effectuate the desired limitation, the government would need to prove the presence of "racketeering" activity as an element of the offense. As the Supreme Court noted in [*United States* v. *Culbert*, 435 U.S. 371 (1978)], this element might pose constitutional difficulties because of the vagueness of the concept of racketeering.
>
> Even if Congress could device a meaningful and constitution definition of racketeering, the addition of this element of proof would significantly impede successful prosecution, thus possibly causing some defendants to be acquitted who are currently convicted. Although Congress confronts this type of choice frequently in defining the boundaries of Federal offenses, the generally satisfactory experience with the Hobbs Act suggests that Congress has acted wisely in drafting the statute broadly and leaving to the Executive Branch broad flexibility and discretion in deciding which violations to prosecute.

R. Pauley, *An Analysis of Some Aspects of Jurisdiction under S. 1437, the proposed Federal Criminal Code*, 47 Geo. Wash. L. Rev. 475, 488 (1979).

The Committee does not find either of these arguments persuasive. By requiring a connection with conduct in violation of the offense described in section 2701 (racketeering) of the proposed code, constitutional difficulties are avoided; the predecessor of that offense has already been upheld against constitutional attack on grounds of vagueness. See discussion at 359 *supra*. The second criticism, as noted by the commentator. is applicable to any limitation on Federal jurisdiction. Under the Committee approach, some persons guilty of robbery, arson, or bribery will not be guilty of a *Federal* offense. This will not, however, necessarily cause "some defendants to be acquitted who are currently convicted." Rather, it should encourage Federal prosecutors not to request indictments in cases that are more properly in the sphere of State concern. Persons involved in robberies which have no Federal connection other than an effect on interstate commerce remain convictable, but in State, rather than Federal court.

§ *2706—Order of criminal forfeiture*

This section carries forward the criminal forfeiture provisions of 18 U.S.C. 1963, which were enacted as part of title IX of the Organized Crime Control Act of 1970. Those provisions represent a radical departure from the previous American legal practice. The First Congress, by Act of April 20, 1790, 1 Stat. 117, abolished forfeiture of estate and corruption of blood (18 U.S.C. 3563). Thus, for nearly 180 years, the United States had no provisions for criminal forfeiture.

The Committee has decided to carry forward the criminal forfeiture provisions of 18 U.S.C. 1963. While those forfeiture provisions have been used infrequently, the Department of Justice has alleged that those provisions are necessary in order to aid in the fight against organized crime.

Subsection (a) provides that a judge, when imposing sentence upon someone convicted of racketeering (section 2701 of the proposed code) or laundering racketeering proceeds (section 2702 of the proposed code), shall order, in addition to any other sentence imposed, that the defendant forfeit to the United States any property that is part of the defendant's interest in the "enterprise" or "racketeering syndicate" (terms that are defined in section 2707 of the proposed code).

Subsection (b) authorizes a judge, at any time after someone is arrested for, or charged with, a violation of section 2701 or section 2702 of the proposed code, to take appropriate action to safeguard forfeitable property.

Subsection (c) authorizes the Attorney General to seize property that has been ordered forfeited and to dispose of that property as soon as commercially feasible. In so doing, the Attorney General must make due provision for the rights of any innocent person. If the property that has been ordered forfeited cannot be disposed of, the rights to that property cannot revert to the defendant.

Subsection (d) provides that all provisions of law relating to the remission or mitigation of civil forfeitures of property for violation of the customs laws shall apply to a criminal forfeiture ordered under this section.

§ *2707—Definitions for subchapter*

This section defines nine terms that are used in subchapter I of chapter 27 of the proposed code.

Section 2707(1) defines "creditor" to mean a person who makes an "extension of credit", or who claims by, under, or through a person making an "extension of credit". This definition is derived from 18 U.S.C. 891(2).

Section 2707(2) defines "debtor" to mean a person to whom an "extension of credit" is made, or a person who guarantees the "repayment" of an "extension of credit" or who undertakes to indemnify the creditor against loss from a failure to repay the "extension of credit". This definition is derived from 18 U.S.C. 891(3).

Section 2707(3) defines "enterprise" to mean a business or other similar business-like undertaking by an association of persons. The term includes a government or government agency. This definition is derived from 18 U.S.C. 1961 and has been discussed in connection with section 2701 of the proposed code. *See* pp. 370–73 *supra*.

Section 2707(4) defines "extension of credit" to mean a loan, a renewal of a loan, or a tacit or express agreement concerning the deferment of the "repayment" or satisfaction of a debt or claim (however the loan, renewal, or agreement arose; whether the loan, renewal, or agreement is acknowledged or disputed; and whether the loan, renewal, or agreement is valid or invalid). This definition is derived from 18 U.S.C. 891(6) and has been discussed in connection with section 2703 of the proposed code. *See* p. 374–76 *supra*.

Section 2707(5) defines the term "extortionate extension of credit" to mean an "extension of credit" with respect to which it is the understanding of the "creditor" and "debtor" at the time the "extension of credit" is made, that delay in making "repayment" could result in the use of force or in threatening or placing any person in fear that any person will be subjected to bodily injury, kidnapping, or injury to reputation or that any property will be damaged. This definition is derived from 18 U.S.C. 891(6) and has been discussed in connection with section 2703 of the proposed code. *See* p. 374–76 *supra.*

Section 2707(6) defines the term "pattern of racketeering activity" to mean two or more separate acts of "racketeering activity", at least one of which took place after the effective date of subchapter I of chapter 27 of the proposed code (relating to racketeering). The acts, while separate, must be interrelated and not isolated events. This definition is derived from existing case law, *see United States* v. *Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), and has been discussed in connection with section 2701 of the proposed code. *See* p. 370–73 *supra.*

Section 2707(7) defines the term "racketeering activity" to mean conduct that violates specified sections of the United States Code or that constitutes a felony under a State statute relating to murder, kidnapping, arson, robbery, bribery, extortion, trafficking in dangerous drugs or controlled substances, or engaging in a gambling business. The specified sections of the United States Code are: sections 1721 (witness bribery), 1722 (informant bribery or graft), 1723 (tampering with a witness or an informant), 1724 (retaliating against a witness or an informant), 1725 (tampering with physical evidence), 1751 (bribery), 1752 (graft), 1903 (alcohol and tax offenses), 1911 (smuggling), 1912 (trafficking in smuggled property), 1921 (trafficking in contraband cigarettes), 1922 (unlawful conduct relating to contraband cigarettes), 2301 (murder), 2303 (manslaughter), 2311 (maiming), 2312 (aggravated battery), 2315 (terrorizing), 2321 (kidnaping), 2501 (arson), 2521 (robbery), 2522 (extortion) 2523 (blackmail), 2531 (theft), 2532 (trafficking in stolen property), 2534 (executing a fraudulent scheme), 2535 (bankruptcy fraud), 2537 (criminal infringement of a copyright), 2541 (counterfeiting), 2542 (forgery), 2543 (making, trafficking in, or possessing a counterfeiting or forging implement), 2544 (trafficking in counterfeit labels for phonorecords and copies of motion pictures and audiovisual works), 2551 (bribery of a government contractor), 2552 (labor bribery), 2553 (sports bribery), 2555 (commercial bribery), 2561 (securities offenses) (insofar as the violation consists of fraud), 2562 (monetary offenses), 2703 (loansharking), 2704 (travel or transportation in aid of racketeering), 2711 (trafficking in an opiate or phencyclidine), 2712 (trafficking in drugs), 2741 (operating a gambling business), and 2744 (prohibited sexual conduct involving minors) of the proposed code, and section 302 of the Labor Management Relations Act of 1947 (29 U.S.C. 186). The definition of "racketeering activity" is derived from 18 U.S.C. 1961. Current law has been modified, however, by the addition of violations of sections 2537 and 2544 of the proposed code to the definition of "racketeering activity." The Committee did so because of the evidence of large-scale, organized criminal activities with regard to record and film counterfeiting. *New York Times*, Dec. 7, 1978, at 1, col. 1; *NBC Nightly News*, May 9, 1979. Indeed, it appears that the illegal profits to organized criminal activity from counterfeiting a hit record, for example, outstrip the legitimate profits of recording companies, which must bear the recording and promotional expenses and pay artists' royalties. *See Washington Post*, March 9, 1980, at H–1. The definition of "racketeering activity" has been discussed in connection with section 2701 of the proposed code. *See* p. 373 *supra.*

Section 2707(8) defines "racketeering syndicate" to mean an enterprise of five or more persons who engage, on a continuing basis, in conduct constituting a "pattern of racketeering activity", other than "racketeering activity" consisting of conduct constituting a felony under section 2741 of the proposed code (relating to operating a gambling business) or under the law of a State relating to operating a gambling business. The term "racketeering syndicate" is not defined in current Federal law, and the definition in section 2707(8) has been discussed in connection with section 2701 of the proposed code. *See* pp. 372 *supra.*

Section 2707(9) defines the term "repayment" to mean (1) a return (in whole or in part) of an "extension of credit", and (2) a payment of interest on, or of a charge for, an "extension of credit". This definition is derived from 18 U.S.C. 891(4).

SUBCHAPTER II—DRUG OFFENSES

Current Law

This subchapter brings forward, modifies, and replaces various sections of the Controlled Substances Act and the Controlled Substances Import and Export Act, which were enacted as titles II and III, respectively, of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91–513, 84 Stat. 1236.

The Controlled Substances Act makes it unlawful for any person, except as authorized by the Act

> knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or (2) to create, distribute or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. 841 (a).

Most of the terms used in 21 U.S.C. 841(a) (such as "manufacture", "distribute", and "dispense") are defined in 21 U.S.C. 802. The term "possess with intent to manufacture, distribute, or dispense", as used in 21 U.S.C. 841(a), includes constructive possession. Constructive possession requires that the actor be able to exercise dominion and control over the substance. *United States* v. *Phillips*, 496 F.2d 1395, 1397 (5th Cir. 1974); *United States* v. *Grayson*, 597 F.2d 1225, 1229 (9th Cir. 1979).

The constitutionality of the Controlled Substances Act has been upheld as a valid exercise of power under the commerce clause, but it is unnecessary that a particular act be shown to have affected interstate or foreign commerce in order to sustain a conviction under the Act. *United States* v. *Scales*, 464 F.2d 371, 373 (6th Cir. 1972); *United*

States v. *Montes-Zarate*, 552 F.2d 1330, 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 947 (1978). The allegation that the scheme of scheduling controlled substances is irrational because marihuana is assertedly less harmful than alcohol or tobacco has been rejected. *United States* v. *Gaertner*, 583 F.2d 308, 312 (7th Cir. 1978).

The Controlled Substances Import and Export Act makes it unlawful to import into the customs territory of the United States from any place outside of such territory (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedules I or II, or any narcotic drug in schedules III, IV, or V. 21 U.S.C. 952(a). Terms used in the description of this offense are defined in 21 U.S.C. 951. There are 2 exemptions. It is not unlawful to import as much crude opium and cocoa leaves as the Attorney General finds to be necessary for legitimate purposes. 21 U.S.C. 952(a)(1). It is also not unlawful to import such controlled substances in schedules I or II, or any narcotic drug in schedules III, IV, or V, as the Attorney General finds to be necessary for the legitimate needs of the United States. However, such importations are permitted only during an emergency in which domestic supplies of such drugs are found to be inadequate or when competition among domestic manufacturers is inadequate and cannot be made adequate by registering more manufacturers. 21 U.S.C. 952(a)(2).

The Controlled Substances Import and Export Act also makes it unlawful to export from the United States any narcotic drug in schedules I, II, III, or IV, unless (1) that drug is exported to a country that is a party to certain international narcotic control conventions, (2) the country of destination has an adequate narcotic import control system, (3) the country of destination has issued the consignee a narcotic import license, (4) the exporter establishes that the narcotic is to be used for medical or scientific purposes in the country of destination, and (5) the Attorney General has issued an export permit. 21 U.S.C. 953(a). There is an exemption that permits the Attorney General to authorize the export of any narcotic drug in schedules I–IV to any country that is a party to certain international agreements if the particular drug is to be applied to a special scientific purpose in the country of destination and the authorities of such country will permit the importation of that drug for such purpose.

The Controlled Substances Import and Export Act makes it unlawful for any person to bring or possess on board any vessel or aircraft, or on board any vehicle of a carrier, arriving in or departing from the United States or the customs territory of the United States, a controlled substance in schedules I or II or a narcotic drug in schedules III or IV, unless such substance or drug is a part of the cargo entered in the manifest or part of the official supplies of the vessel, aircraft, or vehicle. 21 U.S.C. 955.

Finally, the Controlled Substances Import and Export Act makes it unlawful for any person to manufacture or distribute a controlled substance in schedules I or II intending or knowing that such substance will be unlawfully imported into the United States. 21 U.S.C. 959. This provision specifically states that it is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States and fixes venue for trial as the district where an accused enters the United States, or the District of Columbia.

A person who engages in a continuing criminal enterprise violates 21 U.S.C. 848. While the offense in 21 U.S.C. 848 involves conduct related to controlled substances, the primary focus of that section is on organized criminal activity. The proposed code carries 21 U.S.C. 848 forward in the racketeering subchapter of chapter 27 of the proposed code.

§ 2711—Trafficking in an opiate or phencyclidine

Subsection (a) makes it an offense for someone knowingly to (1) manufacture or traffic in an opiate or phencyclidine; (2) create or traffic in a counterfeit substance containing an opiate or phencyclidine; or (3) import or export an opiate or phencyclidine or possess an opiate or phencyclidine aboard a vehicle arriving in or departing from the United States or the customs territory of the United States. The terms "manufacture", "traffic", "import", "opiate", "phencyclidine", "counterfeit substance", and "customs territory of the United States" are defined in section 2715 of the proposed code. The term "vehicle" is defined in section 101 of the proposed code.

The Committee chose to use the term "traffic" instead of the terms "dispense" and "distribute", which are used in current law (21 U.S.C. 841(a)) in order to assure that the higher penalties of this offense are applied only to those participating in commercial transactions, and not to persons who transfer small quantities to friends without any consideration. Constructive transfers, such as the case in which a physician, in the usual course of professional practice, issues prescriptions without a legitimate medical purpose, are covered by the offense. *United States* v. *Moore*, 423 U.S. 122 (1975); *United States* v. *Roya*, 574 F.2d 386 (7th Cir.), *cert. denied*, 439 U.S. 857 (1978). This section applies to pharmacists, *United States* v. *Hayes*, 595 F.2d 258 (5th Cir.) 444 U.S. 934 (1979), and to drug sales personnel *United States* v. *Hill*, 589 F.2d 1344 (8th Cir.), *cert. denied*, 442 U.S. 919 (1980), despite the fact that such persons may be registrants under the Controlled Substances Act (21 U.S.C. 822), or that order forms (21 U.S.C. 828), or prescriptions (21 U.S.C. 829) were used in the commission of the offense.

The importation branch of the offense in subsection (a)(3) requires that the controlled substance came from outside the United States (or the customs territory of the United States). *United States* v. *Miranda*, 593 F.2d 590, 596 (5th Cir. 1979). Subsection (a)(3) reaches attempts to import controlled substances. Under the current offense of attempt (or conspiracy) to import controlled substances, 21 U.S.C. 963, it must be proven that the defendant knew that the controlled substance was intended to be imported into the United States. *United States* v. *Conroy*, 589 F.2d 1258, 1274 (5th Cir. 1979). It is unnecessary to show physical custody of the material in order to obtain a conviction for importation. *United States* v. *Valencia*, 492 F.2d 1071, 1074 (9th Cir. 1974).

The possession branch of the offense in subsection (a)(3) expands current law, 21 U.S.C. 955, which prohibits possession on board any vessel or aircraft or on board any vehicle of a carrier arriving in or departing from the United States or the customs territory of the United States. The term "vehicle" in subsection (a)(3), which is defined in section 101 of the proposed code, is broader than the term "vehicle of a carrier" in 21 U.S.C. 955. As under current law, *United*

States v. *LaFroscia*, 485 F.2d 457 (2d Cir. 1973), constructive possession is sufficient to convict under subsection (a)(3) for possession on board a vehicle.

The defense is often raised in drug courier cases that the defendant did not know that what was being carried was a controlled substance, that the courier had been given a sealed container and had no way to find out what was inside of that container. Current law rejects this defense on the ground that the courier need only be "willfully blind" about the nature of what is being carried. *United States* v. *Joly*, 493 F.2d 672, 674 (2d Cir. 1974); *United States* v. *Restrepo-Granda*, 575 F. 2d 524, 528–29 (5th Cir. 1978). Section 2711 reaches the same result (as does section 2712 of the proposed code (relating to trafficking in drugs)), since the term "knowingly" is defined in section 302 of the proposed code to include the concept of willful blindness. See discussion of this issue at 35–6 *supra*.

Subsection (b)(1) classifies the offense as a B felony when the offense involves 100 grams or more of an opiate or phencyclidine, when the offense consists of distributing an opiate or phencyclidine to a person who is less than 18 years old and who is at least 5 years younger than the defendant, or when the offense is committed after the defendant has been convicted of a felony under Federal law relating to an opiate or phencyclidine. Subsection (b)(2) classifies the offense as a C felony in any other instance.

Subsection (c) provides for extraterritorial Federal jurisdiction over an offense described in this section if the actor knows or intends that the substance will be imported into the United States. The objective principle of extraterritorial jurisdiction, that the prohibited act is intended to have effect in the United States, supported the finding of implicit extraterritorial jurisdiction in cases charging conspiracy to import controlled substances under 21 U.S.C. 963 or to distribute controlled substances under 21 U.S.C. 846. *United States* v. *Postal*, 589 F.2d 862, 885 (5th Cir., *cert. denied*, 444 U.S. 832 (1979); *United States* v. *Cadena*, 585 F.2d 1252, 1259 (5th Cir. 1978). This subsection makes such jurisdiction explicit.

§ *2712—Trafficking in drugs*

This section is parallel to section 2711 of the proposed code.

Subsection (a) makes it an offense for someone knowingly to (1) manufacture or traffic in a controlled substance other than an opiate or phencyclidine; (2) create or traffic in a counterfeit substance other than a counterfeit substance containing an opiate or phencyclidine; or (3) import or export a controlled substance other than an opiate or phencyclidine or possess a controlled substance aboard a vehicle arriving in or departing from the United States or the customs territory of the United States. The terms "manufacture", "traffic", "import", "controlled substance", "opiate", "phencyclidine", "counterfeit substance", and "customs territory of the United States" are defined in section 2715 of the proposed code. The term "vehicle" is defined in section 101 of the proposed code.

Subsection (b)(1) classifies the offense as a B felony when the controlled substance is listed in Schedule I or II of the schedule of controlled substances (21 U.S.C. 812) and is 30 grams or more of a narcotic drug other than an opiate. Subsection (b)(2) classifies the offense as a C felony if the controlled substance is listed in schedule I or II and is (1) less than 30 grams of a narcotic drug other than an opiate or (2) 454 kilograms or more of marihuana. Subsection (b)(3) classifies the offense as a D felony if the controlled substance is a substance listed in Schedule I or II other than a narcotic drug or more than 300 grams but less than 454 kilograms of marihuana, or a substance listed in Schedule III. Subsection (b)(4) classifies the offense as an E felony if the controlled substance is a substance listed in Schedule IV or is 150 grams or more, but not more than 300 grams, of marihuana. Subsection (b)(5) classifies the offense as an A misdemeanor if the controlled substance is a substance listed in Schedule V or is less than 150 grams of marihuana. Subsection (b) also provides, however, that where the offense consists of distributing the controlled substance to a person who is less than 18 years old and who is at least 5 years younger than the defendant, the offense is classified at one class above the class otherwise specified. The terms "narcotic drug", "marihuana" and "schedule" are defined in section 2715 of the proposed code.

The penalty structure established by subsection (b) raises the penalty for cocaine trafficking in amounts of more than 30 grams (approximately one ounce). The Committee believes that the enormous sums of money involved and the extensive violence associated with cocaine trafficking justify the severe punishment provided for by subsection (b). *See* Hearings on Cocaine: A Major Drug Issue of the Seventies Before the House Select Committee on Narcotics Abuse and Control, 95th Cong., 1st sess, Serial No. 96–1–9 (1979).

Subsection (b) also raises the penalty for large-scale trafficking in marihuana. Current law provides for the equivalent of class D felony punishment. H.R. 6940 and S. 2490 were passed on September 8 and 9, 1980, respectively. They raise the penalty for violation of 21 U.S.C. 841 involving more than 1,000 pounds of marihuana. Subsection (b) provides for class C felony punishment when the trafficking involves 454 kilograms (1,000 pounds) or more of marihuana.

Currently a person who distributes "a small amount of marihuana for no remuneration" is treated in the same manner as one prosecuted for a possession offense under 21 U.S.C. 844 (21 U.S.C. 841(b)(1)(B)(4)). The term "small amount" was never defined nor has it been construed by any reported cases. The Committee was informed that no such cases have been prosecuted in the Federal courts since 1973. The Committee chose to eliminate the ambiguity of the "small amount" provision and to carry forward the policy of lesser penalties for small amounts. It therefore provides that the quantity of 150 grams or more but not more than 300 grams of marihuana will be treated as a class E felony and the quantity of less than 150 grams of marihuana will be treated as a class A misdemeanor.

Subsection (b) carries forward the current penalties for trafficking in other drugs.

Subsection (c) provides for extraterritorial Federal jurisdiction over an offense described in section 2712 if the controlled substance is other than a substance listed in Schedule III, IV, or V and the actor

knows or intends that the substance will be imported into the United States. This extraterritorial jurisdiction is limited to Schedules I and II substances because the current section which it is intended to replace is so limited. 21 U.S.C. 959.

§ 2713—Possessing drugs

Subsection (a) makes it an offense for someone knowingly to possess a controlled substance. The term "controlled substance" is defined in section 2715 of the proposed code.

The term "possession" is not defined in the proposed code, nor is it defined in current law. Possession requires some measure of dominion and control over the controlled substance, *United States* v. *Maspero*, 496 F.2d 1354, 1359 (5th Cir. 1974); *United States* v. *Littrell*, 574 F.2d 828, 834–35 (5th Cir. 1978), but simple presence at the location of the drugs is not enough to prove possession (or knowledge). *United States* v. *Wynn*, 544 F.2d 786, 791 (5th Cir. 1977).[1]

Subsection (b)(1) makes it a class D felony to possess 100 grams or more of an opiate or phencyclidine. This is more severe than the current penalty because of the Committee's view that this quantity is much greater than what usually is possessed for personal use.

Subsection (b)(2) makes it a class A misdemeanor to possess less than 100 grams of an opiate or phencyclidine, or a quantity of marihuana or other controlled substance. This penalty carries forward the current penalty for simple possession of controlled substances in 21 U.S.C. 844.[2]

Subsection (c) provides a defense when the controlled substance was obtained by the actor from, or pursuant to, a valid prescription or order issued by a practitioner acting in the course of the practitioner's professional practice. This carries forward the "unless" clause of 21 U.S.C. 844. The language "pursuant to a valid prescription" is intended to bring forward the defense, currently available to an agent acting on behalf of a principal for whom the drug was prescribed, if the agent was acting in the course of an agency created for a valid purpose. *United States* v. *Forbes*, 515 F.2d 676, 680 (D.C. Cir. 1975).

Subsection (d) provides for a term of probation for certain violators of this section. This carries forward 21 U.S.C. 844(b)(1). Thirty-six States have expungment provisions for persons convicted of drug-related offenses. *See United States* v. *Glasglow*, 389 F. Supp. 217 (D.D.C.

[1] A person who comes into possession of a controlled substance cannot be convicted as an accomplice to the transfer by which he or she obtained the controlled substance. United States v. Swiderski, 548 F.2d 445, 451 (2d Cir. 1977).

[2] The Committee acted to restore the current law penalty for possession of marihuana, contrary to the Subcommittee's recommendation for reduced penalties for the possession of small quantities. The Committee took this action to avoid the time-consuming debate that this issue would create. The Committee has not received sufficient testimony, and is not otherwise in possession of sufficient information, to determine whether it is appropriate to reduce the penalties for such an offense. By reenacting the current offense, at the same penalty level, the Committee expresses no views on the merits of reducing the penalty for possession of marihuana. *See generally* Hearings on Decriminalization of Marihuana before the House Sel. Comm. on Narcotics Abuse and Control, 95th Cong., 1st sess., Ser. No. 95–1–8 (1977); Report on Considerations For and Against the Reduction of Federal Penalties for Possession of Small Amounts of Marihuana for Personal Use, House Sel. Comm. on Narcotics Abuse and Control, 95th Cong., 1st sess., Ser. No. 95–1–9 (1977); Hearings on Health Consequences of Marihuana Use Before Subcomm. on Crim. Justice of the Senate Comm. on the Judiciary, 96th Cong., 2d sess., Ser. No. 96–54 (1980); NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972); E. BRECHER, LICIT & ILLICIT DRUGS (1972); L. GRINSPOON, MARIHUANA RECONSIDERED (2d ed. 1977); J. KAPLAN, MARIJUANA—THE NEW PROHIBITION (1970).

1975). Subsection (d)(1) provides that the period of probation cannot exceed 12 months. Subsection (d)(2) provides that the probation term is not available to someone who has been convicted previously of an offense under subchapter II of chapter 27 of the proposed code, who has been convicted previously of any Federal offense relating to narcotic drugs, marihuana, or depressant or stimulant substances, or who has previously been granted a term of probation under subsection (d). Current law provides that a State court conviction is not a bar to a special probation term under 21 U.S.C. 844(b)(1). *United States* v. *Sidella*, 469 F.2d 1079, 1081 (4th Cir. 1972). The Committee intends to carry forward this result. Subsection (d)(3) provides that a prosecution with respect to which a deferral is granted under subsection (d) shall be dismissed upon a successful completion of the term of probation. Subsection (d)(4) provides that such a dismissal shall be without a court adjudication of guilt being entered. However, the Department of Justice is directed to keep a nonpublic record of the prosecution solely for the purpose of determining whether an individual is eligible for deferral under subsection (d). A prosecution dismissed pursuant to subsection (d) is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose.

§ 2714—Violating a drug regulation

Subsection (a) makes it a class D felony to violate section 401(d) of the Controlled Substances Act (21 U.S.C. 841(d)) as that section will exist on the effective date of the Criminal Code Revision Act of 1980. This cross-referenced offense is treated differently from other cross-referenced offenses in the proposed code because section 401(d) is subject to a sunset provision providing for repeal of that section on January 1, 1981. At the time of this writing, legislation to extend the life of section 401(d), H.R. 6940, has passed both House of Congress, 126 *Congressional Record* H 3826–33, 3836 (daily ed. May 20, 1980); 126 *Congressional Record* S 12188–92 (daily ed. Sept. 8, 1980), and is awaiting the signature of the President. The proposed code will provide penalties only for such prohibitions on the possession of piperidine as exist in the law on the effective date of H.R. 6915. The Committee, by providing a cross-reference to section 401(d), expresses no views on the merits of the repeal of the sunset clause of that section.

Section 401(d) of the Controlled Substances Act (21 U.S.C. 841(d)) makes it unlawful for any person knowingly or intentionally to possess any piperidine with intent to manufacture phencyclidine, except as authorized by the Act, or to possess any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine, again except as authorized by the Act.

The term "violates" as used in this subsection is a variant of the term "to violate", that is defined in section 101 of the proposed code. Pursuant to that definition, subsection (a) requires that the actor engage in the conduct prohibited by section 401(d) of the Controlled Substances Act in the circumstances and with the results and states of mind required by section 401(d). The use of the term "violates" is intended to ensure that this section incorporates not only the exact provisions of section 401(d), but also any judicial interpretation of the section.

Subsection (b) (1) makes it a class A misdemeanor to violate section 402(c) (2) of the Controlled Substances Act (21 U.S.C. 842(c) (2)). Section 402(c) (2) of the Controlled Substances Act punishes a knowing violation of section 402 (a) or (b) of that Act. Section 402(a) of that Act makes it unlawful for any person

(1) who is subject to the requirements of part C (relating to the registration of manufacturers, distributors, and dispensers of controlled substances) of the Controlled Substances Act, to distribute or dispense a controlled substance in violation of section 829 of title 21;

(2) who is a registrant under the Controlled Substances Act, to distribute or dispense a controlled substance not authorized by the actor's registration to another registrant or other authorized person, or to manufacture a controlled substance not authorized by the actor's registration;

(3) who is a registrant under the Controlled Substances Act, to distribute a controlled substance in violation of 21 U.S.C. 825;

(4) to remove, alter, or obliterate a symbol or label required by 21 U.S.C. 825;

(5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under the Comprehensive Drug Abuse Prevention and Control Act of 1970;

(6) to refuse any entry into premises or any inspection authorized by the Comprehensive Drug Abuse Prevention and Control Act of 1970;

(7) to remove, break, injure, or deface a seal placed upon controlled substances, pursuant to sections 824(f) or 881 of title 21 or to remove or dispose of substances so placed under seal;

(8) to use, to the actor's advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under the Comprehensive Drug Abuse Prevention and Control Act of 1970, any information acquired in the course of an inspection authorized by that Act concerning any method or process which as a trade secret is entitled to protection; or

(9) to distribute or sell piperidine in violation of regulations established under 21 U.S.C. 830(a) (2), regarding presentation of identification.

Section 402(b) of the Controlled Substances Act makes it unlawful for any person who is a registrant under that Act to manufacture a controlled substance in schedule I or II which is (1) not expressly authorized by the registration and assigned to the registrant by a quota pursuant to 21 U.S.C. 826, or (2) in excess of a quota assigned to the registrant pursuant to 21 U.S.C. 826.

Subsection (b) (2) makes it a class A misdemeanor to violate section 1011(2) of the Controlled Substances Import and Export Act (21 U.S.C. 961(2)), which punishes a knowing or intentional violation of 21 U.S.C. 954. Section 954 of title 21 provides that notwithstanding the importation and exportation offenses in 21 U.S.C. 952 and 953, and the registration requirement under 21 U.S.C. 957, a controlled substance in schedule I may be imported into the United States for

transshipment to another country, or transferred from one vessel, vehicle, aircraft to another vessel, vehicle, or aircraft within the United States for immediate exportation, provided that such importation, transfer, or transshipment is (1) for scientific, medical, or other legitimate purposes in the country of destination, and (2) the prior written approval of the Attorney General has been obtained. In addition, 21 U.S.C. 954 renders it lawful to import, transfer, or transship a controlled substance in schedule II, III, or IV, provided that advance notice is given to the Attorney General in accordance with regulations.

The term "violates" as used in this subsection is a variant of the term "to violate", that is defined in section 101 of the proposed code. Pursuant to that definition, subsection (b) requires that the actor engage in the conduct prohibited by section 402(c) (2) of the Controlled Substances Act (21 U.S.C. 842(c) (2) or section 1011(2) of the Controlled Substances Import and Export Act (21 U.S.C. 961(2)) in the circumstances and with the results and states of mind required by section 402(c) (2) or 1011(2). The use of the term "violates" is intended to ensure that this section incorporates not only the exact provisions of sections 402(c) (2) and 1011(2), but also any judicial interpretations of those sections.

Subsection (c) makes it a class E felony to violate 21 U.S.C. 843(a) (1), (2), (3), or (5) which makes it unlawful for any person—

who is a registrant under the Controlled Substances Act, knowingly or intentionally to distribute a controlled substance classified in schedule I or II, in the course of the registrant's legitimate business, except pursuant to an order form as required by 21 U.S.C. 828;

knowlingly or intentionally to use, in the course of the manufacture or distribution of a controlled substance, a registration number that is fictitious, revoked, suspended, or issued to another person;

knowingly or intentionally to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; or

knowingly or intentionally to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another, or any likeness of any of the foregoing, upon any drug or container or labeling thereof so as to render such a drug a counterfeit substance.

The term "violates" as used in this subsection is a variant of the term "to violate", that is defined in section 101 of the proposed code. Pursuant to that definition, subsection (c) requires that the actor engage in the conduct prohibited by section 403(a) (1), (2), (3), or (5) of the Controlled Substances Act in the circumstances and with the results and states of mind required by section 403(a) (1), (2), (3), or (5) of the Controlled Substances Act. The use of the term "violates" is intended to ensure that this section incorporates not only the exact provisions of section 403(a) (1), (2), (3), or (5), but also any judicial interpretations of the section. Section 403(a) (4) prohibits the furnishing of false or fraudulent material information in, or omitting ma-

terial information from, applications, reports, records, or other documents required to be kept or filed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, or to present false or fraudulent identification where the person is receiving or purchasing piperidine and the person is required to present identification under 21 U.S.C. 830(a). That offense is carried forward by section 1742 of the proposed code (relating to making a false statement).

§ 2715—General provisions for subchapter

Subsection (a) defines 15 terms used in the subchapter on drug offenses. Subsection (a)(1) defines the term "import" to mean to import into the United States from any place outside the United States, or into the customs territory of the United States from any place outside the customs territory of the United States but within the United States. This definition carries forward 21 U.S.C. 951(a)(1).

Subsection (a)(2) defines the term "customs territory of the United States" to mean the States of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. This definition is derived from general headnote 2 of the revised tariff schedules, 19 U.S.C. 1202.

Subsection (a)(3) defines the term "traffic" to mean to transfer, prescribe, or otherwise dispose of to another as consideration for anything of value, or to obtain control of with intent to transfer or dispose of as consideration for anything of value. This includes what is commonly called possession with intent to deliver.

Subsection (a)(4) defines the term "dispense" to mean to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the order of, a practitioner, and includes the prescribing or administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. This definition carries forward in modified form the definition of "dispense" in 21 U.S.C. 802(10). Current law has been modified so as not to require that the order of a practitioner be "lawful". Some practitioners charged under current law with unlawfully distributing controlled substances have attempted to defend against such charges by asserting that they issued a "lawful order" (e.g., a prescription) and therefore there was a "dispensing" instead of a "distributing" of the controlled substance. The Committee, by deleting "lawful" from the definition of "dispense", has precluded such a defense. *See United States* v. *Leigh*, 487 F.2d 206, 208 (5th Cir. 1973); Senate Rep. No. 96–553 at 823 (1980).

Subsection (a)(5) defines the term "manufacture" to mean the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging or repackaging of such substances or labeling or relabeling of its container. However, the term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to the practitioner's administration or dispensing of such drug or substance in the course of the practitioner's professional practice; and the term "manufacturer"

means a person who manufactures a drug or other substance. This definition carries forward 21 U.S.C. 802(14).

Subsection (a)(6) defines the term "schedule", followed by a Roman numeral, to mean the appropriate schedule of controlled substances established by section 202 of the Controlled Substances Act (21 U.S.C. 812).

Subsection (a)(7) defines the term "controlled substance" to mean a drug or other substance, or immediate precursor included in Schedule I, II, III, IV, or V. However, the term does not include distilled spirits, wine, malt, beverages, or tobacco, as those terms are defined or used in subtitle E (relating to alcohol, tobacco, and certain excise taxes) of the Internal Revenue Code of 1954 (26 U.S.C. 5001 et seq.). This definition carries forward 21 U.S.C. 802(6).

Subsection (a)(8) defines the term "counterfeit substance" to mean a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser. The definition carries forward 21 U.S.C. 802(7).

Subsection (a)(9) defines the term "marijuana" to mean all parts of the plant botanically classified as genus Cannabis (including all species of such genus), whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, the sterilized seed of such plant which is incapable of germination. This is a slight modification of the definition in 21 U.S.C. 802(15), which currently refers to all parts of the plant Cannabis sativa L. There has been frequent litigation over the issue of whether the prohibition applies to other Cannabis species and whether the expert witnesses are capable of accurately determining whether the dried and crushed parts of the plant that are offered in evidence are Cannabis sativa. The case law has generally held that Congress intended to cover all types of marijuana when the present law was enacted. *United States* v. *Maskeny*, 609 F.2d 183, 188 (5th Cir. 1980); *United States* v. *Wornock*, 595 F.2d 1121, 1122 (7th Cir. 1979) *cert. denied*, 100 S.Ct. 67, (1980). The new definition eliminates the ambiguity. The definition includes hashish.

Subsection (a)(10) defines the term "narcotic drug" to mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis: (1) opium, coca leaves, and opiates; (2) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates; or (3) a substance, and any compound, manufacture, salt deriva-

tive, or preparation thereof, which is chemically identical with any of the previous substances. However, the term does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine. This carries forward the definition in 21 U.S.C. 802(16).

Subsection (a)(11) defines the term "opiate" to mean a mixture or substance containing a detectable amount of any narcotic drug that is a controlled substance listed in Schedule I or II, other than a narcotic drug consisting of (A) coca leaves; (B) a compound, manufacture, salt or derivative, or preparation of coca leaves; or (C) a substance chemically identical thereto. This is a modification of the current definition in 21 U.S.C. 802(17), which is not specific. Current law requires that there be a "detectable amount". *United States* v. *Jeffers*, 524 F.2d 253, 256 (7th Cir. 1975) (rejects "usable quantity" doctrine); *United States* v. *Sudduth*, 458 F.2d 1222, 1224 (10th Cir. 1972).

Subsection (a)(12) defines the term "practitioner" to mean a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted by the United States, or the jurisdiction in which such person practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research. This carries forward the definition in 21 U.S.C. 802 (20). Under current law, an essential element in the prosecution of a practitioner for distributing or dispensing in violation of 21 U.S.C. 841 is that the defendant lacked authorization under the Controlled Substances Act. A defendant must be allowed to introduce evidence of registration with the proper authority, *United States* v. *King*, 587 F.2d 956, 963–65 (9th Cir. 1978), and the Government must prove that the dispensing or distributing was not for a legitimate medical purpose in the usual course of professional practice, *United States* v. *Rogers*, 609 F.2d 834, 839 (5th Cir. 1980); *see United States* v. *Moore*, 423 U.S. 122 (1975). The Committee intends to carry forward these requirements.

Subsection (a)(13) defines the term "production" to include the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

Subsection (a)(14) defines the term "immediate precursor" to mean a substance (A) which the Attorney General has found to be, and by rule has designated as being, the principal compound used, or produced primarily for use, in the manufacture of a controlled substance; (B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and (C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance. This carries forward 21 U.S.C. 802(22).

Subsection (a)(15) defines the term "phencyclidine" to mean 1-(1-phenylcyclohexyl) piperidine, its salts, or any immediate precursor, homolog, analog, or derivative (or salt thereof) of 1-(1-phenylcyclohexyl) piperidine that is included in schedule I or II of the controlled substances act. The definition carries forward 21 U.S.C. 830(c)(2). Phencyclidine is also called PCP.

Subsection (b) provides a defense to a prosecution for an offense under sections 2711, 2712 and 2713 of the proposed code that the actor's conduct was authorized by the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*). This carries forward provisions in current law ("except as authorized by this subchapter . . ."). 21 U.S.C. 841(a), 844(a), 951(a)(1) and (2) and (b)(1) and (2).

SUBCHAPTER III—EXPLOSIVE AND WEAPONS OFFENSES

Current Law

1. *Explosives offenses*—The importation, manufacture, distribution, and storage of explosive materials is covered in chapter 40 of title 18 of the United States Code. A number of unlawful acts are set out in 18 U.S.C. 842 and penalties are prescribed in 18 U.S.C. 844. An explosive is defined in 18 U.S.C. 841 as

> any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion; the term includes, but is not limited to, dynamite and other high explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters.

The conduct made unlawful by 18 U.S.C. 842 is that which frustrates the regulation and licensing of the explosives trade. It has been held that a sufficient nexus between explosives and interstate commerce exists and that such nexus need not be stated in congressional findings in order to support the exercise of congressional power in this area. *United States* v. *Dawson*, 467 F.2d 668 (8th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973). Exceptions to the coverage of 18 U.S.C. 842 are set forth in 18 U.S.C. 845: (1) transportation by rail, water, highway or air which is regulated by the Department of Transportation; (2) the use of explosives materials in medicines and medicinal agents "in the forms prescribed by the official United States Pharmacopeia, or the National Formulatory;" (3) transportation, shipment, receipt, or importation to agencies of the United States or any State or political subdivision thereof; (4) small arms ammunition and its components; (5) limited quantities (less than 50 pounds) of black powder, percussion caps, safety, and pyrotechnic fuses, quills, quick and slow matches, and certain friction primers; (6) manufacture, distribution, storage, or possession of explosives under regulation of the military department of the United States.

Two additional relevant offenses (to which the above exceptions do not apply) are set forth in 18 U.S.C. 844. Transporting or receiving an explosive in interstate or foreign commerce "with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property is punishable under 18 U.S.C. 844(d). The penalty is enhanced where personal injury results. Similar enhanced penalty language in 18 U.S.C. 844(i) has been held not to apply when the only party injured was the defendant standing trial. *United States* v. *Schwanke*, 598 F.2d 575 (10th Cir. 1979). The possession of an explosive in any Federal building without written consent is an offense under 18 U.S.C. 844(g).

The transportation of explosives and other hazardous substances on vessels is regulated by 46 U.S.C. 170. A knowing violation of any provision of 46 U.S.C. 170, or any regulation issued pursuant to it, is an offense under 46 U.S.C. 170(14). This penalty is enhanced by 46 U.S.C. 170(15) when death or bodily injury results from the violation.

Bringing, carrying, or possessing explosives on board United States vessels, without obtaining the permission of the master of such vessel is prohibited by 18 U.S.C. 2277, which covers vessels registered, enrolled, or licensed under United States laws as well as those vessels under United States control or guard. An exception is made for members of the Armed Forces or government employees (Federal or State) acting under authority in the performance of their duties. The section covers dynamite, nitroglycerin "or other explosive article or compound."

Masters of vessels carrying steerage passengers who take, carry, or have on board explosives are punishable under 18 U.S.C. 2278.

Someone who "willfully delivers or causes to be delivered to an air carrier or to the operator of a civil aircraft for transportation in air commerce, or [who] recklessly causes the transportation in air commerce of, any shipment, baggage, or other property which contains a hazardous material, in violation of any rule, regulation or requirement with respect to the transportation of hazardous materials issued by the Secretary of Transportation" commits an offense under 49 U.S.C. 1472(h).

Transportation of hazardous materials generally is covered by chapter 27 of title 49. Such materials are defined by 49 U.S.C. 1802(2) to include any substance or material "in a quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce. Explosives are specified in 49 U.S.C. 1803 as materials which may be designated by the Secretary of Transportation. Someone who willfully violates a provision of 49 U.S.C. chapter 27, or a regulation issued pursuant to that chapter, violates 49 U.S.C. 1809(b).

Finally, 40 U.S.C. 193f makes it unlawful to carry on to the Capitol grounds or to have readily accessible any explosive. The section also covers such conduct in the Capitol buildings. Discharging an explosive in these areas is also prohibited.

2. *Firearms offenses*—Penalties for existing Federal firearms offenses are contained in 18 U.S.C. 924, 18 U.S.C. App. 1202, and 26 U.S.C. 5861, 5871.

Subsection (a) of 18 U.S.C. 924 establishes penalties for (1) violations of chapter 44 of title 18 (18 U.S.C. 921–28) or (2) false statements made in connection with chapter 44. The principal prohibitions of chapter 44, found in section 922, are of three types: those applicable only to licensed firearms dealers, importers, manufacturers and collectors; those applicable to everyone other than licensed firearm dealers, importers, manufacturers, and collectors; and those which are universally applicable.

Licensed firearm dealers, importers, manufacturers, and collectors may only ship firearms or ammunition to similarly licensed individuals (18 U.S.C. 922(a)(2)); may not sell firearms or ammunition to minors, in violation of State or local law, to out-of-state residents (subject to certain exceptions), to those who have failed to comply with the license requirements for purchasers, to anyone who has been indicted for or convicted of a felony, or to any fugitive, drug abuser, or mental defective (18 U.S.C. 922(b)(d)); may not sell any of certain types of firearms except as authorized by the Secretary of the Treasury (18 U.S.C. 922(b)); and must comply with the record keeping requirements of 18 U.S.C. 923 (18 U.S.C. 922(m)).

Only licensed dealers, manufacturers, or importers may engage in the business of dealing, manufacturing, or importing of firearms or ammunition (18 U.S.C. 922(a)(1)); receive firearms or ammunition shipped from out-of-state (18 U.S.C. 922(a)(3)); or transport certain firearms in interstate commerce (18 U.S.C. 922(a)(4)).

It is generally unlawful for anyone to make false statements to acquire a firearm or ammunition (18 U.S.C. 922(a)(6)); without proper notice, to transport firearms or ammunition on a common carrier (18 U.S.C. 922(e)); to transport firearms or ammunition as a common carrier in knowing violation of chapter 44 (18 U.S.C. 922(f)); to ship or receive firearms or ammunition in interstate commerce as an individual indicted or convicted of a felony, or as a fugutive, drug abuser, or mental defective (18 U.S.C. 922 (g), (h)); to ship or receive stolen firearms or ammunition in interstate or foreign commerce (18 U.S.C. 922 (i), (j)); or ship or receive any firearm with obliterated serial numbers in interstate or foreign commerce (18 U.S.C. 922(k)).

The constitutionality of these prohibitions has been upheld in the face of challenges that they violated a constitutional right to bear arms, *United States* v. *King*, 532 F.2d 505 (5th Cir.), *cert. denied*, 429 U.S. 960 (1976); *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir. 1975); *United States* v. *Johnson*, 497 F.2d 548 (4th Cir. 1974); that they were unconstitutionally vague, *United States* v. *Kowlski*, 502 F.2d 203 (7th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975); *United States* v. *Quiroz*, 449 F.2d 583 (9th Cir. 1971); and that they established unconstitutional classifications in violation of the equal protection component of the fifth amendment, *United States* v. *Weatherford*, 471 F.2d 47 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); *Cody* v. *United States*, 460 F.2d 34 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972). The provisions have been found to be a valid exercise of the Congressional power under the commerce clause, *United States* v. *Hornbeck*, 489 F.2d 1325 (7th Cir. 1973), *cert. denied*, 416 U.S. 907 (1974); *Mandina* v. *United States*, 472 F.2d 1110 (8th Cir.), *cert. denied*, 412 U.S. 907 (1973), and, where the offense does not specify an interstate element, to be applicable to purely intrastate misconduct, *United States* v. *Day* 476 F.2d 562 (6th Cir. 1973); *United States* v. *Hornbeck*, 489 F.2d 1325 (7th Cir. 1973), *cert. denied*, 416 U.S. 907 (1974).

Section 922(a)(1) proscribes engaging in the business of dealing in firearms without a license, regardless of whether the dealings involve or affect interstate or foreign commerce. *United States* v. *King*, 532 F.2d 505 (5th Cir.), *cert. denied*, 429 U.S. 960 (1976); *United States* v. *Ruisi*, 460 F.2d 153 (2d Cir.), *cert. denied*, 409 U.S. 914 (1972); *United States* v. *Redus*, 469 F.2d 185 (9th Cir. 1972).

While an individual need not devote full time and attention to the business in order to violate section 922(a)(1), more than one or two

isolated instances of dealing are ordinarily required. *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir. 1975), *cert. denied*, 424 U.S. 981 (1976); *United States* v. *Tarr*, 589 F.2d 55 (1st Cir. 1978) (suggesting, however, that a single transaction involving a substantial number of firearms and a substantial amount of money might constitute engaging in the business of dealing in the firearms). Section 922(a)(1) encompasses transactions undertaken in expectation of profit, *United States* v. *Van Buren*, 593 F.2d 125 (9th Cir. 1979); *United States* v. *King*, 532 F.2d 505 (5th Cir.), *cert. denied*, 429 U.S. 960 (1976); *United States* v. *Huffman*, 518 F.2d 80 (4th Cir.), *cert. denied*, 423 U.S. 864 (1975), but no actual profit need be established for conviction, *United States* v. *Angelini*, 607 F.2d 1305 (9th Cir. 1979); *United States* v. *Powell*, 513 F.2d 1249 (8th Cir.), *cert. denied*, 423 U.S. 853 (1975); *United States* v. *57 Miscellaneous Firearms*, 422 F. Supp. 1066 (W.D.Mo. 1976). One who engages in the business of dealing in firearms or ammunition without a license need not know of the prohibition or intend its violation for conviction. *United States* v. *Powell*, 513 F.2d 1249 (8th Cir.), *cert. denied*, 423 U.S. 853 (1975); *United States* v. *Swinton*, 521 F.2d 1255 (10th Cir. 1975), *cert. denied*, 424 U.S. 981 (1976); *United States* v. *Ten Firearms & Twenty-Four Rounds*, 444 F. Supp. 305 (N.D.Tex. 1977). Similarly, interstate transportation of certain shotguns, machine guns and other firearms in violation of subsection 922(a)(4) requires only knowledge of the transportation and not its illegality. *United States* v. *Jones*, 481 F.2d 653 (2d Cir. 1973); *United States* v. *Weiler*, 458 F.2d 474 (3d Cir. 1972).

Cases arising under section 922(a)(6) (false statements in connection with acquisition of a firearm or ammunition), section 922(d) (sale of a firearm or ammunition to an indicted or convicted felon, drug abuser, or mental defective), section 922 (g) and (h) (transportation or receipt in interstate commerce of a firearm or ammunition by an indicted or convicted felon, drug abuser, or mental defective), and 18 U.S.C. App. 1202 (receipt, possession or transportation of firearms by convicted felons, dishonorably discharged veterans and mental incompetents) reflect a similar interpretation. As a general rule, an individual remains a convicted felon for purposes of these provisions until the conviction has been reversed. This is true even if the underlying conviction is reversible on constitutional grounds, *Lewis* v. *United States*, 100 S. Ct. 915 (1980); *United States* v. *MacGregor*, 617 F.2d 348 (3d Cir. 1980); if the underlying conviction is reversed subsequent to the firearms violation, *United States* v. *Cassity*, 521 F.2d 1320 (6th Cir. 1975); *United States* v. *Williams*, 484 F.2d 428 (8th Cir. 1973); if the person receives a State pardon for the underlying conviction, *United States* v. *Sutton*, 521 F.2d 1385 (7th Cir. 1975); *United States* v. *Dameron*, 460 F.2d 294 (5th Cir.), *cert. denied*, 409 U.S. 882 (1972); *contra*. *United States* v. *One Lot Eighteen Firearms*, 325 F. Supp. 1326 (D.N.H. 1971); if the civil rights to the person are restored pursuant to State law *United States* v. *Barrett*, 504 F.2d 629 (6th Cir. 1974), *aff'd*, 423 U.S. 212 (1976); *United States* v. *Ziegenhagen*, 420 F. Supp. 72 (E.D.Wis. 1976); if State records of the conviction are expunged or sealed *United States* v. *Andrino*, 497 F.2d 1103 (9th Cir.), *cert. denied*, 419 U.S. 1048 (1974); *United States* v. *Brzoticky*, 588 F.2d 773 (10th Cir. 1978); *United States* v. *Bergeman*,

592 F.2d 533 (10 Cir. 1979); or if the person has received a suspended sentence on the underlying offense, *United States* v. *Beebe*, 467 F.2d 222 (10th Cir. 1972), *cert. denied*, 467 U.S. 222 (1974); *United States* v. *Rosenstengel*, 323 F. Supp. 499 (E.D.Mo. 1971).

Where the provision applies to those under indictment, its application is limited to instances where the accused is aware of the indictment, *United States* v. *Renner*, 496 F.2d 922 (6th Cir. 1974), and perhaps does not include cases where the criminal charge is an information rather than an indictment, *United States* v. *Isaacs*, 539 F.2d 686 (9th Cir. 1976); *contra*, *Schook* v. *United States*, 337 F.2d 563 (8th Cir. 1964). Prior possession of a particular firearm does not preclude prosecution for unlawful receipt or false statements where there is a break in possession as in the case of redemption of a pawned firearm, *Huddleston* v. *United States*, 415 U.S. 814 (1974); *United States* v. *Frazier*, 547 F.2d 272 (5th Cir. 1977). *See United States* v. *Robbins*, 579 F.2d 1151 (10th Cir. 1978). No specific intent to violate the firearms provisions is required; it suffices that the individual knowingly engaged in the conduct which in fact violated the prohibition. *United States* v. *Behenna*, 552 F.2d 573 (4th Cir. 1977); *United States* v. *Cochran*, 546 F.2d 27 (5th Cir. 1977); *United States* v. *Cornett* 484 F.2d 1365 (6th Cir. 1973). The proscriptions of sections 922(a)(6) and 922(d) apply both to interstate and intrastate transactions. *Huddleston* v. *United States*, 415 U.S. 814 (1974); *United States* v. *Crandall*, 453 F.2d 121 (1st Cir. 1972); *United States* v. *O'Neill*, 467 F.2d 1372 (2d Cir. 1972); *United States* v. *Green*, 471 F.2d 775 (7th Cir. 1972); *United States* v. *Menna*, 451 F.2d 982 (9th Cir.), *cert. denied*, 405 U.S. 963 (1972). In provisions specifying interstate and foreign commerce, *e.g.*, 18 U.S.C. 922(h) and 18 U.S.C. App. 1202, there need not be any proximate nexus between the interstate or foreign shipment and the prohibited conduct. *Barrett* v. *United States*, 423 U.S. 212 (1976); *Scarborough* v. *United States*, 431 U.S. 563 (1977); *United States* v. *Wynde*, 579 F.2d 1088 (10th Cir. 1978), *cert denied*, 439 U.S. 871 (1979).

Section 924(b) makes it unlawful to transport or receive a firearm in interstate or foreign commerce with the knowledge or intent that it be used in the commission of a felony.

The remaining general firearms offenses are contained in chapter 53 of title 26, 26 U.S.C. 5801-72. The chapter creates a system of occupational and transfer taxes and registration. An earlier version of the system was found violative of the fifth amendment, *Haynes* v. *United States*, 390 U.S. 85 (1968), but the defect was cured by subsequent amendments, *see United States* v. *Freed*, 401 U.S. 601 (1971). In addition to the chapter's affirmative obligations, 26 U.S.C. 5861 makes it unlawful for anyone (a) to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special (occupational) tax or having registered as required by law; (b) to receive or possess a firearm transferred to the person in violation of the provisions of chapter 53; (c) to receive or possess a firearm made in violation of chapter 53; (d) to receive or possess a firearm which is not registered to the person in the National Firearms Registration and Transfer Record; (e) to transfer a firearm in violation of chapter 53; (f) to make a firearm in violation of chapter 53; (g) to obliterate, re-

move, change, or alter the serial number or other identification required by law; (h) to receive or possess a firearm having the serial number or other required identification obliterated, removed, changed, or altered; (i) to receive or possess a firearm which is not identified by a serial number as required by chapter 53; (j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required; (k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or (l) to make, or cause the making of, a false entry on any application, return, or record required by chapter 53, knowing such entry to be false. Firearms involved in violation of the chapter are subject to forfeiture under 26 U.S.C. 5872.

3. *Using a firearm or explosive in the course of a crime.*—Section 924(c) of title 18 provides felony penalties for "Whoever—(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony. . . ."

While violation of section 924(c) is considered a separate offense distinct from the underlying offense, *United States* v. *Eagle*, 539 F.2d 1166 (10th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977); *United States* v. *Crew*, 538 F.2d 575 (4th Cir.), *cert. denied sub nom. Jones* v. *United States*, 429 U.S. 852 (1976), an accused may not be convicted for both violation of section 924(c) and any underlying offense which authorizes enhancement if a dangerous weapon is used, *Busic* v. *United States*, 100 S. Ct. 1747 (1980); *Simpson* v. *United States*, 435 U.S. 6 (1978). As used in chapter 44 of title 18, the term "firearm" includes explosives, and the use and carriage proscribed in section 924(c) encompasses the use or carrying of explosives during the commission of a felony. *See* 18 U.S.C. 921(a)(3), (4); *United States* v. *Melville*, 309 F. Supp. 774 (S.D.N.Y. 1970). The courts appear to have interpreted the "use" element fairly broadly to cover firearm possession related to the commission of the underlying felony. *See United States* v. *Grant*, 545 F.2d 1309 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977) (use of firearms to provide security to protect a large quantity of cocaine possessed with intent to distribute); *United States* v. *Moore*, 580 F.2d 360 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978) (gun concealed in the waistband of an individual convicted of attempted bank robbery and use of a firearm found to be a tool in bank robbery trade). Conviction for carrying a firearm during the commission of a Federal felony requires that the carrying of the firearm be unlawful under Federal or State law without reference to the underlying offense. *United States* v. *Risi*, 603 F.2d 1193 (5th Cir. 1979); *United States* v. *Garcia*, 555 F.2d 708 (9th Cir. 1977); *United States* v. *Ramirez*, 482 F.2d 807 (2d Cir.), *cert. denied*, *sub nom. Gomez* v. *United States*, 414 U.S. 1070 (1973). The carriage proscribed includes not only physical possession but transportation in the glove compartment of an automobile. *United States* v. *Barber*, 594 F.2d 1242 (9th Cir.), *cert. denied*, 444 U.S. 835 (1979). The knowledge required for violation is a voluntary and intentional commission of the act charged. *Id.*

4. *Possessing a weapon or explosive aboard an aircraft*—Section 902(*l*)(1) of the Federal Aviation Act of 1958, 49 U.S.C. 1472 (*l*)(1), prohibits boarding or attempting to board an aircraft while armed with a concealed deadly or dangerous weapon, or placing or attempting to place a bomb aboard an aircraft. Where the violation is committed "willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life," the maximum penalties are increased. Exempted from the provisions of the section are law enforcement officials, and those authorized under FAA regulations. There is also an exemption for those instances where the weapon is contained in inaccessible baggage, 49 U.S.C. 1472(*l*)(3).

While the weapon must be concealed, *United States* v. *Flum*, 518 F.2d 39 (8th Cir.), *cert. denied*, 423 U.S. 1018 (1975), and the accused must be aware of the existence of the concealed weapon, *United States* v. *Lee*, 539 F.2d 606 (6th Cir. 1976), the intent to conceal is not an element of the offense, *United States* v. *Flum*, 518 F.2d 39 (8th Cir.), *cert. denied*, 423 U.S. 1018 (1975). Deadly or dangerous weapons include a loaded tear gas pistol, *United States* v. *Brown*, 508 F.2d 427 (8th Cir. 1974), an empty pistol, *United States* v. *Cook*, 446 F.2d 50 (9th Cir. 1971); *United States* v. *Ware*, 315 F. Supp. 1333 (W.D.Okla. 1970); and switchblade and butcher knives *United States* v. *Flum*, 518 F.2d 39 (8th Cir.), *cert. denied*, 423 U.S. 1018 (1975); but not a starter pistol that could not be readily adopted to fire a projectile, *United States* v. *Dishman*, 486 F.2d 727 (9th Cir. 1973).

§ *2721—Explosives offenses*

This section in part carries forward 18 U.S.C. 844 and in part cross-references to explosives offenses outside of title 18 of the United States Code.

Subsection (a)(1)(A) makes it an offense for someone knowingly to receive, transport, or possess an explosive intended to be used, or with intent that such explosive be used, to commit a Federal felony or a State crime punishable by more than one year's imprisonment. The term "explosive" is defined in section 2725 of the proposed code. The use of a "knowing" state of mind creates a higher standard of culpability than does current law. *See* section 2721 of the proposed code (relating to firearms offenses). Subsection (a)(1)(B) classifies the offense as an A felony if, while committing the offense, the actor recklessly causes the death of another person; as a B felony if, while committing the offense, the actor recklessly causes bodily injury to another person; and as a C felony in any other instance. This carries forward in slightly modified form the penalty provisions of 18 U.S.C. 844(d).

Subsection (a)(2)(A) makes it a class C felony for someone to violate section 382 (a) through (i) of the Criminal Code Revision Act of 1980, which reenacts 18 U.S.C. 842(a) through (i). Subsection (a)(2)(B) makes it a class A misdemeanor for someone to violate section 382 (j), or (k) of the Criminal Code Revision Act of 1980. The term "violates" as used in subsection (a)(2) is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this subsection requires that the actor engage in the conduct prohibited by section 382 of the Criminal Code Revision Act

of 1980, in the circumstances and with the results and states of mind required by section 382. The use of "violates" is intended to ensure that subsection (a)(2) incorporates not only the exact provisions of section 382 of the Criminal Code Revision Act of 1980, but also any judicial interpretations of the current provision being carried forward in section 382.

Subsection (a)(3)(A) makes it an offense for someone to violate section 4472(14) of the Revised Statutes of the United States (46 U.S.C. 170(14)) (relating to the regulation of the carriage of explosives). The offense is classified as a C felony if, while committing the offense, the actor recklessly causes the death of another person, and as an E felony in any other instance. Subsection (a)(3)(B) makes it an E felony for someone to violate section 902(h)(2) of the Federal Aviation Act of 1958 (49 U.S.C. 1472(h)(2)). Subsection (a)(3)(C) makes it a class D felony to violate section 110(b) of the Hazardous Materials Transportation Act (49 U.S.C. 1809(b)).

The term "violates" as used in subsection (a)(3) is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsection (a)(3) requires that the actor engage in the conduct prohibited by the referenced statutes, in the circumstances and with the results and states of mind required by the referenced statutes. The use of "violates" is intended to ensure that subsection (a)(3) incorporates not only the exact provisions of the referenced statutes, but also any judicial interpretations of the referenced statutes.

Subsection (a)(4) makes it a class A misdemeanor for someone knowingly to possess an explosive (1) in a building, with reckless disregard for the fact that the building is a Federal building; or (2) on the grounds of the United States Capitol building. This carries forward 18 U.S.C. 844(g) and 40 U.S.C. 193.

Subsection (b) provides a defense to a prosecution under subsection (a)(4) that the possession of the explosive was in conformity with the written consent of the government agency or person responsible for the management of the building or grounds.

Subsection (c) provides for Federal jurisdiction over an offense described in subsection (a)(1) if the explosive is being transported, shipped, or received in interstate or foreign commerce and over an offense described in subsection (a)(4) if the building is owned by, or is under the care, custody, or control of, the United States or if the grounds are the United States Capitol grounds. There is Federal jurisdiction over an offense described in subsections (a)(2) and (a)(3) if such offense occurs within the general or special jurisdiction of the United States. *See* section 111(b) (relating to Federal jurisdiction) of the proposed code.

Subsection (d) provides for extraterritorial Federal jurisdiction if the building is owned by, or is under the care, custody, or control of the United States.

§ *2722—Firearms offenses*

This section in part carries forward 18 U.S.C. 924(b) and in part cross-references to firearms offenses outside of title 18 of the United States Code.

Subsection (a)(1) makes it a class C felony for someone knowingly to receive, transport, or possess a firearm or ammunition with intent that such firearm or ammunition be used, or with reasonable cause to believe that such firearm or ammunition is to be used, to commit a Federal felony or a State crime that is punishable by imprisonment of more than one year. The term "firearm" is defined in section 2725 of the proposed code.

Subsection (a)(2) makes it a class D felony to violate sections 402 or 403 of the Criminal Code Revision Act of 1980, which reenact 18 U.S.C. 922, 923. Subsection (a)(3) makes it a class C felony for someone to violate chapter 53 of the Internal Revenue Code of 1954 (relating to machine guns, destructive devices, and certain other firearms). Subsection (a)(4) makes it a class E felony for someone to violate section 1202 of title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (relating to the receipt, possession, or transportation of firearms by persons prohibited from engaging in such conduct).

The term "violates" as used in subsections (a)(2), (a)(3), and (a)(4) is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, those subsections require that the actor engage in the conduct prohibited by the referenced sections, in the circumstances and with the results and states of mind required by the referenced sections. The use of "violates" is intended to ensure that subsections (a)(2), (a)(3), and (a)(4) incorporate not only the exact provisions of the referenced sections, but also any judicial interpretations of the referenced sections. For example, with respect to subsection (a)(4), *see United States* v. *Bass*, 404 U.S. 336 (1971).

Subsection (b) provides for Federal jurisdiction over an offense described in subsection (a)(1) if the receipt, transportation, or possession is in interstate or foreign commerce. There is Federal jurisdiction over an offense described in subsections (a)(2), (a)(3), and (a)(4) if the offense occurs within the general or special jurisdiction of the United States. *See* section 111(b) of the proposed code.

§ *2723—Using a firearm or explosive in the course of a crime*

This section carries forward 18 U.S.C. 924(c). Current law, however, has been modified and the punishment provided has been made more severe. The current provision is not capable of frequent or effective use for two main reasons. First, current law requires that the Government prove that the weapon carried during a felony was carried unlawfully under Federal or State law. This requirement adds an unnecessary burden in light of the fact that the essence of the offense is the use of the weapon, not its illegal status. Second, the use of 18 U.S.C. 924(c) is effectively precluded where the punishment scheme for the underlying offense also provides for an enhanced penalty. *Busic* v. *United States*, 100 S. Ct. 1747 (1980); *Simpson* v. *United States*, 435 U.S. 6 (1978).

Subsection (a) makes it an offense for someone knowingly to carry or use a firearm, an explosive, or an imitation firearm or explosive during the commission of a Federal felony that involved the use of violence or the threat of imminent violence. The current provision (18 U.S.C. 924(c)) applies to the commission of any Federal felony, not

just Federal felonies involving violence or the threat of imminent violence. The Committee decided to change current law because the rationale for this kind of provision is the risk to an identifiable victim. Thus, a limitation to felonies involving violence or the threat of imminent violence is appropriate. Under the broader coverage of the current provision, a person who carried a stater pistol while making out a false income tax return was covered.

The Committee has also deleted the requirement found in current law that the firearm or explosive be carried "unlawfully." The Committee decided that the legal status of the dangerous object used to commit a violent felony was irrelevant.

The Committee also changed current law by including the carrying of imitation firearms. The Committee believes that the fear generated in crime victims who are confronted by someone carrying what appears to be a firearm or explosive is the same regardless of whether that apparent firearm or explosive is real or an imitation.

The terms "firearm" and "explosive" are defined in section 2725 of the proposed code. The term "imitation firearm or explosive" is not defined but is intended to reach realistic facsimilies of actual or real firearms and explosives. An imitation firearm or explosive is sufficiently realistic to engender a belief on the part of a person observing the criminal conduct (a victim or a witness) that the device is real. One who concludes that the device is real will, of course, react as if the device actually were real. Since the potential level of violence in a crime situation is often a function of a victim or witness' perception about the nature of the threat posed by the wrongdoer, the Committee hopes that the inclusion of imitation firearms and explosives will help deter people from committing offenses which pose a threat of violence.

Subsection (b) (1) classifies an offense described in section 2723 as a C felony unless the offense is a second or subsequent offense by the same defendant under section 2723, in which case the offense is a B felony. Subsection (b) (2) provides that if the actor used a firearm or explosive that, at the time of the offense, was capable of causing serious bodily injury (a term defined in section 2725 of the proposed code), then (1) in the case of a first offense under section 2723, the court must impose a prison term of at least 2 years on the defendant, and (2) in the case of a second or subsequent offense by the same defendant under section 2723, the court must impose a prison term of at least 4 years on the defendant. Subsection (b) (2) also provides that the prison term so imposed must be served consecutively to any term of imprisonment imposed for the felony during which the offense takes place. Subsection (b) (3) provides that no defendant sentenced under subsection (b) shall be eligible for parole before the end of the sentence required by subsection (b) (2). In other words, the prison terms specified in subsection (b) (2) are mandatory minimum terms.

In structuring the penalty for this offense, the Committee intends that the separate provision for criminal liability set forth in section 2723 be applied only to those offenses that have not already taken into account the danger to life posed by the use of weapons. Therefore, this offense would appropriately be applied to offenses such as that described in section 2521 of the proposed code (relating to robbery), but not to offenses such as that described in section 2724

of the proposed code (possessing a weapon or explosive aboard an aircraft) because the latter offense already punishes the same conduct. This approach is in accord with the policy of existing case law. See *Busic* v. *United* States, 100 S. Ct. 1747 (1980); *Simpson* v. *United States*, 435 U.S. 6 (1978). The classification and sentencing system of the proposed code eliminates some of the problems that might be encountered in the application of this offense. Thus, the Committee, in classifying individual offenses, has avoided the use of penalty enhancements for the use of weapons. Unlike current law, therefore, someone who commits a felony level assault or a robbery with a firearm would be punishable for both the underlying offense and a violation of section 2723 of the proposed code.

The classification scheme set forth in subsection (b) modifies current law by making the penalty more severe. Under the present statute, the prison term to be imposed for the first offense can be suspended. The prison term for a first offense provided for in subsection (b) (2) cannot be suspended. Further, current law does not preclude the release of the prisoner on parole; subsection (b) (2) does.

Subsection (c) provides for Federal jurisdiction over an offense described in section 2723 if there is Federal jurisdiction over the felony during which the offense takes place.

§ 2724—Possessing a weapon or explosive aboard an aircraft

Subsection (a) makes it an offense for someone to violate section 902(*l*) of the Federal Aviation Act of 1958 (49 U.S.C. 1472 *l*). The term "violates" as used in subsection (a) is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, subsection (a) requires that the actor engage in the conduct prohibited by section 902(*l*) of the Federal Aviation Act of 1958, in the circumstances and with the results and states of mind required by section 902(*l*). The use of "violates" is intended to ensure that section 2724 incorporates not only the exact provisions of section 902(*l*) of the Federal Aviation Act of 1958, but also any judicial interpretations of section 902(*l*). *See, e.g., United States* v. *Lee*, 539 F.2d 606, 608 (6th Cir. 1976) (defendant must know the weapon was concealed).

Subsection (b) classifies an offense described in section 2724 as a D felony if, during the commission of the offense, the defendant acted with reckless disregard for the safety of human life, and as an A misdemeanor in any other instance.

§2725—Definitions for subchapter

This section defines 5 terms used in subchapter III of chapter 27 of the proposed code.

Paragraph (1) defines the term "explosive" to mean gunpowder, powder used for blasting, all forms of high explosives, blasting material, fuze (other than an electric circuit breaker), detonator, and other detonating agent, smokeless powder, other explosive or incendiary device, and any chemical compound, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion. This carries forward 18 U.S.C. 844(j).

Paragraph (2) defines the term "firearm" to mean (1) any weapon (including a starter gun) which will, or is designed to or may be readily converted to, expel a projectile by the action of an explosive; (2) the frame or receiver of any such weapon; (3) any firearm muffler or firearm silencer; or (4) any destructive device. The term "firearm" does not include an antique firearm as defined in section 401(a)(4) of the Criminal Code Revision Act of 1980 (which reenacts portions of 18 U.S.C. 921). This carries forward 18 U.S.C. 921(a)(3).

Paragraph (3) defines the term "destructive device" to mean (1) any explosive, incendiary, or poison gas bomb, grenade, rocket with a propellant charge of more than 4 ounces, missile with an explosive or incendiary charge of more than one-quarter ounce, mine, or device that is similar to any of the preceeding devices; (2) any type of weapon (other than a shotgun or a shotgun shell which the Secretary of the Treasury finds is generally recognized as particularly suitable for sporting purposes) by whatever name known that will, or that may be readily converted to, expel a projectile by the action of an explosive or other propellant, and that has any barrel with a bore of more than one-half inch in diameter; and (3) any combination of parts either designed for or intended for use in converting any device into any destructive device described in paragraph (3) and from which a destructive device may be readily assembled. The term "destructive device" does not include any device that is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, that is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned or given by the Secretary of the Army (pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code); or any other device that the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes. This carries forward 18 U.S.C. 921(a)(4).

Paragraph (4) defines the term "dangerous weapon" to mean a firearm or any other weapon, device, instrument, material or substance, whether animate or inanimate, that as used or intended to be used is capable of producing death or serious bodily injury.

Paragraph (5) defines the term "serious bodily injury" to mean bodily injury involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

SUBCHAPTER IV—RIOT OFFENSES

Current law

The offenses classed as riot offenses involve a breach of the public peace. The common law offenses of riot, rout, and unlawful assembly were misdemeanors. The English "Riot Act" was added in 1714, creating a felony without benefit of clergy, which was committed when 12 or more rioters continued together for an hour after an official proclamation to disband was read to them by a magistrate. *See* R. Perkins, *Criminal Law* 407 (2d ed. 1969), (suggests that the expression, "reading the riot act," derives from this).

Current Federal law primarily uses only 2 jurisdictional bases for punishing conduct associated with riots: (1) jurisdiction over Federal penal or correctional institutions, 18 U.S.C. 1792, and (2) the commerce power. 18 U.S.C. 231, 232, 245, 2101, and 2102, and 5 U.S.C. 7313. It is, therefore, left to the Assimilative Crimes Act, 18 U.S.C. 13, to punish any riots within the special maritime and territorial jurisdiction of the United States, except for those occurring in penal institutions.[1]

Of the current Federal riot provisions, 18 U.S.C. 1792 is the oldest.[2] It provides for punishment of anyone who instigates a riot at a Federal penal institution or conveys a dangerous instrumentality into or in such an institution. The other Federal riot statutes are based on the effect on interstate or foreign commerce of local civil disturbances and were enacted in 1968 as part of the Civil Rights Act, Pub. L. 90–284, and the Omnibus Crime Control and Safe Streets Act. Pub. L. No. 90–351, 82 Stat. 197.

Principal among these provisions is 18 U.S.C. 2101, which prohibits travel in or use of a facility of interstate or foreign commerce with intent to perform any of several specified acts ancillary to a riot or disturbance involving three or more persons.

Among the acts covered are: inciting, organizing, carrying on a riot; performing an act of violence in furtherance of a riot; and aiding and abetting a riot instigator or participant. For conviction there must be a showing of travel or use of commerce facilities, intent, and an overt act. Annot., 22 *A.L.R. Fed.* 256 (1975). This provision has been upheld against several constitutional challenges. *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *In Re Shead*, 301 F. Supp. 560 (N.D. Cal.), *aff'd sub nom.*, *Carter* v. *United States*, 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970); *United States* v. *Hoffman*, 334 F. Supp. 504 (D.D.C. 1971); *National Mobilization Committee to End the War in Vietnam* v. *Foran*, 411 F.2d 934 (7th Cir. 1969).

The applicability of this provision to speech-related conduct, however, has been judicially limited by a constitutional standard enunciated in another context by the Supreme Court in *Brandenberg* v. *Ohio*, 395 U.S. 444 (1969). If the overt act cited in an 18 U.S.C. 2101 prosecution is speech, the speech must have "urged or instigated" the assemblage to imminent riot in a context where there was a "high likelihood" of riot. *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). The court recognized "first amendment problems in the statute," but rejected constructions of it that would have it reach protected expression, declaring the case a "close" one. *Id.* at 362. The definition of riot in 18 U.S.C. 2101 is broad. The term reaches to a public disturbance involving an act or threats of violence by one or more persons who are part of an assemblage of 3 or more persons, where the act or threat results or would

[1] To date there does not seem to have been a reported case indicating a riot prosecution under the Assimilative Crimes Act.

[2] It was enacted in its present form in 1948 and is derived from former 18 U.S.C. 252. Its constitutionality has apparently not been challenged and the only point which seems in dispute is whether those who aid and abet a principal initiator of a prison riot may be successfully prosecuted under the act. Even this point is moot because most aiders and abetters can be reached by charging a violation of 18 U.S.C. 2 along with the 18 U.S.C. 1792 charge, Annot., 15 *A.L.R. Fed.* 748 (1973).

result in personal injury or property damage and, if a threat is involved, the person making the threat has the ability of immediately executing the threat and the threat involves the commission of an act or acts of violence. It is not necessary that a riot take place for an offense to occur under this section.

Sections 231–33 of title 18, the Civil Obedience Act of 1968, prohibit the (1) transportation of or teaching the use of weapons, if the actor knows, has reason to know, or intends that the same will be employed in a civil disorder, and (2) obstructing the police in a civil disorder that affects commerce or interferes with a federally protected function. A civil disorder is defined in 18 U.S.C. 232(1) as "any public disturbance involving acts of violence by assemblages of three or more persons which causes an immediate danger of or results in damage or injury to the property or person of any other individual." The courts have uniformly upheld section 232(1) against constitutional attacks. *See United States* v. *Featherston*, 461 F.2d 1119 (5th Cir.), *cert. denied*, 409 U.S. 991 (1972); *National Mobilization Committee to End the War in Vietnam* v. *Foran*, 411 F.2d 934 (7th Cir. 1969); *United States* v. *Hoffman*, 334 F. Supp. 504 (D.D.C. 1971); *United States* v. *Mechanic*, 454 F.2d 849 (8th Cir. 1971), *cert. denied*, 406 U.S. 929 (1972).

Section 245(3) of title 18 forbids committing an act accompanied by force or threat of force, resulting in injury or intimidation, or interfering with any one whose business is in or affects commerce.

Section 7313 of title 5 provides for additional post-conviction sanctions in the form of ineligibility for holding Federal Government positions for those convicted by any Federal, State, or local court of competent jurisdiction of inciting, organizing, promoting, encouraging, or participating in a civil disorder or riot or of aiding and abetting another in so doing.

§ 2731—Inciting or leading a riot

This section carries forward, with modifications, 18 U.S.C. 1792, 2101, and 2102.

Subsection (a)(1) makes it an offense for someone knowingly to incite others to engage immediately in conduct constituting an offense under section 2733 of the proposed code under circumstances rendering it likely that such incitement will imminently cause the commission of such offense, and thereby intentionally to cause a riot. The term "riot" is defined in section 2734 of the proposed code.

In order for someone to be guilty of an offense described in subsection (a)(1) ("inciting" a riot), a riot must actually take place. The Committee, in so providing, has followed the recommendation of the National Commission on Reform of Federal Criminal Laws (*see Final Report* section 1801(1) (1971)) and the approach used in the District of Columbia riot law 22 D.C. Code section 1122 (enacted by Public Law 90–226 18 Stat. 734 (1967)). *See United States* v. *Jeffries*, 45 F.R.D. 110 (D.D.C. 1968). Subsection (a)(1) also requires that the actor intentionally bring about a riot. This is also derived from the District of Columbia riot law, 22 D.C. Code section 1122. *See United States* v. *Jeffries*, 45 F.R.D. 110, 119 (D.D.C. 1968) ("willfully" requires knowing *and* intentional aid to violent conduct involving grave danger to property). This requirement carries forward the common-

law approach and the approach of the Model Penal Code. *See* R. Perkins, *Criminal Law* 408 (2d ed. 1969); Model Penal Code section 250.1(1) (1962).

Subsection (a)(1) requires that the actor incite others to engage *immediately* in riotous conduct and that the incitement occur under circumstances that render it likely that the incitement will *imminently* cause the commission of the riotous conduct. The Committee intends by this requirement to comply with constitutional requirements. *See Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

Subsection (a)(2) makes it an offense for someone, during a riot and with intent to further that riot, knowingly (1) to urge participation in that riot and thereby further the riot; (2) to lead that riot and thereby further the riot; or (3) to give commands, instructions, or directions and thereby further the riot.

Subsection (b) provides that an offense described in section 2731 is a class C felony if the offense takes place in a Federal facility used for official detention and a class D felony in any other instance. The term "official detention" is defined in section 1719 of the proposed code. This carries forward current law.

Subsection (c) provides for Federal jurisdiction over an offense described in section 2731 when the offense is committed within the special jurisdiction of the United States or when the riot involves persons in a Federal facility used for official detention. The former is new to Federal law.[1] The latter carries forward the jurisdiction of 18 U.S.C. 1792.

Current law (18 U.S.C. 2101) also reaches situations where a person has traveled in interstate commerce with an intent to incite a riot. The Committee has decided not to carry forward that jurisdiction, which became a part of Federal law in 1968, because of the lack of a demonstrated need for such jurisdiction (there have been no Federal prosecutions based upon interstate travel since 1974) and because of the availability of effective State and local prosecutions for riot and property destruction offenses. The Committee's approach of providing for Federal jurisdiction in areas of particular Federal concern (the special jurisdiction of the United States and Federal detention facilities) assures protection of vital Federal interests without unnecessarily intruding into matters that have been adequately handled on the State and local level for virtually all of our Nation's history.

§ 2732—Providing arms for a riot

This section carries forward 18 U.S.C. 231(a). Subsection (a) makes it an offense for someone knowingly to supply, or to teach the use of, a thing with reckless disregard for the fact that such thing is a dangerous weapon or destructive device, with intent that such thing be used in a riot. The requirement that the actor have "the intent to promote a riot" is a more stringent culpability requirement than in current law. Since this offense does not require a result (i.e., the occurrence of a riot) or even the "clear and present danger" of a riot, such a narrowing helps ensure the constitutionality of the provisions.

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1 Under current Federal law, riotous conduct which occurs within the special jurisdiction of the United States is prosecutable under the Assimilative Crimes Act (18 U.S.C. 13) through the application of various diverse and inconsistent provisions borrowed from State penal laws. The Committee accepted the recommendations of the Department of Justice and provided a uniform approach to riot within the special jurisdiction of the United States. This approach comports with recommendations of the National Advisory Commission on Civil Disorders. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 289 (1968).

See Brandenburg v. *Ohio*, 395 U.S. 444, 450–57 (1969) (Douglas, J., concurring). To violate this section, the actor must do more than advocate; the actor must also have the specific intent to further a riot. The term "riot" is defined in section 2734 of the proposed code; the terms "destructive device" and "dangerous weapon" defined in section 2725 of the proposed code.

Subsection (b) classifies the offense as a D felony when the offense involves supplying and as an E felony when the offense involves teaching.

Subsection (c) provides for Federal jurisdiction over an offense described in this section when the riot affects interstate or foreign commerce or when the riot affects a Federal Government function, operation, or action. The term "Federal Government function" referred to in this subsection must be a lawful and authorized function.

§ 2733—Engaging in a riot

This section carries forward 18 U.S.C. 1792 and 2101. Subsection (a) makes it an offense for someone, during a riot and with intent to further a riot, knowingly to engage in violent and tumultuous conduct.

Subsection (b) classifies an offense under this section as an E felony if the offense is committed in a Federal facility used for official detention and as an A misdemeanor in any other instance. This modifies current law somewhat. Current law (18 U.S.C. 1792) classifies engaging in a riot in a Federal detention facility as the equivalent of a class C felony, the same level of punishment as inciting or leading a riot in a Federal detention facility. The Committee believes that inciting or leading a riot is more serious conduct and ought to be punished more severely than participation in a riot. Consequently, the Committee graded the offense in this section at one level below the offense of inciting or leading a riot, when the jurisdiction is based upon the fact that the riot takes place in a Federal detention facility. The Committee also believes that engaging in a riot in a Federal detention facility is more serious than engaging in a riot that takes place on a Federal enclave. Thus, the Committee has classified participation in a riot on a Federal enclave at one level below participation in a riot in a Federal detention facility.

Subsection (c) provides for Federal jurisdiction over an offense described in this section if the offense is committed within the special jurisdiction of the United States or if the offense is committed in a Federal facility used for official detention. Subsection (d) provides for extraterritorial jurisdiction when the offense is committed in a Federal facility used for official detention.

§ 2734—Definition for Subchapter

Section 2734 defines the term "riot", for the purposes of subchapter IV of chapter 27 of the proposed code, to mean a public disturbance that (1) involves an assemblage of 10 or more individuals as participants, (2) involves violent and tumultuous conduct on the part of the participants, and (3) causes or creates a grave danger of imminently causing bodily injury or substantial damage to property. This definition is derived from 18 U.S.C. 2102.

The requirement that 10 or more persons be involved is based upon the recommendation of the Brown Commission (*see Final Report* section 1801(1) (1971)). *See also* Brown Commission, *Working Papers* 988, 1023 (1970); N.Y. Penal Law section 240.06 (McKinney 1975) (requiring 10 participants).

The definition of riot requires that the participants engage in violent and tumultuous conduct. This requirement has several functions. It helps ensure that the criminal provisions in which the term "riot" is used are not unconstitutionally vague. *See United States* v. *Matthews*, 419 F.2d 1177, 1188–89, 1195–96 (D.C. Cir. 1969) (Wright, J. dissenting). The Committee intends that this phrase be construed to require "mindless, insensate violence and destruction serving no legitimate need for political expression". *United States* v. *Matthews*, 419 F.2d 1177, 1182 (D.C. Cir. 1969). The requirement of violent and tumultuous conduct, as so construed, means that the definition of riot carries forward the exemptions of 18 U.S.C. 2101(e) (relating to the pursuit of legitimate labor objectives) and 18 U.S.C. 2102(b) (relating to advocacy of ideas) since the conduct proscribed by subchapter IV of chapter 27 of the proposed code would not fall within the exemptions of current law. The requirement of violent and tumultous conduct is consistent with the recommendations of the National Commission on Reform of Federal Criminal Laws (see *Final Report* sections 1801–03 (1971). *See also Brown* Commission *Working Papers* 1023 (1970).

SUBCHAPTER V—GAMBLING, SEXUAL EXPLOITATION OF CHILDREN, AND OBSCENITY

Current Law

1. *Gambling.*—Federal gambling laws presently are scattered throughout the United States Code. Although the most commonly invoked provisions are contained in title 18, additional provisions are included in titles 15, 26, and 39 of the United States Code.

The title 18 offenses reflect an attempt to accommodate the need for Federal assistance to States in protecting their citizens from having gambling brought to them from out of State, while providing assurance to the States sponsoring lotteries, drawing revenues from other legal gambling enterprises, and otherwise sanctioning gambling that their endeavors will not be thwarted by the Federal Government. The Federal gambling policy has been described as follows:

> The national policy toward gambling rests heavily on principles of federalism and, in most instances, has merely supported the substantive policy choices of the several states. The federal government has attempted to adapt federal law to shifts in public attitudes toward gambling. Because some states have established and encouraged lotteries, but other states still oppose them, Congress has had to balance conflicting state interests.

Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923, 957 (1978).

Setting up, operating, owning, or holding an interest in a gambling ship, conducting or operating any gambling game or device, or inducing, enticing, soliciting or permitting any person to bet or play at any gambling establishment on a gambling ship, if that ship is

"on the high seas, or is an American vessel or otherwise within the jurisdiction of the United States and not within the jurisdiction of any State", is prohibited by 18 U.S.C. 1082. Transporting passengers between the United States and a gambling ship is prohibited by 18 U.S.C. 1083.

The interstate transmission of "bets or wagers" or of "information assisting in the placing of bets or wagers" by someone "engaged in the business of betting or wagering" is prohibited by 18 U.S.C. 1084. Information for use in news reporting or sports events is exempted from the coverage of 18 U.S.C. 1084, as is the transmission of information from and to a State where wagering is legal. This section has been upheld as not unconstitutionally vague, *Katz* v. *United States*, 369 F.2d 130 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 347 (1967); *United States* v. *Brodson*, 390 F. Supp. 774 (E.D. Wis. 1975), not unconstitutional when applied to transmissions to a State where gambling is legal (but from a State where gambling is not legal), *Martin* v. *United States*, 389 F.2d 895 (5th Cir.), *cert. denied*, 391 U.S. 919 (1968), and not violative of first amendment rights of speech. *Truchinski v. United States*, 393 F.2d 627 (8th Cir.), *cert. denied*, 393 U.S. 831 (1968).

However, although 18 U.S.C. 1084 is relatively frequently utilized, that section's effectiveness has been undercut by ambiguities which courts have not resolved. For example, Federal courts are divided as to whether the section reaches a person who *receives* a bet or wager or information assisting in making a bet or wager. Some courts have held that the term "transmisssion" in 18 U.S.C. 1084 restricts the class of offenders to those who send rather than receive the bet or information (unless, of course, they can be said to have caused the transmission by the other party, so as to be guilty under 18 U.S.C. 2 (b)). *See e.g.*, *United States* v. *Stonehouse*, 452 F.2d 455 (7th Cir. 1971). Other courts have held that the clear purpose of the section was to reach both the sender and receiver of such bets or information, and that this result is evident through the employment of the broad phrase "*uses* a wire communication facility" in 18 U.S.C. 1084(a) (emphasis added). *See United States* v. *Tomeo*, 459 F.2d 445 (10th Cir.), *cert. denied*, 409 U.S. 914 (1972); *United States* v. *Sellers*, 483 F.2d 37, 44–45 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

Another ambiguity results from the language "bets or wagers". One court has held that the use of the plural form was merely an oversight, and that the section should be construed to reach a single use of interstate facilities. *Sagansky* v. *United States*, 358 F.2d 195 (1st Cir. 1965), *cert. denied*, 385 U.S. 816 (1966). This result would appear to be compelled by 1 U.S.C. 1, which provides that "in determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the plural include the singular".

The Federal law of lotteries, 18 U.S.C. 1301–07, which is based upon 19th century legislation, makes it an offense to import lottery tickets or advertisements, transport or receive lottery tickets or advertisements in interstate or foreign commerce, use the mails to send lottery tickets or advertisements, or broadcast any advertisement or information concerning a lottery. Certain fishing contests are exempted from the lottery proscriptions by 18 U.S.C. 1305, and State conducted lotteries are exempted by 18 U.S.C. 1307.

The lottery provisions refer to a "lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part on lot or chance". The courts generally have held that in order for there to be a "lottery, gift enterprise, or similar scheme", there must be a prize, consideration, and the distribution of the prize by chance rather than according to merit. *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284 (1954); *Eastman* v. *Armstrong Byrd Music Co.*, 212 F.662 (8th Cir. 1914). If no valuable consideration is sought from the public, then a "lottery, gift enterprise, or similar scheme" is not involved. *Post Publishing Co.* v. *Murray*, 230 F.773 (1st Cir.), *cert. denied*, 241 U.S. 675 (1916).

The Supreme Court has sustained the constitutionality of 18 U.S.C. 1301 (importation and transportation of lottery tickets and lottery advertisements), *see Lottery Case*, 188 U.S. 321 (1903), and has held that 18 U.S.C. 1301 does not reach records containing figures representing the results of a lottery, *see France* v. *United States*, 164 U.S. 676 (1897).

The validity of 18 U.S.C. 1302 (mailing lottery tickets or advertisements) has also been upheld, and that section has been strictly interpreted not to reach the mailing of information and paraphernalia as to how a lottery might be set up, but only the mailing of information relating to an ongoing lottery. *United States* v. *Halseth*, 342 U.S. 277 (1952).

The validity of 18 U.S.C. 1304 (broadcasting lottery information) has been upheld against a first amendment challenge. *See American Broadcasting Co.* v. *United States*, 110 F. Supp. 374, 380 (S.D.N.Y. 1953) (3-judge court), *aff'd*, 347 U.S. 284 (1954). The section has been construed to prohibit only the broadcasting of advertisements and information directly promoting an existing lottery, not the broadcasting of news concerning lotteries. *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970). *Cf. New Jersey Lottery Comm'n* v. *United States*, 491 F.2d 219 (3d Cir. 1974), *vacated and remanded for consideration of mootness*, 420 U.S. 371 (1975).

The Travel Act (18 U.S.C. 1952) prohibits traveling in, or using a facility in, interstate or foreign commerce with intent to (1) distribute the proceeds of any "unlawful activity," (2) commit any crime of violence to further any "unlawful activity," or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any "unlawful activity," and thereafter performing or attempting to perform any of the foregoing acts. The term "unlawful activity" is defined to mean any business enterprise involving, *inter alia*, "gambling . . . in violation of the laws of the State in which they are committed or of the United States." This provision was aimed at racketeering activities of organized crime thought to be beyond the reach of local authorities and therefore does not preempt local law.

While 18 U.S.C. 1952 requires interstate travel or the use of interstate facilities, one court has found that such travel or use need not be an integral part of the "unlawful activity". *United States* v. *Barrow*, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967). The section also requires the existence of a "business enterprise", which means that there must be a course of conduct involving more than one illicit game. There need not be, however, a highly profitable enter-

prise run by an organized crime syndicate. *United States* v. *Pauldino*, 443 F.2d 1108 (10th Cir.), *cert. denied*, 404 U.S. 882 (1971); *United States* v. *Roselli*, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

This section has withstood a number of constitutional attacks predicated on claims of vagueness, encroachment upon powers reserved to the States, equal protection, and abridgement of the right to travel. While the section has proved of significant assistance in fulfilling the Federal Government's role in combatting large scale illegal gambling, the somewhat clumsy drafting of the section has generated a host of issues requiring court interpretation, including the nature of the intent required. The courts have generally held that the section necessitates a showing of travel with an intent to facilitate an activity which the accused knew to be unlawful under State but not Federal law. *See United States* v. *Miller*, 379 F.2d 483, 486 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967); *United States* v. *Polizzi*, 500 F.2d 856, 876–77 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). Another question that has arisen concerns who must engage in the travel. In *Rewis* v. *United States*, 401 U.S. 808 (1971), the Court held that the mere fact that customers of a gambling establishment travel interstate does not render them guilty; the Court further held that persons who conduct an illegal gambling operation do not violate the section simply because they are aware of or can foresee that some of their customers will travel interstate to patronize it. However, the Court cited with approval a line of lower court cases indicating that the section is violated when the agents or employees of the gambling establishment themselves cross State lines in furtherance of illegal activity, and indicated that the same result might obtain where those who conduct an illegal gambling enterprise activity purposefully encouraged interstate travel by customers. *Id.* at 813–14.

The sending or carrying in interstate or foreign commerce of any wagering paraphernalia or device used or to be used in bookmaking, wagering pools with respect to a sporting event, or in a numbers, policy, bolita, or similar game is prohibited by 18 U.S.C. 1953. The prohibition extends to any person except a common carrier in the usual course of business. The section does not apply to (1) parimutuel betting equipment or materials for use at racetracks or sporting events in connection with which betting is legal under applicable State laws; (2) the transportation of betting materials to be used in placing bets on a sporting event into a State where such betting is legal; (3) the carriage or transportation of a newspaper or similar publication; and (4) equipment, tickets, or materials for use within a State in a State conducted lottery.

Section 1953 was enacted in part to fill a gap created by the narrow judicial construction of the older lottery provisions and to aid the States in suppressing illegal gambling activity. House Rep. No. 87–968 (1961); *United States* v. *Fabrizio*, 385 U.S. 263, 269 (1966). In the *Fabrizio* case, the Supreme Court broadly interpreted 18 U.S.C. 1953, holding that the section was not aimed solely at gambling activities by organized crime and reaches the shipment of paraphernalia relating to a sweepstakes from a State where the sweepstakes was lawful and into

a State where the sweepstakes was not lawful. The Court also construed the terms defining the type of gambling paraphernalia whose transportation is prohibited to include an "acknowledgement" (in effect, a receipt), even though the acknowledgement is not essential for the collection of a prize.

The operation of large scale illegal gambling businesses is prohibited by 18 U.S.C. 1955, which makes it an offense to conduct, finance, manage, supervise, direct or own all or part of an "illegal gambling business". The phrase "illegal gambling business" is defined to mean a gambling business which (1) is a violation of the law of a State or political subdivision in which the business is conducted; (2) involves 5 or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (3) has been or remains in substantially continuous operation for a period in excess of 30 days or has a gross revenue in excess of $2,000 in any single day. Bingo games, lotteries, and other games of chance conducted by charitable organizations are exempted from the coverage of 18 U.S.C. 1955.

Section 1955 was enacted as part of the Organized Crime Control Act of 1970 (Pub. L. No. 91–452, 84 Stat. 937) and has been sustained against constitutional challenge. *See, e.g.*, *United States* v. *Ceraso*, 467 F.2d 653 (3d Cir. 1972); *United States* v. *Hunter*, 478 F.2d 1019 (7th Cir.), *cert. denied*, 414 U.S.C. 857 (1973); *United States* v. *Thaggard*, 477 F.2d 626 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973); *United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). The courts have held that a State criminal law must have been violated and that violations of nonpenal regulations are not sufficient to meet this requirement, *United States* v. *Gordon*, 464 F.2d 357 (9th Cir. 1972), that all who participate in a gambling business, no matter how insignificant the participation, may be counted to fulfill the five person requirement, *United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972), *vacated and remanded on other grounds*, 417 U.S. 903 (1974), but that mere customers may not be included, *United States* v. *Curry*, 530 F.2d 636 (5th Cir.), *cert. denied sub nom.*, *Hemingway* v. *United States*, 429 U.S. 829 (1976). The courts are split over whether those furnishing "line" information by telephone may be counted toward the five person requirement. *Compare United States* v. *DiMuro*, 540 F.2d 503 (1st Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977), *with United States* v. *Todaro*, 550 F.2d 1300 (2d Cir.), *cert. denied*, 433 U.S. 909 (1977). The Supreme Court has held that a conspiracy to violate 18 U.S.C. 1955 does not merge with the section 1955 offense. *Iannelli* v. *United States*, 420 U.S. 707 (1975).

Another provision enacted as part of the Organized Crime Control Act of 1970 (Pub. L. No. 91–452, 84 Stat. 936), 18 U.S.C. 1511, punishes any conspiracy to obstruct the criminal laws of a State or political subdivision of a State, with the intent to facilitate an illegal gambling business if (1) one or more of the conspirators does any act to effect the objective of the conspiracy, (2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision, and (3) one or more of the conspirators conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

The section contains a definition of "illegal gambling business" identical to the definition of that term which is found in 18 U.S.C. 1955. Bingo games, lotteries, and similar games of chance conducted by charitable organizations are not covered by 18 U.S.C. 1511. This section has been upheld as within the constitutional powers of Congress. *See United States* v. *Thaggard*, 477 F.2d 625 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973); *United States* v. *Riehl*, 460 F.2d 454 (3d Cir. 1972); *United States* v. *Garrison*, 348 F. Supp. 1112 (E.D. La. 1972).

Title 15 of the United States Code also contains gambling provisions, although those provisions are rarely used. The interstate shipment of slot machines and other gambling devices is prohibited by 15 U.S.C. 1172, and 15 U.S.C. 1173 requires manufacturers and others who deal with gambling devices to register with the Attorney General. The criminal penalties attached to 15 U.S.C. 1173 may be subject to challenge on fifth amendment grounds. Whether this is so may in large measure depend upon whether the class of those who must register is a criminally suspect class. *See Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968).

The labeling and marking of shipments of gambling devices is required by 15 U.S.C. 1174, and 15 U.S.C. 1175 prohibits the manufacture, possession, repair, or use of a gambling device in the District of Columbia or within the special maritime or territorial jurisdiction of the United States.

The above provisions are made not applicable to racetrack parimutuel betting machines and to certain other types of devices by 15 U.S.C. 1178. In addition, 15 U.S.C. 1172 exempts from the coverage of that section shipments to States that specifically exempt themselves from the prohibitions of that section.

Title 26 of the United States Code at one time provided Federal law enforcements officials with certain weapons to combat gambling, based upon an invocation of the taxing power. The Supreme Court, however, declared that these provisions could not be enforced in the face of a valid claim of the fifth amendment privilege against compulsory self-incrimination, since the class of persons against whom these provisions were aimed—persons in the business of wagering—were a criminally suspect class as to whom compliance with the law might well provide a link in the chain of evidence incriminating them as to another offense. *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968). Subsequently, Congress amended the provisions, and 26 U.S.C. 4424 now provides that no information maintained or furnished to the government pursuant to the wagering and occupational tax provisions may be used against the taxpayer in any criminal proceeding except a proceeding to enforce a tax under title 26. This amendment has the effect of resuscitating the criminal application of these statutes. *See* House Rep. No. 93-1401 (1974).

Other title 26 provisions impose a 2 percent tax on wagers (26 U.S.C. 4401); exempt from taxation parimutuel betting, certain coin operated devices, and State conducted lotteries, wagering, pools, and sweepstakes (26 U.S.C. 4402); require those liable for the wagering tax to keep daily records of pertinent data (26 U.S.C. 4403); impose a special occupational tax on anyone engaged in the business of accepting or receiving wagers (26 U.S.C. 4411); require those subject to the occupational tax to register with the Internal Revenue Service (26 U.S.C. 4412); and require that the account books of anyone liable for a tax under title 26 be perpetually available for inspection (26 U.S.C. 4423).

Finally, 39 U.S.C. 3005 permits postal authorities to take certain specified steps when someone is suspected of using the mails to conduct a lottery.

2. *Obscenity.*—Current obscenity prohibitions are found in chapter 71 of title 18.

Current offenses describe the type of material proscribed simply as "obscene, lewd, lascivious, indecent, filthy, or vile."

Because obscenity provisions aim at regulating speech and communication, they have been closely scrutinized by the courts in light of the first amendment. In 1973 the Supreme Court upheld the authority of State and Federal governments to regulate obscenity and provided some guidance for legislatures seeking to curb pornography. In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), the Court acknowledged that legislatures had wider interests than the protection of minors and that they could set limits on the distribution of sexually oriented literature on the basis of conclusions supported by less than scientific accuracy. In *Miller* v. *California*, 413 U.S. 15 (1973), the Court enunciated the standard by which unprotected pornography could be identified.

The Court has stated that the standard to be applied is "(a) whether 'the average person, applying contemporary community standards' would find the work taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24. Whether the material is "patently offensive" and whether it "appeals to prurient interest in sex are questions for the trier of fact, who must apply "contemporary community standards." *Smith* v. *United States*, 431 U.S. 291, 301 (1977).

"A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law," *Smith* v. *United States*, 431 U.S. 291, 302 (1977), *quoting Hamling* v. *United States*, 418 U.S. 87, 104–5 (1974). Chief Justice Burger's opinion for the Court in *Miller* speaks of the type of material to be considered obscene: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller* v. *California*, 413 U.S. 15, 25 (1973). When the material is aimed at an esoteric group, there is a slight variant in the standard to be supplied. The trier of fact must determine whether the "dominant theme of the material taken

as a whole appeals to the prurient interest in sex of the members of [a clearly defined deviant sexual group]". *Mishkin* v. *New York*, 383 U.S. 502, 507 (1966).

There can, moreover, be no prosecution of the private possession of obscenity in one's home for that would involve governmental interference in the "fundamental right to be free . . . from unwanted governmental intrusions to one's privacy." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

3. Sexual exploitation of children.—Sexual exploitation of children is currently forbidden by sections 2423 and 2251–53 of title 18. Section 2423 prohibits the transportation of a minor in interstate or foreign commerce with the intent that the minor engage in (1) prostitution; or (2) prohibited sexual conduct if the transporter knows or has reason to know that the minor's prohibited sexual conduct will be commercially exploited by anyone.

Section 2252 prohibits transportation in interstate or foreign commerce or the mails for the purpose of sale or distribution for sale, or receiving for the purpose of sale or distribution for sale, or the sale following shipment in interstate or foreign commerce or the mails, of obscene visual or print medium depicting a minor engaging in sexually explicit conduct if the production of the medium involved the use of a minor engaging in such conduct.

Section 2251 of title 18 provides penalties for (1) "any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct," and (2) "any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct," if the defendant "knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed," or "if such visual or print medium has actually been transported in interstate or foreign commerce or mailed." "Sexually explicit conduct" is defined in 18 U.S.C. 2253 as "actual or simulated" sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sado-masochistic abuse (for the purpose of sexual stimulation); or lewd exhibition of the genitals or pubic area of any person." Minor is defined as a person under 16 years old.

Sexual conduct involving minors is also covered by the provisions of chapter 117 of title 18, also known as the Mann Act. Section 2421 of title 18 U.S.C. prohibits the knowing transportation of a woman or girl in interstate or foreign commerce, in the District of Columbia, or the territories, or possessions of the United States "for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." Both men and women may violate the act; "the fact that the class

of possible victims is limited to females" does not present a ground to attack the provision's constitutionality on the basis of the equal protection clause. *United States* v. *Garrett*, 521 F.2d 444, 446 (8th Cir. 1975). The Act has been held to be valid notwithstanding an absence of commercial exploitation. *Hoke* v. *United States*, 227 U.S. 308 (1913). Where more than one woman is transported there is only one offense, *Bell* v. *United States*, 349 U.S. 81 (1955), but where the same woman has been transported in interstate commerce more than once each transportation is a separate offense, *Reed* v. *United States*, 142 F.2d 435 (5th Cir. 1944). Even if the woman furnishes her own transportation, another may be convicted of the offense. *Brown* v. *United States*, 314 F.2d 293 (9th Cir. 1963). It has been held that if a woman is taken to another State and returned to the home State, where sexual intercourse takes place, the offense has been completed. A bigamous marriage has been held to be an "immoral purpose," punishable under the act. *Reamer* v. *United States*, 318 F.2d 43 (8th Cir. 1963); *United States ex rel. Sirchie* v. *Smith*, 52 F. Supp. 610 (E.D.Pa. 1943). Mormons transporting women with whom they lived as polygamous spouses were held subject to the Act. *Cleveland* v. *United States*, 329 U.S. 14 (1946).

Section 2422 of title 18 penalizes anyone who knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia, for the purpose of prostitution, debauchery, or other immoral purpose, or who with the intent that such woman or girl shall engage in prostitution, debauchery, or any other immoral practice, whether with or without her consent and thereby knowingly causes her to be carried as a passenger in interstate or foreign commerce, or in the District of Columbia, by any common carrier.

Section 1952 of title 18, the Travel Act, punishes anyone who travels in interstate or foreign commerce or uses any facility thereof, with intent to (1) distribute proceeds of any unlawful activity, (2) commit any crime of violence to further any unlawful activity, or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and who thereafter performs or attempts to perform any of the acts set forth in (1), (2), and (3). The term "unlawful activity" is defined to mean, among other things, any business enterprise involving prostitution offenses in violation of the laws of the United States or of the state in which they are committed.

Section 1384 of title 18 penalizes anyone who, within reasonable distance of any military or naval camp, fort, post, yard, base, cantonment, training, or mobilization place as the appropriate Secretary of one of the armed forces shall designate and publish, "engages in prostitution or aids or abets prostitution or procures or solicits for the purposes of prostitution, or keeps or sets up a house of ill fame, brothel, or bawdy house, or receives any person for the purposes of lewdness, assignation, or prostitution into any vehicle or building, or leases or rents or contracts to rent or lease any vehicle or building knowing or with good reason to know that it is intended to be used for any of the purposes herein prohibited."

§ 2741—Operating a gambling business

This section carries forward a number of provisions of existing Federal law with respect to prohibitions against operating gambling businesses. 15 U.S.C. 1172–78; 18 U.S.C. 1082, 1084, 1953 and 1955.

Subsection (a)(1) makes it an offense for someone knowingly to control, manage, supervise, direct or finance a gambling business (a term defined in subsection (f). This carries forward 18 U.S.C. 1955. Subsection (a)(2) makes it an offense for someone knowingly to carry or send a gambling device, gambling information or gambling proceeds to any place within a State from any place outside that State. (The terms "gambling", "gambling device", and "gambling information" are defined in subsection (f). Subsection (a)(3) makes it an offense for someone knowingly otherwise to engage in, promote, or carry on a gambling business. The terms used in this subsection are intended to reach persons who conduct a gambling business, but are not designed to include patrons of gambling establishments. *Rewis* v. *United States*, 401 U.S. 808 (1970). This carries forward 18 U.S.C. 1955(b)(1).

Subsection (b)(1) provides that an offense described in subsection (a)(1), or in subsection (a)(3) (if the actor receives layoffs, wagers, or otherwise provided reinsurance in relation to persons engaged in a gambling business), is a D felony. Subsection (b)(2) provides that an offense described in subsection (a)(2), or in subsection (a)(3) in a situation other than that described in subsection (b)(1), is a class E felony. This classification system follows the recommendations of the Brown Commission (*see Final Report* section 1841 (1971)).

Subsection (c)(1) provides for Federal jurisdiction over an offense described in subsection (a)(1) when the offense affects interstate or foreign commerce. This is consistent with the jurisdictional requirement of the racketeering offense set forth in section 2701 of the proposed code. Subsection (c)(2) provides for Federal jurisdiction over an offense described in subsection (a)(2) or (3) when (1) the United States mail or a facility in interstate or foreign commerce is used in the commission of the offense; (2) movement of any person or gambling device across a State or United States boundary occurred during the commission of the offense; or (3) the offense occurred in the special jurisdiction of the United States. This carries forward 18 U.S.C. 1952.

Subsection (d) provides that, solely for the purpose of obtaining an arrest warrant or a wiretap order, there is probable cause to believe that a business has taken in $2.000 or more in a single day if 5 or more individuals are involved and if the business operates for 2 or more successive days. This section is derived from 18 U.S.C. 1955(c).

Subsection (e)(1)(A) provides a defense to a prosecution under subsection (a)(1) when the kind of gambling business or enterprise, the manner in which that business or enterprise was operated, and the defendant's participation in that business or enterprise were legal in all States and localities in which such business or enterprise was carried on, including any State or locality from which a customer placed a wager with, or otherwise patronized, the gambling business or enterprise, and any State or locality in which the wager was received or

to which such wager was transmitted. This carries forward current law (*see* 18 U.S.C. 1955 (b)(1)(i)) and is a recognition that in the area of gambling the appropriate Federal role is to supplement the States. If a State chooses not to make a certain kind of activity criminal, then there is no paramount Federal interest in overruling that decision.

Subsection (e)(1)(B) provides that it is a defense to a prosecution under subsection (a)(2) when (1) a gambling device was sent into a State or locality where such devices are legal; (2) the defendant was a common or public contract carrier and was carrying the device in the usual course of business; (3) the defendant was a player or bettor and the device was a ticket or other embodiment of the defendant's claim; (4) the gambling information was transmitted in connection with news or sports reporting or editorial commentary; (5) the gambling information was transmitted from a place where such gambling is legal to a place where such gambling is legal; (6) the transmission of the gambling offense would violate any of sections 471–74 of the bill but for the exception in section 477 of the Criminal Code Revision Act of 1980; or (7) the gambling proceeds were obtained by lawful participation in gambling that was legal in all places in which it was carried on. This carries forward 15 U.S.C. 1172 and 18 U.S.C. 1084, 1301, 1302, 1952 and 1953.

Subsection (e)(2) provides that it is a bar to prosecution for an offense under this section that the gambling business is legal in the State in which such gambling business takes place.

Subsection (f) defines 4 terms for the purposes of section 2741. Subsection (f)(1) defines "gambling" to include pool selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita, or numbers games, or selling chances therin. This carries forward 18 U.S.C. 1955(a)(2).

Subsection (f)(2) defines the term "gambling business" to mean a business involving gambling of any kind that (1) has 5 or more persons engaged in the business, (2) has been in substantially continuous operation for 30 days or more or has taken in $2,000 or more in a single day. This carries forward 18 U.S.C. 1955(a)(1).

Subsection (f)(3) defines the term "gambling device" to mean (1) any device covered by section 1 of "An Act to prohibit transportation of gambling devices in interstate and foreign commerce", or (2) any record, paraphernalia, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, bingo or keno games, lotteries, policy, bolita, numbers or similar games, or any equipment for carrying on card or dice games (other than cards or dice used in such games). This carries forward 15 U.S.C. 1171 and 1178.

Subsection (f)(4) defines the term "gambling information" to mean information consisting of, or assisting in, the placing of a bet or wager or the purchase of a ticket in a lottery or similar game of chance. This carries forward 18 U.S.C. 1084.

§ 2742—Sexual exploitation of children

This section carries forward 18 U.S.C. 2251, which was enacted in 1978 as part of the "Protection of Children Against Sexual Exploitation Act of 1977" (Pub. L. No. 95–225, 92 Stat. 7 (1978)).

Subsection (a)(1) makes it an offense for someone knowingly to employ, use, induce, or coerce any minor to engage in sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct. Subsection (a)(2) makes it an offense for someone knowingly to have a minor assist another person to engage in sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct. Subsection (a)(3) makes it an offense for someone who has custody or control of a minor knowingly to permit that minor to engage in, or knowingly to permit that minor to assist another person to engage in any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct.

Subsection (b) classifies the offense as C felony if the offense is committed after the defendant has previously been convicted of an offense under section 2742 and as a D felony in any other instance.

Subsection (c)(1) defines "minor" to mean any person under the age of 16 years. Subsection (c)(2) defines "sexually explicit conduct" to mean actual or simulated conduct of 5 types: (1) sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or the opposite sex); (2) bestiality; (3) masturbation; (4) sado-masochistic abuse (for the purpose of sexual stimulation); or (5) lewd exhibition of the genitals or pubic area of any individual. Subsection (c)(3) defines "producing" to mean producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit. Subsection (c)(4) defines "visual or print medium" to mean any film, photograph, negative, slide, book, magazine or other visual or print medium. These definitions are taken without change from 18 U.S.C. 2253.

Subsection (d) provides for Federal jurisdiction over an offense described in section 2742 when the offense is committed within the special jurisdiction of the United States or when the visual or print medium is transported in interstate or foreign commerce or in the mail. This expands upon current law, which does not cover the special jurisdiction of the United States. Prosecution of an offense under this section is easier than under 18 U.S.C. 2251 since no knowledge by the defendant of the interstate or foreign transportation of the visual or print medium need be proven. *See* section 302(c) (relating to state of mind requirement for offenses described in this title) of the proposed code.

§ *2743—Transferring or exhibiting obscene material*

This section brings forward 18 U.S.C. 1461, 1462, 1463, 1465, and 2252. Those sections refer to obscene material, but they do not define that term.

Subsection (a)(1) makes it an offense for someone knowingly to transfer or exhibit obscene material, or to possess such material with intent to transfer or exhibit that material, to an individual (1) with reckless disregard for the fact that such individual is a minor or (2) in a manner affording that individual no immediately effective opportunity to avoid exposure to the material. Subsection (a)(2) makes it an offense for someone commercially to transfer or exhibit obscene material, or to possess such material with intent commercially to transfer or exhibit such material to any person.[1]

Subsection (b) classifies the offense as a C felony if (1) the obscene material is visual or print medium, (2) the producing of that visual or print medium involves the use of a minor engaging in sexually explicit conduct, and (3) the visual or print medium depicts that sexually explicit conduct. The terms "visual or print medium", "sexually explicit conduct", and "producing" are defined in section 2742(c) (relating to sexual exploitation of children) of the proposed code. This classification provision brings forward 18 U.S.C. 2252. Subsection (b) classifies an offense under this section as a D felony in any other instance. This brings forward 18 U.S.C. 1461, 1462, 1463, and 1465.

Subsection (c)(1) provides a defense to a prosecution under this section when the obscene material was transferred, exhibited, or possessed with intent to transfer or exhibit, to a person: (1) associated with an institution of higher learning, either as a faculty member or as an enrolled student, teaching or pusuing a bona fide course of study, or conducting or engaging in a bona fide research program, to which such material is pertinent; or (2) whose receipt of such material was authorized in writing by a licensed or certified psychiatrist, psychologist, or medical practitioner.

Subsection (c)(2) provides a bar to prosecution for an offense described in this section when the transfer, exhibiting, or possession was not illegal in the State or locality where such transfer, exhibiting, or possession took place. This provision is a recognition that States are primarily responsible for making and enforcing laws regulating public morality. If a State chooses not to make illegal the transfer, exhibition, or possession with intent to transfer or exhibit, of certain material, then there is no paramount Federal interest justifying Federal overruling of that State decision.[2] This principle has been recognized with respect to regulation of other aspects of public morality. Thus, for example, 18 U.S.C. 1084 makes it an offense for someone engaged in the gambling business to transmit a bet on sporting events by wire in interstate or foreign commerce. However, there is an exemption in that provision which makes the section inapplicable to such a transmission from a State where such a bet is legal to a State where such a bet is legal. *See* 18 U.S.C. 1953(b).[3]

Subsection (d)(1) defines the term "obscene material" for the purposes of section 2743. The definition, while new to Federal statutory law, has been derived from Federal case law, primarily the decision in *Miller* v. *California*, 413 U.S. 15 (1973). The definition of "obscene material" has 3 parts. The first part of the definition has two branches: (1) Material that, taken as a whole, upon the application of contemporary community standards, would be found to appeal to the

[1] Thus, this offense does not reach the situation where one adult gratuitously transfers material to another adult, even though the mails were used to effect the transfer.

[2] The paramount State interest in the enforcement of obscenity laws is recognized in other ways in the proposed code. For example, the proposed code does not use a "national standard" in the test for determining whether material is obscene. Rather, the proposed code incorporates the present Federal court rule that the jury will apply the standard of the area from which the jury is drawn. See p. 415 *supra*.

[3] *Cf.* 18 U.S.C. 1511, 1952, and 1955 (requiring that the gambling be illegal under the law of the State in which the gambling is carried on) and 18 U.S.C. 1307 (making certain lottery provisions inapplicable to State-run lotteries).

prurient interest in sex of the average individual; or (2) material that, taken as a whole, if intended by the transferor or exhibitor to be transferred or exhibited to a sexually deviant class, upon the application of contemporary community standards would be found to appeal to the prurient interest in sex of an average individual within such sexually deviant class. This part of the definition is derived from *Miller* v. *California*, 413 U.S. 15 (1973), and *Mishkin* v. *New York*, 383 U.S. 502 (1966).[4]

The second part of the definition of "obscene material" is that the material, when assessed by the application of contemporary community standards, depicts or describes in a patently offensive manner (1) actual or simulated representations or descriptions of an act of sexual intercourse (including genital-genital, anal-genital, and oral-genital intercourse), whether between human beings or between a human being and an animal; (2) masturbation; (3) excretory functions; (4) flagellation, torture or other violence indicating a sado-masochistic sexual relationship; or (5) lewd exhibition of the genitals. This part of the definition is derived from *Miller v. California*, 413 U.S. 15 (1973), and *Smith* v. *United States*, 431 U.S. 291 (1977).[5]

The third part of the definition of "obscene material" is that the material, when considered as a whole, lacks serious literary, artistic, politicial, or scientific value. This part of the definition is derived from *Miller* v. *California*, 413 U.S. 15 (1973).

Subsection (d)(2) defines the term "minor" to mean an unmarried individual who has not attained the age of 16 years.

Subsection (e) provides for Federal jurisdiction over an offense described in section 2743 in 3 situations. Subsection (e)(1) provides for Federal jurisdiction when the offense is committed within the special jurisdiction of the United States. This is new to Federal law. Subsection (e)(2) provides for Federal jurisdiction when the mail or a facility in interstate or foreign commerce is used in the commission of the offense. This carries forward 18 U.S.C. 1461, 1463, 1465, and 2252.[6]

Subsection (e)(3) provides for Federal jurisdiction when the material is moved across a State or United States boundary in the planning,

[4] In the *Mishkin* case, it was argued by the defendant that the material involved was so disgusting that, rather than appealing to the prurient interest in sex of an average individual, the material would disgust an average individual. Therefore, it was argued, the material could not be obscene. The Supreme Court rejected that argument and held that material was obscene if the material was intended for a sexually deviant class of individuals and the material appealed to an average individual within that sexually deviant class. Mishkin v. New York, 383 U.S. 502, 508–10 (1966). Thus, without this aspect of the first part of the definition, material directed at sexually deviant class of individuals would not fall within the first part of the definition of the term "obscene material".

[5] In *Smith*, the Court repeated the three part test set forth in *Miller* and indicated that patent offensiveness was to be judged on the basis of contemporary community standards.

> The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way.

Smith v. United States, 431 U.S. 291, 300–01 (1977).

[6] Subsection (e)(2) expands the jurisdiction of the Federal Government with respect to child pornography proscribed by 18 U.S.C. 2252, which in subsection (a) requires that the shipment in interstate or foreign commerce or in the mails must be done "knowingly." Under the proposed code, no state of mind need be proved as to the use of interstate or foreign commerce or the mails. *See* section 302 (relating to state of mind requirement for offenses described in this title) of the proposed code. Thus, in a prosecution under section 2743 of the proposed code for the distribution of child pornography that is encompassed by 18 U.S.C. 2252, the prosecution would not have to prove any state of mind as to the fact that the material was shipped in interstate or foreign commerce or through the mails. As indicated before, under 18 U.S.C. 2252 the prosecution would have to show a knowing use of interstate or foreign commerce or the mail.

execution, or concealment of the offense. This is also new to Federal law.

§ 2744—Prohibited sexual conduct involving minors

This section carries forward 18 U.S.C. 2423, which was enacted as part of the "Protection of Children Against Sexual Exploitation Act of 1977" (Pub. L. No. 95–225, 92 Stat. 7 (1978)).

Subsection (a)(1) makes it a class C felony for someone knowingly (1) to cause a minor to engage in prohibited sexual conduct as consideration for anything of pecuniary value, or (2) to assist a minor to participate in prohibited sexual conduct with reckless disregard for the fact that such conduct will be commercially exploited by any person.

Subsection (b)(1) defines the term "prohibited sexual conduct" to mean, for the purposes of section 2744, (1) sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal), whether between individuals of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sado-masochistic abuse for the purpose of sexual stimulation; or (5) lewd exhibition of the genitals or pubic area of any individual. This carries forward 18 U.S.C. 2423(b)(2).

Subsection (b)(2) defines the term "minor" to mean, for the purposes of section 2744, an individual who has not attained the age of 18 years. This carries forward 18 U.S.C. 2423(b)(1).

Subsection (b)(3) defines the term "commercial exploitation" to mean, for the purposes of section 2744, having monetary or other material gain as a direct or indirect goal. This carries forward 18 U.S.C. 2423(b)(3).

Subsection (b)(4) defines the term "anything of pecuniary value" to mean, for the purposes of section 2744, anything of value (a term which is defined in section 101 of the proposed code) in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; or any other property that has a value in excess of $100. This definition is consistent with the definition of the term "anything of pecuniary value" in other parts of the proposed code. *See* sections 1762 (relating to general provisions for subchapter) and 2557 (relating to definition for subchapter) of the proposed code.

Subsection (c) provides for Federal jurisdiction over an offense described in section 2744 when the offense is committed within the special jurisdiction of the United States or when the minor moved across a State or United States boundary or was transported in interstate or foreign commerce in the commission of the offense. This carries forward 18 U.S.C. 2423 but expands upon that section to cover the movement of the minor across a State or United States boundary.

SUBCHAPTER VI—PUBLIC HEALTH AND SAFETY OFFENSES

§ 2751—Offenses involving food-related and health-related industries

This section makes it a class E felony to violate section 12(a)(1) of the Poultry Products Inspection Act (21 U.S.C. 461(a)(1)), section 406(a)(1) of the Federal Meat Inspection Act (21 U.S.C. 676(a)(1)), section 12(a)(1) of the Egg Product Inspection Act (21 U.S.C. 1041(a)(1)), or section 303(b) of the Federal Food, Drug, and

Cosmetic Act (21 U.S.C. 333(b)). The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by the referenced sections, in the circumstances and with the results and states of mind required by those sections. The use of "violates" insures that section 2751 incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

§ 2752—Environmental pollution

This section makes it an offense for someone to violate section 309(c)(1) or 404(s)(4)(A) of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)(1), 1344(s)(4)(A)), section 113(c)(1) of the Clean Air Act (42 U.S.C. 1857c-8(c)(1)), section 11(a)(1) of the Noise Control Act of 1972 (42 U.S.C. 4910(a)(1)), section 3008(d) of the Solid Waste Disposal Act (42 U.S.C. 6928(d)), section 24(c)(1), (2) or (3) of the Outer Continental Shelf Lands Act (43 U.S.C. 1350(c)(1), (c)(2), or (c)(3)) or section 4417a(14)(B) of the Revised Statutes of the United States (46 U.S.C. 391a(14)(B)). The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by the referenced sections, in the circumstances and with the results and states of mind required by those sections. The use of "violates" ensures that section 2752 incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

Subsection (b)(1) classifies an offense under subsections (a)(1) through (a)(5) as an A misdemeanor for the first offense and as an E felony for a second or subsequent offense. Subsection (b)(2) classifies an offense under subsection (a)(6) as an E felony. Subsection (b)(3) provides that notwithstanding the provisions of section 3502 of the proposed code, (1) the authorized fine for a class A misdemeanor under this section is the higher of $25,000 per day of violation or the fine authorized by section 3502, and (2) the authorized fine for a class E felony under this section is the higher of $50,000 per day of violation or the fine authorized by section 3502.

§ 2753—Pipeline safety offenses

This section makes it a class D felony for someone to violate section 11(c) of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. 1679a(c)) or section 208(c) of the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. 2007(c)). The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by the referenced sections, in the circumstances and with the results and states of mind required by those sections. The use of "violates" insures that section 2753 incorporates not only the exact provisions of the referenced sections, but also any judicial interpretations of those sections.

SUBCHAPTER VII—ASSIMILATIVE CRIMES OFFENSES

Current law

The Assimilative Crimes Act, 18 U.S.C. 13, supplements Federal criminal laws for crimes committed in Federal enclaves by adopting

local law. Basically, the Act provides that when something is done on a Federal reservation which is not made criminal by the laws of the United States, but which is a crime under the laws of the surrounding jurisdiction (State, territory, possession or district), then the conduct should be punished in accordance with the local law treating the offense. The effect of the Act is to federalize a significant portion of State criminal law for the purpose of prosecuting crime in Federal enclaves.

Various purposes have been ascribed to the provision. It is said to fulfill the evident need for dealing comprehensively with criminal offenses committed within Federal enclaves. *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *United States* v. *Prejean*, 494 F.2d 495 (5th Cir. 1974). Federal criminal laws are not comprehensive. They leave unpunished certain activity that is commonly punished by local law. It is therefore said that a major purpose of the Assimilative Crimes Act is to prevent Federal enclaves from becoming havens for crime by using local law to fill the gaps in Federal criminal laws. The Act has also been recognized as serving the interests of comity.

> [C]ongress, in adopting [the Assimilative Crimes Act], sedulously considered the two-fold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory which is situated within their exterior boundaries and which hence would be subject to exclusive State jurisdiction but for the existence of a United States reservation.

United States v. *Press Publishing Co.*, 219 U.S. 1, 9 (1911). Finally, the Act has been characterized as having the purpose of insuring that crimes committed in Federal enclaves and surrounding State territory are treated uniformly, *United States* v. *Best*, 573 F.2d 1095 (9th Cir. 1978); *Acunia* v. *United States*, 404 F.2d 140 (9th Cir. 1968); *United States* v. *Marcyes*, 557 F.2d 1361 (9th Cir. 1977).

The problems which have arisen concerning the application of the Assimilative Crimes Act fall into a distinct areas: (1) where the Act applies; (2) when the Act applies; and (3) what State law is assimilated.

Areas Covered.—The Assimilative Crimes Act is applicable to conduct which takes place "within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title" (18 U.S.C. 7). Section 7 of title 18 defines the special maritime and territorial jurisdiction of the United States as consisting of 5 areas: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and various vessels; (2) Various vessels on the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where that River constitutes the International Boundary Line; (3) Lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State for the erection of necessary buildings; (4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States;

(5) Various aircraft while such aircraft are in flight over high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

The geographical areas described in 18 U.S.C. 7(1), (4), and (5), however, are automatically excluded from coverage since those subsections relate to locations outside the jurisdiction of any State, territory, district or possession and the Assimilative Crimes Act applies only to Federal enclaves within these jurisdictions. Thus, the only relevant provisions are 18 U.S.C. 7(2) and (3), and there is some doubt about 18 U.S.C. 7(2), one commentator having argued that the Act's use of the word "places" shows an intent to limit the Act's coverage to dry land. *See* Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685, 687, (1957). While the argument is mostly academic since the Assimilative Crimes Act has rarely been used to prosecute crime on the Great Lakes, it has been rejected the few times it has been raised. In one case a battleship was specifically held to be a "place" within the meaning of the Act, *United States* v. *Carter*, 84 F. 622 (2d. Cir. 1897), and in another case on point the Act was held applicable to conduct on a vessel in voyage on State waters of Lake Michigan. *United States* v. *Gill*, 204 F.2d 740 (7th Cir.), *cert. denied*, 346 U.S. 825 (1953).

The Assimilative Crimes Act has been used most often to prosecute crimes in areas covered by 18 U.S.C. 7(3), which encompasses such diverse places as Indian reservations, *United States* v. *Marcyes*, 557 F.2d 1361 (9th Cir. 1977), military bases, *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383 (1944), navy yards, *United States* v. *Schuster*, 220 F. Supp. 61 (E.D. Va. 1963), post offices, *United States* v. *Andem*, 158 F. 996 (D. N.J. 1908), national parks, *see Bowen* v. *Johnston*, 306 U.S. 19 (1939); *Crater Lake National Park Co.* v. *Oregon Liquor Control Comm'n.*, 26 F. Supp. 363 (D. Or. 1939); *but see United States* v. *Woods*, 450 F. Supp. 1335 (D. Md. 1978), and airports, *Air Terminal Services, Inc.* v. *Rentzel*, 81 F. Supp. 611 (E.D. Va. 1949).

When State law is assimilated.—The Assimilative Crimes Act provides that if a Federal law punishes the crime, State law is not to be assimilated. In *Williams* v. *United States*, 327 U.S. 711 (1946), however, the court questioned the validity of the statutory rape conviction of a married white man for having sexual intercourse with an unmarried Indian girl over 16 but under 18 years old on the Colorado River Indian Reservation in Arizona. The defendant was convicted under the Assimilative Crimes Act using Arizona law which made the age of consent 18, while a Federal law governing the offense of statutory rape on Indian reservations made the age of consent 16. The Supreme Court held that the conviction under the assimilated Arizona law was barred by the Assimilative Crimes Act.

> We hold that the Assimilative Crimes Act does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act.

Id. at 717.

The *Williams* case has unfortunately caused a debate, which continues today, whether the Assimilative Crimes Act ceases to apply when a Federal statute forbids the precise act at issue or when that Federal statute proscribes the generic type of conduct? The Eighth Circuit has adopted the generic type test, so that if an Act of Congress prohibits the general type of conduct charged in the indictment, Federal court jurisdiction is limited to the Federal provision. *United States v. Butler*, 541 F.2d 730 (8th Cir. 1976); *United States v. Big Crow*, 523 F.2d 955 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976). The Second Circuit has taken a different approach. It has adopted the rule that as long as the State law proceeds on a different theory from the Federal provision the State law can be assimilated, even though the precise acts giving rise to the charge constitute a federally defined crime. Thus, in *United States v. Jones*, 244 F. Supp. 181 (S.D.N.Y. 1965), *aff'd*, 365 F.2d 675 (2d Cir. 1966), the Second Circuit upheld the convictions of persons staging a disruptive demonstration in front of a courthouse under an assimilated New York disorderly conduct statute, even though a Federal law made it a crime to disturb court operations by picketing in front of a courthouse. *See also Fields* v. *United States*, 438 F.2d 205 (2d Cir. 1971). This issue has also been raised but not decided in a few other circuits. *Shirley* v. *United States*, 554 F.2d 767 (6th Cir. 1977), *United States* v. *Patmore*, 475 F.2d 752 (10th Cir. 1973); *United States* v. *Easley*, 387 F. Supp. 143 (N.D. Cal. 1974); *United States* v. *Narciso*, 446 F. Supp. 252 (E.D. Mich. 1977).

By its terms, 18 U.S.C. 13 bars State law from assimilation only when an Act of Congress punishes the misconduct. In a few cases, however, the courts have carved out a second exception. They have held that State law cannot be used to obtain a conviction if the State law is inconsistent with a policy expressed in a Federal statute. *Cheyenne-Arapaho Tribes* v. *Oklahoma*, 618 F.2d 665 (10th Cir. 1980); *King* v. *Gemini Food Services, Inc.*, 438 F. Supp. 964 (E.D. Va. 1976), *aff'd*, 562 F.2d 297 (4th Cir. 1977); *Vincent* v. *General Dynamics Corp.*, 427 F. Supp. 786 (N.D. Tex. 1977). The Supreme Court has carried this idea one step further and implied that State law cannot be adopted if the State law is inconsistent with a Federal regulation, *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 390 (1944); *see also United States* v. *Pardee*, 368 F.2d 368 (4th Cir. 1966); *Air Terminal Services Inc.* v. *Rentzel*, 81 F. Supp. 611 (E.D. Va. 1949), although the Court subsequently appears to have retreated from this position. *United States* v. *Sharpnack*, 355 U.S. 286, 293 n.9 (1958).

Finally, the Assimilative Crimes Act cannot be utilized to enforce penal provisions of State regulatory laws. For example, *United States* v. *Best*, 573 F.2d 1095 (9th Cir. 1978), held that California measures authorizing suspension of a driver's license are regulatory and not penal and thus they could not be enforced against a driver prosecuted for drunken driving on a Federal enclave. *See also United States* v. *Marcyes*, 557 F.2d 1361 (9th Cir. 1977). In *Vincent* v. *General Dynamics Corp.*, 427 F. Supp. 786, 800 (N.D. Tex. 1977), it was held that penal provisions of Texas right-to-work laws were barred from assimilation on the ground that they were only supportive of civil policy.

What State law is adopted.—The Assimilative Crimes Act provides that in absence of a controlling Federal law, a person "shall be guilty of a like offense and subject to a like punishment" under "the laws [of the State, territory, possession or district] in force at the time of such act or omission." This language raises the question of which State laws are to be applied—those defining the offense and fixing the punishment or also those which establish procedure and set policy?

Most courts have chosen to assimilate only those State laws which define and punish the crime. The choice is explained in terms of policy. According to the majority view, the primary purpose of 18 U.S.C. 13 is to fill the void in the criminal law applicable to Federal enclaves created by Congress' failure to pass specific criminal statutes, not to equalize the rights and duties of persons on and off Federal enclaves. The majority, therefore, emphasize that a prosecution under the Assimilative Crimes Act is a Federal prosecution and therefore ought to depend on Federal policies and procedures. In keeping with this rationale, the courts have held that the following Federal procedures ought to prevail over their state counterparts: (1) the standards for appellate review of a sentence, *United States* v. *Lincoln*, 581 F.2d 200 (9th Cir. 1978); (2) the requirements for testing the sufficiency of an indictment, *McCoy* v. *Pescor*, 145 F.2d 260 (8th Cir. 1944), *cert. denied*, 324 U.S. 868 (1945); and (3) the statute of limitations for prosecuting a crime, *United States* v. *Andem*, 158 F. 996 (D.N.J. 1908). This preference for Federal rules has also led the courts to reject State laws which embody prosecutorial and investigative policies. Thus, in *United States* v. *Johnson*, 426 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 842 (1970), the court held that a State law preventing conviction for both the inchoate and the principal offense did not have to be followed, and in *Smayda* v. *United States*, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966), the court refused to assimilate California policies governing police investigative techniques.

A few cases have gone the other way. In *United States* v. *Press Publishing Co.*, 219 U.S. 1 (1911), the Supreme Court held that State law regarding the charging of an offense should be followed because the Assimilative Crimes Act evinced a policy to intrude as little as possible on State criminal law practices. This same rationale partially explains 2 other decisions, both involving drunken driving convictions. In *United States* v. *Best*, 573 F.2d 1095 (9th Cir. 1978), the court looked to State law to determine whether the suspension of a driver's license served a regulatory or a punitive purpose, and in *Kay* v. *United States*, 255 F.2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958), the court approved the use of State procedures for testing the alcoholic content of blood.

§ 2761—Violating State or local law in an enclave

This section carries forward, with modification, the Assimilative Crimes Act (18 U.S.C. 13). That Act provides that, within a Federal enclave, it is unlawful for someone to engage in any act or omission "which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession or District" within which the enclave is located. The need for such a provision is greater under present

law than under the proposed code because present Federal criminal law is neither comprehensive nor uniform in application. The Committee has decided to carry forward the policy of the Act but to modify the Act's penalty structure.

Subsection (a) makes it an offense for someone, in a Federal enclave, to violate a criminal law then in force in the State or locality in which the enclave is located, if such violation does not otherwise constitute an offense under a Federal law applicable in the enclave and if, in light of other Federal law relating to similar conduct, such violation was not intended to be excluded from the application of this section. The latter provision is a recognition that the lack of a Federal enactment which makes the conduct involved a Federal offense may constitute Federal policy that such conduct should not be criminal when engaged in on a Federal enclave.

A Federal enclave, for the purposes of this section, is a place described in section 113(b)(1) and (2), section 113(c)(4), or section 114 of the proposed code. The term "violates" as used in this section is a variant of the term "to violate," which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by the State or local law, in the circumstances and with the results and states of mind required by the State or local law. The use of violates insures that section 2761 incorporates not only the exact provisions of the State or local law defining the offense, but also judicial interpretations of the State or local law defining the offense.

Subsection (b)(1) classifies an offense described in this section as an A misdemeanor if the maximum term of imprisonment authorized by the State or local law is one year or more; as a misdemeanor of the lowest class for which there is authorized under chapter 37 of the proposed code a term of imprisonment equal to or exceeding the maximum term of imprisonment authorized by the State or local law if that maximum is less than one year; and as an infraction if the only penalty authorized by the State or local law is a criminal fine. Subsection (b)(2) provides that, notwithstanding the classification system set forth in subsection (b)(1), the term of imprisonment and the fine that may be imposed cannot exceed the maximum authorized by the State or local law. A State misdemeanor may, for example, carry a maximum jail term of 90 days. Subsection (b)(1) would classify the offense as a B misdemeanor, for which section 3702 of the proposed code provides a maximum term of imprisonment of 6 months. However, the maximum term of imprisonment that could be imposed upon a defendant is limited by subsection (b)(2) to 90 days, the maximum authorized by the State law involved.

The classification of this offense reflects the view of the Committee that the proposed code's comprehensive treatment of all Federal felonies makes it inappropriate to classify assimilated offenses as more than misdemeanors.

Subsection (c) provides that in a prosecution for an offense described in this section, it is a question of law whether a State or local law is then in force and whether a circumstance described in subsection (a)(1) or (2) exists. Pursuant to section 121, those questions will be decided by the court. Subsection (c) also provides that no state of

mind need be proven with respect to the fact that (1) the place where the alleged violation took place was a Federal enclave, (2) the State law was then in force, or (3) a circumstance described in subsection (a) (1) or (2) exists.

Subsection (d) provides that, in the case of a place within the Indian country jurisdiction of the United States (which is defined in section 114 of the proposed code), it is a bar to prosecution for an offense described in this section that (1) the alleged offense was not an offense committed by a non-Indian against an Indian, or by an Indian against a non-Indian in Indian country, or (2) the Indian committing the offense has been punished by the local law of the tribe, or treaty stipulations secure or may secure the exclusive jurisdiction over such offense to the Indian tribes. This carries forward the second paragraph of 18 U.S.C. 1152.

§ *2762—Illegal patient admittance and retention practices*

This section makes it a class D felony for someone to violate section 1909(d) of title XIX of the Social Security Act (42 U.S.C. 1396h(d)). The term "violates" as used in this section is a variant of the term "to violate", which is defined in section 101 of the proposed code. Pursuant to that definition, this section requires that the actor engage in the conduct prohibited by the referenced section, in the circumstances and with the results and states of mind required by that section. The use of "violates" ensures that section 2762 incorporates not only the exact provisions of the referenced section, but also any judicial interpretations of that section.

Subtitle III—Sentencing and Corrections

Overview

The American system of criminal justice, in its determinations of criminal responsibility, can be justifiably proud of its long standing commitment to fundamental fairness and due process of law. Solicitude for the rights of the accused in criminal cases, and a reluctance to grant unnecessary power to the government, have been part of our jurisprudence since the early days of the Republic. Tragically, society's response to criminal conduct once guilt has been determined has not been given the same attention. Today because of congressional inaction, the Federal sentencing structure lacks coherence, rationality, uniformity, and fairness. The chapters of the criminal code which are outlined on the following pages begin the process of remedying decades of neglect.

The proposed code establishes, for the first time in Federal law, a comprehensive set of procedures and sentencing options for the disposition and treatment of persons found guilty of commiting crimes. The code's sentencing system has four major components. First, the permissible purposes of sentencing are set forth. Second, judges are directed to use certain procedures and to rely upon certain objective information when imposing a criminal sentence. Third, judges will be assisted in meting out sentences by a system of sentencing guidelines based on categories of offenses and offenders. The sentencing guidelines will be developed by the judiciary and approved by Congress. Finally, the code grants defendants the right to appellate review of criminal sentences.

The proposed code's new sentencing system is rooted in certain conclusions about the deficiencies and inadequacies of current law. The single most pervasive flaw in current law is disparity in sentencing. The absence of Congressional guidance to the judiciary has all but guaranteed that, without apparent justification, similarly situated offenders convicted of the same type of offense will receive different sentences. This disparity results in part because judges are not required to state their reasons for imposing a particular sentence and, in part, because the sentencing system is premised on the belief that individualized justice is served by making ad hoc predictions about the likelihood of a defendant's rehabilitation in a prison environment or on probation. Thus current law permits persons convicted of the same offense and with the same criminal history to receive different sentences based on supposition about how long it will take them to be "cured" in prison.

Congress took a substantial step towards limiting sentence disparity in the Parole Commission and Reorganization Act of 1976. Using the procedures of that Act, the Parole Commission has succeeded in reducing much of the disparity in the amount of time served by those similarly situated. But the decision whether to incarcerate in the first place

is still subject to disparity. Further, the Parole Commission cannot eliminate disparity where the sentencing court has set a period of parole ineligibility above what would ordinarily be the applicable parole guideline.

A second major flaw in current law concerns the lack of clearly delineated procedures for the imposition of sentence. Present law authorizes only two types of sentences explicitly—prison and fines. There is no "sentence" of probation, conditional discharge, or restitution. There is also no explicit method of resolving factual disputes which materially affect sentence decisions. *See generally* J. Smith, *A Primer on Federal Sentencing Options and Procedures: Parts I and II*, 16 Crim. L. Bull. 101–130, 197–231 (1980).

The proposed code provides two remedies for these problems. First, to be fair, the sentencing system will use information to which the defendant has had fair access and an opportunity to contest. Second, the code limits the use of rehabilitation as the sole rationale for a sentence of imprisonment. Thus the focus of the sentencing inquiry should be the nature of the harm done or threatened and the defendant's level of culpability, rather than irrelevant information about the defendant's socio-economic or educational background, except insofar as such information serves to mitigate the potential punishment. The core goals of the new sentencing system are fairness and certainty. One element of fairness is that the severity of the sentence be proportionate and directly related to the culpability of the offender and to the harm done. Commensurate punishment will be both a goal and a limit on total judicial discretion.

Courts will be assisted in the sentencing inquiry by the proposed code's requirement that the presentence report list the available sentence options, including alternatives to imprisonment. The defendant and defense counsel will have access to the presentence report at least five days before sentencing. Moreover, the code provides for a sentencing hearing to resolve factual disputes.

Finally, critics of the current sentencing system have claimed that the only way to achieve complete and comprehensive reform is to abolish parole. The Committee carefully considered this suggestion and rejected it. The rationale for this action is set forth in greater detail in the discussion of chapter 47 of the proposed code. *See* pp. 505–513 *infra*.

Subtitle III—Sentencing and Corrections

Chapter 31—General Provisions

Introduction

The Committee has made the most noteworthy departures from current law in the area of sentencing. The current Federal sentencing system has a number of deficiencies. Congress has not explicitly provided the courts with any direction concerning the appropriate purposes of sentencing, nor has Congress clearly set forth procedures to govern the imposition of sentence. Sentencing has, therefore, been characterized by complete and unguided judicial discretion, resulting in substantial disparities among sentences imposed upon similar offenders convicted of committing similar offenses.

The Committee, in making changes in current Federal sentencing practices, was concerned about the present rate and level of incarceration. The Committee does not want to increase, in the aggregate, either the rate of incarceration or the length of incarceration. The Committee also recognized that some aspects of the proposed code's sentencing system are novel (such as the development and use of sentencing guidelines). Such provisions may not work as intended or may have unforeseen and undesirable consequences. Therefore, the Committee has taken steps, such as the retention of parole, to minimize the potential for adverse results.

The proposed code makes three major improvements in the present Federal sentencing system. First, it mandates the development of sentencing guidelines to assist judges in imposing sentences. Second, it requires the court to state, on the record, the reasons for imposing a sentence. Third, it permits defendants to appeal sentences.

The House of Representatives has never before undertaken a comprehensive revision of sentencing procedures. The Committee's approach is supported by many of the participants in the criminal justice system, including judges, prosecutors, defense attorneys, and probation and parole officers. The sentencing system in the proposed code represents a bipartisan and balanced reform effort.

The Committee has not included the death penalty in the proposed code. Title 18 presently contains no constitutional death penalty provision (see discussion below) and thus, in reality, there is no death penalty for any title 18 offense. The Committee has chosen to carry forward the current state of the law with regard to the death penalty, believing that whether the proposed code should include a death penalty is a matter better left for separate consideration.

Title 18 presently contains approximately 15 offenses for which the penalty of death is authorized: 18 U.S.C. 34 (relating to destruction of aircraft, aircraft facilities, motor vehicles, or motor vehicle facilities when death results); 18 U.S.C. 351 (b) and (d) (relating to Congressional assassination, kidnapping, and assault; penalties); 18 U.S.C. 794 (relating to gathering or delivering defense information

to foreign government) 18 U.S.C. 844 (d), (f), and (i) (relating to penalties (for explosives offenses)); 18 U.S.C. 1111 (relating to murder); 18 U.S.C. 1114 (relating to protection of officers and employees of the United States); 18 U.S.C. 1716 (relating to injurious materials as nonmailable); 18 U.S.C. 1751 (b) and (d) (relating to Presidential assassination, kidnapping and assault; penalties); 18 U.S.C. 1992 (relating to wrecking trains); 18 U.S.C. 2031 (relating to special maritime and territorial jurisdiction (for rape)); 18 U.S.C. 2113(e) (relating to bank robbery and incidental crimes); and 18 U.S.C. 2381 (relating to treason).

There is no provision of law, in title 18 or elsewhere, that regulates the imposition of the dealth penalty under those sections. Therefore, the death penalty cannot constitutionally be imposed upon a defendant convicted of one of those offenses. *Furman* v. *Georgia*, 408 U.S. 238 (1972). See House Rep. No. 93–885 at 15 (reprinted in [1974] U.S. Code Cong. & Ad. News 3975, 3981).

Mr. Justice Blackman, dissenting in *Furman*, noted that the decision in that case would invalidate "all those provisions of the federal statutory structure that permit the death penalty . . ." *Id.* at 411. Since Mr. Justice Blackman wrote, numerous lower court opinions have borne him out by indicating the unconstitutionality of 18 U.S.C. 1111, *United States* v. *Kaiser*, 467 F.2d 470–75 (5th Cir. 1977); *United States* v. *Watson*, 496 F.2d 127, 138 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974); *United States* v. *Freeman*, 380 F. Supp. 1004 (D.M.D. 1974); 18 U.S.C. 1716, *United States* v. *Watson*, 496 F.2d 1125 (4th Cir. 1973); *cert. denied*, 415 U.S. 979 (1974); 18 U.S.C. 2031, *United States* v. *Kasto*, 584 F.2d 268, 274 (8th Cir. 1978), *cert. denied*, 99 Sup. Ct. 1267 (1979); *United States* v. *Johnson*, 425 F. Supp. 986 (D. La. 1976); *United States* v. *Quinones*, 353 F. Supp. 1325 (D. P.R. 1973); and 18 U.S.C. 2113(e), *See United States* v. *McGee*, 488 F.2d 731 (5th Cir.), *cert. denied*, 417 U.S. 949 (1974); *Ralph* v. *Warden, Maryland Penitentiary*, 438 F.2d 786 (4th Cir. 1970); *Carter* v. *United States*, 388 F. Supp. 1334, 1336 (W.D. Pa. 1974), *aff'd*, 517 F.2d 1397 (3rd Cir. 1975); *United States* v. *Crowell*, 359 F. Supp. 489 (M.D. Fla. 1973), *aff'd*, 498 F.2d 324 (5th Cir. 1974). *See also Pope* v. *United States*, 392 U.S. 651 (1968) (18 U.S.C. 2113(e)) unconstitutional based on *United States* v. *Jackson*, 390 U.S. 570 (1968) (18 U.S.C. 2113(e)).[1]

The Committee's judgment that the death penalty cannot constitutionally be imposed under those title 18 provisions authorizing the death penalty is concurred in by the Senate Judiciary Committee, *see* Senate No. 96–553, at 131 (1980), and by the Department of Justice. *See United States* v. *Weedell*, 567 F.2d 767 (8th Cir. 1977). (Government agrees that the death penalty provisions of 18 U.S.C. 1111 are unconstitutional.)

Whether to have the death penalty is a highly controversial and emotion-laden issue. If it is decided to have a death penalty, it must then be decided that offenses it should apply to and what procedures are necessary for its imposition. These matters require a close and careful reading of the Supreme Court's death penalty decisions. The Committee believes that these matters are better considered separately from the proposed code and is, therefore, carrying forward current law with respect to the death penalty provisions of current title 18.

[1] 49 U.S.C. 1472(i) contains a death penalty and has procedures imposing that penalty. These procedures were established in light of *Furman* v. *Georgia*, 408 U.S. 238 (1972). Whether 49 U.S.C. 1472(i) meets all constitutional requirements has not yet been decided by the courts.

§ *3101—Purposes of sentencing*

This section, which is new to Federal law, sets forth eight purposes to be served by a criminal sentence. The purposes are derived from the Model Penal Code (*see* section 1.02(2) (Proposed Official Draft 1962), the Brown Commission (*see Final Report* section 102 (1971)), and the recommendations of leading experts in penology. Perlman and Stebbins, *Implementing an Equitable Sentencing System: The Uniform Commissioner's Model Sentencing and Corrections Act*, 65 Va. L. Rev. 1175 (1979) (a thorough and thoughful analysis of the proposed model code); Perlman and Potuto, *The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview*, 58 Neb. 925 (1979). *See also* N.Y. Penal Law section 1.05; Cal. Penal Code section 1170; Me. Rev. Stat. tit. 17–A, section 1155. While Congress has long been encouraged to articulate a comprehensive sentencing policy, National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* standard 16.7 (1979); President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society*, 143 (1967). This is the first time that Congress will have done so. *See generally Williams* v. *New York*, 337 U.S. 241, 248 n. 13 (1949) (sentencing court should consider restraint, retribution, rehabilitation and deterrence).

Paragraph (1) provides that a criminal sentence may be imposed to "assure that the severity of the sentence is proportionate and directly related to the culpability of the offender and the harm done" by the offense. Consideration of the moral blameworthiness of the offender and the damage sustained by society ensures fairness in punishment. These concepts, while difficult to define, depend on the nature of the particular offense and upon the relevant characteristics of the particular offender. "Harm" refers to the extent of the injury done or intended by the act. "Culpability" refers to the actor's intent or motive and to any circumstances involved in the offense that demonstrate the degree of blameworthiness. A. von Hirsch, *Doing Justice: The Choice of Punishment* ch. 8 (1976); N. Morris, *The Future of Imprisonment* (1974); Cal. Penal Code Section 1170(a)(2) (West Cum. Supp. 1980). This provision, of course, does not mean that the punishment imposed upon a defendant can automatically be increased merely because of the severity of the harm that occurs. *See* Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. Pa. L. Rev. 1497 (1974).

Paragraph (2) provides that a criminal sentence may be imposed to ensure that offenders convicted of similar crimes under similar circumstances will receive similar sentences. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–3.2, comment at 74 (2d ed. tent. draft 1979).

Paragraph (3) provides that a criminal sentence may be imposed to promote respect for the law. This purpose is achieved when exces-

sively harsh or lenient sentences are avoided. American Friends Service Committee, *Struggle for Justice* (1971).

Paragraphs (4) and (5) relate to deterrence.[1] Paragraph (4) provides that a criminal sentence may be imposed to deter criminal conduct by those other than the defendant ("general" deterrence). Paragraph (5) provides that a criminal sentence may be imposed to protect the public from further crimes by the defendant ("specific" deterrence).

Paragraph (6) provides that a criminal sentence may be imposed to provide the defendant with needed education, vocational training, medical care, and other correctional treatment in the most effective manner. Rehabilitation of offenders has long been a controversial goal of the criminal justice system. The Committee believes that it is of important public interest to reintegrate offenders into the community. Therefore, rehabilitation is a permissible reason for imposing a sentence. However, a court should not give primary consideration to the defendant's prospects for rehabilitation when deciding whether to incarcerate the offender. *See* section 3703(a) (relating to considerations in sentencing to imprisonment) of the proposed code. Senate Rep. No. 96–553, at 942, 1240, n. 27, 1243–45 (1980); American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.2, comment at 18–19 (2d ed. tent. draft 1979).

Accurate predictions of an individual's prospects for rehabilitation are difficult to make. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. Pa. L. Rev. 297 (1974). Thus it is unfair and unproductive to use rehabilitation prospects as the sole basis for sending an offender to prison or for keeping the offender there longer than otherwise necessary. This approach to the role of rehabilitation is endorsed in the most recent studies on the topic. *See, e.g.*, A. von Hirsch, *Doing Justice: The Choice of Punishment* (1976); N. Morris, *The Future of Imprisonment* 17–18 (1974).

Paragraphs (7) and (8) reflect a concern for the victim of a crime and for the community as a whole, and they encourage an offender to take responsibility for his or her actions. Paragraph (7) provides that a criminal sentence may be imposed to provide restitution to a victim of an offense. Paragraph (8) provides that a criminal sentence may be imposed to reconcile the victim, the community, and the offender. Paragraphs (7) and (8) encourage the offender to accept responsibility for his or her actions. Underlying the concept of reconciliation in paragraph (8) is an awareness that the overwhelming majority of offenders remain in, or return to, the community and that reconciliation will serve the needs not only of the victim and the community, but also of the offender. An unduly harsh sentence may serve only to embitter the offender and thereby to engender future crimes. *See* testimony of Rev. Barry Lynn, on behalf of the National Council of Churches, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Congress, 1st sess. (1980). *See also* Law Reform Commission of Canada, *Studies on Sentencing* (1974); Law Reform Commission of Canada, *Dispositions and Sentences in the Criminal Justice Process*, 8–9 (1977) (emphasizing the need for reconciliation in the criminal justice process).

[1] The renewal of interest in deterrence occurs at both the theoretical and empirical levels. For especially interesting discussions, *see* R. Zimring & A. Hawkins, *Deterrence: The Legal Threat in Crime Control* (1973), and Andenaes, *General Prevention— Illusion or Reality?* 43 *J. Crim. L., Crim, & Police Sci.* 76 (1952). Attempts to assess the empirical tenability of the general deterrence notion can be found in Atones & Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis*, 63 *J. Crim. L., Crim., & Police Sci.* 530 (1973); Bailey, Martin, & Gray, *Crime and Deterrence: A Correlation Analysis*, 11 *J. Research in Crime & Deling.* 124 (1974); Bean & Cushing, *Criminal Homocide, Punishment and Deterrence: Methodological and Substantive Reconsiderations*, 52 *Social Sci. Q.* 277 (1971); Chiricos & Waldo, *Punishment and Crime: An examination of Some Empirical Evidence*, 18 *Social Prob.* 209 (1970); and Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 *J. Legal Studies* 259 (1972).

§ 3102—Factors to be considered in sentencing

This section, which is new to Federal law, sets forth four factors that a court must consider when imposing a sentence upon a criminal defendant. Paragraph (1) requires that the court consider the nature and circumstances of the offense and the history and characteristics of the defendant. *See United States* v. *Wardlaw*, 576 F.2d 932, 939 (1st Cir. 1978) (defendant entitled to be sentenced based on seriousness of the offense and other individual factors). Paragraph (2) requires the court to consider the purposes of sentencing set forth in section 3101 of the proposed code.

Paragraph (3) requires that the court consider the kinds of sentences available, including effective alternatives to imprisonment. The Committee believes that it is best, whenever possible, to use effective alternatives to imprisonment, *see* section 3103, *infra*, but it considered and rejected suggestions made by the American Bar Association and by corrections experts that the proposed code set forth a presumption in favor of nonprison sentences. *See, e.g.*, American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.2 (2d ed. tent. draft 1979). American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.4, comment at 42–44 (2d ed. tent. draft 1979); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, standards 5.2 and 5.3 (1974); Maine Rev. Stat. Ann. title 17–A, § 1201 West 1980 Pamplet; Ill. Ann Stat. ch. 38, section 1005–6–1 Smith-Hurd Supp. 1979; Ind. Code Ann. section 35–8–1A–7 (1979). Their approach is based on the theory that judges should use the least severe or least drastic sentence necessary to achieve the appropriate sentencing purpose.

To the extent that this theory would compel courts to use alternatives to prison, it would be an inappropriate limitation upon the discretion of the sentencing court. To the extent that it would simply encourage courts to use the least drastic sentence that is appropriate, it would be superfluous. In the Committee's view, any preference for particular kinds of sentences is better expressed in the context of the sentencing guidelines to be developed pursuant to chapter 43 of the proposed code.

Paragraph (4) requires the court to consider the applicable sentencing guidelines in effect on the date of sentencing. Sentencing guidelines explained in greater detail at 591–600 *infra*, are intended to bring regularity, but not rigid uniformity, to the sentencing process. The guidelines are not merely advisory, because courts are required to consider them. At the same time, they are not mandatory because courts are not required to follow them.

Requiring a court to use the sentence guidelines in effect on the date of sentencing might run afoul of the *ex post facto* clause of the Constitution. *See Warden* v. *Marrero*, 417 U.S. 653, 663 (1979) (retro-

active change in parole release guidelines poses serious *ex post facto* clause problems). While some courts have held that changes in parole release guidelines do not violate the *ex post facto* clause, *see, e.g.*, *Zeidman* v. *United States Parole Commission*, 593 F.2d 806 (7th Cir. 1979); *Ruip* v. *United States*, 555 F.2d 1331 (5th Cir. 1977), those courts assumed that the guidelines in question were not mandatory. The Committee, consequently, has structured the sentence guidelines so that the application of the guidelines is not mandatory. The Committee expects that in most instances any change in the guidelines will work to the benefit of the defendant by reducing the severity of the sentence. To the extent that any changes in the proposed rules would work to the defendant's detriment, the committee on sentencing and the Judicial Conference might consider precluding the retroactive application of the guidelines. This would avoid any constitutional problems.

§ *3103—Imposition of sentence*

This section, and the rest of this chapter, implement the directive of the United States Supreme Court that "it is now clear that the sentencing process . . . must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (Stevens, J., for a plurality of the Court).

This section, which (except for subsections (a) and (b)(1)) has no direct counterpart in current law, establishes the method for imposition of sentence. Subsection (a) carries forward Rule 32(a)(1) of the Federal Rules of Criminal Procedure and requires that a sentence be imposed without unreasonable delay.

The requirement that a sentence be imposed without "unreasonable delay" is derived in part from the sixth amendment's speedy trial guarantee. *Juarez-Cesares* v. *United States*, 496 F.2d 190, 192 (5th Cir. 1974); *Brady* v. *Superintendent*, 443 F.2d 1307, 1308–1310 (4th Cir. 1971).

Whether a delay is "unreasonable" will depend on a number of different factors. *See United States* v. *Williams*, 407 F.2d 940, 946 (4th Cir. 1969); *Treakle* v. *United States*, 327 F.2d 82, 83 (9th Cir. 1964). If the defendant requests a delay in the imposition of sentence, complaints from the defendant about delay would ordinarily not be sustained. *United States* v. *Reese*, 568 F.2d 1246, 1252–53 (6th Cir. 1977); *Whaley* v. *United States*, 394 F.2d 399, 401–02 (10th Cir. 1968); *Brooks* v. *United States*, 423 F.2d 1149 (8th Cir.), *cert. denied*, 400 U.S. 872 (1970); *Post* v. *United States*, 500 F.2d 582 (8th Cir. 1974). A justifiable delay would occur when a defendant and the attorney for the Government agree to seek a delay in sentencing in order to resolve unresolved factual disputes or to allow the defendant to cooperate with an ongoing criminal investigation. *See United States* v. *Roberts*, 100 S.Ct. 1358 (1980).

There are two specific exceptions to the rule requiring the imposition of sentence without unreasonable delay, in sections 2713(d) (relating to possessing drugs) and 4704(c) (relating to time of eligibility for release on parole) of the proposed code, that permit deferred sentencing proceedings under certain conditions.

Subsection (b)(1) also carries forward rule 32(a)(1) of the Federal Rules of Criminal Procedure and provides that the sentencing court must give the defendant's counsel an opportunity to speak on behalf of the defendant and must ask the defendant personally whether the defendant wants to make a statement or present information in mitigation of punishment. Subsection (b)(1) also provides that the attorney for the Government must have an equivalent opportunity to address the court. Subsection (b)(2) requires that the court, before imposing sentence, consider each type of sentence available. The court, when appropriate, must consider imposing a sentence involving a combination of penalties (e.g., a sentence imposing a fine and restitution), as well as a sentence involving only one kind of penalty (e.g., a sentence imposing conditional discharge). When imposing sentence, the court must state the reasons for the particular sentence decided upon.

Subsection (c) requires that the court, when imposing sentence, (1) make such findings as are necessary to resolve any material fact in controversy that may affect sentencing; (2) make such findings as are necessary to determine the applicable sentencing guideline; (3) specify the applicable sentencing guideline; and (4) state the specific reasons for imposition of a sentence different from that provided in the applicable sentencing guideline, if the sentence is not consistent with that guideline. The requirement that the court state the reasons for a sentence different from that provided in the applicable sentence guideline, together with the requirement of subsection (b)(1) and section 3105 (relating to presentence hearing) of the proposed code, is the foundation of the proposed code's procedures for appellate review of sentence. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–6.4 (2d ed. Tent. Draft 1979); Model Sentencing and Corrections Act section 3–206 (1979). This fact-finding process is essential to appellate review and the parole release function, both of which rely upon factual determinations by sentencing courts.

The reasons given by the court must be specific and meaningful. As researchers have already found, appellate review cannot be effectively implemented without a statement of reasons that distinguishes the individual case from those set forth in the sentencing guidelines. Diamond and Zeisel, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 4 Am. Bar Foundation Research J. 881, 928–934 (1977).

The Committee has already provided in section 3102(3) that the court shall consider "effective alternatives to imprisonment." Section 3103 of the proposed code requires the court to consider a list of sentencing options and to state the reason for the sentence imposed. While this approach does not require the use of non-prison sanctions, it does assure the full and complete evaluation of such options by the sentencing court in criminal cases. *See* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.3(a) (2d ed. tent. draft 1979).

Subsection (d) requires the court to impose a sentence consistent with the sentence guidelines prescribed by chapter 43 of the proposed code, unless the court find that an aggravating or mitigating circumstance should result in another sentence. The subsection uses the term "consistent with" the applicable sentence guideline because the actual form and content of the sentence guidelines is to be determined by the process for developing guidelines, which is set forth in

chapter 43 of the proposed code. It seems likely that a sentencing guideline will call for a range of punishment—i.e., in the case of a sentence of imprisonment, a guideline will call for a term of imprisonment of between X and Y months. (This is the approach taken by the United States Parole Commission with its parole guidelines. *See* 28 C.F.R. sections 2.20, 2.21 (1979). A sentence "consistent with" such a guideline would require service of a term of imprisonment of between X and Y months. Likewise with a sentence of a fine; if the applicable guideline calls for a fine of between X and Y dollars, then a sentence "consistent with" that guideline would impose payment of a fine in an amount between X and Y dollars.

The Committee does not intend to limit a sentencing court's discretion to determine that an aggravating or mitigating circumstance in a case justifies a sentence that is not consistent with the applicable sentence guideline. However, the sentencing court must explain clearly any deviation from the applicable guideline. If the court justifies such a deviation by referring to a factor which has already been taken into account in the formulation of the guideline, then the court must explain in detail why the guideline has inadequately dealt with that factor. *See* section 4302 *infra.*

§ 3104—Presentence report

This section in part carries forward provisions of Rule 32 of the Federal Rules of Criminal Procedure and in part incorporates certain improvements in presentence procedures suggested by the American Bar Association. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–5.4 (2d ed. tent. draft 1979). The Committee also benefitted immeasurably from excellent research done under the auspices of the Federal Judicial Center concerning current presentence report practices. Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1613 (1980).

Subsection (a)(1), which carries forward Rule 32(c)(1) of the Federal Rules of Criminal Procedure, requires the probation service of the court to make a presentence investigation and submit a presentence report to the court before the imposition of sentence, unless (1) the defendant (with the permission of the court) waives such investigation and report, and (2) the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion. The court must explain the latter finding on the record. Nearly 20 States require that presentence investigation reports be prepared. American Bar Association, *Sentencing Alternatives and Procedures*, comment at 113 nn. 18–19, (2d ed. tent. draft 1979). A waiver of the presentence investigation and presentence report is permitted, and the Committee expects such a waiver to occur most frequently in those cases that involve less serious offenses, in particular infractions and class C and B misdemeanors. This section also envisions the use of short form presentence reports for less serious cases. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–5.1, comment at 116 (2d ed. tent. drafted 1979).

Subsection (a)(2) requires that the presentence report contain (1) a record of previous criminal convictions; (2) the applicable sentence guideline developed under chapter 43 of the proposed code; and (3) any other information that may aid the court, including such matters as the nature and extent of nonprison programs and resources available and the applicability of such programs and resources to the defendant. *See* Administrative Office of the United States Courts, *The Presentence Report* (1978) (publication no. 105). The presentence report should indicate in a summary fashion the sources (other than confidential) for the information in the presentence report. The current practice of the Probation Service is to seek verification of the information contained in the presentence report. 10 Administrative Office of the United States Courts, Division of Probation, *Guide to Judiciary Policies and Procedures*, Probation Manual. ch. 2, section 2003 (1978); American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–5.1(c) (2d ed. tent. draft 1979); *United States* v. *Weston*, 448 F.2d 626 (9th Cir. 1970). The presentence report *must* contain the defendant's history of prior convictions and *may* contain the defendant's history of prior arrests. *See United States* v. *Strother*, 578 F.2d 397, 405, n. 8 (D.C. Cir. 1978). This approach follows the recommendation of the American Bar Association that arrest records should not normally be relied on at sentencing. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–5.1 and commentary at 117 (2d ed. tent. draft 1979). Since prior arrests are of limited usefulness and are potentially misleading, if such data is requested, the probation officer should report the facts about the arrest (including the disposition of the charges) in order to be able to assist the court in weighing the probative value of an arrest that does not lead to a conviction against the potentially adverse impact of such an arrest on the presumption of innocence. *See Commonwealth* v. *Shoemaker*, 226 Pa. Super. 203, 313 A.2d 342 (1973), *aff'd*, 462 Pa. 342, 341 A.2d 111 (1975) (1973) (use of arrest record improper); Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 Mich. L. Rev. 1361, 1377–1384 (1975) (discusses the legal and policy problems with relying on arrest records in sentencing).

Subsection (a)(2)(B) requires the presentence report to contain the applicable sentence guideline. In order to be able to comply with this requirement, the probation officer must assess the nature and circumstances of the offense and the history and characteristics of the defendant. In making that assessment, the probation officer should speak to defendant's counsel, to the defendant, or to both. This will reduce the possibility of a factual dispute that would require a sentencing hearing pursuant to section 3105 of the proposed code to resolve. A guilty plea involving the defendant agreeing to certain facts would, of course, be conclusive between the parties as to the agreed-upon facts.

Subsection (a)(2)(C) permits the presentence report to include any information that may aid the court in sentencing and sets forth 4 types of information encompassed by this provision. Subsection (a)(2)(C)(i) provides that a presentence report may contain a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior. This type of information will probably be included in the report in most instances because such informa-

tion is relevant to determining the applicable sentence guideline. Subsection (a) (2) (C) (ii) provides that a presentence report may contain a statement concerning the nature and extent of nonprison programs and resources available and the applicability of such programs and resources to the defendant. This sort of information will aid the sentencing court in considering effective alternatives to imprisonment, which is called for by section 3102(3) of the proposed code. A mere list of alternatives would not be sufficient to "aid the court in sentencing"; there should be enough information to enable the sentencing court to determine whether the use of a nonprison program would be appropriate. A listing of alternatives accompanied by standardized reasons why such alternatives are inappropriate, would likewise not be sufficient. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–5.1(d) (ii) (H) (2d. ed. tent. draft 1979).

Subsection (a) (2) (C) (iii) provides that a presentence report may contain a statement of the harm done to, or the loss suffered by, a victim of the offense. This information is necessary in order to assist a sentencing court in determining whether restitution is appropriate punishment. Subsection (a) (2) (C) (iv) provides that a presentence report may contain, in the case of an offense for which a monetary sanction may be imposed, a statement of the financial resources of the defendant, the financial needs of the defendant and the defendant's dependents, the restitution needs of the victim, and any gain derived from or loss caused by, the criminal conduct of the defendant. This sort of information is helpful to a sentencing court in determining whether to impose a sentence of a fine or a sentence of restitution.

Subsection (a) (3) prohibits the disclosure of the presentence report to the court or to any person unless the defendant has pleaded guilty or nolo contendere or has been found guilty. However, if the defendant consents, the court may inspect a presentence report at any time. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–5.2 (2d ed. tent. draft 1979); *Gregg* v. *United States*, 394 U.S. 489, (1969) (preconviction disclosure may prejudice the judge and constitute reversible error).

Subsection (b) (1) (A) provides that, except as provided in subsection (b) (1) (B), a copy of the presentence report (exclusive of a sentence recommendation) shall be furnished to the defendant and the defendant's counsel at least 5 days before imposition of sentence. The defendant and defendant's counsel are entitled to an opportunity to comment on the report. The disclosure and the opportunity to comment may be waived by the parties. The Committee has made several significant changes in the current method and timing of the disclosure of the presentence report.

The Committee concluded that present disclosure practice did not provide defendants with an adequate opportunity to review the presentence report. Thus, the proposed code requires the disclosure to take place at least 5 days before sentence is imposed. In addition, the disclosure must be made to both the defendant and the defense counsel. This will enhance the appearance of fairness and will facilitate the resolution of factual claims about which only the defendant has knowledge. No request for disclosure is necessary. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–5.5 (2d ed. tent. draft 1979).

Subsection (b) (1) (B) permits the court to state, orally or in writing, a summary of certain information to be relied upon in determining sentence in lieu of disclosing the portion of a presentence report that contains that information. The statement may be made to the parties *in camera*, and the defendant and the defense counsel are entitled to an opportunity to comment upon such information. The information involved is (1) diagnostic opinion, the disclosure of which might seriously disrupt a program of rehabilitation; (2) sources of information that was obtained upon a promise of confidentiality; and (3) any other information, the disclosure of which might result in physical or other harm to the defendant or another person. This provision is derived in part from Rule 32(c) (3) of the Federal Rules of Criminal Procedure and the policy of encouraging disclosure.

In deciding whether certain portions of the presentence report should be withheld, the court should carefully assess the degree of the harm or the degree of the risk posed by disclosure. *See* Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts* 93 Harv. L. Rev. 1613, 1694–95 (1980). If the court decides not to disclose certain portions of the report, the summary of those portions must be specific and factual. *Woody* v. *United States*, 567 F.2d 1353 (5th Cir.), *cert. denied*, 436 U.S. 908 (1978). The court in *Woody* held that in deciding how specific the summary should be, the court must balance the claim of confidentiality against the intent behind the rule to afford the defendant a fair opportunity to correct or rebut erroneous information in the undisclosed portion of the presentence report. The Committee believes that the approach in *Woody* is the proper approach. *See* Fennell & Hall. *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1613, 1694–95 (1980), and cases cited therein. The Committee also believes that, whenever possible, measures less drastic than nondisclosure should be used. *See, e.g., United States* v. *Long*, 411 F. Supp. 1203 (E.D. Mich. 1976).

Subsection (b) (2) requires that any information disclosed to the defendant or the defense counsel also be disclosed to the attorney for the Government. This carries forward Rule 32(c) (3) (C) of the Federal Rules of Criminal Procedure.

The fact finding process envisioned by this chapter will require the cooperation of both the prosecution and the defendant (through defense counsel except where the defendant is acting *in propria persona*.). The gathering of information for the presentence report is, of course, the responsibility of the probation officer. The probation officer must rely on the prosecution for most official information concerning the defendant's prior criminal history and probably will obtain from the prosecution a proposed version of the facts underlying the conviction. However, the probation officer must remain neutral with respect to any factual disputes between the parties.

The prosecution has an affirmative obligation to provide the sentencing court with accurate factual information which would be relevant to sentencing. *See* United States Department of Justice, *Principles of Federal Prosecution*, Part G at 46–56 (1980); American Bar Association, *Prosecution Function* standard 3–62 (2d ed. tent. draft 1979);

National Association of District Attorneys, *National Prosecution Standards* standard 18.1E (1977). Any memoranda or other statements about sentencing made to the court should be disclosed to the defendant and defense counsel pursuant to section 3105(b) of the proposed code (relating to presentence hearing). This requirement is derived from current law. *See United States* v. *Robin*, 545 F.2d 775 (2d Cir. 1976); *United States* v. *Perri*, 513 F.2d 572, 575 (9th Cir. 1975); *United States* v. *Huff*, 512 F.2d 66, 71 (5th Cir. 1975); *United States* v. *Rosner*, 485 F.2d 1213, 1229–31 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Solomon*, 422 F.2d 1110, 1119–1121 (7th Cir. 1970), *cert. denied*, 300 U.S. 911. *See also United States* v. *Miller*, 495 F.2d 362, 366 (7th Cir. 1974) ("the need for disclosure of prosecutor's report is greater than the need for a probation officer's report"). The obligation of furnishing information to the court is especially important because decisions which materially affect sentencing and parole release should be resolved at sentencing. Thus, the responsibility to exercise due diligence in bringing complete information to the attention of the court must be an important concern of the government attorneys. Defense attorneys have a similar obligation. *United States* v. *Pickney*, 551 F.2d 1241, 1248, 1249 n. 51 (D.C. Cir. 1976).

Subsection (b)(3) requires that any copy of a presentence report or written statement that is made available to the defendant or the defense counsel under subsection (b) must be returned to the probation service of the court immediately after imposition of sentence, unless the court directs otherwise. This carries forward Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure.

Subsection (b)(4) directs the court to require that any erroneous information in a presentence report be corrected.

Subsection (b)(5) provides that reports of studies, and any recommendations in such studies, made by the Director of the Bureau of Prisons under section 4704(c) (relating to time of eligibility for release on parole) or 6106 (c) (relating to dispositional hearing) of the proposed code will be treated as a presentence report within the meaning of section 3104. This carries forward Rule 32(c)(3)(E) of the Federal Rules of Criminal Procedure.

§ *3105—Presentence hearing*

This section is derived primarily from the recommendations of the American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, and other recent studies on presentence matters. Since approximately 90 percent of all Federal convictions result from pleas of guilty, the most significant event in the Federal criminal justice process, for both the victim and the offender, usually is sentencing.

The sentencing system established by the proposed code, in order to function properly, requires that the sentencing judge have available information which is as accurate and objective as possible. Since the sentencing guidelines required by chapter 43 of the proposed code will be based primarily on objective factors, such as the offender's prior criminal record and the nature of the harm done, the appropriate sentence in a specific case will depend upon a factual determination about whether (or which of) certain factors exist. Thus, it is crucial that the sentencing judge be able to base decisions about the defendant's background and the nature of the harm caused by the criminal act upon adequate and accurate information.

In the overwhelming majority of cases, there will undoubtedly be no dispute about the existence of the factors that bear upon the sentencing decision. Those factors may have been established by the evidence at trial, by a plea agreement, or by an informal postconviction agreement. Although the Committee anticipates that factual issues not resolved at trial or by plea agreement ordinarily will be settled by informal postconviction conferences, *see* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–5.5 (2d ed. tent. draft 1979); "Second Circuit Approves Proposed Sentencing Rule," New York L.J. March 18, 1976, at 1, col. 3, and at 4, col. 1; Model Sentencing and Corrections Act section 3–206 (1979), the Committee recognizes that occasionally the facts affecting sentencing will be in dispute. This section establishes a procedure for quick resolution of such disputes.

Subsection (a)(1) requires the sentencing judge, at least 5 days after disclosure of the presentence report to the defendant, to conduct a hearing to determine any unresolved issue of fact that is essential to the sentencing decision. The judge is also permitted to conduct such a hearing if the hearing will in any way assist in the sentencing decision. The section leaves it to the judge's discretion to decide whether to hold the hearing in open court and whether to allow witnesses to be subpoenaed. Subsection (a)(2) requires the sentencing judge to make specific findings on any issue of fact that is essential to the sentencing decision.

Subsection (b) provides that (1) a party raising an issue of fact not based on information in the presentence report must give notice to the other parties in such form and manner as the court shall direct; and (2) the parties may subpoena, call and cross-examine witnesses, if the court so permits. The Committee reluctantly rejected a blanket rule which would have guaranteed the parties the right to subpoena witnesses and documents. The Department of Justice persuasively argued that there were situations where it would be inappropriate to require Government informants as witnesses. *See Fatico* v. *United States*, 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd*, 579 F.2d 707 (2d Cir. 1978) *on remand*, 458 F. Supp. 388 (E.D. N.Y.), *aff'd on other grounds*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1018 (1980). Nothing in this section requires the disclosure of the identity of a government agent or informant by a third party, when good cause for non-disclosure has been established. The Committee intends that, in deciding whether to issue a subpoena, the sentencing judge will balance the defendant's need for an effective opportunity to confront adverse information, or to solicit favorful information, against the claims of the potential recipient of the subpoena.

Subsection (c)(1) requires the party alleging a fact to prove that fact by a preponderance of the evidence. This standard is derived from current case law. *United States* v. *Weston*, 448 F.2d 626, 634 (9th Cir. 1971); *United States* v. *Woody*, 567 F.2d 1353, 1358, n. 7 (5th Cir.) *cert. denied*, 436 U.S. 908 (1978). The use of a preponderance of the evidence standard has been held constitutional. *United States* v. *Inendino*, 463. F. Supp. 252 (N.D. Ill. 1978) (interpreting 18 U.S.C. 3575).

The Committee recognized that factual determinations at sentencing can have adverse consequences, such as with respect to parole release and prison classification. The fact-finding process required by this section will reduce the necessity for the Parole Commission to make factual determinations regarding the nature of the offense and offender, in order to apply the parole release guidelines. The resolution of factual disputes will also facilitate the use of the sentencing guidelines, since application of the guidelines depends on the nature of the offense and the background of the offender, matters which may well be determined at any sentencing hearing.

Subsection (c)(2)(A) provides that no fact proved at trial or established by a plea of guilty or nolo contendere may be disputed by any party at a sentencing hearing. The sentencing judge, of course, is free to use or reject any such facts. If the judge rejects facts that would have been beneficial to the defendant, then the judge should consider permitting the defendant to withdraw the plea of guilty or nolo contendere. *See generally* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–6.5(b)(iii) (2d ed. tent. draft 1979).

Subsection (c)(2)(B) provides that if the Government intends to rely upon any prior convictions sustained by the defendant, it must prove, beyond a reasonable doubt, that such convictions occurred. A certified or otherwise authenticated copy of any such convictions should be sufficient. The Committee also intends by this subsection to carry forward current case law, including *Baldasar* v. *Illinois*, 100 S. Ct. 1585 (1980); *Tucker* v. *United States*, 404 U.S. 443 (1973); *Farrow* v. *United States*, 580 F.2d 1339 (9th Cir. 1978); *Strader* v. *Troy*, 571 F.2d 1263 (4th Cir. 1978), which provide that the Government has no duty to establish the validity of any conviction unless the defendant first introduces some credible evidence that a previous conviction was unconstitutionally obtained. The Committee uses the term "credible evidence" to mean some information, whether or not legally admissible. *See* p. 497 *infra*. A defendant can meet this burden by introducing a copy of the judgment of conviction showing that the defendant was not represented by counsel when the conviction was sustained, and an affidavit that representation by counsel was not waived and that the defendant was indigent at the time of the conviction. *See Burgett* v *Texas*, 389 U.S. 109 (1967) (if record is silent on the presence of counsel, absence of counsel is presumed); *Carnley* v. *Cochran*, 360 U.S. 506 (1962) (waiver of counsel will not be presumed from a silent record).

When a defendant challenges the constitutional validity of a prior conviction, the Government need not reestablish the defendant's guilt. Rather, the Government must only rebut the legal merits of the challenge. The defendant will therefore not be permitted to challenge factual determinations made at the prior proceeding. This subsection simply permits the defendant to avoid the adverse consequences flowing from a prior conviction, when that conviction is constitutionally invalid.

Subsection (c)(2)(C) provides that any factual statement in the presentence report (other than a statement of the defendant's previous convictions) is presumed to be true, but if the defendant offers credible

evidence to controvert such a statement, then the Government must prove the statement by a preponderance of the evidence. Courts may often find that this requirement is met by a defendant's denial, under oath, of the alleged fact. Otherwise a defendant may be unable to shift the burden of persuasion and thereby be required to disprove a negative.[1] This provision is based on the recommendations of the American Bar Association. *See* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–6.4 (2d ed. tent. draft 1979) and (Model Sentencing and Corrections Act 3–207 (1979). As noted above, the term "credible evidence" means some information, whether or not legally admissible. See American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–6.4(c), comment at 156–158 (2d ed. tent. draft 1979); *United States* v. *Harris*, 558 F.2d 366, 376 (7th Cir. 1977). *See, e.g., Kadis* v. *United States*, 373 F.2d 370, 374–75 (1st Cir. 1967) (level of evidence necessity to raise entrapment defense). *See generally Note, A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 Geo. L.J. 1515 (1978) (arguing that the Government should be required to meet a high standard of persuasion). The Committee places the burden of proof with the Government because the Committee recognizes the difficulties in requiring the defendant to prove a negative. In addition, the Government is the party with easiest access to the information. While the evidentiary standard is a preponderance of the evidence, the Committee does not intend to preclude a court from applying a higher standard where the court deems such standard appropriate for constitutional reasons. The Model Sentencing and Corrections Act, for example, requires that certain facts be established beyond a reasonable doubt. Model Sentencing and Corrections Act section 3–207(e)(2) (1979); *see also Addington* v. *Texas*, 441 U.S. 418 (1979) clear and convincing evidence required for a civil commitment. The use of evidentiary standards such as "clear and convincing evidence" or proof beyond a reasonable doubt may be appropriate, depending on the nature of the adverse consequences of the factual determination. *See United States* v. *Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974) (proof beyond a reasonable doubt required before the court can consider a perjury allegation stemming from a previous criminal trial). *See generally United States* v. *Fatico*, cited at 445 *supra*. The Committee expects and encourages the courts to continue to be sensitive to the defendant's due process rights at sentencing.

Subsection (c)(2)(D) provides that the sentencing judge may consider any information about the defendant's history, characteristics, and conduct that is relevant to the sentencing decision, unless consideration of that information is otherwise prohibited by law. This provision is derived from 18 U.S.C. 3577, which provides that a wide range of relevant information should be available at sentencing. *See generally* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–6.4 (2d ed. tent. draft 1979). The Federal

[1] In the event that a defendant decided to take the stand to controvert a fact alleged in the presentence report consideration should be given to granting the defendant use immunity. *See generally Lefkowitz* v. *Turley*, 414 U.S. 70, 79 (1973); *Roberts* v. *United States*, 600 F.2d 815, 818, n. 13 (D.C. Cir. 1979) (*en banc*) (*per curiam*), *rev'd on other grounds*, 100 S. Ct. 1358 (1980). Without immunity, defendants may be placed on the horns of dilemma; to take the stand and thereby risk exposure for unrelated criminal conduct, or to not take the stand and thereby permit the use of inaccurate and rebuttable information.

Rules of Evidence do not apply to the sentencing stage of a criminal case (*see* Fed. R. Evid. 1101(d)(3)); the Committee by this subsection reaffirms that result.

Subsection (c)(2)(E), requires the sentencing judge to make any finding of fact that negates a factual statement in the presentence report a part of that report. This should eliminate the possibility that adverse consequences in prison classification or parole release eligibility will result from such inaccurate information. *See Rosati* v. *Horan*, 459 F. Supp. 1148, 1152 (E.D.N.Y. 1977). The Committee intends that the Administrative Office of the United States Courts implement this statutory directive through guidelines or other appropriate procedures.

§ 3106—Classification of offenses outside this title

Subsection (a)(1) provides that an offense outside of title 18 that is not classified shall be treated for "all purposes" as:

(1) an infraction, if the maximum imprisonment authorized is 5 days or less or if no imprisonment is authorized;

(2) a class C misdemeanor, if the maximum imprisonment authorized is between 5 and 30 days;

(3) a class B misdemeanor, if the maximum imprisonment authorized is between 30 days and 6 months;

(4) a class A misdemeanor if the maximum imprisonment authorized is between 6 months and one year; and

(5) a class E felony, if the maximum imprisonment authorized is more than one year.

Subsection (a)(2) provides that where the maximum penalty is life imprisonment or a more severe penalty, the unclassified offense shall be treated as a class A felony. The Committee intends the phase "all purposes" to mean that a person convicted of an offense outside title 18 is eligible to receive a sentence of conditional discharge, probation, restitution, fine or imprisonment, if such sentence is otherwise permissible for the particular classification.

Subsection (b) provides that, with respect to unclassified offenses outside of title 18, the maximum penalty that may be imposed is that which is set forth in the unclassified, nontitle 18 offenses. The effect of this section is to retain the fine and imprisonment levels for offenses outside of title 18. The Committee has attempted to include the bulk of Federal felonies found outside of title 18, either by rewriting the provisions and including them in the proposed code, or including them by use of the cross reference technique.

The Committee considered and rejected a suggestion made by the Department of Justice that the maximum permissible fines be increased for offenses outside of title 18. Testimony of Philip Heymann, Assistant Attorney General, Criminal Division, Department of Justice, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 1st sess. (1980). Such changes should be made by the committees of Congress with legislative jurisdiction over non-title 18 offenses. While many of those offenses provide for inadequate fines, an across-the-board increase would not be appropriate. Rather, changes should be made on an offense-by-offense basis. The Committee made such an assessment for offenses in title 18. However, the Committee

did not review on an offense-by-offense basis the fine levels for the hundreds of regulatory offenses located outside of title 18. It hopes that the appropriate committees of the Congress will undertake such a review and decide whether some offenses should be repealed as obsolete, the sanctions attached to other offenses should be modified to make them consistent with the approach taken in the proposed code, and whether some conduct should be decriminalized.

The Senate, which increased the fine levels for offenses found outside of title 18, admitted in its report that "there appear to be too many regulatory offenses, and little rationality in the sentences imposed for those offenses . . . ." Senate Rep. No. 96–553, at 955 (1980).

Chapter 33—Conditional Discharge, Probation, and Restitution

Subchapter I—Conditional Discharge

Introduction

This subchapter creates a new criminal sanction of a "conditional discharge". While the practical effect of this sentence can be achieved under current law, the formulation used by the Committee is conceptually clearer and more consistent with the use of other criminal sanctions. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.3(b)(v), comment at 23 (2d ed. tent. draft 1979). A conditionally discharged sentence is similar to probation in that it is reserved for situations where incarceration is not contemplated. It is applicable only to individual criminal defendants who do not require the supervision of a probation officer and to organizational defendants for which rehabilitative services would be inappropriate. Under current Federal law organizations have received suspended sentences coupled with the imposition of conditions. *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972) (court assumes propriety of a suspended sentence, but finds improper an "unreasonable condition"); *United States* v. *Ehrlich Co. Inc.*, 372 F. Supp. 768 (D. Md. 1974) (construing 18 U.S.C. 3651); *see also United States* v. *Clovis Liquor Dealers Trade Associations*, 540 F.2d 1389 (10th Cir. 1976) (assuming such a sentence is authorized, but striking down a particular condition imposed on the defendant). This subchapter carries forward this result.

§ 3301—Applicability of conditional discharge

Section 3301 permits the imposition of a sentence of conditional discharge unless the offense involved is a class A felony and the defendant is an individual or unless the defendant is sentenced at the same time to probation or imprisonment for the same or a different offense.

§ 3302—Term of sentence of conditional discharge

Section 3302 provides that a term of conditional discharge runs for not more than (1) 60 months, if the offense is a felony, (2) 24 months, if the offense is a misdemeanor, and (3) 12 months, if the offense is an infraction.

§ 3303—Considerations in sentencing to conditional discharge

Section 3303 directs the sentencing judge, in deciding whether to impose a sentence of conditional discharge, to consider the factors

set forth in section 3102 of the proposed code and to give primary consideration to the purposes of sentencing set forth in section 3101 (a)(3), (4), (6), (7), and (8) of the proposed code.

§ *3304—Conditions of conditional discharge*

Subsection (a)(1) mandates the sentencing judge to require, as a condition of a conditionally discharged sentence, that the defendant not commit another offense during the term of the sentence. Subsection (a)(2) permits the court to impose any additional conditions that are reasonably related to the factors set forth in section 3102 of the proposed code and that involve no greater deprivation of liberty than is reasonably necessary.

Subsection (b)(1) specifies some conditions that a sentencing judge may impose pursuant to subsection (a)(2)—make restitution to a victim of the offense; meet family responsibilities; and pay a fine. Subsection (b)(2) provides that a term of confinement may not be imposed as a condition of a conditionally discharged sentence.

By creating a separate sentence of conditional discharge, the Committee intends to preclude the use of a term of imprisonment as a condition. If the court wishes to impose a term of imprisonment as a condition of the sentence, it may do so by sentencing the defendant to probation.

§ *3305—Monitoring compliance with conditions*

Subsection (a) permits the court to make whatever orders it deems necessary in order to monitor the defendant's compliance with the conditions of the sentence. Subsection (b) authorizes the probation service of the court to perform whatever duties are reasonably necessary to monitor compliance with the conditions of a conditionally discharged sentence. Ordinarily an individual defendant will only require monitoring regarding compliance with restitution or other, similarly straightforward, conditions. Probation officers should be able to dispatch with this task without extended or complicated supervision. One way to achieve enforcement of these conditions would be to impose a fine and delay the first payment for a period of time. In the event that the defendant complied with these conditions, the fine could later be reduced or eliminated. Of course, revocation of conditional discharge is another, less subtle, method of securing enforcement.

An organizational defendant serving a conditionally discharged sentence presents a slightly more complex problem. Organizations convicted of crimes differ both in size and organizational structure, making it difficult to fashion an appropriate punishment to fit a given offense. Coffee, *Beyond the Shut Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and Effective Legal Response*, 63 Virg. L. Rev. 1099 (1977). The only available sanctions against an organization are requiring the payment of a fine, or of restitution, or compliance with a reasonable condition. Because organizations are artificial "persons," they cannot be said to act with the same kind of mental state as individuals; they only act through their agents. Often, organizational liability is based on conduct that was not the result of a conscious or explicit decision of the organization's governing body or managers. Current Federal law, however, creates criminal liability for the organization on the basis of a "vicarious liability" standard imported from civil law. *See* Hauptly & Rider, *The Proposed Federal Criminal Code and White Collar Crime*, 47 Geo. Wash. L. Rev. 527 (1979). Thus, the degree of organizational complicity can vary considerably from offense to offense. The proposed code permits the sentencing court to consider the culpability level of the organization in determining the appropriate conditions to impose.

The Committee intends that the development of appropriate standards for the imposition of conditions on organizational defendants should be accomplished through judicial innovation and through appellate review. The purpose of such conditions should be to protect the public and to promote respect for the law. As the American Bar Association has said:

> Although the courts lack the competence or capacity to manage organizations, the preventive goals of the criminal law can in special cases justify a limited period of judicial monitoring of the activities of convicted organizations.

American Bar Association, *Sentencing Alternatives and Procedures* standard 18–2.8 (2d ed. tent. draft 1979).

In addition, the ABA suggests that the imposition of conditions on organizational defendants should be limited to situations where the criminal behavior was serious, repetitive, and either facilitated by inadequate internal accounting or monitoring controls or where a clear and present danger to public health and safety exists. While these limitations may be wise considerations, they are not necessarily the only factors which come into play. Further judicial innovation and appellate review should help in developing the appropriate standards for the imposition of conditions on organizational defendants. Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 Am. Crim. L. Rev. 419 (1980); Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Crime*, 89 Yale L.J. 353 (1979).

SUBCHAPTER II—PROBATION

This subchapter replaces the provisions of existing law which authorize the suspension of sentence. Under current Federal law there is no "sentence" of probation. Current law (18 U.S.C. 3651) merely authorizes a court to suspend the imposition of execution of a sentence and to impose certain conditions of probation. By setting forth the parameters of probation, this subchapter creates a more coherent logical and honest sentencing scheme. M. Levin, *Urban Politics and the Criminal Courts* 161–173 (1977) (summarizing social science research findings that similarly situated offenders placed on probation have lower recidivism rates than those sent to prison).

§ *3321—Applicability of probation*

Current Federal law (18 U.S.C. 3651) provides that a court may suspend the sentence of a person convicted of a Federal crime, unless the maximum penalty for the crime is death or life imprisonment. *See United States* v. *Dennison*, 588 F.2d 1112 (5th Cir 1979), *rev'd on other grounds*, 603 F.2d 1143 (1979) (mandamus to correct an improper sentence issued).

The proposed code's sentencing classification system makes current law's capital offenses into class A felonies. Therefore, this section carries forward current law when it prohibits a court from imposing a sentence of probation on a person convicted of a class A felony.

This section also provides that a person sentenced to probation shall not be sentenced simultaneously to prison or to a conditionally discharged sentence. The Committee concluded that it would be illogical to sentence a person to a supervised sentence of probation but at the same time to an unsupervised sentence such as conditional discharge. Similarly, it does not make sense for a court to impose a sentence involving community supervision if at the same time it also sentences the defendant to a period of incarceration.

§ *3322—Term of sentence of probation*

This section carries forward current law in limiting the maximum probationary term upon conviction of a felony to 5 years. Consistent with the recommendations of the Brown Commission, it imposes a 2-year limit upon conviction of a misdemeanor and one year for infractions. *See Final Report*, section 3102(1) (1971). *See also* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.3 (b) (ii) (2d ed. tent. draft 1979).

§ *3323—Considerations in sentencing to probation*

This section sets forth two criteria to be considered by a court in determining whether to impose a sentence of probation. It also sets forth the criteria for impositions of conditions of probation, if a defendant is sentenced to a period of probation.

In deciding whether to impose a probationary sentence, the court shall consider the factors set forth in section 3102 of the proposed code. These factors are (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of sentences available, including effective alternatives to imprisonment; and (3) the applicable sentencing guidelines.

The sentencing court must also give "primary consideration" to the relevant purposes of sentencing, as set forth in subsections (1), (2), (3), (5), (6), (7), and (8) of section 3101 of the proposed code.

Use of the term "primary consideration" means that such purposes are to be given substantially greater weight than any other purposes. Thus, "deterrence," a sentencing consideration set forth in section 3101 (4) of the proposed code, shall not be given primary importance when the court is deciding whether or not to impose probation.

§ *3324—Conditions of probation*

This section sets forth the mandatory and permissive conditions of probation. The listing of permissive conditions is not exclusive, nor does the committee anticipate that all, or even most, of the conditions will be imposed routinely on probationers. The two mandatory conditions are (1) compliance with Federal, State and local criminal laws, and (2) the payment of restitution, if not otherwise impractical. Under current Federal law, courts presume that the probationer knows that he or she may not violate any laws, although notice of such a condition is required. *United States* v. *Dane*, 570 F.2d 840, 843–44 (9th Cir. 1977); *Bernal-Zazueta* v. *United States*, 225 F.2d 60 (9th Cir. 1955). Use of the phrase "impractical" is intended to permit the court to consider the defendant's ability to make restitution. By requiring restitution as an automatic condition of probation, the Committee expresses its concern for the victims of crime. See discussion of section 3332(b) *infra*, for a further explanation of restitution and the concept of "impracticability."

Subsection (a) (2) limits the use of probationary conditions to those reasonably related to the purposes of sentencing and involving no greater deprivation of liberty than necessary to achieve those purposes. This "reasonable relationship" test is derived, in part, from current Federal case law. *See United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 264 (9th Cir. 1975); *United States* v. *Polk*, 556 F.2d 803 (6th Cir.), *cert. denied*, 434 U.S. 862 (1977); American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.3(e) (2d ed. tent. draft 1979).

The permissive conditions listed in subsection (b) of section 3324 are derived from the practice under current law (18 U.S.C. 3651), which permits the court to impose any condition it "deems best." They are also derived from the recommendations of the Model Penal Code (*see* section 301.1 (Proposed Official Draft 1962)), the Brown Commission Laws (*see Final Report* section 3103 (1971)), the National Advisory Commission on Criminal Justice Standards and Goals (*see Corrections* standard 16.11 (1974)), and National Conference of Commissioners on Uniform State Laws (*see* Model Sentencing and Corrections Act section 3–302 (1979)). *See also* Note, *Judicial Review of Probation Conditions*, 67 Colum. L. Rev. 181 (1967).

The Committee intends that the nature of the offense and the offender determine the propriety of imposing any particular condition. *See* discussion of section 3102, infra.

Subsection (b) (1) authorizes the court to order an offender to meet family responsibilities, such as support of dependents. A similar condition has been upheld under current law. *United States* v. *Wilson*, 469 F.2d 368 (2d Cir. 1972). The Committee intends that the meeting of family obligations take priority over payment of a criminal fine, if the defendant is financially unable to do both.

Subsection (b) (2) authorizes the court to impose a fine as a condition of probation consistent with the procedures set forth in Chapter 35 (relating to fines) of the proposed code. A similar condition has been upheld under current law. *Driver* v. *United States*, 232 F.2d 418 (4th Cir. 1956); *Stone* v. *United States*, 153 F.2d 331 (9th Cir. 1946).

Subsection (b) (3) permits the court to require that the offender conscientiously pursue employment or training, as recommended by the National Commission on the Reform of Federal Criminal Laws (*see Final Report* section 3103(2) (a)).

Subsection (b) (4) permits the court to limit the association of offenders with others. A similar condition has been upheld under current law. *United States* v. *Albanese*, 554 F.2d 543 (2d Cir. 1977); *Birzon* v. *King*, 469 F.2d 1241 (2d Cir. 1972). The phrase "associating unnecessarily" is meant to carry forward the interpretation given a similar phrase by the Supreme Court in *Arciniega* v. *Freeman*, 404 U.S. 4 (1971). Thus, such a condition does not preclude "incidental

contacts between ex-offenders in the course of work on a legitimate job for a common employer"). *See* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.3(vii) (2d tent. draft 1979).

Subsection (b)(5) authorizes the court to limit the offender's use of alcohol or illegal drugs if such condition is reasonably related to the purposes of sentencing. This condition is based on a recommendation by the National Commission on the Reform of Federal Criminal Laws (*see Final Report* section 3103(2)(h)). *United States* v. *Miller*, 549 F.2d 105 (9th Cir. 1977) (defendant convicted of drunk driving, required to abstain from alcohol).

Subsection (b)(6) authorizes the court to prohibit a probationer from possessing a firearm, dangerous weapon or other similar destructive device.

Subsection (b)(7) allows the court to require offenders to undergo medical treatment. Non-indigent probationers may be required to pay the costs of such programs. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–2.3 (2d ed. tent. draft 1979).

Subsection (b)(8) creates the statutory authority for "split sentences," *i.e.*, sentences involving a short time of imprisonment in combination with a probationary period. The maximum allowable period of incarceration in a split sentence is six months; the Committee does not intend to preclude courts from imposing less time in custody in appropriate cases. The Committee expects that ordinarily, offenders will be incarcerated in their local communities. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.4 comment at 30–32 (2d ed. tent. draft 1979); R. Goldfarb and L. Singer, *After Conviction*, 552–589, 594–595 (1973). Moreover, the Committee expects that the current practice of courts in imposing "weekend" sentences will be continued. Under a weekend sentence, the offender lives in the community, works or attends school during the week, and is incarcerated only on weekends. The court, of course, may not impose as a condition of probation a term of imprisonment in excess of that otherwise authorized for a conviction of that level offense. *See* Testimony of Judge Gerald Tjoflat, United States Circuit Judge, Fifth Circuit Court of Appeals, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong. 1st Sess. (1980).

Subsection (b)(9) authorizes the court to require an offender to perform community service. A number of state and local courts have successfully used community service as an alternative to incarceration. A number of State statutes authorize such use of community service. *See* Harris, *Community Service by Offenders* (1979); Bergman, *Community Service in England: An Alternative to Custodial Sentence*, 39 Fed. Probation 43 (1975); Brown, *Community Service as a Condition of Probation*, 41 Fed. Probation 7 (1977). Through this provision, the Committee encourages the Federal courts to follow the examples set by the State and local courts. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.4, comment at 32–34 (2d ed. tent. draft 1979).

Subsections (b)(10) and (11) authorize the court to place reasonable restrictions on the probationer's place of residence. For example,

the court may require the probationer to reside within the court's jurisdiction. However, if the probationer moves to another jurisdiction, the court may transfer jurisdiction over the probationer to the new jurisdiction. *See* section 4505 of the proposed code.

Subsection (b)(12) authorizes the court to require the probationer to report to a probation officer. A similar condition has been upheld under current law. *United States* v. *Rodgers*, 588 F.2d 651 (8th Cir. 1978).

Subsection (b)(13) authorizes the court to require the probationer to submit to visits by probation officers. This subsection does not authorize warrantless searches; searches must be conducted in compliance with the requirement of 4507 of the proposed code. *See generally* Note, *Fourth Amendment Limitations on Probation and Parole Supervision*, 1976 Duke L.J. 71; Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U.L. Rev. 800 (1976).

Subsection (b)(14) authorizes the court to require the probationer to truthfully answer questions relevant to the probation conditions. Of course, the probationer's Fifth Amendment privilege against self-incrimination restricts the scope of this condition. *See*, *e.g.*, *United States* v. *Deaton*, 468 F.2d 541, 544 (5th Cir.), *cert. denied*, 410 U.S. 934 (1972) (error, but not reversible error, to admit the statement of a parolee's parole officer of statement concerning an admission made by a parolee who had not been given *Miranda* warnings); *State* v. *Magby*, 113 Ariz. 345, 544 P.2d 1272 (1976); *State* v. *Lekas*, 201 Kan. 579, 442 P.2d 11 (1968); *State* v. *Gallagher*, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974).

Pursuant to subsections (b)(15) and (16), the court may require the probationer to notify the probation officer of a change in address or if arrested.

Subsection (b)(17) authorizes the court to require the defendant to authorize disclosure of certain bank and financial records to a probation officer. The Financial Privacy Act of 1978 (12 U.S.C. 3404), restricts third party access to such financial records. But courts have ordered probationers to disclose certain financial data. The effect of subsection (b)(17) is to continue that authority. *See*, *e.g.*, *United States* v. *Pierce*, 561 F.2d 735 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978), *United States* v. *Manfredonia*, 341 F. Supp. 790, 795 (S.D.N.Y.), *aff'd per curiam*, 459 F.2d 1392 (2d Cir.), *cert. denied*, 409 U.S. 851 (1972).

Finally, subsection (b)(18) authorizes the court to impose any other condition that meets the requirements of 3324(a)(2) of the proposed code. This subsection gives the sentencing court the flexibility to impose conditions that both meet the individual needs of the probationer and achieve the purposes for which the sentence was imposed. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.3(f), comment at 29–30 (2d ed. tent. draft 1979). For example, under current law a court is permitted to impose narrow restrictions on employment. *United States* v. *Villarin-Gerena*, 553 F.2d 723 (1st Cir. 1977) (no police work); *Whaley* v. *United States*, 324 F.2d 356 (9th Cir. 1963), *cert. denied*, 376 U.S. 911

(1964) (no car repossession work); *Barnhill* v. *United States*, 279 F.2d 105 (5th Cir. 1960), *cert. denied*, 364 U.S. 824 (1960) (no future gambling); *Stone* v. *United States*, 153 F.2d 331 (9th Cir. 1946) (no interstate dining car work); *United States* v. *Greenhaus*, 85 F.2d 116, 117 (2d Cir. 1936) (no stock or bond sale work). *See also United States* v. *Bishop*, 537 F.2d 1184 (4th Cir. 1976) (defendants not to frequent racetracks or place bets while on probation and bail) *Hoffa* v. *Saxbe*, 328 F. Supp. 1221 (D.D.C. 1970). Of course, "before any defendant is required to give up his job, or trade or profession, he [sic] should be given a meaningful opportunity to demonstrate why such a condition might be inappropriate." *United States* v. *Pastore*, 537 F.2d 675, 682 (2d Cir. 1976). *See* section 3105 of the proposed code and American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.8(b)(i) and (iv) (2d ed. tent. draft 1979).

SUBCHAPTER III—RESTITUTION

This subchapter breaks new ground in Federal law by explicitly recognizing the importance of restitution as a criminal sanction. *See generally* Galway & Hudson, *Offender Restitution in Theory and Action* (1978); Barnett and Hagel, *Restitution, Retribution, and the Legal Process* (1977); Hudson & Galway, *Restitution in Criminal Justice: A Critical Assessment of Sanctions* (1977); J. Hudson, *Restitution in Criminal Justice* (1974). While current Federal law permits a court to require the payment of restitution as a condition of a suspended sentence, this subchapter makes restitution a separate and distinct sentence. Under the proposed code, an offender can be sentenced to restitution alone or in combination with any other sentence (such as a fine and/or a prison term). In another significant improvement over current law, the subchapter establishes clear procedural rules for the imposition of a sentence of restitution. For example, it describes the nature of the property loss which is compensible, and establishes set-off requirements against any subsequent court penalties. Current Federal law (18 U.S.C. 3651) simply limits the use of restitution to cases where it is "deemed best" by the court.

The increased emphasis on the use of restitution has been reflected in recent State enactments. 18 Pa. Cons. Stat. Ann. section 1106 (Purdon) (West Cum. Supp. 1980–81); 1979 Wash. Legis. Serv. ch. 29, pp. 39–1005–5–6; Iowa Code Ann. section 907.12 (1979); New Jersey Code of Crim. Justice, 2 C:43–2 (1980).

§ *3331—Applicability of restitution*

This section provides that restitution may be imposed on a criminal defendant unless the offender is an individual convicted of a class A felony or an organizational defendant charged with certain specified anti-trust and regulatory offenses. The Committee concluded that these offenses already provide sufficient civil and administrative remedies; therefore, victims of such offenses are adequately protected by current law. For example, an antitrust violation can lead to civil suits and to treble damages. See 15 U.S.C. 15. The Committee is concerned that the use of restitution not become a substitute for complex civil litigation led to the exclusion of regulatory offenses from section 3331. As provided in section 3332(6), "[t]he court shall not impose a sentence of

restitution . . . if such imposition will unduly complicate or prolong the sentencing process." The Committee determined that the regulatory offenses referred to in section 3331 were so complicated as to merit statutory exclusion.

§ *3332—Nature of sentence of restitution*

Under current Federal law (18 U.S.C. 3651), a court may require restitution as a condition of a suspended sentence. Thus a defendant "may be required to make restitution or reparation to aggrieved parties for *actual damages* or loss caused by the offense for which conviction was had" (emphasis added). Unfortunately, courts have not interpreted current law in a uniform manner. For example, indirect victims of antitrust violations, such as community agencies, are sometimes considered "aggrieved parties" under section 3651, *United States* v. *White Stag Manufacturing*, No. 76–75 (D. Or. 1977), and sometimes not. *United States* v. *Clovis Retail Liquor Dealers Trade Association*, 540 F. 2d 1389, 1390 (10th Cir. 1976).

Finally, it is also unclear whether current law permits a court to make a restitution order in compensation for events or actions which are not directly proven at a trial or as a result of a guilty plea. *Karrell* v. *United States*, 181 F.2d 981 (9th Cir. 1950) (restitution limited to a count of conviction. *Compare United States* v. *Beuchler*, 557 F.2d 1002 (3d Cir. 1977), *with United States* v. *Landay*, 513 F.2d 306 (5th Cir. 1975), and *United States* v. *Tiler*, 602 F.2d 30 (2d Cir. 1979) (restitution condition upheld where defendants were convicted of a violation of 18 U.S.C. 371 even though actual damages had not been ascertained—in part because all that had been required by the district court was the payment of a sum to the clerk as a contingency for when damages had been established).

Section 3332 resolves the conflicts and ambiguities of current law in an equitable manner. Subsection (a) provides that an offender may be required to make compensation to the victim of an offense in two circumstances. Restitution may only be imposed with respect to damages established by the conviction. Restitution cannot be imposed for damages caused by conduct in charges that are dismissed.

Restitution is appropriate for offenses involving conduct that produces bodily injury and for offenses involving property damage. In the case of bodily injury, restitution is limited to "necessary medical expenses." A defendant who inflicts property damage has two options. If the property remains available, the offender may return it. If the property can not be returned, the offender is to pay the higher of the market value of the property at the time of the offense or at the time of sentencing. This formulation places the victim of the crime in the most advantageous situation possible, relative to the valuation of the property. The term "property" is defined in section 101 of the proposed code. The Committee does not intend to limit the concept of payment of monetary compensation. If a victim and an offender can agree, the offender may render a service instead.

The Committee intends that the term "victim" be defined to include persons or groups who would not have suffered but for the offender's conduct. American Bar Association, *Sentencing Alternatives and Procedures* standard 19–2.4, comment at 35 (2d ed. tent. draft 1979). However, the Committee does not intend to in-

clude insurance companies or other sureties within the definition of "victim."

Subsection (b) expresses the Committee's concern, noted earlier, that the sentencing proceeding not become a protracted "mini-trial" of a civil nature.

Subsection (c) provides that the court shall not order restitution if the victim has received a judgment or settlement (including an insurance settlement) in a proceeding involving the same injury or property loss, damage or destruction. It would, of course, be contrary to public policy for an insurance company to refuse to pay a victim on the ground that the victim might be awarded restitution upon conviction of the wrongdoer. Any amount paid to a victim under a sentence of restitution shall, pursuant to subsection (c)(2), be set off against any money later recovered in any Federal civil proceeding, or in any state proceeding. These provisions ensure that the victim does not receive double compensation for the same injury.

The Committee considered, but rejected as unnecessary, a provision making the ordering of payment of restitution inadmissible in a subsequent criminal or court proceeding in federal cases. The Federal Rules of Evidence protects the offender against prejudicial use of such information. Fed. R. Evid. 403. In addition, it is obviously necessary to refer restitution award in subsequent civil actions to enforce the award. Finally, the failure to make restitution would be admissible for impeachment purposes. Fed. R. Evid. 801.3(21) and (22). The Committee also concluded that it would be inappropriate, and perhaps unconstitutional, to create such a Federal rule of evidence for the States.

§ *3333—Considerations in sentencing to restitution*

This section provides that the court shall give primary consideration to all of the purposes of sentencing, except the defendant's need for rehabilitative services, set forth in Section 3101 of the proposed code. In addition, the court shall consider the nature of the offense and the offender, the need to use effective non-prison sanctions, and the applicable sentencing guidelines. As one court put it:

> Restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility. The probationer may learn to consider more carefully the consequences of his or her actions. One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life. Conditioning probation on making restitution also protects the community's interest in having the victims of crime made whole.

Huggett v. *State*, 266 N.W.2d 403, 407 (Wis. 1978)

§ *3334—Conditions of sentence of restitution*

This section authorizes the payment of restitution in installments. In addition, it limits the available time period for making such payments to the point when any other sentence would expire. This provision closely follows the recommendations of the National Conference of Commissioners on Uniform State Laws. *See* Model Sentencing and Corrections Act section 3–601(c) (1979).

§ *3335—Making of restitution relating to organizations*

This section, likes its counterpart in section 3505 of the proposed code (relating to the payment of fines by an organization) creates an affirmative duty by responsible persons within an organization to make court-ordered restitution.

§ *3336—Enforcement of sentence of restitution*

This section authorizes the government to take steps to enforce a restitution award in the same manner as if it had obtained a civil judgment. It does not create a right of action against the United States by the person to whom the restitution is to be paid.

SUBCHAPTER IV—GENERAL PROVISIONS FOR CHAPTER

§ *3341—Commencement of a term of conditional discharge or probation*

This section establishes the general rule that a term of probation or conditional discharge begins to run from the date the sentence is imposed, thus allowing the term's expiration to be easily calculated. This is consistent with current federal case law. *See, e.g., Gaddis* v. *United States*, 280 F. 2d 334 (6th Cir. 1960); *Davis* v. *Parker*, 293 F. Supp. 1388 (D. Del. 1968).

However, if an appeal is taken, the sentencing court has discretion to stay an order placing a defendant on probation. Fed. R. Crim. Pro. 38(4). *United States* v. *Brown*, 555 F. 2d 407 (5th Cir. 1977); *United States* v. *Bishop*, 537 F. 2d 1184 (4th Cir. 1976).

§ *3342—Finality of judgment involving conditional discharge, probation, or restitution*

This section establishes that a sentence of conditional discharge, probation, or restitution is final for purposes of appeal and collateral attack. Judgments imposing probation are final for all purposes under current law, even though the sentence is subject to revocation for noncompliance with the conditions of probation. *Nix* v. *United States*, 131 F.2d 857 (5th Cir.), *cert denied*, 318 U.S. 771 (1943); *Buhler* v. *Pescor*, 63 F. Supp. 632 (W.D. Mo. 1945).

§ *3343—Multiple sentences of conditional discharge or probation*

This section establishes that a sentence of conditional discharge or probation shall run concurrently with other like sentences. In addition, such sentences shall run concurrently with any other sentence, except a sentence of imprisonment. Current law provides that probation terms run concurrently, *see, e.g., Engle* v. *United States*, 332 F. 2d 88 (6th Cir.), *cert. denied*, 379 U.S. 903 (1964), and that sentences of imprisonment are excepted from this rule, *See, e.g., Demarois* v. *Farrell*, 87 F. 2d 957 (10th Cir.), *cert. denied*, 302 U.S. 683 (1937); *Ashworth* v. *United States*, 392 F. 2d 245 (6th Cir. 1968) (term of imprisonment tolls the running of the term of probation).

§ *3344—Termination of sentence of conditional discharge, probation or restitution*

This section provides the court can terminate the term of probation or conditional discharge before the end of the statutory period if it

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would be "in the interest of justice". This provision is derived from current law (18 U.S.C. 3653).

§ *3345—Modification of term of conditions of sentence of conditional discharge, probation, or restitution*

This section permits the court to modify the conditions of a non-prison sentence. This section comports with the recommendations of the American Bar Association (*see Sentencing Alternatives and Procedures*, standard 18–7.3, comment at 174 (2d ed. tent. draft 1979)), as well as those of the National Advisory Commission on Criminal Justice Standards and Goals (*see Corrections* standard 5.4 (1973)), the National Commission on the Reform of Federal Criminal Laws (*see Final Report* 3102(2) (1971)), and the National Conference of Commissioners on Uniform State Laws (*see Model Sentencing and Corrections Act* section 3–304 (1979)). The Committee expects that the courts will most frequently use this procedure to decrease a burden on the defendant created by a particular condition or set of conditions. In the less frequent instance that a new or more restrictive condition is imposed, the Committee intends that the defendant be given a hearing that comports with due process requirements, including counsel, to contest the charge. Under current law, a hearing is required before a condition of probation may be changed to the detriment of the defendant. *United States* v. *Skipworth*, 508 F.2d 598 (3rd Cir. 1975). The Committee does not intend that this procedure be used as a substitute for the revocation procedures of sections 3347–49 of the proposed code. It should not be used when there is an allegation of misbehavior by the offender, but rather when there is a change in circumstances or new information is discovered.

§ *3346—Written statement of conditions of sentence of conditional discharge, restitution, or probation*

Section 3346 requires the sentencing judge to direct a probation officer to give the defendant a written statement of all of the conditions of a sentence of conditional discharge, probation, or restitution with sufficient specificity to serve as a guide for the defendant's conduct.

§ *3347—Summons and warrant for violation of conditional discharge, probation, or restitution*

This section sets forth the preliminary procedures of non-prison sentence revocations. In combination with section 4506 of the proposed code (relating to arrest of persons assisted by probation officers), it provides for notice of the alleged violations and sets forth the consequences of such allegations. The provisions of this section are derived from current statutes, case law and the recommendations of the American Bar Association (*see Sentencing Alternatives and Procedures* standards 18–7.3, 18–7.5 (2d ed. tent. draft 1979)) and the National Conference of Commissioners on Uniform State Laws (*see Model Sentencing and Corrections Act* section 3–307 (1979)).

Subsection (a) sets forth two methods for giving the defendant notice of an alleged violation of a conditionally discharged or probationary sentence. The preferred method is for the probation officer to use a summons. Only if there is a reason for detaining the probationer for the commission of serious criminal misconduct shall the probation officer apply to the court for the issuance of an arrest warrant. *See generally* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–7.5(a) (2d ed. tent. draft 1979).

Subsection (b) requires a summons or warrant to be issued in a timely fashion. If criminal charges against the defendant are pending, the summons or warrant may be held in abeyance. Generally, however, the summons or warrant should be issued promptly, even if the defendant has been convicted and imprisoned on another charge. Subsection (b)(2) provides that the issuance and service of a summons or warrant under this section serves as a detainer. Thus, a probationer who has been arrested for a State law violation, and confined, can have a detainer placed against him or her through the use of a summons. In *Moody* v. *Daggett*, 429 U.S. 78 (1976), the Supreme Court held that a Federal parolee while on parole was not entitled to immediate parole revocation hearing upon issuance of parole violator warrant. Thus, while due process may not as a general rule require prompt action, *United States* v. *Johnson*, 563 F.2d 363 (8th Cir. 1977), policy considerations do so require. Delays in the processing of revocations do not work to the benefit of the public or the criminal justice system.

According to subsection (c), a summons or warrant issued pursuant to this section shall be accompanied by a statement outlining the conditions allegedly violated and providing for notice of the hearing, the defendant's rights at the hearing, and the potential consequences of such a hearing. This requirement is derived in part from the Supreme Court's decision in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), where the court required notice of the hearing, its purpose and the violations alleged to have occurred. In addition, this requirement is derived from the recommendations of the National Advisory Commission on Criminal Justice Standards and Goals (*see Corrections* 16.1 (1974)). *See also Model Sentencing and Corrections* Act section 3–307 (1979). This formulation is also similar to proposed rule 32.1 of the Federal Rules of Criminal Procedure, promulgated by the Supreme Court in 1979. H. Doc. No. 96–112, 96th Cong., 1st sess. (1979).

§ *3348—Preliminary hearing and revocation hearing with respect to alleged violation of sentence of conditional discharge, probation, or restitution*

The provisions of this section and of section 3349 of the proposed code set forth the procedures to be used when a person who has been given a sentence of conditional discharge, restitution, or probation is alleged to have violated a condition of such sentence. These procedures are derived from 18 U.S.C. 3653, Rule 32 of the Federal Rules of Criminal Procedure, proposed amendments to those Rules submitted by the Supreme Court in 1979, various court decisions, and the recommendations of several model acts. *See generally Model Sentencing and Corrections Act* (1979); National Advisory Commission on Criminal Justice Standards and Goals (*see Corrections* (1973)); Note, *Revocation of Conditional Liberty for the Commission of a Crime*, 74 Mich L. Rev. 525 (1976).

According to subsection (a), when a defendant has allegedly violated a condition of a sentence of conditional discharge, probation or restitution, the court with jurisdiction over the defendant (or a court reasonably near the place of the alleged violation, if the court of juris-

diction so orders) shall conduct a preliminary hearing without unreasonable delay, to determine whether there is reasonable cause to believe that such violation has occurred.

The revocation procedure is bifurcated into preliminary and final hearings, pursuant to the dictates of *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); and *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). These cases and their progeny clearly establish that probationers and parolees must be accorded due process in the revocation process.

Subsection (a) recognizes that a person under supervision may be alleged to have committed a violation outside the district having jurisdiction. It therefore requires that, in general, the hearing take place at or near the place of the alleged violation. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972).

If the court finds probable cause that the offender has committed the violation, it may: (1) revoke the sentence and order the defendant confined pending a hearing under section 3348(b); (2) permit the defendant to remain at liberty pending a final hearing, if the court determines that confinement is not warranted by the frequency or seriousness of the alleged violation, that the defendant is likely to appear for future proceedings, and that the defendant is not a danger to self or others; or (3) terminate the proceedings against the defendant, if such action is in the interest of justice.

The Committee recognizes that a finding of probable cause could be based on any number of factual situations. If the nature of the violation is not serious, if the risk that the offender will not appear for a final revocation hearing is insubstantial, and if there is no danger to the offender or to others, the probationer should be temporarily restored to conditional release, restitution, or probation. Different procedures apply to the arrest of a person not serving such a sentence. Such persons have not been convicted of a crime; they are to be released unless there is a likelihood that they will not appear for trial. See discussion of section 6306 of the proposed code. The nature and circumstances of the alleged violation are more appropriately considered in the context of a revocation situation.

Subsection (a)(2) provides that conviction for any offense committed after the sentence was imposed constitutes probable cause under this section. This provision is analogous to a policy approved by the Supreme Court in the parole context in *Moody* v. *Daggett*, 429 U.S. 78, 86 n. 7 (1976). Subsection (a)(2) recognizes that probable cause may not be based solely upon the arrest of a person under supervision. *See Wolfel* v. *Sanborn*, 555 F.2d 583 (6th Cir. 1977) (forfeiture of a bail bond is not a conviction for purposes of determining whether a parolee is entitled to a parole hearing.). *See also* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–7.3, Comment at 173 (2d ed. tent. draft 1979).

Subsection (b) requires the court to hold a revocation hearing no later than 60 days after a finding of probable cause. The requirement of a prompt hearing is taken from 18 U.S.C. 3653, which requires that a hearing take place "[a]s speedily as possible after an arrest." A statutory requirement of a timely hearing is necessary because the courts have held that the Speedy Trial Act does not apply to probation

revocations. *See, e.g., United States* v. *Jackson*, 590 F. 121, 123 5th Cir.), *cert. denied*, 441 US. 912 (1979).

Subsection (c) provides that at both the preliminary and final revocation hearings, the defendant has the right to be represented by counsel, to be apprised of adverse evidence, to confront and cross-examine adverse witnesses, and to appear, testify, and present witnesses and relevant evidence. With the exception of the right to counsel, these rights are derived from the constitutional requirements explicated in *Gagnon* and *Morrissey*. The Court in *Gagnon* held that the need for counsel at a probation revocation proceeding should be determined by the facts of each case. Whether counsel is required in a particular case is a question of fundamental fairness, which in turn is resolved by considering the ability of the offender to represent himself or herself, and whether the proceeding constitutes a "critical stage" of a criminal proceeding. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 789–90 (1973). *See also Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967). *See generally Gill* v. *Estelle*, 530 F.2d 1152 (5th Cir. 1976) (counsel constitutionally required at a probation revocation proceeding).

The Committee rejected case-by-case approach taken by the Court in *Gagnon*. Because it is more consistent with procedural fairness, section 3348 requires counsel in every case. Sentence revocation hearings are unlikely to take place unless there is a substantial risk that the liberty of the probationer is at stake, and that the penalty for a violation will be incarceration. The requirement of counsel is also consistent with the procedural rights Congress has granted to parolees. *See* 18 U.S.C. 4214(a)(2)(B). This change from current law is supported by the American Bar Association. *See Sentencing Alternatives and Procedures* standard 18.7–5, comment at 181 (2d ed. tent. draft 1979).

Subsection (d) permits a defendant to knowingly and intelligently waive a preliminary hearing and a revocation hearing.

§ 3349—Action concerning violation of condition of conditional discharge, probation, or restitution

Subsection (a) provides that if, after a revocation hearing, the court determines by a preponderance of the evidence that the defendant has violated a condition of a sentence of conditional discharge, probation, or restitution, the court may take the following action: (1) continue the sentence unchanged; (2) reprimand the defendant; (3) modify the conditions of the sentence; or (4) revoke the sentence and impose any sentence that was available to the court at the time of initial sentencing. However, where a sentence of conditional discharge or restitution is revoked, the court may impose a sentence involving imprisonment only if it finds that the defendant engaged in conduct that both violated a condition of the sentence and was a Federal or state felony. These limits reflect the Committee's concern that sentences of imprisonment may be too frequently imposed for technical violations of conditional, nonprison sentences. *United States* v. *Reed*, 573 F.2d 1020 (8th Cir. 1978) (minor technical violations should not produce automatic revocations). The American Bar Association has urged that courts consider the least drastic response to revocation proceedings. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–7.3(c) (2d ed. tent. draft 1979).

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The use of a "preponderance of evidence" standard is derived from the requirements of current law. *United States* v. *Smith*, 571 F.2d 370 (7th Cir. 1978) (court must be "reasonably satisfied" that the probationer violated a condition of probation); *United States* v. *Nagelberg*, 413 F.2d 708 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970); *United States* v. *Strada*, 503 F.2d 1081 (8th Cir. 1975); *United States* v. *Everes*, 534 F.2d 1186 (5th Cir.), *cert. denied*, 429 U.S. 1024 (1976). The American Bar Association, on the other hand, uses the more exacting standard of clear and convincing evidence. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–7.5(e)(iii) (2d ed. tent. draft 1979).

Subsection (b) directs the court, in carrying out its responsibilities under subsection (a), to consider (1) if the defendant has been convicted of a Federal or State offense, the seriousness of any Federal or State offense of which the defendant may have been convicted; and (2) the frequency and seriousness of other violations of the conditions of the sentence. This provision is derived from the revocation procedures applicable to Federal parolees. *See* 18 U.S.C. 4214(d).

Subsection (c) provides that where the court modifies or revokes the sentence, any money previously paid by the defendant shall be credited towards any new or modified monetary obligation.

If the court revokes a sentence of probation and imposes a sentence of imprisonment, then any time served in confinement during the period of probation shall, pursuant to subsection (d), be credited toward the term of imprisonment. In addition, any time served under probation without a violation of its conditions may be counted towards the term of imprisonment.

Subsection (e) provides that if the court modifies a sentence of probation by extending the term of the sentence or by increasing a period of confinement imposed as a condition of the sentence, then any time served in confinement during the sentence of probation shall be counted towards the modified period of confinement. In addition, any time served under probation without violating a condition of the sentence may be counted towards the modified term of the sentence.

Giving the defendant credit for time served or money paid is consistent with the committee's approach regarding credit for time served before sentence. See section 3706 of the proposed code. Credit for imprisonment is also consistent with current law. *Thomas* v. *United States*, 327 F.2d 795 (10th Cir.), *cert. denied*, 377 U.S. 1000 (1964).

The Committee explicitly authorizes granting credit for time served under probation supervision without violations. Courts currently take this information into account in determining the nature of the sanction to impose for a probation violation. The Committee intends to encourage such considerations. Successful service of a period of supervision, which may entail substantial deprivations of liberty, should be given some consideration in assessing a potential revocation penalty. *See* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–7.3(e) (2d ed. tent. draft 1979). The Committee considered but rejected a flat rule which would have credited the defendant with one half of the time served under supervision without a violation, because it believes that similar results can be

achieved without unnecessary intrusion into the exercise judicial discretion. *Compare United States* v. *Shead*, 568 F.2d 678, 684 (10th Cir. 1978) (refusal to credit time spent on probation does not violate equal protection or due process); *Mauney* v. *Garrison*, 558 F.2d 214, 215 (4th Cir. 1977) (court may order probationer to serve his full suspended sentence even though probation was revoked four years and three months after it was granted). This provision is consistent with the recommendations of the American Bar Association. *See Sentencing Alternatives and Procedures* standard 18–7.3(e) (2d ed. tent. draft 1979).

Subsection (f) requires that the court render a decision under this section within 21 days of the revocation hearing. The decision must include a statement of its reasons. This provision is derived from 18 U.S.C. 4214(e), which establishes a similar rule for Federal parolees.

Subsection (g) provides that the court's power, both to revoke a sentence of conditional discharge or probation and to impose a new sentence, extends for a reasonable period beyond the expiration of the term of such sentence if before its expiration a summons or warrant under section 3347 of the proposed code was issued. This subsection clarifies a question which has arisen under current law. *See Skipworth* v. *United States*, 508 F.2d 598 (3d Cir. 1975).

§ 3350—Definition for chapter

This section defines the term "month" to mean a period of 30 days.

CHAPTER 35—FINES

Introduction

Under current Federal law, fines are an authorized sentence for virtually every offense. However, in several important respects the statutory scheme relating to fines is deficient. First, because existing law does not classify offenses, maximum fine levels are frequently unrelated to the severity of the offense. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–2.7, comment at 49 (2d ed. tent. draft 1979). The fines provided for offenses of similar severity are often quite dissimilar. Second, current law is based on a series of *ad hoc* Congressional decisions over the years about what appropriate maximum fine levels should be. Many of these decisions were made decades ago and are woefully inadequate to deter criminal behavior. Finally, current law in general lacks any articulated standards and procedures to guide courts in imposing fines.

This chapter substantially rectifies these deficiencies. It relates fine levels to the offense classification system of the proposed code and dramatically increases maximum fines, bringing them in line with modern realities. Finally, chapter 35 clearly sets forth procedures and standards to guide the courts in imposing criminal fines.

§ 3501—Applicability of fine

Subsection (a) authorizes a court to impose a fine upon a defendant who is convicted of an offense, except in the case of an individual defendant convicted of a class A felony, in which case a fine may be imposed only if a term of imprisonment is also imposed. In every other instance a fine may be imposed in addition to any other authorized sentence.

Subsection (b) requires that a fine be paid to the clerk of the court, who must deposit amounts received from fines paid in the general fund of the Treasury as miscellaneous receipts.

§ *3502—Amount of sentence of fine*

Section 3502 provides that the maximum amount of a fine (unless otherwise provided by Act of Congress, including any other more specific provision of the proposed code) is:

(1) for a felony, $250,000 if the defendant is an individual and $1,000,000 if the defendant is an organization;

(2) whether the defendant is an individual or an organization

(a) $25,000 for a class A misdemeanor,

(b) $15,000 for a class B misdemeanor,

(c) $5,000 for a class C misdemeanor, and

(d) $1,000 for an infraction.

These maximum fine levels represent a dramatic increase over current law. The Committee concluded that existing penalties do not adequately provide the judiciary with sufficient flexibility to impose sentences which will adequately deter future criminal conduct.

Many previous proposals for reform of the Federal criminal laws have given the courts authority to use alternative methods to calculate fines. For example, the National Commission on Reform of Federal Criminal Laws would permit a court to double the gain or loss caused by the offense. *See Final Report* section 3301 (1971). The Committee concluded that this approach would unnecessarily complicate sentencing proceedings and turn hearings on fines into damage mini-trials. *See* statement of the Business Roundtable, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 1st sess. (1980). The Committee, therefore, has decided to increase fine levels instead.

The proposed code enables a court to impose a fine that will force the defendant to disgorge ill-gotten gains. The Committee, however, does not anticipate that the maximum permissible fine will be routinely imposed. In determining the amount of a fine, the court must assess both the nature of the harm done and the defendant's ability to pay. See section 3503 of the proposed code. It is therefore unlikely that the maximum fine will be imposed in very many cases. In addition, the sentencing guidelines will provide guidance to the courts on appropriate fine levels.

The Committee expects that the increased fine maximums established by this chapter will assist the effort to combat white collar crime. The higher fine levels will discourage any view that fines are simply a cost of doing business and will be a more effective deterrent to criminal behavior.

Section 3502 distinguishes between individuals and organizations in setting maximum fine levels for felony convictions. The Committee concluded that an amount sufficient to penalize or deter an individual may not be sufficient to deter an organization, which generally have greater resources than individuals. In addition, since prison terms are not an available sanction against organizations, it is equitable to provide for larger maximum fines for organizations than for individuals. *See generally* N.Y. Penal Law section 400.30 (McKinney 1969).

§ *3503—Considerations in sentencing to fine*

Section 3503 requires that the sentencing judge, in determining whether to impose a fine and, if so, the amount and method of payment, consider (1) the factors set forth in section 3102 (relating to factors to be considered in sentencing) of the proposed code; (2) the defendant's income, earning capacity, and financial resources, including the burden that the fine will impose upon the defendant and any person legally or financially dependent on the defendant (e.g., family members, or in the case of an organization, innocent stockholders and/or employees); (3) the proof received at trial, or as a result of a guilty plea, concerning any pecuniary gain by the defendant; and (4) any other pertinent equitable consideration. An example of such equitable considerations would be whether an organization had made "any effort . . . to discipline the persons responsible for the offense and [had taken] any steps taken to ensure against recurrence of the offense." Senate Rep. 96-553 at 975 (1980). The Committee expects that the courts will, as a general rule, give priority to the needs of crime victims and any obligation by the defendant to make restitution, over collection of a criminal fine. Section 3503 also requires the court to give primary consideration to the purposes of sentencing set forth in subsections (a)(1), (2), (3), and (4) of section 3101 (relating to purposes of sentencing of the proposed code) and to the need to deprive the defendant of any illegally obtained gains. Fines are not to be unreasonably aggregated. *See* section 4302 of the proposed code (relating to content of sentencing guidelines).

§ *3504—Conditions of fine*

Subsection (a) permits the court to require payment of a fine in specified installments or within a specified time, which may not exceed the greater of the maximum term of probation or imprisonment authorized for the offense. Current law (18 U.S.C. 3651) authorizes a fine to be imposed as a condition of a suspended sentence.

The use of installment payments is widespread in various States and in England. Although unless specified otherwise, a fine must be paid immediately, the Committee hopes that authorizing payment of a fine over a period of time will encourage courts to view this sanction as an effective alternative to imprisonment. *See generally*, Note, *The Use of the Fine as a Criminal Sanction in New Jersey: Some Suggested Improvements*, 28 Rutgers L. Rev. 1185, 1190–1193 (1975); American Bar Association, *Sentencing Alternatives and Procedures*, standard 18-2.7, 18-7.4(c) (2d ed. tent. draft 1979).

Subsection (b) prohibits a court from imposing any other condition as a part of a sentence of fine. A court may not impose a fine and provide that the defendant be incarcerated if the fine is not paid, since it is constitutionally impermissible to punish a person based merely on financial status. *Tate* v. *Short*, 401 U.S. 395 (1971); *Williams* v. *Illinois*, 399 U.S. 235 (1970). The court must inquire into the reasons for the nonpayment. If the nonpayment was caused by circumstances beyond the defendant's control, the sentencing court should modify the terms, amount or payment schedule of the fine pursuant to section 3506 (relating to modification or remission of fine) of the proposed code.

If on the other hand, the defendant is able to pay the fine, but fails to do so, the court may punish the defendant for a violation of section

1735 (relating to disobeying a judicial order) of the proposed code, a class A misdemeanor. If the fine is coupled with a condition of a sentence of conditional discharge or of probation, obligating the defendant to pay the fine, then non-payment by a defendant with the ability to pay can result in a revocation proceeding pursuant to sections 3347 (relating to summon and warrant for violation of condition of conditional discharge, prohibition, or restitution) and 3348 (relating to preliminary hearing and revocation or hearing with respect to alleged violation of sentence of conditional discharge, probation, or restitution) of the proposed code. In addition, the Government, acting as a creditor, can seek enforcement through civil remedies, including attachment and sale of the defendant's assets. *See* F. R. Civ. P. 64 and 69.

§ *3505—Payment of fines relating to organizations*

This section provides that those responsible for paying a fine imposed on an organizational defendant are those who are authorized to make the organization's disbursements, and such person's superiors. The Committee intends to ensure the collection of such fines by specifying who is responsible for their payment. American Bar Association, *Sentencing Alternatives and Procedures* standard 18–7.4(d) (2d ed. tent. draft 1979).

Nothing in this section is intended to interfere in any way with the application of State laws concerning the indemnification of agents of an organization by that organization. Thus, the effect of laws like Del. Code. Ann. title 8, section 145(a) (1974), and N.Y. Bus. Corp. Law section 727(e) (McKinney 1980), remains unchanged. *See generally* ABA–ALI Model Business Corporation Act (1977). Likewise, nothing in this section affects the validity of the requirements of the Foreign Corrupt Practices Act (15 U.S.C. 78dd–2).

§ *3506—Modification or remission of fine*

Subsection (a)(1) permits a defendant who has been sentenced to a fine to petition the court for an extension of the time for payment, for a modification in the method of payment, or for a remission of all or a part of the unpaid portion. Subsection (a)(2) permits the court to grant the defendant's petition if the court finds that (1) the circumstances that originally warranted the amount of the fine or the method or time for payment no longer exist, or (2) it would be otherwise unjust to require payment in the amount imposed, in the manner, or within the time specified. These procedures generally comport with those recommended by the American Bar Association. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–7.4 (2d ed. tent. draft 1979).

Subsection (b) authorizes a defendant who has been ordered to pay a fine and who, after imposition of sentence, voluntarily makes restitution to the victim of the offense, to petition the court for a total or partial remission of the fine. The amount of any such remission can not exceed the amount of the restitution payments. Thus, pursuant to this section, a defendant who makes a postsentence voluntary restitution payment will be in the same position as a defendant who made such a payment either at the presentence stage or as the result of court ordered restitution.

§ *3507—Enforcement of sentence of fine*

Section 3507 permits the United States to enforce a fine in the same way that it can enforce a civil judgment.

The Committee is concerned about the difficulty in collecting fines. *See* Robinson, *Collecting U.S. Criminal Fines: A Headache for Justice System*, Washington Post, December 2, 1979, at A–1, Col. 8 (a discussion of the problems faced by the Department of Justice in collecting fines). Hearings on the Reform of the Federal Criminal Laws Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 92d Cong., 2d sess. at 1709–32 (1972) (testimony of W. Plumb) (the sources cited therein outline the problems with current fine collection practices).

The Department of Justice has suggested that the mechanism for the collection of fines be modified. This suggestion provided that criminal fines should be collected in a manner similar to that used by the government to collect taxes. *See* Senate Rep. No. 96–553 at 1147–54 (1980). While the Committee was sympathetic with the need for a comprehensive fine collection program, there was less certainty about the merits of the specific proposal. The Committees hopes that the Executive Branch, in cooperation with Congress, will thoroughly review this matter, and that a workable program can be developed. This review should encompass whether the payment of fines should have priority over the offender's other financial obligations, such as restitution to the victim, support for family, and payments to secured and unsecured creditors. In addition, the review should address the administrative mechanism for the implementation of any such program, including the expected costs and anticipated returns.

Chapter 37—Imprisonment

§ *3701—Applicability of imprisonment*

This section provides that a defendant (other than an organization) may be sentenced to a term of imprisonment upon conviction of an offense. The term "offense" is defined in section 101 of the proposed code.

§ *3702—Term of imprisonment*

Section 3702 provides that the maximum term of imprisonment is:

(1) life for a class A felony;
(2) 160 months for a class B felony;
(3) 80 months for a class C felony;
(4) 40 months for a class D felony;
(5) 18 months for a class E felony;
(6) 12 months for a class A misdemeanor;
(7) 6 months for a class B misdemeanor; and
(8) 30 days for a class C misdemeanor.

No term of imprisonment is authorized for an infraction. The exclusion of a term of imprisonment for an infraction is supported by the Brown Commission (*see Final Report* section 3001(3) (1971)).

Present Federal law has no explicit classification structure for terms of imprisonment. The punishment for offenses vary, representing ad hoc decisions made by Congress over the years. As a result, essentially

similar conduct may call for different maximum terms of imprisonment. The adoption of a classification structure for the proposed code follows the recommendation of the National Commission on Reform of Federal Criminal Laws (*see Final Report* section 3201). The Model Penal Code also utilizes a classification structure (*see* section 6.02). The actual classification scheme used by the Committee is modeled after New York's. 1965 N.Y. Laws ch. 1030 (effective September 1, 1965).

The Committee arrived at the classification structure of the proposed code by evaluating the maximum prison terms called for by current Federal law. While there are over 15 different maximum prison terms set forth in title 18 of the United States Code, most offenses provide for one of the following maximums: 2 years, 3 years, 5 years, 10 years, 20 years, or life or any term of years. The Committee folded these logical and existing distinctions of current law into five categories of felonies. The Committee also found that the maximum prison term for misdemeanors in title 18 was usually one year, 6 months, or 30 days. In addition, there are a group of misdemeanors which provide for only a fine. The Committee stucture of three classes of misdemeanors and a class of infraction thus closely parallels current law.

The maximum term of imprisonment authorized for each type and class of offense is the functional equivalent of current law maximums. The Committee determined that the "good time" provisions of current law (18 U.S.C. 4161–66), which grant all but a handful of Federal prisoners a one-third reduction in their sentences, violated principles of honesty in sentencing. The availability of good time has made the maximum prison terms of current law somewhat artificial. *See generally* Partridge, Chaset, & Eldridge, *The Sentencing Options of Federal District Judges*, 84 F.R.D. 174, 183–84 (1979). For example, a 20 year sentence under current law is in reality a 13 and one-third year sentence. The National Commission on Reform of Federal Criminal Laws recommended doing away with good time. *See* Brown Commission, *Final Report* section 3402, Comment at 300 (1971); Brown Commission, *Working Papers* 1299 (1970). *See also* 18 U.S.C. 5005–26 (the "Federal Youth Corrections Act", which does not provide for good time credits for persons sentenced under that Act). P. O'Donnell, M. Churgin and D. Curtis, *Toward a Just and Effective Sentencing System*, 68 (1976); the Committee has concluded that continued use of artificially long sentences with good time disserves both the public and the Federal criminal justice system, and consequently, the proposed code does not provide for credit for good behavior while in prison. To compensate for what would otherwise be an increase in prison time served, the Committee reduced current law maximums by one-third. Thus, the current law maximum of 20 years becomes a maximum of 13 and one-third years in the proposed code.

The Committee's approach will result in sentences that are more realistically calculated to approximate the actual time to be served in prison. *See generally* American Bar Association, *Sentencing Alternatives and Procedures*, standards 18–2, and 18–2.5(b)(1), comment at 12–14, and 36–44 (2d ed. tent. draft 1979). This movement towards what might be called "truth in sentencing" will achieve two purposes. First, this approach will focus attention on the relative

blameworthiness of the defendant. *See* R. Singer, *Just Deserts* 100–11 (1979). Second, the deflation of artificially high sentences will help to move public and legislative perceptions of sentence length closer to the actual time served. *See, e.g.*, Blumstein & Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's View* (1980) (public perceptions about sentence length differ substantially from actual time served). Reducing the length of maximum sentences and abolishing good time will not deprive prison officials of authority to assure good institutional behavior. The Director of the Federal Bureau of Prisons testified that so long as the parole system and other incentives for good behavior currently available are continued, "good time" is unnecessary. Testimony of Norman Carlson, Director, Federal Bureau of Prisons, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. (1979). Hearings on S. 1437 before the 95th Cong., 1st sess., at 8886 Vol. XIII (1977) (testimony of Norman Carlson, Director, Federal Bureau of Prisons). *See also* Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 92d Cong., 2d sess., at 4151–92 (1972) (survey of corrections officials; one-third urged abolition of good time).

§ *3703—Considerations in sentencing to imprisonment*

Section 3703 directs the court, in determining whether to impose a term of imprisonment and the length of such term, to consider the factors set forth in section 3102 of the proposed code and to give *primary* consideration to the purposes of sentencing set forth in sections 3101(a) (1), (2), (3), (4), and (5) of the proposed code.

This section represents one of the most important decisions made by the Committee. Sentencing courts should not use the defendant's need for correctional treatment as the primary justification imposing a prison term or to determine its length. This does not mean, however, that rehabilitation programs within the Bureau of Prisons should be cut back. Rather, the provision emphasizes that the unpredictable nature of the rehabilitative process makes unfair the use of rehabilitation the sole sentencing rationale. *See* Senate Rep. No. 96–553 at 942, 987–88, and 934 n. 13 (1980).

§ *3704—Modification of term of imprisonment*

Section 3704 provides that the sentencing judge may not modify a term of imprisonment after the term is imposed, except that (1) the judge, upon motion of the Director of the Bureau of Prisons or of the United States Parole Commission and notice to the defendant and the attorney for the Government, may reduce the term of imprisonment if the judge finds that extraordinary and compelling reasons warrant the reduction; and (2) the judge may modify the term to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure. This provision is supported by the American Bar Association, *Sentencing Alternatives and Procedures* standard 18–7.2, and standard 18–7.1, comment at 171 (no power to increase sentence, except to correct an illegal sentence) (2d ed. tent. draft 1979).

Under current law, the Director of the Bureau of Prisons is authorized to petition the sentencing court for review of sentence. Unfortu-

nately, this authority is infrequently invoked. The Committee decided to authorize the United States Parole Commission to seek review to enable review of sentences involving the use of judicially imposed periods of parole ineligibility which are substantially above the applicable presumptive parole release date. While these cases are few in number, this provision will provide another method for coordinating the sentencing guidelines and the parole release guidelines. *See* letter from P. Hoffman, Director of Research, United States Parole Commission, to Congressman Robert F. Drinan, Chairman, Subcommittee on Criminal Justice, House Committee on the Judiciary, dated March 25, 1979 (only 5.8 percent of all prisoners considered for parole in fiscal year 1979 had minimum sentences in excess of 6 months above the top of the parole guidelines).

§ *3705—Multiple sentences of imprisonment*

This section is new to title 18. Subsection (a) provides that multiple sentences of imprisonment imposed on a defendant at the same time run concurrently. A sentence of imprisonment imposed upon a defendant who at the time of imposition of the sentence is subject to a previously-imposed Federal or State term of imprisonment runs concurrently with the previously-imposed sentence. A sentencing judge may impose consecutive sentences in such cases, however, if the judge finds that the imposition of a consecutive sentence is appropriate and states the reasons for that finding on the record. Subsection (a) explicitly sets forth a presumption in favor of concurrent sentences. Under current Federal law, sentences of imprisonment are presumed concurrent if imposed at the same time. *United States* v. *Ortiz-Martinez*, 557 F.2d 214 (9th Cir. 1977); *Borum* v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969). Sentences of imprisonment are assumed to be concurrent if both involve Federal offenses. *Subas* v. *Hudspeth*, 122 F.2d 85 (10th Cir. 1941). If, however, the first sentence of imprisonment is imposed for a State offense and the second sentence is imposed for a Federal offense, those sentences run consecutively. *See United States* v. *Segal*, 549 F.2d 1293 (9th Cir.), *cert. denied*, 431 U.S. 919 (1977); *United States* v. *Harrison*, 156 F. Supp. 756 (D. N.J. 1957). *But cf. United States* v. *Hardin*, 446 F.2d 148 (5th Cir. 1971) (district court ordered State and Federal sentences to run concurrently and required that the Attorney General designate a State prison as a Federal facility). The Committee decided to remove this anomaly by providing that Federal and State sentences are presumed to run concurrently.

Subsection (a) does not preclude the use of consecutive sentences. A judge may impose consecutive sentences as long as the judge specifically states, on the record, the reason why consecutive sentences were imposed. For example, nothing in this section prevents the imposition of a consecutive sentence where such sentence is otherwise authorized or mandated by law. See section 2723 (relating to using a firearm or explosive during the course of a felony). The Committee has rejected the approach of the Senate criminal code revision legislation, which places an absolute statutory maximum on the length of consecutive sentences. *See* Senate Rep. No. 96–553 at 995–96 (1980). Instead, the Committee has instructed the committee on sentencing and the Judicial Conference to provide that consecutive terms of imprisonment for conduct which arose out of a single criminal episode or incident should not be above the maximum term authorized for an offense one grade higher than the most serious offense for which the defendant is sentenced. *See* section 4302(c)(2)(B) of the proposed code.

The Committee's purpose in fashioning subsection (a) has been to assure that multiple punishments not attach for what is essentially the same criminal conduct but at the same time to provide sentencing judges with the discretion to impose a sentence that accomplishes the purposes of sentencing. *See* section 3101 (1), (2), and (3) of the proposed code. The Committee believes that the provisions of subsection (a) comport with the American Bar Association's recommendations. American Bar Association, *Sentencing Alternatives and Procedures* standard 18–4.5 (2d ed. tent. draft 1979).

This provision, as does the general rule stated in section 3705(a), explicitly recognizes that the "Congress does not ordinarily intend to punish the same offense under two different statutes." *Whalen* v. *United States*, 100 S. Ct. 1432 U.S. L. W. (1980). If one offense prohibits certain conduct in a general way and another offense prohibits a specific type of that conduct, they are the "same offense" for purposes of the rule of *Blockburger* v. *United States*, 284 U.S. 299 (1932), that the double jeopardy clause bars prosecutions for the "same offense." *See Hunter* v. *State*, 27 Crim. L. Rep. 2462 (Sup. Ct. Delaware, June 24, 1980) (finding that the *Blockburger* test, that is compelled by the Double Jeopardy clause, precludes the imposition of multiple punishments for the "same offense"). For example, a defendant convicted of conspiracy and also as an accomplice cannot receive consecutive punishments. *But see* Senate Rep. No. 96–553 at 77 (1980).

The Committee considered adopting a statutory rule suggested by the Brown Commission that would have precluded the use of consecutive sentences where multiple offenses were committed "as part of a single course of conduct during which there was no substantial change to the nature of the criminal objective." Brown Commission, *Final Report* section 3204, comment at 293 (1971). The Committee concluded that this approach, as well as other similar legislative rules, (*see, e.g.*, Ill. Ann. Stat. ch. 38, section 1005–8–4 (Smith-Hard 1973); N.Y. Penal Law section 70.25(2) (McKinney 1975); *see also* Model Sentencing and Corrections Act 3–107 (1978)), and judicially developed rules, (*see, e.g., Mutchler* v. *State*, 560 P.2d 377 (Alaska Sup. Ct. 1977); *Gray* v. *State*, 538 S.W. 2d 391 (Tenn. 1976); *see also* Note, *Criminal Law: Concurrent and Consecutive Sentencing*, 1973 Ill. L. Forum, 423 (1973)), fail to cut through the Gordian knots in this area of the law. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–4.5, comment at 98 (2d ed. tent. draft 1979). Although sympathetic to the policy objectives of these proposals, the Committee believes that any statutory formulations may prove difficult to apply uniformly. Thus, the Committee has delegated this difficult task to the committee on sentencing. Section 4302 requires the committee on sentencing to make recommendations with respect to the use of consecutive or multiple punishments for offenses arising out of essentially the same transaction. *See* section 4302 (c)(1)(B) and (c)(2).

The phrase in subsection (a), "except as otherwise provided by law", is meant to allow the use of consecutive sentences when specifically

authorized or required by the Congress. An example of a mandated consecutive sentence is found in section 2723 (relating to using a firearm or explosive during a felony) of the proposed code.

Subsection (b) provides that a judge may not order that multiple sentences of imprisonment run consecutively if (1) the sentences are for an offense described in section 1101 (attempt) or 1102 (conspiracy) of the proposed code and for an offense that was the objective of such attempt or conspiracy; or (2) the sentences are for offenses which differ only in that one offense prohibits a kind of conduct generally and the other offense prohibits a specific type of such general conduct.

This provision is based on the recommendations of the National Commission on the Reform of Federal Criminal Laws. *See Final Report* section 3204(2) (1971). The preclusion of consecutive sentences for attempts or conspiracies when the offense is completed is a logical one also found in the Senate criminal code revision legislation. *See* section 3203(a) of S. 1722. The limitation on the use of consecutive sentences for offenses which differ in that one offense prohibits a kind of conduct generally and the other offense prohibits a specific type of the same type of conduct is designed to reach situations where, for example, a defendant has been convicted of both theft and robbery based on the same act.

§ *3706—Commencement of term of imprisonment and credit for time served*

Subsection (a), which is based on the first sentence of 18 U.S.C. 3568, provides that a term of imprisonment commences on the day the defendant is received in custody for the service of the sentence. Thus, credit for a sentence begins to run from the earlier of the point in time when the offender is received in custody awaiting transportation to, or is received at an official detention facility (as defined in section 1719 of the proposed code).

Subsection (b) provides that a defendant be given credit toward the service of a term of imprisonment for any time spent in confinement before the commencement of the sentence of imprisonment if that time has not been credited against another sentence and if the time spent in confinement was the result of (1) the offense for which the sentence is imposed, or (2) any other charge, for which the defendant was arrested after the commission of the offense, for which the sentence was imposed. This subsection is based on the recommendations of the National Commission on Reform of Federal Criminal Laws. *See* Brown Commission *Final Report* section 3205 (3) (1971); Brown Commission *Working Papers* 1325 (1970). *See also* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–4.7 (2d ed. tent. draft 1979); Senate Rep. No. 96–553 at 996 (1980).

Subsection (c) requires the Bureau of Prisons to credit against the term of imprisonment all time served in a State or local detention facility after the commission of the Federal offense, if such time was served solely as the result of a Federal detainer. This subsection codifies the result in *Brown* v. *United States*, 489 F.2d 1036 (8th Cir. 1974). In *Brown*, a Federal parolee was charged with a State offense and was held without bail because of the placement of a Federal detainer. The defendant is entitled to credit because the time spent in State custody

was spent in connection with the offense with the meaning of 18 U.S.C. 3568. *See also Taylor* v. *United States*, 456 F.2d 1101 (5th Cir. 1972).

§ *3707—Youthful Offenders*

Section 3707 authorizes a judge to designate a defendant as a "youthful offender" if the defendant is sentenced to imprisonment and (1) the defendant is less than 21 years old on the date of sentencing, and (2) the judge finds that the defendant will benefit from placement in a separate facility or institution under section 3907(c) of the proposed code.

This section, along with sections 3907(c) and 4303(a)(4) of the proposed code, carries forward certain provisions of the Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.* When Congress first passed the Youth Corrections Act in 1950, correctional experts generally agreed that rehabilitation was the goal of corrections, and that, particularly with respect to youthful offenders, the prison environment could foster a "cure" for criminal behavior if the sentence was long enough. Unfortunately, these hopes were misplaced. Over the last 30 years, the Youth Corrections Act has failed to fulfill its goals. Youthful offenders frequently spent more time in prison than similarly situated persons who were sentenced as adults.

The Youth Corrections Act failed to equal either its promises or its proponents' expectations for a number of reasons. First, the Act was based on the faulty premise that the criminal justice system could accurately predict which individuals would benefit from treatment, devise appropriate treatment methods, and determine when such individuals had been "cured." Second, the Bureau of Prisons has not responded adequately to the Act's mandate. Congress intended that youthful offenders be physically segregated from adults, and that they be provided with special programs designed to facilitate rehabilitation. House Rep. No. 81–2979 (1950), reprinted in [1950] *U.S. Code Cong. & Ad. News* 3983, 3987–88; Senate Report No. 81–1180 (1950). The Bureau of Prisons has inexplicably failed to comply with this mandate. *Johnson* v. *Bell*, 487 F. Supp. 977, 987 (E.D. Mich. March 12, 1980) (testimony of E. Toth on behalf of the United States Bureau of Prisons: "I don't think we felt particularly constrained by the Youth Corrections Act . . . so that what we're doing today has strayed from the original intent of the Youth Act, I'm sure".)

Third, contrary to the intent of Congress, the special sentencing provisions often served to place youthful persons in a disadvantageous position. *See* United States Department of Justice, Bureau of Prisons, *Annual Report*, Table C–2 (1979) (purporting to show that youthful offenders serve longer terms for the same offense than adult offenders). Fourth, offenders between the ages of 18 and 26, treated as "youthful offenders" under the provisions of current law (18 U.S.C. 5005 *et seq.*), are more appropriately judged by the same criteria used to evaluate adults. Fifth, current law's emphasis on alternatives to incarceration for youthful offenders should apply equally to adults. Sixth, the Youth Corrections Act has produced the anomolous result that a person designated as a youth act offender remains so until the end of the sentence, no matter how long that may be. Testimony of Norman Carlson, Director, Federal Bureau of Prisons, Hearings on

Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. (1980) (a forty year old YCA offender is possible under current law).

The proposed code, while repealing the Youth Corrections Act, carries forward its polices in five ways. First, section 3102(3) of the proposed code requires a judge to consider effective alternatives to incarceration when imposing a sentence. Pursuant to section 3303 (relating to considerations in sentencing and conditional discharge) and 3323 (relating to considerations in sentencing to probation) of the proposed code, a court must consider the defendant's need for education, vocational training or other correctional treatment in deciding whether a sentence of conditional discharge or probation is appropriate. Section 3703 (relating to consideration in sentencing to imprisonment) of the proposed code prohibits a court from justifying a prison sentence solely on the expectation of rehabilitation. In combination, these provisions should ensure that careful consideration will be given to alternatives to incarceration.

Second, this section specifies the criteria a court should use to designate youthful offenders, thus making the sentencing of youthful offenders more uniform. Under current law, the criteria are vague at best. *Durst* v. *United States*, 434 U.S. 542 (1978); *Dorszynski* v. *United States*, 418 U.S. 424 (1974). This section requires that judges designate youthful offenders under the standards recommended by the committee on sentencing pursuant to section 4303(a)(4) of the proposed code.

Third, section 3907 (relating to commitment to Attorney General; residential treatment center; extension of limits of confinement; work furlough) of the proposed code mandates the use of separate institutions for those designated as youthful offenders. This both reaffirms Congress' original intent behind the Youth Corrections Act and remedies the present practice of incarcerating youth and adult offenders in the same institution. *See United States ex rel Dancy* v. *Arnold*, 572 F.2d 107 (3d Cir. 1978); *Johnson* v. *Bell*, 487 F. Supp. 977 (E.D. Mich. 1980); *Watts* v. *Hadden*, 469 F. Supp. 223 (D. Colo. 1979); *Brown* v. *Carlson*, 431 F. Supp. 755 (W.D. Wis. 1977). Although the period of segregation ends at age 21, the Committee expects that the Bureau of Prisons will carefully classify youths returning to the adult system to ensure appropriate placement. Nothing in this section or in section 3907 of the proposed code prevents the use of specialized programs for persons under age 21 who have not been designated "youthful offenders" under this section. *See generally Brown* v. *Carlson*, 431 F. Supp. 755 (W.D. Wis. 1977).

Fourth, youthful offenders should be provided specialized industrial training, educational, and counseling programs. The Committee expects that the Bureau of Prisons will conduct a thorough review of the offender's need for correctional programs as part of a comprehensive classification program. According to the Bureau of Prisons, there are presently approximately 1,000 youthful offenders under 21 years of age in the Federal prison system. The system is clearly capable of segregating and providing specialized programs for so small a number of individuals. Current case law supports these procedures. *Johnson* v. *Bell*, 487 F. Supp. 977 (E.D. Mich 1980). Chief Justice Warren Burger has also advocated separate treatment opportunities for youthful offenders. *Carter* v. *United States*, 306 F.2d 283, 285 (D.C. Cir. 1962).

Fifth, the expungement procedures of current law are carried forward in section 8123 of the proposed code (relating to relief from certain collateral results of convictions of certain first offenses).

§ 3708—Definition for chapter

This section defines the term "month" to mean a period of 30 days.

CHAPTER 39—PRISON ADMINISTRATION

SUBCHAPTER I: PRISONS

Introduction

The 25 sections found in this subchapter carry forward, with largely minor technical and conforming changes, the provisions of current law which govern the operation of the Federal prison and correctional system.

§ 3901—Limitation on detention; control of prisons

Section 3901, which is derived from 18 U.S.C. 4001, authorizes the Attorney General to imprison, or detain in pretrial detention, only those persons whose detention is pursuant to an Act of Congress. This section does not deprive the military of its right to house violators of the Uniform Code of Military Justice. This section also vests administrative authority for the prison system with the Attorney General.

§ 3902—Director and employees of Bureau of Prisons

Section 3902, which is derived from 18 U.S.C. 4041, establishes the Bureau of Prisons and authorizes the appointment of its Director.

§ 3903—Duties of Bureau of Prisons

Section 3903, which is derived from 18 U.S.C. 4042, sets forth the duties of the Bureau of Prisons. Among those duties are the management of all Federal penal and correctional institutions, establishment of rehabilitation programs for prisoners, and authority to provide technical assistance to the States.

§ 3904—Powers of Bureau of Prisons employees

Section 3904, which is derived from 18 U.S.C. 4004, establishes the law enforcement authority of employees of the Bureau of Prisons. Employees are authorized to make arrests of persons sought for a limited type of criminal offense, where the obtaining of an arrest warrant would be impractical. Employees are not authorized to carry firearms, unless the Attorney General issues regulations to that effect. In addition, certain employees are authorized to administer oaths.

§ 3905—Medical relief; expenses

Section 3905, which is derived from 18 U.S.C. 4005, authorizes the Secretary of Health and Human Services to appoint certain medical personnel to serve offenders held by the Bureau of Prisons.

§ *3906—Classification and treatment of prisoners*

Section 3906, derived from 18 U.S.C. 4081, provides that the Federal correctional system shall be planned in such a way as to create an integrated system that takes into account the nature of the community of offenders and their rehabilitation needs. The Committee intends that the Bureau of Prisons make a complete study of each youthful offender committed to its custody pursuant to section 3707 of the proposed code. This study should include a mental and physical examination to determine the offender's special needs for an individualized system of care and treatment. The Committee also intends that the Bureau of Prisons develop a wide variety of placement options, including residential treatment centers. Such institutions can be those established directly by the Bureau of Prisons or those of various States and local agencies with which the Federal Government has contracted. *See* American Bar Association, *Sentencing Alternatives and Procedures* standard 18–2.6, comment at 44–46, and standard 18–2.4 (2d ed. tent. draft 1979).

The combination of comprehensive classification programs and improved educational and training facilities will enable the Bureau of Prisons to fulfill the mandate of the Youth Corrections Act to provide specialized services to youth offenders. *United States* v. *Butler*, 481 F. 2d 531, 536 (D.C. Cir. 1973); *Brown* v. *Carlson*, 431 F. Supp. 755, 768–73 (W.D. Wisc. 1977).

§ *3907—Commitment to Attorney General; residential treatment centers; extension of limits of confinement; work furlough*

Section 3907 carries forward, in modified form, a number of sections from current title 18. The section is primarily derived from 18 U.S.C. 4082. The Committee made some changes to accommodate judicial decisions with respect to the Youth Corrections Act (18 U.S.C. 5005–26). Courts have construed the Youth Corrections Act to require the physical segregation of persons sentenced under that Act from any adult offenders. *United States ex rel. Dancy* v. *Arnold*, 572 F.2d 107 (3d Cir. 1978); *Johnson* v. *Bell*, 487 F. Supp. 977 (E.D. Mich. 1980); *Watts* v. *Hadden*, 469 F. Supp. 223 (D. Colo 1979). This construction led to the anomalous result that persons well above the age of 26, but convicted before the age of 26, were being segregated from other adults.

The Committee determined that it was valid to separate offenders of a young age who had committed less serious offenses from persons who were older and more hardened. The Committee believes, however, that "youth", in this context, should be limited to the age range of 18 to 21. Rather than creating a blanket rule, the Committee has directed the committee on sentencing and the Judicial Conference to promulgate criteria for use in the designation of such "youthful" offenders. In addition, sentencing judges will have discretion at the time of sentencing to determine whether to use such a designation. *See* sections 3907(c) and 3707 of the proposed code. Designation of a person as a "youth" offender will require separation from adults. Such separation will last only until age 21. The Committee intends the Bureau of Prisons to classify "youthful offenders" pursuant to section 3906 of the proposed code.

Subsection (b) requires the Attorney General to promulgate regulations concerning minimum standards for the care and housing of

inmates. These regulations are to take into account the recommendations of relevant professional groups (such as the American Correctional Association, the United Nations, and the American Bar Association).

The Department of Justice has already begun to develop these standards. United States Department of Justice, *Corrections Standards* (1980). In addition, the Bureau of Prisons has agreed to endorse the standards of the American Correctional Association. *See, e.g., Manual of Standards for Adult-Correctional Institutions* (1979).

Twelve Federal correctional institutions were, as of September 1, 1980, accredited by the American Correctional Association as being in compliance with such standards. The remaining institutions should be accredited within the near future.

The combination of these standards with the standards promulgated by the American Bar Association's Joint Task Force on ABA Standards Relating to the Legal Status of Prisoners, *Legal Status of Prisoners* (4th tent. draft 1980), and the United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders (Rev. 1970), would comply with the requirements of this section.

The remaining subsections of section 3907 provide authority for the Attorney General to create programs for furloughs and work release programs. Comptroller of the United States, General Accounting Office, *Community Based Correctional Programs Can Do More To Help Offenders* (Feb. 15, 1980) (Report GGD–80–25)

The Bureau of Prisons currently uses community treatment facilities to house those near the end of their sentence of imprisonment. The results of this practice have been encouraging, but the full potential of this program has yet to be realized. *See* General Accounting Office. *Community Based Correctional Programs Can Do More To Help Offenders* (Report No. GGD–80–25, Feb. 15, 1980); J. Beck, S. Seiter and H. Leibowitz, *Community Treatment Center Field Study* (Office of Research Federal Prison System, 1978). The proposed code does not include a specific rule to govern the use of community corrections facilities, *see* Senate Rep. No. 96–553 at 1070 (1980) (the last ten percent of a sentence should be served in a community treatment facility), because the Bureau of Prisons will undoubtedly wish to permit persons other than those just about to be released to be included in those programs.

§ *3908—Penitentiary imprisonment; consent*

Section 3908 permits offenders to opt to be housed in a Federal penitentiary if they have been convicted by a military court or have been given a sentence of less than one year for a crime punishable by more than one year. This section is derived from 18 U.S.C. 4083.

§ *3909—Copy of commitment delivered with prisoner*

Section 3909, derived from 18 U.S.C. 4084, provides that commitment orders shall accompany the prisoner to the place of confinement.

§ *3910—Transfer for State offense; expense*

Section 3910, which is derived from 18 U.S.C. 4085, authorizes the Attorney General to house in State prisons Federal offenders convicted

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also of State offenses, when requested to do so by the Governor authority of the State.

§ *3911—Temporary safekeeping of Federal offenders by marshals*

Section 3911, which is derived from 18 U.S.C. 4086, grants limited supervisory authority to the United States marshal with respect to Federal inmates. This section, for example, is used to authorize marshals to accompany inmates who are called as witnesses to a trial.

Nothing in this section affects the application of the Uniform Code of Military Justice.

§ *3912—Federal prisoners in State institutions; employment*

Section 3912, which is derived from 18 U.S.C. 4002, authorizes the Attorney General to arrange to house prisoners in State penal institutions for periods of up to 3 years. Inmates who are housed under this program may not be employed in a State prison industry which competes with private enterprises.

§ *3913—Federal institutions in States without appropriate facilities*

Section 3913, which is derived from 18 U.S.C. 4003, authorizes the construction of Federal institutions in a State when no appropriate State facilities are available to house Federal prisoners.

§ *3914—Subsistence for prisoners*

Section 3914, derived from 18 U.S.C. 4003, authorizes the Attorney General to pay the costs of inmates in the custody of the U.S. marshal's service.

§ *3915—Transportation expenses*

Section 3915, which is derived from 18 U.S.C. 4008, authorizes the payment of transportation costs of inmates who travel away from a penal or correctional institution.

§ *3916—Appropriations for sites and buildings*

Section 3916, which is derived from 18 U.S.C. 4009, authorizes the appropriation of funds for the planning of new correctional facilities.

§ *3917—Acquisition of additional land*

Section 3917, which is derived from 18 U.S.C. 4010, authorizes the acquisition of land by the United States to use for prison construction.

§ *3918—Custody of State offenders*

Section 3918, which is derived from 18 U.S.C. 5003, authorizes the Attorney General to house in the Federal prison system offenders who have been sentenced by a State court. The section also requires that the United States shall be fully reimbursed for the expenses of such housing. The Committee expresses no views concerning the correctness of cases construing the current law. *Compare Howe* v. *Civiletti*, Civ. No. 79–2251 (2d Cir. June 23, 1980); *Sisbarrow* v. *Warden*, 592 F.2d 1 (1st Cir. 1979); *with Lono* v. *Fenton*, 581 F.2d 645 (7th Cir. 1978).

§ *3919—Discharge from prison*

Section 3919, derived from 18 U.S.C. 4281, requires the Bureau of Prisons to authorize the payment of transportation costs for released inmates, and of "gate money" of up to $100.

§ *3920—Arrested but unconvicted persons*

Section 3920, which is derived from 18 U.S.C. 4282, authorizes the payment of the travel expenses of material witnesses.

§ *3921—Discharge*

Section 3921, which is derived from 18 U.S.C. 4163, establishes the rules for setting a release date, when the statutory release date would fall on a Saturday, Sunday or holiday.

§ *3922—Orders respecting persons in custody*

Section 3922, which is derived from 18 U.S.C. 3012, provides that the transportation of prisoners to a United States court or at the direction of an attorney for the United States shall be done without writ and without fee.

§ *3923—Advisory Corrections Council*

Section 3923, which is derived from 18 U.S.C. 5002, establishes the Advisory Corrections Council. The Council serves as a forum for resolution of interagency policy disputes. In addition, the Council has offered legislative suggestions on corrections topics.

§ *3924—Establishment of National Institute of Corrections*

This section, which is derived from 18 U.S.C. 4351, establishes the National Institute of Corrections. The National Institute of Corrections is a research and clearinghouse organization on topics such as corrections, recidivism, probation, parole, and sentencing.

§ *3925—Authority and duties of National Institute of Corrections*

This section outlines the duties and authority of the National Institute of Corrections.

SUBCHAPTER II—EMPLOYMENT OF PRISONERS

§ *3981—Federal prison industries; board of directors*

This section, which is derived from 18 U.S.C. 4121, establishes the Board of Directors of the Federal Prison Industries and provides for the membership of the Board.

§ *3982—Administration of Federal prison industries*

This section, which is derived from 18 U.S.C. 4122, provides for the administration of the Federal Prison Industries.

§ *3983—New industries*

This section, which is derived from 18 U.S.C. 4122, provides limitations on the development of new prison industries.

§ *3984—Purchase of prison-made products by Federal departments*

This section, which is derived from 18 U.S.C. 4124, provides for certain rules with respect to the purchase of prison made goods.

§ *3985—Public works; prison camps*

This section, which is derived from 18 U.S.C. 4125, gives the Attorney General certain authority with respect to the use of the services of Federal prisoners.

§ *3986—Prison industries fund; use and settlement of accounts*

This section, which is derived from 18 U.S.C. 4126, provides for the administration of the prison industries fund.

§ *3987—Prison industries report to Congress*

This section, which is derived from 18 U.S.C. 4127, provides that the Board of Directors of the Federal Prison Industries shall make an annual report to the Congress.

§ *3988—Enforcement by Attorney General*

This section, which is derived from 18 U.S.C. 4128, confers upon the Attorney General authority to act in emergencies when it is not possible for the Board of Directors of the Federal Prison Industries to act.

Chapter 41—Appeal of Sentence

Introduction

Until 1891, criminal defendants in the Federal system had the right to obtain appellate review of their sentences.[1] In one of the most significant reforms of the proposed code, this chapter restores that right. Appellate review is the cornerstone of the new sentencing system; it serves to assure defendants that judges have complied with the proposed code's sentencing procedures and will encourage compliance with the sentencing guidelines to be promulgated pursuant to chapter 43 of the proposed code.

Defendants in criminal cases already have the right to seek appellate review of the merits of any criminal conviction. Even relatively insignificant procedural errors at trial can be appealed. This right has been a part of American jurisprudence since 1891, Act of March 3, 1891, ch. 517, 26 Stat. 826, 827, (1891); *see Carroll* v. *United States*, 354 U.S. 394, 400 n.9 (1957), and may have constitutional dimensions, *Abney* v. *United States*, 431 U.S. 651 (1977); *Blackledge* v. *Perry*, 417 U.S. 21, 25 n.4 (1974). *See also* Hood, *The Right of Appeal*, 29 La L. Rev. 498 (1969). In comparison, the lack of appellate review of sentences seem incongruous.[2] Despite the potential deprivation of liberty involved in criminal sentences, judges are not required to state their reasons for imposing a particular sentence, nor does current law provide judges with any guidance about appropriate ranges for particular offenses. Widespread sentence disparity is the result. Partridge & Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (1974 ed.) (Federal Judicial Center study) (hereinafter cited as *Second Circuit Study*).[3]

[1] For an extensive discussion of the early history of appellate review, *see* Coburn, *Disparity in Sentencing and Appellate Review of Sentencing*, 25 Rutgers L. Rev. 207 (1971).

[2] Defendants sentenced under the "dangerous special offender" and the "dangerous special drug offender" provisions (18 U.S.C. 3576; 21 U.S.C. 849) are granted a limited form of appellate review, but sentences are so rarely imposed under those provisions that appellate rights are practically non-existent.

[3] *See also* New York Executive Advisory Comm. on Sentencing, Crime and Punishment in New York: An Inquiry to Sentencing and the Criminal Justice System (1979); L. Sutton, Variations in Federal Criminal Sentences: A Statistical Assessment at the National Level (1978); W. Gaylin, Partial Justice: A Study of Bias in Sentencing (1974); National Advisory Comm'n. on Criminal Justice Standards and Goals, Corrections (1973). J. Hogarth, Sentencing as a Human Process (1971). President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967); Cargan & Coats, *The Indeterminate Sentence and Judicial Bias*, 19 Crime & Delinquency 144 (1974).

Over the last 60 years, scores of researchers have studied the sentencing practices of State and Federal courts. *See* Everson, *The Human Element in Justice*, 10 J. Crim. L. & Criminology 90 (1919); C. Bahn, *Sentence Disparity and Civil Rights* (1977). These studies have shown that sentencing practices are frequently affected by such inappropriate factors as the offender's race, sex or economic status; by who the sentencing judge is, and by where the court is located. Comment, *Discretion in Felony Sentencing—A Study of Influencing Factors*, 48 Wash. L. Rev. 857 (1972); Note, *Sentencing Study*, 52 Wash. L. Rev. 103 (1976). Tiffany, Avichai & Peters, *A Statistical Analysis of Sentencing in Federal Courts*, 4 J. Legal Stud. 369 (1975); L. Sutton, *Variations in Federal Criminal Sentences: A Statistical Assessment at the National Level* (1978); Seymour, *1970 Sentencing Study for the Southern District of New York*, 45 N.Y.S. Bar J. 163 (1973). They have invariably concluded that disparity based on inappropriate factors is endemic to an indeterminate sentencing system.

In 1974, the Federal Judicial Center conducted on behalf of the United States Court of Appeals for the Second Circuit an important and innovative study of sentencing practices within that circuit. It distributed 20 actual case files to district court judges and asked them to impose sentence. Since each judge was given the same files, the only variable which could account for any sentencing variation was the judge doing the sentencing. The offenses and the offenders remained constant.

The study concluded that "disparity is a serious problem in a substantial proportion of Second Circuit cases," and that the problem was not caused by a few judges with erratic sentencing practices. Rather the "absence of a consensus . . . [was] the norm." Since huge disparities existed within the Eastern and Southern Districts of New York, the study also concluded that the geographic location of the courts was not a major factor. *Second Circuit Study*.

Federal judges have also condemned disparity. As one district court put it:

> While absolute uniformity is neither desirable nor attainable, it is imperative that a greater similarity of treatment be attained than now prevails. Individual treatment of offenders must inevitably lead to differences in standards, but this does not account for the flagrant disparities which occur in cases where the only differentiating factors are the geographical situs of the offense or the proclivities of the sentencing judge.

Byrne, *Federal Sentencing Procedures: Need For Reform*, 42 Los Angeles Bar Bulletin 563–64 (1967).

Unjustified sentence disparity is unfair to defendants and violates basic concepts of even-handed justice. It is anomalous to permit appellate review of procedural irregularities, but not to permit appeals of sentences, which just as directly affect the defendant's liberty. Since over 90 percent of all criminal cases and end in guilty pleas, the only real issue for the vast majority of offenders is the nature of the sentence. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 Harv. L. Rev. 293 (1975). Appellate review of sentences will further the goals of individualizing justice, eliminating

the perception that the current system is unfair, and substantially reducing sentencing disparity. *See* American Bar Association, *Appellate Review of Sentences* standard 20–12 (1978).

Chapter 41 therefore provides for appellate review of sentences. The Committee in drafting the provisions of chapter 41 considered not only the rights of criminal defendants but also such public policy concerns as appellate court case load and the need for compliance with applicable sentencing guidelines. Thus, chapter 41 permits a defendant to appeal a sentence that is consistent with applicable sentencing guidelines only by leave of the appellate court. Such a sentence will be vacated only if the appellate court finds it clearly unreasonable. Section 4102 (relating to procedure for appeal for sentence) of the proposed code provides that sentences inconsistent with the sentencing guidelines are reviewable, and are subject to reversal or modification if they are unreasonable. This approach comports with the recommendation of the American Bar Association that the "availability of appellate review of the sentence should not be limited to those cases where the sentence imposed falls outside the applicable guideline range." *See* American Bar Association, *Sentencing Alternative and Procedures* standard 18–2.3 (2d ed. tent. draft 1979); American Bar Association, *Appellate Review of Sentences* standard 20–1.1 (1978) .

Sentencing guidelines are not a complete solution for the problem of the Federal criminal justice system. To require courts to impose the sentence called for by the sentencing guideline, would be effectively to eliminate judicial discretion and would create a sentencing scheme of a mandatory nature. As the Judicial Conference has persuasively demonstrated, such a sentencing structure would be doomed to failure. Federal Judicial Center, *An Evaluation of the Probable Impact of Selected Proposals for Imposing Mandatory Minimum Sentences in the Federal Courts* (1977). On the other hand, appellate court scrutiny injects the critical element of a systematic review of the application of judicial discretion and reduces the chances that the sentencing guidelines will result in arbitrary sentences. As Judge, now Justice Stewart said:

> Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives. . . . It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this most important dimension of fundamental justice.

Shepard v. *United States*, 257 F.2d 293, 294 (6th Cir. 1958) (Stewart, J., then circuit court judge).

§ *4101—Appeal of sentence by defendant*

Subsection (a) permits a defendant to appeal a sentence on the ground that the sentence was not authorized by law. This provision carries forward current law. Under current Federal law, a review of sentence has been granted in cases of reliance on misinformation of a constitutional magnitude, *see, e.g.*, *Townsend* v. *Burke*, 334 U.S. 746

[illegible] *United States* v. *Tucker*, [illegible] F.2d [illegible] (8th Cir. 1971); cases where impermissible criteria involving race or sex have been used, *see, e.g.*, *United States* v. *Myles*, [illegible] F.2d [illegible] (8th Cir. 1974); situations in which the court has failed to receive and consider mitigating circumstances, *see, United States* v. *Brown*, [illegible] F.2d [illegible], [illegible] (2d Cir. 1971); *United States* v. *Malone*, [illegible] F.2d [illegible], [illegible] (8th Cir. 1971); cases in which it is shown that the court used a "fixed and unreasoning" sentencing policy, *generally* meaning that the court has assigned the same sentence for a specific crime to all offenders, *see, e.g.*, *United States* v. *Salazar*, [illegible] F.2d [illegible] (2d Cir. 1974); *United States* v. *Hartford*, [illegible] F.2d [illegible] (8th Cir. 1974); *United States* v. *Baker*, [illegible] F.2d [illegible] (2d Cir. 1974); *United States* v. *Townsend*, [illegible] F.2d [illegible] (3d Cir. 1975); *United States* v. *Daniels*, [illegible] F.2d [illegible] (8th Cir. 1961); *Wooley* v. *United States*, [illegible] F.2d [illegible], [illegible] (8th Cir. 1973); *United States* v. *McKinney*, [illegible] F.2d [illegible] (8th Cir. 1972); *see also United States* v. *Diamond*, [illegible] F.2d [illegible] (4th Cir. 1974) (*per curiam*) (improper to consider non-dismissal reliance as a factor in sentencing); sentences that have been influenced by the judge's "aversion" to the defendant's social or political views, *see United States* v. *Broom*, [illegible] F.2d [illegible], [illegible] (2d Cir. 1973); *United States* v. *Mitchell*, [illegible] F.2d [illegible], [illegible] (2d Cir. 1968) (Kaufman, J., concurring); and sentences that reflect punishment imposed by the court for the defendant's failure either to plead guilty, *see United States* v. *Stockwell*, 472 F.2d 1156, 1157–58 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973); or to accept a judicially approved plea bargain, *see United States* v. *Stockwell*, 472 F.2d 1156, 1157–58 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973); *see also* Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 Mich. L. Rev. 1361, 1435–40 (1975).

Subsection (b)(1) permits a defendant to appeal a sentence (other than a sentence imposed for an infraction) on the ground that the sentence (1) is based upon an inapplicable sentence guideline, (2) is more severe than the most severe sentence provided in the sentence guidelines and is unreasonable, or (3) is a sentence for which no sentence guideline has been promulgated and is unreasonable. A sentencing guideline is inapplicable when its use is based on erroneous fact findings, or where there has been a mechanical mistake made in selecting and applying a guideline to a correctly determined set of facts.

The distinction between sentences which are within or without the guidelines is designed to give an incentive to the judiciary to apply them. The creation of a different standard of review will enable the appellate courts to give presumptive validity to sentences within the sentencing guidelines. Sentences which are within the guidelines and which would be clearly unreasonable should be unusual. The Committee anticipates that the appellate courts will use the opportunity to review sentences within the guidelines to establish a common approach to the guidelines and to give feedback to the guidelines developers. Subsection (b)(2) permits a defendant whose sentence for a felony is within the applicable sentence guideline to petition for leave to appeal on the ground that the sentence is clearly unreasonable.

This approach is consistent with the recommendations of the American Bar Association, *Appellate Review of Sentences* standard 20–1.1(c) (2d ed. 1978).

Subsection (c) precludes a defendant from appealing a sentence imposed pursuant to a plea agreement accepted by the court if the sentence is (1) no greater than the sentence which the attorney for the government recommended or agreed not to oppose, or (2) the sentence agreed to by the defendant and the attorney for the Government. The preclusion of agreed upon sentences is a reflection of the need to preserve judicial resources. Cases where the defendant and the attorney for the Government have agreed on a plea and the essence of a sentence, where the judge has agreed to accept the plea agreement, and where the sentence is consistent with the agreement, the defendant has no justifiable cause to complain about the sentence. In the rare case where the defendant has misapprehended the nature of the plea agreement or the expected sentence the otherwise applicable provisions relating to vacating pleas should be used instead of appellate review of sentence. Fed. R. Civ. Proc. 11(e)(4); 32(d).

§ 4102—Procedure for appeal of sentence

Subsection (a) requires the defendant to file a notice of appeal under subsection (a) or (b)(1), or a petition for leave to appeal under subsection (b)(2), within 30 days after the imposition of sentence. The notice or petition is filed with the clerk of the district court.

Subsection (b) requires the clerk of the district court to transmit to the court of appeals those portions of the record relevant to the sentence. *See* American Bar Association, *Appellate Review of Sentences* standard 20–3.3 (2d ed. 1978).

Subsection (c) directs the court of appeals to consider: (1) those portions of the trial record transmitted under subsection (b); (2) the applicable sentence guideline; (3) the district court's opportunity to observe the defendant; (4) the purposes of sentencing set forth in section 3101 of the proposed code; and (5) the factors to be considered at time of sentencing set forth in section 3102 of the proposed code. The appellate court will, of course, review the district court's compliance with the procedural requirements of chapter 31 of the proposed code. *See* American Bar Association, *Appellate Review of Sentences* standard 20–3.2(ii) ("the reviewing court . . . should . . . review . . . the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.")

Subsection (d)(1) authorizes the court of appeals (1) to vacate the sentence and resentence the defendant or (2) to remand the case to the district court for sentencing, but in neither instance can any new sentence be more severe than the sentence being appealed. This limitation comports with the recommendations of the American Bar Association. *Appellate Review of Sentences* standard 20–3.3 (2d ed. 1978). *See also* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–4.9, comment at 107–110 (2d ed. tent. draft 1979). In order to take either course of action, subsection (d)(1) requires that the court of appeals determine:

(1) in an appeal under subsection (a), that the sentence is not authorized by law;

(2) in an appeal under subsection (2)(1)(A), that the sentence is based upon an inapplicable sentence guideline;

(3) in an appeal under subsection (b)(1)(B), that the sentence is more severe than the most severe sentence provided in the sentence guideline and is unreasonable;

(4) in an appeal under subsection (b)(1)(C), that the sentence is one for which no sentence guideline has been prescribed and is unreasonable; or

(5) in an appeal under subsection (b)(2), that the sentence is within the sentence guideline and is clearly unreasonable.

Subsection (d)(2) requires that the court of appeals give reasons in writing for any decision to vacate sentence and impose a lesser sentence or remand to the district court. *See* American Bar Association, *Appellate Review of Sentences* standard 20–3.1(b) (2d ed. 1978).

Subsection (e) permits a defendant to join an appeal of sentence with an appeal on any other issue.

Subsection (f) authorizes the court of appeals to permit or to require the attorney for the Government to file an answer. The appeal is to be decided on the basis of the appeal and the answer, i.e., without oral argument, unless the court of appeals otherwise directs.

The Committee anticipates that the Supreme Court will forward to the Congress proposed changes in the Federal Rules of Criminal and Appellate Procedure to implement effectively the provisions of this chapter. In addition, the Committee anticipates that the various Circuit Courts of Appeals will create circuit rules for the disposition of appeals from sentence. The desirability of permitting oral arguments on sentence appeals should be carefully considered in establishing such procedures. In order for appellate reveiw to play a meaningful role in assuring that not only a check on compliance with the sentencing guidelines, but also in maintaining the appearance of fairness, the review should be more than mechanical. Appellate courts should not create rules which have the effect of delegating the ministerial function of reviewing sentences to clerks.

Chapter 43—Sentencing Guidelines

Introduction

This chapter mandates the Judicial Conference of the United States with the assistance of a committee on sentencing to promulgate comprehensive sentencing guidelines, and sets forth the procedures for doing so. The guidelines break new ground in several respects. First, they provide courts with sentencing standards, which should materially reduce sentence disparity. Second, these standards will enable courts and the Congress to relate levels of punishment to distinct categories of offenders and offenses. Finally, the procedures for promulgating the guidelines will provide a forum for the development of national sentencing policies.

The concept of sentencing guidelines is relatively new to American law and to the criminal justice system. D. Gottfredson, L. Wilkins & P. Hoffman, *Parole and Sentencing Guidelines* (1978). The United States Parole Board (now the United States Parole Commission), in conjunction with leading academic experts, first developed a series of guidelines in 1974. United States Parole Commission, *Federal Parole*

Decision-Making: Selected Reprints Vol. I (1974–1977) and Vol. II (1978–1979); Coffee, *The Repressed Issues of Sentencing*, 66 Geo. L.J. 975 (1978). A number of State parole authorities have also successfully implemented guidelines; some State and local courts have followed suit by promulgating sentencing guidelines. In the past few years, sentencing guidelines have been used in such diverse jurisdictions as Essex County, New Jersey (Newark); Maricopa County, Arizona (Phoenix); and Denver, Colorado. L. Wilkins, J. Kress, D. Gottfredson, J. Calpin & A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* (1978); Testimony of Don Gottfredson, Graduate School of Criminal Justice, Rutgers University, Hearings on Revision of Federal Criminal Laws, Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. (1980). *See* Criminal Courts Technical Assistance Project, Institute for Advanced Studies in Justice, American University Law School, *Overview of State and Local Sentencing Guidelines and Sentencing Research Activity* at 2 (1980) (sentencing guideline projects underway at State or local level, or both, in 23 States).

More recently, the States of Minnesota and Pennsylvania have adopted sentencing commissions and sentencing guidelines. Minn. Stat. Ann. section 244.09 (West Supp. 1979); Minnesota Sentencing Guidelines Commission, *Report to the Legislature* (Jan. 1, 1980); 18 Pa. Cons. Stat. Ann. sections 1381–86 (Purdon Supp. 1979–80). These and other legislative proposals have provided increased impetus for sentencing guidelines. But use of the term "sentencing guidelines" has led to some misconceptions about them. First, there is no one generally accepted model for sentencing guidelines. While many jurisdictions use similar approaches, the differences between them probably outnumber the similarities. Zalman, *Sentencing Guidelines*, 67 Geo. L.J. 1005, 1012–15 (1979); Forst, Rhodes, & Wellford, *Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines*, 7 Hofstra L. Rev. 89 (1979). Second, sentencing guidelines do not necessarily mandate fixed sentences, with no possibility of release on parole. Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra 89 (1978); A. von Hirsch, *Abolish Parole?* (1979); Taylor, *In Search of Equity: The Oregon Parole Matrix*, 43 Fed. Probation 52 (1979); Ariz. Rev. Stat. Ann. section 13–901 (1978) (retains discretionary parole release despite enactment of presumptive sentencing scheme); Or. Rev. Stat. section 144.780 (Repl. Vol. 1977) (sets forth parole release guidelines). Although sentencing release guidelines can help to regularize the decision making process, guidelines alone cannot eliminate sentencing disparity. Both sentencing and parole guidelines are needed to facilitate this result. See discussion of chapter 47, *infra* at 505–13. *See* Zeisel & Diamond, *Search for Sentencing Equity; Sentence Review in Massachusetts and Connecticut*, 4 Am. B. Foundation Research J. 881 (1977); Note, *Appellate Review of Primary Sentencing Decisions; A Connecticut Case Study*, 69 Yale L. J. 1453, 1464–66 (1960) (appellate review of sentence by itself can accomplish very little).

It is to be hoped that innovations such as the committee on sentencing and the sentencing guidelines will promote a dialogue among the

courts, the Congress and the public about how best to achieve justice and equity in the Federal criminal justice system. The decision to create sentencing guidelines may well prove to be easier than those regarding how the guidelines are to be promulgated, what they are to say, and how they are to be used. Congress task in resolving these questions will be made easier with the expert assistance of the committee on sentencing.

§ *4301—Sentencing guidelines*

Subsection (a)(1) requires the Judicial Conference of the United States to prescribe sentencing guidelines for the use of Federal judges in determining the appropriate sentence for convicted criminal defendants. The purpose of these guidelines is to: (1) promote fairness and certainty in sentencing; (2) eliminate unwarranted disparity in sentencing; and (3) improve the administration of justice.

The Judicial Conference of the United States was created in 1922 pursuant to 28 U.S.C. 331. Its members include the Chief Justice of the United States, the chief judge of each of the judicial circuits, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patents Appeals and one district court judge from each judicial circuit (chosen at a circuit conference pursuant to 28 U.S.C. 311 and 333).

The Judicial Conference of the United States is the appropriate body to promulgate the sentencing guidelines for several reasons. First, the procedures for promulgating the sentencing guidelines are familiar to Congress in that they are similar to those the Judicial Conference uses to promulgate amendments to the Federal Rules to Civil Procedure (28 U.S.C. 2072) and the Federal Rules of Criminal Procedure (18 U.S.C. 3371). *Cf.* 28 U.S.C. 2076 (relating to the Federal Rules of Evidence) (if one House of Congress disapproves a proposed amendment, that amendment does not take effect; amendments creating, abolishing, or modifying a rule of privilege require enactment by Congress). Second, because judicial discretion in sentencing is a cornerstone of the criminal justice system, assigning the task of developing guidelines to the Judicial Conference is only logical. In addition, judges who have had a strong voice in developing the guidelines will be more likely to consistently and fairly apply them. L. Wilkins, J. Kress, D. Gottfredson, J. Calpin & A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* 28 (1978). Third, the Administrative Office of the United States Courts and the Federal Judicial Center, the research and study arm of the Judicial Conference, have sufficient resources to assist in the promulgation of the guidelines. There is no reason to create another agency when the Judicial Conference has the expertise and capacity to write the guidelines.[1] Equally important, to create an Executive branch agency or commission to promulgate the guidelines might not comport with the constitution's separation of powers requirement. Tonry, *The Sentencing Commission in Sentencing Reform*, 7 Hofstra L. Rev. 315, 319–21, n. 12 (1979); *but see Note, The United States Sentencing Commission: A Constitutional Delegation of Congressional Power*, 55 Ind. L. J. 117

[1] This expertise should make Congressional rejection of the guidelines unlikely. However, if Congress has a major policy disagreement with the approach taken in the proposed sentencing guidelines, it may be advisable to reject the guidelines—at least temporarily—in total and send them back to the committee on sentencing for further study.

(1979); Hearings on H.R. 6869 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong. 1st and 2d sess., Serial No. 52, at 1455 (testimony of Phyllis Bamberger, Attorney-in-Charge, New York Legal Aid Society). Traditionally, the courts and Congress have shared the responsibilities for establishing Federal sentencing policies. Congress criminalizes conduct and sets maximum sentences, while the courts actually impose those sentences. *Ex parte United States*, 242 U.S. 27 (1916) (courts do not have independent authority to suspend sentence); *United States* v. *Rosenberg*, 195 F.2d 583 (2d Cir. 1952) (appellate courts are not authorized to review sentences within the statutory limits).

Any suggestion that the Executive Branch should be responsible for promulgating the guidelines would present troubling constitutional problems. More importantly, it would fundamentally alter the relationship of the Congress and the Judiciary with respect to sentencing policies and their implementation. Wilkins, *Sentencing Guidelines to Reduce Disparity*, 1980 Crim. L. Rev. 201 ("Control is best exercised by those who are controlled—by that means the collective wisdom and experience of the judges can become effective in sentencing policy.").

Subsection (a)(2) requires the Judicial Conference to submit complete proposed sentencing guidelines to the Congress by May 1 of the year they are to be effective.

As with the Federal Rules of Criminal Procedure, the guidelines will take effect 180 days after they are submitted to Congress, unless Congress takes contrary action. 18 U.S.C. 3371. The rejection of any particular sentencing guideline should be undertaken only after careful study. Such piecemeal changes may skew an otherwise balanced package, and the rejection of a guideline would leave the courts without guidance and may force appellate courts to hear numerous duplicative appeals. *See* section 4101(b)(1)(C) of the proposed code. Title III of the proposed code requires the Judicial Conference to submit the first sentencing guidelines six months before the code's effective date. They should address the appropriate disposition of all offenses set forth in the code, although these initial guidelines may be relatively general in nature. Sentences for infrequently prosecuted offenses or unusually complex cases may be more effectively developed through later amendments.

Subsection (b) requires the Judicial Conference to also submit to Congress a detailed and comprehensive statement of the projected effect of the guidelines on Federal prisons, criminal dockets, and expenditures. Chief Justice Burger has long advocated the use of judicial impact statements. Burger, *Annual State of the Judiciary*, 56 A.B.A.J. 929 (1970). *See also* Minn. Stat. Ann. section 244.09(5) (1979) (impact statement on correctional resources required with submission of sentencing guidelines).

Subsection (b) also requires the Judicial Conference to consult with the Federal Bureau of Prisons, the Administrative Office of the United States Courts, the United States Parole Commission, the Office of Management and Budget, and other relevant Federal agencies before preparing the impact statement. Other relevant agencies or groups who should be consulted include prosecutive agencies, such as the Department of Justice, probation officers, pretrial service agencies, and Federal Community and Public Defenders.

Because of the need for complete and objective information in the impact report the Judicial Conference should consider relying on academicians and independent consultants for its preparation. The impact statements should not be prepared by the same people who developed the guidelines.

Although the Committee considered but rejected requiring the sentencing guidelines to be based on the average time actually served under existing law it does expect the impact statement to compare the sentence range proposed in the guidelines with the actual time served. *See* p. 492 *infra*. To the extent possible, given the limited knowledge on the subject, the impact statement should reflect any influence a change in the guidelines might have on the incidence of criminal conduct. *See generally* National Academy of Sciences, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978); New York Executive Advisory Committee on Sentencing, *Crime and Punishment in New York: An Inquiry into Sentencing and the Criminal Justice System*, 109–23 (1979) (and studies cited in footnotes and in Appendix E); Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 Yale L. J. 1408, 1410 (1979); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 Buffalo L. Rev. 717 (1972).

Subsection (c) provides that amendments to the sentencing guidelines shall become effective in the same fashion as the initial guidelines.

§ 4302—Contents of sentencing guidelines

Subsection (a) establishes the basic parameters of the sentencing guidelines to be promulgated pursuant to section 4301 of the proposed code. Within these parameters, the development of the guidelines is left to the discretion of the Judicial Conference and its committee on sentencing. Congress should not become involved in day-to-day technicalities concerning sentencing. The California and Indiana sentencing systems, *see* Cal. Penal Code sections 1170, 3000, and 3040 (West Supp. 1979); Ind. Code sections 35–50–1–1, have been criticized for requiring such involvement on the part of State legislatures. *See, e.g.*, Messinger & Johnson, *California's Determinate Sentencing Statute: History and Issues*, reprinted in *Determinate Sentencing: Reform or Repression?* (1978); Clear, Hewitt, & Regoli, *Discretion and the Determinate Sentence: Its Distribution, Control and Effect on Time Served*, 24 Crime & Delinquency 428 (1978). *See generally* Zimring, *Making Punishment Fit the Crime*,—Hastings Center Report—(Dec. 1976); Alschuler, *Sentencing Reform and Prosecutorial Powers: A Critique of Recent Proposals for Fixed and Presumptive Sentence*, 126 U. Pa. L. Rev. 550 (1978).

The technical expertise developed by the committee on sentencing should permit Congress to focus on the larger policy questions, rather than technical details, when it reviews the proposed guidelines. M. Frankel, *Criminal Sentences: Law Without Order* 118–24 (1972); Tonry, *The Sentencing Commission in Sentencing Reform*, 7 Hofstra L. Rev. 315 (1979); Zalman, *A Commission Model of Sentencing*, 53 Notre Dame Law. 266 (1977); Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 798–820 (1980).

In order to avoid unnecessary disparity in sentences, subsection (a)(1) requires that the sentencing guidelines be based on categories of offenses and offenders. Similarly situated offenders (that is, persons with relatively similar prior criminal histories) convicted of offenses within the same category ordinarily should not receive materially different sentences.

The guidelines promulated by the United States Parole Commission, *see* 28 C.F.R. 2.20, provided a model for the Committee's deliberation on the nature of the guidelines. Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 Colo. L. Rev. 237 (1980). The parole guidelines use a matrix model, with one axis measuring offense severity and the other measuring the offender's relevant previous history. This approach has also been adopted in a modified form in Minnesota. Minnesota Sentencing Guidelines Commission, *Report to the Legislature* (Jan. 1, 1980). As attractive as these models are, they represent the product of just more than a decade of research. Other, more sophisticated models are probably still to be developed. Forst, Rhodes & Wellford, *Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines*, 7 Hofstra L. Rev. 175 (1979); Sutton, *Predicting Sentences in Federal Courts: Feasibility of a National Sentencing Policy* (1978); A. Partridge & M. Leavitt, *The Feasibility of a National Sentencing Policy* (1979) (published by the Federal Judicial Center); Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 Geo. L. J. 975 (1978). Thus, this section deos not dictate the use of any particular format for the guidelines.

There are, however, some limitations on the authority of the Judicial Conference. Subsection (b) requires the guidelines to indicate the appropriate sentencing disposition for each case within each category of offenders and each category of offense. However, the appropriate sentencing disposition need not be based on the average time actually served under current law. The Committee intends that there be no aggregate increase in the rate of imprisonment or in the average time served, and that there be no substantial increase in the prison population. Any such changes should be clearly revealed in the impact statement required by section 4301 of the proposed code.

The sentencing guidelines created by this section are to be based on the facts which arise out of the defendant's conviction. The Committee does not intend, nor does it approve of, the use of sentencing guidelines on mere allegations of what the offender did. *See. e.g.*, Model Sentencing and Corrections Act section 3–115, Commentary at 143–45 (1980) (provides for "real offense sentencing"); *see also* Perlman and Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioner's Model Sentencing and Corrections Act*, 65 Va. L. Rev. 1176, 1199–1213 (1980). To permit "real offense" sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties. Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 757–72 (1980) (a lengthy discussion of the constitutional and policy questions involved in using a defendant's actual criminal behavior as a basis for sentencing decisions as opposed to the offense of conviction).

Defendants have a constitutional right to require that the Government prove the elements of a crime beyond a reasonable doubt. The Supreme Court has, however, never clearly reconciled what appear to be apparently inconsistent views with respect to the degree to which due process protections apply at the sentencing stage. *Compare Williams* v. *New York*, 337 U.S. 241, 250 (1949), *with Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion per Stevens, J.) ("the sentencing process . . . must satisfy the requirements of the Due Process Clause."

This problem is compounded in the context of a new criminal code. Under the assumptions prevalent in when *Williams* was decided, judges were given the widest possible latitude in setting a sentence. For reasons outlined in greater detail elsewhere, the Committee has rejected the premises of an indeterminate sentencing system. The use of sentencing hearings, a requirement that a sentence be accompanied by a statement of reason, sentencing guidelines, and meaningful appellate review are all a part of an overall sentencing system that structures discretionary decision making in sentencing.

These changes alone necessitate a review in the treatment of factors to be considered in sentencing, and who has the burden of establishing them.

The choice posed by these legal and policy shifts is whether the sentencing guidelines should address the crime of conviction or the alleged "real offense" in setting the appropriate guideline sentence. If the sentencing guidelines were to be based on the "real offense" several problems would surface. First, there may be an unintended effect on plea bargaining. If, for example, "real offense" sentencing guidelines did not distinguish between defendants who plead and those who go to trial, there would be a substantial impact on the rate of plea bargaining. On the other hand, an explicit discount or reduction in expected sentence solely because of a waiver of the constitutional right to a trial may be improper. *Corbitt* v. *New Jersey*, 439 U.S. 212, 227 (1978) (Stewart, J., concurring).

The second problem with "real offense sentencing" is that it would permit the prosecution to obtain substantially more severe penalties without the need to meet the higher burden of proof. The Supreme Court, in *Specht* v. *Patterson*, 386 U.S. 605 (1967), found that increases in sentence based on predictions of future misconduct amounted to a deprivation which triggered the right to a separate sentencing hearing complete with a right to confrontation and cross-examination. Moreover, countenancing severe increases in the penalty levels based on facts not proven by the prosecution would offend basic notions of procedural fairness.

A final problem with the use of "real offense" sentence guidelines is that to permit the consequences of a particular grade of felony to equal or exceed the consequences of the next highest grade felony because of unproven allegations would do violence to the Congressionally designed classification scheme. Professor Schulhofer gives a good example:

> [F]or a defendant committing robbery and pleading guilty to theft, the sentence under the [Senate's] proposed Federal Criminal Code could not exceed five years' imprisonment,

> the statutory maximum for theft. Referring to the guidelines, the sentencing judge might find that the prison term indicated, for this defendant's offender category, was two and one-half years for an actual theft and five and one-half years for robbery. In such a case, a real-offense policy would call for a five and one-half year sentence, regardless of the formal characterization of the offense. Because the statutory maximum may not be exceeded, however, a five-year sentence would be imposed on the "theft" conviction, while five and one-half years would have been imposed upon formal conviction for robbery. If the guideline sentence for robbery were only four and one-half years, that sentence would be imposed whether the formal conviction was for robbery or theft.

Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 758–59 (1980).

The rejection of a "real offense" sentencing scheme does not prevent the sentencing court from considering factors not directly established as an element of the offense. First, the sentencing guidelines should reflect differences in the nature of the conduct underlying various offenses of conviction. This differentiation does not permit the use of factors that would justify a conviction for a different, more serious crime. Thus, the guidelines for theft should not reflect distinctions between theft by embezzlement and by force, because theft by force would be robbery. On the other hand, it would be appropriate to distinguish between a person who committed arson for pecuniary gain and a person who set a fire under the mistaken belief that such person had a right to do so. The distinction made by these guidelines should be limited to a range within the classification for the particular offense of conviction involved. This approach is consistent with the recommendations of the American Bar Association's Project on Standards Relating to the Administration of Criminal Justice, *Sentencing Alternatives and Procedures*, Standard 18–3.1, comment at 71 (2d ed. tent. draft 1979) (to the extent that "real offense" sentencing guidelines are generally rejected).

In addition to the distinctions which would be permissible in the sentencing guidelines, the court has a certain amount of leeway by virtue of the provisions of section 3105(c)(2)(D) of the proposed code. The inclusion of such information in the sentencing process in this fashion, as opposed to systematic inclusion in the guidelines, will make it more visible and individualized and subject these factual assertions to the burden of proof provisions of chapter 31 of the proposed code. Thus, under the proposed sentencing structure the primary focus of sentencing will be on the facts involved the defendants conviction, although deviation from the usual case is permissible, and indeed encouraged if due process standards are met.

It is clear from other experiences with sentencing guidelines, including that of the United States Parole Commission, that reliance only on past sentencing practices is not advisable. Academic researchers have demonstrated that it is a relatively easy task to describe the most important factors which went into a sentencing decision once the necessary data is gathered. L. P. Sutton, *Variations in Federal Criminal*

Sentences: A Statistical Assessment At the National Level (1978) (length of prison term was found to be more predictable than was the decision to incarcerate). Although it is possible for the committee on sentencing simply to review past sentencing decisions, to determine the factors associated with those decisions and to premise the guidelines on these factors, such descriptive guidelines merely lock future decision-making into the wisdom—and the errors—of the past. Coffee, *Repressed Issues in Sentencing*, 66 Geo. L. J. 975, 1034 (1978); Singer, *In Favor of Presumptive Sentences Set by a Sentencing Commission*, 124 Crime & Delinquency 401 (1978). While it is of course important to begin with these past practices, policy considerations may demonstrate a need for change. The committee on sentencing may find helpful the methods used by the United States Parole Commission to revise the parole release guidelines.

It may someday be possible accurately to predict the effect on crime of changes in sentence severity. If the Judicial Conference or the Congress conclude that current sentences are too long or too severe, it would be a mistake to perpetuate such sentences. The Judicial Conference should review the existing literature, including that concerning the experience of the States, and evaluate whether shorter sentences for less serious offenses are appropriate. *See* Lasker, *Presumption Against Incarceration*, 7 Hofstra L. Rev. 407 (1979) (and studies cited therein). If, for example, there were a fair degree of certainty that less serious punishment for nonviolent first offenders would not present an appreciable risk to public safety or create disrespect for law, then a sentence guideline setting forth such reduced penalties would be in order, even though past practice is to the contrary. Similarly, if there were a strong showing that increased sentence severity for a particular category of offense or offender would produce a substantial reduction in crime, then the Judicial Conference should recommend such a change. *See* Wilkins, *Problems with Existing Prediction Studies and Future Research Needs*, 71 J. R Crim. L. & Criminology 98 (1980). *See generally* Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 Yale L.J. 1408 (1979).

In general, the guidelines should not require automatic enhancement or reduction of a sentence if aggravating or mitigating circumstances exist. The Supreme Court in *Roberts* v. *Louisiana*, 431 U.S. 633 (1977) (per curiam), noted some of the myriad of factors to be considered at sentencing:

> Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts. . . .

In some States, the legislature lists various aggravating or mitigating factors and requires their mechanical application. *See e.g.*, Ariz. Rev. Stat. Ann. section 13–702(A) (1979). The Committee rejected such a rigid approach. Some factors often denominated by legislatures as aggravating or mitigating can be applied in such a way as to perpetuate sentence disparity, or, in some cases, impermissible kinds of

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discrimination. In other instances, the same fact could be both aggravating and mitigating, depending on the circumstances.

However, the guidelines should provide that those with previous criminal histories should be punished more severely than first offenders, because the level of culpability of a person with a prior record is higher, and such a person is on fair notice that subsequent convictions such a person is subject to enhancement of punishment. *Graham* v. *West Virginia*, 224 U.S. 616, 623 (1912) ("[T]he repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."). *See* A. von Hirsch, *Doing Justice* 85 (1976). But care should be used in assessing the consequences of the offender's prior criminal history. R. Farrell and V. Swigert, *Prior Offense Record as a Self-Fulfilling Prophesy*, 12 Law & Soc. Rev. 437 (1978).

The Committee expresses no view as to the wisdom or propriety of using records relating to adjudications of juvenile criminal misbehavior. This policy issue must be resolved by the committee on sentencing. In this regard, the committee on sentencing may benefit from the work done by the Minnesota Sentencing Commission. *See* Minnesota Sentencing Commission, *Report to the Legislature* (January 1, 1980).

As guidance to the committee on sentencing, the following factors should be considered as potentially aggravating or mitigating insofar as these factors are not already taken into account in the classification of the offense. Some of these factors may be incorporated in the guidelines, whereas others may be specified as reasons for departure from the guidelines.

(1) If more than one defendant was involved in the crime, the defendant was a leader of the criminal activity or received substantial income from the criminal conduct;

(2) the offense involved more than one victim;

(3) a victim was particularly vulnerable;

(4) a victim was treated with cruelty during the perpetration of the offense;

(5) the harm inflicted on a victim was especially great;

(6) the offense evidenced a high degree of cruelty or was committed to gratify the defendant's desire for pleasure or excitement;

(7) the defendant has a recent history of unwillingness to substantially comply with the conditions of a sentence involving supervision in the community;

(8) the offense clearly involved premeditation and a sophisticated level of advance planning;

(9) the defendant abused a position of public trust to commit the offense.

(10) the defendant's criminal conduct neither caused nor threatened serious bodily harm;

(11) the defendant did not contemplate that the criminal conduct would cause or threaten serious bodily harm;

(12) the defendant acted under strong provocation;

(13) substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though such grounds do not establish a defense such as coercion, duress, mistake, or necessity;

(14) the defendant played a minor, passive role in the commission of the offense;

(15) before detection, the defendant compensated, or make a good faith attempt to compensate, the victim of the criminal conduct for the damage or injury sustained;

(16) the defendant, because of youth or old age, lacked substantial judgment in committing the offense;

(17) the defendant was motivated by a strong desire to provide necessities for the defendant's family;

(18) the defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense;

(19) the defendant assisted authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed offenses;

(20) the defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the defendant's conduct;

(21) the victim, if any, initiated the conduct or participated in such conduct.

See California Rules of Court sections 414 and 416; Model Sentencing and Corrections Act sections 3–108 and 3–109; Twentieth Century Fund, *Fair and Certain Punishment* 44–45 (1976); Model Penal Code section 7.01; *see also* American Bar Association, *Sentencing Alternatives and Procedures* standards 18–2.1 and 18–3.2(b)(i), comment at 10 (2d ed. tent. draft 1979); and National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, standard 5.2(3) (1974).

As noted earlier, the proposed code's new sentencing scheme is an attempt to eliminate disparity in sentencing. Current practice is characterized by unfettered judicial discretion and an absence of Congressional guidance. Thus, there is a potential for the courts to base sentencing decisions on inappropriate grounds, such as race or sex. The use of socio-economic data such as educational achievements or family history can be discriminatory, as has persuasively been shown in the context of employment decision making. *See* Genz, *Employers' Use of Criminal Records Under Title VII*, 29 Cath. U. L. Rev. 597 (1980) (and cases cited therein). *See generally* Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 Geo. L.J. 975, 1017–18 (1978). Socio-economic data should not be considered relevant to the promulgation of sentencing guidelines simply because such data may have influenced past decisionmaking. The ability to predict or assess further behavior by using such data is insufficiently developed to justify its use. American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–3.2(a)(vi), comment at 75 (2d ed. tent. draft 1979); N. Morris, *The Future of Imprisonment* 62–73 (1974). Blumstein, Cohen, & Nagin, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978). Even assuming the accuracy of predictive data, substantial questions of fairness would have to be resolved before any use of such information should be undertaken. O'Leary, Gottfredson, & Gellman, *Contemporary Sen-*

tencing Proposals, 11 Crim. L. Bull. 555, 567–70 (1975) (discusses the philosophy that a sentence should be based on what a defendant did rather than on predictions about future criminality); Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 Geo. L.J. 975, 1056–1105 (1978); Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 Mich. L. Rev. 1362 (1975).

Two of the more significant issues to be addressed by the guidelines are set forth in subsections (c)(1) and (2) (relating to fines and to imprisonment, respectively, and discussed at 498–500 *infra*. In addition, the guidelines should address certain other issues.

First, they should provide guidance on the most fundamental decision of sentencing—whether to deprive a convicted person of liberty (the "in-out" decision). Under current law, this decision is made without any Congressional guidance. Many sentencing guidelines address only the appropriate duration of prison terms, or are too vague to be meaningful. *See, e.g.*, California Rules of Court sections 414 and 416.

Second, the guidelines should address the circumstances under which a sentence of conditional discharge, probation or restitution is appropriate, and the nature of any probation conditions. *See* Minnesota Sentencing Commission, *Report to the Legislature*, (Jan. 1, 1980) (a thoughtful treatment of both types of guidelines issues).

While the Committee does not mandate the use of a particular form of sentencing guidelines, the proposed guidelines must be more than a list of general purposes or criteria for the sentencing judge to consider in individual cases. *See, e.g., California Rules of Court* section 414; State of New Jersey Administrative Office of the Courts, *Report of the Sentencing Guidelines Project to the Administrator of the New Jersey Courts* (1978) (a mere description of past sentencing practices). The guidelines must also be more than a series of actual or hypothetical cases, with recommended dispositions for each. Judicial Council of the Second Circuit Court of Appeals, *Benchmarks Project* (December 23, 1979). The proposed code contemplates a systematic guideline structure. While the Committee does not require a particular format, it does expect that the proposed guidelines will be clear, specific, internally consistent, relatively easy to understand and apply, and will explicitly state the policy goals of the guidelines.

Subsection (c)(1) requires that the guidelines indicate appropriate fine levels. Chapter 35 of the proposed code sets forth additional factors to be considered in promulgating the guidelines. The committee on sentencing should consider recommendations with respect to "day fines" (calculated on the basis of how much the defendant earns) or similar methods of fine calculation. *See* Newton, *Alternatives to Imprisonment, Crime & Delinquency* 109 (1976); National Swedish Council for Crime Prevention, *A New Penal System* (1978). The guidelines should indicate the dollar amount to be paid and payment schedules, and should avoid unreasonable aggregation of fines imposed for more than one conviction based on the same conduct or criminal episode.

Subsection (c)(1)(B) is based on suggestions by the American Bar Association and representatives of the business community. It reflects

two basic changes in the law. First, current law permits aggregation of offenses. For example, each mailing in a scheme to defraud is a separate offense. 18 U.S.C. 1341; *Durland* v. *United States*, 161 U.S. 306 (1896). The proposed code provides that only one offense is committed under such circumstances, because the convictions are based on the same conduct "or arise" from the same criminal episode. *See, e.g.*, section 2534 (relating to executing a fraudulent scheme) of the proposed code. Second, fine levels for many offenses are woefully inadequate under current law. Current law permits, if not encourages, unnecessary multiple charges in order to increase potential fine liability to an adequate level. By dramatically increasing fine levels from an average of $10,000 for most felonies to a million dollars for organizations and $250,000 for individuals, the proposed code avoids this situation. The phrases "same conduct" and "same criminal episode" are based on the recommendations of the Brown Commission (*see Final Report* section 703). This provision does not, however, affect specific statutory authorization to impose separate fines for daily criminal violations. *See, e.g.*, section 2753 of the proposed code.

Subsection (c)(2) parallels subsection (c)(1) and requires that sentencing guidelines providing for a term of imprisonment must indicate a range of time for such term. The time ranges for less serious offenses should be narrower than those applicable to the most serious offenses. It may be difficult to develop an accurate statistical profile, and thus an appropriate range of time, for these more serious offenses, since such offenses so infrequently occur and are so varied in nature.

The range of time also depends on whether the committee on sentencing bases the guidelines on "symbolic" or "real" time. Symbolic time is the amount of time imposed; real time is the amount of time actually served. A. von Hirsch & K. Hanrahan, *The Question of Parole* 83–104 (1979) (discusses the likely problems with moving to "real time" sentencing); David Rothman, Doing Time: Days, Months and Years in the Criminal Justice System, Pinkerton Lecture delivered at the School of Criminal Justice, State University of New York at Albany, March 6, 1974 (unpublished but reprinted in part, Op Ed page, *New York Times*, September 9, 1977). If the committee uses symbolic time, the recommended length of imprisonment may simply be a maximum amount. If the committee uses real time, the range of time should be narrow enough to eliminate sentencing disparities, but wide enough to apply to a general class of offenses, rather than only to one very specific offense. The committee on sentencing should use its discretion to resolve these questions.[1]

The sentencing guidelines must of course be coordinated with the guidelines promulgated by the United States Parole Commission. If the guidelines use symbolic time, the actual duration of a sentence will be determined by the parole guidelines. In addition, judicially mandated periods of parole ineligibility pursuant to section 4704(b)(2) of the proposed code should not increase. Otherwise, dramatic increases in the prison population would occur. Current law permits judges to set periods of parole ineligibility of up to one-third the sentence imposed, but in well over 90 percent of cases before the Parole Com-

[1] If a criminal provision proscribes a wide range of conduct, and each type of conduct is of a different level of culpability, the committee on sentencing may set lower guidelines for the less culpable conduct than for the more culpable, even though both are proscribed by the same section of the proposed code.

mission, this authority has not been exercised in a way that substantially conflicts with parole release guidelines. Letter from Benjamin J. Malcolm, Vice-Chairman, United States Parole Commission, to Congressman Robert F. Drinan, Chairman, Subcommittee on Criminal Justice, House Judiciary Committee (June 26, 1980). The Committee does not expect the courts to attempt to evade the guidelines through increased use of their authority to set periods of parole ineligibility.

If the committee on sentencing uses a symbolic time, then the sentencing guidelines would (1) set the maximum imprisonment for categories of offenses and offenders; (2) strictly limit the use of periods of parole ineligibility; (3) permit coordination between sentencing judges and the Parole Commission by encouraging the use of judicial recommendations of release dates, where appropriate.

If the committee on sentencing chooses a "real time" approach, there should be a concommitant decline in the rate of parole grants. Section 4705(a) of the proposed code requires that parole and sentence guidelines be coordinated. Under this type of system, the rate of parole grants would decrease and prisoners would simply be released at the expiration of their sentences.

These suggested options are not intended to constrict the choices of the committee on sentencing if the committee finds other alternatives to be more effective.

Subsection (c)(2) provides that the prison term guidelines indicate that the aggregate of consecutive terms of imprisonment may not exceed the maximum term of imprisonment authorized for an offense one grade higher than the most serious offense of conviction. Neither current Federal law nor section 3705 of the proposed code favors consecutive sentences. In addition, multiple punishments for the "same conduct or criminal episode" are inappropriate. Although, for example, a person who commits several bank robberies over a period of weeks may be more culpable than someone who commits only one bank robbery, and may deserve a more severe sentence, the guidelines should not be manipulated to permit the endless "stacking" of sentences.

§ *4303—Committee on Sentencing*

This section creates a Committee on Sentencing within the Judicial Conference of the United States. Its members are selected pursuant to the procedures set forth in section 4304 of the proposed code.

Subsection (a) lists seven basic functions of the committee. First, the committee will compile certain sentencing data, in accordance with its own policy dictates. However, the data should actually be gathered by a staff from the Probation Service of the Administrative Office of the United States Courts. This carefully selected staff should be comprised of people experienced in appropriate areas of the criminal justice system.

Second, the committee will recommend sentencing guidelines to the Judicial Conference. Given the other important responsibilities of the Conference, and the judicial workload of the Conference members, the Committee expects the Judicial Conference to give substantial weight to the recommendations of the committee. If there are differences between the recommendations of the committee on sentencing and those submitted to the Congress by the Judicial Conference, there should be a detailed explanation of the reasons for departing from the recommendations of the committee.

Third, the committee on sentencing will recommend "charge reduction" guidelines to assist Federal judges in determining whether to accept plea agreements in which a defendant pleads guilty or nolo contendere to a charged offense or to a lesser offense and the Government refrains from bringing other charges or moves for the dismissal of other charges. These guidelines should be in the form of a suggested amendment to Rule 11 of the Federal Rules of Criminal Procedure.[2] Plea bargaining in the Federal court system severely limits the range of permissible punishments available to a judge. Sentencing and plea bargaining policies must therefore be coordinated to eliminate disparate treatment of offenders.

The Senate Criminal Code legislation has been criticized for failing to limit prosecutorial discretion. *See, e.g.*, Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcommittee on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st & 2nd Sess. 2462–73 (statement of William Anderson, U.S. General Accounting Office); 1933 (Judge James Burns, D. Ore.); 2245, 2262 (John Cleary, Nat'l Legal Aid & Defender Ass'n); 595–96 (Thomas Emerson, Professor of Law, Yale Law School); 2331–42 (Matthew Heartney, Yale Law School); 2356–57 (G. La Marr Howard, National Association of Blacks in Criminal Justice); 2474 (United States District Judge Morris E. Lasker, S.D.N.Y.); 2224 (Cecil C. McCall, Chairman, U.S. Parole Comm'n) (1978). Charge reduction guidelines are an attempt to respond to this criticism. *See generally* Schulhofer, *Prosecutorial Discretion and Federal Sentencing Reform* (1979) (Federal Judicial Center report). Although sentence guidelines do not directly interfere with prosecutors' plea bargaining practices, guidelines for the exercise of prosecutorial discretion should be developed separately. *See, e.g.*, Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. Rev. 1 (1971); Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney Office*, 11 Crim. L. Rev. 48 (1975); White, *A Proposal for Reform of the Plea-Bargaining Process*, 119 U. Pa. L. Rev. 439, 453–62 (1971).[3]

The proposed code instead focuses on the role of the judge in regulating the plea bargaining process. Although current Federal law authorizes judges to accept or reject plea agreements, Rule 11 of the Federal Rules of Criminal Procedure; *United States* v. *Bean*, 564 F. 2d 700, 702, n. 3 (5th Cir. 1977); *United States* v. *Melendrez-Sales*, 446

[2] Between the date of passage of the proposed code and its effective date, the Committee intends to recommend a change in Rule 11 of the Federal Rules of Criminal Procedure so that Rule 11 will govern the withholding of charges as well as their dismissal.

[3] The recent publication of general guidelines by the Department of Justice, *Principles of Federal Prosecution* (1980) is a small but important step in the right direction. However, unless the Department is better able to coordinate prosecutive policies and practices, there is a continued risk that the application of justice will be uneven for reasons unrelated to the culpability of the offender. General Accounting Office. *Reducing Federal Judicial Sentencing and Prosecuting Disparities: A Systemwide Approach is Needed* (March 19, 1979); General Accounting Office, *United States Attorneys Do Not Prosecute Many Suspected Violators of Federal Law* (1977). As the Department of Justice itself has demonstrated, many United States Attorneys have adopted disparate policies with respect to the declination of Federal prosecutions. United States Department of Justice. *United States Attorney's Guidelines for the Declination of Alleged Violations of Federal Criminal Laws—A Report to the United States Congress* (Nov. 1979). The likelihood that diverse prosecutive policies will continue is an important reason for avoiding the pitfalls of mandatory sentences, because in mandatory sentencing systems the prosecution gains power and its decision can produce new kinds of disparity.

F. 2d 861 (9th Cir. 1972) (*dictum*), there are no meaningful standards to guide these decisions. The standards called for by subsection (a)(1)(3) will help to avoid inequities which could be created by the use of plea bargaining circumvent sentencing guidelines. People with similar criminal histories who are convicted of similar offenses should not receive markedly different sentences merely because they were more successful in plea bargaining.

Subsection (a)(4) requires the committee on sentencing to recommend to the Judicial Conference standards by which judges can determine whether a person should be designated a youthful offender. A person so designated will be housed in facilities separate from adult offenders and will be provided special treatment programs. *See* section 3707 of the proposed code.

Subsection (a)(5) requires the committee on sentencing, in carrying out its responsibilities under this chapter, to seek the opinions and participation of a cross-section of persons interested in the Federal criminal justice justice system. This requirement should be viewed in conjunction with section 4305 of the proposed code, which permits the committee on sentencing to hold public hearings, and with the informal rule-making process described in section 4303(b) of the proposed code. All interested individuals and groups—such as defense attorneys, prosecutors, inmates, probation officers, and members of academic and religious communities—should have an opportunity to be heard on the nature of the proposed guidelines.

Subsections (a)(6) and (7) require the committee on sentencing to make certain information public. Subsection (a)(6) requires disclosure of relevant information about the sentencing practices of the Federal courts. Subsection (a)(7) requires the committee on sentencing to submit to the Congress an annual report, including recommendations for any appropriate legislation.[1]

Subsection (b) provides that for purposes of certain sections of title 5 of the United States Code, the committee on sentencing is an "agency." Its records are therefore subject to the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act, 5 U.S.C. 552a. Meetings of the committee on sentencing must be open to the public where 5 U.S.C. 552b (relating to open meetings) so provides. Finally, the committee on sentencing is subject to the requirements of 5 U.S.C. 553 (relating to rulemaking), which governs the publication of proposed rule changes and comment thereon before the changes are submitted to the Judicial Conference.

The meetings and records of the Judicial Conference are not subject to these provisions of title 5 of the United States Code, since all records relevant to the creation of the guidelines are subject to disclosure pursuant to the provisions of the proposed code applicable to the committee on sentencing. In addition, it may not be appropriate for Judicial Conference meetings to be held in public. The process of

[1] Use of reliable and objective information should be coupled with disclosure to the defendant. Therefore, the Judicial Conference should consider recommending that rule 11 of the Federal Rules of Criminal Procedure be changed to require that, during plea discussions, the prosecution disclose to the defendant the applicable sentencing and parole guidelines. Otherwise, defendants may later challenge their guilty pleas as less than knowing and intelligent. *Compare United States* v. *Bazzano,* 570 F.2d 1120, 1128 (3d Cir. 1977) (no plain error for counsel to fail to obtain Parole Commission guidelines) *with Yothers* v. *United States,* 572 F.2d 1326, 1328 (9th Cir. 1978) (court required to inform defendant of special (post-release) parole term).

rulemaking in other contexts, such as the Federal Rules of Criminal and Civil Procedure, has been criticized because of its closed nature. J. Weinstein, *Reform of Court Rule Making Procedures* (1977). Requiring the Judicial Conference, when submitting proposed sentencing guidelines to Congress, to explain any material changes from the guidelines drafted by the committee on sentencing along with the rulemaking requirements set forth in subsection (b), meets some of these objections.

§ *4304—Membership and organization of the Committee on Sentencing*

Subsection (a) provides that the committee on sentencing will consist of seven members appointed by the Judicial Conference of the United States. This subsection also provides that a member of the committee may be removed, in accordance with due process, for malfeasance or other good cause.

Subsection (b) requires that the membership of the committee on sentencing reflect a variety of backgrounds and participation in the Federal criminal justice system. Four members of the committee must be judges of the United States in regular active service. Although appellate judges should be included, direct experience in Federal criminal sentencing should be the criterion for selection.

The remaining three members of the committee on sentencing must be individuals who are not judges at the time of their appointment and who have not previously been judges. These three individuals must reflect a broad spectrum of experiences and backgrounds, and the Judicial Conference should use its discretion to achieve a desirable balance. It is essential, however, that individuals with experience in criminal defense work be selected. Since recent sentencing reforms have frequently benefited from the input of other disciplines, nonlawyers should also be considered for membership,

Pursuant to subsection (c), the terms of the members of the committee on sentencing will be partially staggered. The ordinary term will be 4 years, except that initially, three members will have terms of 3 years. Subsection (c)(2) sets an outside limit of 8 years on the length of time an individual may serve on the committee.

Subsection (d) provides that full time officers or employees of the United States will not receive additional compensation for service on the committee on sentencing. These individuals will, of course, be reimbursed or otherwise compensated for travel and other related expenses.

The members of the committee on sentencing who are not already full time Federal employees will be compensated on a *per diem* basis at the level of a GS–18 employee, to accommodate the flexible meeting schedule of the committee. Although the committee may meet frequently at first, it may not be as necessary to do so once the guidelines are promulgated.

Subsection (e) requires the committee on sentencing to designate one of its members to chair the committee.

Although, as stated above, at least initially, the committee on sentencing will probably meet frequently, and the committee itself should make all policy decisions. Zalman, *Making Sentencing Guidelines Work: A Response to Professor Coffee,* 67 Geo. L. J. 1005, 1013 (1979) (discusses the policy issues which arise in the process of con-

structing guidelines for discretionary decision-making). It is important that membership on the committee not be a full time occupation otherwise active judges would effectively be precluded from membership.

§ *4305—Hearings by Committee on Sentencing*

This section authorizes the committee on sentencing to hold public hearings for the purposes of carrying out its functions under chapter 43 of the proposed code. Public hearings are not to be the exclusive vehicle for public comment, but should be viewed in conjunction with the requirements for comment afforded by sections 4303(a)(5) and (b) of the proposed code. *See* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–3.3 (2d ed. tent. draft 1979).

§ *4306—Cooperation of Federal agencies*

This section provides that other relevant Federal agencies must comply with requests for information and cooperation from the committee on sentencing.

Chapter 45—Post-Sentence Administration

§ *4501—Assistance in conditional discharge, probation, or parole*

This section requires that a probation officer assist someone who is sentenced to conditional discharge or is on parole, to the degree warranted by the conditions of such sentence or parole.

§ *4502—Appointment of probation officers*

Subsection (a) authorizes a district court to appoint probation officers to serve with or without compensation. The court may remove a compensated probation officer for cause and may remove a noncompensated probation officer at its discretion.

Subsection (b) requires that the appointment of a probation officer be entered on the court's records, and subsection (c) provides for the designation of a chief probation officer in a district where there is more than one probation officer.

This section derived from 18 U.S.C. 3654.

§ *4503—Duties of probation officers*

This section requires probation officers to perform certain specified duties, as well as those duties directed by the court. This section is derived from 18 U.S.C. 3655.

§ *4504—Transportation of persons assisted by probation officers*

This section authorizes a judge, after imposing a sentence of conditional discharge or probation, to direct a United States Marshal to provide a defendant with transportation to the place where the defendant is required to be as a condition of the sentence, as well as a subsistence allowance while traveling to that place.

This section is derived from 18 U.S.C. 4283.

§ *4505—Transfer of jurisdiction over persons assisted by probation officers*

This section authorizes a judge imposing a sentence of conditional discharge or probation to transfer jurisdiction over the defendant to

the district court for any district to which the defendant is required or permitted to proceed (with that district court's concurrence).

This section is derived from 18 U.S.C. 3653.

§ *4506—Arrest of persons assisted by probation officers*

This section authorizes a probation officer to arrest a defendant sentenced to a term of conditional discharge or probation if during that term the defendant violates a condition of the sentence, the violation occurs in the presence of the probation officer, and the violation constitutes a crime. *See* American Bar Association, *Sentencing Alternatives and Procedures*, standard 18–7.5(a) (2d ed. tent. draft 1979).

This section carries forward a portion of 18 U.S.C. 3653 relating to the basis for the arrest of probationers and persons serving conditionally discharged sentences. Current Federal case law has applied the requirements of the fourth amendment to the use of arrest warrants by probation officers. *United States* v. *Basso*, C.R. 75–4 (D. Conn. 1979), *app. pending*, No. 79–1464 (2d Cir. Nov. 2, 1979). This case law requires a probation officer to convey some credible evidence of probable cause to believe a probation violation has occurred, before an arrrest is authorized.

§ *4507—Searches by probation officers*

This section authorizes a court, at the request of a probation officer, to issue a search warrant for evidence that a person being assisted by the probation officer has (1) violated a condition of a sentence of conditional discharge or probation, or of parole, or (2) has committed a crime. To get the warrant, the probation officer must establish reasonable and articulable grounds to believe that the person has violated a condition or committed the crime.

In this regard, the Committee accepted the view of the Fourth Circuit Court of Appeals in *United States* v. *Workman*, 585 F.2d 1205 (1978), which authorizes warrantless searches of probationers only under generally applicable exceptions to the fourth amendment or when a court order has been obtained. In addition, the Committee authorizes a probation officer to apply to an appropriate District Court for a search warrant. Under this procedure, the Court should grant such an order if the officer clearly articulates a reasonable basis for the belief that a law or condition of probation is being, or has been, violated. Thus, under this section a court order may be obtained upon a showing of less than probable cause.

Chapter 47—Parole

Introduction and Background

When the National Commission on Reform of Federal Criminal Laws began its deliberations more than a decade ago, the primary focus of its work was on redefining substantive offenses. The Brown Commission directed little attention at sentencing reform. During the 93d and 94th Congresses and for much of the first session of the 95th Congress, there were no serious legislative proposals aimed at abolishing parole. The Senate criminal code recodification bill of the 95th Congress, as originally introduced on May 2, 1977, retained the parole release function. *See also* S. 2699 (by Mr. Kennedy) (94th Cong., 1st

sess.). The question of whether the Federal parole release function should be retained is of recent vintage and should be viewed in historical context.

During the latter part of the 19th century and for most of the 20th century, the conventional wisdom of many correctional experts and commentators has been that rehabilitation and discretion played a central role in sentencing. D. Rothman, *Conscience and Convenience* (1980); Zalman, *The Rise and Fall of the Indeterminate Sentence*, 24 Wayne St. L. Rev. 45 (1977), New York Governor's Special Committee on Criminal Offenders, *Preliminary Report* (1968); Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole Systems*, 16 J. Crim. L. & P.S. 9 (1925–26); *Lewis, The Indeterminate Sentence*, 9 Yale L.J. 17 (1899). Beginning in the early 1970's, however, this almost monolithic optimism began to crack. *See, e.g.*, D. Lipton, R. Martinson & J. Wilks, *The Effectiveness of Correctional Treatment* (1975); Robison & Smith, *The Effectiveness of Correctional Programs*, 17 Crime & Delinquency 67 (1971); N. Morris, *The Future of Imprisonment* (1974); J. Mitford, *Kind and Usual Punishment* (1973).

In 1980 the pendulum appears to have swung in the opposite direction, and the function of parole release, with its supposed foundation in the "medical model", has become one of the most controversial issues in the criminal code legislation. *See generally Symposium on Sentencing*, 7 Hofstra L. Rev. 1–139, 243–471 (1978–79). The proposed code retains the functions of the United States Parole Commission, and in order to understand the rationale and consequences of this decision, it is necessary to review the recent history of sentencing reform.

Traditionally, parole was thought to have at its root a philosophy that the criminal is "ill" and that a period of imprisonment will provide a cure. This approach (sometimes referred to as the "medical model") assumed that, because it is impossible accurately to predict how long the cure would take, judges should only set the outside limits of the prison term. The parole board would assess the progress of the inmate towards the desired state of rehabilitated grace and decide when the inmate should be released. Traditional parole boards were granted unfettered discretion to make predictions about whether a "cure" had taken place and whether the inmate could safely be released into society. D. Rothman, *Conscience and Convenience* 159–201 (1980); New York Executive Advisory Committee on Sentencing, *Crime and Punishment in New York: An Inquiry into Sentencing and the Criminal Justice System* 51 (1979).

A rehabilitative sentencing philosophy held sway in the United States for most of this century. The past 10 years, however, have seen a growth in criticism of the "medical model". Beginning with Professor Kenneth Culp Davis, a leading authority on administrative law, traditional parole has been characterized as a disgrace. K. Davis, *Discretionary Justice* 126 (1969). Critics have claimed, quite correctly, that some parole boards operated without any written, or even unwritten, policies, rules or standards. J. Mitford, *Kind and Usual Punishment* (1974); American Friends Service Committee, *Struggle for Justice* (1971); Citizens Inquiry on Parole and Criminal Justice, *Report on New York Parole* (1974). The absence of certainty was so

pervasive that it created unrest in the prisons and disrespect for the law. New York State Special Commission on Attica, *Attica: The Official Report of the New York State Special Commission on Attica* 93 (1972). *See also* D. Rothman, *Conscience and Convenience* (1980).

Parole was criticized for another and more fundamental reason—the tasks it was expected to perform were premised on erroneous assumptions. First, literature from social scientists demonstrated either that prison programs had little appreciable effect on whether a prisoner was going to commit new crimes on release, or that it was impossible to predict which programs worked and under what circumstances. D. Lipton, R. Martinson, & J. Wilks, *The Effectiveness of Correctional Treatment* (1975). Second, most experts agreed that neither parole boards nor any other panel of experts, including psychiatrists, could accurately predict when or if an offender is rehabilitated. von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 Buffalo L. Rev. 717 (1971). Thus, the parole board as traditionally viewed has been assigned tasks beyond its capacity to perform.

The crescendo of criticism, including that of Congressional leaders, *see* Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 American U.L. Rev. 477 (1973); *see also* D. Stanley, *Prisoners Among Us* (1976), soon produced results. At the Federal level, the United States Parole Board, in cooperation with the National Council on Crime and Delinquency, undertook in 1972 a research project which has triggered a dramatic transformation of the parole and sentencing process. The Federal researchers discovered that there was a discernable trend or implicit policy in parole decision making and that parole decisions were not based primarily upon the "medical model" assumptions associated with the indeterminate sentence. The research showed that the primary factors influencing parole decision making were not inmate behavior in prison (and acts of artificial contrition), but the seriousness of the person's crime and prior criminal history. As a result, the United States Parole Board developed and implemented a set of guidelines for parole release decisions based on these factors. The evolution of this consistent set of standards for parole decision making has helped create a fairer parole system. Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 Crime & Delinquency 7 (1975).

Despite the development of parole guidelines, the Federal parole system of the early 1970's still presented some significant deficiencies. The sentencing system remained relatively indeterminate because inmates did not quickly know when they were going to be released. Moreover, there were no explicit procedural protections for prisoners in the parole process. Congress responded in a thorough and comprehensive fashion with the passage of the Parole Commission and Reorganization Act of 1976. 18 U.S.C. 4201–18. The provisions of that Act, many of which were devised by this Committee under the leadership of Representatives Kastenmeier and Railsback, cured the remaining deficiencies in the Federal parole process.

Under the Parole Commisssion and Reorganization Act of 1976, the guidelines were statutorily mandated, procedural fairness was guar-

anteed, and certainty about presumptive release dates was assured. Thus, since 1972 the parole release function has undergone an almost complete overhaul. Perhaps ironically, it has been the very process of reform in the parole area which led to some of the simplistic suggestions that parole be abolished. In evaluating the claims of the parole abolitionists, it is important to keep in mind that the Federal parole system is not in the mold of the traditional rehabilitative assumption about parole. The structure and practices of the revamped Parole Commission serves several essential functions in the sentencing process. The Committee concluded that until adequate experience and evidence has been developed under the new sentencing structure established by the proposed code, the parole release function should be retained. Outlined below in summary form is a description of the importance of parole and an overview of how it will work in the new scheme.

Under current Federal law, the judiciary is left largely in uncharted waters about how to sentence offenders. This vast leeway in selecting a sentence produces a discretionary decision making process which is unstructured and which produces frequently disparate results. For more than two-thirds of all Federal convictions, judges select sentences with no substantial prison term, such as a fine, probation, or jail for a year or less. Director of the Administrative Office of the United States Courts, *1979 Annual Report*, 462, table D–5 (1979) (of 32,913 defendants sentenced, only 10,316 received terms in excess of one year in prison). For this group of offenders, there is no benchmark or guidepost to assist judges in sentencing. For the remaining offenders who get more than a year in prison, there are significant constraints on the length of their prison terms—the parole release guidelines. As described in greater detail elsewhere, the parole guidelines establish the time a person will actually serve in prison. The parole guidelines are one of the few areas of the entire criminal justice system where offenders are given a justifiable expectation that the government official will conform discretionary judgments to a norm. Parole guidelines promote consistency by setting standards for the duration of prison terms for categories of similarly situated offenders. The parole guidelines are able to create this norm by weighing in a uniform fashion the severity of the offender's conduct and the person's previous criminal history. The development of these categories has taken the guess work out of the parole release process. Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra L. Rev. 89 (1978).

Perhaps as important as the guidelines, has been the requirement that inmates receive a "presumptive release date" within 120 days of admission to prison. This requirement makes the current Federal system virtually determinate. There is no longer room in the Federal system to argue about uncertainty in the length of imprisonment.

In sum, the Parole Commission, through the use of a national parole policy implemented by a small, centralized, group of professionals has given birth to, and effectively implemented, a system which is fair and consistent in the treatment of offenders. Moreover, the Parole Commission's emphasis on the factors of offense seriousness and previous criminal history comports with the need to provide just and commensurate punishment.

Under the proposed code, the Parole Commission would continue to set the duration of prison terms. It is likely that the initial sentencing guidelines promulgated by the Judicial Conference will address primarily the decision of whether or not to impose a prison term. If the sentencing guidelines go no further, they will have made a substantial improvement over current law with respect to about two-thirds of the Federal offenders.

Thus, maintenance of the parole release function will preserve recent Congressional reforms, and the remaining provisions of the Code with respect to sentencing will only serve to enhance the fairness and certainty of the rest of the system.

Criticisms of parole

Most criticism of parole has been directed at the "medical model" of parole. As noted above, this species of criticism is not applicable to the Federal parole release function. A new, and arguably more sophisticated set of arguments, has been fashioned by the advocates of parole abolition. Senate Rep. No. 96–553 at 912–32 (1980). They now argue that because guidelines have worked so well in the parole area, that they should be merely transferred to all sentencing decisions. They go on to claim that, once sentencing guidelines are created, parole becomes duplicative. These arguments, which are supported by no persuasive evidence, misconceive the current role of parole release.

The Committee, early in its deliberations, considered the elimination of parole. The idea of simiplicity and orderliness in sentencing had superficial appeal. In fact, an early draft of this bill called for the elimination of parole. The Committee discovered during the course of its hearings, however, that parole abolition would be extremely unsound public policy. Numerous witnesses wrote or testified concerning the functions served by the current parole system. The vast majority of individuals and organizations cogently argued about the deleterious consequences of a precipitous move towards abolition.[1]

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[1] The individuals and organizations who recommended against the precipitous abolition of parole included: (1) AMERICAN BAR ASSOCIATION, SENTENCING ALTERNATIVES AND PROCEDURES vi–vii and standard 18–4.1(a) (2d ed. tent. draft 1979); (2) American Correctional Association, letter from Anthony Travisono to Representative Robert F. Drinan, Chairman, Subcommittee on Criminal Justice of the House Committee on the Judiciary, dated September 26, 1979; (3) National Council of Churches, testimony of Reverend Barry Lynn, Hearings on Revision of Federal Criminal Laws before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st Sess. (1980); (4) National Council on Crime and Delinquency, testimony of Milton Rector, Director, Hearings on Revision of Federal Criminal Laws before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st Sess. (1980); (5) National Legal Aid and Defenders Association, testimony of John Cleary, Hearings on Revision of Federal Criminal Laws before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st Sess. (1980); (6) American Civil Liberties Union, testimony of John Shattuck and David Landau, Hearings on Revision of Federal Criminal Laws before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st Sess. (1980); and (7) National Urban League, letter from Ronald H. Brown, to Representative Robert F. Drinan, Chairman, Subcommittee on Criminal Justice of the House Committee on the Judiciary (June 14, 1979).

In addition, the Subcommittee on Criminal Justice received testimony or written communications advising against the abolition of parole from the following experts in the criminal justice field: Don M. Gottfredson, Dean of the Graduate Schoo. of Criminal Justice, Rutgers University (co-author of GUIDELINES FOR PAROLE AND SENTENCING (1978)); Alfred Blumstein, Professor of Urban and Public Affairs, Carnegie-Mellon University (editor of, and contributor to, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECT OF CRIMINAL SANCTIONS ON THE CRIME RATE (1978), published by the National Academy

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Witnesses, including persons in the forefront of the determinate sentencing reform movement, pointed out that the creation of the United States Parole Commission established a dual authority model. Under this model responsibility for sentencing decisions is shared between the judiciary and the legislatively mandated Parole Commission. This division of responsibilities has permitted the Parole Commission to serve, what the American Bar Association has called, a "safety net" function. American Bar Association, *Sentencing Alternatives and Procedures* vi–vii, 80–84 (2d ed. tent. draft 1979); Hearings on H.R. 6869 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Congress, 1st and 2d sess., Serial No. 52, at 791 (1979) (testimony of Professor Louis Schwartz, former staff director of the Brown Commission, on behalf of Americans for Democratic Action). The extensive experience the Parole Commission has with scaling lengthy prison terms to categories of crimes and criminals allows it to set realistic prison terms. The safety net function also enables the Parole Commission to prevent the prison term served for offenses from fluctuating arbitrarily or capriciously.

Many of the witnesses pointed out that the limited experience available in the States that had quickly moved to abolish parole was that sentence length increased. *See, e.g.*, Clear, Hewitt & Regoli, *Discretion and the Determinate Sentence: Its Distribution, Control and Effect on Time Served*, 24 Crime & Delinquency 428 (1978).

There is evidence that the public and political perception of what is an "appropriate" prison term is at considerable variance above the actual time served in prison for such offenses.

> Popular impressions about sentence lengths (that is, both about judges' average sentences and about average stays in prison) tend to be wide of the mark, both in the direction of over and underestimation. Given public concern about crime any change in the manner of computing sentences is likely to create alarm if it seems to permit convicted felons to leave prison much sooner.
>
> This makes it essential that the [agency that creates sentencing guidelines] avoid creating the appearance of greater leniency than is actually true of its policies. Yet this . . . would be precisely the impression created by an overnight shift to "real time." Even if the [guidelines agency] is somewhat more insulated from political "heat" than the legislature, it would still find it difficult to confront wide public consternation about its policies.
>
> Is "real time," then, as simple and forthright as it appeals? Perhaps it might be, had there never been any other system—that is, had sentences always been expressed in time served, and had the public become acclimated to the lower numbers that such a system would require. But one is not working with a clean slate. People have become accustomed to a dual system of reckoning time, with the long purported sentences that such a system permits. Here, a rapid shift to real-time sentences may heighten confusion, not alleviate it.

A. von Hirsch & K. Hanrahan, *The Question of Parole* 89–90 (1979). Blumstein & Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's View*, 14 Law & Soc'y Rev.—(1980). *See also* testimony of Professor Alfred Blumstein, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 1st Sess. (1980).

This public perception about sentence length would, but for parole, likely be translated into legislatively decreed sentencing guidelines set at a level far above current periods of incarceration. The Committee concluded as a result of this evidence that the Parole Commission should continue to play the important role of helping to scale criminal penalties insofar as prison terms are concerned. Preservation of this time-scaling function will prevent drastic increases in the prison population.

The second function of parole frequently ignored by the abolitionists is the utility of parole release in reducing sentence disparity. The available data indicates that the use of a set of guidelines, when coupled with a centralized decision making body, can materially reduce disparity in sentence length. Gottfredson, *Parole Guidelines and the Reduction of Sentencing Disparity: A Preliminary Study*, 16 J. Research in Crime & Delinquency 218 (1979) O'Leary, *Parole Theory and Outcomes Reexamined*, 11 Crim. L. Bull, 304, 306–308 (1975) (parole release has been shown to reduce disparities in time served). *See also* Testimony of Karen Skrivseth of the United States Department of Justice in Hearings on S. 1437 Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, 95th Cong., 1st Sess. at 9203. "(. . . the parole guidelines have substantially reduced unwarranted disparity in the lengths of imprisonment . . ."). However, many commentators, after a review of the literature on the efficacy of appellate review of sentence have expressed doubts about whether the addition of appellate review can achieve a similar result. Testimony on Andrew von Hirsch, Rutgers University Graduate School of Criminal Justice, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, House Committee on the Judiciary, 96th Cong., 1st sess. 1327 (1979); Hearings on H.R. 6869 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Congress, 1st and 2d sess., Serial No. 52, at 1356 (1979) (testimony of Professor Michael Tonry). One recent study of the effectiveness of appellate review indicates that such review without other changes (such as requiring the sentencing court to state its reasons for

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of Sciences); Alvin Bronstein, Executive Director of the National Prison Project of the American Civil Liberties Union; Dale G. Parent, Executive Director of the Minnesota Sentencing Guidelines Commission; Donald J. Newman, Dean of the School of Criminal Justice, State University of New York at Albany (author of CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966)); Marvin Wolfgang, Professor of Sociology and Law, University of Pennsylvania (a leading American criminologist and member of the Advisory Committee of the Brown Commission); Caleb Foote, Professor of Law, University of California (contributor to STRUGGLE FOR JUSTICE (1971) and author of several studies on bail release practices); Professor Andrew von Hirsch, Graduate School of Criminal Justice, Rutgers University (author of DOING JUSTICE (1974) and THE QUESTION OF PAROLE (1979)); Professor Leslie Wilkins, School of Criminal Justice, State University of New York at Albany (author of EVALUATING PENAL MEASURES (1969) and pioneer in sentencing and parole guidelines); David Stanley, Brookings Institution (author of PRISONERS AMONG US: THE PROBLEM OF PAROLE (1978)); Charles Silberman (author of CRIMINAL VIOLENCE, CRIMINAL JUSTICE (1979) and member of the 20th Century Fund's Task Force on Criminal Sentencing whose report FAIR AND CERTAIN PUNISHMENT (1976) called for determinate sentencing); Professor Franklin Zimring, University of Chicago (co-author of DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1976) and consultant to the Brown Commission); Dennis Curtis, Professor, Yale Law School (co-author of TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1974)).

imposing a sentence, a comprehensive set of sentencing guidelines, and the administrative capacity to process large numbers of cases) in the system cannot be expected to be successful. Samuelson, *Sentence Review and Sentence Disparity: A Case Study of the Connecticut Sentence Review Decision*, 10 Conn. L. Rev. (1977); Executive Advisory Committee on Sentencing, *Crime and Punishment in New York: An Inquiry into Sentencing and the Criminal Juestice System* 48–50 (1979). The proposed code's system of appellate review should overcome many of the deficiencies of current Federal law, as well as the difficulties State courts have faced in relation to State appellate review of sentences. However, the provisions of chapter 41 are not a panacea.

Appellate review under the proposed code would occur at the level of the Circuit Courts of Appeals. The evolution of a national standard from 11 disparate circuits is not a realistic expectation in the immediate future. One of the most egregious forms of disparity is based on differing regional attitudes. In addition, the varying workloads among the circuits may not allow the same degree of attention to be given to all sentence appeals. The Committee, therefore, concluded that maintenance of the parole function could continue to serve as a check against sentence disparity.

The third function of parole release which has been neglected by the abolitionists is the development of new information about the offender and the offense after sentencing. This function deflates, in part, the argument about the alleged duplication of functions in a system which both sentencing and parole guidelines. While the current parole system is not based on a rehabilitative model, a prisoner's institutional or prison record is still relevant to release into the community. The parole release guidelines in effect now measure offense severity and prior criminal history to set a "presumptive release date". The guidelines assume, however, that the prisoner maintains a good prison record. 28 C.F.R. 2.20 (1979). Under the current law, and under the proposed code, the parole release date can be adversely affected (i.e., retarded or rescinded) by misconduct in prison. In other words play acting cannot get you out, but bad acting can keep you in. The abolition of parole would, in effect, deprive the public of its right to receive the best protection from criminal conduct. At least one recent study of parolee recidivism claims that there is a strong relationship between serious institutional misbehavior and future criminal conduct. Gottfredson, Prison Behavior and Release Performance: Empirical Reality and Public Policy, (1979) (unpublished) (data from the Parole Commission with respect to Federal inmates indicates that institutional behavior of particular types may have a strong relationship with post-release behavior). The Committee recognizes that there are studies which reach apparently contrary results. N. Morris, *The Future of Imprisonment*, 35 (1974). A. von Hirsch and K. Hanrahan, *The Question of Parole*, 32 (1979). The Committee is extremely reluctant to encourage the use of prediction based upon the inconclusive evidence relating to institutional behavior. The fact remains, however, that if future empirical research validates the usefulness of institutional behavior as method of assessing the incapacitative effect of a sentence, then such information should be available to affect the

duration of a prison term (within narrow limits). To the extent that a sentencing guidelines system abolishes the parole release function, it eliminates the ability to use post imposition of sentence information to scale the penalty. The failure to allow such factors to come into play may well reduce such a system's ability to protect society from crime.

In addition, to being able to respond to changes in the offender, the Parole Commission has been placed in a position where it can re-evaluate the societal perception concerning the relative seriousness of the offense. Particularly for longer sentences it would be grossly unfair to continue to incarcerate a person long after similarly situated offenders who were sentenced more recently were released from prison. This situation would occur unless there is a mechanism for retroactively reviewing sentences when the penalty for a category of crime has changed. The Parole Commission (a single, centralized decision making body) is best suited to perform this function. For example, the Parole Commission recently completed an evaluation of all the prisoners in the Federal system potentially affected by a reduction in the guideline range for certain categories of drug offenses. Senate Rep. No. 96–553 at 1237 (1979). The use of an administrative agency to perform this review process is both more efficient and more likely to produce equitable and uniform results. Contrary to the arguments offered by the Senate Judiciary Committee, reliance on petitions for review by the sentencing court simply will not work. First, rehearings by 550 different district court judges cannot produce a coherent national policy. Second, the limitation found in the Senate bill to persons who have served more than 5 years reduces the number of potential applicants to such an extent as to make the option meaningless.

Conclusion

The Committee has carried forward the innovations of the 94th Congress with respect to parole release. The Parole Commission has done an excellent job of carrying out its functions, and the Committee concluded that there was inadequate evidence to justify abolition of the Federal parole system now or in the immediate future. Current parole release practice is: (1) determinate in nature, (2) uses appropriately structured guidelines based on offense severity and prior criminal history; (3) performs a time scaling and safety net function; (4) serves as a factor in the reduction of sentence disparity and (5) has the capability of evaluating new information about the offender and the gravity of the offense. The clear and convincing weight of the evidence favors retaining the parole function. To the extent that the arguments about duplication of function have merits, the Committee has provided a mechanism in section 4716 of the proposed code which will enable a thoughtful review of these claims in a later Congress.

§ *4701—Establishment of Parole Commission*

This section carries forward 18 U.S.C. 4202 and establishes a 9 member United States Parole Commission as an independent agency in the Department of Justice. The Commission is related to the Department solely for administrative purposes. Parole decisions are to be independent of, and not governed by, the investigative and prosecu-

torial parts of the Department of Justice. The President, by and with the advice and consent of the Senate, appoints parole commissioners to serve terms of 6 years and designates one commissioner to chair the Commission.

§ *4702—Powers and duties of Commission*

This section carries forward 18 U.S.C. 4203.

Subsection (a) requires the Parole Commission to meet as a policy making group at least quarterly in order to: (1) establish guidelines and procedural rules for parole determinations so that the administration of parole will be uniform; (2) establish as many regional subdivisions as are necessary to carry out the Commission's functions; and (3) act upon budget recommendations. The budget recommendations of the Commission are separate from other agencies of the Department of Justice.

Subsection (b) authorizes the Commission, by a majority vote and pursuant to procedures set forth in chapter 47, to: (1) grant or deny parole to any Federal prisoner who is eligible for parole; (2) impose conditions under which any prisoner may be released on parole; (3) modify or revoke the parole of any individual who has violated the conditions of release; and (4) request probation officers to perform certain duties with respect to parole supervision. Subsections (b)(1), (2) and (3) therefore vest authority for parole decision making in the discretion of the United States Parole Commission.

Subsection (b)(4) reflects Congressional policy encouraging United States probation officers to consult with the Parole Commission to ensure that the goal of parole supervision is to protect the public as well as to meet the needs of the parolee.

Subsection (c)(1) allows the Commission to delegate its decision making powers regarding to initial parole determinations to regional commissioners and, with respect to decisions on appeal, to the commissioners on the National Appeals Board.

The regional commissioner, acting under delegated powers, may adopt the recommendation of the Parole Commission's hearing examiners (see discussion of subsection (c)(2) *infra*) or make an independent decision. The Commission should provide appropriate review procedures for delegated decision-making, particularly where the regional commissioner's decision deviates from the recommendation of the 2 member panel of hearing examiners. This will ensure consistent national parole policies. For example, the Parole Commission might provide that a regional commissioner's decision that deviates from the recommendation of the hearing examiners would not become effective until the regional commissioner's reasons for such decision have been reviewed by a member of the National Appeals Board and such member has declined to certify the case to that body for decision. Such a procedure would recognize the authority and responsibility of the regional commissioners, while providing appropriate appellate oversight of the regions. Review procedures should identify and reconcile patterns of decisions involving significant inconsistencies between regions or departures from national parole policies as promulgated by the Commission.

Although the language of this subsection is flexible enough to permit the Commission to reserve by regulation special categories of

cases for initial parole decision by the Commission as a whole, the Committee contemplates that normally the decisionmaking process will be delegated to regional commissioners, subject to review by the National Appeals Board. In appropriate cases, the full Commission (or some other quorum of commissioners) may consider cases, but a decision by the full Commission, whether as a matter of original jurisdiction or on appeal, should take place only where special circumstances exist.

Subsection (c)(2) provides that hearing examiners shall compile the information upon which the decisions of regional commissioners will be based. In performing this function, hearing examiners will conduct proceedings and hearings, take sworn testimony, make a record of the pertinent evidence presented at parole proceedings and hearings, make findings of probable cause and issue subpoenas in parole revocation hearings, and make specific recommendations for each parole decision to be made by the regional commissioner. In decisions involving the granting or denial of parole, or the revocation of parole, pursuant to sections 4705 and 4713 (a) and (c), respectively, of the proposed code, at least two examiners must concur in the findings and recommendations. If the two examiners do not concur, a third examiner may cast the deciding vote after reviewing the case record, findings, and recommendations of each examiner. Parole determination proceedings, and revocation hearings, conducted by panels of two examiners are to be held in the Federal penal institutions on a regular schedule.

On occasion it may be appropriate for one examiner to conduct the proceedings. A second examiner must then review the case record, findings and recommendations, and concur in the findings and recommendations. An exception to this general rule is that findings of probable cause in local revocation hearings may be made by an individual hearing examiner upon the existing record.

The Committee expects that in most instances, the regional commissioner will follow the recommendation of the hearing examiners. This expectation recognizes the crucial role of hearing examiners in the parole process without detracting from the regional commissioner's executive responsibility. Because most recommendations will fall within the parole release guidelines, the regional commissioner's primary obligation in such cases is to ensure that the guidelines have been properly interpreted and followed. It is the intent of the Committee that hearing examiners recommend a disposition outside the guidelines only when they determine that there is good cause to do so. In those cases, the regional commissioner shall review the case and determine whether good cause exists to justify an exception to the guidelines.

Subsection (c)(3) permits the Commission, in certain parole revocation proceedings, to delegate power to conduct hearings and make findings and recommendations to Federal and State executive or judicial branch officials. The delegation of such power may be necessitated by time limitation and administrative problems involved in holding local preliminary and revocation hearings pursuant to section 4713 of the proposed code. In the Federal system, the executive branch function of parole supervision is carried out by United

States probation officers, who are employees of the judicial branch. In present practice, certain United States probation officers may conduct probable cause hearings relating to parolees supervised by other officers. This subsection permits this practice to continue. Although a Federal judge is also authorized to conduct such hearings, a judge may not do so if at some later date that judge might preside over litigation arising from the revocation proceedings.

Subsection (c)(4) enables the Commission to review any delegated decision on its own motion and permits the Commission to delegate this review authority to the National Appeals Board.

Subsection (d) provides that in promulgating guidelines and regulations, and in creating regions or acting on the agency's budget pursuant to subsection (a), the Commission shall operate by majority vote. Records of the commissioner's final votes shall be available for public inspection. Each member shall be provided with all necessary information to make such determinations and shall have one vote.

§ *4703—Powers and duties of the Chair*

This section carries forward 18 U.S.C. 4204.

Subsection (a) authorizes the chair, who functions as the chief executive officer of the Commission, to: (1) preside at the meetings of the full Commission (whether a regular meeting or a special meeting called by the chair or any three commissioners); (2) make all personnel decisions [1] (except that the full Commission must confirm the appointment of any hearing examiner before such person's probationary status as a first-year government employee terminates); (3) delegate work among the Commissioners and the various units and employees of the Commission; (4) carry out fiscal responsibilities, including preparation of appropriations requests and oversight of Commission expenditures; (5) designate at least three commissioners to serve on the National Appeals Board, one of whom shall also serve as vice chair, and designate one commissioner to serve in each of the parole regions as regional commissioner,[2] (6) shall speak for the Commission and report annually to each house of Congress on its activities [3]; and (7) perform such other duties as are necessary to carry out any other responsibilities and functions of the Commission.

Subsection (b) provides that, in addition to the duties set forth above, the chair is responsible for research and training units within the Commission, to provide information concerning the parole process to public and private agencies. The chair has certain other conventional administrative powers, including procuring, contracting, utilizing and accepting services performed by Federal, State and other governmental resources as well as by private agencies.

Subsection (c) provides that the chair will carry out any administrative duties and responsibilities in accord with the Commission's national parole policies.

[1] This provision is not intended to exempt the Commission from such Office of Personnel Management regulations as are presently applicable.

[2] In making any such designation the Chair must consider the commissioner's years of service, personal service and fitness and must obtain the concurrence of the President or his designee. (Because the commissioner's workload is heavy, effective and swift Administration action is needed, and the concurrence should therefore be prompt).

[3] The Annual Report must be approved by the Commission and must contain such additional views of commissioners as may be submitted.

§ *4704—Time of eligibility for release on parole*

This section carries forward, in modified form, 18 U.S.C. 4205.

Subsection (a) provides that a prisoner serving a sentence or sentences of more than one year is eligible to be released on parole after having served one-half of such sentence or sentences or, in the case of a prisoner sentenced to life or a term of imprisonment of 20 years or more, after having served 10 years of such sentence. Current law (18 U.S.C. 4205(a)) provides that a prisoner is eligible after service of one-third of the sentence (or sentences) of imprisonment. The elimination of "good time" in chapter 37 of the proposed code dictates this modification and the consequent reduction in statutory maximum sentences. *See* section 3702. No change in practice is intended. For example, an offender who received a 20 year maximum sentence under current law, and who was eligible for parole release at the expiration of one-third of the sentence, could be released at the expiration of 6 and two-thirds years. Under the proposed code, the maximum available sentence of imprisonment would be 13 and one-third years, and thus under this provision parole eligibility at one-half of the maximum sentence imposed would also mean potential release at the end of 6 and two-thirds years. Stated alternatively, one-third of the whole (present law) is equal to one-half of two-thirds of the whole (the proposed code).

Prisoners serving consecutive sentences are to have those sentences treated as a single term for parole eligibility purposes. Thus, a prisoner serving consecutive sentences totaling more than 20 years, like a prisoner serving a life term, is eligible for parole after 10 years. This carries forward current practice.

Subsection (b) enables a court to (1) direct that the prisoner be eligible for parole at any time up to one half of the maximum sentence, or (2) specify that the Commission may release the prisoner on parole at any time. It is the intent of the Committee that a court use subsection (b)(1) only to make a prisoner eligible for parole at an earlier time than provided by subsection (a). Subsection (b)(1) may not be used to override the 10 year eligibility limit of subsection (a).

Subsection (c) permits a judge to order the Bureau of Prisons to conduct a study of the defendant before the final sentencing disposition is made. Such studies should be conducted in a timely fashion. L. Farmer, *Observation and Study: Critique and Recommendations on Federal Procedures*, (Dec. 1977) (published by the Federal Judicial Center, FJC–R–77–13). The reenactment of this provision assures that judicial constructions of current law will continue. *See United States* v. *Sennett*, 505 F.2d 774, 779 (7th Cir. 1974); *United States* v. *Lewis*, 486 F.2d 1264 (D.C. Cir. 1973); *Powers* v. *United States*, 325 F.2d 666, 667 (1st Cir. 1973) (disclosure of observation and study reports are governed by the procedures that are applicable to presentence reports). However, to the extent that the courts continue to be less than fully satisfied with these reports, the courts may wish to ensure that the person who prepared the report is available for cross-examination. *See United States* v. *Hopkins*, 531 F.2d 576 (D.C. Cir. 1976); *United States* v. *Phillips*, 479 F.2d 1200, 1203 (D.C. Cir. 1973).

Subsection (d) provides for the preparation of a progress report by the Bureau of Prisons, which will be considered by the Commission during the parole release determination. In addition to the material provided by the Bureau of Prisons, the Commission is authorized to make such other investigations as it may deem appropriate.

Subsection (e) provides a means to coordinate sentencing and parole decisions by requiring that the sentencing court furnish a copy of the presentence report and the court's findings and reasons for the sentence to the Parole Commission. In addition, the Commission is authorized to seek information from other government agencies such as the United States Probation Service and the Federal Bureau of Investigation. Upon request, these agencies shall furnish all available information and, where appropriate, their views and recommendations.

Subsection (f) reenacts existing law to provide that chapter 47, which contains the general parole provisions, should not be construed to provide parole eligibility for persons otherwise ineligible for parole by other specific provisions of the law.

§ *4705—Parole determination criteria*

This section carries forward 18 U.S.C. 4206 and sets forth the standards and criteria to be used by the Parole Commission in making parole release determinations for all Federal prisoners who are eligible for parole, regardless of whether the sentence is imposed under subsection (a) or (b) of section 4704 (relating to time of eligibility for release on parole) of the proposed code.

Subsection (a) requires the Commission to consider a number of factors before arriving at a final parole release determination. The Commission's judgments on these factors is committed to the discretion of the Commission.

First, the Commission must determine the institutional behavior of each prospective parolee. This does not mean that parole release decisions are to be based on assessment of "rehabilitation" in prison. The need to maintain safe and orderly prisons, however, requires that the Parole Commission consider institutional conduct in order to punish serious violations of institutional discipline.

Second, the Parole Commission should consider both the nature and circumstances of the offense and the history and characteristics of the prisoner. It is the Committee's view that these two items are most significant in making equitable release decisions and should be reflected both in the Commission's decisions and in its guidelines for parole release determinations.

The Parole Commission, in making each parole determination, must determine the relative severity of the prospective parolee's offense and in so doing must be congizant of the public perception of. and respect for, the law. It is the Committee's view that the United States Parole Commission is joined in this purpose by the courts, the Congress and the other executive agencies in a continuing effort to instill respect for the law. The Parole Commission's efforts in this regard are fundamental and shall be manifested by appropriate parole determinations.

The phrase "nature and circumstances of the offense" in subsection (a) indicates that the Commission should consider not merely the

statutory title of the offense of conviction, but also the attendant details found by the sentencing court pursuant to the procedures of chapter 31 of the proposed code, including the degree of responsibility of various codefendants, whether the offense was an isolated act or part of a continuous course of conduct, and the amount and nature of any harm threatened or consummated.

The United States Parole Commission currently uses the real offense to determine the severity of an offense, and thus the offender's release date. United States Parole Commission Procedure Manual, Appendix 4 (May 1, 1979). This approach has been upheld by several courts. *Billitieri* v. *United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976); *Bistram* v. *United States Board of Parole*, 535 F.2d 329 (5th Cir. 1976); *Zannino* v. *Arnold*, 531 F.2d 687 (3d Cir. 1976). The primary reason for the Parole Commission's approach is the absence of a comprehensive classification scheme for criminal offenses. In addition, current law does not require the sentencing court to make findings of fact about the nature and circumstances involved in the offense, nor does it require that a sentencing judge state the reasons for imposing a particular sentence. Thus, the Parole Commission must make some factual determinations to create the categories of offenses and offenders upon which its guidelines are based. In the proposed code, however, the Congress has carefully crafted a classification scheme. The bill also requires the court to hold sentencing hearings, make findings of fact and state the reason for imposing a sentence. Thus, the reasons for using "real offense" sentencing do not exist under the proposed code.

Determinations of just punishment are part of the parole process, and these determinations cannot easily be made. The concept of "just punishment" means in part that comparable periods of incarceration should be imposed for similar offenses committed under similar circumstances. The parole decision-maker must weigh concepts of general and special deterrence, and of retribution and punishment, and must reach a result that will not depreciate the seriousness of the prisoner's offense or promote disrespect for the law. To the extent possible, this result should not be inconsistent with the findings in parole decisions regarding other prisoners. This reconciliation process should reduce unwarranted disparity between sentences of similarly situated offenders. There are two separate criteria involved in determining if "release would not depreciate the seriousness of the prisoner's offense or promote disrespect for the law." There may be cases in which one criterion is satisfied but the other is not. For example, if a public official was convicted of fraud involving a violation of the public trust and sentenced to 3 years of imprisonment, release on parole after one year might not "depreciate the seriousness of the offense," but the Commission could justify denying release on the grounds that such release "would promote disrespect for the law."

The use in subsection (a)(2) of the phrase "release would not jeopardize the public welfare" is intended by the Committee to recognize that imprisonment has the temporary effect of denying the opportunity for future criminality. The Committee expects the Parole Commission to attempt to determine the probability that any offender would commit a new offense by comparing such offender with other

offenders who have similar backgrounds. Such predictions are inexact, and the Commission should use extreme caution in making them. On the other hand, information about the offender's prior criminal record, and especially recent criminal conduct, has been demonstrated to be useful in making determinations about future conduct. The section does not specifically define the predictive factors the Commission should consider using because the Committee intends to encourage the Parole Commission to continue to refine both the criteria used to make such predictions and the means used to gather information in support of the predictions. Of course, before using predictive factors, the Parole Commission should carefully review the fairness of such a practice. Great care should be exercised so as to avoid the use of factors which would produce punishments that are not just.

Subsection (a) further provides that release determinations should be made after considering the Parole Commission guidelines. The Committee intends that the guidelines serve as a national parole policy, as well as a uniform measure of justice. The Parole Commission should actively seek the counsel and comment of the corrections and criminal justice communities prior to promulgation of guidelines.

The phrase "shall be released" as used in subsection (a) includes release at the expiration of the sentence as well as release on parole.

Pursuant to subsection (b), when parole is denied, the prisoner shall be given a written notice that states with particularity and specificity the reasons for such denial. Ordinarily, this can be complied with by advising the prisoner of the applicable guideline, how the guidelines were applied to the case, and whether any departure from the guidelines was warranted. *Shahid* v. *Crawford*, 599 F. 2d 666 (5th Cir. 1979).

The term "holidays," as used in subsection (b) refers to congressionally declared Federal holidays.

Subsection (c) permits the Commission to grant or deny parole notwithstanding the guidelines only when the Commission has determined that there is good cause to do so. When the Commission takes such action, it must provide the prisoner with a statement setting forth "with particularity the reasons for the Commission's determination, including a summary of the information relied upon." For example, if a prisoner, who has served an amount of time recommended by the guidelines for release, is denied parole, the prisoner shall receive a specific explanation of the factors which caused the Commission to reach a determination outside the guidelines.

For the purposes of subsection (c), "good cause" means substantial reason. Such cause must be in good faith, and not arbitrary, irrational, unreasonable, irrelevant, or capricious.

What constitutes good cause to go outside the established guidelines cannot be precisely defined because such cause must be broad enough to cover many situations. For example, in determining that a prisoner should serve more time than the guidelines recommend, the Commission should consider factors such as whether the prisoner committed an offense involving an unusual degree of sophistication or planning, has a lengthy prior record, or was part of a large scale conspiracy or continuing criminal enterprise. On the other hand, the Commission should consider factors such as a prisoner's adverse

family or health situation in deciding whether to make a parole release determination below the guidelines.

In any case where the parole determination is to go outside the guidelines, the reasons for such a determination should be stated specifically, to facilitate review by the National Appeals Board. This process should also produce more uniformity and greater precision in granting or denying parole. Needless to say, if parole release decisions outside the parole guidelines are frequently made, the Commission should reevaluate its guidelines.

§ *4706—Information considered*

This section carries forward 18 U.S.C. 4207. Subsection (a) requires the Commission to consider the following information, if available and relevant, when making parole release determinations: (1) reports and recommendations of prison staff; (2) the prospective parolee's prior criminal record; (3) presentence investigation reports; (4) recommendations of the sentencing judge; (5) reports of physical, mental, or psychiatric examinations; (6) the findings and reasons upon which the sentence was based; and (7) transcripts of relevant district court proceedings. The Commission is also entitled to consider other relevant information submitted by the prisoner.

The Committee expects that availability and relevance will limit the Commission's responsibility to consider this material. For example, if a transcript of district court proceedings has not been sent to the Commission or if a judge has not commented on the sentence or parole of the offender, such material is deemed unavailable and the Commission is under no duty to solicit it.

Although the Commission shall consider the recommendations of the sentencing judge and the findings and reasons upon which the sentence was based, there is no requirement that the Commission base its release decisions on the length of the sentence imposed, lest any disparity in sentence lengths be perpetuated by the parole decisions.

The Commission in its discretion shall decide the relevance of material submited to it. Therefore, the Committee does not intend to assign a certain weight to any of the information before the Commission in the parole release process. *Scarpa* v. *United States Board of Parole*, 477 F.2d 278 (5th Cir. 1973), *vacated as moot*, 414 U.S. 809 (1974). However, the Commission is bound by the fact-finding process required by section 3105(a)(2) (relating to presentence hearings) of the proposed code. Under the doctrine of collateral estoppel and on the basis of fairness, the United States Parole Commission is of course bound by findings of fact made by the sentencing court. *See generally Ash* v. *Swenson*, 397 U.S. 436, 444 (1970). But the Parole Commission may consider newly discovered evidence that was unavailable, dispite diligent and good faith efforts, at the time of the sentencing hearing. (*See Christopher* v. *United States Board of Parole*, 589 F.2d 924 (7th Cir. 1978). Even in these relatively rare cases, this information should be used with great care because it could adversely affect the amount of time the offender must serve in prison. The Parole Commission, if it promulgates guidelines in this area, might find the Oregon parole guidelines a useful model. Ore. Adm. Rule, ch. 254, section 155-015-3B (eff. February 1, 1979).

It would not be practical or desirable for the Commission to make a record of the relevance or weight accorded to each piece of information before it. This subsection, in combination with the requirement of section 4705(b) of the proposed code that the reasons for denying parole be stated with particularity, and the requirement of section 4705(c) of the proposed code that if a decision outside the guidelines is made the Commission should state the reasons for such decision, "including a summary of the information relied upon", should not be construed as requiring the Commission to make a written evaluation of every piece of information considered.

The phrase "at the time of sentencing" in subsection (a)(4) includes the 120-day time period for sentence modification provided by Rule 35 of the Federal Rules of Criminal Procedure.

§ 4707—Parole determination proceeding

This section carries forward 18 U.S.C. 4208. Subsection (a) provides that a parole determination proceeding must be held unless the Commission decides to grant release on the basis of the prisoner's record. The phrase "prisoner's record" refers to the information considered by the Commission in parole determination proceedings.

In the case of a prisoner with a minimum sentence, the parole determination proceeding shall be held, whenever feasible, not later than 30 days prior to the expiration of the minimum sentence. In the case of a prisoner with no minimum sentence or who has been reimprisoned following revocation proceedings, the parole determination proceeding shall be held, whenever feasible, not later than 120 days following imprisonment or reimprisonment in a Federal institution. The Committee intends that the Commission attempt, whenever feasible, to provide prompt parole determination proceedings for prisoners serving all or any part of their sentences in State or local prison facilities.

This subsection also incorporates the practice implemented by the Parole Commission in 1977 by which a prisoner is given a "presumptive date of release" (either by parole or expiration of sentence) promptly after the initial parole hearing. 28 C.F.R. section 2.12 (1979). The "presumptive date of release" is the time at which the Commission will order the prisoner's release, assuming that the prisoner maintains a good prison disciplinary record. By receiving the presumptive release date early in the sentence—subject to continued good institutional conduct—the prisoner is relieved of the uncertainty that has been one of the major criticisms of parole systems in the past. The Committee recognizes, however, that considerations of practicality may require the Commission to promulgate reasonable rules to limit the presumptive date procedure. For example, the Commission currently restricts presumptive dates to those cases in which release apears to be warranted within 10 years of the parole determination proceeding. 28 C.F.R. section 2.12(a) (1979).

In addition, this subsection permits a prisoner "knowingly and intelligently" to waive any parole determination proceeding. The phrase "knowingly and intelligently" requires the prisoner to acknowledge in writing that he or she understands what is being waived and that the choice is conscious, intentional, and without coercion.

Subsection (b) provides that notice of pending release proceedings and access to reports or other documents to be considered by the Commission in the release proceeding must be given to the inmate at least 30 days prior to the proceeding. Where an inmate has just arrived at an institution, however, it may be impossible to comply with this time requirement. Therefore, the subsection permits waiver, at the inmate's option, of the time requirement. If an inmate refuses to waive notice, the Commission may schedule special sessions, although it is under no obligation to do so. If no special sessions are scheduled, the inmate shall be heard by the Commission at the next regularly scheduled parole proceedings at that institution. The phrase "report or other documents" in subsection (b)(2) refers to those materials in the institution's files which the Commission considers in making its parole release determinations.

Subsection (c) provides that an eligible federal prisoner shall have reasonable access to certain documents used by the Commission in determining parole eligibility. However, three categories of documents may be excluded: (1) diagnostic opinions such as psychological or psychiatric reports which, if revealed to the inmate might seriously disrupt the inmate's institutional program; (2) documents containing information obtained upon the basis of a pledge of confidentiality; or (3) any other information which, if revealed, might result in harm, physical or otherwise, to any person.

Paragraphs (1), (2) and (3) of subsection (c) are virtually identical to section 3104(b) (relating to the court's power to refuse disclosure of certain information in the presentence investigation report) of the proposed code. The Commission, the Bureau of Prisons, or any other agency that deems the document excludable shall prepare a summary of it. The summary should inform the inmate of the basic contents of the excluded material, but should do so "bearing in mind that need for confidentiality". The phrase "bearing in mind the need for confidentiality" includes consideration of possible harm to any person. In addition, in summarizing material excluded under subsection (c)(1), unnecessary disruption of the prisoner's institutional program should be avoided.

Subsection (d)(1) permits the prisoner to consult, as provided by the Director of the Bureau of Prisons, by mail or otherwise with a representative or any other person concerning the impending proceeding. The phrase "as provided by the Director" simply acknowledges that such communications must conform with institutional policies and regulations promulgated by the Bureau of Prisons for prisoner mail, visiting, and other forms of communication.

Subsection (c)(2) permits the inmate to select a representative for assistance before and during the parole determination proceeding. The Commission is authorized to promulgate rules and regulations governing the qualifications of the representative. The Committee does not intend by the use of the term "representative" that the parole determination process be analogized to formal judicial proceedings.

Subsection (e) permits the prisoner to appear and testify in his or her own behalf at the parole determination proceeding. The term "testify" is not intended to require testimony under oath. Such testimony is not analogous to that in a formal judicial proceeding.

Subsection (f) provides that the Commission must maintain and make available upon request a complete record of every parole deter-

mination proceeding. Availability of the record does not entail preparation of a transcript in every case. When the Commission has prepared a transcript for its own use, a copy must be provided to the inmate if requested. If, however, the proceeding was tape recorded and never transcribed, then the availability requirement is satisfied if the Commission forwards a copy of the tape to the institution, where the inmate can listen to it. Alternatively, if written notes of the proceeding were made and the Commission forwards a copy of such notes, the availability requirement has been satified.

Subsection (g) provides that if parole is denied, the hearing examiners shall, "if feasible," personally explain the reasons for their recommendation to the inmate. The phrase "if feasible" simply acknowledges the possibility of a split recommendation requiring the vote of a third hearing examiner who may not be present. The inmate is not required to listen to such explanation. The hearing examiners shall also, when feasible, advise the inmate about what actions might enhance the offender's prospects for parole. The Committee intends that this requirement be narrowly construed. In situations in which the prisoner has been convicted of a serious offense, it may be that nothing will enhance the inmate's parole prospects until some additional period of time has been served. Promises of parole should not be used to coerce inmate participation in institutional programming.

Subsection (h) provides that additional parole determination proceedings shall be held for a prisoner who is denied parole at least every 18 months if the prisoner is sentenced to a term or terms of imprisonment of more than one year but less than 7 years, or every 24 months if the prisoner is sentenced to a term or terms of imprisonment of 7 years or more.

The Committee intends that all of the material bearing on the parole decision be considered at the initial determination proceeding, but that the subsequent proceedings required by this section focus upon those items or facts that may have changed since the first proceeding.

Subsection (i) sets forth the procedures to be followed when a presumptive date of release is to be rescinded because the prisoner has violated institutional rules or committed a new crime after the presumptive release date was set. Although an inmate's parole date may also be rescinded if the Commission receives information of presentence conduct which, though due diligence was exercised, was not available at the time of the initial hearing, such a rescission proceeding is not covered by this section. In those circumstances, the Commission may rescind a parole grant by conducting another hearing of the same type as the initial parole release proceeding. This approach comports with the decision in *Karger* v. *Sigler*, 384 F. Supp. 10 (D. Mass. 1974). *See also Christopher* v. *United States Board of Parole*, 589 F.2d 924 (7th Cir. 1978) (where the court approves the use of new information to rescind a presumptive release date). Where rescission of the presumptive parole release date is to be based on a violation of institutional disciplinary rules or the commission of a new crime, the Commission may rescind the presumptive date after a due process hearing. With respect to such hearing, the prisoner shall be given notice of the alleged violation; notice of the time, place, and purpose of the hearing; disclosure of the adverse evidence; an opportunity to be represented by retained or appointed counsel or another representative; an opportunity to appear, testify, and present witnesses and evidence; and an opportunity to confront and cross-examine adverse witnesses. These procedural protections parallel those applicable to parole revocation proceedings. See section 4713 of the proposed code. This implements the decision of the court in *Ready* v. *United States Parole Commission*, 483 F. Supp. 1273 (M.D. Pa. 1980).

The types of documents exempt from disclosure in connection with a parole determination proceeding under subsection (c) are also exempt from disclosure under subsection (i).

In lieu of the hearing described above, the Commission may postpone a presumptive release date for up to 60 days if the Bureau of Prisons has made a finding that the inmate has violated an institutional rule. The term "seriously violated a rule of the place of confinement" means a major institutional rule, the breach of which threatens the life or safety of inmates, or the property of the institution. The conduct must constitute a major disciplinary problem for the institution. The use of this provision to severely punish a person for technical violations of administrative or "housekeeping" rules would be inappropriate. While there is some doubt about the extent of the applicability of the eighth amendment's prohibition against cruel and unusual punishment to prison disciplinary proceedings, *Compare Hutto* v. *Finney*, 437 U.S. 678 (1978) *with Sostre* v. *McGinnis*, 442 F.2d 178, 194, (2d Cir. 1971), *cert. denied sub. nom.*, *Sostre* v. *Oswald*, 404 U.S. 1049 (1972); *Jackson* v. *Biship*, 404 F.2d 571 (8th Cir. 1968), the purpose of this provision is to limit the penalty to a sanction proportionate and directly related to the nature of the harm done or threatened by the conduct. *See* 3101(1) of the proposed code (relating to the purposes of sentencing). A finding of this type must result from a hearing where the prisoner is provided notice of the alleged violation and of the time, place and purpose of the hearing; an opportunity to be present in accordance with Bureau of Prisons rules; and an opportunity to be apprised of the adverse evidence, to confront and cross-examine adverse witnesses, and to appear, testify, and present witnesses and evidence, unless the Bureau of Prisons specifically finds that such opportunities would jeopardize correctional goals or the security of the institution. These procedural protections parallel the constitutional requirements outlined by the Supreme Court in *Wolff* v. *McDonald*, 418 U.S. 539 (1979), concerning the forfeiture of statutorily created good time credits.

In hearings conducted under this subsection, the Commission and the Bureau of Prisons may subpoena witnesses and evidence for themselves or on behalf of the offender. In exercising the discretion to issue a subpoena, the Commission and the Bureau of Prisons should consider several factors, including the possibility of substitutes for live testimony, the relevance of the testimony or evidence sought, and whether or not such testimony or evidence is duplicative.

§ *4708—Conditions of parole*

This section carriers forward 18 U.S.C. 4209.

Subsection (a) provides that, as a condition of parole, every parolee must be prohibited from committing a Federal, State, or local criminal offense during the period of parole. The Commission may impose

conditions of parole that limit the parolee's liberty (short of incarceration) if, in the Commission's judgment, such conditions are reasonable necessary to protect the public welfare. The Commission may also impose other conditions of parole to the extent that there is a reasonable relationship between such condition, on the one hand, and the nature and circumstances of the offense and the history and characteristics of the parolee, on the other hand. Conditions of parolee limiting the parolee's liberty (short of incarceration) and other conditions of parole may be modified. The phrase "Federal, State or local crime" excludes such petty violations as minor traffic offenses, except where a pattern of such violations indicates disrespect for the law.

Subsection (b) provides that conditions imposed by the Commission must be specific, so that they can serve as a guide to behavior. Upon release, the parolee is to be given a certificate setting forth such conditions in writing. An effort shall be made to ensure that each parolee understands the nature of such conditions. The Committee intends that if the first language of the parolee is one other than English, the conditions of parole should be translated into that language when feasible.

Subsection (c) provides that the conditions of parole may require that an individual reside in or participate in the program of a community treatment center or addict treatment program.

Subsection (d) sets forth the procedures and standards by which conditions of parole may be modified. If a supervising probation officer wishes to modify the conditions of parole, the officer may apply to the Commission for such modification, and shall give the parolee notice of the proposal. The parolee shall have 10 days in which to comment on, or object to, such proposed modification. The Commission shall review applications for modification of the conditions of parole and consider any relevant information which the parolee may present. If approved, the proposed modification shall take effect within 21 days following the 10 day period in which the parolee may object or comment.

In addition, the Commission may modify conditions on its own motion, provided the parolee has been given 10 days to comment on the proposed modification.

The parolee may also petition the Commission for a modification of parole conditions. The Commission shall act with due deliberation on such petitions, but, in order to deter parolees from submitting repeated or unwarranted applications, shall not be required to respond within the 21 day period required for petitions of probation officers.

Notwithstanding the authority to modify the conditions of parole, the Commission may not modify the condition prohibiting each parolee from violating the criminal laws.

Section 4713 (relating to revocation of parole) of the proposed code, and not this section, governs the modification of the conditions of parole after a revocation proceeding.

§ *4709—Jurisdiction of Commission*

This section carries forward 18 U.S.C. 4210.

Subsection (a) provides that an individual released on parole remains in the legal custody of the Attorney General until either the sentence expires by operation of law or the Commission terminates

parole supervision pursuant to section 4710 (relating to early termination of parole) of the proposed code.

Subsection (b) provides that the Parole Commission's jurisdiction over a parolee terminates no later than the date of the expiration of the sentence imposed by the court, except under certain circumstances set forth in this section.

This subsection also provides that an individual whose parole has been revoked upon conviction of any new criminal offense that is punishable by a term of imprisonment, detention or incarceration in a penal institution shall receive no credit for service of the sentence for which the individual has been paroled from the day released on parole until the person either returns to Federal custody following completion of any new sentence of incarceration or the Commission determines that the sentences should run concurrently, pursuant to section 4713 (b) or (c) (relating to revocation of parole) of the proposed code. In computing the date the sentence expires, the Commission shall take into account the amount of time the parolee served for the original offense prior to being released on parole, and the amount of time served for such offense following revocation. The times combined shall not be longer than the maximum term for which the person was sentenced in connection with the original offense.

The Committee intends the phrase "punishable by a term of imprisonment, detention or incarceration in a penal facility" to mean any term of confinement which may be levied upon adjudication of guilt or delinquency. It does not include detention prior to adjudication. A person convicted of any offense that is punishable by any term of imprisonment will not receive credit toward service of the original sentence if no sentence of imprisonment is ultimately imposed.

This subsection also provides that an individual whose parole has been revoked for violating any other condition of release shall receive credit toward service of the sentence for the time served before the release on parole and for the time spent on parole prior to the date that a warrant or summons was issued pursuant to section 4712 of the proposed code.

Subsection (c) provides that the Commission may extend the time of its jurisdiction over any parolee who is an absconder or who has refused or failed to respond to any reasonable request, order, summons, or warrant of the Commission, or any member or agent thereof. This extension may be for as long a period of time as the parolee refused or failed to respond. In deciding whether to extend its jurisdiction, the Parole Commission shall consider how long the parolee was imprisoned prior to release on parole, how long the parolee served on parole prior to refusing or failing to respond to the Commission or any of its agents, and whether there was any continuous period of time thereafter during which the parolee did not refuse or fail to respond to the Commission or any of its agents.

Subsection (d) provides that a term of parole shall run concurrently with any other term of parole or probation.

Subsection (e) provides that when the Commission's jurisdiction over a parolee terminates, or otherwise expires, it must issue a certificate of discharge to the parolee and may provide additional copies of the document to other agencies if it deems it appropriate.

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§ *4710—Early termination of parole*

This section carries forward 18 U.S.C. 4211.

Subsection (a) provides that the Parole Commission may at any time terminate supervision over the parolee upon its own motion or upon the petition of a parolee.

Subsection (b) requires periodic reviews of the status of each parolee in order to determine if continued supervision on parole is necessary. A review must take place 2 years after each parolee's release on parole and annually thereafter.

Subsection (c)(1) provides that after 5 years of parole supervision the parolee shall be released from supervision unless the Commission determines that there is a "likelihood that the parolee will engage in conduct violating any criminal law". The term "likelihood that the parolee will engage in conduct violating any criminal law" is similar to the term "release would not jeopardize the public welfare" used in section 4705 (relating to parole determination criteria) of the proposed code. Both rely on the use of probability in making the judgments required of the Commission by this section. Application of each of these standards involves an estimate of the probability of certain behavior, rather than the certainty of such behavior. "Likelihood", however, is a higher standard than is used in section 4705 of the proposed code because the Commission will have supervised the parolee in the community for 5 continuous years, and will thus be able to compare the parolee's conduct with that of other offenders with similar backgrounds. Neither periods of parole supervision prior to the most recent release on parole nor time in confinement on any other sentence shall be included in the calculation of the 2 and 5 year time periods set forth in subsections (b) and (c).

§ *4711—Aliens*

This section reenacts current law (18 U.S.C. 4212) with respect to aliens subject to deportation after release on parole. Subsection (a) provides that in such cases, the Commission may authorize the release of such prisoner for deportation purposes. Subsection (b) requires that the prisoner then be delivered to the appropriate immigration official for deportation.

§ *4712—Summons to appear or warrant for retaking of parolee*

This section carries forward 18 U.S.C. 4213.

This section provides that the Commission may initiate revocation proceedings through either a summons or a warrant. The Committee intends that the Commission minimize any disruption to the parolee's life that a revocation proceeding may cause. The Commission therefore has discretion to use either a summons or warrant when a condition of parole is alleged to have been violated. The Committee recognizes, however, that the use of a summons for a parolee with a prior adult or juvenile record may be inappropriate.

Subsection (b) requires that any summons or warrant be issued as soon as practicable after the alleged violation is discovered, "except when delay is deemed necessary." The decision as to when the revocation process should be initiated is committed to the Commission's discretion. The Committee intends that it shall not be a defense to a revocation that previous parole violations were either ignored or not acted upon.

Subsection (c) requires that any summons or warrant issued pursuant to this section provide the parolee with written notice of (1) the conditions of parole which are alleged to have been violated, (2) the parolee's rights, and (3) possible action which may be taken by the Commission. The Commission may satisfy the general notice requirements with a printed form that sets forth the necessary information.

Subsection (d) provides that any Federal correctional officer or other Federal officer authorized to serve criminal process within the United States can execute warrants under this section, if so directed by the Commission.

§ *4713—Revocation of parole*

This section carries forward 18 U.S.C. 4714.

This section establishes parole revocation procedures to be implemented after a summons or warrant has been issued pursuant to section 4712 of the proposed code. The Committee recognizes that parole revocation proceedings may result in the deprivation of liberty. This section therefore sets forth procedural safeguards relating to those proceedings, including those required by the Supreme Court in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), and *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

Subsection (a) applies to parolees who have not been convicted of a new crime. The revocation process for them consists of 2 hearings: (1) a preliminary hearing, held near the place of the alleged violation, to determine if there is probable cause to believe that the parolee has violated a condition of parole; and, if probable cause exists; (2) a revocation hearing to determine if a violation has taken place, and, if it did, whether or not there are mitigating circumstances so that revocation is not warranted. The probable cause hearing must be held without unnecessary delay.

After finding of probable cause at the preliminary hearing, the Commission may release the parolee to supervision, pursuant to subsection (a)(1)(A), if the Commission believes that continuation of revocation proceedings is not warranted, or that incarceration is not warranted by any of the following considerations: (1) the alleged frequency or seriousness of a violation; (2) the degree of likelihood that the parolee will not appear at the revocation proceeding; or (3) the degree of danger that the parolee represents to any person.

Both the preliminary and final revocation hearings must be conducted in accordance with the following procedures: (a) The parolee must be given notice of the allegations and the time, place, and purpose of the scheduled hearing; (b) The parolee is entitled to be represented by retained counsel or, if the parolee is unable to retain counsel, by counsel provided pursuant to section 5101 (relating to adequate representation of defendants) of the proposed code. Alternatively, the parolee may choose another representative, as provided by Parole Commission rules and regulations. *See Baldwin* v. *Benson*, 584 F.2d 953 (10th Cir. 1978); (c) The parolee is entitled to an opportunity to appear, testify, and present witnesses and relevant evidence; and

(d) The parolee is entitled to an opportunity to be apprised of adverse evidence and to confront and cross-examine adverse witnesses,

unless the Commission specifically finds substantial reason for not allowing such confrontation. The phrase "apprised of the adverse evidence" is to be construed in accordance with present law's disclosure requirements with respect to parole revocation proceedings. In addition, although there is often no adequate alternative to live testimony, the Committee recognizes that in some cases it may be appropriate for the Commission to use conventional substitutes for live testimony, including affidavits, depositions and documentary evidence. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 783 n. 5 (1973). The phrase "substantial reason" includes situations involving (1) the potential of harm to any person; (2) testimony that is irrelevant or duplicative; and (3) the possibility that witnesses may be unavailable due to illness or distance from the proceeding.

Subsection (a) permits the Commission to subpoena witnesses and evidence for parole revocation proceedings. In exercising its discretion to issue a subpoena the Commission shall consider factors such as the relevance of the testimony or evidence sought, and whether or not such testimony or evidence is duplicative.

Subsection (b) authorizes the Commission, if it determines by a preponderance of the evidence that the parolee has violated a condition of parole, to restore the parolee to supervision, issue a reprimand, modify any condition of parole release, refer the parolee to a halfway house, or revoke parole.

Subsection (b) also provides for abbreviated revocation proceedings where the parolee has sustained a new criminal conviction. A new criminal conviction *per se* satisfies the probable cause requirement in parole revocation proceedings. *United States* v. *Tucker*, 524 F.2d 77 (5th Cir.), *cert. denied*, 424 U.S. 966 (1975).

The Commission must review parole detainers placed against parolees who have been imprisoned after conviction for a new crime committed while on parole. The Commission must review such detainer within 180 days of the day it was lodged. Notice of the pending review must be sent to the parolee as soon as practical after the detainer has been lodged. The Commission need not hold a dispositional hearing to determine if mitigating circumstances exist. If the Commission decides that more information is needed for the detainer review, a dispositional hearing may be held at the institution in which the parolee is serving the new sentence. Legal representation, as described in subsection (a) (2) (B) of this section, is provided to assist the parolee in the dispositional process.

Following the dispositional review described above, the Commission may let the detainer stand or withdraw it. If the detainer is withdrawn, the parolee will be reinstated to supervision. Thus, the Federal sentence will run without interruption until expiration.

Subsection (c) permits an alleged parole violator who knowingly and intelligently waives the right to revocation proceedings under subsection (a), who knowingly and intelligently admits to a violation of a preliminary hearing held under subsection (a) (1) (A)), or who is retaken under subsection (b) of this section, to receive a parole revocation hearing within 90 days of being retaken into Federal custody. The alleged parole violator has the right to notice of such hearing, to

appear and testify on his or her own behalf, and to representation by counsel or a representative as provided in subsection (a) (2) (B).

§ *4714—Appeal*

This section carries forward, in modified form, 18 U.S.C. 4215.

Subsection (a) provides that a parolee may appeal to the National Appeals Board within 30 days of receiving written notice of any action setting a release date, denying parole, imposing or modifying parole conditions, denying discharge from parole, or revoking parole. The National Appeals Board must decide the appeal within 60 days of receiving the appellant's papers.

This amends certain provisions of the Parole Commission and Reorganization Act of 1976 by deleting an intermediate administrative appeal to the Regional Parole Commissioner. Because the regional commissioner has already made one decision in a case, this intermediate appellate step in unnecessary. A final decision can be expedited by providing a single appeal directly to the National Appeals Board.

Subsection (b) carries forward current law and provides that the National Appeals Board may review any decision of a regional commissioner upon the written request of the Attorney General. This provision has not been used since 1976. The Attorney General may bring additional information to the attention of the National Appeals Board.

§ *4715—Applicability of Administrative Procedure Act*

This carries forward 18 U.S.C. 4218.

This section brings the Commission's rulemaking process within purview of the Administrative Procedure Act (chapter 5 of title 5 of the United States Code.). Subsection (c) makes the actions of the Commission reviewable under chapter 7 (relating to judicial review procedures) of that Act. *See Pickus* v. *United States*, 507 F.2d 1107 (D.C. Cir. 1974).

Commission decisions involving the granting, denial, modification, or revocation of parole are to be considered actions committed to agency discretion for the purpose of section 701(a) (2) of title 5 of the United States Code, but these decisions, as opposed to rulemaking decisions discussed in subsection (c), are excluded from the judicial review provisions of chapter 7 of title 5. This reflects current law. Nothing in this section limits the right to judicial review of any constitutional claims regarding such decisions.

§ *4716—Report by Judicial Conference*

This section requires the Judicial Conference of the United States and the Parole Commission to submit reports to Congress about the effectiveness of the parole release system in conjunction with the sentencing guidelines required by chapter 43 of the proposed code. The Judicial Conference, pursuant to sections 4303 and 4304 of the proposed code, must establish a committee on sentencing to promulgate these guidelines, which become effective once they are approved by the Judicial Conference and Congress. The first of the reports to Congress must be submitted not later than 5 years after the effective date of the guidelines. Successive reports must be submitted at regular intervals thereafter. If earlier, preliminary reports are feasible and the data presented sound, such reports should be presented to Congress when ready.

In promulgating the guidelines, the committee on sentencing must address the fundamental question of whether the guidelines should, in addition to addressing the decision whether to impose a prison term (the so-called "in/out" decision), attempt also to address the matter of the actual length of time served in prison. If the committee on sentencing chooses the former approach, the parole guidelines will continue to regulate prison term lengths. Thus, there will be no inconsistency between the sentencing guidelines and the Parole Commission guidelines. These guidelines would necessarily have to address the question of maximum sentence length and whether a period of parole ineligibility should be imposed. *See—supra.*

If the committee on sentencing takes the latter approach, it could set sentence length either by using artificially long, or "symbolic" sentences, as current law does, or by using the average times actually served pursuant to the parole release system.

For example, a person sentenced under current law to 20 years in prison cannot serve more than 13⅓ years (unless there is extraordinary prison misbehavior) because "good time" provisions reduce the sentence by one-third. Moreover, current law sets parole eligibility consideration at one-third of the sentence. Thus, under current law most offenders with 20 year sentences serve between 6 and 13⅓ years. See discussion of "good time" and parole eligibility at 517 *supra.*

The 20 year sentence imposed is known as "symbolic" time and the time actually served is known as "real" time. The public and the judiciary are generally aware of only the symbolic time. In addition, since Congress has in the past set statutory maximums, it might review proposed sentencing guidelines in that light. Thus, even if the sentencing guidelines submitted to Congress reflected real time, Congress might revise them to reflect symbolic time instead. If that were the case, the size of the prison population could be controlled only through continued use of the parole release system.

On the other hand, if the sentencing guidelines set real time sentences, a prisoner would be eligible for parole after service of one-half of the sentence. But since the sentencing and parole guidelines would be coordinated, the rate of parole grants would decrease and prisoners would simply be released at the expiration of their sentences. If this result is reported to Congress pursuant to the requirements of this section, the parole release system may ultimately be abrogated.

Some have argued that the sentencing guidelines cannot be fairly evaluated while the Parole Commission continues to function. *See, e.g.*, Letter from United States Circuit Judge Jon O. Newman to Congressman Robert F. Drinan, Chairman, Subcommittee on Criminal Justice, House Committee on the Judiciary (Sept. 14, 1979). They suggest, for example, that courts might begin to impose long periods of parole ineligibility, resulting in unrealistically long sentences, in order to frustrate the application of the parole guidelines.

However, under current law, which places *no* constraints on the sentencing discretion of judges, parole eligibility is set at a time later than that specified in the parole guidelines in less than 7 percent of the cases that go before the Parole Commission. Letter from Benjamin J. Malcolm, Vice-Chairman, United States Parole Commission, to Congressman Robert F. Drinan, Chairman, Subcommittee on Criminal

Justice of the House Committee on the Judiciary (June 26, 1980). That percentage should be reduced, rather than increased, by the use of sentencing guidelines, and especially by appellate review of sentences above the guidelines. Both sentencing and parole decisions are to be based on the applicable guidelines. The Committee does not expect the courts to attempt to evade the parole guidelines through increased use of their authority to set periods of parole ineligibility.

Some criticize as duplicative a system that retains parole release, but also uses sentencing guidelines, because each set of guidelines would consider similar types of information, such as the seriousness of the offense and the offender's previous criminal history. *See* letter of the Honorable Jon O. Newman, United States Court of Appeals for the Second Circuit, to Robert F. Drinan, Chairman, Subcommittee on Criminal Justice of the House Committee on the Judiciary (September 14, 1979). But parole guidelines would be redundant only if experience during the five year test period persuasively demonstrated that the committee on sentencing was able to promulgate precisely drafted and comprehensive guidelines, and if district and appellate court judges were prepared to follow the guidelines. If the initial guidelines are imprecise, or if courts do not adequately comply with them, then parole release guidelines will be essential in performing a time scaling function as well as reducing disparity in terms of confinement. There is nothing redundant about having a safety net.

In sum, the reports required by this section will address several critical questions regarding the sentencing guidelines and the parole system:

(1) If the committee on sentencing chooses to establish guidelines with "real time" ranges, are the guidelines drafted by the committee on sentencing and promulgated under chapter 43 of the proposed code as specific and precise as those of the Parole Commission?[1]

(2) Do those guidelines reflect realistic periods of imprisonment when setting forth the ranges for maximum sentences?

(3) Do judges apply the sentencing guidelines in a consistent manner?[2]

(4) How frequently are presumptive release dates modified on the basis of information not considered at the time of sentencing?

(5) What types of circumstances are considered when such modifications are made?

(6) Are such modifications appropriate?

§ *4717—Definitions for chapter*

This section defines six terms for the purposes of chapter 47 of the proposed code.

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[1] The Parole Commission's guidelines, 28 C.F.R. 2, address the questions of (a) how to score offenses, i.e., how much to rely on past sentencing practices and the statutory classification scheme, and whether to use the "real offense" or the offense of conviction; (b) how to create categories of offenders, i.e., how to evaluate previous criminal history, including juvenile dispositions; (c) what weight to give to each characteristic of the offense or offender; and (d) what rationale to use to support the policy decisions behind the guidelines. These questions have also been intelligently addressed in the Minnesota Sentencing Guidelines, *see* Minnesota Sentencing Commission, Report to the Legislature (Jan. 1, 1980), and in the Oregon Parole Guidelines, *see* Oreg. Rev. Stat. section 144780 (Repl. vol. 1977).

[2] On the average, in one year, a United States district judge imposes fewer than 30 prison sentences of more than one year. Statement of Cecil C. McCall, Chairman, United States Parole Commission, Hearings on Revision of Federal Criminal Laws before the Subcommittee on Criminal Justice of The House Committee on the Judiciary, 96th Cong., 1st sess. (1980). Thus, it is possible that, at least initially, judges will experience some difficulty in categorizing offenses and offenders and in applying the correct guidelines.

Paragraph (1) defines the term "Commission" to mean the United States Parole Commission.

Paragraph (2) defines the term "Commissioner" to mean a member of the United States Parole Commission.

Paragraph (3) defines the term "Director" to mean the Director of the Bureau of Prisons.

Paragraph (4) defines the term "eligible prisoner" to mean a prisoner imprisoned under chapter 37 of the proposed code who is eligible for parole under the proposed code or any other law. The term includes a prisoner whose parole has been revoked and who is not otherwise ineligible for parole. The United States Parole Commission thus has authority to make parole decisions when the person is sentenced for a Federal offense, whether that person is confined in a Federal facility, a State or local facility, or a District of Columbia facility.

Paragraph (5) defines the term parolee to mean an eligible prisoner who is released on parole.

Paragraph (6) defines the term "rules" to mean rules prescribed by the Commission under section 4702 of the proposed code and section 553 of title 5. Guidelines for parole decision making promulgated by the Parole Commission are rules and regulations with the meaning of this definition.

Subtitle IV—Administration and Procedure

Chapter 51—General Provisions

§ 5101—Adequate representation of defendants

This section, which carries forward in modified form 18 U.S.C. 3006A, requires the establishment, in each judicial district, of a plan to ensure the adequate representation of indigent defendants in criminal cases. The administrative mechanism for the development and implementation of such plans are carried forward without change. The Committee has, however, made three changes in current law. These changes are the result of recommendations made by the Judicial Conference of the United States through the Administrative Office of the United States Courts, by the Federal Public and Community Defenders, and by various members of the defense bar.

The first change made by the Committee increases by 50 percent the maximum fee that a district plan may authorize as payment to an attorney for representation of a defendant under a district plan. The present maximum fee was set more than a decade ago, and this change barely compensates for inflation. This increase comports with the recommendations of the American Bar Association. *See* American Bar Association, *Providing Defense Services* standard 5–2.4 (1979).

The second change provides for representation of a person who is a witness before a grand jury or court if there is reason to believe, either prior to or during testimony, that the witness could be subject to any criminal prosecution or face loss of liberty. This change was suggested by the Judicial Conference of the United States. The provision does not address the issue of whether counsel representing a witness before a grand jury will be permitted inside the grand jury room at the time the witness actually testifies.

The third change concerns the classes of offense which district plans must include within their coverage. Current law (18 U.S.C. 3006A) provides that district plans must provide representation when the charge involves a felony or a misdemeanor, other than a petty offense (which is defined in 18 U.S.C. 1 to mean an offense punishable by imprisonment for 6 months or less). Thus, using the proposed code's classification scheme, current law would require that district plans provide representation when the charge involves a felony or a class A misdemeanor. The Committee has carefully examined the matter and has concluded that the better course of action is to require that district plans provide representation when the charge involves a felony or any class of misdemeanor.

Indigent defendants have, in addition to the statutory entitlement to counsel found in 18 U.S.C. 3006A, a broader constitutional right to counsel. The Supreme Court has held that the right to counsel attaches to those offenses which are sufficiently socially stigmatizing

to trigger the protections of a jury trial. *District of Columbia* v. *Colts*, 282 U.S. 63 (1930) (counsel required for driving while intoxicated charge). *See also United States* v. *Sanchez-Meza*, 547 F.2d 461 (9th Cir. 1976) (conspiracy charge justifies the appointment of counsel); *Brady* v. *Blair*, 427 F. Supp. 5, 9–10 (S.D. Ohio 1976) (driving while intoxicated triggers the right to counsel). Just last year, the Court held that an indigent defendant who received jail time was entitled to publicly supplied counsel. *Scott* v. *Illinois*, 440 U.S. 367 (1979).

The implementation of the *Scott* case presents practical difficulties. A judge, at the time of arraignment (or even earlier), must predict that the defendant will be convicted and determine the probable sentence, in order to decide whether an indigent defendant qualifies for a publicly supplied counsel under *Scott*. The Committee believes that the administration of justice would be better served by an easier to use rule. *See generally* Uniform Rules of Criminal Procedure 321 (b), 10 U.L.A. 69 (1974) (criticizing a case-by-case approach). Therefore, the Committee has provided that district plans cover all misdemeanors. This approach is supported by the American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, the National Conference of Commissioners on Uniform State Laws, and the American Law Institute.[1] Moreover, this approach is consistent with what is done in the majority of the States. *See Scott* v. *Illinois*, 440 U.S. 367, 386 nn. 18–22 (1979).

§ *5102—Appeal by United States*

This section, which carries forward 18 U.S.C. 3731, provides that the Government may appeal a limited range of decisions made by district courts. The Committee does not expand the Government's appeal right, recognizing that such expansions are disfavored.

§ *5103—Procedure to and including verdict*

This section carries forward 18 U.S.C. 3771 and authorizes the Supreme Court to prescribe rules of pleading, practice, and procedure for all proceedings in criminal cases through verdict. This section also establishes a method of Congressional review of proposed rules.

§ *5104—Procedure after verdict*

This section, which carries forward 18 U.S.C. 3772, authorizes the Supreme court to prescribe rules of practice and procedure for proceedings in criminal cases after verdict. The section also establishes a method of Congressional review of proposed rules.

§ *5105—Rules of procedure in cases conducted by magistrates; practice and appeal*

This section carries forward 18 U.S.C. 3401 and provides that appeals from the decisions of United States magistrates shall lie with the various United States district courts. This section also authorizes the Supreme Court to prescribe rules of procedure and practice for the trial of cases before United States magistrates and for the hearing of appeals before the judges of United States district courts.

[1] ABA, PROVIDING DEFENSE SERVICES std. 5–4.1 (1979); NAT'L. ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS std. 13.1 (1974); Model Public Defender Act §§ 1(4) and 2(a)(1); UNIFORM RULES OF CRIMINAL PROCEDURE 321(b); MODEL CODE OF PRE-ARRANGEMENT PROCEDURE §§ 310.(5) and 310.2.

CHAPTER 53—ARREST, LAW ENFORCEMENT, AND OTHER PRELIMINARY MATTERS

§ *5301—Indictment and list of jurors and witnesses for prisoner in capital cases*

Section 5301 reenacts 18 U.S.C. 3432, and requires that a person charged with a capital offense be given, at least 3 days prior to the start of trial, a copy of the indictment, and a list of the names and addresses of the witnesses and the members of the jury panel.

§ *5302—Demands for production of statements and reports of witnesses*

Section 5302 reenacts 18 U.S.C. 3500, also known as the "Jencks Act," which regulates disclosure to the defendant of statements made by Government witnesses which are in the possession of the Government.

§ *5303—Power of courts and magistrates*

Section 5303 reenacts 18 U.S.C. 3041, and empowers specified judicial officers to commit to jail or to release pursuant to chapter 63, before trial, any person charged with an offense against the United States.

§ *5304—Extraterritorial jurisdiction*

Section 5304 reenacts 18 U.S.C. 3042. Section 5304 applies the release power in section 5303 of the proposed code to the cases of fugitives arrested outside the special or general jurisdiction of the United States.

§ *5305—Security of the peace and good behavior*

Section 5305 reenacts 18 U.S.C. 3043, and authorizes designated judicial officers to hold to security of the peace and for good behavior.

§ *5306—Warrant for removal*

Section 5306 reenacts 18 U.S.C. 3049 and provides that only one warrant is needed to transport a prisoner from district to another.

§ *5307—Powers of the Federal Bureau of Investigation*

Section 5307 reenacts 18 U.S.C. 3052 and empowers agents of the Federal Bureau of Investigation to carry firearms, serve warrants and subpenas of the United States and to make arrests. The provision in this section that authorizes arrest upon "reasonable suspicion" means that the elements of "probable cause" required by the fourth amendment must be present. *United States* v. *Green*, 525 F.2d 386 (8th Cir. 1975); *United States* v. *Johnson*, 495 F.2d 378 (4th Cir.), *cert. denied*, 419 U.S. 860 (1974).

§ *5308—Powers of marshals and deputies*

Section 5308 reenacts 18 U.S.C. 3053 and authorizes United States marshals and their deputies to carry firearms and make arrests.

§ *5309—Powers of certain officers relating to offenses involving animals and birds*

Section 5309 reenacts 18 U.S.C. 3054 and provides that employees authorized by the Secretary of the Interior to enforce provisions relating to importing, transporting, labeling, and packaging various

class of animals and birds, and officers of the customs service, may, to enforce certain provisions relating to animals and birds, make arrests and serve warrants.

§ *5310—Powers of Secret Service*

Section 5310 reenacts 18 U.S.C. 3056 and authorizes the Secret Service to protect certain public officials and foreign guests, and members of the families of those officials and guests; to investigate and arrest persons for violating specified Federal laws, including violations of 16 sections of title 18; to execute warrants, carry firearms, and perform other duties authorized by law.

Subsections (1), (2), and (3) grant the Secret Service jurisdiction to perform certain protective functions. This provision is derived from the first sentence of 18 U.S.C. 3056.

Subsection (4) provides the Secret Service with authority to detect and arrest persons committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and foreign governments. These provisions carry forward the second clause of 18 U.S.C. 3056(a). This approach carries forward the same broad reach as current law. It authorizes the detection and arrest of persons in violation of certain sections of proposed title 18, as well as section 271 (relating to mutilation of national bank obligations); section 301 (relating to counterfeiting obligations or securities); section 302 (relating to imitating obligations or securities; advertisements); section 303 (relating to uttering coins of gold, silver, or other metal); section 304 (relating to tokens or paper used as money); and section 306 (relating to printing and filming of United States and foreign obligations and securities) of title II of this bill. This approach allows law enforcement jurisdiction to be exercised over offenses of this nature that may be added by future Congresses.

Subsection 5 provides for authority to detain and arrest persons who are in violation of nine sections of title I of proposed title 18, as well as several sections of title II of the bill. The enumerated offenses carry forward certain specific offenses listed in 18 U.S.C. 3056(a). In general, the Secret Service is granted authority to detain and arrest persons involved in criminal activity involving theft, forgery, or counterfeiting of certain governmental obligations, securities, or electronic representations thereof. This will preserve the Secret Service's significant law enforcement expertise in these areas.

The remaining subsections of this section carry forward the rest of 18 U.S.C. 3056.

§ *5311—Bankruptcy investigations*

Section 5311 reenacts 18 U.S.C. 3057 and directs certain officials who have reasonable grounds to believe that the bankruptcy laws have been violated or that an investigation should be made in connection therewith, to report the facts to the United States attorney, who is authorized to make such an investigation.

§ *5312—Interned belligerent nationals*

Section 5312 reenacts 18 U.S.C. 3058 and provides that a member of the armed force of a belligerent nation or faction who has been interned in the United States is subject to arrest if such person leaves or attempts to leave the jurisdiction of the United States.

§ *5313—Rewards and appropriations therefor*

Section 5313 reenacts 18 U.S.C. 3059 and authorizes the Attorney General to offer and pay a reward for the capture of, or for providing information leading to the arrest of, persons charged with violating the criminal laws of the United States or any State.

§ *5314—Powers of postal personnel*

Section 5314 reenacts 18 U.S.C. 3061 and authorizes certain postal service personnel to serve warrants, make arrests in connection with property in the custody of the Postal Service, use of mails or postal offenses.

§ *5315—Preliminary examination*

Section 5315 reenacts 18 U.S.C. 3060 and requires that a preliminary examination be held within specified time limits in order to determine whether there is probable cause to believe that an offense has been committed and that the arrested person committed such offense.

§ *5316—Surrender of youthful offenders to State authorities; expenses*

Section 5316 reenacts 18 U.S.C. 5001 and provides that persons under 21 years of age who are arrested for the commission of offenses punishable by courts of the United States may be turned over to a State or the District of Columbia if it is determined that such disposition would be in the best interest of the United States and the juvenile and that the State can and will assume jurisdiction over the juvenile according to its laws.

§ *5317—Railroad police*

Section 5317 is new to Federal law. The section empowers the Attorney General to delegate to any railroad common carrier, or to any employee of such carrier, any investigative or law enforcement function of the Attorney General that is necessary for the protection of employees and passengers of the carrier, property of the carrier, and property moving in interstate or foreign commerce in possession of such carrier. This section was added in response to the increasingly serious problem of personal and property offenses being committed against railroads and their customers and freight and in recognition of the limited Federal law enforcement resources. It is not the Committee's intent to expose the Federal Government to any tort or other liability for the misconduct or inattention of railroad police. Such liability remains solely with the railroads employing, training, equipping, or supervising such police.

CHAPTER 55—EXTRADITION, TRANSFER, AND INTERSTATE AGREEMENT ON DETAINERS

SUBCHAPTER I—EXTRADITION

§ *5501—Scope and limitation of subchapter*

Section 5501 reenacts 18 U.S.C. 3181 and provides that the extradition subchapter is in force with respect to a foreign country only to the extent that a treaty of extradition with that country is in existence.

§ *5502—Fugitives from State to State*

Section 5502 reenacts 18 U.S.C. 3182 and sets forth the procedure for obtaining extradition of a person who has fled from one State to another State.

§ *5503—Fugitives from State into extraterritorial jurisdiction of United States*

Section 5503 reenacts 18 U.S.C. 3183 and sets forth the procedure for obtaining extradition of an American citizen or national who has fled from a State to a country in which the United States exercises extraterritorial jurisdiction.

§ *5504—Fugitives from foreign country to United States*

Section 5504 reenacts 18 U.S.C. 3184 and sets forth the procedure for extraditing a person sought by a foreign government with which the United States has a treaty or convention of extradition.

§ *5505—Fugitives from country under control of United States into the United States*

Section 5505 reenacts 18 U.S.C. 3185 and sets forth the procedure for the extradition of a person from the United States to a foreign country or territory that is occupied by or is under the control of the United States.

§ *5506—Secretary of State to surrender fugitive*

Section 5506 reenacts 18 U.S.C. 3186 and authorizes the Secretary of State to order the surrender of a person committed under sections 5504 or 5505 to the authorized agent of a foreign government.

§ *5507—Provisional arrest and detention within extraterritorial jurisdiction*

Section 5507 reenacts 18 U.S.C. 3187 and provides that an arrest under sections 5503 and 5504 of the proposed code may be obtained, in advance of the presentation of formal proofs, by telegraph. No person may be held in custody pursuant to a telegraphic request for more than 90 days.

§ *5508—Time of commitment pending extradition*

Section 5508 reenacts 18 U.S.C. 3188 and sets 2 calendar months as the maximum length of time that a person can be held in custody pending rendition to a foreign government.

§ *5509—Place and character of hearing*

Section 5509 reenacts 18 U.S.C. 3189 and provides that hearings in extradition cases shall be held on land, publicly, and in a room accessible to the public.

§ *5510—Evidence on hearing*

Section 5510 reenacts 18 U.S.C. 3190 and provides that papers offered in an extradition hearing shall be admissible in evidence if they meet the authentication requirements of the demanding country. A certificate to that effect by the principal United States diplomatic officer constitutes proof of such authentication.

§ *5511—Witnesses for indigent fugitives*

Section 5511 reenacts 18 U.S.C. 3191 and authorizes, upon an appropriate showing, the payment of fees of witnesses on behalf of a person defending against extradition.

§ *5512—Protection of accused*

Section 5512 reenacts 18 U.S.C. 3192 and authorizes measures to be taken to safeguard a person extradited by a foreign government to the United States.

§ *5513—Receiving agent's authority over offenders*

Section 5513 reenacts 18 U.S.C. 3193 and provides that an agent who receives, on behalf of the United States, a person extradited to the United States by a foreign government, shall have all of the powers of a United States marshal that are necessary for the safekeeping of the extradited person.

§ *5514—Transportation of fugitive by receiving agent*

Section 5514 reenacts 18 U.S.C. 3194 and provides that an agent transporting a fugitive pursuant to section 5502 of the proposed code is empowered to transport the fugitive to the State from which the fugitive fled.

§ *5515—Payment of fees and costs*

Section 5515 reenacts 18 U.S.C. 3195 and makes provision for the payment of costs and expenses associated with an extradition.

SUBCHAPTER II—TRANSFER

§ *5541—Scope and limitation of subchapter*

Section 5541 reenacts 18 U.S.C. 4100 (which was, along with the other sections of this subchapter, added to title 18 by Public Law 95–144, 91 Stat. 1212). Section 5541 defines the scope of the subchapter on transfer of prisoners. Nothing in this section affects or interferes with the various Status of Forces agreements.

§ *5542—Authority of the Attorney General*

Section 5542 reenacts 18 U.S.C. 4102 and authorizes the Attorney General to act on behalf of the United States under transfer of prisoner treaties and to execute the tasks necessary to carry out the subchapter on transfer of prisoners.

§ *5543—Applicability of United States laws*

Section 5543 reenacts 18 U.S.C. 4103 and provides that all laws of the United States pertaining to prisoners, probationers, parolees, and juvenile offenders apply to prisoners transferred to the United States, unless a treaty or the subchapter on transfer of prisoners provides otherwise.

§ *5544—Transfer of offenders on probation*

Section 5541 reenacts 18 U.S.C. 4104 and sets forth provisions relating to the transfer of an offender who is on probation.

§ *5545—Transfer of offenders serving sentence of imprisonment*

Section 5545 reenacts 18 U.S.C. 4105 and sets forth provisions relating to the transfer of an offender serving a sentence of imprisonment.

§ *5546—Transfer of offenders on parole; parole of offenders transferred*

Section 5546 reenacts 18 U.S.C. 4106 and sets forth provisions relating to the transfer of an offender who is on parole.

§ *5547—Verification of consent of offender to transfer from the United States*

Section 5547 reenacts 18 U.S.C. 4107 and sets forth procedures relating to the verification of the consent of an offender to be transferred from the United States.

§ *5548—Verification of consent of offender to transfer to the United States*

Section 5548 reenacts 18 U.S.C. 4108 and sets forth procedures relating to the verification of the consent of an offender to be transferred to the United States.

§ *5549—Right to counsel; appointment of counsel*

Section 5549 reenacts 18 U.S.C. 4109 and provides that in proceedings to verify the consent of an offender to transfer, the offender shall have the right to advice of counsel and to the appointment of counsel if the offender cannot afford counsel.

§ *5550—Transfer of juveniles*

Section 5550 reenacts 18 U.S.C. 4110 and provides that juveniles transferred to the United States shall be subject to subchapter I (relating to juvenile delinquency) of chapter 61 of the proposed code unless the relevant treaty (or an agreement under such treaty) provides otherwise.

§ *5551—Prosecution barred by foreign conviction*

Section 5551 reenacts 18 U.S.C. 4111 and provides that an offender transfered to the United States shall not be prosecuted for any offense if the prosecution for that offense would have been barred in the jurisdiction seeking such prosecution by the sentence upon which the transfer was based.

§ *5552—Loss of rights, disqualification*

Section 5552 reenacts 18 U.S.C. 4112 and provides that a transferred offender does not lose any civil, political, or civic rights other than those which, under the law of the United States or the State in which the issue arises, would result from the fact of the foreign conviction.

§ *5553—Status of alien offender transferred to a foreign country*

Section 5553 reenacts 18 U.S.C. 4113 sets forth provisions relating to the status of an alien offender who is transferred to a foreign country.

§ *5554—Return of transferred offenders*

Section 5554 reenacts 18 U.S.C. 4114 and sets forth procedures relating to the return of a transferred offender to the country from which that offender was transferred.

§ *5555—Execution of sentences imposing an obligation to make restitution or reparations*

Section 5555 reenacts 18 U.S.C. 4115 and provides that a judgement in the transferring country ordering the transferred offender to make

restitution or reparation to the victim of the offense may be enforced in the United States as though that judgment were a civil judgment rendered by a United States district court.

§ *5556—Definitions for subchapter*

Section 5556 reenacts 18 U.S.C. 4101 and defines 10 terms used in the subchapter on transfer of prisoners.

SUBCHAPTER III—INTERSTATE AGREEMENT ON DETAINERS

§ *5561—Enactment into law of Interstate Agreement on Detainers*

Section 5561 reenacts section 2 of the Interstate Agreement on Detainers (Public Law 91–538, sections 1–8, 84 Stat. 1397–1403), which is currently set forth in the appendix to title 18 of the United States Code. The Interstate Agreement on Detainers is a compact between the United States, on its own behalf and on behalf of the District of Columbia, and the several States of the United States to provide a uniform procedure for prisoners to demand trial in one jurisdiction where charges are pending while they are in custody in a second jurisdiction, or for a prosecutor from one jurisdiction to have a prisoner who is subject to prosecution in the first jurisdiction, detained and transferred from a second jurisdiction.

§ *5562—Definitions for Interstate Agreement on Detainers for purposes of United States and District of Columbia*

Section 5562 reenacts sections 3 and 4 of the Interstate Agreement on Detainers, which define the terms "Governor" and "appropriate court".

§ *5563—Enforcement; regulations; right to amend*

Subsection (a) reenacts section 5 of the Interstate Agreement on Detainers, which directs all courts, agencies, and employees of the United States to cooperate with one another and with the party States in enforcing the Interstate Agreement on Detainers. In addition, section 5563 reenacts section 6 of the Agreement, which authorizes the Attorney General of the United States and the Mayor of the District of Columbia to establish the necessary regulations to effectuate the Agreement.

CHAPTER 57—IMMUNITY OF WITNESSES

§ *5701—Immunity generally*

Section 5701 reenacts 18 U.S.C. 6002 and provides that a person may be ordered to testify or produce information in a proceeding before or ancillary to a Federal court or grand jury, an agency of the United States, or either House of Congress, notwithstanding a claim of privilege against self-incrimination. The section further provides that the person is immune from the use of such testimony in any criminal case, except for prosecutions for perjury, giving a false statement, or otherwise failing to comply with the order to testify to produce information.

§ *5702—Court and grand jury proceedings*

Section 5702 reenacts 18 U.S.C. 6003 and authorizes a United States district court, upon request of the United States attorney for that district, to issue an order compelling an individual to testify or produce

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information. The section provides that a United States attorney may, with the approval of the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General, request such an order if that United States attorney believes that the testimony or other information may be necessary to the public interest and that the individual has refused or is likely to refuse to testify or produce the information on the basis of that individual's privilege against self-incrimination.

§ *5703—Certain administrative proceedings*

Section 5703 reenacts 18 U.S.C. 6004 and authorizes an agency of the United States, with the approval of the Attorney General, to issue an order compelling an individual to give testimony or provide other information. The section also provides that an agency may issue such order only if, in such agency's judgment, the testimony or other information may be necessary to the public interest and such individual has refused or is likely to refuse to testify or provide other information on the basis of such individual's privilege against self-incrimination.

§ *5704—Congressional proceedings*

Section 5704 reenacts 18 U.S.C. 6005 and authorizes a United States district court, upon proper request, to issue an order compelling an individual to give testimony or provide other information.

§ *5705—Definitions for chapter*

Section 5705 reenacts 18 U.S.C. 6001 and defines four terms for the purposes of chapter 57 of the proposed code.

Chapter 59—Jurisdiction and Venue

§ *5901—District courts*

Section 5901 reenacts 18 U.S.C. 3231 and provides that the district courts of the United States have original jurisdiction, exclusive of the courts of the States, over all offenses against the laws of the United States.

§ *5902—Murder or manslaughter*

Section 5902 reenacts 18 U.S.C. 3236 and provides that the offense of murder or manslaughter is deemed to have been committed at the place where the injury was inflicted or where the means were employed that caused the death, without regard to the place where the death occurred.

§ *5903—Offenses begun in one district and completed in another*

Section 5903 reenacts 18 U.S.C. 3237. Subsection (a)(1) provides that an offense against the United States begun in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which the offense was begun, continued, or completed. Subsection (a)(2) provides that an offense involving the use of the mails or transportation in interstate or foreign commerce is a continuing offense and may be prosecuted in any district from, through, or into which such commerce or mail moved.

Subsection (b) provides that where a prosecution is under 26 U.S.C. 7203 (relating to willful failure to file return, supply information, or pay tax) or under 26 U.S.C. 7201 or 7206 (1), (2), or (5) (relating to fraud and false statements) involving the use of the mails, and the

prosecution is begun in a judicial district other than the one in which the defendant resides, the defendant may, within 20 days of arraignment, move to be tried in the district in which the defendant resided at the time of the allege offense.

§ *5904—Offenses not committed in any district*

Section 5904 reenacts 18 U.S.C. 3238 and provides that the trial of an offense begun or committed on the high seas or outside the jurisdiction of any State or district shall be held in the district in which the offender is arrested or to which the offender was first brought. The section also provides that if the offender is not arrested, an indictment or information may be filed in the district of the last known residence of the offender or, if no such residence is known, in the district of the District of Columbia.

§ *5905—Threatening communications*

Section 5905 reenacts 18 U.S.C. 3239 and provides that a defendant to a charge of violating section 2315 or 2316 of the proposed code (relating to terrorizing and to communicating a threat, respectively), with respect to communications originating in the United States, shall be entitled to be tried in the district in which the communication was first set in motion, in the mails, or in commerce between the States.

§ *5906—Venue for offenses under section 2743*

Section 5906 is a new section and applies the policy underlying 18 U.S.C. 3239 (relating to venue for trials for threatening communications) to the offense described in section 2743 of the proposed code (relating to transferring or exhibiting obscene material). Subsection (a) provides that a prosecution under section 2743 may be brought only in the district in which the offense was completed or from which the illegal material was disseminated. *See United States* v. *Thomas*, 613 F.2d 787, 792 (10th Cir. 1980).

Subsection (b) provides that an offense described in section 2743 may not be prosecuted in a district solely on the basis of a transfer or exhibiting that takes place at the request, order, or instigation of an agent or employee of a government.

Subsection (c) provides that a conspiracy to commit an offense described in section 2743 may be prosecuted only in a district in which the conspiracy was entered into or in which a substantial portion of the conspiracy occurred.

§ *5907—Interstate flight*

Section 5907 reenacts 18 U.S.C. 1073 and 1074 and provides that a prosecution of an offense under section 1718 of the proposed code (relating to flight to avoid prosecution or appearance as a witness) may be prosecuted only in the district in which the State crime was alleged to have been committed.

§ *5908—Creation of new district or division*

Section 5908 reenacts 18 U.S.C. 3240 and provides that if, after an offense is committed, a county or territory is transferred to another district or division or a new district or division is created, prosecution shall commence as though the new district or division had not been created, or the country or territory had not been transferred, unless

the defendant applies to have the case removed to the new district or division for trial.

§ *5909—Jurisdiction of District Court of the Virgin Islands*

Section 5909 reenacts 18 U.S.C. 3241 and provides that the United States District Court of the Virgin Islands has jurisdiction over offenses under the laws of the United States, not locally inapplicable, committed within the territorial jurisdiction of such court and concurrent jurisdiction with other district courts of the United States over offenses against the laws of the United States committed upon the high seas. The section deletes a reference in the present section to the United States District Court of the Canal Zone.

§ *5910—Jurisdiction of proceedings relating to transferred offenders*

Section 5910 reenacts 18 U.S.C. 3244 and provides, relative to proceedings under subchapter II (relating to transfers) of chapter 55 of the proposed code, that (1) the country in which an offender was convicted has exclusive jurisdiction over proceedings to challenge, modify or set aside convictions or sentences handed down in that country; (2) all proceedings on behalf of an offender transferred from the United States to a foreign country shall be brought in the court which would have had jurisdiction and competence if the offender had not been transferred; (3) all proceedings on behalf of an offender transferred to the United States pertaining to the manner of execution of the sentence in the United States shall be brought in the district court for the district in which the offender is confined or is supervised; (4) all proceedings on behalf of an offender seeking to challenge the validity of an offender's transfer from the United States shall be brought in the district court in which the transfer proceedings were originally held; and (5) all proceedings on behalf of an offender seeking to challenge the validity of an offender's transfer to the United States shall be brought in the district court for the district in which the offender is confined or supervised.

Chapter 61—Disposition of Juvenile or Incompetent Offenders

Current Law

Incompetence to stand trial—Federal procedures regarding the finding, before or during trial, that a defendant is incompetent to stand trial are governed by 18 U.S.C. 4244, 4246 and 4248. Under 18 U.S.C. 4244, the court, upon motion of the United States attorney or the defense, or upon its own motion, may order the defendant committed for a "reasonable period" for psychiatric examination to determine competence to stand trial. If the report indicates incompetence, the court must have a hearing on the issue. Apparently, however, if the report indicates competence, no hearing is required. The court is permitted, in its discretion, to order an accused committed to a hospital for the examination. Statements made by an accused during the examination may not be admitted into evidence on the issue of guilt in any criminal proceeding.

At the hearing subsequent to a report indicating incompetence, the court must make a finding regarding the defendant's competence to stand trial. The test to be applied is whether the defendant has sufficient present ability to consult with the defense attorney with a reasonable degree of rational understanding and whether the defendant has a rational as well as a factual understanding of the proceedings. It is not sufficient that the defendant is oriented to time and place and has some recollection of events. *Dusky* v. *United States*, 362 U.S. 402 (1960) (*per curiam*). Neither statutory nor case law indicates the standard to be applied in making this determination.

Following a finding of incompetence, the court is authorized, under 18 U.S.C. 4246, to commit the accused to the custody of the Attorney General until competence is restored or the pending charges are otherwise disposed of. Again, no standard is stated for such commitment. However, in *Jackson* v. *Indiana*, 406 U.S. 715 (1972), the Supreme Court held that, if the commitment is of a potentially indefinite duration, equal protection requires that the same standard be applied as that applied to persons being civilly committed. Further, in *Addington* v. *Texas*, 441 U.S. 418 (1979), the Court held that the minimum standard for civil commitment is "clear and convincing evidence." *Jackson* also held that due process dictates that a commitment based solely on incompetence cannot last longer than is reasonably necessary to determine whether there is a substantial probability that the defendant will attain competence in the reasonably foreseeable future. *Jackson* v. *Indiana*, 406 U.S. 715 (1972). Thus, in so far as 18 U.S.C. 4646 would permit indefinite commitment, it is undoubtedly unconstitutional. However, in conjunction with 18 U.S.C. 4248 (discussed below) Federal law has been construed as only permitting indefinite commitment after a finding of dangerousness. *Id.* at 732–33. *See also United States* v. *Curry*, 410 F. 2d 1372 (4th Cir. 1969); *United States* v. *Walker*, 335 F. Supp. 705 (N.D. Cal. 1971); *Cook* v. *Ciccone*, 312 F. Supp. 822 (W.D. Mo. 1970); *United States* v. *Jackson*, 306 F. Supp. 4 (N.D. Cal. 1969); *Maurietta* v. *Ciccone*, 305 F. Supp. 775 (W.D. Mo. 1969).

Section 4248 of title 18 provides that a commitment of an incompetent person will continue until—

> the sanity or mental competency of the person shall be restored or until the mental condition of the person is so improved that if . . . released [the person] will not endanger the safety of the officers, the property, or other interests of the United States, or until suitable arrangements have been made for the custody and care of the prisoner by the State of . . . residence, whichever event shall first occur.

Upon the occurrence of any of the above circumstances, the Attorney General is directed to file with the committing court a certificate stating the termination of the commitment and the grounds upon which the termination was based. The constitutionality of the Federal commitment proceedings was upheld in *Greenwood* v. *United States*, 350 U.S. 366 (1956), as necessary and proper to the Federal constitutional power to prosecute offenses against the United States. Section 4248 also provides that nothing in the section is to be construed as precluding a defendant from establishing eligibility for release through a writ of habeas corpus.

Discovery, following trial, of mental incompetence during trial is governed by 18 U.S.C. 4245. Under that section, if the board of exami-

ners established by 18 U.S.C. 4241 (see discussion of transfer to a mental hospital, *infra*) determines that a prisoner was incompetent during trial, and the issue was not raised during trial, the director of the Bureau of Prisons must so certify. The Attorney General must submit the report of the board and the certification to the District Court in which the person was convicted. The court must then hold a hearing on the question of competence, in which the report of the board constitutes prima facie evidence of its facts and findings. If the court finds that the defendant was incompetent at the time of trial, it must vacate the conviction and order a new trial.

Commitment following verdict of not guilty by reason of insanity—Current Federal law makes no provision for the commitment of persons acquitted by reason of insanity.

Transfer to hospital of mentally disordered prisoners—Section 4241 of title 18 provides for the establishment of a board of examiners in each Federal correctional institution. The board has the responsibility of examining any inmate alleged "to be insane or of unsound mind or otherwise defective." Upon receipt of a report of the board, the Attorney General is authorized to have the inmate transferred to a mental hospital until such time as the "sanity or health" of the prisoner is restored, or until the maximum sentence, without deduction for good time, has expired. If the inmate recovers prior to the expiration of sentence, the inmate is to be returned to a correctional facility until the expiration of the sentence, 18 U.S.C. 4242.

The procedures of 18 U.S.C. 4241–42 are constitutionally insufficient in view of the Supreme Court's decision in *Vitek* v. *Jones*, 100 S. Ct. 1254 (1980). In that case, the Court held that due process requires the following minimum procedures prior to a transfer to a mental hospital: (1) written notice to the prisoner of the pending transfer; (2) a hearing, after sufficient notice to give the prisoner the opportunity to prepare, at which the evidence supporting the transfer is disclosed to the prisoner, and the prisoner is given the opportunity to present evidence opposing transfer; (3) an opportunity for the prisoner to present witnesses and cross-examine witnesses called by the State, unless good cause is found for prohibiting such an opportunity; (4) an independent decision maker; (5) written findings of fact and of the reasons supporting transfer; (6) qualified and independent assistance to the prisoner in preparing and presenting the case, although not necessarily by legal counsel; and (7) timely and effective notice of the foregoing rights.

Delivery to state authorities of mentally disordered prisoners upon expiration of sentence—The superintendent of any hospital to which a prisoner is committed is authorized, under 18 U.S.C. 4243, to order the prisoner delivered to the authorities of the State in which the prisoner resides, or, if the prisoner has no residence, from which the prisoner was committed, if the superintendent believes that the prisoner is still "insane" or is a menace to the public. Under *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), a person nearing the end of a prison sentence cannot be civilly committed without a jury trial, since the Constitution requires a jury trial in order to commit a person not contemporaneously serving a prison term.

Subchapter I—Juvenile Delinquency

§ *6101—Delinquency proceedings in district courts; transfer for criminal prosecution*

This section and the remainder of this subchapter carry forward without major change the provisions of the 1974 Juvenile Justice and Delinquency and Prevention Act, 18 U.S.C. 5031–42.

This section and its companion, section 702 (relating to an immaturity bar to prosecution) of the proposed code, require all juveniles charged with Federal offenses to be transferred to the appropriate State officials unless the Attorney General can certify, after investigation, that the State does not have, or refuses to assume, jurisdiction over the juvenile or that the State does not have programs and services adequate to serve the needs of juveniles. Only if such certification is made may the juvenile be proceeded against by the Federal government.

Those juveniles not surrendered to the State must be tried as juveniles in Federal court, with two exceptions. First, a juvenile may waive the right to proceed as a juvenile. Second, in the case of a juvenile charged with a class A, B, or C felony, the Attorney General may establish that trial as an adult is in the public interest. These provisions carry forward, with minor conforming changes, the structure of current law.

According to both current law and this section, certain factors must be considered in determining whether to try as an adult a juvenile charged with a serious crime. All of the factors listed in subsection (e), except paragraph (7), are derived from current law. The Committee added paragraph (7), "whether juvenile disposition will reflect the seriousness of the juvenile's conduct, promote respect for the law, and provide a just response to the conduct of the juvenile" to help ensure greater conformity in the treatment of juveniles and adults charged with serious crimes. *See* section 3101 (relating to the purposes of sentencing for adults) of the proposed code.

It should be noted that the number of persons prosecuted under the provisions of the Juvenile Justice and Delinquency Act of 1974 is very small. Only 95 proceedings were brought during the one year period ending June 30, 1979. *Annual Report of the Director of the Administrative Office of the United States Courts* at 426, Table D–2. (1979)

§ *6102—Custody prior to appearance before a magistrate*

This section, which carries forward 18 U.S.C. 5033, requires that juveniles and their parents or guardians be advised of the juvenile's legal rights. It also requires that the juvenile be arraigned promptly after arrest.

§ *6103—Duties of magistrate*

This section carries forward 18 U.S.C. 5034. It imposes on Federal magistrates certain duties with respect to alleged juvenile delinquents. Magistrates are required to ensure juveniles of counsel at the critical stages of the proceedings and to release the juvenile to a parent or guardian unless detention of the juvenile is required to secure the juvenile's timely appearance before the appropriate court or to ensure the juvenile's safety or that of others.

§ *6104—Detention prior to disposition*

This section, which carries forth 18 U.S.C. 5035, requires the Attorney General to house juveniles awaiting disposition separately from adults. This is designed to implement the Congressional policy of placing juveniles in suitable facilities near their homes.

Section 6101 permits irregular contact between juveniles and adults. This does not mean that they may be housed together. Rather, it means that adult prisoners may act as peer counselors to prevent future delinquency. The phrase "insofar as possible" used in this section is intended to permit commingling of adjudicated delinquents and unadjudicated juveniles only on a temporary basis and only when no other measures are feasible.

The phrase "regular contact with adult persons" is intended to allow occasional contact in the context of a bona fide treatment or counseling program. This provision is not intended to permit the confinement of juveniles and adults in the same housing unit.

§ *6105—Speedy Trial*

This section, which carries forward 18 U.S.C. 5036, requires that juveniles in detention be tried within 30 days of the beginning of detention, unless extraordinary circumstances are present. Delay because of court congestion is impermissible, but delay caused by the juvenile or the juvenile's counsel tolls the provisions of this section.

§ *6106—Dispositional Hearing*

This section, which carries forward 18 U.S.C. 5037, requires the court to hold a separate dispositional hearing after a juvenile has been adjudicated delinquent. It requires that the dispositional hearing take place within 20 days of adjudication. Both parties may have access to the presentence report.

Subsection (b) provides that a juvenile may not be punished more severely than an adult convicted of an offense involving the same conduct. Subsection (c) permits the court to commit a juvenile to the custody of the Attorney General for observation and study prior to sentencing.

§ *6107—Use of juvenile records*

This section, which carries forward 18 U.S.C. 5038, limits the disclosure of juvenile records by public officials with access to them.

Subsection (a) preserves confidentiality by requiring courts, throughout any juvenile delinquency proceedings, to prevent disclosure of the record to unauthorized persons. After completion of the proceedings, the entire record is to be sealed. Thereafter, information concerning the proceeding may be released only as necessary to comply with an inquiry from another court, an agency preparing a presentence report for another court, a treatment agency or facility to which the juvenile has been committed, a law enforcement agency investigating the commission of an offense, or an agency investigating the person for a law enforcement or national security position.

Because of constitutional requirements, the language in 18 U.S.C. 5038 prohibiting disclosure "by any medium of public information" has been deleted from section 6107. In *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the Court held that a similar West Virginia statute violated the first amendment. Thus, subsection (d) prohibits disclosure only by court officials. It does not reach the publishing of such information by the press when such information has been lawfully obtained.

§ *6108—Commitment*

This section, which carries forward 18 U.S.C. 5039, limits the types of places that can be used to house juveniles after an adjudication of delinquency. This section essentially parallels section 6104 (relating to pre-adjudication detention) of the proposed code.

§ *6109—Support*

This section, which carries forward 18 U.S.C. 5040, was also a part of the Juvenile Justice and Delinquency Prevention Act of 1974. It authorizes the Attorney General to contract for housing and services for juvenile offenders.

§ *6110—Parole*

This section, which carries foward 18 U.S.C. 5041, provides that juveniles may be released on parole under such terms as are provided for in the regulations of the United States Parole Commission.

§ *6111—Revocation of parole or probation*

This section, which carries forward 18 U.S.C. § 5042, provides that juveniles shall be accorded notice and a hearing with counsel before parole or probation is revoked. It is designed to supplement the constitutional requirements of procedural due process. The Committee intends to permit the courts to set the exact parameters of these procedural protections.

§ *6112—Definitions for subchapter*

This section carries forward the definitions of "juvenile" and "juvenile delinquency" in 18 U.S.C. 5031.

SUBCHAPTER II—MENTAL INCOMPETENCE

This subchapter establishes new procedures to determine competence to stand trial and to treat those found incompetent to stand trial.[1] These procedures were developed because of recent judicial decisions regarding the due process and substantive rights of those found incompetent to stand trial, and the continued development of medical science regarding the treatment of the mentally disturbed. Current procedures regarding incompetence to stand trial have not been revised since 1949.

The subchapter also establishes procedures to deal with people involved in the criminal justice system who suffer from psychological or psychiatric disabilities but who are not incompetent to stand trial.

§ *6121—Screening examinations*

This section provides that the attorney for the government or for the defendant may, at any time during the course of a criminal proceeding, move for an order for an examination to determine the de-

[1] Nothing in this subchapter affects District of Columbia Code section 24–301(d) (1973).

fendant's competence to stand trial. The court may also make such an order on its own motion. Such motion must be granted whenever there is reasonable cause to believe that a defendant is not competent. Both the motion for such an order, and the order itself, must state the specific facts upon which they are based.

A screening examination must be conducted by a qualified mental health examiner at the place of confinement if the defendant is in custody, or, if not, on an outpatient basis. The mental health examiner must report to the court within 3 days, excluding weekends and holidays, of the court's order. The purpose of the screening examination is to avoid frivolous motions and unnecessary, prolonged examinations. Such a procedure has been recommended through model legislation proposed by the Mental Health Law Project. Mental Health Law Project, *Incompetence to Stand Trial on Criminal Charges*, 2 Mental Disability L. Rep. 617 (1978).

§ *6122—Mental competence examination*

This section provides that, when the court receives the screening examination report, it must determine whether the results indicate that the defendant is competent or that more information is necessary. The defendant may challenge a finding of competence by demanding a hearing, which must be held within 48 hours. If the defendant is found competent, with or without the hearing, trial will proceed.

If the court determines that more information is necessary, the court must order a mental competence examination. It must be conducted by a qualified mental health examiner who is not on the staff of any institution to which the defendant may be sent if found incompetent. The examination must be conducted on an outpatient basis unless the court makes findings of fact that at least one of the following is true:

(1) the nature of the examination is such that inpatient examination is necessary;

(2) the defendant's past behavior demonstrates an unwillingness or inability to appear for outpatient examination;

(3) the defendant presents a substantial probability of serious bodily injury to any person or of substantial damage to the property of another; or

(4) the defendant is already in custody.

The preference for outpatient examination reflects the Committee's belief that, absent a showing of dangerousness or of the necessity of hospitalization for specific procedures, there is no reason to treat a person alleged to be incompetent differently from other persons awaiting trial. There is no evidence to support a belief that the daily observation of a defendant in an institutional setting is necessary to an examination for the purpose of determining competence to stand trial. Mental Health Law Project, *Incompetence to Stand Trial on Criminal Charges*, 2 Mental Disability L. Rep. 617, 623 (1978). This provision is in accord with the interpretation of current law by the Court of Appeals for the District of Columbia Circuit that a pretrial order for mental examination and observation does not constitute a valid basis for the denial of bail where release is

otherwise appropriate under the Bail Reform Act, 18 U.S.C. 3141–52. *Marcey* v. *Harris*, 400 F.2d 772 (D.C. Cir. 1968). The Committee recognizes, of course, that a defendant's mental condition will, and should, affect the original decision whether to release the defendant or set bail.

The report of the mental health examiner must be filed with the court, with copies to the attorneys for both parties, within 15 days after the order of examination. The 15 day period may be extended under 2 circumstances: (1) if the examination is to take place at a non-local facility, and the additional time is necessary to transport the defendant; or (2) if the court finds, upon motion of either party, that specific additional examination procedures are necessary and cannot be completed within the 15 day period. In the second instance, an extension of 30 days may be granted.

The report of the mental health examiner must contain the following:

(1) a description of the defendant's social background;

(2) a complete explanation of the procedures used to evaluate the defendant, including the results of any tests and the assumptions made in performing such tests;

(3) a description of any symptoms of mental disorder displayed by the defendant;

(4) the conclusions of the mental health examiner regarding the psychological condition of the defendant, including the basis of those conclusions and the likelihood that the defendant's condition will improve, with or without treatment; and

(5) all records and tests and conferences involved in the examination.

This provision is in accord with current case law holding that it is unconstitutional for a court to rely solely upon the conclusory judgment of the examiner. *Holloway* v. *United States*, 343 F.2d 265 (D.C. Cir. 1964).

In addition, the mental health examiner may offer an opinion as to the defendant's competence. The Committee, however, recognizes that there is a considerable body of opinion that the ultimate issue of competence involves a legal, rather than a medical, determination and that a mental health examiner may thus appropriately decline to offer an opinion regarding competence. *See* Hearings on H.R. 6869 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st and 2d sess., Serial No. 52, at 2141 (1978) (testimony of Dr. Lee Coleman). *See also Blocker* v. *United States*, 288 F.2d 853, 863 (D.C. Cir. 1961) (Burger, J., concurring).

Section 6122, as does current law, provides that any statements resulting from the mental competence examination, and any evidence derived from such examination, are inadmissible, in any criminal trial of the defendant, on the issue of whether the defendant engaged in prohibited conduct. Moreover, such evidence is admissible on issues of insanity of state of mind only if first offered by the defendant.

§ *6123—Report on examination and hearing on competence*

This section sets forth the procedures to determine a defendant's competence to stand trial. Upon receipt of the report from the mental

health examiner, the court must schedule a hearing on the defendant's competence within 10 days. However, if the defendant requests an additional examination, the court must continue the hearing an additional 15 days and appoint an examiner of the defendant's choice. A hearing on the issue of competence is constitutionally required. *Pate* v. *Robinson*, 383 U.S. 375 (1966).

Following the hearing, the court must determine, by a preponderance of the evidence standard, whether the defendant is competent. Although this standard differs from that constitutionally required for civil commitment under *Addington* v. *Texas*, 441 U.S. 418 (1979), the Committee believes that there are a number of reasons why it is both constitutional and desirable. First, the question of competence is often raised by the defendant, and it would be inappropriate to require a higher standard as a protection for the defendant when the defendant is making the motion. To apply one standard to the defendant, and another to the prosecution might be possible, but is unnecessary in view of the other reasons discussed below. Second, the period of potential commitment is limited to 8 months by this section and section 6124 of the proposed code (relating to treatment to restore incompetent defendant). In *Jackson* v. *Indiana*, 406 U.S. 715, 725 (1972), the Court indicated that applying a different standard to a person alleged to be incompetent than to a person being civilly committed might be permissible if the commitment for incompetence were clearly temporary. Finally, applying a higher standard may well result in the trial of persons who are incompetent, which would, in most circumstances, constitute a violation of due process. *See Pate* v. *Robinson*, 383 U.S. 375 (1966); *Bishop* v. *United States*, 350 U.S. 961 (1956) (*per curiam*).

If the court finds that the defendant is competent, trial must proceed. If not, the court must hold an additional hearing without unnecessary delay to determine whether the defendant is likely to be restored to competence within 8 months (the maximum treatment period), and if so, what treatment is most likely to restore the defendant to competence. If the court decides it is unlikely that the defendant will recover, and the defendant does not request treatment, the court must release the defendant, and dismiss any charges other than class A or B felonies. If, however, the court determines that there is a likelihood that the defendant will recover, or if the defendant requests treatment, the court may order treatment pursuant to section 6124 of the proposed code. If the defendant opposes treatment, the court may decide, in the interests of justice, that the burdens of subjecting the defendant to involuntary treatment outweigh the value to society of the defendant's potential conviction.

The court must weigh the following factors to determine if the charges should be dismissed:

(1) the likelihood that the defendant will be restored competence;

(2) the nature of the treatment required;

(3) the seriousness of the crimes the defendant allegedly committed;

(4) the likelihood of conviction of the defendant; and

(5) the potential sentence that the defendant would serve if convicted.

Pursuant to section 6123, identical procedures must be followed upon receipt of a report on the results of treatment. However, the defendant must be released following the hearing if he or she remains incompetent and has been treated for an aggregate period of 8 months. The 8 month maximum for treatment was chosen by the Committee in view of the opinion of the United States Supreme Court in *Jackson* v. *Indiana*, 406 U.S. 715 (1972), that, absent civil commitment, a defendant may not be held in custody because incompetent to stand trial for longer than is reasonably necessary to determine whether there is a substantial probability that the defendant will regain competence within the foreseeable future.

The Committee believes that almost all persons found to be incompetent will be severely intellectually deficient or will be suffering from a disorder involving a loss of contact with reality, e.g. a psychosis. The prospects for recovery in the latter case are minimal. Similarly, a chronic psychosis is unlikely to respond to treatment, other than psychotropic medication, within a period that will permit a fair trial. However, the great majority of acute psychotics are responsive to current treatment programs, and can be expected to regain competence within weeks or months of treatment. Laboratory of Community Psychiatry, Harvard Medical School, *Competency to Stand Trial and Mental Illness* iv (NIMH, DHEW Pub. No. (HSM) 73–9105, 1973). *See also* Burt, *Rights of the Mentally Handicapped in Criminal Proceedings*, in 2 *Legal Rights of the Mentally Handicapped* 1111–13 (B. Ennis & P. Friedman eds. 1973). Thus, 8 months is a more than adequate period for the treatment of those who are reasonably likely to recover competence within a reasonable period of time. Section 6124 of the proposed code provides for the trial of chronic psychotics and other persons who are able to maintain competence through the administration of psychotropic medication.

§ *6124—Treatment to restore incompetent defendant*

This section sets forth the procedures to be followed in providing treatment for a person found incompetent to stand trial.

The place of treatment is to be determined by the court, which may issue orders to the director of the facility where treatment is to occur to ensure prompt and effective treatment. Treatment is to be on an outpatient basis unless the court makes a finding of fact that one of the following circumstances exists:

(1) the nature of the treatment is such that inpatient treatment is necessary;

(2) the defendant's past behavior demonstrates an unwillingness or inability to appear for outpatient treatment;

(3) the defendant presents a substantial probability of serious bodily injury to any person or of substantial damage to the property of another; or

(4) the defendant is already in custody.

Again, since the defendant has not been convicted of any crime, the Committee does not believe that there is any reason to treat such a person differently from other persons awaiting trial, absent a showing of dangerousness or other compelling circumstances.

The section also regulates the use of certain forms of treatment: psychosurgery (e.g., lobotomies); electric shock therapy (e.g., elec-

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troconvulsive therapy); and protracted use of psychotropic drugs (e.g., thorazine). The Secretary of the Department of Human Services is directed to issue regulations regarding such treatment. The regulations must require that a person capable of consenting be given an oral explanation of the treatment at least 24 hours prior to it. The patient must also sign a written consent form containing the explanation. Both explanations must take place before an impartial witness and must include the reason for the treatment, the nature of the treatment, the likelihood of recovery with and without the treatment, the possible side-effects of the treatment, its possible alternatives, and the right of the patient to refuse treatment. If the patient is capable of informed consent, such treatment can only occur with the permission of the court and the patient's guardian. The Committee believes that such regulations and requirements are appropriate in view of the controversial nature of these treatments. *See, e.g.*, Mental Health Law Project, *Civil Commitment*, 2 Mental Disability L. Rep. 75, 122–26 (1977). In particular, the Committee is concerned about the use of psychosurgery, and considered banning its use. However, in view of the significant decrease in the use of psychosurgery as a method of treatment, *see* Donnelly, *The Incidence of Psychosurgery in the United States, 1971–1973*, 135 Am J. Psychiatry 1476 (1978), the Committee decided to leave the decision regarding psychosurgery in the hands of the therapist and patient, subject to careful regulation by the Secretary of the Department of Health and Human Services.

Section 6124 provides that the director of the treatment facility must report to the court if at any time the director determines that the defendant has recovered, or that further treatment would be useless, and in no event later than 110 days after the order of treatment. In addition, a second report must always be made to the court at the end of 230 days of treatment, if the defendant still remains in treatment.

The report to the court must include the following:

(1) the treatment provided the defendant;

(2) any change in the defendant's condition with respect to competence to stand trial;

(3) any recommendations for future treatment;

(4) any differences from earlier reports regarding the likelihood of the defendant recovering; and

(5) the likelihood that additional treatment will restore the defendant's competence.

Upon receiving the director's report, the court must proceed according to the procedures set out in section 6123 of the proposed code.

Section 6124 also sets forth methods by which an incompetent defendant can resolve pending criminal charges without being restored to competence. First, any pretrial motions that may be resolved without the defendant's participation may be raised and litigated. However, the defendant may raise the issues again if, following the restoration of competency, the defendant is able to demonstrate that there is additional information to be considered that was not available because of the defendant's incompetence.

Secondly, a defendant may proceed to trial if he or she maintains competence because of the administration of psychotropic medication. In such a case, all parties must be informed of the nature of the medication, and the defendant may require that the jury be informed

of the medication and its side effects upon the defendant's affect and behavior. In addition, even if the defendant maintains competence because of medication, the court may require that the defendant undergo treatment if it feels that competence without the aid of medication is likely to be restored.

Such provisions are necessary because, as explained by the Mental Health Law Project:

> In some jurisdictions the defendant's need of tranquilizing or sedating drugs is conclusive evidence of trial incompetency calling for confinement for restorative treatment and no return to court unless he is competent without the aid of medication.
>
> Incompetent defendants are committed to state mental hospitals where medications are administered. The defendants are subsequently returned to jail, where—usually by the court rule or for lack of medical personnel—psychotropic medication is withdrawn, producing exacerbation of acute symptoms prior to return to court. Under the pressures of incarceration and impending trial and without medication, many return to court highly disturbed, hence unfit for trial; they are therefore recommitted to the state mental hospital until restored.
>
> The Group for the Advancement of Psychiatry attributed this runaround to a "lack of intelligent collaboration between psychiatrists and jurists." Their report stated that the policy of withholding drugs would be unconscionable if it were followed by psychiatrists for other persons. "If no patient could be returned to society unless free of medication, the major revolution in psychiatric treatment accomplished by psychoactive medication would be virtually worthless."
>
> The reaction of some courts is based on the false assumption that psychotropic drugs produce a kind of "chemical sanity"—a pejorative term used mistakenly to characterize a state of mind unacceptable for participation in a trial. Yet many persons in responsible positions throughout society function effectively despite their continued need for similar medication, and defendants may also.
>
> However, drugs may affect the defendant's demeanor and physical appearance in court. These alterations could influence the jury's assessment of the defendant and his testimony. The point was illustrated in *State* v. *Murphy*, 56 Wash. 2d, 761, 335 P.2d 323 (1960), where the defendant was given heavy doses of three psychoactive drugs shortly before he took the witness stand. The drugs apparently enabled him to appear calm, cool and detached as he related the gory details of the murder for which he was on trial. His courtroom demeanor contrasted sharply with his prior appearance. The State of Washington Supreme Court reversed his conviction, stating that there was a "reasonable possibility that [the defendant's] attitude, appearance and demeanor, as observed by the jury, have been substantially influenced or affected by circumstances over which he had no real control."
>
> The legally undesirable consequences of drug-induced demeanor can be minimized if the effect of drugs on the de-

fendant is known to the other trial participants. When a defendant appears in court in such circumstances the judge and counsel for both parties should be told by the treating psychiatrist: (1) that the defendant is appearing under the influence of drugs, (2) the type and dosage of the drug administered and (3) the mental state of the defendant, including his appearance, attitude and verbal style, prior to administration of the medication. This information may be provided to the jury upon request of the defense. However, in order to preclude the introduction of inflammatory and prejudicial information, the prosecution should not be able to introduce this into evidence.

Although the trial of defendants rendered competent through medication is preferable to prolonged incompetency commitments, it is not an ideal situation. And the defendant should have a right to treatment to relieve his need for and reliance on psychotropic medication so that he may stand trial without it. If the defendant has some chance of being restored to competency to stand trial without ultimate reliance on medication (or without heavy dosages) he should be entitled to a reasonable delay for treatment.

Mental Health Law Project, *Incompetence to Stand Trial on Criminal Charges*, 2 Mental Disability L. Rep. 617, 626–27 (1978) (citations omitted).

The Committee does not intend that a decision by a defendant to accept psychotropic medication and to proceed to trial under the influence of such medication be considered a waiver of any due process deficiencies that may arise during trial as a result of the medication. However, the Committee expects that, due to the safeguards provided by this section, such deficiencies are likely to be extremely rare.

The provisions regarding psychotropic medication are in accord with some State court decisions on the issue. In *State* v. *Hampton*, 253 La. 399, 218 So.2d 311 (1969), the Louisiana Supreme Court overturned a decision of a lower court and held that a defendant whose mental capacity is maintained through the use of medication is nevertheless competent to stand trial.. The court stated that a determination of competence must be based on the present state of the defendant and not on its causes. As the defendant has little hope of recovery without medication, she would have been denied a trial if not held fit. Similarly, in *State* v. *Rand*, 20 Ohio Misc. 98, 247 N.E.2d 342 (Ohio Ct. C.P. 1969), an Ohio court ruled that, when a defendant is competent to stand trial under properly administered drugs, the defendant must either be maintained on drugs and brought to trial or discharged; and in *State* v. *Stacy*, 556 S.W. 2d 552 (Tenn. Crim. App. 1977), a Tennessee court ruled that medication may be used to render a defendant mentally competent to stand trial.

§ *6125—Delivery to State officials of certain persons suffering from mental disease or defect*

This section provides for the disposition of persons who are before a Federal court and who are found not guilty by reason of insanity, incompetent to stand trial with no substantial probability of improvement, or still incompetent to stand trial after the maximum period of

treatment. Under section 6125, a person who is believed by the court to be dangerous, following a dismissal of the charges against such person, may be transferred in custody to the appropriate State officials. Following such transfer, Federal custody is terminated and the decision whether to pursue civil commitment is left to the appropriate State officials. Federal custody may only be resumed if criminal charges against the defendant are reinstated.

Similar procedures are to be followed if a person about to be released after serving a term of imprisonment is determined to be dangerous.

The Committee has rejected the establishment of a Federal procedure for commitment of the dangerously insance, following a verdict of not guilty by reason of insanity, or at the end of a term of imprisonment, and the continuation of the Federal procedure for commitment of those who have been found incompetent to stand trial and also dangerous, because of both constitutional and policy reasons. The Committee recognizes that the Federal government is one of specifically enumerated powers. State governments, on the other hand, may act in any given area unless specifically prohibited by the Constitution. Commitment and treatment of the mentally ill has traditionally been left to the states pursuant to their *parens patriae* or general police power. The Federal government has no such authority. Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832 (1960). Those acquitted by reason of insanity in Federal courts are usually surrendered to the State in which the Federal court sits, either for trial or for commitment pursuant to the State's power to deal with its mentally ill residents.

Very occasionally, a State will refuse to accept jurisdiction over a mentally ill person, and since the Federal courts have no power over that person, he or she is released from Federal jurisdiction. It is this relatively infrequent situation [1] that has prompted proposals to give the Federal government the power to commit those found legally insane in Federal court.

There are two possible sources of such power in the Constitution: (1) the Federal government's power to prosecute Federal crimes, or (2) the Federal government's power pursuant to the "necessary and proper" clause of the Constitution to execute its enumerated powers.

(1) Federal criminal power:

Commentators disagree as to whether this power is sufficient to support a commitment procedure. Some argue that such commitment is justifiable as an extension of the power to prosecute. Others contend that once a person has been acquitted, all Federal criminal power over that person is terminated.

[1] The number of persons raising the insanity defense in a given year has been estimated at less than one percent of serious felons, with less than 100 persons successfully raising the defense. The Federal portion would be considerably less. *See Hearings on Reform of Federal Criminal Laws before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee and Before the Senate Judiciary Committee*, 93d Cong., 1st sess. through 96th Cong., 1st sess., 7023 (1974) (testimony of Seymour Pollack, Esq., M.D., President, American Academy of Psychintry and the Law). Another expert has stated that the defense is only successful in 2 percent of the cases. *Id.* at 7007 (Testimony of Stanley Portnow, M.D., Chairman, Committee on Psychiatry and the Law, American Psychiatric Association). Of this very small number of persons acquitted in Federal courts because of insanity defenses, very few would be rejected by the States for commitment proceedings if there were any indication of dangerousness.

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The Judicial Conference is a proponent of the first position, but its arguments are not persuasive. It relies heavily upon *Greenwood* v. *United States*, 350 U.S. 366 (1956), which upholds the government's power indefinitely to commit those found incompetent to stand trial. This situation is distinguishable from commitments following an acquittal by reason of insanity. The government's criminal power over an incompetent person is a continuing one. If the person recovers, criminal proceedings may be renewed, but once a person has been acquitted by reason of insanity, the Federal Government's power over the defendant is ended. *Cf.* Note, *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code*, 64 Yale L.J. 1070, 1077, 1079 (1955):

> The criminal power cannot, by definition, uphold confinement of an incompetent who has not been convicted of a criminal act and who, by the terms of the statute, is not being held in anticipation of a criminal trial . . . [The] proper way to confine insane persons is by civil commitment for insanity. They cannot be committed criminally because they have not committed criminal acts.

Pre-trial commitments of incompetent defendants pursuant to 18 U.S.C. 4246 and 4247 permit the defendant to be held indefinitely even though the charges are dismissed. Professor Caleb Foote is troubled by the "constitutional thinness" of such procedures and condemns them as an unwise extention of quasi-criminal commitment. According to Professor Foote:

> Pre-trial commitment has never been and should not be permitted to become a devious means of assuring criminal custody over persons on the alternative ground that, although they can demonstrate that they are not guilty, psychiatric opinion finds them dangerous to the interests of the United States.

Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832, (1960). *Accord*, Note, *Federal Commitment of Defendants Found Not Guilty By Reason of Insanity—Proposed Legislation*, 52 Iowa L. Rev. 930 (1967).

Changing the plea and verdict form to "guilty but insane" might semantically resolve this problem and allow the government to continue its power over the defendant.

(2) The Federal Government's power to carry out its enumerated powers:

In Federal enclaves, where there is no State for which the *parens patriae* power is reserved, the Federal Government has the power to commit those found legally insane. Article I, section 8, clause 17.

Outside of Federal enclaves, the Federal Government may do whatever is "necessary and proper" to execute its enumerated powers and thus to protect its interests, employees, and property. Article I, section 8, clause 18. Depending on how widely or narrowly such interests are defined, the government may have the power to commit those acquitted by reason of insanity.

Some commentators contend that Federal interests should be broadly defined. If Congress has the power to regulate the type of conduct

involved, it may do so through criminal sanctions administrative remedies, or civil remedies, including commitment. *See* Note, *Federal Commitment of Defendants Found Not Guilty By Reason of Insanity—Proposed Legislation*, 52 Iowa L. Rev. 930 (1967). This view is supported by the tendency of the United States Supreme Court to construe the powers of the Federal Government broadly, especially when exercised pursuant to the commerce clause. The same interests legitimately protected or furthered by the enactment of a Federal criminal law would also be protected or furthered by enactment of a civil commitment power. Such a power would therefore be necessary and proper to execute Congress's enumerated powers. *See* Note, *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code*, 64 Yale L.J. 1070, 1077 (1955).

The Judicial Conference contends that the Federal Government's power of self-preservation should be broadly construed. Others contend that Federal interests should be narrowly construed.

The Federal Government's power to maintain continued custody over those whose terms have expired but who are found to be dangerously insane is more closely analogous to the proposal at issue here. In this context, Professor Foote finds the government's power to prosecute and punish criminals to be a "more limited and more reasonable constitutional basis" than is protection of Federal interests:

> Federalism as applied in the insanity field has presumed that the states are competent to protect the community (including Federal interests) against the insane, and impatience with the apparent failure of the states to do this job in the cases of a few released Federal prisoners hardly warrants a novel theory of Federal power which would establish the constitutional basis for upsetting an historically entrenched bastion of exclusive state jurisdiction.

Foote, *A Comment on Pre-trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832, 837 (1960).

Also somewhat analogously, Congress has provided for the civil commitment of those addicted to drugs even though they have not committed a crime, 28 U.S.C. 2901 *et seq*. These sections are closer to a *parens patriae* power but have never been adequately tested in the courts.

In view of these considerations, the Committee believes that a Federal procedure for the commitment of the dangerously mental disturbed would constitute an inappropriate interference with the balance of Federal and State powers. Moreover, such a procedure could constitute a precedent for further Federal involvement in the care of the mentally ill. Once the Federal Government takes on the task of caring for the dangerously mental ill that become involved in the Federal criminal system, Congress would most likely be asked to expand the Federal role even further. For example, legislation might be proposed allowing the Federal Government to take over State mental health institutions, or to accept the transfer of those incarcerated there, when the State is allegedly not doing a satisfactory job. The Committee thus believes that the care of the mentally ill is a task that uniquely belongs within the *parens patriae* powers of the States.

§ *6126—Board of examiners*

This section carries forward paragraphs one and two of 18 U.S.C. 4241, and establishes a Board of Examiners. The section also establishes the procedures by which the board is to examine any person alleged to be suffering from a psychological disorder and to report its findings to the Attorney General.

§ *6127—Incompetence undisclosed at trial*

Section 6127 carries forward 18 U.S.C. 4246, with modifications to conform the procedures to the rest of this subchapter.

The section provides that whenever the Director of the Bureau of Prisons certifies to the Attorney General that the Board of Examiners (*see* section 6126 of the proposed code) has found reasonable cause to believe that a prisoner was incompetent at the time of trial, the Attorney General shall submit the certification and the report of the Board of Examiners to the clerk of the district court in which the defendant was convicted, unless the question of competence was determined at the time of trial.

Upon receipt of the certification and report, or at any time if the court otherwise has reason to believe that the defendant lacked competence at the time of trial, the court must proceed in the same manner as if the issue of competence had been raised during trial, except that no screening examination is required.

The report of the Board of Examiners is sufficient to establish a *prima facie* case of incompetence. This provision reflects current law.

A finding that the prisoner was incompetent at the time of trial requires the court to vacate the conviction and grant a new trial.

§ *6128—Transfer for treatment*

This section sets forth the procedures for involuntary treatment of a prisoner who is suffering from a mental disease or defect. It carries forward, in modified form, 18 U.S.C. 4242 and paragraph three of 18 U.S.C. 4241. If a person serving a sentence of imprisonment objects in writing to transfer to a facility for care or treatment, the person shall not be transferred other than in accordance with the procedures of this section.

In such a situation, the attorney for the government must file a motion with the court in which the facility is located, requesting a hearing on the transfer. The motion for a hearing must be granted if the court finds reasonable cause to believe that the imprisoned person is suffering from a mental disease or defect that requires treatment. The same procedures as are used to determine competence to stand trial shall then be followed. An examination must be conducted, a report prepared, and a hearing held.

If, following the hearing, the court determines by clear and convincing evidence that the imprisoned person is in need of treatment, it shall order such treatment at a facility designated by the court. Such treatment shall last until the termination of the person's sentence, or until no longer necessary, whichever period is shorter.

If the director of the designated facility finds that the defendant has recovered, the director must promptly notify the court. At that point, if an unserved term of imprisonment remains, the court shall order the person reimprisoned.

The Committee intends the provisions of this section to be interpreted in light of the constitutional requirements of *Vitek* v. *Jones*, 100 S. Ct. 1254 (1980). See discussion at 548 *infra*. It is expected that any additional procedures that are constitutionally required by that case will be provided through the Federal Rules of Criminal Procedure.

§ *6129—Definitions for section 6121 through 6124 and general provisions for subchapter*

Subsection (a) sets forth definitions applicable to sections 6121–24 of the proposed code. "Competence" is defined in accordance with current statutory and case law. "Qualified mental health examiner" is defined so as to permit examination not only by psychiatrists, but also by psychologists with experience in treating mental diseases and defects.

Subsection (b) makes clear that nothing in subchapter II of chapter 61 of the proposed code is intended to alter the availability of a writ of habeas corpus as a means for challenging confinement pursuant to the provisions of the subchapter.

CHAPTER 63—RELEASE

SUBCHAPTER I—RELEASE GENERALLY

Introduction

The provisions of this subchapter are derived from sections 3141 through 3156 of title 18. The Committee does not intend to make any substantive changes in these sections. The Committee held no hearings on the topics of bail and pretrial release, and therefore it takes the view that any changes in this chapter should be considered in separate legislation.

§ *6301—Power of courts and magistrates*

This section authorizes courts and magistrates to set bail or order release in noncapital cases. It also provides that only the court with original jurisdiction over the capital offense has the authority to admit to bail or to otherwise release the person.

§ *6302—Surrender by bail*

This section allows a surety to arrest a defendant released on bail if that defendant has failed to comply with the conditions of bail. The section also authorizes a court to hold such a bail violator in detention and to release the surety from his or her obligation.

§ *6303—Additional bail*

This section provides that a court, having previously set bail, may impose additional security if the defendant is about to abscond.

§ *6304—Cases removed from State courts*

This section provides that a defendant subject to a judgment of conviction from a State court, who seeks review of such conviction in the United States Supreme Court, shall not be released from custody until a final judgment upon such review or, if the offense is bailable, until a bond with reasonable sureties is filed.

§ *6305—Contempt*

Section 6305 provides that nothing in chapter 63 of the proposed code deprives the court of the ability to punish a person for contempt of court.

§ 6306—Release in general prior to trial

This section sets forth circumstances under which a defendant is to be released pending trial. Subsection (a) provides that a person charged with an offense, other than one punishable by death, shall be released—either on recognizance or with an unsecured appearance bond—unless the court determines that such a release will not reasonably secure the defendant's appearance at trial. If the court determines that unsecured release is inappropriate, it may impose any one or more of the following conditions:

(1) third party custody;
(2) restrictions on travel, association, or place of abode.
(3) a 10 percent bond;
(4) a bail bond with sufficient surety, or a cash deposit;
(5) any other condition deemed reasonably necessary to assure appearance, including a condition that the person return to custody after specified hours.

Subsection (b) authorizes the court, in determining the conditions of release, to consider: (1) the nature of the offense; (2) the weight of the evidence; (3) the defendant's family ties, financial resources, character and mental condition, community ties, and criminal history; and (4) any previous record of appearances.

Subsection (c) requires the court to specify any conditions of release that are set. Subsections (d) and (e) authorize judicial review of any detention or other condition that may be ordered. Subsection (f) provides that the Federal Rules of Evidence do not apply to release hearings and proceedings.

§ 6307—Release in certain serious cases or after conviction

This section establishes the procedure for releasing persons who are charged with serious offenses or who have been convicted but who have an appeal pending. Generally, such defendants are treated in the manner provided by section 6306 of the proposed code (relating to release in general prior to trial) unless the court has reason to believe that conditional release will not reasonably assure that the person will not flee or pose a danger to any other person. The section also provides that the court is authorized to order the person detained if the court finds a risk of flight or danger or if it appears to the court that an appeal is frivolous or taken for delay.

§ 6308—Release of material witnesses

This section provides that conditions may be imposed upon the release of a material witness and provides for certain safeguards for material witnesses.

§ 6309—Appeal from conditions of release

This section permits the defendant a right to appeal from certain release decisions. The lower court's determination must be upheld if it is "supported by the proceedings below."

§ 6310—Definitions for sections 6306 through 6310

This section defines "judicial officer" and "offense" for the purposes of subchapter I of chapter 63 of the proposed code.

SUBCHAPTER II—PRETRIAL SERVICES AGENCIES

§ 6331—Establishment of pretrial services agencies

Section 6331 reenacts 18 U.S.C. 3152 and provides that the Director of the Administrative Office of the United States Courts shall establish, on a demonstration basis in 10 representative judicial districts, a pretrial services agency. The agency is to supervise, control, and provide supportive services to defendants released under this chapter. The districts are to be designated by the Chief Justice of the United States after consideration of factors set forth in this section and consultation with the Attorney General.

§ 6332—Organization of pretrial services agencies

Section 6332 reenacts 18 U.S.C. 3153 and provides that the powers of five of the pretrial services agencies shall be vested in the Division of Probation of the Administrative Office of the United States Courts and shall operate under general policies set by that division.

The powers of each of the remaining five pretrial services agencies shall be vested in a Board of Trustees, which shall establish general policy for the agency. The members of the Board shall be appointed for a 3 year term of office by the chief judge of the United States district court for the district that the agency serves and must meet certain representation requirements. Each pretrial services agency can hire necessary personnel, experts, and consultants pursuant to the relevant provisions of title 5 of the United States Code.

§ 6333—Functions and powers of pretrial services agencies

Section 6333 reenacts 18 U.S.C. 3154 and provides that each pretrial services agency shall perform such functions as the district court to be served may specify.

§ 6334—Report to Congress

Section 6334 reenacts 18 U.S.C. 3155 and provides that the Director of the Administrative Office of the United States Courts must annually report to Congress on the accomplishment of the pretrial services agencies.

§ 6335—Definitions for subchapter

Section 6335 reenacts 18 U.S.C. 3156(b) and defines the terms "judicial officer" and "offense" for the purposes of this subchapter.

CHAPTER 65—SEARCH AND SEIZURE

SUBCHAPTER I—SEARCH WARRANTS

§ 6501—Grounds for issuing warrant

This section, which carries forward 18 U.S.C. 3103a, provides that, in addition to the grounds for the issuance of search warrants found in the Federal Rules of Criminal Procedure, search warrants may be issued for any property that constitutes evidence of a criminal offense in violation of the laws of the United States.

§ 6502—Persons authorized to serve search warrant

This section, which carries forward 18 U.S.C. 3105, authorizes certain persons to serve search warrants.

§ *6503—Service of warrants and seizures by Federal Bureau of Investigation*

This section, which carries forward 18 U.S.C. 3107, authorizes agents of the Federal Bureau of Investigation, and their superiors, to execute search warrants.

§ *6504—Breaking doors or windows for entry or exit*

This section, which carries forward 18 U.S.C. 3109, authorizes an officer to break open any outer or inner door or window of a house, any part of a house, or anything inside a house, in order to execute a search warrant if, after notice of such officer's authority and purpose, such officer is refused admittance or when necessary to liberate the officer or another aiding the officer.

§ *6505—Search warrants for seizure of animals, birds, or eggs*

This section, which carries forward 18 U.S.C. 3112, provides that the Secretary of the Interior may authorize Interior Department employees to execute search warrants in connection with the violation of certain environmental offenses. The section also authorizes a customs officer to execute search warrants in connection with certain environmental offenses.

SUBCHAPTER II—INTERCEPTION OF COMMUNICATIONS

§ *6511—Application for order of interception*

Subsection (a)(1) renacts 18 U.S.C. 2516(1) and authorizes a Federal law enforcement officer to apply to a Federal court for an order authorizing the interception of a private communication if the interception may provide evidence of certain enumerated crimes.

Subsection (a)(2) reenacts 18 U.S.C. 2518(1) and sets forth what an application for an order of interception must contain.

Subsection (b) reenacts 18 U.S.C. 2516(2) and authorizes the principal prosecuting attorney of a State or any political subdivision of a State, to the extent authorized by State law, to apply to a State court for an order authorizing interception of a private communication if the interception may provide evidence of the commission of certain enumerated crimes.

§ *6512—Issuance of order*

Subsection (a) reenacts 18 U.S.C. 2518(3) and provides that a Federal or State court may issue an *ex parte* order authorizing the interception of a private communication within the geographic jurisdiction of the court after making certain factual and legal determinations.

Subsection (b) reenacts 18 U.S.C. 2518(4) and sets forth what the court's order must specify.

Subsection (c) reenacts 18 U.S.C. 2518 (5) and (6) and provides that an order of interception may authorize an interception for 30 days and may authorize an extension of the order upon making certain findings. Subsection (c) also authorizes the court to require the filing of periodic reports.

Subsection (d) reenacts 18 U.S.C. 2518(4) and provides that the order can be fashioned to direct a communications common carrier, a landlord, or other person, to furnish the applicant for the order with

information, facilities and technical assistance necessary to accomplish the interception. Subsection (d) also requires that such parties furnishing assistance be compensated by the applicant for the order at the prevailing rate.

§ *6513—Interception of a private communication without prior authorization*

Section 6513 reenacts 18 U.S.C. 2518(7) and authorizes the interception of a private communication without a court order under certain circumstances. The section also requires that an application for a court order be made within 48 hours after such an interception has occurred or commenced.

§ *6514—Records and notice of interception*

Subsection (a) reenacts 18 U.S.C. 2518(8) (a) and (b) and sets forth provisions pertaining to recording interceptions of private communications, the preservation of those recordings, and the sealing of applications made and orders issued pursuant to subchapter II (relating to interception of communications) of chapter 65 of the proposed code.

Subsection (b) reenacts 18 U.S.C. 2518(8)(d) and sets forth provisions pertaining to notification of persons who are parties to an intercepted communication.

§ *6515—Use of information obtained from an interception*

Subsection (a) reenacts 18 U.S.C. 2515 and provides that no part of the contents of a private communication that has been intercepted may be received in evidence if the disclosure of that information would be in violation of subchapter II (relating to interception of communications) of chapter 65 of the proposed code.

Subsection (b) reenacts 18 U.S.C. 2517(5) which provides that if a law enforcement officer, while intercepting a private communication in accordance with subchapter II of chapter 65 of the proposed code, learns of an offense other than the one being investigated by the interception, the attorney for the government may move the court for an order approving such interception.

Subsection (c) reenacts 18 U.S.C. 2517 (2), (3) and (4) which provide that a law enforcement officer may disclose the contents of an interception to the extent that such disclosure is appropriate to the proper performance of such officer's duties. Subsection (c) also provides that a person who has received information concerning an intercepted private communication in accordance with subchapter II of chapter 65 of the proposed code may use such information while testifying under oath in an official proceeding. Finally, subsection (c) provides that a privileged private communication that is intercepted does not cease to be privileged because of such interception.

Subsection (d) reenacts the last sentence of 18 U.S.C. 2518(8)(a) and provides that the seal of the authorizing court (or a satisfactory explanation for the absence of such seal) is a prerequisite for the use or disclosure of intercepted private communications (or derivative evidence therefrom) in any official proceeding.

Subsection (e) reenacts 18 U.S.C. 2518(9) which provides that the contents of an intercepted communication may not be received in evi-

dence in a court proceeding unless each aggrieved person (defined in section 6517(1) of the proposed code) who is a party to the proceeding, not less than 10 days before the proceeding, has been furnished with a copy of the court order and the accompanying application.

Subsection (f) reenacts 18 U.S.C. 2518(10) and sets forth provisions pertaining to a motion by an aggrieved person to suppress the contents of an intercepted private communication or evidence derived from such contents.

§ 6516—Report of interception

Subsection (a) reenacts 18 U.S.C. 2519(1) and sets forth provisions pertaining to the filing of a report with the Administrative Office of the United States Courts by a court ordering an interception of a private communication, or authorizing an extension of such an order.

Subsection (b) reenacts 18 U.S.C. 2519(2) and requires the Attorney General of a State, or the principal prosecuting attorney of a State or a political subdivision of a State, to file a report with the Administrative Office of the United States Courts.

Subsections (c) and (d) reenact 18 U.S.C. 2519(3). They require the Director of the Administrative Office of the United States Courts to report annually to Congress and authorize the Director to issue regulations dealing with the content and form of the reports required to be filed under subsections (a) and (b).

§ 6517—Definitions for subchapter

Section 6517 reenacts 18 U.S.C. 2510 and sets forth definitions of seven terms used in subchapter II of chapter 65 of the proposed code.

SUBCHAPTER III—PEN REGISTERS

Introduction

A pen register is a device that, when attached to a telephone line, monitors electrical impulses caused when the dial or push buttons on the telephone are used. A pen register enables a person to learn the numbers that are dialed on that telephone, but will not indicate whether the call was completed. It also does not enable a person to listen to any conversation that might ensue if the call is completed.

Under current law, a pen register does not "intercept" communication and thus its use is not governed by Title III of the Omnibus Crime and Control and Safe Streets Act of 1968, 18 U.S.C. 2510–20 (relating to obtaining wiretap orders). *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166–67 (1977).

Use of a pen register has been held not to constitute a search within the meaning of the fourth amendment. *Smith* v. *Maryland*, 442 U.S. 735 (1979). A subject's expectation of privacy in such circumstances is considered to be doubtful, since most people are aware that the telephone company can and routinely does record the numbers they dial. For example, the telephone company records numbers dialed for purposes of billing long distance calls and to identify annoying calls. *Id.* at 742–43. Since such information is voluntarily turned over to the telephone company, the subject "assumes the risk" that the telephone company will reveal it to the police. Thus, any expectation of privacy

on the part of the defendant is not considered to be reasonable. *Id.* at 743–44.

Use of a pen register apparently does, however, constitute a search for purposes of Rule 41 of the Federal Rules of Criminal Procedure (relating to the issuance of search warrants). *United States* v. *New York Telephone Co.*, 434 U.S. 159, 169–70 (1977). *Contra United States* v. *New York Telephone*, 434 U.S. 159, 182–186 (Stevens, J., dissenting in part). Since the device is installed on telephone company property, rather than on the subject's, the subject cannot claim invasion of property or intrusion into a "constitutionally protected area." *Smith* v. *Maryland*, 442 U.S. 735, 741 (1979). Therefore, if the telephone company will cooperate, a Federal law enforcement officer need not seek judicial approval in order to use a pen register. If the telephone company is unwilling to cooperate, the law enforcement official must apply for a search warrant under Rule 41. Pursuant to the All Writs Act, 28 U.S.C. 1651 (a), a court issuing a warrant can direct the telephone company to assist the Federal law enforcement official in the installation of a pen register. *United States* v. *New York Telephone Co.*, 434 U.. 159, 172 (1977).

As noted above, the invasion of privacy by installation of a pen register is considered to be minimal because no interception of a conversation is possible. *Smith* v. *Maryland*, 442 U.S. 735, 741. Even so, the proposed code requires judicial approval before a pen register may be used. A court order may be issued upon the showing, required by section 6543, that "there is reason for the belief that the information likely to be obtained by the pen register is relevant to a legitimate criminal or civil investigation." In emergency situations, a prior court order is unnecessary, but the Government must seek an order within 48 hours of the installation.

The Committee rejected requiring the Government to seek a search warrant under Rule 41 of the Federal Rules of Criminal Procedure. It is questionable whether Rule 41 governs the use of pen registers or other electronic surveillance. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 182–86 (1977) (Stevens, J., dissenting in part). The Committee also rejected requiring the Government to proceed pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The legislative history of that Act reveals that Congress did not intend Title III to govern use of pen registers, since Title III covers only interceptions. *Id.* at 166–67 (1977).

The provisions of the proposed code regulating the use of pen registers are consistent with current Department of Justice policy, which recognizes that many telephone companies are unwilling to cooperate in the installation of a pen register without a court order. In addition, some pen register installations involve a trespass onto the premises of another. Such an installation is analogous to any situation in which law enforcement officers seek to enter premises without consent, and must obtain prior judicial approval to do so.

§ 6541—Authorization for pen register

Section 6541 provides that no Federal authority may install or use a pen register without first obtaining a court order, unless such installation or use is in connection with an emergency, as provided for in section 6544 of the proposed code.

§ *6542—Application for an order for a pen register*

Section 6542 requires that an application for use of a pen register be made under oath and in writing, and include the identity of the law enforcement officer making the application and a statement of the facts and circumstances relied upon to justify the applicant's belief that an order should issue.

§ *6543—Issuance of an order for a pen register*

Subsection (a) provides that the court shall issue an order authorizing the installation or use of a pen register if the court determines, on the basis of the facts submitted by the applicant, that there is reason to believe that the information likely to be obtained by the pen register is relevant to a legitimate criminal investigation.

Subsection (b) requires that an order issued pursuant to section 6543 specify: (1) the identity, if known, of the person to whose phone the pen register will be attached; (2) the identity, if known, of the person who is the subject of the investigation; (3) the number of the telephone to which the pen register will be attached; (4) a statement about the nature of the criminal investigation to which the information likely to be derived from the pen register relates; (5) the identity of the agency authorized to install and use the pen register; and (6) the time period during which the use of the pen register is authorized. The order must also direct, if the applicant so requests, that a communications common carrier, landlord, or other specified person assist in the installation and use of the pen register.

Subsection (c) provides that the order may authorize the use of the pen register only for the lesser of 30 days or the time necessary to accomplish the objective of the authorization. The time period may be extended for an additional period not to exceed 30 days.

Subsection (d) requires that an order authorizing the installation and use of a pen register direct a communications common carrier from whom the phone is leased not to disclose the existence of the pen register for at least 60 days after the removal of the pen register. The nondisclosure requirement can be extended for periods of up to 60 days if the court finds that disclosing the existence of the pen register would (1) endanger the safety of anyone, (2) result in flight from prosecution, (3) result in tampering with or the destruction of evidence, (4) result in the intimidation of potential witnesses, or (5) otherwise seriously jeopardize an investigation or official proceeding.

§ *6544—Emergency use of pen register without prior authorization*

This section permits the installation and use of a pen register without a court order if a law enforcement officer specially designated by the Attorney General reasonably determines that (1) an emergency situation exists with respect to criminal activities threatening to life or to conspiratorial activities characteristic of organized crime, necessitating the installation and use of a pen register before a court order can be obtained, and (2) there are grounds for obtaining a court order. In addition, an application for a court order must be made as soon as practicable after the pen register is installed, but in no event more than 48 hours after the installation. The use of the pen register must cease when the information sought is obtained or when the application for an order is denied, whichever first occurs.

§ *6545—Assistance in installation and use of a pen register*

Subsection (a) authorizes a communications common carrier, a landlord, or other person to assist in the installation and use of a pen register when so required by a court order or when there is an emergency and the law enforcement officer is proceeding under section 6544 of the proposed code. Subsection (b) authorizes the compensation of a communications common carrier, landlord, or other person.

§ *6546—Definitions for subchapter*

This section defines the following terms for the purposes of subchapter III of chapter 65 of the proposed code: "communications common carrier", "court of competent jurisdiction", "federal authority", "legitimate criminal investigation", and "pen register".

Chapter 67—Special Grand Jury

§ *6701—General provisions*

Section 6701 reenacts 18 U.S.C. 3334 and provides that the Federal Rules of Criminal Procedure applicable to regular grand juries apply to special grand juries to the extent not inconsistent with chapter 67 of the proposed code.

§ *6702—Summoning and term of special grand jury*

Section 6702 reenacts 18 U.S.C. 3331 and sets forth under what circumstances a special grand jury can be summoned. The section provides that the term of a special grand jury is 18 months, which can be extended for periods of 6 months at a time to a maximum of 36 months.

§ *6703—Powers and duties of special grand jury*

Section 6703 reenacts 18 U.S.C. 3332 and sets forth provisions relating to the power and duties of a special grand jury.

§ *6704—Special grand jury reports*

Section 6704 reenacts 18 U.S.C. 3333 and authorizes a special grand jury to issue a report upon completion of the term of the special grand jury. The section also sets forth provisions pertaining to the receipt and release of the report.

Chapter 69—Speedy Trial

§ *6901—Time limits and exclusions*

This section carries forward 18 U.S.C. 3161, a part of the Speedy Trial Act. Section 6901 sets time limitations for the trial and disposition of Federal offenses. The Committee does not intend to change the substance of the Speedy Trial Act, and the only changes made by the Committee in the text of the Speedy Trial Act are technical in nature. For example, subsections (f) and (g) of 18 U.S.C. 3161 have been deleted because they are not necessary in light of the effective date of the proposed code.

§ *6902—Sanctions*

This section, which carries forward 18 U.S.C. 3162, provides for sanctions for the violation of a provision of chapter 69 of the proposed code.

§ *6903—Persons detained or designated as being of high risk*

This section, which carries forward 18 U.S.C. 3164, provides that the trial or other disposition of certain cases be accorded priority. The cases that must be given priority are (1) those involving persons held in custody pending trial, and (2) those involving released persons who are designated "high risk" by the attorney for the Government.

§ *6904—Speedy trial data*

This section, which carries forward 18 U.S.C. 3165–71, specifies the data that must be included in district plans implementing the Speedy Trial Act. The Committee has combined seven sections of current law and has eliminated obsolete provisions of those seven sections, but has not changed any of the requirements of existing law with respect to the content of the district plans.

§ *6905—Sixth amendment rights*

This section, which carries forward 18 U.S.C. 3173, provides that no provision of chapter 69 of the proposed code shall be interpreted as a bar to any claim of denial of speedy trial as required by the Sixth amendment to the Constitution of the United States.

§ *6906—Judicial emergency*

This section, which carries forward 18 U.S.C. 3174, establishes a mechanism for the declaration of a judicial emergency and for the consequences of such a declaration. Obsolete provisions of 18 U.S.C. 3174 are eliminated.

§ *6907—Definitions for chapter*

This section, which carries forward 18 U.S.C. 3172, defines two terms for the purposes of chapter 69 of the proposed code.

Chapter 71—Trial by United States Magistrates

§ *7101—Misdemeanors and infractions*

This section, which carries forward 18 U.S.C. 3401, provides for magistrates to try misdemeanors and infractions in certain instances. The Committee has made certain technical and conforming changes to the present provision in order to accommodate the new terminology of the proposed code but has not made any substantive changes in the jurisdiction or powers of magistrates. The Committee does not approve of the practice of some magistrates who sentence persons to consecutive sentences, thereby imposing a term in excess of one year. *See United States* v. *Manjarrez-Arce*, 382 F. Supp. 1046 (S.D. Cal.), *aff'd*, 504 F.2d 426 (9th Cir. 1974), *cert. denied*, 419 U.S. 1112 (1975).

Chapter 73—Witnesses and Evidence

§ *7301—Refusal to pay as evidence of embezzlement*

This section, which carries forward 18 U.S.C. 3487, provides that certain facts constitute prima facie evidence of embezzlement. The Committee does not intend to change current law by reenacting this section.

§ *7302—Foreign documents*

This section, with sections 7303 through 7307 of the proposed code, carries forward 18 U.S.C. 3491–96, and sets forth certain rules with respect to the admissibility of foreign documents in the courts of the United States.

§ *7303—Commission to consular officers to authenticate foreign documents*

This section, which carries forward 18 U.S.C. 3492, provides for the authentication of certain foreign documents by consular officials.

§ *7304—Deposition to authenticate foreign documents*

This section, which carries forward 18 U.S.C. 3493, provides for the taking of depositions by consular officials in connection with the authentication of foreign documents.

§ *7305—Certification of genuineness of foreign documents*

This section, which carries forward 18 U.S.C. 3494, provides for the certification of genuineness of foreign documents.

§ *7306—Fees and expenses of consuls, counsel, interpretors, and witnesses*

This section, which carries forward 18 U.S.C. 3495, provides for the compensation of certain persons with respect to the authentication of foreign documents and for other purposes.

§ *7307—Regulations by President as to commissions, fees of witnesses, counsel, and interpreters*

This section, which carries forward 18 U.S.C. 3496, authorizes the President to prescribe regulations with respect to the subject matter covered by sections 7303–06 of the proposed code.

§ *7308—Admissibility of confessions*

This section, which carries forward 18 U.S.C. 3501, provides for the admissibility of confessions. The Committee does not change current law in any manner.

§ *7309—Admissibility in evidence of eyewitness testimony*

This section, which carries forward 18 U.S.C. 3502, provides for the admissibility of eyewitness testimony.

§ *7310—Depositions to preserve testimony*

This section, which carries forward 18 U.S.C. 3503, provides for depositions to preserve testimony.

§ *7311—Litigation concerning sources of evidence*

This section, which carries forward 18 U.S.C. 3504, sets forth certain rules about the litigation of claims that evidence was obtained by the use of any eavesdropping device (as that term is defined in section 2126 of the proposed code).

Subtitle V—Ancillary Civil Proceedings

Chapter 81—Ancillary Public Civil Proceedings

SUBCHAPTER I—FORFEITURE

This subchapter consolidates all of the forfeiture provisions applicable to offenses outlined in subtitle II of the proposed code. The primary purpose of this subchapter is to set forth the various procedures which apply when the government seeks to use these forfeiture provisions. Such procedures include: (1) a standard for evaluating whether the property is forfeitable; (2) protection of the rights of innocent third parties; (3) the right to a jury trial; and (4) appellate review.

Current Law

There are over 20 different sections within title 18 which provide for civil type forfeiture. The property which is forfeitable is generally either contraband or property used in certain illegal activities. Several of these sections are reenacted without substantive change in title II of the Criminal Code Revision Act of 1980: 18 U.S.C. 43, 44, 492, 844, 924, 962, 1165 and 1762. *See* sections 203, 204, 305, 384, 404, 413, 458 and 552 of the bill. Those forfeiture provisions, as well as those found in other titles of the United States Code, are not directly affected by this subchapter. The provisions of this subchapter affect only those offenses which are defined in subtitle II of title I of the proposed code.

For the most part the forfeiture provisions of this subchapter carry forward the coverage of current Federal law. However, the Committee did expand the forfeiture provisions of current law by providing for the forfeiture of property involved in crimes which have posed substantial problems in recent years.

The forfeiture provisions of this subchapter are primarily civil in nature. Section 2706 of the proposed code creates a criminal forfeiture provision which is *in personam* in nature. The forfeiture provisions of this subchapter are *in rem* in nature. These civil type proceedings have been a part of the common law for centuries and a part of Federal law since the beginning of the Republic. *See generally Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974); Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 Wm. & Mary L. Rev. 661 (1978); Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 Minn. L. Rev. 379 (1976). *See also* Doyle & Morgan, Criminal Forfeiture (Library of Congress, Congressional Research Service memorandum, June 15, 1971).

Under current law, 28 U.S.C. 2461(b), "in cases of seizure on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty." Thus, unless

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otherwise provided by statute, Federal forfeiture proceedings are conducted pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims, the Federal Rules of Civil Procedure, and the procedural provisions of title 28 covering *in rem* and admiralty proceedings. *United States* v. *$5,372.85 United States Coin and Currency*, 283 F. Supp. 904 (S.D.N.Y. 1968). These procedures would, for example, require that the property libelled be described with "particularity." Supplemental Rules for Admiralty and Maritime Claims C(3) (2) (a). United States districts courts, pursuant to 28 U.S.C. 1355, have original jurisdiction over statutory forfeiture proceedings.

§ *8101—Property forfeitable and methods of seizure*

This section sets forth the types of property which may be forfeitable under this subchapter. The 29 sections of the proposed code set forth in subsection (c) generally carry forward the coverage of current law or extend forfeiture to analogous offenses. These sections, or others like them, have been upheld as constitutional by the courts. *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 580 (1931); *United States* v. *One Ford Coupe Automobile*, 272 U.S. 321, 329 (1926). See also T. Mitchell, *The Development of the Law of Forfeitures in the United States* (1969).

Subsection (a) of this section authorizes the appropriate government agency to seize property which may be forfeitable. The Committee intends that the agency with primary law enforcement jurisdiction for the detection, investigation, and prosecution of the type of offense involved would exercise the seizure authority. Thus, for example, in certain counterfeiting cases the Department of the Treasury would be the "appropriate government agency" by virtue of the authority given it by section 5319 (relating to powers of Secret Service) of the proposed code.

Subsection (b) of this section places limitations on the seizure of property. The types of property listed in subsection (c) are seizable only if the agency has complied with the requirements of section 8102 (relating to seizure proceeding) of the proposed code or if the seizure is either pursuant to a search warrant or incident to a constitutionally permissible arrest. In part, this limitation carries forward the policy behind decisions which have held that even though forfeiture is civil in form, it is criminal in nature and, thus, the exclusionary rule applies. *See One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 702 (1965); *Bond* v. *United States*, 116 U.S. 616, 634 (1886) (pre-exclusionary rule, but holds that forfeiture is criminal in nature).

The inclusion of authority to seize property in connection with an arrest is meant to serve two goals. First, where the property is either a fruit or instrumentality of a crime, its seizure will assist law enforcement in the preservation of evidence. Second, to the extent that the property involved is contraband, e.g., heroin, its seizure will assist in the protection of the public. The Committee does not intend that the opportunity to seize property incident to an arrest serve as a substitute for following the procedures set forth in section 8102 of the proposed code in routine cases. *See United States* v. *McCormack*, 502 F.2d 281, 288–89 (9th Cir. 1974).

Subsection (c) expands upon current law in the property that is subject to forfeiture. For example, the Committee has added the following property to that covered by current law: (1) property used in a

violation of section 2537 (relating to criminal infringement of a copyright) of the proposed code; (2) property involved in a violation of section 2544 (relating to trafficking in counterfeit labels for phonorecords, and copies of motion pictures and audiovisual works) of the proposed code; and (3) property used in connection with a violation of section 1512 (relating to smuggling an alien into the United States) of the proposed code. The Committee concluded that the problems experienced by law enforcement in reducing the activities of large scale operators in these areas of criminal activity justified the departure from current law.

While most of the paragraphs in subsection (c) merely indicate that any property is forfeitable, paragraph (19) limits the nature of the property to preclude the application of this subchapter to real property. This result is consistent with current case law. *See Di Giacomo* v. *United States*, 346 F. Supp. 1009 (D. Del. 1972).

Paragraphs (17) and (18) of subsection (c) do not represent the only forfeiture provisions applicable to explosives and firearms. Additional provisions, derived from current law (18 U.S.C. 844(c) and 924(d)) are carried forward in title II of the Criminal Code Revision Act of 1980. *See* sections 384 and 404(b) of the bill.

§ *8102—Seizure proceeding*

This section establishes the ordinary procedure to be used by law enforcement authorities to seize property which is potentially forfeitable and should be utilized unless one of the exigent circumtances listed in section 8101 of the proposed code exists. This section requires the appropriate government agency to apply for an order authorizing the seizure in the same fashion as is required for a search warrant. *See* Rule 41 of the Federal Rules of Criminal Procedure. Under this procedure the government will be required to show that there is probable cause to believe that the property for which the seizure order is sought was involved in the commission of the offense.

In addition, the government must show that the property was "significantly involved" in the commission of the offense. The term "significantly involved" is not a defined term and will necessarily have to be given more complete delineation in the context of individual cases. The term is used, however, in order to preclude the seizure of property that was only tangentially or incidentally involved in the crime. *See United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971).

The Committee assumes that rules of procedure to govern forfeiture proceedings will be promulgated by the Supreme Court pursuant to 28 U.S.C. 2072 or 18 U.S.C. 3771 and 3772. See discussion of the current law of forfeiture *supra* at 575–76. Section 8102 contains no specific authority for the issuance of protection orders because such authority exists under the All Writs Act (28 U.S.C. 1651).

§ *8103—Procedure after seizure*

This section establishes the procedure for adjudication of claims of persons interested in any property seized under subchapter I (relating to forfeiture) of chapter 81 of the proposed code. This section departs from current Federal law by allowing innocent third parties with financial interests in the property subject to forfeiture to have their equitable, as well as legal, claims settled by the district court

rather than by the seizing agency. Under current Federal law innocent third parties must petition the seizing agency or the Attorney General for mitigation or recission of any forfeiture awards. *Cf.* 28 C.F.R. Part 9 (remission or mitigation of civil forfeitures, pursuant to 19 U.S.C. 1618). *See also United States* v. *One 1972 Mercedes Benz 250*, 545 F.2d 1233, 1235 (9th Cir. 1975) (decision of Attorney General not judicially reviewable).

Subsection (a) requires the court to take reasonable steps to provide persons having a financial interest in the property with notice of the proceedings. The nature of such notice will vary from case to case, but the Committee intends that diligent and good faith efforts be undertaken so that actual notification is achieved. The notification should occur as early after the seizure as possible. This requirement will facilitate informal resolution of disputes and will expedite a hearing should one become necessary. *See Jackel* v. *United States*, 304 F. Supp. 993 (S.D.N.Y. 1969).

Subsection (b) provides that a hearing must be held if requested by an interested party. Such a request would be made by motion. Subsection (c) provides that if the Government shows, by a preponderance of the evidence, that the seized property was significantly involved in the commission of the offense, then the court may order forfeiture of the property to the United States. While forfeiture proceedings have been characterized as civil in form and criminal in nature, the courts have upheld the use of a "preponderance standard". *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237, 267 (1877); *Compton* v. *United States*, 377 F.2d 408, 411 (8th Cir. 1967); *Martin* v. *United States*, 277 F.2d 785, 786 (5th Cir. 1960). Nothing in this section should be construed as limiting the authority of a court to require a higher standard of proof if the Constitution so requires. *See County Court of Ulster County, New York* v. *Allen*, 442 U.S. 140 (1979).

The Committee intends that the right to a jury trial be extended to the affected parties. While there has been some dispute as to whether the parties had a right to a jury trial in a forfeiture proceeding at the time of the adoption of the Constitution, it is clear that substantial rights are affected by a forfeiture order, and thus a forfeiture proceeding should carry the protection of a jury determination on important questions of fact. The Committee, therefore, adopts the reasoning in *United States* v. *One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980). In addition, the Committee intends that an order under this section be a final order and thus appealable under 28 U.S.C. 1291.

Subsection (d) provides that a person with an interest in the property may still obtain relief even if the court determines that the property was significantly involved in the commission of the offense. An innocent third party (such as the holder of a security interest) that establishes ownership or a financial interest by a preponderance of the evidence may obtain from the court an order for the disposition of the property in such a manner that does equity to the third person's "innocent interest". What constitutes an "innocent interest" will, of course, vary from case to case. Ordinarily, an "innocent interest" will mean (1) good faith ownership (or possession of a financial interest) by the third party; (2) lack of knowledge by the third party about the underlying violation of law; and (3) absence of any criminal intent by the third party. *See, e.g.*, 8 U.S.C. 1324(a).

Subsection (d) authorizes the court, upon the appropriate showing, to issue an order that does equity to the third person. This calls upon the court to perform the equitable function of fashioning an order that does justice both to the Government and to the innocent third party. Thus, for example, if the assets of an ongoing business are ordered forfeited to the Government, the court could order that they be disposed of through bulk sales and with minimal disruption of the business and its labor force.

Subsection (e) provides that certain types of property which have been ordered forfeited must be destroyed. The types of property involved are infringing phonorecords, infringing copies of motion pictures or audiovisual works, and counterfeit labels. This is consistent with the prevailing practice under the copyright laws (*see* 17 U.S.C. 503(b) and 506(b)) and under the customs laws (*see* 19 C.F.R. 133. 52(b)).

SUBCHAPTER II—CIVIL RESTRAINT OF RACKETEERING

§ 8111—Civil remedies

Section 8111, which carries forward 18 U.S.C. 1964, gives district courts jurisdiction to prevent and restrain violations of subchapter I (relating to racketeering) of chapter 27 of the proposed code and authorizes them to issue appropriate orders (such as an order divesting someone of any interest in an enterprise). Subsection (b) authorizes the Attorney General to institute a proceeding under this section, and subsection (c) authorizes a person whose business or property has been injured by a violation of subchapter I (relating to racketeering) of chapter 27 of the proposed code to sue for treble damages and the costs of the suit. Subsection (d) provides that a judgment for the Government in an action under subchapter II of chapter 81 of the proposed code estops the defendant from denying the essential allegations of the criminal offense in any subsequent civil suit brought by the Government.

§ 8112—Venue and process

Section 8112, which carries forward 18 U.S.C. 1965, provides for venue in any district in which the defendant resides, does business, has an agent, or is found. Process may be served anywhere in the United States, although a subpoena for persons residing more than 100 miles outside the judicial district must be judicially approved.

§ 8113—Expedition of actions

Section 8113, which carries forward 18 U.S.C. 1966, requires that actions under subchapter II of chapter 81 be heard expeditiously.

§ 8114—Evidence

Section 8114, which carries forward 18 U.S.C. 1967, allows the court to close to the public any proceedings brought under subchapter II of chapter 81.

§ 8115—Civil investigative demand

Section 8115, which carries forward 18 U.S.C. 1968, permits the government to issue civil investigative demands to persons allegedly involved in racketeering activities.

§ *8116—Definitions for subchapter*

Section 8116 defines "enterprise", "pattern of racketeering activity", and "racketeering activity" for the purposes of subchapter II of chapter 81 of the proposed code.

SUBCHAPTER III—RESTRICTIONS ON IMPOSITION OF CIVIL DISABILITIES

Introduction

This subchapter sets forth the collateral consequences which flow from a conviction of a Federal offense. Sections 8121 and 8122 prohibit artificial and capricious discrimination against former offenders in the granting of government benefits or employment. These sections are derived partially from constitutional requirements and partially from the recommendations of several national commissions on corrections. *See* Joint Task Force on the ABA Standards Relating to the Legal Status of Prisoners, *Legal Status of Prisoners* standards 23–8.1–8.8 (4th tent. draft 1980). Section 8123 permits the expungement of a record of conviction in certain circumstances and thereby carries forward, in modified form, the expungement provisions of the Youth Corrections Act (18 U.S.C. 5012).

Subchapter III is intended to assure that persons convicted of a Federal offense are successfully reintegrated into the community, one of the goals of the sentencing system of the proposed code (*see* section 3101(8)). The service of a sentence authorized by the proposed code constitutes, in the Committee's judgment, sufficient punishment for someone convicted of a Federal offense. To go beyond such punishment and discriminate against someone convicted of a crime when there is no direct relationship between the right or benefit and the conduct that led to the conviction, only compounds the social and economic problems already faced by persons convicted of crime. The Committee, in fashioning the limitations and restrictions on governmental action set forth in subchapter III, has carefully balanced the needs of the government with the civil rights of former offenders.

Collateral consequences resulting from criminal convictions have traditionally ranged from limitations on civil rights to disqualification from public employment or ineligibility for professional licenses. Potuto, *A Model Proposal to Avoid Ex-Offender Employment Discrimination*, 41 Ohio St. L.J. 77 (1980);[1] Davis, *Records of Arrest and*

[1] The civil and employment disabilities imposed on offenders exist throughout Federal statutes and regulations. The Federal government has adopted provisions through which occupational licenses must or may be denied to ex-offenders. *See, e.g.*, 7 U.S.C. 12a(2)(B) (Secretary of Agriculture authorized to deny convicted felon's registration as futures commission merchant and floor broker); 46 C.F.R. 10.02–1 (convicted narcotics law violators ineligible for deck or engineering officer's licenses for a period of 10 years). Numerous Federal statutes preclude employment of ex-offenders by private persons or associations. *See, e.g.*, 29 U.S.C. 504(a) (prohibiting labor organizations from employing in any non-clerical or non-custodial position any person who has within five years been convicted of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of a narcotics law, murder, rape, assault with intent to kill, assault inflicting grievous bodily injury, a violation of specific labor statutes, or conspiracy to commit any of the cited offenses); 12 U.S.C. 1785 (c) (prohibiting federally-insured credit unions from employing, in any capacity whatever, any person convicted of an offense involving dishonesty or a breach of trust unless written authorization for the hiring is obtained from the Administrator of the National Credit Union Administration); 21 U.S.C. 467(a), 671 (authorizing the Secretary of Agriculture to deny or to terminate federally required poultry or meat inspection services where the applicant for or recipient of the services "or anyone responsibly connected with the applicant or recipient" has within 10 years been convicted of one of various listed felonies or "more than one misdemeanor" involving particular types of fraud or deception).

In addition, there is a statutory bar against ex-offenders' enlistment in the armed forces of the United States, 10 U.S.C. 504 ("No person . . . who has been convicted of a felony may be enlisted in any armed forces. However, the Secretary concerned may authorize exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies"), and there is a potential exclusion of persons convicted of felonies and misdemeanors from all Federal civil service positions. 5 C.F.R. 731.202(b) (Office of Personnel Management may deny employment to an applicant or current employee guilty of "criminal, dishonest, infamous, or notoriously disgraceful conduct").

Similarly, social security rights and other Federal benefits may be lost upon conviction. *See, e.g.*, 5 U.S.C. 8312 (prohibiting retirement benefit payments to an individual or such individual's survivor or beneficiary, convicted of enumerated offenses); 42 U.S.C. 402(u) (providing that a court may withhold old-age and survivors' insurance benefits payments as an additional penalty for enumerated offenses; 24 U.S.C. 50 (excluding soldiers convicted of felonies from the benefits of the Soldiers' Home); and 38 U.S.C. 505 (excluding any individual convicted of any offense from benefits administered by the Veterans' Administration).

Conviction: A Comparative Study of Institutional Abuse, 13 Creighton L. Rev: 863 (1980). Despite the prevalence of such collateral consequences, however, numerous commentators and national commissions have condemned such measures.[2] As a Presidential commission said 13 years ago:

> to ban convicted persons from activities without regard to the particular conviction's relevance to the particular activity can be expected seriously to impede efforts to rehabilitate offenders by encouraging their participation in society; without any compensating benefit to society.

The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 91 (1967).

Despite the consensus that arbitrary restrictions on the rights of former offenders should be eliminated, little has been done at the Federal level. A few Federal statutes have been enacted which began to take into account the problems of former offenders. *See, e.g.*, 10 U.S.C. 3253 and 8253 (relating to military service); 28 U.S.C. 1861 (relating to jury duty). For the most part, however, the States have responded more positively to the problems of discrimination against former offenders. At least nine States have specific statutory protections for former offenders. *See, e.g.*, Conn. Gen. Stat. Ann section 4–61g (West Supp. 1979); Fla. Stat. Ann. section 112.011 (Supp. 1974–1978); Hawaii Rev. Stat. section 354–2 (1974); Minn. Stat. Ann. section 243.88 (West Supp. 1979); N.M. Stat. Ann. sections 28–2–1 to 2–6 (1978); N.Y. Correc. Law section 703, 754, 755; S.D. Codified Laws Ann. section 23 A–27–35 (1979); Wash. Rev. Code Ann. section 9.96.050 (1977); Wis. Stat. Ann. section 57.078 (West Supp. 1979–80). The provisions of sections 8121 and 8122 of the proposed code parallel the policy conclusions reached in these State statutes.

In addition to the policy reasons for responding to the concerns about discrimination against former offenders, there are constitu-

[2] *See, e.g.*, National Advisory Committee on Criminal Justice Standards and Goals, Corrections 46–48, 592–93 (1973); President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections, ch. 8 (1967); Center for the Study of Legal and Manpower Disabilities, Civil Disabilities of Ex-Offenders (1974); American Bar Association, National Clearinghouse on Offender Employment Restrictions, Laws, Licenses and the Offender's Right to Work (1973); Meltsner, Caplan & Lane, *An Act to Promote the Rehabilitation of Criminal Offenders in the State of New York*, 23 Syracuse L. Rev. 885, 887–98 (1973); New York City Commission on Human Rights, The Employment Problems of Ex-Offenders (1974); Note, *The Collateral Consequences for a Criminal Conviction*, 23 Vand. L. Rev. 929 (1970); Pownall, Employment Problems of Released Prisoners (1969); Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia, Report (1967); Hess, *Abuse of the Record of Arrest Not Leading to a Conviction*, 13 Crime & Delinquency 494 (1967).

tional reasons for doing so. A number of courts have held that statutes or ordinances which automatically discriminate against former offenders violate either the Equal Protection Clause or the Due Process Clause. *Miller* v. *Carter*, 547 F.2d 1314 (7th Cir. 1977) (city ordinance which barred persons with certain criminal convictions from obtaining a chauffeur's license violated Equal Protection Clause) (Campell, J., concurring, would also find the ordinance contravenes the Due Process Clause), *aff'd.*, 434 U.S. 356 (1978); *Smith* v. *Fuessenich*, 440 F. Supp. 1077 (1977) (D.Conn.) (three judge court) (Connecticut statute which barred felony offenders from employment with licensed private detective agency violates Equal Protection Clause of the Fourteenth Amendment because it made an irrational distinction between misdemeanants and felons); *Butts* v. *Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974) (three judge court) (Iowa statute which totally bars ex-offenders from civil service positions violates the Equal Protection Clause because it makes arbitrary and irrational classifications without requiring a "direct relationship" between the conduct which led to the conviction and the job duties). *See also Schware* v. *Board of Examiners*, 353 U.S. 232 (1956) (there must be a reasonable relationship between requirements for admission to the bar and the applicant's fitness).

Sections 8121 and 8122 deal with the problems of former offenders without unnecessarily limiting the discretion of government agencies. These sections proscribe discrimination against former offenders when there is no direct, demonstrable relationship between the right or benefit involved and the conduct which led to the conviction. This approach eliminates any potential constitutional problems with statutes, administrative regulations, or agency practices which authorize or permit discrimination based on a nondirect relationship. *Butts* v. *Nichols*, 381 F. Supp. 573 4) (three judge court). At the same time, these sections preserve the rights of govenment agencies to select competent and trustworthy employees and distribute privileges and benefits for eligible recipients.

§ *8121—Limitation on restriction of eligibility for certain Federal activities because of Federal conviction*

Subsection (a) prohibits restricting the eligibility of someone convicted of a Federal crime for (1) a Federal benefit, privilege, service, program, facility, or activity or (2) voting, qualifying as a candidate, or acting as an election official in a Federal election. Subsection (a) (2) effectuates a policy that discrimination against former offenders in the provision of Federal benefits and for voting in Federal elections is irrational and improper.[1] The power to enact such a provision is derived from article I, section 4, clause 1 of the Constitution ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by law make or alter such regulations") and from section five of the 14th amendment. This provision is virtu-

[1] The United States Supreme Court in Oregon v. Mitchell, 400 U.S. 112 (1970), upheld a Congressional determination that 18 year olds be permitted to vote. The Court held that Congress had authority to set requirements for voting in Federal elections. The Committee, recognizing the potential constitutional problems in enacting a provision applicable to State and local elections, has chosen in the context of this legislation only to regulate Federal elections.

ally identical to one contained in H.R. 14594 which was reported favorably by the Committee on the Judiciary during the end of the Second Session of the 93rd Congress. *See* Harings on H.R. 9020 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 93d Cong., 2d sess., (1974). *See also* Model Penal Code section 306.3 (1962); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, standard 16.17 at 593 (1974); The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, at 90 (1967); National Conference of Commissioners on Uniform State Laws, *Uniform Act on the Status of Convicted Persons*, sections 2 and 3 (1965). This view is supported by the recommendations of the National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, section 16.17 (1974); Model Penal Code section 306.1 (1962).

Subsection (a) will have only a slight impact upon the more than 15 States that do not automatically disqualify former offenders. The other States will be required to permit persons who meet the requirements of section 8121 to vote in that portion of any election that involves the selection of Federal officials. To the extent that a State does not allow such persons to vote in State and local elections, separate ballots may be necessary. Yadlosky and Durbin, *Disenfranchisement of Convicted Persons* (1977) (Congressional Research Service, Library of Congress, memorandum, no. 77–45A, 636–1109 (R)).

Subsection (b) defines the term "convicted person" for the purposes of section 8121, to mean (1) with respect to subsection (a) (1), a person who has been convicted of a Federal offense; and (2) with respect to subsection (a) (2), a person who has been convicted of a Federal offense and who has completed any term of imprisonment imposed for such convictions. Thus, section 8121 does not, for purposes of voting in Federal elections, apply to persons still incarcerated. The States are, of course, able to authorize such persons to vote in Federal (or State and local) elections. *See generally* Note, *Need for Reform of Felon Disenfranchisement Laws*, 83 Yale L.J. 580 (1974); Note, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 Stan. L. Rev. 845 (1973); Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 Am. Crim. L. Rev. 721 (1973).

Subsection (c) (1) permits restricting the eligibility of a convicted person for any activity described in subsection (a). Subsection (c) (1) (A) permits such a restriction if that restriction is specifically authorized by a Federal law that first takes effect on or after the effective date of the Criminal Code Revision Act of 1980. Subsection (c) (1) (B) permits such a restriction if such restriction is imposed under the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, or the Commodity Exchange Act.

Subsection (c) (1) (C) permits such a restriction if that restriction is imposed by the President with respect to employment for which appointment is made by the President. Subsection (c) (1) (C) does not apply to every executive branch employee. Rather, it is intended to reach only those people with whom the President must work closely. Thus, even though the President appoints all military officers, subsec-

tion (c)(1)(C) does not exempt such appointments from the provisions of section 8121. Subsection (c)(1)(D) permits such a restriction if that restriction is imposed with respect to employment in a law enforcement agency, by a contractor of a law enforcement agency (if such contract involves law enforcement functions), or as a law enforcement officer.

Subsection (c)(1)(E) permits such a restriction if there is a direct relationship between the conduct constituting the offense and the activity involved. The term "direct relationship" is derived from the Model Sentencing and Corrections Act, section 4–1005 (1979) and means an actual and substantial connection between, on the one hand, the conduct that can be expected from the former offender because of the crime for which that person has been convicted and, on the other hand, the particular activity involved. This standard is analogous to the standard used in the prohibitions against racial discrimination found in the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1242(a)(1)). *See* 31 C.F.R. 51.51(i) (1979).

Subsection (c)(2) provides that, notwithstanding any other provision of law, a restriction under subsection (c)(1) is effective (1) in the instance of a conviction resulting in a sentence of conditional discharge, probation, or imprisonment, for not more than 5 years after the last day of the term involved; (2) in the instance of a conviction resulting in a sentence of fine, for not more than 5 years after the date on which payment of the fine is completed; (3) in the instance of a sentence of restitution, for not more than 5 years after the date on which restitution is completed; and (4) in the instance of a conviction resulting in more than one sentence, until not later than the latest applicable date under subsection (c)(2)(A), (B), and (C).

Subsection (d) permits a sentencing court to impose a restriction as a part of a sentence, if imposing that restriction is otherwise within the sentencing power of the court. For example, section 1301 of the proposed code authorizes as a punishment for conviction of treason disqualification for life from holding office as a Federal public servant. Pursuant to that section, a sentencing court can disqualify someone who is convicted of treason under section 1301 of the proposed code from holding office as a Federal public servant.

Subsection (e) directs the Attorney General to prescribe rules for the implementation of section 8121.

It should be noted that section 719 of H.R. 6915 amends 28 U.S.C. 1865(b) to conform with the general policy behind the provisions of section 8121. Section 719 provides that jury service may not be denied to a convicted person unless such person is serving a sentence of imprisonment or the requisite 5-year time period has expired. This provision, of course, does not grant any right to jury service, but merely ends the practice of automatically excluding all former offenders. Former offenders may be excluded by a party's exercise of a peremptory challenge or a challenge for cause. A challenge for cause on the basis of the conviction will not lie. This approach comports with the recommendations of the American Bar Association's Joint Task Force on the ABA Standards Relating to the Legal Status of Prisoners, *Legal Status of Prisoners* standard 23–8.5 (4th tent. draft 1980).

§ *8122—Limitation on restriction of eligibility for certain government employment because of certain convictions*

Subsection (a)(1) provides that, except as provided in subsection (c), the eligibility of a person for employment by a Federal, State, or local government agency may not be restricted because of such person's conviction. Subsection (a)(2) provides that for the purposes of this subsection, the term "convicted person" means a person convicted of a Federal offense who has completed any term of imprisonment imposed for such conviction. The purpose of this definition is to differentiate the reach of this provision from the reach of subsection (b).

Subsection (b) provides that, except as provided in subsection (c), the eligibility of a person for employment by a Federal agency shall not be restricted on account of such person's conviction. Subsection (b)(2) defines the term "convicted person" to mean, for the purpose of subsection (b), an individual convicted of either a State or Federal offense who has completed any term of imprisonment imposed for such conviction.

Subsection (c) permits restricting the eligibility of a convicted person for any employment described in subsection (a) or (b). Subsection (c)(1)(A) permits imposing such a restriction if that restriction is specifically authorized by a Federal law that first takes effect on or after the effective date of the Criminal Code Revision Act of 1980. Subsection (c)(1)(B) permits imposing such a restriction if that restriction is imposed under the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, or the Commodity Exchange Act. *See Savage* v. *CFTC*, 548 F.2d 192, 197 (7th Cir. 1977); *Silverman* v. *CFTC*, 562 F.2d 432 (7th Cir. 1977).

Subsection (c)(1)(C) permits imposing such a restriction if that restriction is imposed by the President with respect to employment for which appointment is made by the President. Subsection (c)(1)(C) does not apply to every executive branch employee. Rather, it is intended to reach only those people with whom the President must work closely. Thus, even though the President appoints all military officers, subsection (c)(1)(C) does not exempt such appointments from the provisions of section 8122.

Subsection (c)(1)(D) permits imposing such a restriction if that restriction is imposed with respect to employment in a law enforcement agency, by a contractor of a law enforcement agency (if such contract involves law enforcement functions), or as a law enforcement officer.

Subsection (c)(1)(E) permits imposing such a restriction if there is a direct relationship between the conduct constituting the offense and the activity involved. The term "direct relationship" is derived from the Model Sentencing and Corrections Act, section 4–1005 (1979) and means an actual and substantial connection between, on the one hand, the conduct that can be expected from the former offender because of the crime for which that person has been convicted and, on the other hand, the particular employment involved. *See* New York Correction Law section 750(3). This standard is analogous to the standard used in the prohibitions against racial discrimination found in the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1242(a)(1)). *See* 31 C.F.R. 51.51(i) (1979).

Subsection (d) provides that a sentencing court may impose a restriction on eligibility for employment that is otherwise within the sentencing power of the court.

Subsection (e) requires the Equal Employment Opportunity Commission, after consultation with the Attorney General, to issue rules to implement section 8122. The purpose of this provision is to help agencies regulate their behavior. The Committee intends that the Equal Employment Opportunity Commission, in promulgating rules under subsection (e), consider similar provisions in State statutes. *See* Potuto, *A Model Proposal to Avoid Ex-Offender Employment Discrimination*, 41 Ohio St. L.J. 77, 101–02 n. 150 (1980).

This section is based on the power of Congress under section five of the 14th amendment *Cf. Oregon* v. *Mitchell*, 400 U.S. 112, 131–34 (1970) (Black, J.) (Congressional provision for 18 year old vote); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (section five authorizes the passage of legislation to secure the guarantees of the fourteenth amendment). Convicted persons who suffer as a result of a violation of this section have a civil cause of action. *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). The remedies available to such aggrieved parties apply against both to private parties as well as governmental entities. *Hutto* v. *Finney*, 437 U.S. 678 (1978) (11th amendment inapplicable when legislation is passed under section five of the fourteenth amendment).

§ *8123—Relief from certain collateral results of convictions of certain first offenses*

Current law has two expungement provisions, in 21 U.S.C. 844(b) and 18 U.S.C. 5021. Although a limited number of drug offenders may have their convictions expunged pursuant to 21 U.S.C. 844(b)[1], most criminal records are sealed pursuant to 18 U.S.C. 5021. That section permits persons convicted and sentenced under the Federal Youth Corrections Act (YCA), 18 U.S.C. 5005 *et seq.*, to have their criminal conviction records automatically "set aside" and sealed, upon unconditional and successful completion of sentence. A nonpublic record, however, is separately maintained by the Department of Justice. *Doe* v. *Webster*, 606 F.2d 1226 (D.C. Cir. 1979), *United States* v. *Henderson*, 482 F. Supp. 234 (D. N.J. 1979)

The relief provided by 18 U.S.C. 5021 is limited to persons under the age of 26.

The meaning of the term "set aside" in 18 U.S.C. 5021 is ambiguous. The court in *Doe* v. *Webster*, 606 F.2d 1226 (D.C. Cir. 1979), in a thorough examination of the policy underlying 18 U.S.C. 5021, concluded that that the primary concern of that section was to protect

[1] Under 21 U.S.C. 844(b)(1), a defendant may be placed on probation prior to an entry of a judgment of guilty. Upon the successful completion of a probationary term, the court may discharge the individual and dismiss the proceedings without entering a judgment of guilty. Under 21 U.S.C. 844(b)(1), all court records of the proceedings are sealed and a nonpublic record is kept by the Department of Justice solely for use by the courts in determining whether the defendant qualifies under 21 U.S.C. 844(b)(1) in future proceedings. 21 U.S.C. 844(b)(2) explicitly provides for the expungement of official records (including those concerning the defendant's arrest, indictment or information, trial finding of guilt, and dismissal and discharge, but excluding a nonpublic record kept by the Department of Justice) of offenders under the age of 21 at the time of the offense who apply to the court for relief under 21 U.S.C. 844(b).
Some 36 States have expungement statutes for drug offenders. *See* United States v. Glasgow, 389 F. Supp. 217, 225 n. 21 (D.D.C. 1975).

young offenders from the social stigma and loss of economic opportunity that often result from a criminal conviction. The court concluded that the drafters of the Youth Corrections Act intended to provide a youthful offender with a clean slate, and that the rehabilitation objectives of the Act could be effectuated only if the provision that authorized setting aside the conviction were construed as an expungement provision. *Id.* at 1238–40. The Committee has followed this interpretation of 18 U.S.C. 5021 in drafting section 8123.

Section 8123 corrects certain serious deficiencies in the Youth Corrections Act and in judicial interpretations of it. *See* Harnsberger, *Does the Federal Youth Corrections Act Remove the "Leper's Bell" from Rehabilitated Offenders?*, 7 Fla. St. L. Rev. 395, 417–19 (1979); Note, *Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision*, 66 Kentucky L. J. 741, 742, 756 (1977–78). First, 18 U.S.C. 5021 applies only to persons under age 26. Section 8123 contains no age restriction.[2]

Second, as noted above, the language of 18 U.S.C. 5021 is ambiguous; it does not clearly set forth the meaning of the term "set aside". nor does it describe how the relief is to be implemented. *See* Harnsberger, *Does the Federal Youth Corrections Act Remove the "Leper's Bell" from Rehabilitated Offenders?*, 7 Fla. St. L. Rev. 395, 396 n. 10 (1979). Section 8123 expressly sets forth the intended effect of a relief order; it restricts disclosure, provides that all rights and privileges shall be restored, and grants the offender the right to deny the conviction.

Third, relief under 18 U.S.C. 5021 is automatic upon a successful completion of sentence. *United States* v. *Arrington*, No. 79–5327 (5th Cir. June 12, 1980). There is no opportunity for the Government to participate in the expungement decision. The decision is entirely within the discretion of the court; no standard for the court's decision is provided. Section 8123, to the contrary, provides significant protection to society by requiring that the court may grant relief only upon application of the offender. Moreover, there must be a hearing in which the Government may participate and a judicial finding that such relief is in the public interest.

Fourth, there are no exceptions to the broad sweep of 18 U.S.C. 5021's expungement mechanism. The 4 exceptions to section 8123 serve to protect the public from possible adverse consequences of an expungement relief order.

Fifth, unlike section 8123, current law does not impose on public servants any obligation not to disclose expunged information. Finally, State agencies have not given an expansive reading to 18 U.S.C. 5021's set aside provision because of the section's ambiguity. *See* Glough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 Wash. U. L. Q. 147, 152 (1966); *The Collateral Consequences of Criminal Conviction*, 23 Vand. L. Rev. 929 (1970). By contrast, the supremacy clause would mandate that State agencies defer to the clear commands of

[2] The decision to omit the age restriction was made at the suggestion of Mr. Sawyer of Michigan, who cited his State's favorable experience with a similar statute, also without age restrictions. *See* MICH. COMP. LAWS ANN. §§ 780.621–22 (1965).

section 8123. *See* Schaefer, *The Federal Youth Corrections Act*, 39 Fed. Probation Q. 31, 36 (1975).

Subsection (a) provides that an individual convicted of a Federal offense, other than a class A felony, may apply for relief after the expiration of a requisite period of time. The term "offense" is defined in section 101 of the proposed code and does not include a military offense. Subsection (a) excludes certain individuals from eligibility for relief under section 8123. Individuals excluded are those who have previously been convicted of a Federal felony, a State offense punishable by death or by imprisonment for more than one year; those who have previously obtained relief under this section; and those who face pending criminal (including misdemeanor) charges. The term "punishable" means the statutory maximum sentence, not the punishment actually imposed. *Cf. United States* v. *Dennison*, 588 F.2d 1112 (5th Cir. 1979) (interpreting 18 U.S.C. 3651's use of "punishable" to mean potential maximum sentence) (subsequent case history not pertinent).

Subsection (a)(4) provides that the court may grant relief only after a hearing in which the government participates and only if the court determines that relief is in the public interest. In making its decision, the court should assess the seriousness of the underlying offense, whether the type of conduct underlying the offense was sufficiently blameworthy to justify the continued stigma attached to the conviction, and the propriety of restoring the offender's rights and privileges. Any such decision is a final order under 28 U.S.C. 1291 and thus appealable by either the Government or the applicant. In order to facilitate review, the court should state the reasons for its decision.

Subsection (b) establishes a waiting period before a person may apply for relief under this section. An individual is not eligible for relief under this section: (1) until 3 years after the last day of a term of a sentence of conditional discharge, probation or imprisonment for a felony; (2) until 3 years after the date on which the payment of a fine is completed, in the case of a sentence of fine for a felony; (3) until 3 years after the date on which the payment of restitution is completed, in the case of a sentence of restitution for a felony; (4) until one year after the last day of a term of a sentence of conditional discharge, probation or imprisonment for a misdemeanor; (5) until one year after the date on which the payment of a fine is completed, in the case of a sentence of fine for a misdemeanor; and (6) until one year after the date on which the payment of restitution is completed, in the case of a sentence of restitution for a misdemeanor. In the case of multiple sentences, the individual is not eligible until the longest applicable period of time has expired.

Subsection (c) sets forth the effect of an order granting relief and provides that if the person is convicted of a Federal felony or a State offense punishable by death or imprisonment for more than one year, the order granting relief shall terminate. As stated above, "punishable" means the potential maximum punishment, not the punishment actually imposed. *Cf. United States* v. *Dennison*, 588 F.2d 1112 (5th Cir. 1979) (interpreting 18 U.S.C. 3651) (subsequent case history not pertinent).

Subsection (c)(1) provides that if relief is granted pursuant to this section, Federal, State, and local public officials are prohibited from disclosing any official records or information relating to an individual's conviction. There are four exceptions to this prohibition that are discussed below. Failure to comply with this requirement will create a civil cause of action on the part of the offender, to enforce his or her rights. *See supra* at 586. The Committee intends to adopt the definition of the term "conviction" set forth in *Doe* v. *Webster*, 606 F.2d 1226, 1230–31 (D.C. Cir. 1979). "Conviction" in the context of expungement means the record of the conviction itself, not the person's arrest record. The Committee considered but rejected the definition used by the court in *United States* v. *Henderson*, 482 F. Supp. 234, 241–43 (D.N.J. 1979), which included the arrest record as well. The disclosure of arrest record information, however, continues to be limited by Federal regulations. 28 C.F.R. 20.21(b), 20.32–33 (1978).

In sum, subsections (a), (b), and (c) require not the destruction of the record of the conviction, but rather the sealing of that record. The record is to be unavailable to the public and to government agencies, except that the Department of Justice shall maintain a nonpublic record. This practice follows that currently used by courts granting expungement orders pursuant to the Youth Corrections Act. *See, e.g.*, *Doe* v. *Webster*, 606 F.2d 1226, 1244 (D.C. Cir. 1979); *United States* v. *Henderson*, 482 F. Supp. 234, 243 n.12 (D.N.J. 1979). A record maintained by the Department of Justice will reflect the person's arrest record with a notation that the conviction is sealed.

The Department of Justice can disclose the sealed conviction record only if one of the 4 exceptions set forth in subsection (c)(1) applies. Subsection (c)(1)(A) provides that the information may be admitted in any criminal proceeding if that information is otherwise admissible under applicable law. The information might be inadmissible, for example, on grounds of prejudice. *See, e.g.*, Fed. R. Evid. 609(a). The subsection contemplates disclosure where a person who has obtained relief under this section is called as a witness in such person's own criminal trial or that of a third party. The conviction could properly be used to impeach the credibility of the witness. Fed. R. Evid. 608 (relating to evidence of character and conduct of witness), 609 (relating to impeachment by evidence of conviction of crime), and 803(22) (relating to hearsay exceptions; availability of declarant immaterial).

Subsection (c)(1)(B) authorizes a court with jurisdiction over the subject matter to request and receive information relating to the conviction record. The Committee intends "jurisdiction over the subject matter" to mean jurisdiction over the person's conviction record. This definition necessarily excludes a State court from acting pursuant to this exception. A Federal district court, however, could authorize disclosure of such information in a presentence report for an individual who has received relief under this section, or in a civil trial.

Subsection (c)(1)(C) authorizes the release of the information to a Federal agency for national security reasons.

Subsection (c)(1)(D) provides that the information may be made available to a law enforcement agency for employment screening and for criminal investigation purposes involving the offender whose conviction record has been sealed. The term "law enforcement agency" includes local and State agencies with access to the files of the Department of Justice.

Subsection (c)(2) provides that someone who has obtained relief under this section does not commit a criminal offense by failing to

admit or acknowledge the conviction. The Committee intends the term "offense" to refer to the crimes of perjury, making a false statement, or any other criminal offense of a similar nature.

Subsection (c)(3) restores the civil rights of persons who obtain relief under this section. The Committee intends that the convicted person be restored to the same position as before the conviction. Thus any legal rights, such as the right to practice a profession, to serve on a Federal jury, or to seek public office would be restored if the person is otherwise eligible. In fashioning an order "in the public interest," the court may properly limit the effect of an order under this section so as to continue certain disabilities. In addition, a prosecution under a Federal statute predicated upon a prior felony conviction cannot be based on an expunged conviction. This carries forward current law regarding Youth Corrections Act convictions based on federal firearms violations, *United States* v. *Arrington*, No. 97–5327 (5th Cir. June 12, 1980); *United States* v. *Purgason*, 565 F.2d 1279 (4th Cir. 1977); *United States* v. *Fryer*, 545 F.2d 11 (6th Cir. 1976), and for offenses relating to the deportation of aliens, *Mestre Morera* v. *I.N.S.*, 462 F.2d 1030 (1st Cir. 1972). *See generally* Note, *The Impact of Expungement Relief on Deportation of Aliens for Narcotics Convictions*, 65 Geo. L. J. 1325 (1977). The supremacy clause requires States and their agencies to follow the provisions of this section. *See* Schaefer, *The Federal Youth Corrections Act*, 39 Fed. Probation Q. 31, (1975); *People* v. *Garcia*, 93 Misc. 2d 667 (Sup. Ct. N.Y., 1978).

Subsection (d) provides that two or more convictions based on the same conduct or arising from the same criminal episode shall be treated as a single conviction. This subsection is based on an analogous recommendation by the Brown Commission that related offenses be tried together. *See* Brown Commission, *Final Report* section 703 (1971). The Committee intends the term to be given the same meaning as a parallel phrase used in Rule 8(a) of the Federal Rules of Criminal Procedure ("same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan").

Subsection (e) provides that section 8123 applies to convictions taking place before the effective date of the proposed code. The Committee decided that, if after a hearing where the Government had the right to be heard, a court determined that the "public interest" was served by an expungment order, then such a procedure should also be available to defendants sentenced under current law.

Chapter 83—Ancillary Private Civil Proceedings

§ 8301—Civil action against an eavesdropping offender

Section 8301 reenacts 18 U.S.C. 2520, which provides that a person whose private oral communication is intercepted, disclosed or used in violation of section 2121 (relating to eavesdropping) of the proposed code shall have a civil cause of action against an offender. A successful plaintiff is entitled to actual or liquidated damages, punitive damages, reasonable attorney's fees and reasonable litigation costs. A defendant, having acted in reasonable reliance on a court order or legislative authorization, has a complete defense to a proceeding brought under this section.

TITLE II OF THE BILL—REENACTMENT OF CERTAIN PORTIONS OF FORMER TITLE 18 WITH SUBSTANTIVE CHANGES, AMENDMENTS TO LAWS OUTSIDE OF TITLE 18, AND TECHNICAL AND CONFORMING PROVISIONS

Subtitle I—Reenactment of Certain Portions of Former Title 18 with Substantive Changes

Introduction

This subtitle contains reenacted sections of current title 18 that are not directly replaced by sections of the proposed code. Either these sections are highly specialized (*see*, *e.g.*, section 202, importation of injurious animals into the United States), are infrequently prosecuted (*see*, *e.g.*, section 205, transportation and sale of water hyacinths), or carry very light sentences (*see*, *e.g.*, section 343, unauthorized use of the character "Woodsy Owl"). The Committee also placed in this subtitle several offenses that did not conform to the style and structure of the proposed code, and that could not easily be rewritten to conform to the proposed code (*see*, *e.g.*, section 362, espionage). These offenses are carried forward exactly as they appear in current title 18 and are punished pursuant to those provisions of the proposed code that cross-reference those offenses, by the use of the term "violates." Use of the term "violates," a variation of the term "to violate," defined in section 101 of the proposed code, requires that the actor engage in the conduct prohibited by the pertinent section in the circumstances and with the results and states of mind required by the section. The use of the term "violates" insures that the section incorporates not only the exact provisions of the section, but the judicial interpretations of the section.

The Committee determined to apply the sentencing scheme used in the proposed code and to generally follow the current law penalties. Many of the reenacted sections prohibit conduct that, in more serious circumstances, is covered as a felony by the proposed code. In that case the reenacted section carries a misdemeanor penalty. Other sections carry maximum penalties that are not subject to direct to the sentencing scheme of the proposed code translation (e.g., $500 fine or six months imprisonment) in which case the Committee compared the seriousness of the offense to the seriousness of other offenses and graded accordingly.

Chapter 1—Animals, Birds, Fish, and Plants

Section 201

Section 201 reenacts 18 U.S.C. 41, which relates to the willful hunting, fishing, trapping or other intentional disturbance to wildlife on Federal Wildlife Refuges.

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Section 201 classifies this offense as an infraction and as an A misdemeanor when committed with respect to a member of an endangered species, as that term is defined in section 3(6) of the Endangered Species Act of 1973 (16 U.S.C. 1532(6)). This classification reflects the Committee's intent to provide greater protection to endangered species. Current law does not draw this distinction.

Section 201 also changes current law by deleting the provision that relates to the willful injury to, or the destruction of property of, the United States on Federal Wildlife Refuges. Destruction of Federal property is an offense under sections 2503 (relating to property destruction), 2502 (relating to aggravated property destruction), and 2501 (relating to arson) of the proposed code.

SECTION 202

Section 202 reenacts 18 U.S.C. 42, which relates to the importation of injurious animals into the United States, or shipment of injurious animals between the continental United States and specified territories of the United States.

Subsection (b) classifies the offense as an infraction unless the offense is committed with respect to a member of an endangered species (as defined in section 3(6) of the Endangered Species Act of 1973 (16 U.S.C. 1532(6)), in which case the offense is an A misdemeanor. This changes current law in order to provide greater protection to endangered species. Serious offenses involving the importation of injurious animals can be prosecuted under section 1911 (relating to smuggling) of the proposed code, which provides for felony penalties.

SECTION 203

Section 203 reenacts 18 U.S.C. 43, which relates to the transportation of wildlife taken in violation of State, Federal, or foreign law. The offense is classified as an A misdemeanor when committed with respect to a member of an endangered species (as defined in section 3(6) of the Endangered Species Act of 1973 (16 U.S.C. 1532(6)) and as an infraction otherwise. Commission of the offense results in forfeiture. The Committee changed current law in order to provide greater protection for endangered species.

SECTION 204

Section 204 reenacts 18 U.S.C. 44, which relates to the marking and labeling of packages containing wild animals, their dead bodies, or any parts thereof, such as furs or hides, when shipped or transported in interstate or foreign commerce. Section 204 classifies the offense as an A misdemeanor if committed with respect to a member of an endangered species and as an infraction in any other instance commission of the offense results in forfeiture of the package. The Committee changed current law in order to provide greater protection for endangered species.

SECTION 205

Section 205 reenacts 18 U.S.C. 46, which relates to the transportation and sale of water hyacinths, alligator grass, or water chestnut plants and classifies the offense as an infraction.

SECTION 206

Section 206 reenacts 18 U.S.C. 47, which relates to using aircraft or motor vehicles to hunt wild horses or burros and to the polluting of watering holes on public land or ranges in order to trap or maim such animals. It classifies the offenses as an infraction.

CHAPTER 3—ASSAULT

SECTION 211

Section 211 reenacts 18 U.S.C. 112, which relates to the protection of foreign officials, official guests of the United States, and internationally protected persons from minor interferences. It classifies the offense as a B misdemeanor.

Subsection (a) of 18 U.S.C. 112, relating to assaulting a foreign official, official guest, or internationally protected person, is deleted because that type of conduct is covered by chapter 23, subchapter II, of the proposed code (relating to assault offenses). Subsection (f) of 18 U.S.C. 112, which provides that to enforce this section, the Attorney General may request assistance from the armed forces, is deleted because that authority is provided for in section 1771 (relating to use of armed forces as posse comitatus) of the proposed core.

CHAPTER 5—BANKRUPTCY

SECTION 221

Section 221 reenacts 18 U.S.C. 151, which defines the term "debtor" for sections 222–23 of the bill.

SECTION 222

Section 222 reenacts 18 U.S.C. 154, which prohibits a trustee or other officer of the court in a bankruptcy case from buying an interest in the estate which is the subject of such officer's commission and from refusing to permit an inspection of the documents relating to the affairs of the estate. It classifies the offense as an infraction.

SECTION 223

Section 223 reenacts 18 U.S.C. 155, which prohibits agreements to fix fees or other compensation between parties in bankruptcy proceedings. It classifies the offense as an A misdemeanor.

CHAPTER 7—BRIBERY, GRAFT, AND CONFLICT OF INTEREST

SECTION 231

Section 231 carries forward, without substantive change, 18 U.S.C. 202 and defines the terms "special Government employee" and "official responsibility".

SECTION 232

Section 232 carries forward, in modified form, 18 U.S.C. 204, which prohibits practice in the Court of Claims by Members of Congress.

and Members of Congress elect, it classifies the offense as an A misdemeanor and disqualifies a person convicted under this section from holding any office of honor, trust or profit under the United States.

SECTION 233

Section 233 reenacts 18 U.S.C. 205, which prohibits an officer or employee of the United States from acting as an agent or attorney for anyone prosecuting a claim against the Federal government or in any proceeding in which the United States is a party, or from accepting a gratuity or interest in any claim against the United States, other than in the proper discharge of the official duties of the officer or employee. A violation of this section is a class A misdemeanor.

SECTION 234

Section 234 reenacts 18 U.S.C. 206, which exempts retired officers of the uniformed services of the United States, or any other person especially exempted by Congress, from the prohibition of section 233 of the bill.

SECTION 235

Section 235 reenacts 18 U.S.C. 207, which prohibits certain former officers and employees of the United States, and their associates, from representing a person before an agency or court of the United States with regard to matters with which the former officer or employee was personally and substantially involved while so employed or which were subject to the employee's official responsibility. A violation of this section is a class A misdemeanor.

Subsections (d), (e) and (f) provide exemptions for certain grades of employees, employees covered by regulations of the Director of the Office of Government Ethics, and for communications of scientific information.

SECTION 236

Section 236 reenacts 18 U.S.C. 209, which prohibits a government official or employee from receiving a salary or compensation for services rendered as such official or employee from any source other than the United States and classifies the offense as an A misdemeanor.

Subsection (e) excludes from the section's coverage the payment of actual relocation expenses incident to participation in an executive exchange or fellowship program.

SECTION 237

Section 237 reenacts 18 U.S.C. 211, which prohibits the acceptance or solicitation of anything of value to aid a person to obtain employment under the United States. Section 237 does not carry forward the first paragraph of 18 U.S.C. 211, which deals with appointive offices, because such conduct is prohibited by section 1755 (relating to trading in public office) of the proposed code. A violation of section 237 is a class A misdemeanor.

SECTION 238

Section 238 reenacts 18 U.S.C. 212, which prohibits an officer, director, or employee of certain banks from making a loan or granting a gratuity to a bank examiner who has the authority to examine the bank.

Section 238 deletes the reference in 18 U.S.C. 212 to National Agricultural Credit Corporations, which no longer exist.

A violation of this section is a class A misdemeanor. In addition, the section carries forward the penalty of a fine consisting of a sum equal to the money so loaned or gratuity given.

SECTION 239

Section 239 reenacts 18 U.S.C. 213, which prohibits any bank examiner from accepting a loan or gratuity from any person connected with a subject of examination.

Section 239 deletes the reference in 18 U.S.C. 213 to National Agricultural Credit Corporations, which no longer exist.

A violation of this section is a class A misdemeanor. It carries forward the additional penalties of a fine equal to the money loaned or given, and the disqualification of the examiner from holding office.

SECTION 240

Section 240 reenacts 18 U.S.C. 218, and provides for voiding government transactions in relation to which there has been a final conviction for any violation of chapter 7 of title II of the bill, relating to bribery, graft, and conflict of interest (sections 231 through 239).

Section 240 also provides for voiding transactions made in relation to violations of sections 1751 through 1755 of the proposed code (relating to bribery, graft, trading in government assistance, trading in special influence, and trading in public office). This section also provides as an additional penalty that the United States is entitled to recover the amount expended, the thing transferred, or the reasonable value thereof.

CHAPTER 9—CIVIL RIGHTS

SECTION 251

Section 251 reenacts 18 U.S.C. 243, which prohibits the disqualification of, or failure to summon, jurors to any court of the United States or any State on account of race or color.

A violation of this section is an infraction but a maximum fine of $5,000 may be imposed. This carries forward the current penalty.

SECTION 252

Section 252 reenacts 18 U.S.C. 244, which prohibits discrimination against anyone wearing the uniform of any of the armed forces of the United States. A violation of this section is an infraction.

Chapter 11—Claims and Services in Matters Affecting Government

SECTION 261

Section 261 reenacts 18 U.S.C. 290, which prohibits the unlawful withholding of a person's armed forces discharge papers by one engaged in the collection of claims for pay or other allowances for that person.

A violation of this section is a class B misdemeanor. This section carries forward an additional penalty which disbars such a claims agent from prosecuting claims in any agency of the United States.

SECTION 262

Section 262 reenacts 18 U.S.C. 291, which prohibits court officials or other Federal officers from purchasing, at less than face value, claims against the United States for fees, mileage, or expenses of a witness or juror or other officer of the court. A violation of this section is an infraction.

SECTION 263

Section 263 reenacts 18 U.S.C. 292, which prohibits the solicitation of employment in respect to a Federal employee compensation case, claim, or award and the receipt of unapproved fees or other consideration for services furnished with respect to such a case, claim, or award. A violation of this section is a class A misdemeanor.

Chapter 13—Coins and Currency

SECTION 271

Section 271 reenacts 18 U.S.C. 333, which prohibits the mutilation of national bank obligations. A violation of this section is an infraction.

Chapter 15—Contracts

SECTION 281

Section 281 reenacts 18 U.S.C. 431, which prohibits a Member of Congress or a Member's agent from executing or holding any contract or agreement entered into on behalf of the United States or an agency thereof.

According to opinions of the Attorney General, which interpreted the predecessor provisions of this section: (1) these prohibitions do not prevent a Member of Congress from serving as a United States attorney, 2 Op. Att'y Gen. 38 (1826); (2) a partnership that includes a Member of Congress cannot enter into a contract with the government unless the Member of Congress withdraws from the partnership, 4 Op. Att'y Gen. 47 (1842); (3) a Member of Congress may serve as surety on a performance bond of a contractor with the United States, 18 Op. Att'y Gen. 286 (1885); (4) a contract with the reclamation service is a contract within these prohibitions, 26 Op. Att'y Gen. 537 (1908); (5) a contract with a corporation, in which a Member of Congress owns shares, is lawful, 33 Op. Att'y Gen. 45 (1921); and (6) a contract with a corporation in which a Member of Congress has a 30% ownership share is lawful, 39 Op. Att'y Gen. 165 (1938). By reenacting these sections, the Committee does not express either approval or disapproval of these opinions.

A violation of this section is an infraction, but, in lieu of the general penalty for an infraction, a maximum fine of $3,000 may be imposed.

SECTION 282

Section 282 reenacts 18 U.S.C. 432, which prohibits an officer or employee of the United States from making a contract or agreement on behalf of the United States or an agency thereof with a Member of Congress. A violation of this section is an infraction but, in lieu of the general penalty for an infraction, a maximum fine of $3,000 may be imposed.

SECTION 283

Section 283 reenacts 18 U.S.C. 433, and exempts certain contracts from the prohibitions of sections 281 and 282 of the bill.

Section 283 modernizes the references to acts cited in 18 U.S.C. 433 that have been replaced by later enactments. For example, the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*) has replaced the Farm Credit Act of 1933.

SECTION 284

Section 284 reenacts 18 U.S.C. 435, which prohibits any officer or employee of the United States from knowingly contracting to pay an amount in excess of the amount appropriated for the erection, repair, or furnishing of any public building, or for any public improvement. A violation of this section is an infraction.

SECTION 285

Section 285 reenacts 18 U.S.C. 436, which prohibits any officer or employee of the United States from contracting for, or permitting any official of a correctional institution to hire out, the labor of a prisoner confined for violation of a law of the United States. A violation of this section is a class A misdemeanor.

SECTION 286

Section 286 reenacts 18 U.S.C. 437, which prohibits an officer or employee of the United States from having an interest in a contract or possible contract for goods and supplies for Indians.

A violation of this section is a class B misdemeanor and carries forward the additional penalty of current law that one who violates this section shall be removed from office.

SECTION 287

Section 287 reenacts 18 U.S.C. 438, which provides a criminal penalty for the receipt of money contrary to 25 U.S.C. 81 (which sets standards for contracts with Indian tribes or Indians) and 25

U.S.C. 82 (relating to payment of attorney's fees for certain Indian claims cases).

A violation of this section is a class B misdemeanor. In addition, money received in violation of the section shall be forfeited. This additional penalty carries forward current law.

SECTION 288

Section 288 reenacts 18 U.S.C. 439, which prohibits any person from receiving money under contract for services regarding application for enrollment as a citizen of the Five Civilized Tribes, unless the United States consents to the contract. A violation of this section is a class B misdemeanor.

SECTION 289

Section 289 reenacts 18 U.S.C. 440, which prohibits an employee of the Postal Service from having any interest in a contract with the Postal Service. A violation of this section is an infraction.

SECTION 290

Section 290 reenacts 18 U.S.C. 441, which prohibits making a contract for furnishing supplies to the Postal Service with anyone who has engaged or proposed to engage in price fixing or collusive arrangements with respect to bidding to furnish such supplies.

A violation of this section is a class A misdemeanor. In addition, if the offender is a contractor for furnishing such supplies, the contract may be annulled.

SECTION 291

Section 291 reenacts 18 U.S.C. 442, which prohibits the Public Printer, Superintendent of Printing, Superintendent of Binding, and any of their assistants from having an interest in the publication of a newspaper or periodical, or in printing, binding, engraving or lithographing of any kind, or in any contract for furnishing material connected with public printing, binding, lithographing, and engraving. A violation of this section is a class A misdemeanor.

SECTION 292

Section 292 reenacts 18 U.S.C. 443, which makes it an offense to secrete, mutilate, obliterate, or destroy certain records of war contractors within certain time periods.

Certain language was deleted as obsolete.

Because of the lapse of time since the end of World War II and the improbability that any such contracts are still in force, the Committee felt that a violation of this section should be a class A misdemeanor, rather than a felony.

CHAPTER 17—COUNTERFEITING AND FORGERY

SECTION 301

Section 301 reenacts 18 U.S.C. 474(6), which prohibits photographing or printing a likeness of an obligation or security of the United States and the sale or importation of such likeness, except to or at the direction of an officer of the United States.

Because more serious violations of the counterfeiting and forgery laws are set forth in sections 2541 and 2542 (relating to counterfeiting and forgery) of the proposed code, the Committee reduced the penalty for a violation of this section from a felony to a class A misdemeanor.

Section 301 reenacts only paragraph 6 of 18 U.S.C. 474. The remaining paragraphs are covered by section 2543 (relating to making, trafficking in or possessing a counterfeiting or forging implement) of the proposed code.

SECTION 302

Section 302 reenacts 18 U.S.C. 475, which prohibits the printing or distribution of any business card, notice, circular or advertisement in the likeness of, or attached to, any obligation or security of the United States. A violation of this section is an infraction.

SECTION 303

Section 303 reenacts 18 U.S.C. 486, which prohibits the unauthorized manufacture or circulation of metal coins intended for use as money, whether the coins resemble coins of the United States or a foreign country, or are an original design.

Because serious violations of the counterfeiting and forgery laws are set forth in sections 2541 and 2542 (relating to counterfeiting and forgery) of the proposed code, the Committee reduced the penalty for a violation of this section from a felony to a class A misdemeanor.

SECTION 304

Section 304 reenacts 18 U.S.C. 491, which prohibits the manufacture, possession with intent to use, circulation, sale or use of any slug, token, paper, or other thing similar in size and shape to a lawful coin of the United States, and intended to be used as money, to obtain property or services, or for rationing. A violation of this section is a class A misdemeanor.

SECTION 305

Section 305 reenacts 18 U.S.C. 492, which provides for the forfeiture of counterfeit articles and material, and of apparatus used in the making of such counterfeits, and makes it an offense to fail or refuse to surrender possession of such articles, material, or apparatus upon request of an authorized agent of the Treasury Department. A violation of this section is a class A misdemeanor.

SECTION 306

Section 306 reenacts 18 U.S.C. 504, which describes circumstances in which the printing, publishing, importing, or filming of certain United States and foreign obligations, securities, and postage stamps are permitted.

CHAPTER 19—CUSTOMS

SECTION 311

Section 311 reenacts 18 U.S.C. 543, which prohibits any revenue officer from knowingly permitting goods to enter the United States if less than the amount of duty legally due is paid.

Because more serious violations of the smuggling laws are set forth in section 1911 (relating to smuggling) of the proposed code, the Committee reduced the penalty for a violation of this section from a felony to a class A misdemeanor. The section retains the additional penalty that one who violates this section shall be removed from office.

SECTION 312

Section 312 reenacts 18 U.S.C. 546, which prohibits anyone who owns all or part of a vessel from allowing the vessel to be used in smuggling merchandise into a foreign country in violation of its laws, if the laws of the foreign country provide for a criminal penalty or forfeiture for violation of the United States customs laws. A violation of this section is a class A misdemeanor.

SECTION 313

Section 313 reenacts 18 U.S.C. 548, which prohibits the fraudulent concealment, removal, or repacking of goods in any bonded warehouse, and the fraudulent marking of packages in such a warehouse. The section also provides for forfeiture of goods concealed, removed, or repacked, and of packages marked, altered, defaced, or obliterated in violation of the section. A violation of this section is a class A misdemeanor.

SECTION 314

Section 314 reenacts 18 U.S.C. 549, which prohibits the unauthorized removal of goods from customs custody or the unauthorized attachment or removal of a customs seal or mark. A violation of this section is a class A misdemeanor.

CHAPTER 21—THEFT

SECTION 321

Section 321 reenacts 18 U.S.C. 650, which provides criminal penalties for public depositaries of funds who fail to safeguard deposits.

Section 321 applies the offense to the Secretary of the Treasury rather than to the Treasurer of the United States. The section no longer covers embezzlement, which is covered by section 2531 (relating to theft) of the proposed code.

The section requires that the public depositary "knowingly" fail to keep safely all moneys deposited. A person who is aware of the inadequacy of the safeguards of the deposit is penalized by this section.

A violation of this section is a class A misdemeanor.

CHAPTER 23—EMBLEMS, INSIGNIA, AND NAMES

SECTION 331

Section 331 reenacts 18 U.S.C. 700, which prohibits the desecration of the flag of the United States. A violation of this section is a class A misdemeanor.

SECTION 332

Section 332 reenacts 18 U.S.C. 701, which prohibits the unauthorized manufacture, possession, or sale of official badges, identification cards, and other insignia of the United States or any colorable imitation thereof. A violation of this section is a class B misdemeanor.

SECTION 333

Section 333 reenacts 18 U.S.C. 702, which prohibits the unauthorized wearing of the uniform of any of the armed forces of the United States or the Public Health Service. The reference in 18 U.S.C. 702 to the Canal Zone is deleted as obsolete. A violation of this section is a class B misdemeanor.

SECTION 334

Section 334 reenacts 18 U.S.C. 703, which prohibits anyone, with the intent to mislead or deceive, from wearing any official uniform of a foreign nation with which the United States is at peace. A violation of this section is a class B misdemeanor.

SECTION 335

Section 335 reenacts 18 U.S.C. 704, which prohibits the unauthorized manufacture, wearing, or sale of decorations or medals of the armed forces of the United States. A violation of this section is a class B misdemeanor.

SECTION 336

Section 336 reenacts 18 U.S.C. 705, which prohibits the unauthorized manufacture, reproduction, or sale of medals, emblems, or other insignia of veterans' organizations. A violation of this section is an infraction.

SECTION 337

Section 337 reenacts 18 U.S.C. 706, which prohibits the unauthorized or fraudulent use of the sign or insignia, or a colorable imitation thereof, of the American National Red Cross.

A violation of this section is an infraction. Subsection (b) provides that any use of such sign or insignia which was lawful on June 25, 1948 is not made unlawful by this section.

SECTION 338

Section 338 reenacts 18 U.S.C. 707, which prohibits the unauthorized or fraudulent use of any sign or emblem, or any colorable imitation thereof, of the 4–H clubs. A violation of this section is an infrac-

tion. Subsection (b) provides that any use of such sign or emblem which was lawful on June 25, 1948 is not made unlawful by this section.

SECTION 339

Section 339 reenacts 18 U.S.C. 708, which prohibits the use, for commercial purposes, of the coat of arms of the Swiss Confederation. A violation of this section is an infraction. Subsection (b) provides that any use of such coat of arms which was lawful on August 31, 1948 is not made unlawful by this section.

SECTION 340

Section 340 reenacts 18 U.S.C. 709, which prohibits false advertising or misuse of the names of Federal agencies to convey a false impression of connection with a Federal agency.

The section no longer applies to defunct Federal agencies such as the "National Agricultural Credit Corporation" and the "Reconstruction Finance Corporation". Subsection (b) provides that any use of any name or title which was lawful on June 25, 1948 is not made unlawful by this section.

A violation of this section is an infraction.

SECTION 341

Section 341 reenacts 18 U.S.C. 710, which prohibits the unauthorized manufacture, use, or sale of cremation urns of the same design as those used to contain the cremated remains of deceased members of the armed forces of the United States. A violation of this section is an infraction.

SECTION 342

Section 342 reenacts 18 U.S.C. 711, which prohibits the unauthorized manufacture, reproduction, or use for profit of the character or name "Smokey Bear." A violation of this section is an infraction.

SECTION 343

Section 343 reenacts 18 U.S.C. 711a, which prohibits the unauthorized manufacture, reproduction, or use for profit of the character or name "Woodsy Owl" or the associated slogan, "Give a Hoot, Don't Pollute." The section makes clear that the appropriate authorization can be given by the Secretary of Agriculture.

A violation of this section is an infraction.

SECTION 344

Section 344 reenacts 18 U.S.C. 712, which relates to the misuse of names or insignia by collection agencies or private detective agencies to convey a false impression of connection with a Federal agency.

A violation of this section is an infraction, rather than a felony, as current law provides. The more serious offense of impersonating a Federal official is covered by section 1702 (relating to impersonating an official) of the proposed code as a class E felony.

SECTION 345

Section 345 reenacts 18 U.S.C. 713, which prohibits the unauthorized use of a likeness of the great seal of the United States, or the seals of the President or Vice-President, to convey the false impression of sponsorship or approval by the United States. It also prohibits the unauthorized manufacture or sale of the seals of the President or Vice-President. A violation of this section is an infraction.

The Attorney General is authorized to sue to enjoin violations of this section upon complaint by any Federal agency.

SECTION 346

Section 346 reenacts 18 U.S.C. 715, which prohibits the unauthorized manufacture or use of any likeness of "The Golden Eagle Insignia." Subsection (b) provides that the section does not make unlawful any use that was lawful on July 11, 1972. A violation of this section is an infraction.

CHAPTER 25—ESCAPE AND RESCUE

SECTION 351

Section 351 reenacts 18 U.S.C. 756, which prohibits anyone from aiding or enticing a person to escape or to attempt to escape from an internment in the United States in accordance with the law of nations.

A violation of this section is a class A misdemeanor.

CHAPTER 27—ESPIONAGE AND CENSORSHIP

SECTION 361

Section 361 reenacts 18 U.S.C. 793, which prohibits the gathering, transmitting, and dissemination of specific non-public defense information. Pursuant to section 1322 (relating to disseminating national defense information) of the proposed code, a violation of this section is a class C felony. Subsection (g) of 18 U.S.C. 793 is not reenacted because its substance is covered by section 1102 (relating to conspiracy) of the proposed code. The Committee neither approves nor disapproves of any judicial or administrative interpretations of 18 U.S.C. 793 by reenacting this section.

SECTION 362

Section 362 reenacts 18 U.S.C. 794, which prohibits the gathering or delivering of defense information to aid foreign governments.

Pursuant to section 1321(a) (relating to espionage) of the proposed code, a violation of this section carries forward current law. The Committee neither approves nor disapproves of any judicial or administrative interpretations of 18 U.S.C. 794 by reenacting this section.

SECTION 363

Section 363 reenacts 18 U.S.C. 795, which prohibits unauthorized photographing or sketching of defense installations or equipment.

A violation of this section is a class A misdemeanor. The Committee neither approves nor disapproves of any judicial or administrative interpretations of 18 U.S.C. 795 by reenacting this section.

SECTION 364

Section 364 reenacts 18 U.S.C. 796, which prohibits the use of aircraft for photographing defense installations.

A violation of this section is a class A misdemeanor. The Committee neither approves nor disapproves of any judicial or administrative interpretations of 18 U.S.C. 796 by reenacting this section.

SECTION 365

Section 365 reenacts 18 U.S.C. 797, which prohibits the publication or sale of photographs or drawings of defense installations.

A violation of this section is a class A misdemeanor. The Committee neither approves nor disapproves of any judicial or administrative interpretations of 18 U.S.C. 797 by reenacting this section.

SECTION 366

Section 366 reenacts 18 U.S.C. 798 (of 1951), which prohibits the disclosure of classified information to unauthorized persons. Pursuant to section 1323 (relating to disseminating classified information) of the proposed code, a violation of this section is a class C felony. The Committee neither approves nor disapproves of any judicial or administrative interpretations of 18 U.S.C. 798 by reenacting this section.

SECTION 367

Section 367 reenacts 18 U.S.C. 799, which prohibits the willful violation of any regulation or rule promulgated by the National Aeronautics and Space Administration for the protection or security of any of its property.

A violation of this section is a class A misdemeanor. The Committee neither approves nor disapproves of any judicial or administrative interpretations of 18 U.S.C. 799 by reenacting this section.

CHAPTER 29—EXPLOSIVES AND OTHER DANGEROUS ARTICLES

SECTION 371

Section 371 reenacts 18 U.S.C. 836, which prohibits the transportation of fireworks into any State that prohibits their use or sale.

A violation of this section is a class A misdemeanor.

CHAPTER 31—IMPORTATION, MANUFACTURE, DISTRIBUTION, AND STORAGE OF EXPLOSIVE MATERIALS

SECTION 381

Section 381 reenacts 18 U.S.C. 841, and defines the terms used in chapter 31 of title II of this act (relating to importation, manufacture, distribution and storage of explosive materials). The definitions parallel current law.

SECTION 382

Section 382 reenacts 18 U.S.C. 842, which sets forth the prohibited acts relating to distribution, licensing, and transportation of explosive materials. Subsections (d) and (i) include technical changes in the cross-references to conform to the new section numbers in the proposed code.

Pursuant to section 2721 (relating to explosives offenses) of the proposed code, a violation of subsections (a) through (i) of this section is a class C felony, and of subsections (j) and (k), a class A misdemeanor.

SECTION 383

Section 383 reenacts 18 U.S.C. 843, which sets forth the requirements for application for and issuance of licenses and user permits for explosive materials.

SECTION 384

Section 384 reenacts section 18 U.S.C. 844(c) and provides for forfeiture of explosive materials used in violation of chapter 31 of title II (relating to importation, manufacture, distribution, and storage of explosive materials) of the bill or in violation of any rule or regulation issued under this chapter or any other Federal criminal law. This section carries forward the applicability of section 5845(a) of the Internal Revenue Code of 1954 (relating to forfeiture of firearms) to forfeitures of explosive material in this chapter of title II. Other paragraphs of 18 U.S.C. 844 are covered by substantive sections of the proposed code.

SECTION 385

Section 385 reenacts 18 U.S.C. 845, and provides for exceptions to the offenses included in chapter 31 of title II (relating to importation, manufacture, distribution, and storage of explosive materials) of the bill.

The exceptions in 18 U.S.C. 845 that apply to 18 U.S.C. 844 are deleted from this section because those subsections are not reenacted in the same fashion as in current law.

SECTION 386

Section 386 reenacts 18 U.S.C. 846, which authorizes the Secretary of the Treasury to inspect the site of any accident or fire where explosive materials may have been involved.

Deleted by this section are references to the authority of the Attorney General and the FBI to conduct investigations under 18 U.S.C. 844 because that section has not been reenacted in the same language as in current law. However, Department of Justice investigation authority is retained for sections 2501 through 2503 (relating to arson and property destruction) of the proposed code which pertain to the conduct covered by 18 U.S.C. 846.

SECTION 387

Section 387 reenacts 18 U.S.C. 847, and authorizes the Secretary of the Treasury to promulgate rules and regulations necessary to carry

out the provisions of this chapter of title II (relating to importation, manufacture, distribution, and storage of explosive materials) of the bill. The section leaves the current regulations in force. The Committee neither approves nor disapproves of the regulations or any judicial interpretations of them by reenacting this section.

SECTION 388

Section 388 reenacts 18 U.S.C. 848, which states that Congress does not intend to preempt the field in which any provision in this chapter operates, unless such provision and State law are irreconcilably inconsistent.

CHAPTER 33—FALSE PERSONATION

SECTION 391

Section 391 reenacts 18 U.S.C. 911, which prohibits falsely representing oneself to be a citizen of the United States. A violation of this section is a class A misdemeanor.

SECTION 392

Section 392 reenacts 18 U.S.C. 916, which prohibits a person from falsely impersonating a 4-H club member or agent. A violation of this section is a class B misdemeanor.

SECTION 393

Section 393 reenacts 18 U.S.C. 917, which prohibits falsely impersonating a member or agent of the American National Red Cross for the purpose of soliciting or receiving money or material. A violation of this section is a class B misdemeanor.

CHAPTER 35—FIREARMS

SECTION 401

Section 401 reenacts 18 U.S.C. 921, and defines terms used in chapter 35 of title II (relating to firearms) of the bill.

SECTION 402

Section 402 reenacts 18 U.S.C. 922, which sets forth unlawful activities regarding firearms. The section sets forth the circumstances and procedures for the lawful sale or transfer of firearms and describes those authorized to sell or receive firearms. The cross-references in this section are updated to refer to the appropriate sections of the proposed code and other laws.

Section 402 does not reenact subsections (i) and (j) of 18 U.S.C. 922, which pertain to stolen firearms or ammunition, because coverage of that conduct is provided for in section 2531 (relating to theft) of the proposed code.

The penalties for a violation of this section are set forth in section 404 of title II of the bill.

SECTION 403

Section 403 reenacts 18 U.S.C. 923, which provides procedures for obtaining or revoking a license for a firearm.

SECTION 404

Section 404 reenacts 18 U.S.C. 924, and makes it a class D felony to violate chapter 35 of title II (relating to firearms) of the bill and to make certain false statements, by cross-reference to section 2722 (relating to firearms offenses) of the proposed code.

This section reenacts the current provisions for forfeiture of firearms used in violation of the law.

Section 404 does not reenact 18 U.S.C. 924(b), which enhances the penalty for the use of firearms during the commission of a crime, because that conduct is incorporated in section 2723 (relating to using a firearm or explosive in the course of a crime) of the proposed code.

SECTION 405

Section 405 reenacts 18 U.S.C. 925, and sets forth exceptions to the coverage of chapter 35 of title II (relating to firearms) of the bill for shipment of firearms and ammunition to various persons and updates the cross references.

SECTION 406

Section 406 reenacts 18 U.S.C. 926, and authorizes the Secretary of the Treasury to promulgate rules and regulations for the implementation of this chapter. Section 406 reenacts the current authority without any change and leaves current regulations in force. The Committee neither approves nor disapproves of the regulations or any judicial interpretations thereof.

SECTION 407

Section 407 reenacts 18 U.S.C. 927, and states that Congress does not intend to preempt the field of firearms law, unless a provision of this chapter and State law are irreconcilably inconsistent.

CHAPTER 37—FOREIGN RELATIONS

SECTION 411

Section 411 reenacts 18 U.S.C. 955, which prohibits anyone in the United States from undertaking certain financial transactions with, or on behalf of, a foreign government if that government is in default of payments to the United States. A violation of this section is a class A misdemeanor.

SECTION 412

Section 412 reenacts 18 U.S.C. 961, which prohibits anyone within the United States from strengthening an armed vessel that is in the service of a foreign power if the foreign power is at war with a foreign power with which the United States is at peace. A violation of this section is a class A misdemeanor.

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SECTION 413

Section 413 reenacts 18 U.S.C. 962, which prohibits anyone within the United States from arming a vessel with the intent that it be used against a nation with which the United States is at peace.

A violation of this section is a class A misdemeanor. The section carries forward the current provision for the forfeiture of any such vessel. One half of the proceeds of forfeiture will be distributed to the informer and the other half to the United States.

SECTION 414

Section 414 reenacts 18 U.S.C. 970(b), which prohibits trespassing upon or refusing to leave premises in the United States that are used for official business or diplomatic, consular, or residential purposes by a foreign government, an international organization, a foreign official or an official guest of the United States, with intent to intimidate, coerce, threaten or harass.

A violation of this section is a class B misdemeanor.

Section 414 does not reenact 18 U.S.C. 970(a), which is covered by sections 2501 to 2503 (relating to arson and property destruction) of the proposed code.

SECTION 415

Section 415 reenacts 18 U.S.C. 953 (the "Logan Act") which makes it a class E felony for a citizen of the United States directly or indirectly to commence or carry on any correspondence or intercourse with a foreign government or any officer or agent thereof, with intent to influence the policies or conduct of any foreign government or any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the policies of the United States. The Committee substituted the word "policies" for the word "measures" in 18 U.S.C. 953. This change is not intended by the Committee to expand or contract the scope of this section.

Subsection (b) provides that this section shall not abridge the right of a citizen or such citizen's agent to apply to any foreign government or the agents thereof for redress of any injury which such citizen may have sustained from such government or any of such government's agents or subjects.

CHAPTER 39—FRAUD AND FALSE STATEMENTS

SECTION 421

Section 421 reenacts 18 U.S.C. 1009, which prohibits the circulation of false rumors which are derogatory of the financial condition or will have a negative effect on the solvency or financial standing of the Federal Savings and Loan Insurance Corporation.

A violation of this section is a class A misdemeanor.

SECTION 422

Section 422 reenacts 18 U.S.C. 1012, which makes it an offense to influence the Department of Housing and Urban Development to acquire property or to enter into a contract and to fail to disclose an interest the actor has in the property or a benefit the actor will receive from the contract.

Section 422 does not reenact the first 2 paragraphs of 18 U.S.C. 1012 since those prohibitions are covered by section 1742 (relating to making false statements) and subchapter VI of chapter 17 (relating to official corruption and intimidation) of the proposed code.

A violation of this section is a class A misdemeanor.

SECTION 423

Section 423 reenacts 18 U.S.C. 1013, which makes it an offense to defraud with respect to, or to misrepresent the terms or character of, any loan issued by a Federal land bank or intermediate credit bank.

A violation of this section is a class A misdemeanor.

Since the National Agricultural Credit Corporation has been abolished, the current law reference to it has been omitted.

CHAPTER 41—GAMBLING

SECTION 431

Section 431 reenacts 18 U.S.C. 1081, which provides definitions used in chapter 41 of title II (relating to gambling) of the bill except for the obsolete definition of "wire communication facility."

SECTION 432

Section 432 reenacts 18 U.S.C. 1083, which provides a civil penalty for operating a vessel to transport passengers between a point within the United States and a gambling ship outside the jurisdiction of any state. The Secretary of the Treasury remains authorized to promulgate rules and regulations to enforce this section and leaves the current regulations (if any) in force. The Committee neither approves nor disapproves of any regulations or any judicial or administrative interpretations thereof.

SECTION 433

Section 433 reenacts 18 U.S.C. 1084(d), which requires a common carrier under Federal Communications Commission jurisdiction to discontinue or refuse to provide service to a customer if the carrier is informed that the facility is or will be used for gambling purposes.

Section 433 does not reenact 18 U.S.C. 1084 (a), (b) and (c) because those subsections are covered by section 2741 (relating to operating a gambling business) of the proposed code.

CHAPTER 43—HOMICIDE

SECTION 441

Section 441 reenacts 18 U.S.C. 1115, which penalizes misconduct or negligence of ship officers, owners, or inspectors that results in loss of life.

A violation of this section is a class A misdemeanor. The more serious types of conduct which result in loss of life are punishable under

sections 2301 (relating to murder) and 2302 (relating to manslaughter) of the proposed code.

Chapter 45—Indians

SECTION 451

Section 451 reenacts 18 U.S.C. 1151, which defines Indian country as used in chapter 45 of title II (relating to Indians) of the bill.

SECTION 452

Section 452 reenacts 18 U.S.C. 1154, which prohibits the introduction of any spirits, wine, or beer into Indian country other than as permitted under a specific ordinance.

Section 452 does not reenact 18 U.S.C. 1154(b) since the subsection is obsolete.

A violation of this section is a class B misdemeanor.

SECTION 453

Section 453 reenacts 18 U.S.C. 1155, which prohibits distributing any intoxicants on the site of an Indian school. A violation of this section is a class A misdemeanor.

SECTION 454

Section 454 reenacts 18 U.S.C. 1156, which prohibits the unlawful possession of intoxicants in Indian country.

A violation of this section is a class A misdemeanor.

SECTION 455

Section 455 reenacts 18 U.S.C. 1159, which prohibits the misrepresentation of goods for sale as Indian products. A violation of this section is a class B misdemeanor.

SECTION 456

Section 456 reenacts 18 U.S.C. 1161, which defines the places where Indian country liquor laws do not apply.

SECTION 457

Section 457 reenacts 18 U.S.C. 1164, which prohibits the destruction, defacement, or removal from Indian country of a boundary sign or sign warning that hunting, trapping, or fishing is prohibited. A violation of this section is a class B misdemeanor.

SECTION 458

Section 458 reenacts 18 U.S.C. 1165, which prohibits knowing entry onto Indian lands for the purpose of hunting, trapping, or fishing without authority.

A violation of this section is an infraction. The section carries forward the provision that all game, fish and peltries found to be unlawfully possessed shall be forfeited.

Chapter 47—Liquor Traffic

SECTION 461

Section 461 reenacts 18 U.S.C. 1261, and authorizes the Secretary of the Treasury to enforce chapter 47 of title II (relating to liquor traffic) of the bill and to promulgate appropriate regulations. It leaves the current regulations in force. The Committee neither approves nor disapproves of any regulations nor any judicial or administrative interpretations thereof by reenacting this section.

The section conforms to current regulatory authorization by deleting reference to the "Commissioner of Internal Revenue." The reference to the Canal Zone is also deleted as obsolete.

SECTION 462

Section 462 reenacts 18 U.S.C. 1263, which requires bills of lading to accompany all shipments of alcoholic beverages. A violation of this section is an infraction.

SECTION 463

Section 463 reenacts 18 U.S.C. 1264, which prohibits any employee of a common carrier from delivering alcoholic beverages to anyone other than the bona fide consignee except on written order of the consignee.

A violation of this section is an infraction.

Chapter 49—Lotteries

SECTION 471

Section 471 reenacts 18 U.S.C. 1301, which prohibits bringing into the United States lottery tickets with the intent of disposing of such tickets, or carrying or depositing for carriage in interstate commerce any lottery tickets. The section also prohibits the knowing receipt of such tickets. A violation of this section is a class A misdemeanor.

SECTION 472

Section 472 reenacts 18 U.S.C. 1302, and prohibits depositing in the mail or sending or delivering by mail any letter concerning any lottery, any lottery ticket, any check or payment for the purchase of a lottery ticket, any newspaper containing an advertisement for a lottery, or any gambling device as defined in section 2741(f)(3) (relating to operating a gambling business) of the proposed code.

An initial violation of this section is a class A misdemeanor. Subsequent violations are a class E felony.

SECTION 473

Section 473 reenacts 18 U.S.C. 1303, which prohibits any postal service officer or employee from acting as an agent for any lottery, or know-

ingly sending or delivering by mail any lottery ticket or advertisement for a lottery. A violation of this section is a class A misdemeanor.

SECTION 474

Section 474 reenacts 18 U.S.C. 1304, which prohibits any broadcast of advertisements for, or information about, a lottery.

A violation of this section is a class A misdemeanor.

SECTION 475

Section 475 reenacts 18 U.S.C. 1305, and excepts from chapter 49 (relating to lotteries) of title II of the bill any fishing contest not conducted for profit.

SECTION 476

Section 476 reenacts 18 U.S.C. 1306, which sets forth the penalty for national banks, federally insured banks and savings and loan institutions and member banks of the Federal Reserve System that participate in lottery-related activities. A violation of this section is a class A misdemeanor.

SECTION 477

Section 477 reenacts in modified form 18 U.S.C. 1307. This section exempts from sections 471, 472, 473 and 474 of the bill certain types of advertisement, publication or broadcast of information concerning a lottery conducted by a State; mailing within a State of lottery-related material of a State-conducted lottery; or broadcast of advertisements or information concerning a lottery conducted by certain nonprofit or charitable organizations operated in accordance with the State law of the broadcast location or where the broadcast is received.

The changes in this section are intended to incorporate the policy changes offered by Senator Malcolm Wallop of Wyoming and adopted by the Senate as a part of the Criminal Code Reform Act considered in the 95th Congress. S. 1437, 95th Cong., 1st sess., 123 Congressional Record 13061 (1977). *See* 124 Congressional Record 1037–1040 (Jan. 26, 1978).

CHAPTER 51—OBSCENITY

SECTION 481

Section 481 reenacts 18 U.S.C. 1464, which prohibits radio communication of any obscene, indecent, or profane language. The section modifies the sentence to conform to the proposed code as a class A misdemeanor. Radio communication includes television broadcasts as defined in 47 U.S.C. 153(b). *Allen B. Dumont Laboratories* v. *Carroll*, 184 F.2d 153, 155 (3d Cir.), *cert. denied*, 340 U.S. 929 (1950).

The Committee by reenacting this section does not intend to change current law or to approve or disapprove of any judicial or administrative interpretations thereof.

CHAPTER 53—PASSPORTS AND VISAS

SECTION 491

Section 491 reenacts 18 U.S.C. 1545, which prohibits the violation of any safe conduct or passport issued under the authority of the United States. A violation of this section is a class A misdemeanor.

CHAPTER 55—POSTAL SERVICE

SECTION 501

Section 501 reenacts 18 U.S.C. 1693, which prohibits carrying, collecting, or receiving mail contrary to law. A violation of this section is a class C misdemeanor.

SECTION 502

Section 502 reenacts 18 U.S.C. 1694, which prohibits anyone making regular trips over post routes from carrying letters or packets which would otherwise be mail, except as they relate to the cargo carried or to the current business of the carrier. A violation of this section is an infraction.

SECTION 503

Section 503 reenacts 18 U.S.C. 1695, which provides that whoever carries a letter or packet aboard a vessel that carries mail, other than in such mail, commits a class C misdemeanor.

SECTION 504

Section 504 reenacts 18 U.S.C. 1696, which relates to privately run services for carrying mail.

Subsection (a) reenacts 18 U.S.C. 1696(a), which make it a class B misdemeanor to establish a private express for the conveyance of letters or packets, or in any manner to cause or provide for the conveyance of letters or packets by regular trips or at stated periods over any post route or from place to place between which mail is regularly carried.

The section does not prohibit any person from receiving and delivering mail that has been properly stamped to an authorized depository for mail.

Subsection (b) makes it an infraction to transmit by private express or other unlawful means, or to deliver to any agent thereof, or to deposit at any appointed place for the purpose of being transmitted, any letter or packet.

Chapter 55 (relating to postal service) of title II of the bill does not prohibit the conveyance of letters or packets by private hands without compensation or by special messenger employed for the particular occasion only.

SECTION 505

Section 505 reenacts 18 U.S.C. 1697, which prohibits anyone in control of any conveyance from knowingly transporting any person who is carrying letters or packets as a private express contrary to law. A violation of this section is an infraction.

SECTION 506

Section 506 reenacts 18 U.S.C. 1698, which makes it an offense for a person in charge of a vessel carrying mail between ports or places in

the United States to fail to make prompt delivery of that mail to the appropriate post office. A violation of this section is an infraction.

The section repeals as obsolete the last sentence of 18 U.S.C. 1698, which provides remuneration of two cents for each letter or packet delivered.

SECTION 507

Section 507 reenacts 18 U.S.C. 1699, which prohibits a vessel from making entry or breaking bulk until all letters on board are delivered to the nearest post office. A violation of this section is an infraction.

SECTION 508

Section 508 reenacts 18 U.S.C. 1700, which prohibits any mail carrier from abandoning or deserting any mail before it has been appropriately delivered. A violation of this section is a class A misdemeanor.

SECTION 509

Section 509 reenacts 18 U.S.C. 1703, which prohibits any Postal Service employee from secreting, opening, or delaying the mail. Language in 18 U.S.C. 1703(b) that prohibits destroying or delaying delivery of a newspaper or permitting the opening of any mail is not carried forward in this section because that offense is covered by sections 2502 (relating to aggravated property destruction) and 2503 (relating to property destruction) of the proposed code. A violation of this section is a class A misdemeanor.

SECTION 510

Section 510 reenacts 18 U.S.C. 1704, which prohibits counterfeiting or possessing a key suited to a lock adopted by the Postal Service and in use on any postal bags, boxes, drawers, or other postal receptacles, and prohibits the manufacturer of such locks or keys from delivering them to anyone not authorized by the Postal Service to receive them. This section does not carry forward the first paragraph of 18 U.S.C. 1704, which prohibits stealing a postal key, because that offense is covered by section 2531 (relating to theft) of the proposed code. A violation of this section is a class A misdemeanor.

SECTION 511

Section 511 reenacts 18 U.S.C. 1705, which prohibits injuring or destroying a letter box or other receptacle for mail.

This section does not carry forward the provision relating to the destruction of mail deposited within any box because that offense is covered in section 2502 (relating to aggravated property destruction) and section 2503 (relating to property destruction) of the proposed code).

A violation of this section is a class A misdemeanor.

SECTION 512

Section 512 reenacts 18 U.S.C. 1706, which prohibits destruction or injury to mail bags. A violation of this section is a class A misdemeanor.

SECTION 513

Section 513 reenacts 18 U.S.C. 1712, which prohibits a postal service officer or employee from inducing a person to deposit mail at the office where the officer or employee is employed, for the purpose of increasing the compensation of the office knowing that the matter is properly mailable at another post office.

This section does not carry forward the first paragraph of 18 U.S.C. 1712, the substance of which is covered by sections 1742 and 2531 (relating to making a false statement, and theft, respectively) of the proposed code.

A violation of this section is a class A misdemeanor.

SECTION 514

Section 514 reenacts 18 U.S.C. 1713, which prohibits a postal service officer or employee from issuing a money order without payment.

A violation of this section is an infraction.

SECTION 515

Section 515 reenacts 18 U.S.C. 1715, which prohibits the mailing of concealable firearms to unauthorized persons.

A violation of this section is a class A misdemeanor.

SECTION 516

Section 516 reenacts 18 U.S.C. 1716, which prohibits the mailing of injurious articles such as poisonous animals, drugs, liquor, inflammable substances, and certain kinds of knives.

This section does not carry forward the last two paragraphs of subsection (h) of 18 U.S.C. 1716 because those violations are covered by chapter 23 (relating to offenses against the person) of the proposed code.

A violation of this section is a class A misdemeanor.

SECTION 517

Section 517 reenacts 18 U.S.C. 1716A, which prohibits the mailing of motor vehicle master keys.

A violation of this section is a class A misdemeanor.

SECTION 518

Section 518 reenacts 18 U.S.C. 1717, and prohibits the mailing of articles containing matter in violation of sections 361 or 362 of title II of the bill (relating to gathering, transmitting or losing defense information, and gathering or delivering defense information to aid foreign governments) or whose content advocates or urges treason, insurrection, or forcible resistance to any law of the United States.

A violation of this section is a class A misdemeanor.

SECTION 519

Section 519 reenacts 18 U.S.C. 1722, which prohibits the submission of false evidence to the postal service in order to obtain a second-class rate for the transportation of a publication in the mail.

A violation of this section is an infraction.

SECTION 520

Section 520 reenacts 18 U.S.C. 1723, which prohibits anyone from avoiding postage charges by using a lower class mailing rate.

A violation of this section is an infraction.

SECTION 521

Section 521 reenacts 18 U.S.C. 1724, which authorizes the Postal Service to require the transportation of mail by vessels sailing between the United States and a foreign port.

SECTION 522

Section 522 reenacts 18 U.S.C. 1725, which prohibits anyone from depositing in a letter box any mailable matter on which no postage has been paid, with the intent to avoid payment of postage.

A violation of this section is an infraction.

SECTION 523

Section 523 reenacts 18 U.S.C. 1729, which prohibits anyone from setting up or professing to conduct a post office without authority.

A violation of this section is an infraction.

SECTION 524

Section 524 reenacts 18 U.S.C. 1730, which prohibits any unauthorized person from wearing a uniform or badge authorized by the Postal Service for letter carriers.

The section deletes language that precluded theatrical, television, or motion-picture use of Postal Service uniforms if the portrayal tended "to discredit that service". The deleted language is similar to language declared unconstitutional in *Schacht* v. *United States*, 398 U.S. 58 (1970).

A violation of this section is a class B misdemeanor.

SECTION 525

Section 525 reenacts 18 U.S.C. 1731, which prohibits the false labeling of any vehicle as a mail carrier. The accomplice liability provisions of 18 U.S.C. 1731(b) were not carried forward by this section because they are covered by section 501 (relating to accomplices) of the proposed code.

A violation of this section is a class B misdemeanor.

SECTION 526

Section 526 reenacts 18 U.S.C. 1732, which prohibits a postmaster from approving a bid bond or surety on a contract before it is properly signed or by failing to exercise due diligence before such approval.

A violation of this section is a class A misdemeanor and results in dismissal from office and disqualification from holding the office of postmaster.

SECTION 527

Section 527 reenacts 18 U.S.C. 1734, which prohibits failure to label as an advertisement matter printed in a publication entered in the mail as second class matter if the editor received valuable consideration for printing it. A violation of this section is an infraction.

SECTION 528

Section 528 reenacts 18 U.S.C. 1735, which prohibits using the mails for delivery of sexually-oriented advertisement in violation of 39 U.S.C. 3010 (relating to mailing of sexually-oriented advertisements).

A violation of this section is a class A misdemeanor. More serious violations of this section would be subject to felony penalties under section 2743 (relating to transferring or exhibiting obscene material) of the proposed code.

SECTION 529

Section 529 reenacts 18 U.S.C. 1736, which prohibits the use of information or evidence against any person in a criminal proceeding obtained by compliance with 39 U.S.C. 3010 (relating to mailing of sexually oriented advertisements).

SECTION 530

Section 530 reenacts 18 U.S.C. 1737, which prohibits the manufacture of sexually-related mail matter, intending or knowing that it will be deposited in the mail in violation of 39 U.S.C. 3008 (relating to prohibition of pandering advertisements) or 39 U.S.C. 3010 (relating to mailing of sexually-oriented advertisements).

A violation of this section is a class A misdemeanor. More serious violations of this nature are covered by section 2742 (relating to sexual exploitation of children) of the proposed code.

CHAPTER 57—PRESIDENTIAL ASSASSINATION, KIDNAPING, AND ASSAULT

SECTION 541

Section 541 reenacts 18 U.S.C. 1751, which authorizes the Attorney General to pay an amount not to exceed $100,000 for information concerning any presidential assassination, kidnaping, or assault.

This section does not carry forward provisions in 18 U.S.C. 1751 that specific offenses and punishments for assassination, kidnapping, or assault of the President or Vice President. Those offenses are found in chapter 23 (relating to offenses involving the person) of the proposed code. Section 541 also does not include subsections (h) and (i) of 18 U.S.C. 1751, which permit the suspension of jurisdiction of a State or local authority to investigate a violation under this section and to authorize assistance to the FBI by any agency, including the Army, Navy, and Air Force, because such authority is found in section 117 (relating to Federal jurisdiction: when preemptive) and section 1771 (relating to use of armed services as posse comitatus) of the proposed code.

SECTION 542

Section 542 reenacts 18 U.S.C. 1752, which provides for protection for any temporary residence or office of the President and his staff.

This section modifies 18 U.S.C. 1752 to provide for a restriction of an area if it is necessary to protect the President or to permit ingress to or egress from such area by the President or persons associated with the President.

A violation of this section is a class B misdemeanor.

CHAPTER 59—PRISON-MADE GOODS

SECTION 551

Section 551 reenacts 18 U.S.C. 1761, which prohibits the knowing transportation in interstate commerce or importation from a foreign country of any goods produced in prisons or by prisoners, other than by prisoners on parole or probation. The section carries forward certain exemptions and adds a new exemption for goods produced by convicts or prisoners participating in a program made up of seven pilot projects designated by the Administrator of the Law Enforcement Assistance Administration. A violation of this section is a class A misdemeanor.

SECTION 552

Section 552 reenacts 18 U.S.C. 1762, which requires that all packages containing goods produced in prison or by prisoners, except those on parole or probation, be plainly marked when transported in interstate or foreign commerce. A violation of this section is an infraction and the goods may be forfeited.

CHAPTER 61—PUBLIC LANDS

SECTION 561

Section 561 reenacts 18 U.S.C. 1856, which prohibits anyone who has started a fire on land controlled by the United States from leaving the fire unattended or allowing it to spread beyond his control. A violation of this section is a class B misdemeanor.

SECTION 562

Section 562 reenacts 18 U.S.C. 1858, which prohibits the willful destruction, defacing or removing of a government survey mark. A violation of this section is an infraction. Serious violations of this kind are covered by sections 2502 and 2503 (relating to aggravated property destruction and to property destruction) of the proposed code.

SECTION 563

Section 563 reenacts 18 U.S.C. 1859, which prohibits anyone from interrupting the surveying of public lands or of any private land claim which may be confirmed by the United States. A violation of this section is a class A misdemeanor.

SECTION 564

Section 564 reenacts 18 U.S.C. 1860, which prohibits collusive agreements or other interference with bidding for the purchase of land of the United States offered at public sale. A violation of this section is a class A misdemeanor.

SECTION 565

Section 565 reenacts 18 U.S.C. 1861, which prohibits deception of prospective purchasers of land which is or is represented to be land of the United States offered for sale or subject to disposition under the public-land laws. A violation of this section is a class A misdemeanor.

CHAPTER 63—PUBLIC OFFICERS AND EMPLOYERS

SECTION 570

Section 570 reenacts 18 U.S.C. 1902, which prohibits disclosing nonpublic crop information or speculating on commodities on the basis of inside information. This section is cross-referenced in section 2125 (c) (relating to revealing private information submitted for a government purpose) of the proposed code and is classified as a C felony.

SECTION 571

Section 571 reenacts 18 U.S.C. 1903, which prohibits someone acting in an official capacity in the administration of an Act of Congress relating to crop insurance from speculating in an agricultural commodity. This section is cross-referenced in section 2125(a) (relating to revealing private information submitted for a government purpose) of the proposed code and is classified as an E felony.

SECTION 572

Section 572 reenacts 18 U.S.C. 1905, which prohibits an officer or employee of the United States from disclosing any information of a confidential nature that comes to such officer or employee in the course of employment. The Committee, in reenacting 18 U.S.C. 1905, neither approves nor disapproves of any of the opinions written in the case of *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979) (interpreting 18 U.S.C. 1905).

A violation of this section is a class A misdemeanor and shall result in removal from office or employment.

SECTION 573

Section 573 reenacts 18 U.S.C. 1906, which prohibits a bank examiner or an employee of the General Accounting Office from disclosing information from a bank examination without express written permission. A violation of this section is a class A misdemeanor.

SECTION 574

Section 574 reenacts 18 U.S.C. 1907, which prohibits a farm credit examiner from disclosing, without authorization, information concerning borrowers from certain banks.

This section does not reenact the language pertaining to joint-stock land banks which no longer exist. A violation of this section is a class A misdemeanor and results in the disqualification of the violator from holding office as an examiner.

SECTION 575

Section 575 reenacts 18 U.S.C. 1909, which prohibits bank; FDIC, or farm credit examiners from providing any other services, for compensation, to any bank or banking or loan association, or to an officer, director or employee thereof. A violation of this section is a class A misdemeanor.

SECTION 576

Section 576 reenacts 18 U.S.C. 1910, which prohibits nepotism in the appointment of a receiver or trustee by a judge of any court of the United States. A violation of this section is a class A misdemeanor.

SECTION 577

Section 577 reenacts 18 U.S.C. 1911, which prohibits the willful failure by a receiver, trustee, or manager in a case before a court of the United States to manage property in accord with the laws of the State in which the property is located. A violation of this section is a class A misdemeanor.

SECTION 578

Section 578 reenacts 18 U.S.C. 1913, which prohibits, in the absence of congressional authorization, the use of money appropriated by Act of Congress to lobby, directly or indirectly, a Member of Congress. A violation of this section is a class A misdemeanor and after notice and a hearing shall result in removal from office.

SECTION 579

Section 579 reenacts 18 U.S.C. 1915, which prohibits an officer of the United States from making an unauthorized compromise of a claim arising under the customs laws. A violation of this section is a class A misdemeanor.

SECTION 580

Section 580 reenacts 18 U.S.C. 1916, which prohibits employment of an individual in the civil service in an Executive department for services unconnected to the appropriation from which he or she is paid, and failure to return money from lapsed salaries and unused appropriations to the Treasury of the United States. A violation of this section is a class A misdemeanor.

SECTION 581

Section 581 reenacts 18 U.S.C. 1917, which prohibits a member or employee of the Office of Personnel Management, or an individual in the public service, from interfering with a civil service examination. A violation of this section is a class A misdemeanor.

SECTION 582

Section 582 reenacts 18 U.S.C. 1918, which prohibits an employee of the United States from inciting the overthrow of the Government and participating in a strike against the Government. The section changes current law in a number of ways. Current law refers to "advocates", and the Committee has changed that to "incites". The term "incites" as used in section 582 means the incitement of a criminal act that is intended to cause the immediate commission of a crime, where that incitement occurs in circumstances that make it likely that the incitement will imminently bring about the crime incited. *See Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). See also discussion at 102 *supra*.

Current law prohibits membership in an organization of Government employees that asserts the right to strike against the United States Government or the government of the District of Columbia. The Committee has changed current law to prohibit only knowing participation in a strike against the United States Government or the government of the District of Columbia. The assertion of the right to strike is constitutionally protected speech, and the provision of current law that prohibited such assertions or membership in organizations making such assertions was declared unconstitutional in *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

A violation of this section is a class A misdemeanor.

SECTION 583

Section 583 reenacts 18 U.S.C. 1922, which prohibits an officer or employee of the United States with responsibility to make reports concerning Federal employees from failing to file a report, or inducing an injured employee to forego filing a claim for compensation. The language in current law that refers to "neglects" to make reports has been deleted. A violation of this section is an infraction.

CHAPTER 65—RECORDS AND REPORTS

SECTION 591

Section 591 reenacts 18 U.S.C. 2074, which prohibits issuing weather reports falsely represented as having been issued by the Government. It classifies the offense as a B misdemeanor.

SECTION 592

Section 592 reenacts 18 U.S.C. 2075, which punishes an officer who refuses to make a report as required by an Act of Congress or regulation of the Secretary of the Treasury (other than such officer's accounts) within the time specified in the Act or regulation. The language in current law which refers to "neglects" to make a report has been deleted. A violation of this section is an infraction.

SECTION 593

Section 593 reenacts 18 U.S.C. 2076, which prohibits a clerk of a United States district court from refusing to make or forward a

report, certificate, statement, or document as required by law. The language in current law that refers to "neglects" to make or forward a report, certificate, statement, or document has been deleted. A violation of this section is an infraction.

CHAPTER 67—SEAMEN

SECTION 601

Section 601 reenacts 18 U.S.C. 2195, which prohibits a master or officer of a vessel of the United States from abandoning a sailor in a foreign place without justifiable cause. A violation of this section is a class B misdemeanor.

SECTION 602

Section 602 reenacts 18 U.S.C. 2196, which prohibits any person on any merchant vessel, by willful breach of duty or by reason of drunkenness, from endangering the life or limb of any individual or causing damage to the vessel. A violation of this section is a class A misdemeanor.

CHAPTER 69—SHIPPING

SECTION 611

Section 611 reenacts 18 U.S.C. 2277, which prohibits bringing or possessing explosives or dangerous weapons on board certain vessels, without the permission of the owner or master of the vessel. A violation of this section is a class A misdemeanor.

SECTION 612

Section 612 reenacts 18 U.S.C. 2278, which prohibits the master of a vessel from taking on board explosives or articles which are likely to endanger the health or lives of the passengers or the safety of the vessel. A violation of this section is a class A misdemeanor.

SECTION 613

Section 613 reenacts 18 U.S.C. 2279, which prohibits the unauthorized boarding of a vessel before its actual arrival and final mooring. A violation of this section is a class B misdemeanor.

CHAPTER 71—TRAFFICKING IN CONTRABAND CIGARETTES

SECTION 621

Section 621 reenacts 18 U.S.C. 2341, and defines the terms "cigarette", "contraband cigarette", "common or contract carrier", "State", and "Secretary" for sections 621–24 of the bill and for subchapter III (relating to contraband cigarettes) of chapter 19 (relating to offenses involving revenue) of the proposed code. Section 1921 (relating to trafficking in contraband cigarettes) and section 1922 (relating to unlawful conduct relating to contraband cigarettes) of the proposed code punish violations of the provisions of this chapter of the bill as class D and class E felonies, respectively.

SECTION 622

Section 622 reenacts 18 U.S.C. 2342, which sets forth recordkeeping and inspection requirements for shippers, sellers, and distributors of cigarettes.

SECTION 623

Section 623 reenacts 18 U.S.C. 2345, and provides that nothing in sections 621–24 of the legislation affects the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the violation of such laws.

SECTION 624

Section 624 reenacts 18 U.S.C. 2346, and authorizes the Secretary of the Treasury to enforce the provisions of sections 621–24 of the bill and to promulgate appropriate rules and regulations. The current regulations shall remain in force. The Committee neither approves nor disapproves of any regulation or judicial or administrative interpretation of such regulations by reenacting this section.

CHAPTER 73—ARREST AND COMMITMENT

SECTION 631

Section 631 reenacts 18 U.S.C. 3045, which authorizes the issuance of warrants for arrest for violation of the internal revenue laws.

CHAPTER 75—FINES, PENALTIES, AND FORFEITURES

SECTION 641

Section 641 reenacts 18 U.S.C. 3615, which authorizes the seizure and forfeiture of liquor and property involved in any violation of the liquor laws (sections 461–63 of the bill).

SECTION 642

Section 642 reenacts 18 U.S.C. 3620, and provides that any fine imposed upon the master of a vessel for violation of section 612 (relating to explosives on vessels carrying steerage passengers) of the bill is a lien upon the vessel involved.

CHAPTER 77—DISCHARGE AND RELEASE PAYMENTS

SECTION 651

Section 651 reenacts 18 U.S.C. 4285, which authorizes a judge or magistrate to direct a United States marshal to provide noncustodial transportation for a person released under chapter 63 (relating to release) of the proposed code, if that person is financially unable to obtain necessary transportation to appear in court.

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Subtitle II—Sentencing Amendments and Cross-Reference Amendments to Laws other than Title 18 of the United States Code and Other Amendments and Repeals

Section 701

Section 701 amends various provisions of Federal law outside of title 18 of the United States Code, each of which proscribes, and provides criminal penalties for, conduct that is similar to conduct proscribed and penalized by a provision of chapter 13 (relating to offenses involving national defense) of the proposed code. The amendments set forth in this section conform the penalties for these specified offenses to the penalty in the most closely analogous chapter 13 provision.

Subsection (a) amends a provision in one of the neutrality acts (50 U.S.C. 192) to make it compatible with section 1313 (relating to violation of anchorage regulations during war or national emergency) of the proposed code. The provision being amended provides for the seizure and forfeiture of a vessel involved in a violation of a provision regulating vessels in territorial waters of the United States during a war or national emergency. It also provides for a fine and imprisonment for any person who violates such a regulation. Subsection (a) makes the penalty for violation of 50 U.S.C. 192 identical to the penalty for violation of section 1313 of the proposed code.

Subsection (b) amends a portion of the Atomic Energy Act of 1954 (42 U.S.C. 2274(a)), which penalizes an actor who communicates restricted data with intent to injure the United States or to secure an advantage to a foreign nation. Subsection (b) makes the penalty for violation of 50 U.S.C. 2274(a) the same as the penalty for violation of the espionage provision in section 1321(b) (relating to espionage) of the proposed code.

Subsection (c) amends a provision of the Atomic Energy Act of 1954 that penalizes an actor who receives, or attempts or conspires to receive, restricted data with intent to injure the United States or to secure an advantage to a foreign nation (42 U.S.C. 2275). Subsection (c) makes the penalty for violation of 42 U.S.C. 2275 identical to the penalty for violation of the espionage provision in section 1321(b) (relating to espionage) of the proposed code.

Subsection (d) amends a provision of the Atomic Energy Act of 1954 that penalizes the communication of restricted data with reason to believe that the data will be used to injure the United States or to secure an advantage to a foreign nation (42 U.S.C. 2274(b)). Subsection (d) makes the penalty for violation of 42 U.S.C. 2274(b) the same as the penalty provided for violation of section 1322 (relating to disseminating national defense information) of the proposed code.

Subsection (e) amends a provision of the Subversive Activities Control Act of 1950 that provides that one who is convicted under the Act shall be ineligible to hold any office under the laws of the United States (50 U.S.C. 783(d)). Subsection (e) makes the penalty for violation of

50 U.S.C. 783(d) the same as that for violation of section 1323 (relating to dissemination of classified information) of the proposed code, and makes the penalty for violation of 50 U.S.C. 783(c) the same as that provided for violation of section 1324 (relating to receiving classified information) of the proposed code.

Subsection (f) amends a provision set forth in 50 U.S.C. 855 that provides penalties (including, in the case of an alien, deportation) for a violation of any of several provisions of law relating to foreign espionage systems. Subsection (f) makes the penalty for violation of 50 U.S.C. 855 identical to the penalty for violation of section 1325 (relating to failing to register as a person trained in a foreign espionage system) of the proposed code.

Subsection (g) amends section 8(a) of the Foreign Agents Registration Act (22 U.S.C. 618). Subsection (g) provides that the penalty for violation of a provision of section 2 or 4(a) of the Foreign Agents Registration Act will be the same as the penalty provided for violation of section 1326 (relating to failing to register as, or acting as, a foreign agent) of the proposed code.

Subsection (h) amends section 222 of the Atomic Energy Act of 1954 (42 U.S.C. 2272) to delete the penalties specified in that section (for violation of 42 U.S.C. 2077, 2122, or 2131) and to make the penalty that which is set forth in section 1331 (relating to atomic energy offenses) of the proposed code.

Subsection (i) amends section 223 of the Atomic Energy Act of 1954 (42 U.S.C. 2273), which provides a criminal penalty for any violation of the Atomic Energy Act for which no criminal penalty is specifically provided. Subsection (i) amends section 223 to make the penalty the same as that which is set forth in section 1331 (relating to atomic energy offenses) of the proposed code.

Subsection (j) amends section 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2276), which penalizes concealing, altering, or destroying any writing incorporating "restricted data" used in connection with atomic energy development or special nuclear material production. Subsection (j) deletes the penalties specified in section 226 of the Atomic Energy Act of 1954 and makes the offense punishable as set forth in section 1331 (relating to atomic energy offenses) of the proposed code.

Section 702

Section 702 amends 4 provisions of Federal law to make the penalty for violating any of those provisions the same as the penalty for commission of an offense described in section 1505 (relating to engaging in an unlawful international transaction) of the proposed code.

Subsection (a) amends section 5(b) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(b)), which penalizes any person who willfully violates, or attempts to violate, any order, rule, or regulation imposed by the President on international economic relations and communications. Subsection (a) deletes the current penalties of section 5(b) and instead imposes penalties in accordance with those set forth in section 1505 of the proposed code.

Subsection (b) amends section 7(c) of the Neutrality Act of 1939 (22 U.S.C. 447(c)), which makes it unlawful for any person to purchase, sell, or exchange obligations of a government that is identified

in a presidential proclamation as a government involved in a war, if the proclamation states that it is necessary not to trade in the obligations of that government in order to preserve the peace of the United States or in order to protect the lives of United States citizens. Subsection (b) deletes the specific penalties of section 7(c) and instead punishes the proscribed conduct in accordance with section 1505 of the proposed code.

Subsection (c) amends section 38(c) of the Arms Export Control Act (22 U.S.C. 2778(c)), which provides penalties for the willful violation of provisions relating to import and export controls on defense articles and to the reporting of fees paid in connection therewith. Subsection 38(e) also provides penalties for willfully making false statements in a license application or required report. Subsection (c) makes the penalty for any such act the same as the penalty for violation of section 1505 of the proposed code.

Subsection (d) amends section 16 of the Trading with the Enemy Act (50 U.S.C. App. 16), which establishes penalties for transactions with nations, and with residents and allies of nations, with which the United States is at war. Subsection (d) amends section 16 to eliminate the penalties now set forth in that provision and to penalize violations of this section in accordance with section 1505 of the proposed code.

Subsection (e) amends section 6 of the Export Administration Act of 1969 (50 U.S.C. App. 2405), which provides, in subsection (a) thereof, the criminal penalty for first and subsequent violations of 50 U.S.C. App. sections 2401 through 2413 or any regulation thereunder, and, in subsection (b) thereof, the criminal penalty for willful exportation in contravention of any provision of the Export Administration Act or any regulation thereunder. Subsection (e) deletes the specified penalties and makes any such offense punishable as provided in section 1505 of the proposed code.

Subsection (f) amends section 206(b) of the International Emergency Economic Power Act (50 U.S.C. 1705(b)). The subsection deletes the penalties presently set forth in that section and instead makes the penalty that which is set forth in section 1505 of the proposed code.

Section 703

Section 703 adds a new subsection to section 501 of the Employment Retirement Income Security Act of 1974 (29 U.S.C. 1131). The new subsection provides that documents required to be published or kept as part of the records of employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan are government matters for the purposes of section 1742 of proposed title 18. False statements in such documents are currently proscribed in 18 U.S.C. 1027. Section 1742 of the proposed code prohibits false statements in government matters. However, documents required by law to be kept or published are not merely by virtue of that requirement "government matters," a term which includes matters within the jurisdiction of a government agency, and includes government records. "Government records" only covers objects received or kept by the government. This section insures that the above mentioned records will continue to be subject to false statement prohibitions.

Section 704

Section 704 conforms the provisions of the Internal Revenue Code of 1954 (title 26 of the United States Code) which have criminal penalties to the chapters of the proposed code dealing with revenue offenses.

Subsection (a) amends 26 U.S.C. 7201, which makes willful attempted tax evasion a felony. Subsection (a) strikes out the penalties specified in this section for such conduct and instead makes such conduct an offense that is punishable as set forth in section 1901 (relating to tax evasion) of the proposed code.

Subsection (b) amends 26 U.S.C. 7202, which makes it a crime for a person who is required to collect, account for, and pay over a tax willfully to fail to do so or truthfully to account therefor. Subsection (b) strikes out the separate penalties and makes the proscribed conduct "an offense that is punishable as set forth in section 1901" of the proposed code.

Subsection (c) amends section 7214(a) of the Internal Revenue Code of 1954, which makes it a crime for a Federal employee, acting in connection with any revenue law, to engage in extortion or knowingly to demand greater-than-authorized fees or to conspire or collude with another to defraud the United States. Subsection (c) strikes out current law penalties and makes the offense punishable as set forth in section 1901 of the proposed code.

Subsection (d) amends section 7206 of the Internal Revenue Code of 1954, which makes it a crime to make and subscribe a tax return which is verified under penalty of perjury when the person involved does not believe the return is "true and correct as to every material matter". Section 7206 also makes it a crime to aid, assist, or advise in the preparation or presentation of a tax return which is fraudulent or false as to a material matter. The section also proscribes falsifying books and records relating to the condition of a taxpayer. Subsection (d) strikes out the penalties set forth in section 7206 and instead makes the offenses punishable as set forth in section 1901 of the proposed code.

Subsection (e) amends section 7212 of the Internal Revenue Code of 1954, which makes it a crime to act "corruptly or by force or threats of force" to obstruct or impede a Federal employee in the execution of the Internal Revenue Code or forcibly to rescue or attempt to rescue any property that has been seized under the Internal Revenue Code. Subsection (e) amends section 7212 to delete its separate penalties and to make the offenses instead punishable as set forth in section 1901 of the proposed code.

Subsection (f) amends section 7203 of the Internal Revenue Code of 1954, which makes it a crime willfully to fail to pay any estimated tax, or to make an estimated tax return where one is required, or to maintain necessary records. Subsection (f) strikes out the penalty specified in section 7203 and makes the offense punishable as set forth in section 1901 of the proposed code.

Subsection (g) amends section 7204 of the Internal Revenue Code of 1954, which makes it a crime willfully to furnish a false or fraudulent statement where a statement is required by the Internal Revenue Code or regulations thereunder. Subsection (g) strikes out the penalty specified in section 7204 and instead makes the offense punishable as set forth in section 1901 of the proposed code.

Subsection (h) amends section 7205 of the Internal Revenue Code of 1954. As amended, it makes it a crime to willfully supply one's employer with false or fraudulent information relating to tax withholding. Subsection (h) deletes the penalties set forth in section 7205 and instead makes the offense punishable as set forth in section 1901 of the proposed code.

Subsection (i) amends section 7215(a) of the Internal Revenue Code of 1954, which makes it a misdemeanor crime to fail to comply with any provision of section 7512(b) of the tax code. Subsection (i) deletes the penalties set forth in section 7215(a) and makes the conduct an offense punishable as set forth in section 1901 of the proposed code.

Subsection (j) amends section 5601(a) of the Internal Revenue Code of 1954, which establishes criminal penalties applicable to distilling and rectifying, and to activities related to distilling and rectifying. Subsection (j) makes the offenses punishable under section 1903 (relating to alcohol and tobacco tax offenses) of the proposed code.

Subsection (k) amends section 5602 of the Internal Revenue Code of 1954, which establishes the penalty for tax fraud by a distiller. Subsection (k) makes the offense punishable under section 1903 of the proposed code.

Subsection (l) amends section 5603(a) of the Internal Revenue Code of 1954, which establishes penalties for fraudulent noncompliance with recordkeeping, return, and report-filing requirements. Subsection (l) makes fraudulent noncompliance punishable under section 1903 of the proposed code.

Subsection (m) amends section 5607(a) of the Internal Revenue Code of 1954, which penalizes the use of distilled spirits on which alcohol tax has not been paid. Subsection (m) deletes the specified penalties and instead makes any such offense punishable as provided in section 1903 of the proposed code.

Subsection (n) amends section 5661(a) of the Internal Revenue Code of 1954, which penalizes someone who fails to pay any tax imposed upon wine or who violates any related provisions. Subsection (n) deletes the penalty provided presently in section 5661(a) and makes the offense punishable as provided in section 1903 of the proposed code.

Subsection (o) amends section 5671 of the Internal Revenue Code of 1954, which punishes any evasion or attempted evasion of the tax on beer or any failure to keep true and accurate records with regard to such obligation. Subsection (o) strikes the present penalty and makes the offense punishable as set forth in section 1903 of the proposed code.

Subsection (p) amends section 5604(a) of the Internal Revenue Code of 1954, which provides penalties for a variety of specified conduct relating to alcohol taxes and indicia of payment thereof. Subsection (p) deletes the penalty specified in section 5604(a) and makes the offense punishable as set forth in section 1903 of the proposed code.

Subsection (q) amends section 5605 of the Internal Revenue Code of 1954, which makes it a crime willfully to violate any provision of 26 U.S.C. 5291(a) or any regulation thereunder, pertaining to materials used in the manufacture of distilled spirits. Subsection (q) deletes

the penalties of current law and instead makes the offense punishable as set forth in section 1903 of the proposed code.

Subsection (r) amends section 5608 of the Internal Revenue Code of 1954, which punishes making a fraudulent claim for a drawback on any distilled spirits greater than the tax actually paid and also punishes relanding within the jurisdiction of the United States, with intent to defraud the United States, any distilled spirits which have been shipped for exportation. The penalties specified in section 5608 are deleted and the offense is made punishable as set forth in section 1903 of the proposed code.

Subsection (s) amends section 5682 of the Internal Revenue Code of 1954, which makes it a crime to destroy, break, injure, or tamper with any lock or seal placed by a duly authorized internal revenue officer or to open such a lock or seal in the absence of the proper officer. Subsection (s) deletes the penalties presently set forth in section 5682 and instead makes the offense punishable as set forth in section 1903 of the proposed code.

Subsection (t) amends section 5691(a) of the Internal Revenue Code of 1954, which punishes someone who carries on the business of brewer, wholesale or retail dealer in liquors, or wholesale or retail dealer in beer while willfully failing to pay the special taxes relating to liquors. Subsection (t) deletes the present penalties and makes the offense punishable as set forth in section 1903 of the proposed code.

Subsection (u) amends section 5672(a) of the Internal Revenue Code of 1954, which makes it a crime for a brewer to fail or refuse to keep the records and file the returns required by 26 U.S.C. 5415 and regulations thereunder. Subsection (u) deletes the penalties set forth in section 5672 and makes the offense punishable as provided in section 1903 of the proposed code.

Section 705

Section 705 of the Criminal Code Revision Act of 1980 amends in four places section 9042 of the Internal Revenue Code of 1954 (26 U.S.C. 9042) which specifies criminal penalties for violation of provisions of the Presidential Primary Matching Payment Account Act. Section 705 deletes those specified penalties and instead provides that the offense is punishable as set forth in section 2117 (relating to excess campaign expenditures or contributions) of the proposed code.

Section 706

Section 706 amends a number of Federal laws which make it unlawful to reveal private information submitted to the Federal Government for a governmental purpose. The provisions amended set different levels of criminal penalties for what is essentially equivalent conduct. The amendments made by section 706 rectify this lack of uniformity by making the conduct proscribed by each of these sections an offense punishable as set forth in section 2125 (relating to private information submitted for a Government purpose) of the proposed code.

Subsection (a) amends a provision of the Agricultural Adjustment Act (7 U.S.C. 610(g)) that prohibits any person who is acting in any official capacity in the administration of the Agricultural Adjustment

Act from speculating in any agricultural commodity or product or in the stock or interest of any corporation or association engaged in handling, processing, or disposing of any such commodity or product. The specified penalties are deleted and section 2125 of the proposed code is incorporated by reference.

Subsection (b) amends a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136*l*(b)) Subsection (b) deletes the current law penalties and instead makes the offense punishable as set forth in section 2125 of the proposed code.

Subsection (c) amends section 15(c) of the Agricultural Marketing Act (12 U.S.C. 1141j(c)), which makes it unlawful for a cooperative association, a corporation, a clearinghouse, a commodity committee, or a director or employee thereof, to disclose any information imparted to it in confidence in violation of any Government regulation. Subsection (c) deletes the specified penalties and makes the offense punishable as set forth in section 2125 of the proposed code.

Subsection (d) amends a provision of the Agricultural Marketing Act (12 U.S.C. 1141j(d)) that prohibits the inclusion in any governmental publication of any prediction with respect to cotton prices. Subsection (d) deletes the current law penalties and makes the offense punishable as set forth in section 2125 of the proposed code.

Subsection (e) amends 13 U.S.C. 214, that makes it unlawful for a census bureau employee or staff member (past or present) to publish or communicate any information, the disclosure of which is prohibited. Subsection (e) deletes the specified penalties for such conduct and instead makes the offense punishable as provided in section 2125 of the proposed code.

Subsection (f) amends section 16 of the Small Business Act (15 U.S.C. 645), which makes it a crime to embezzle, to make a false statement in a book of record, or to defraud while being connected in any capacity with the Small Business Administration. Section 16 also makes it a crime to conceal, convert, or dispose of for personal use any property that is pledged or mortgaged to or held by the Small Business Administration. These provisions are repealed by this amendment since the specific conduct that is proscribed by them is proscribed by new general sections of the proposed code. The final clause of 15 U.S.C. 645(b) makes it a crime for a person connected with the Small Business Administration to give "any unauthorized information". The penalties specified for such conduct are deleted and the offense is made punishable as set forth in section 2125 of the proposed code.

Subsection (g) amends section 8(c) of the Bretton Woods Agreement Act (22 U.S.C. 286f(c)), which makes it unlawful for any officer or employee of the Federal Government to disclose, other than in the course of official action, any information obtained under section 8(c). Subsection (g) deletes the penalty specified in section 8(c) and makes the offense punishable as provided in section 2125 of the proposed code.

Subsection (h) amends section 7213(a) of the Internal Revenue Code of 1954 (26 U.S.C. 7213(a)), which makes it unlawful for any Federal officer or employee to disclose (except as authorized by the Internal Revenue Code) any tax return information. Subsection (h) deletes the penalty set forth in section 7213(a) and instead makes the offense punishable as set forth in section 2125 of the proposed code.

Subsection (i) amends section 7240 of the Internal Revenue Code of 1954 (26 U.S.C. 7240), which makes it a crime for any person acting in an official capacity to invest or speculate in sugar or liquid sugar or in the stock of any corporation engaged in the production of sugar. The specific penalties for such conduct are deleted by subsection (i) and the offense is made punishable as set forth in section 2125 of the proposed code.

Subsection (j) amends a provision of the Second War Powers Act, 1942 (50 U.S.C. App. 643a), which provides that the Chairman of the War Production Board or any Government agency acting under this legislation shall not disclose any information which such agency deems confidential or with reference to which a request for confidential treatment is made by the person furnishing the information, unless a specific finding to the contrary is made. Subsection (j) deletes the sanction currently specified and provides that the offense is punishable as set forth in section 2125 of the proposed code.

SECTION 707

Section 707 amends three sections of current law to make the maximum penalties for violation thereof the same as that provided in section 2536 (relating to fraud in a regulated industry) of the proposed code.

Subsection (a) amends section 912 of the Housing and Urban Development Act of 1970 (12 U.S.C. 1709–2). It deletes the penalties set forth in section 912 and instead makes the offense punishable as set forth in section 2536 of the proposed code.

Subsection (b) amends section 239(b) of the National Housing Act (12 U.S.C. 1715z–4(b)), which prohibits any owner of mortgaged multifamily property from using any part of the rents or other funds derived from such property in violation of a regulation of the Secretary of Housing and Urban Development. Subsection (b) deletes the penalties currently specified and instead makes the offense punishable as set forth in section 2536 of the proposed code.

Subsection (c) amends a provision of the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1717), which makes it an offense to willfully violate any provision of the Interstate Land Sales Full Disclosure Act or rules and regulations prescribed pursuant thereto, or willfully to make an untrue statement of a material fact or to omit to state a material fact in a statement of record filed under, or a property report issued pursuant to, such Act. Subsection (c) deletes the penalties set forth in 15 U.S.C. 1717 and makes the offense punishable as set forth in section 2536 of the proposed code.

SECTION 708

Section 708 amends 17 U.S.C. 506(a), which provides criminal penalties for infringing a copyright willfully and for purposes of commercial advantage or private financial gain. The penalties specified in 17 U.S.C. 506(a) are deleted and the offense is made punishable as set forth in section 2537 (relating to criminal infringement of a copyright) of the proposed code.

SECTION 709

Section 709 amends section 4 of 41 U.S.C. 54, a 1946 Act that provides specified penalties for any person who knowingly, directly or indirectly, makes or receives certain prohibited payments with respect to government contracts. Section 709 deletes the current penalties and makes the offense punishable as set forth in section 2551 (relating to bribery of government contractors) of the proposed code.

SECTION 10

Section 710 amends several provisions of the Social Security Act relating to medical assistance to conform the penalties set forth in those provisions to that specified in section 2554 (relating to certain medical assistance program offenses) of the proposed code.

Subsection (a) amends 42 U.S.C. 1395nn in 2 ways. First, subsection (a) deletes subsections (a) and (c) of 42 U.S.C. 1395nn. Those subsections, which provide that making a false statement is an offense, are redundant because section 1742 (relating to making a false statement) of the proposed code more clearly and precisely covers the conduct they proscribe. Second, subsection (a) deletes the penalties specified in 42 U.S.C. 1395nn(b) for making or receiving kickbacks, bribes, or rebates and provides that the offense is punishable as set forth in section 2554 of the proposed code.

Subsection (b) amends 42 U.S.C. 1396(h) in 2 ways. First, subsection (b) deletes subsections (a) and (c) of 42 U.S.C. 1396(h) because those subsections, which deal with making false statements, are no longer needed because section 1742 (relating to making a false statement) of the proposed code more clearly and precisely covers the conduct they proscribe. Second, subsection (b) deletes the penalties specified in 42 U.S.C. 1396(h) and makes the offense punishable as set forth in section 2554 of the proposed code.

SECTION 711

Section 711 amends more than a dozen sections of the United States Code that are analogous to, or cross-referenced within, certain sections of subchapter VII of chapter 25 of the proposed code. Subchapter VII deals with investment, monetary, and antitrust offenses.

Subsection (a) amends section 24 of the Securities Act of 1933 (15 U.S.C. 77x), which makes any willful violation of a provision of the 1933 Securities Act, or a rule or regulation promulgated by the Securities and Exchange Commission under that Act, a crime. It also specifies the maximum sentences authorized to be imposed upon conviction of such a violation or upon conviction of filing a registration under such Act which contains an untrue statement of a material fact or omits to state any material fact required to make statements contained therein not misleading. Subsection (a) deletes the maximum sentences set forth in section 24 and provides that the offense is punishable as set forth in section 2561 (relating to securities offenses) of the proposed code.

Subsection (b) amends section 325 of the Trust Indenture Act of 1939 (15 U.S.C. 77yyy), which makes criminal any willful violation

of that Act or a rule, regulation, or order issued under that Act or the willful making of an untrue material statement or the willful omission to state a material fact necessary to make the statements made not misleading, in an application, report, or document filed or required to be filed under a provision of the Act or of such a rule, regulation, or order. Subsection (b) deletes the specific penalties set forth in section 325 and makes the offense punishable as set forth in section 2561 (relating to securities offenses) of the proposed code.

Subsection (c) amends section 32 of the Securities Exchange Act of 1934 (15 U.S.C. 78ff), which sets forth what constitutes a crime under the Securities Exchange Act of 1934 and the maximum penalties for such a crime. As under the analogous provisions summarized above in the 1933 Act and in the 1939 Trust Indenture Act, section 32 makes a crime of willful violation of a provision of the Act or of a rule or regulation issued under the Act, a violation of which is made unlawful thereby. Section 32 also makes it a crime for a regulated person or organization to make material false or misleading statements if such statements are contained in a paper filed or required to be filed under the Securities Exchange Act of 1934 or a rule or regulation issued under that Act. Unlike the other 2 statutes, section 32 also makes it a crime for an issuer to fail to file any information, documents, or reports required to be filed under a provision of the Securities Exchange Act of 1934 or a rule or regulation pursuant to that Act. Subsection (c) deletes the penalties set forth in four provisions of section 32 and instead makes the offense punishable as set forth in section 2561 (relating to securities offenses) of the proposed code.

Subsection (d) amends section 29 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z–3), which sets forth conduct constituting a crime under that Act and also specifies the maximum penalties for such conduct. In addition to the conduct that is proscribed under the statutes referred to earlier in this section, section 29 makes it a crime to falsify any account, correspondence, memorandum, book, paper, or other record that is kept or required to be kept under the Public Utility Holding Company Act of 1935 or rules, regulations, or orders issued pursuant to that Act. Section (d) deletes the current law penalties and makes the offense punishable as set forth in section 2561 (relating to securities offenses) of the proposed code.

Subsection (e) amends section 49 of the Investment Company Act of 1940 (15 U.S.C. 80a–48), which makes the same type of conduct summarized above a crime under the Public Utility Holding Company Act of 1935 as well. Subsection (e) deletes the penalties set forth in section 49 and makes the offense punishable as set forth in section 2561 (relating to securities offenses) of the proposed code.

Subsection (f) amends section 217 of the Investment Advisors Act of 1940 (15 U.S.C. 80b–17), which makes it a crime willfully to violate any provision of the Investment Advisors Act of 1940 or any rule, regulation, or order promulgated by the Securities and Exchange Commission under this authority of that Act. Subsection (f) deletes the penalties set forth in section 217 and makes the offense punishable as set forth in section 2561 (relating to securities offenses) of the proposed code.

Subsection (g) amends a section of a 1970 Act amending the Federal Deposit Insurance Act (12 U.S.C. 1957). Subsection (g) deletes the penalties set forth in 12 U.S.C. 1957 and makes the offense punishable as set forth in section 2562 (relating to monetary offenses) of the proposed code.

Subsection (h) amends section 210 of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1059), which sets forth the penalty for a willful violation of that Act that is committed in furtherance of the commission of any other violation of Federal law or that is committed as part of a pattern of illegality, the volume of which exceeds $100,000 in a 12-month period. Subsection (h) deletes the penalties set forth in section 210 and makes the offense punishable as set forth in section 2562 (relating to monetary offenses) of the proposed code.

Subsection (i) amends section 9 of the Commodity Exchange Act (7 U.S.C. 13), which sets forth conduct that constitutes a crime under that Act and the maximum penalties for such crime. Subsection (i) deletes subsection (a) of section 9 because the conduct penalized under that subsection (e.g., embezzlement) is covered in section 2531 (relating to theft) of the proposed code. Subsection (i) further deletes the penalties set forth in the other subsections of section 9 and instead makes the offense punishable as set forth in section 2563 (relating to commodities offenses) of the proposed code.

Subsection (j) amends a provision of the Federal Reserve Act (12 U.S.C. 617), which makes it a crime to control or fix or to attempt to control or fix the price of any commodities. Subsection (j) deletes the penalties set forth in that provision and makes the offense punishable as set forth in section 2563 (relating to commodities offenses) of the proposed code.

Subsection (k) amends 3 sections of the Sherman Act (15 U.S.C. 1, 2, and 3), which make various specified antitrust violations crimes and which set forth penalties for such crimes. Subsection (k) deletes these penalties and provides that the offense is punishable as set forth in section 2564 (relating to antitrust offenses) of the proposed code.

Section 712

Section 712 amends various provisions of Federal law which are outside title 18 of the United States Code and which deal with controlled substances. Those sections grant authority to specified Federal officials and specify criminal penalties for conduct that is comparable to conduct criminalized by a provision of subchapter II of chapter 27 (relating to drug offenses) of the proposed code. The provisions amended by section 712 are all sections of the Controlled Substances Act and the Controlled Substances Import and Export Act.

Subsection (a) amends section 402(c)(2) of the Controlled Substances Act (21 U.S.C. 842(c)(2)) by deleting the specified maximum penalties and providing that a knowing violation of section 402(c)(2) is an offense punishable as set forth in section 2714 (relating to violating a drug regulation) of the proposed code.

Subsection (b) amends 8 different sections of the Controlled Substances Act. The amendments are to sections 401(d), 403, 501(b), 511, 512(a), 513, 515, and 516 of that Act (21 U.S.C. 841, 843, 871, 881, 882, 883, 885, and 886). Each of the amendments (1) deletes the maximum penalties specified and provides, where appropriate, for sentencing in accordance with the proposed code or (2) extends to subchapter II of

chapter 27 of the proposed code certain authority provided for in the Controlled Substances Act.

Subsection (c)(1) repeals section 1010 of the Controlled Substances Import and Export Act (21 U.S.C. 960).

Subsection (c)(2) amends section 1011(2) of the Controlled Substances Import and Export Act (21 U.S.C. 961(2)) by striking out the penalties set forth in that section and by making the offense punishable under section 2714 (relating to violating a drug regulation) of the proposed code.

Subsection (c)(3) repeals sections 1012, 1013, and 1014 of the Controlled Substances Import and Export Act (21 U.S.C. 962).

Subsection (c)(4) amends section 1015 of the Controlled Substances Import and Export Act (21 U.S.C. 965), which grants certain authority to the Attorney General and employees of the Bureau of Narcotics and Dangerous Drugs. Subsection (c)(4), by adding a cross reference to subchapter II of chapter 27 of the proposed code, ensures that this authority remains the same.

Section 713

Section 713 amends 6 sections of current Federal law which specify criminal penalties for various explosives and weapons offenses. The penalties authorized by these sections are deleted and these offenses are made punishable as set forth in subchapter III of chapter 27 (relating to explosives and weapons offenses) of the proposed code.

Subsection (a)(1) amends section 4472(14) of the Revised Statutes (46 U.S.C. 170(14)), which specifies criminal penalties for a knowing violation of a provision of that section or of a regulation established under that section. Subsection (a)(1) deletes the penalties set forth in section 4472(14) and makes the offense punishable as set forth in section 2721 (relating to explosives offenses) of the proposed code.

Subsection (a)(2) amends section 902(h)(2) of the Federal Aviation Act (49 U.S.C. 1472(h)(2)) by deleting the penalties set forth in that section and by making the offense punishable as set forth in section 2721 (relating to explosives offenses) of the proposed code.

Subsection (a)(3) amends section 110(b) of the Hazardous Materials Transportation Act (49 U.S.C. 1809(b)) by deleting specific penalties for conduct relating to explosives and instead making the offense punishable under section 2721 (relating to explosives offenses) of the proposed code.

Subsection (b) amends provisions setting forth penalties for firearms in section 5871 of the Internal Revenue Code of 1954 (26 U.S.C. 5871), section 1202 of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. App. 1202), and section 902(1) of the Federal Aviation Act of 1958 (49 U.S.C. 1472(l)). The three amendments in subsection (b) delete current law penalties from these sections and replace them with the penalties set forth in section 2722 (relating to firearms offenses) and section 2724 (relating to possessing a weapon or explosive aboard an aircraft) of the proposed code.

Section 714

Section 714 amends 10 sections of Federal law outside of title 18 of the United States Code. Each of those sections prescribes criminal penalties for public health or public safety offenses. Section 714 deletes

these specified penalties and instead penalizes such conduct pursuant to subchapter VI of chapter 27 (relating to public health and safety offenses) of the proposed code.

Subsection (a) amends section 12(a) of the Poultry Products Inspection Act (21 U.S.C. 461(a)), which sets forth maximum penalties for certain violations of the Poultry Products Inspection Act. Subsection (a) strikes out these penalties and makes the offense punishable as set forth in section 2751 (relating to offenses involving food-related and health-related industries) if the violation involves an intent to defraud. Subsection (a) also provides that a violation of 12 U.S.C. 461(a) that does not involve intent to defraud is a Class A misdemeanor.

Subsection (b) amends section 406 of the Federal Meat Inspection Act (21 U.S.C. 676), which sets forth penalties for violations of that Act for which no specific criminal penalty is otherwise provided. Subsection (b) deletes these penalties and makes the offense a violation of section 2751 (relating to offenses involving food-related and health-related industries) of the proposed code if there is intent to defraud, and a Class A misdemeanor in any other case.

Subsection (c) amends section 12 of the Egg Products Inspection Act (21 U.S.C. 1041(a)) by striking out the penalty provided in section 12 (a) for commission of any offense prohibited by 21 U.S.C. 1037 and by making the offense (1) punishable as set forth in section 2751 (relating to offenses involving food-related and health-related industries) of the proposed code if the violation involves fraud or any distribution or attempted distribution of an article that is known to be adulterated, and (2) a Class A misdemeanor in any other case.

Subsection (d) amends section 303(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 333(b)), which specifies the penalties for a second or subsequent conviction for violating any provision of 21 U.S.C. 331 or for any conviction of any such provision with intent to defraud or mislead. Subsection (d) deletes these penalties and makes the offense punishable as set forth in section 2751 (relating to offenses involving food-related and health-related industries) of the proposed code.

Subsection (e) amends section 309(c)(1) of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)(1)), which specifies the maximum criminal penalties for willful or negligent violation of various provisions of that Act. Subsection (e) deletes the specific penalties and makes the offense punishable as set forth in section 2752 (relating to environmental pollution) of the proposed code.

Subsection (f) amends section 404(s)(4)(A) of the Federal Water Pollution Control Act (33 U.S.C. 1344(s)(4)(A)) by deleting the penalites specified in that section and by making the offense punishable as set forth in section 2752 (relating to environmental pollution) of the proposed code.

Subsection (g) amends section 113(c)(1) of the Clean Air Act (42 U.S.C. 1857c–8(c)(1)) by deleting the penalties provided for in that section and by making the offense punishable as set forth in section 2752 (relating to environmental pollution) of the proposed code.

Subsection (h) amends section 11(a)(1) of the Noise Control Act of 1972 (42 U.S.C. 4910(a)(1)), which makes it a crime willfully or knowingly to violate enumerated provisions of the Noise Control Act of 1972. Subsection (h) deletes the penalties specified in section 11(a)

(1) and makes the offense punishable as set forth in section 2752 (relating to environmental pollution) of the proposed code.

Subsection (i) amends section 3008(d) of the Solid Waste Disposal Act (42 U.S.C. 6928(d)), which penalizes knowingly transporting any hazardous waste to a facility without a permit under the Solid Waste Disposal Act, knowingly disposing of any hazardous waste listed in the Solid Waste Disposal Act without a required permit, or knowingly making a false statement or representation in any writing filed, maintained, or used for purposes of compliance with the Solid Waste Disposal Act. Subsection (i) deletes the penalties set forth in section 3008(d) and makes the offense punishable as set forth in section 2752 (relating to environmental pollution) of the proposed code.

Subsection (j) amends section 24 of the Outer Continental Shelf Lands Act (43 U.S.C. 1350), which relates to remedies and penalties under that Act. Subsection (j) deletes the criminal penalties set forth in section 24(c) and provides that the penalty shall be as set forth in section 2752 (relating to environmental pollution) of the proposed code. The amendment also repeals subsection (d) of 43 U.S.C. 1350 as no longer necessary.

Subsection (k) amends section 4417a(14)(B) of the Revised Statutes of the United States (46 U.S.C. 391a(14)(B)), which provides penalties for violations of regulations regarding the carriage of bulk cargoes. Subsection (k) deletes the penalties, and provides that the violations are punishable as set forth in section 2752 of the proposed code.

SECTION 715

Section 715 amends subsection (d) of section 1909 of title XIX of the Social Security Act (42 U.S.C. 1396h(d)), which provides penalties for charging hospital patients receiving medical payments under the Act more than the amount prescribed by State regulations. Section 715 deletes these penalties, makes the offense punishable as set forth in section 2762 of the proposed code.

SECTION 716

Section 716 contains approximately 200 technical conforming amendments to provisions of the United States Code outside of title 18. Each of the sections amended by a provision of section 716 mentions one or more sections of current title 18 of the United States Code.

Since the proposed code will replace all of current title 18, these cross-references must be corrected and updated to conform to the proposed code.

Each section of the United States Code that mentions or identifies a particular section of current title 18 is amended by a provision of section 716. No substantive changes in these sections are made.

SECTION 717

Section 717 contains 2 subsections, each of which deals with child custody questions. Subsection (a) adds a new section (1738A, entitled "Full faith and credit given to child custody determinations") to title 28 of the United States Code. Subsection (b) makes various amendments to section 453 of the Social Security Act (42 U.S.C. 653).

The full faith and credit clause of the United States Constitution requires each State to give "full faith and credit" to final judicial decrees of every other State. Since a child custody order may be modified if changed circumstances warrant a different custody arrangement, such orders are not "final" for purposes of the full faith and credit clause. Thus, a parent dissatisfied with a custody determination can relitigate the question—simply by moving the child to another forum.

Although parental kidnapping may be on the increase, to make it a Federal crime would be a significant expansion of current law. The Federal Kidnapping Act (18 U.S.C. 1201) explicitly exempts parental kidnapping. The Department of Justice opposed making parental kidnapping a Federal crime because it would tax the resources of the already overworked FBI, involve Federal courts in domestic matters in which they have little or no experience and in which State courts have already developed significant expertise, and create the potential for violence when the FBI must arrest a distraught parent. Use of criminal arrest and sanctions would be harmful to the child, whose interests the criminal laws seek to protect. A kidnapped child who sees his or her parent arrested, and who is then placed in a temporary or foster home until the custody situation is resolved, may suffer more than from the original kidnapping. Finally, criminal sanctions work to impair the relations of parent and child.

This section therefore sets forth civil remedies for the problem of parental kidnapping. Any decision to make parental kidnapping a Federal crime should be deferred until experience shows whether these civil remedies are effective.

Subsection (a) of new section 1738A requires each State to enforce, and prohibits them from modifying, any child custody determination made by another State in a manner consistent with this section. The only exception. which is set forth in subsection (f), is where the other State no longer has jurisdiction or has declined to exercise its jurisdiction to modify the determination.

Subsection (b) contains definitions of the major terms used in this section. The term "custody determination" is defined to include temporary as well as permanent custody orders, and includes visitation. The terms "modification" and "modify" are defined to refer to a custody determination made after another custody determination concerning the same child. Such a definition is needed when, for example, there is jurisdiction in two States under different paragraphs of subsection (c)(2) and one of the States makes an order and the other State is asked to make a contrary order.

Subsection (c) states jurisdictional criteria. Although it does not forbid a State from assuming jurisdiction to decide custody matters where such State does not meet the criteria set forth in this subsection, that State's custody determination will not be entitled to full faith and credit pursuant to subsection (a) unless it does meet those crtieria. The "mere physical presence" of a child in a State does not by itself constitute the "significant connection" with that State that is basic to jurisdiction.

Subsection (d) provides that once it is exercised, jurisdiction continues as long as the child or a contestant continues to reside in that State. Thus, a parent cannot "oust" the court of jurisdiction by re-

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moving the child to another jurisdiction in the hopes of obtaining a more favorable determination.

Subsection (e) provides that an order is proper and entitled to universal enforcement only if reasonable notice and an opportunity to be heard is given to all interested persons.

Subsection (f) states the only exception to subsection (a)'s requirement of full faith and credit. The exception applies if (1) the State court has jurisdiction, and (2) the State court that earlier has acted on the case has lost, or has declined to exercise, jurisdiction to modify the earlier determination.

Subsection (g) provides that, during the pendency of a proceeding in one State in accordance with this section, no other State shall exercise jurisdiction to make a custody determination concerning the same child. This subsection gives recognition to the most timely commenced proceeding, unless the court in that proceeding declines jurisdiction in deference to another State which it concludes is a more appropriate forum under the circumstances.

Subsection (b) of section 717 makes a series of amendments to section 453 of the Social Security Act (42 U.S.C. 653) designed to strengthen the Parent Locator Service maintained by the Department of Health and Human Services. Subsection (b) (1) adds language to section 453 that requires the Parent Locator Service to provide information about the whereabouts of any absent parent or child. The current language of section 453 requires the transmission of information about an absent parent only when such information is to be used to locate the parent for the purpose of enforcing support obligations. The amendment permits such information to be used for the purpose of making or enforcing a child custody determination that is entitled to be enforced under 28 U.S.C. 1738A.

The other six paragraphs of subsection (b) make other appropriate amendments to section 453 to provide effective and efficient Federal Government assistance to a parent who has lawful custody of a child who is kidnapped by that parent's estranged spouse.

Section 718

Section 718 contains three amendments to the definitions section (section 102) of the Controlled Substances Act (21 U.S.C. 802).

Paragraph (1) modifies the definition of the term "dispense" by deleting the adjective "lawful" immediately before the phrase "order of, a practitioner" in section 802(10). Paragraph (2) changes the definition of the term "marihuana" to be "all parts of the plant botanically classified as genus Cannabis" in section 802(15). Paragraph (3) deletes the term "lawfully" from the definition of "ultimate user" in section 802(25).

Section 719

Section 719 amends section 501 of the Employee Retirement Income Security Act of 1974 by adding a new subsection (b) (after classifying the existing matter as subsection (a)). The new subsection provides that any document required to be published or kept as part of the records of an employee welfare benefit plan or an employee pension plan shall be considered a "Government matter" for purposes of section 1742 (relating to making a false statement) of the proposed code.

Section 720

Section 720 makes a series of amendments to 28 U.S.C. 1865(b), relating to qualifications for jury service.

Subsection (b) of 28 U.S.C. 1865 sets forth certain permissible exceptions to mandatory service on Federal juries. This amendment repeals the exception that a person "has a charge pending against him for the commission of . . . a crime" or has been convicted of a crime. The amendment reestablishes this permitted exception in paragraphs 5, 6, and 7. A principal result of the change will be to permit former offenders to serve on juries after 5 years have elapsed from the date of their conviction, provided that they are not then serving a sentence of imprisonment. This section conforms the rights of former offenders to those provided in sections 8121 (relating to limitation on restriction of eligibility for certain Federal activities because of Federal conviction) and 8122 (relating to limitation on restriction of eligibility for certain government employment because of certain convictions) of the proposed code.

Section 721

Section 721 adds a new subsection (f) to 28 U.S.C. 604, relating to the duties of the Director of the Administrative Office of the United States Courts. The new subsection requires the Director to investigate the work of Federal probation officers and to collect for publication statistical and other information concerning the work of Federal probation officers. The new subsection also requires such Director to prescribe record forms and statistics to be kept by Federal probation officers, to endeavor to promote the efficient administration of the probation system, to fix the salaries of probation officers under the direction of the Judicial Conference, and to incorporate in the annual report of the Director of the Administrative Office "a statement concerning the operation of the probation system" in the Federal courts.

This amendment has the effect of transferring section 3656 of current title 18 to title 28 of the United States Code.

Section 722

Section 722 amends provisions of laws outside title 18 that provide for the enforcement of subpoenae issued by government agencies. With one exception, these sections provide for application by the agency to a Federal court for an order compelling compliance with a subpoena. Disobedience of such court orders is punishable as contempt. Some provisions authorizing subpoenae also provide for misdemeanor penalties in the case of a failure to obey the subpoena. *See* discussion at 169–70, *supra*. In the case of the district land offices of the Department of the Interior, however, only the misdemeanor penalties are provided.

Subsections (a) through (j)(2) and subsections (k) through (o) of this section amend the provisions which provide that failure to obey a court order compelling attendance is punishable as a contempt. Under the proposed amendment, the provisions of subchapter IV of chapter 17 of title 18, United States Code (relating to contempt), would be applicable to such disobedience of a court order. Thus, except in the case of the limited sanctions provided by section 1731, punishment would be subject to normal criminal procedures.

In accordance with current law, subsection (j)(3) amends 43 U.S.C. 104 to permit disobedience to a subpoena of the district land offices of the Department of the Interior to be punished pursuant to subchapter IV of chapter 17 of title 18, United States Code without prior recourse to a court for an order compelling attendance. Thus, the district land offices constitute an "authorized agency" as defined in section 1737 of the proposed code.

SECTION 723

Section 723 repeals sections or portions of sections, of present law that are unnecessary or redundant or that are inconsistent with the proposed new title 18. At the time of this writing, a Committee amendment is under consideration which would substitute a more extensive section repealing provisions of current law which would be superseded by proposed title 18.

Subsection (a) amends section 313(a)(10) of the Federal Election Campaign Act of 1971 (2 U.S.C. 437g(a)(1)) by striking certain language referring to false statements. Such false statements would be proscribed by section 1742 of the proposed code.

Subsection (b)(1) repeals subsection (c) of section 14 of the United States Grain Standards Act (7 U.S.C. 87c), which provides protection for persons performing duties under that act by including them within the protections of 18 U.S.C. 111, 1114. Such protection would be provided pursuant to section 2303 of the proposed code.

Subsection (b)(2) repeals section 15 of the Agricultural Marketing Act (12 U.S.C. 1141j(b)), which prohibits speculation by employees of the Farm Credit Administration. Such conduct would be proscribed by section 1756 of the proposed code.

Subsection (b)(3) repeals subsection (c) of section 9 of the Farm Labor Contractor Registration Act of 1963 (7 U.S.C. 2018). The conduct proscribed in that section would be prohibited by 1514 of the proposed code.

Subsection (c)(4) repeals subsection (b) of section 16 of the Animal Welfare Act (7 U.S.C. 2146), which prohibits various forcible assaults on and interferences with persons engaged in the performance of duties under that act, or on account of the performance of such duties. Such conduct would be prohibited by sections 1757 and 1758, and subchapter I and II of chapter 25 of the proposed code.

Subsection (c)(1) repeals subsections (c), (d), (e) and (f) of section 308 of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1457). These subsections include property and personnel of the Corporation within the definitions of certain terms of title 18. Under the proposed code, the Corporation constitutes a government agency (section 101), its personnel are public servants (section 101) and the Corporation is a national credit institution (section 1745). The repealed subsections are thus unnecessary.

Subsection (c)(2) repeals paragraph (3) of section 408(j) of the National Housing Act (12 U.S.C. 1730a(j)), which subjects employees of savings and loan holding companies to the provisions of 18 U.S.C. 1006. This section is no longer necessary since such companies would be national credit institutions under the proposed code (section 1745), and its employees would thus be subject to section 1742 of the proposed code.

Subsection (c)(3) strikes out the last sentence of section 8(a) of the Bank Holding Act of 1956 (12 U.S.C. 1847), for the same reasons as for the repeal of 12 U.S.C. 1730a(j)(3), *supra*.

Subsection (d) repeals section 213 of title 13, United States Code, which prohibits false statements by employees of the Bureau of the Census. Such conduct would be prohibited by section 1742 of the proposed code.

Subsection (e)(1) repeals subsection (b) of section 916 of the Electronic Fund Transfer Act (15 U.S.C. 1693n(b)), which prohibits various types of larcenous conduct involving certain debit instruments. Such conduct would be prohibited by section 2531 of the proposed code.

Subsection (e)(2) repeals paragraph (2) of subsection (d) of section 503 of the Natural Gas Policy Act of 1978 (15 U.S.C. 3413), which provides penalties for false statements upon which the Federal Energy Regulatory Commission relied. The proscribed conduct would be covered by section 1742 and the various fraud sections of the proposed code.

Subsection (f)(1) repeals the second paragraph of the Act entitled "An Act to provide an adequate basis for administraiton of the Lake Meade National Recreation Area, Arizona and Nevada, and for other purposes," (16 U.S.C. 460n–8) which establishes a United States magistrate for that area. This section is superfluous in view of the Magistrate Act of 1979, Public Law No. 96–82, 93 Stat. 643.

Subsection (f)(2) repeals paragraph (4) of section 3(b) of the Fish and Wildlife Improvement Act of 1978 (16 U.S.C. 7421(b)), which provides protection for persons performing duties under that act by including them within the protections of 18 U.S.C. 111, 1114. Such protection would be provided pursuant to section 2303 of the proposed code.

Subsection (g)(1) strikes certain language from section 116(d) of title 17, United States Code, which prohibits false statements in applications for certificates to operate phonorecord players. Such conduct would be prohibited by section 1742 of the proposed code.

Subsections (g)(2) and (g)(3) repeal subsection (a) of section 506 and section 509 of title 17, United States Code, which provide for forfeiture of certain property involved in the infringement of copyrights. Such provisions would be superfluous in view of sections 8101–03 of the proposed code.

Subsection (h) repeals paragraph (3) of subsection (f) of section 1001 of the National Defense Education Act of 1958 (20 U.S.C. 581(f)), which applies 18 U.S.C. 1001 to oaths required to be made as a prerequisite for payments under that act. Such conduct would be prohibited by sections 1742 and 2531 of the proposed code.

Subsection (i)(1) repeals subsection (c) of section 12 of the Poultry Products Inspection Act (21 U.S.C. 461), which prohibits various forcible assaults on and interferences with persons engaged in the performance of duties under that act, or on account of the performance of such duties. Such conduct would be prohibited by sections 1757 and 1758, and subchapters I and II of chapter 25 of the proposed code. For similar reasons subsections (i)(2) and (i)(3) repeal section 405 of the Wholesome Meat Act (21 U.S.C. 675) and subsection (c) of section 12 of the Egg Products Inspection Act (21 U.S.C. 1041).

Subsection (i)(4) repeals subsection (c) of section 408 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C.

848(c)), which makes special sentencing provisions for drug offenders. Such provisions are replaced by the sentencing procedures of the proposed code.

Subsection (i)(5) repeals section 714 of the Civil Rights Act of 1964 (42 U.S.C. 20003–13), which provides protection for persons performing duties under that act by including them within the protections of 18 U.S.C. 111, 1114. Such protection would be provided pursuant to section 2303 of the proposed code.

Subsection (j) repeals section 229 of the Atomic Energy Act of 1954 (42 U.S.C. 2278a), which prohibits trespass upon Atomic Energy Commission facilities. Such trespass would be prohibited by section 2512 of the proposed code.

Subsection (k) repeals certain portions of section 13(a) of the Railroad Retirement Act of 1974 (45 U.S.C. 231*l*(a)) which prohibit false statements and false claims under the act. Such conduct would be prohibited by sections 1742 and 2531 of the proposed code.

Subsection (*l*) repeals subsection (a) of section 4 of the Internal Security Act of 1950 (50 U.S.C. 783), which prohibits conspiracies to establish a totalitarian dictatorship. Such conspiracies would be prohibited by section 1002 and 1301–02 of the proposed code.

TITLE III OF THE BILL—EFFECTIVE DATE

Section 901

Section 901 sets forth the effective date of the legislation.

Subsection (a) provides that the Criminal Code Revision Act of 1980 and the amendments and repeals made by the Act shall, except as provided in subsection (b), takes effect on the fourth January 1 that occurs after the date of enactment of the Act.

Subsection (b) provides that the provisions in the legislation relating to sentencing guidelines (chapter 43 of the proposed code) shall take effect on October 1, 1981. The initial sentencing guidelines must be submitted, pursuant to chapter 43, 180 days before the effective date set forth in subsection (a).

Thus, the substantive offense provisions of the legislation will not take effect for more than 3 years after the date of enactment. The Committee agrees with United States District Judge Alexander Harvey, II, that

> [a] three-year period is needed not only to enable the Congress to remedy deficiencies in any of the provisions of the Act before they become effective, but more importantly, in order to educate judges, prosecutors and defense attorneys and thus prepare them for the major changes in indictment forms and in jury instructions (each a mini-opinion) that the new Code will mandate. This need cannot be overemphasized when we recognize that more verdicts are reversed because of faulty jury instructions than for any other cause.

Testimony of United States District Judge Alexander Harvey, II, on behalf of the Judicial Conference of the United States, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice, of the House Committee on the Judiciary, 96th Cong., 1st sess. (1980).

Oversight Findings

The Committee makes no oversight findings with respect to this legislation.

In regard to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

New Budget Authority

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, H.R. 6915 creates no new budget authority or increased tax expenditures for the Federal Government.

Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

Federal Advisory Committee Act of 1972

The Committee finds that this legislation does not create any new advisory committees within the meaning of the Federal Advisory Committee Act of 1972.

Cost Estimate

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressional Budget Office and estimates the cost of Federal outlays for fiscal years 1982, 1983, 1984, and 1985 to be $1.9 million, $3.4 million, $7.0 million, and $8.7 million respectively.

Statement of the Congressional Budget Office

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, and section 403 of the Congressional Budget Act of 1974, the following is the cost estimate on H.R. 6915 prepared by the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, D.C., August 15, 1980.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 6915, the Criminal Code Revision Act of 1980.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

JAMES BLUM
(For Alice M. Rivlin, Director).

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: H.R. 6915.
2. Bill title: Criminal Code Revision Act of 1980.
3. Bill status: As ordered reported by the House Committee on the Judiciary, July 2, 1980.
4. Bill purpose: The bill amends title 18 of the United States Code by revising substantive federal criminal law and its codification, reorganizing administrative procedures and civil proceedings, and changing terms of imprisonment and penalties. Some new offenses are created and some existing are defined differently. The bill also provides for an increase in the compensation permitted for court-appointed counsel representing criminal defendants. The general level of fines is increased. Finally, H.R. 6915 establishes the U.S. Sentencing Committee as an independent committee in the Judicial Branch. The bill is to take effect on the fourth January 1 after the date of enactment, except for the chapter relating to the Sentencing Committee. This provision is to go into effect on October 1, 1981.
5. Cost estimate:

	Millions
Estimated authorization level:	
Fiscal year:	
1981	
1982	$2.0
1983	3.5
1984	7.5
1985	8.9
Estimated outlays:	
Fiscal year:	
1981	
1982	
1983	1.9
1984	3.4
1985	7.0
	8.7

The above table does not include an estimate of the additional receipts to the Federal Government resulting from the bill's changes in the maximum levels for fines.

The costs of this bill fall within budget function 750.

6. Basis of estimate: For the purpose of this estimate, it is assumed that this bill will be enacted late in fiscal year 1980. Thus, it is assumed that all the provisions in the bill, except the Sentencing Committee, shall take effect on January 1, 1984.

The Sentencing Committee established by the bill is to have seven members, to be appointed by the Judicial Conference of the United States. The Committee is to develop sentencing guidelines and general policy statements regarding their application, with periodic reviews, revisions, and reports to Congress. The Committee is to obtain and analyze on a continuing basis data on the sentences imposed by Federal courts in criminal cases.

The Sentencing Committee is to be in place by the beginning of fiscal year 1982. The committee is to have seven members, four judges and three nonjudges. The committee is to be part-time; judges receive no additional pay for their services, and nonjudges are compensated at the daily rate of level GS–18 ($222) for each day they work for the committee.

The Administrative Office of the U.S. Courts estimates that the committee will require about 50 additional full-time staff to carry out the responsibilities described in the bill. Total costs are estimated to be $1.6 million for fiscal year 1982, and $2.7 million in 1983. Estimated costs in later years are adjusted for inflation. It is estimated that 90 percent of each year's sum will be spent in that same year, with the remaining amount spent in the following year.

The bill also authorizes a 50-percent increase in hourly fees payable to court-appointed counsel. Under current law, court-appointed attorneys receive no more than $30 an hour for time expended in court, and $20 per hour for time spent out of court. H.R. 6915 raises the ceiling to $45 an hour for time in court, and $30 an hour for time out of court. Based on information from the Administrative Office of the U.S. Ccurts, it is estimated that the increased cost to the Federal Government would be $4.1 million for the final three-quarters of fiscal year 1984 (assuming January 1, 1984, to be the date of implementation) and $5.7 million for 1985.

H.R. 6915 requires the Attorney General to prescribe guidelines for the exercise of Federal enforcement efforts in circumstances where there is an overlap with State or local jurisdiction. The Attorney General is to report annually to Congress on the nature and extent of the exercise of concurrent Federal jurisdiction, and he is to do so in the course of his annual report of business and statistics required under current law. Based on information from the Department of Justice, it is estimated that there will be no significant additional cost to the Federal Government resulting from this provision. The agency is already performing similar functions.

H.R. 6915 raises the maximum limit on fines. Under current law, almost all offenses carry with them fines as an authorized form of sentence. Usually, a felony is punishable by a maximum fine of $10,000. H.R. 6915 recodifies crimes into classes, and ascribes maximum limits to these classes. If the defendant is an individual (as opposed to an organization) and is convicted of a felony, H.R. 6915 allows him to be fined up to $250,000. H.R. 6915 also stipulates that those leveling fines shall consider the defendant's ability to pay when setting the amount. It is not possible to estimate the amount of additional revenues to the Federal Government that would result from this bill, since it is not possible to predict how the new ceilings will affect the amount of fines levied, or the amounts collected. (Of the $1 billion levied in fines in 1979, the Administrative Office of the U.S. Courts, which collects the bulk of the fines, collected only $41.4 million.)

There are transition costs associated with the implementation of a revised Criminal Code. The following assumptions and estimates are based on information from the Department of Justice.

It is assumed that there will be costs for training those who currently work within the federal criminal system, including preparation

of training seminars, and assignment of personnel to be available to respond to questions from the field. It is estimated that training costs for those in the judicial system would total approximately $400,000.

Changeover costs will involve acquiring copies of the new code, preparing new forms of indictments, modifying the U.S. Attorneys Manual, and assigning personnel to assist in initial cases. It is estimated that these costs would total $500,000.

A revision of the Criminal Code will require these same kind of expenditures from the investigative agencies as well. It is estimated that the Drug Enforcement Administration and the U.S. Marshals Service will each incur a one-time cost of $25,000 to train personnel and revise their various manuals. It is estimated that the Federal Bureau of Investigation will incur a cost of $625,000 for purposes of training personnel, preparing and distributing revised agent guidelines and operation manuals, and for impact evaluation studies.

Thus, it is estimated that the total cost of implementation would be approximately $1.6 million, spent over a 3-year period beginning in fiscal year 1982. It is estimated that 25 percent of the total would be spent in the first year, 50 percent in the second year, and 25 percent in the third year.

7. Estimate comparison: None.

8. Previous CBO estimate: On February 29, 1980, the Congressional Budget Office prepared a cost estimate for S. 1722, the Criminal Code Reform Act of 1979, as ordered reported by the Senate Committee on the Judiciary, January 17, 1980. The Senate bill differs in cost from the House bill primarily in that S. 1722 establishes a Victim Compensation Fund and a Victim Compensation Board, which are not included in H.R. 6915.

In the course of preparing a cost estimate for H.R. 6915, new information has come to light which applies to S. 1722 as well as the House version. The Senate bill would incur the same transition costs as H.R. 6915, totalling $1.16 million over a 3-year period. Also, S. 1722 would result in similar increases in the amount of revenues to the Federal Government because of the maximum fines established by the bill. It is estimated that the Senate version would probably result in a greater increase in receipts than the House version, because S. 1722 establishes a collection system similar to that of the Internal Revenue Service. However, in neither bill is it possible to estimate what the amount of increase may be.

9. Estimate prepared by: Blaire French.

10. Estimate approved by:

C. G. NUCKOLS
(For James L. Blum,
Assistant Director for Budget Analysis).

COMMITTEE VOTE

H.R. 6915 was reported on July 2, 1980 by voice vote, a quorum of Members being present.

ADDITIONAL VIEWS OF CONGRESSMAN DON EDWARDS ON H.R. 6915

Congressman Robert Drinan and the Subcommittee on Criminal Justice did excellent work in writing the new criminal code. Although there are a few provisions of this legislation which trouble me, generally the Drinan Subcommittee version pays proper respect to civil liberties concerns.

For example, the Subcommittee and the full Committee wisely rejected a provision which would have given the government a broad right to appeal sentences. In my judgment this provision would violate the "double jeopardy" clause of the Constitution and would be wrong as a matter of policy.

The Committee rejected efforts to add to federal criminal law the new inchoate crime of facilitation. This proposed crime seeks to criminalize knowing about a crime but not intending its commission. It would not only be contrary to traditional principles of accomplice liability, but also would have major potential for investigative abuse.

The Committee also rejected efforts to add a new inchoate offense of criminal solicitation, which would have punished an actor for endeavoring to persuade another to commit an offense even though there was no overt act towards the commission of the offense. This provision would have directly intruded upon freedom of speech. The very type of criminal investigation necessary to detect solicitation prior to the commission of the underlying crime has clear potential for infringing constitutional rights.

I also applaud the Committee's decision to preserve the *Enmons* decision (*United States* v. *Enmons*, 410 U.S. 396 (1973)) and the current language of 18 U.S.C. § 1951 so that persons or organizations can be prosecuted for extortion only when they "wrongfully" obtain property by threatening force or violence. This Committee action prevented expansion of federal law which would impinge on *bona fide* labor activities protected by the First Amendment, and on states' jurisdiction to enforce their own criminal laws. A legislative overruling of *Enmons* would involve federal law enforcement officials in any labor dispute in which property damage occurred during picketing intended to induce an employer's agreement, as long as the employer was engaged in interstate commerce. It would be a dangerous and unwarranted expansion of federal criminal jurisdiction.

I support these decisions of the Committee, and supported reporting the bill out of Committee. My deep concern, however, is that there is little chance that the Drinan bill will not be seriously compromised by amendment during full House of Representatives consideration, and in the conference with the Senate. The Senate bill contains many new laws that would violate fundamental civil liberties. It authorizes preventive detention. It would give the government unprecedented powers to investigate and prosecute constitutionally protected activity.

If the good work of the Drinan Subcommittee is undone by ill-conceived amendments such as those outlined above, I would not be able to support this legislation. I am convinced that the adoption of such amendments is likely. Therefore, I frankly feel it would be best if further action on this legislation were deferred to a time when the House might more carefully consider the implications of this legislation and these amendments for our constitutionally guaranteed civil rights and liberties.

DON EDWARDS.

ADDITIONAL VIEWS OF ROBERT W. KASTENMEIER ON H.R. 6915, THE CRIMINAL CODE BILL

The risks in any attempt at criminal law codification are great. The substance of penal law has a profound impact on our daily lives. As aptly observed by one noted commentator almost 30 years ago about the challenge of a model penal code:

> If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its coils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual.[1]

Similarly, it can fairly be stated that American society is judged by the quality of its laws and procedures. Residents of this democratic nation have an expectation that their laws and institutions will both serve and protect them. When society through its government acts to deprive one of its members of life, liberty or property, it takes a long and awesome step. This is especially true in the area of criminal law. In the words of a former Chief Justice of the United States,

> No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called measures by which the quality of our civilization may be judged.[2]

Because of its importance to our society, I have long been concerned about the rationality, clarity and quality of our penal law. In addition, I have had a longstanding and continuing interest in the recodification and reform of the federal criminal law. I was a member of the National Commission to Reform the Criminal Laws (the Brown Commission) which proposed an omnibus rewrite of the federal criminal law. I sponsored legislation during the 94th Congress to recodify our criminal laws.

In the past, I have been somewhat disappointed that versions of the new code being considered by the Congress have rejected many of the recommendations of the Brown Commission. While opposing those versions of the new code, I have continued my general support of comprehensive revision of the federal criminal law.

During the approximately 45 hours of full Committee mark-up—nearly all of which I attended—I listened carefully and participated in both the debate and amendment process. After it was all over, I decided to vote "no" for the following reasons.

First, the members did not have an adequate means of reviewing, evaluating, criticizing, and improving the impact on both citizens and

[1] Wechsler, *The Challenge of a model Penal Code*, 65 HARV. L. REV. 1097. 1098 (1952).
[2] Coppedge v. United States, 369 U.S. 438, 449 (1962) (Warren, C. J.).

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governmental processes of a five hundred page bill. In this regard, I wish to associate myself with the separate views of Mr. Seiberling, Mr. Hughes, and Mr. Conyers.

Debate and amendments often focused on emotional issues such as gun control, entrapment, death penalty, and obscenity. Little or nothing was said about less political issues having perhaps an equal or more important impact on daily lives. An illustration of this is the codification of an affirmative defense for reliance upon official misstatement (i.e., the "Watergate" or "Nuremburg" defense). Not a single word was stated or a single amendment offered about this important area of law.

Similarly, very little was said about contempt offenses. Although I happen to agree with many of the provisions drafted by the subcommittee, it goes without saying that they escaped full Committee scrutiny.

Second, I registered a negative vote on passage of the bill by the Committee because in the somewhat hurried push to report the bill during the final week of consideration, the Members unfortunately seemed willing to eliminate several reforms of the criminal laws for which there was a wide consensus of support.

A good example of this was reinsertion of the Logan Act (18 U.S.C. 953) in the code.[3] In my view, the Act is unconstitutional. Moreover, it is mere surplusage, as is indicated by the fact that in the 180 years since it was passed, there has not been a single prosecution under the Logan Act.

There are two constitutional problems with the Logan Act. First, the language of the statute is too vague to be applied consistently and fairly. In the only court decision addressing the proper construction of the Act, the court noted that the constitutionality of the Act was called into question by its vagueness.[4]

The second and more serious constitutional problem with the Act is the extent to which it unconstitutionally infringes on First Amendment rights of freedom of expression. This problem was noted by the Brown Commission, which in the course of recommending its repeal said of the Logan Act: "By its terms, correspondence containing ideas clearly identified as individual action, addressed to foreign officials, could come within its scope and could be an instrument of political oppression." [5] In this regard, the Act punishes expressions of personal opinion concerning foreign policy that are clearly protected by the Constitution.[6]

Even if it were constitutional, the Logan Act is rendered unnecessary by other sections of the Code that are sufficient to reach persons who

[3] The Logan Act provides:

> Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than $5.000 or imprisoned not more than three years, or both.
>
> This section shall not abridge the right of a citizen to apply himself or his agent to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

[4] Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964).

[5] NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 499 (1970).

[6] *See, e.g.*, Bond v. Floyd, 385 U.S.C. 116, 132 (1966); Kilskila v. Nichols, 433 F.2d 745, 748 (7th Cir. 1970).

fraudulently claim to be representatives of the United States Government.[7] To the extent that the Act reaches beyond those statutes, it is unconstitutional and should be repealed.

Moreover, in my opinion, reinsertion of the Logan Act into the Code represents the wrong mentality about codification. It symbolizes the clear possibility that other provisions of doubtful constitutionality and minimal law enforcement value may have survived the Committee's scrutiny. This is an ominous warning of dangers lurking ahead.

Third, I decided to oppose final passage because in several important regards the House code is not an improvement over current law. Sometimes seemingly unimportant changes were made to current statutes or case law that have the result of threatening civil liberties.

Two illustrations of this come to mind. Both involve important departures from current law which I attempted—and failed—to remedy by amendment.

The first involves the subject of "obstructing government function by physical action". H.R. 6915, as reported by the Committee, provides a defense to interference with the making of an arrest where the arrest is illegal and in bad faith and where the interference poses no significant risk of harm to any person.[8] The Committee report admits that "this is most likely a narrower defense than current Federal law provides." This is an accurate assertion, but perhaps a bit understated.

The common law defense of resisting an illegal act of a law enforcement or other federal official turns on the reasonableness of the defendant's conduct, not the officer's "bad faith." This defense is currently available to persons prosecuted under 18 U.S.C. section 111. Thus, for example, "intervention by a third party to prevent grievous bodily harm to another from what reasonably appears to be an unprovoked assault may not subject the intervenor to liability for violation of Section 111." [9]

A defense of resisting illegal conduct by law enforcement officials which is substantially narrower than current law would have a serious impact on the exercise of First Amendment rights. I submit that it is going to be virtually impossible to produce evidence and prove the combination of the following factors: that the arrest was unlawful; that the police officers knowingly acted in bad faith; and that the interference to the arrest was not of such a nature as to pose a significant risk of harm to any person. Consider the case of an orderly, nonviolent demonstration occurring in front of a federal building to protest an action of an agency. Suppose that a law enforcement officer orders demonstrators to disperse or be arrested, on the ground that they are obstructing access to the building, and are threatening interference with the function of the U.S. Marshals. The arresting officer believes that the order is lawful under section 1701 of H.R. 6915. Even though the demonstrators might not be convicted of obstructing the federal building, they could be convicted for obstructing the law enforcement

[7] *See, e.g.*, the crimes of perjury, false statements, and impersonation of officials. *See generally* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, 499 (1970).

[8] *See* section 1701(c) of the proposed code.

[9] United States v. Kartman, 417 F.2d 893, 895, n. 5 (9th Cir. 1969). *See* John Bad Elk v. United States, 177 U.S. 529, 535 (1900). *See generally* Chevingny *The Right to Resist an Unlawful Arrest*, 78 YALE L. J. 1128 (1969); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970).

officer under section 1701 if they refused to obey his illegal order or if they impaired the execution of an unlawful arrest. While the demonstrators might ultimately avail themselves of a defense that they were entitled to disobey an unconstitutional order,[10] there is clearly great potential for abuse in the broad discretion that section 1701 delegates to law enforcement officials acting in good faith, but unlawfully, (or vice versa). to determine what constitutes a physical obstruction prohibited by the statute.

A second example of an unnecessary and unwarranted change from current law is found in section 1316 (relating to wartime impairment of military service obligations). As currently drafted, the section requires that the defendant act "knowingly". This state of mind standard is a departure from current federal law which requires a specific intent to interfere with, hinder or obstruct the recruitment, conscription or induction of persons into the military.

This section of the proposed code is derived from 18 U.S.C. 2388(a) and 50 U.S.C. App. 462(a). Section 2388 of current title 18 uses the phrase ". . . wilfully obstructs the recruiting or military service". Section 462(a) of title 50, Appendix, uses the phrase "knowingly". As with many terms in current law the courts have struggled to attach an exact meaning to the various and diverse terms Congress has chosen to use when creating a state of mind requirement. In general, the courts have construed the term "wilfully" as requiring a specific intent.[11]

Even assuming arguendo that there was not such a strong case law on this issue, support for maintaining current law is still warranted. Because this section regulates conduct which is also potentially protected by the Constitution such as free speech, it is constitutionally necessary to have a criminal statute which employs a specific intent standard. This was the conclusion of the Brown Commission.[12]

These two illustrations may seem unimportant when set in the larger context of criminal codification.[13] I nonetheless offer them as examples of controversial changes in existing law which are not supported by a showing of substantial societal need. Further, when given the choice of returning to current law, the full Committee rejected that recourse. That, in my opinion, was unwise.

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[10] *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

[11] *See* Note, 51 NOTRE DAME LAW. 786 (1976). Dunne v. United States, 138 F.2d 137, 142 (8th Cir. 1943), *cert. denied,* 320 U.S. 790 (1943), (construing a parallel section, 18 U.S.C. 2385). *See also United States* v. *Moylan,* 417 F.2d 1002, 1004 (4th Cir. 1969) (construing 50 U.S.C. App. 462(a).

[12] *See* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT section 1109 (1971); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 446–47 (1970).

[13] Another example of the seemingly unobtrusive mistakes made by the Committee is found in section 2531 of the proposed code. Subsection (e)(36) of that section creates Federal jurisdiction over the offense of theft of property consisting of "airline tickets or other documents issued by air carriers, or their authorized agents . . ." if the value of the tickets is over $5,000 or if more than 100 tickets are taken. This proposed expansion of Federal jurisdiction was initially rejected by the full Committee, and then pursuant to a reconsideration vote, taken in my absence, was approved.

No hearings were held and not a single witness testified on this issue. The Committee Report is starkly silent on the need for this change in existing law, both in terms of whether there is a gap in existing State and Federal law and whether there is a substantial societal problem that requires Federal intervention. I feel that such a showing should be made.

Even assuming arguendo that a need exists, one is left with a nagging feeling that the program is not well drafted. Why, for example, does it not cover the theft of equivalent amounts of boat, train or bus tickets? What about the theft of tickets to the theater or athletic events? In the absence of answers to these questions, I not only oppose section 2531(e)(36) but use it as an illustration of a defect in the ongoing effort to codify our criminal laws.

In this regard, I have often proposed—and I continue to do so now—that when a section of the code is extremely controversial and is unsupported by broad-based interests, the codifiers ought to return to existing law.

In closing, I applaud the efforts of the subcommittee Members and its Chairman for this monumental endeavor. Not only has their dedication to criminal codification been unwavering, but their work-product is an impressive one. I strongly prefer the House bill to its Senate counterpart. And I think that overall the House work-product is an improvement over existing law.

But that is not enough. As in any other monumental undertaking—such as in architecture or art—the test is not whether the work-product is better than any other effort, but whether it is worthy of the civilization it represents. As one who has worked on criminal codification for over fifteen years, I can report that while the House bill is close to meeting the strict scrutiny, that it must receive, it does not quite make the grade. Another year or two to touch up unwise brush strokes or unnecessary blemishes is required to make this massive undertaking one that our children and future generations can live with; and one that we can allow our civilization to be judged by.

ROBERT W. KASTENMEIER.

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ADDITIONAL VIEWS ON GOVERNMENT APPEAL OF SENTENCES BY REPRESENTATIVES MIKE SYNAR, JACK BROOKS, ROBERT W. KASTENMEIER, DON EDWARDS, JOHN F. SEIBERLING, ROBERT F. DRINAN, SAM B. HALL, JR., AND LAMAR GUDGER

One of the most important issues before the Subcommittee on Criminal Justice and the Committee on the Judiciary was the question of whether to permit Government appeal of sentences on the grounds that they are too lenient. Fortunately, both the Subcommittee and the Committee rejected amendments that would have provided for such appeals. Since the Department of Justice has lobbied long and hard for this increase in Federal prosecutorial powers, this issue will undoubtedly be raised again on the floor of the House. For that reason we set forth our views for opposing Government appeals in this supplement to the Committee Report on H.R. 6915.

In framing our constitutional system 200 years ago, the Founding Fathers had the perspective of their own personal experience with abuses of Governmental power. They had the advantage of a century and a half of British experience. They recognized that power corrupts. They saw that governmental power—including prosecutorial power—must be checked through a careful balance among the three branches of Government. In hindsight, we can see that the crowning genius of the American experience in Government is our written Constitution, with its express limitations on governmental power and the creation of an independent judiciary to enforce those constitutional limitations on both the executive and the legislative branches of Government.

Inclusion of a provision in this bill permitting the Government to appeal sentences on the ground that they are too lenient would tend to undermine the independence of our judges. It would also threaten other safeguards in our Constitution and the Bill of Rights for the protection of individual liberty—the bar against double jeopardy and the guarantee of due process. For such reasons we oppose it.[1]

Double Jeopardy

The double jeopardy clause of the Constitution is based on the theme that the state, with its resources and advantages, is entitled to only one opportunity to bring the accused to justice. *Benton* v. *Maryland*, 395 U.S. 784, 795–96 (1969). This constitutional protection against govern-

[1] Government appeal from sentence is opposed vehemently by the American Bar Association, *see* report on Government Appeal of Sentences, 35 Business Law ,617 (1980); Freeman & Earley, *United States* v. *DiFrancesco: Government Appeal of Sentences*, 18 Am. Crim. L. Rev. (1980) (forthcoming), and by the American Civil Liberties Union. *See* testimony of John Shattuck, on behalf of the American Civil Liberties Union, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 1st sess. (1980).

mental overreaching prohibits two prosecutions or two sentences for the same offense. *See* Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 265–66 n. 12 (1965); Massachusetts Body of Liberties § 42 ("No man shall be twice sentenced by Civil Justice for the same Crime, offense, or Trespasse") (reprinted in 1 B. Schwartz, *The Bill of Rights: A Documentary History* 76 (1971)). An essential component of the protection against double jeopardy is the prevention of multiple factual determinations. Permitting the Government to seek a review of the factual determinations of a district court would run afoul of the constitutional prohibition against such repetitive risk-taking by the defendant.

From the first day of the Republic until 1970 there were no Federal or State statutes which authorized the Government to appeal from a sentence. During that nearly 200-year period, however, the Supreme Court has had occasion to comment indirectly on the propriety of such a practice. In a clear line of commentary the Court has uniformly criticized the expansion of Government power at the expense of the individual. *Reid* v. *Covert*, 354 U.S. 1, 37–38 n. 68 (1957) (commenting on an increase in sentence after court martial: "If the double jeopardy provisions of the fifth amendment were applicable such a practice would be unconstitutional."); *United States* v. *Benz*, 282 U.S. 304, 307 (1931); *Murphy* v. *Mass.*, 177 U.S. 155, 160 (1900); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873).

The only existing congressional authorization for Federal Government appeals, 18 U.S.C. 3576, was passed in 1970. This provision has been found constitutionally deficient by the Second Circuit Court of Appeals. *DiFrancesco* v. *United States* 604 F.2d 769 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980). Virtually all commentators agree that granting the Government the right to appeal from a sentence is unwise and unconstitutional, Richey, *Appellate Review of Sentencing: Recommendation for a Hybrid Approach*, 7 Hofstra L. Rev. 71, 80 (1978) ("Such a right would . . . add unnecessarily to the present vast power of the State."); Spence, *The Federal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy*, 37 Md. L. Rev. 739 (1978); Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 Va. L. Rev. 325 (1977). While this double jeopardy question may be answered by the Supreme Court within the next year, it would be foolhardy for Congress to act on this issue this year on the assumption that *DiFrancesco* will be reversed.

Due Process

Government appeal of sentences also raises a serious due process issue. Two opinions of the Supreme Court indicate that Government appeal would present a substantial due process question. *See Chaffin* v. *Stimcombe*, 412 U.S. 17 (1973) (Powell, J.); *Swisher* v. *Brady*, 438 U.S. 204, 219 (1978) (Marshall, J., dissenting). Following a conviction, a defendant is ordinarily sentenced by the judge who presided over the trial. This judge is in a unique position among other trial and appellate judges in that he or she is intimately acquainted with all the intricacies of the trial, viewed the real evidence, and had the opportunity to observe the demeanor of the defendant, the victim, and any

other witnesses. The difference between the information available to the trial judge and that available to others is even more acute when, as under current practice and the procedures developed by the Committee, the defendant is entitled to a separate sentencing hearing. The trial judge is able to examine the competence of the probation officer preparing the presentence report and recommending a sentence, and to observe and investigate what premises and prejudices regarding the defendant and the criminal justice system that the officer has brought to bear upon the preparation of the report and recommendation. The trial judge can also observe the demeanor of the defendant following conviction, and that of any witnesses. The judge can thereafter balance all of the evidence and observations from the trial and sentencing hearing with the needs of the community, and attempt to fashion a just sentence.

When the Government is given a statutory right of appeal, appellate judges are granted the power to override the conclusions of the trial judge and to increase the defendant's sentence solely in light of their review of the written record. The fundamental fairness requirements of due process dictate that a defendant be sentenced on the basis of all available information, not merely that which is committable to writing. An appellate judge cannot be permitted to impose a sentence in such a manner. To permit a "higher court" to negate the value of all the information available to the trial judge would violate due process.

Policy Analysis

Even if the Constitution does not bar prosecutors from appealing sentences that they regard as too lenient, Congress should reject any such enhancement of prosecutorial powers for the following public policy reasons.

As noted above, present Federal criminal procedures give both the person convicted and the prosecutor the opportunity to present to the judge imposing the sentence evidence and arguments on which sentence is most appropriate. Usually the sentence is imposed by the judge who tried the case. Because the judge presided over the trial, he or she already has firsthand knowledge of all of the facts leading to the conviction. The bill before us, H.R. 6915, gives that judge the opportunity to obtain additional information relevant to the proper sentence at a separate sentencing hearing. Both occasions give the trial judge the opportunity to observe the demeanor of the defendant and to assess the potential for rehabilitation. As a result, the district court judge is in a unique position to make the punishment fit the circmstances of the particular crime and the particular defendant.

The two principal justifications for permitting the defendant to appeal from a sentence are to protect the defendant from possible bias on the part of the sentencing judge and to enable the defendant to object to a sentence that goes beyond the limits of the Constitution or the statute.

The three policy arguments offered for permitting an appeal of sentences by the Government are: first, to provide for uniformity, second, to protect society from the occasional "too merciful" judge, and third, to give the prosecutors "equal rights" with the defendants. None of these arguments withstands close scrutiny.

As praiseworthy as the concept of uniformity of sentences may be as an abstract matter, the concept presupposes the possibility of fashioning equal punishment for equal guilt. Rarely, if ever, can two separate and distinct acts by different individuals at different times and different places and under different circumstances be viewed as equally morally reprehensible even though they both constitute the same statutory offense.

Generalization is, of course, necessary in drafting criminal statutes and in setting sentencing guidelines. But it does not follow that the same kind of generalization, simplification and depersonalization should be carried over to the imposition of sentences. Sentencing should not be a mechanical process. Putting those simplistic arguments aside, if the rehabilitative function of sentencing is to be served, it is of paramount importance that the sentencing judge attempt to individualize sentences. In this context, it is difficult to understand why as a matter of policy either a disappointed prosecutor (or a superior in the executive branch), or an appellate court in order to impose a more severe sentence, should be authorized to second guess the judge who saw and heard the relevant evidence.

Allowing the Government to appeal sentences on the ground that they are below the minimum recommended in any sentencing guidelines would have a tendency to transform the lower end of the guidelines into a statutory mandatory minimum sentence. An obvious reality is that judges do not like to be reversed. Thus providing the Government a right to appeal sentences that are below the guidelines would be a subtle pressure on the sentencing judge. A sentencing code that provides for sentencing guidelines but permits the Government to appeal sentences that are more lenient than those recommended in the guidelines threatens the same evils, albeit in a less direct form, that will result from statutory minimum sentences. These evils are oversimplification, the undermining of rehabilitation, the deterring of jury convictions and long term erosion of respect for law and order because of a perception of harsh sentences.

The threat of Government appeal would be a strong deterrent to the filing of appeals by defendants. Many seasoned public defenders fear Government appeal from sentence would lead to "appeal bargaining." *See* testimony of the Federal Public and Community Defenders and of John Cleary, on behalf of the National Legal Aid and Defender Association, Hearings on Revision of Federal Criminal Laws Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 1st sess. (1980). A provision requiring a superior's approval of a prosecutor's appeal does not alter the potential coerciveness of Government appeal of sentences. It merely tends to mitigate those effects by lessening the number of Government appeals. Even assuming good faith restraint by the current occupants of the executive branch, the grant of this type of power is still a mistake. As Justice Frankfurter once said,

> A policy of strict self-limitation is not accompanied by an assurance of permanent tenure and immortality of those who make it the policy. Evil men are rarely given power, they take it over from better men to whom it had been entrusted. There can be no doubt that this shapeless and all-embracing statute can serve as a dangerous instrument of political intimidation and coercion in the hands of those so inclined.

Screws v. *United States*, 325 U.S. 91, 160 (1945) (Frankfurter, J., dissenting).

Giving prosecutors, or their superiors, the authority to appeal sentences they regard as too lenient would unduly enhance prosecutorial powers in the most sensitive criminal cases. The power to appeal would most often apply to cases where the defendant has not negotiated a plea bargain. Although these "unbargained" cases are estimated to be only 10 percent of all criminal convictions, they are often the cases where defendants are most subject to scorn, public feelings run the highest, and the pressures for subjective, political abuse of prosecutorial power are the greatest. Indeed, in the Committee debates on this issue, the proponents of Government appeal sought to limit it to circumstances where the trial judge's sentence was "clearly erroneous" so that it would come into play only in "egregious" situations—where, in their words, "public opinion was outraged by the mildness of the sentence." Far from supporting Government appeal, however, that argument is one of the strongest reasons for rejecting it. The public is not always right, nor merciful, as the need for our anti-lynching laws demonstrates. Today's Justice Department claims that its targets are white collar criminals and civil rights violators. If history is a guide, tomorrow's Attorney General may focus prosecutorial wrath on unpopular political figures. This truth has been recognized on both sides of the Atlantic. An English commentator recently observed:

> Political pressure often builds up in some of these celebrated or notorious cases, cases involving homicide and rape and fraud and sensitive matters, and it would be regrettable if the prosecutor were subject to pressure to exercise the right to appeal. The public is frequently ill-informed when alleging that a sentence is wrong. Politicians and others pressing for things are not always over-endowed with wisdom or even scrupulousness. Sentencing is best left to the independent judiciary.

Samuels, *Should the Prosecution Have the Right To Appeal?*, 130 New York L.J. 104, 105 (1980).

The judicial discretion which opponents of Government appeal and statutory minimum sentences seek to protect is the discretion of the judge who heard and saw the relevant evidence. This discretion, assisted but not bound by guidelines, is the surest means of attaining meaningful uniformity in sentencing: sentences that suit the particular crime and the particular defendant.

The second argument for Government appeal is that we must protect society from the occasional "too merciful" judge. This argument goes against the whole tradition of our constitutional system of providing a series of procedural safeguards to protect the individual when the powers of Government are brought to bear. These constitutional protections are, among others, the right to be free from compelled self-incrimination, the right to counsel and the right to trial by jury. Indeed, one of the purposes of the right to trial by jury is to afford another means to keep the statutory law in step with social con-

science. The right to trial by jury can prevent the conviction of an individual where the jurors feel that the particular facts before them do not merit conviction. Thus, on occasion, "merciful" juries acquit persons charged with a crime. Constitutionally, there is no appeal from its judgment. The individual has run the gauntlet of an indictment, prosecution and trial and escaped without a blow. How then, is it appropriate to allow the prosecutor to compel the defendant, who ran the gauntlet, received only a glancing blow from a "merciful" judge, to go back through the line again for a still harder blow?

Where habitually lenient judges are appointed for life, the Government, having appointed them, has chosen to live with them unless they commit gross improprieties justifying impeachment. The possibility that the Federal Government occasionally may be stuck with such a lenient judge is one of the trade-offs to safeguard an independent judiciary. If the Government wants to protect itself against "too merciful" judges, it must do so by means—other than Government appeal of sentences—that are constitutional. Such means that come readily to mind are careful screening of potential appointments to the Federal bench, motions for disqualification of judges before trial where reasonable grounds exist, and actions for impeachment in the rare egregious instances.

The third argument advanced for Government appeal of sentences is that prosecutors should have equal "rights" with defendants. This argument turns the Constitution on its head. The constitutional safeguards for individuals are a "one-way street"; they are only available to defendants, not to prosecutors. There is no Government right to due process, no Government right to free speech, and no Government right to protection from unreasonable search and seizure. Affording the Government such "rights" would be a contradiction in terms since the purpose of these constitutional safeguards is to provide limitations on Government power. The idea of giving equal "rights" to defendants and prosecutors to appeal sentences that are outside the guidelines contradicts the philosophical premise of our Constitution and the Bill of Rights. The Constitution's recognition of the enormous disparity in power and resources between the defendant and the Government is hardly startling. One commentator, in opposing the concept of prosecutorial appeal of sentences, recently observed:

> The fact that the defendant can appeal is no logical reason for giving the prosecution the same right. The two "sides" are not equal. Their roles are different. The defendant is personally and intimately involved, his very reputation and liberty are involved. The prosecution is merely a public institution, and a powerful one, impartially and indifferently (in the best sense of that word) carrying out a public duty. The independence of the prosecution would be imperilled if it were to become embroiled in sentencing.

Samuels, *Should the Prosecution Have the Right to Appeal?*, 130 New York L.J. 104, 105 (1980).

Our basic concern regarding Government appeal of sentences is the proper use of Government power. The policy question posed is the necessity and propriety of correcting occasional abuses of power by

a few "too merciful" judges by enhancing the power of all prosecutors. This would enable all prosecutors, good and bad, to challenge the sentences of all judges, good and bad. The remedy is grossly out of proportion to the problem.

Recognizing this, the English have consistently rejected allowing prosecutors a right of appeal because it would be a fundamental departure from the traditional independence of the English judiciary and it would introduce serious friction into the relationship of prosecutors to the bench. A. Cross, *The English Sentencing System* 89 (1971). Proponents of Government appeal cite examples of other common law countries, such as Australia, Canada, South Africa and India, that now by statute permit Government appeal of sentences, but they neglect to mention that often that statutory right goes hand in hand with a prosecutorial right to appeal a jury verdict of acquittal—a notion anathema to our Constitution and to the venerable common law doctrine of *autrefois acquit*. *See* Criminal Appeal Act, 1912–1977, section 5A–(2) (New South Wales); Justices Act, 1902–1972, section 197 (Western Australia); Criminal Code Act, 1924, section 401(2) 1 Tasmania Stat. 1052 (1826–1959); Canada Revision Stat. Criminal Code, section 605, (1970); South Africa Criminal Procedure Act, section 311, (1977); India Code of Criminal Procedure, section 378 (1970). Moreover, we cannot be oblivious to events of recent years in both South Africa and India which show that encroachments on individual freedom are the price society ultimately pays for these and other measures which aggrandize the prosecution and undermine the independence of the judiciary.

Conclusion

The Committee on the Judiciary correctly recognized that Government appeal of sentences would be outside the mainstream of our effort to codify and reform the criminal justice process in the United States. It conflicts with important policy positions adopted by H.R. 6915:

Government appeal of sentences is inconsistent with separate sentencing hearings;

Government appeal is inconsistent with the continuity of the trial and sentencing process under which the trial judge imposes sentences;

Government appeal of sentences is inconsistent with rejection of special sentencing courts;

Government appeal of sentences is inconsistent with rejection of statutory minimum sentences;

Government appeal of sentences is inconsistent with advisory, rather than mandatory, sentencing guidelines.

Ultimately Congress must stand steadfastly against Government appeal of sentences because it violates both the letter and the spirit of the Bill of Rights.

Mike Synar.
Jack Brooks.
Robert W. Kastenmeier.
Don Edwards.
John F. Seiberling.
Robert F. Drinan.
Sam B. Hall, Jr.
Lamar Gudger.

ADDITIONAL VIEWS ON COUNSEL FOR WITNESSES BEFORE A GRAND JURY BY REPRESENTATIVES MIKE SYNAR, JOHN F. SEIBERLING, DON EDWARDS, JOHN CONYERS, JR., ROMANO Y. MAZZOLI, AND DAN GLICKMAN

We wish to record disagreement with one action taken by the Committee on the Judiciary during its consideration of the proposed Federal criminal code, H.R. 6915. We refer to the Committee's unfortunate action in deleting section 7312 of the proposed code from the Subcommittee-reported bill. Section 7312 would have, for the first time in our history, allowed counsel to accompany a witness appearing before a Federal grand jury—thus helping to assure due process in the grand jury. Our colleagues on the full Committee have missed an important opportunity to bring some measure of fairness to Federal grand jury proceedings.

During consideration of this issue in the Committee, Mr. Synar proposed a compromise amendment [1] that would have prohibited counsel from representing more than one witness at a time—similar to a provision which has worked well in Colorado for three years. Colorado Rev. Stat. section 16–5–204(4)(d); *People ex rel Losavio* v. *J. L.*, 195 Colo. 494, 580 P.2d 23 (1978) (constitutionality of a bar on multiple representation in the grand jury upheld).

This compromise amendment was intended to meet the concerns of the United States Department of Justice that problems regarding multiple representation of witnesses would be exacerbated by allowing counsel in the grand jury room. Hearings on S. 3905 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Cong., 2d sess., (Part I) at 51–109 (1978) (testimony of Phillip B. Heymann, assistant attorney general, criminal division). Unfortunately, however, the compromise was not adopted, and a motion to delete section 7312 carried.

During the Committee debate on this provision, many Members acknowledged the need for Congressional correction of the problem of grand jury abuse. Some Members claimed this issue could "weigh down" the comprehensive Federal criminal code bill and hinder its

[1] The text of the grand jury provision, with the amendment added in italic, was as follows:

§ 7312. Assistant of counsel to grand jury witness.

(a) A witness who appears before a grand jury of the United States shall be permitted to be accompanied by *an attorney* during such appearance. Such *attorney* may provide advice to the witness, but shall not address the grand jury or otherwise participate in the examination of the witness.

(b) *An attorney who accompanies a witness under this section shall not disclose matters occurring before the grand jury unless such disclosure is specifically authorized by the court or the Federal Rules of Criminal Procedure.*

(c) *The court shall prohibit a/n attorney who otherwise would be permitted to accompany a witness under subsection (a) of this section from accompanying such witness—*

(1) if the court determines, after an in camera hearing, that the attorney has disrupted proceedings before such grand jury, or

(2) if such attorney (or an attorney associated in the practice of law with such attorney) represents any other witness who has appeared before such grand jury in the proceeding involved.

chances of passage in this Congress. Very few Members who spoke on the amendment urged its defeat on the merits of the proposal.

There is widespread support in the Judiciary Committee for attention to the subject of grand jury reform. It is vitally important that the question of adequate representation of grand jury witnesses receive prompt Congressional action. While numerous hearings have been held in prior Congresses on the broad issue of grand jury abuse,[2] we urge that hearings be held during this session of Congress on legislation to allow counsel in the grand jury room, and to consider the issues of multiple representation and obstreperous counsel. We believe the legitimate concerns of the Justice Department can be met through carefully-drafted legislation.

Why is attention needed in this area? To be blunt, the due process revolution has overlooked the grand jury. Many of the major developments during the past 20 years in the criminal justice area have brought due process rights to defendants and targets of investigations. Despite developments such as the requirement of *Miranda* warnings, the right to counsel, and the right to be free from unreasonable searches and seizures, and despite judicial attention to the broader issue of what is appropriate government conduct in the investigation of alleged criminal activity, only very recently has attention been focused on due process rights of those appearing before grand juries. *See* M. Frankel & G. Naftalis, *The Grand Jury* (1975).

Persons summoned to testify before grand juries are treated differently from other participants in the criminal justice process. They are not given *Miranda* warnings, *United States* v. *Mandujano*, 425 U.S. 564 (1976), their fifth amendment rights are truncated, *Hoffman* v. *United States*, 341 U.S. 479 (1952); *Kastigar* v. *United States*, 406 U.S. 441 (1972), and they have no right to privacy, *United States* v. *Calandra*, 414 U.S. 338 (1974).

Fairness demands that a lawyer be allowed to accompany the client before the grand jury. The right to assistance of counsel now requires the Government to guarantee the presence of counsel at every other key stage of a criminal justice proceeding, including custodial interrogation, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), post-presentment, pre-indictment interrogation, *Brewer* v. *Williams*, 430 U.S. 387 (1977), and preliminary hearings, *Coleman* v. *Alabama*, 399 U.S. 1 (1970). The same right to counsel should also attach at the critical stage of a grand jury proceeding.

The American Bar Association, the American Law Institute, and numerous other professional groups have urged adoption of this critical reform on the basis of fundamental fairness, 102 ABA Reports (resolution approved by the House of Delegates, report No. 115, Reports to the House of Delegates, August 1977); American Law Institute Model Pre-Arraignment Code section 340.3 (1975). The distinguished members and leaders of these organizations have the relevant experience in State and Federal courts to qualify them to advocate a workable reform.

Federal grand jury witnesses are now allowed to leave the room every time they wish to consult counsel. *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976); *United States* v. *Kopel*, 552 F. 2d 1265, 1271

[2] Heaings before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary: (1) 95th Cong., 1st sess., on H.R. 94 (1977); (2) 94th Cong., 2d sess., on H.J. Res. 46, H.R. 1277 and related bills. *See also* Hearings on S. 3905 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Cong., 2d sess., at 51–109 (1978).

(7th Cir.), *cert. denied*, 434 U.S. 970 (1977). *See also* Note, *The Presence of Counsel in the Grand Jury Room*, 47 Fordham L. Rev. 1138 (1979); American Bar Association, *Parallel Grand Jury and Administrative Agency Investigations: The Criminal and Civil Implications for Corporations and Their Officers* (1978). There are, however, a number of unacceptable problems with this procedure. First, the process of getting up to leave the grand jury room usually prejudices the witness in the eyes of grand jurors; as a result, witnesses are subtly discouraged from exercising their right to counsel. Second, this procedure delays the proceedings. Third, at least one court has said that a witness may be limited in the frequency with which that witness consults counsel outside the grand jury room. *In re Tierney*, 465 F. 2d 806 (5th Cir. 1972). Fourth—and most important—the witness is often unaware when there *should* be consultation with a lawyer. Intimidated by the setting, witnesses often inadvertently waive their privilege against self-incrimination.

The Justice Department raises the exaggerated claim that allowing lawyers in the grand jury room will disrupt the proceedings. This allegation is contradicted by the experience in the 14 States which now admit lawyers.[3] One veteran district attorney, Dale Tooley of Denver, Colorado, recently commented that the statutory provision in his State "in practice has not caused any difficulty whatever. . . . In fact, the change facilitates proceedings because the witness does not leave the grand jury to consult his attorney, which was often the previous practice." D. Tooley, *Outline: The Grand Jury*, unpublished paper presented to the Grand Jury Committee of the Criminal Justice Section of the American Bar Association, New York, New York (May 9, 1980).

The Justice Department has also raised several other concerns regarding this proposal—ranging from multiple representation problems to the effect on grand jury secrecy and its worry that the grand jury will be turned into an adversary proceeding. *See* Silbert, *Defense Counsel in the Grand Jury—The Answer to the White Collar Criminal's Dream*, 15 Am. Crim. L. Rev. 293 (1978) (summary of law enforcement concerns). We disagree with the Department of Justice—these apparent problems can be prevented through carefully drafted legislation. *See* Tague, *Multiple Representation of Targets and Witnesses During a Grand Jury Investigation*, 17 Am. Crim. L. Rev. 301 (1980); Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stone Wall Defense*, 27 UCLA L. Rev. 1 (1979); Tague *Multiple Representation and Conflicts of Interest in Criminal Case*, 67 Geo. L. J. 1075, 1104–08 (1979). While numerous hearings have been held on grand jury reform, we urge the Committee and the Congress to move swiftly to address this proposal again and promptly to process legislation in this area.

[3] *See* ARIZ. R. CRIM. P. 12.6 (applicable to targets of investigation); COLO. REV. STAT. § 16–5–204(4)(d) (Supp. 1977) (applicable to all witnesses); ILL. ANN. STAT. ch. 38, § 112–4(b) (Smith-Hurd Supp. 1978) (applicable only if witness is a target of the investigation or has already been indicted); KY. REV. STAT. § 22–3009–3010 (1975) (applicable to all witnesses); MASS. ANN. LAWS ch. 277, § 14A (Michie/Law. Co-op Supp. 1978) (applicable to all witnesses); MICH. COMP. LAWS § 767.19e (Supp. 1978) (applicable to witnesses granted immunity); MICH. R. CRIM. P. 18.04 (applicable if witness waives immunity); N.Y. CRIM. PROC. LAW § 190.52 (McKinney Supp. 1978–79) (applicable if witness waives immunity); OKLA. STAT. ANN. tit. 22, § 340 (West Supp. 1978) (applicable to all witnesses); S.D. COMP. LAWS ANN. § 23–30–7 (Supp. 1978) (applicable to all witnesses); VA. CODE § 19.2–209 (1975) (applicable to all special grand jury witnesses); WASH. REV. CODE ANN. § 10.28.120 (Supp. 1978) (applicable to all witnesses unless immunity is granted).

In addition, the Louisiana Supreme Court has held that, in the absence of a statute, a juvenile has a right to be accompanied by counsel in the grand jury. In re Grand Jury Subpoena (Graham), 27 Crim. L. Rep. 2346 (June 23, 1980).

We must balance the vast investigative power and efficiency of the Federal grand jury with a measure of fairness and due process. Allowing a lawyer to accompany a client before the grand jury will help achieve this goal. Such legislation providing for counsel in the grand jury demands a priority on our attention.

JOHN SEIBERLING.
DON EDWARDS.
JOHN CONYERS.
R. Y. MAZZOLI.
DAN GLICKMAN.
MIKE SYNAR.

SEPARATE VIEWS OF REPRESENTATIVES JOHN F. SEIBERLING, WILLIAM J. HUGHES, AND JOHN CONYERS ON H.R. 6915

H.R. 6915 is one of the most complex and sweeping pieces of legislation the House Judiciary Committee has looked at in many years. A rewrite of the Criminal Code has, in one form or another, been under consideration by Congress since 1971. Although during the 96th Congress, the full Committee spent at least 45 hours marking up this particular bill, much of this time was occupied by procedural wrangles and dilatory tactics. In our opinion, the Members did not have an adequate means of reviewing and evaluating the potentially far-reaching impact of this 500-page bill. Even a seemingly small technical change in the criminal laws can have serious consequences for the right of individuals.

To afford an opportunity for a comprehensive critique of the Committee's work, Rep. Seiberling moved at the end of the last mark-up session to defer the final Committee vote on H.R. 6915 until after the July recess. This would have allowed members, staff, and interested groups an opportunity to evaluate and brief the Members on the full implications of the Committee's final product. Unfortunately, this motion was defeated, and we therefore felt constrained to vote against Committee approval of H.R. 6915.

The bill makes several substantive changes in current law and myriad changes in form and terminology. This in itself would not trouble us if all the changes had been adequately discussed and the consequences fully understood. Many of these changes are essentially the work of Subcommittee staff. On several occasions it became apparent that the Chairman and the other members of the Subcommittee were not fully aware of some of the implications of these changes, and in some cases the staff did not understand them either. We have the uncomfortable feeling that this bill is loaded with "sleepers" on every page, and that future prosecutors, defendants, courts and Congresses will be uncovering them for decades to come.

With that caveat, it is only fair to say that the Committee made an effort generally to avoid rewriting substantive criminal law through this legislation. For instance, the Committee narrowly, but, in our opinion, wisely, turned back an effort to reverse a Supreme Court decision (*United States* v. *Enmons*, 410 U.S. 396 (1973)) and therefore broaden application of the Federal extortion law to labor disputes. We opposed this change because it would, at worst, have turned every strike into a criminal conspiracy and, at best, would have resulted in needless Federal intrusion into the traditional criminal jurisdiction of the States. The Federal government should not be in the business of taking over local law enforcement wherever there is a strike, yet this change would have done just that, placing Federal authorities in the role of local authorities even where the local police are better able to deal with incidental acts of violence that might arise in tense, strike-related

situations. We deplore the use of violence, whether in labor disputes or otherwise. However, there are many legal tools presently available to deal with strike-related violence, including criminal penalties under State law, private actions for injunctions in both State and Federal courts, contempt proceedings against those who violate injunctions, private suits for damages in State and Federal courts, loss of employment rights otherwise available under the NLRA because of strike misconduct, and NLRB suits for temporary restraining orders under section 10(j) of the NLRA. Therefore, the Committee wisely voted down this proposed change.

Other substantive changes which were wisely rejected by the Committee included the proposed creation of two new categories of unintentional vicarious criminal liability through the addition of "solicitation" and "facilitation" as Federal offenses.

The crime of "solicitation" would have penalized a person who solicited conduct which resulted in a violation of the criminal laws, but who did not participate in such conduct. Under the existing laws of conspiracy and accomplice liability the activity meant to be covered by the criminal solicitation proposal can generally be prosecuted now. While, in some cases, the proposal would make prosecution much easier, it would, by the same token, present a serious potential for infringement of First Amendment rights, because the thrust of the solicitation offense is to punish the act of speaking certain words, not the act of carrying those words out. Consider the great difficulty in distinguishing criminal solicitation from constitutionally protected speech in a case involving the advocacy of certain religious practices, or one involving the suggestion to march in a demonstration of some kind. Making solicitation an offense would likely have a chilling effect, for an individual would not be required to know that the conduct he encourages is criminal for him to be guilty of soliciting it. The danger that this statute would be used to harass unpopular people or stifle controversial comment is far too great and the need far too slight to justify addition of such an offense to the Code.

The Committee also rejected as without significant justification the proposed offense of "facilitation," which would have criminalized even the routine provision of goods or services if the provider knew that the recipient was engaged in or intended to engage in criminal conduct, even if the provider had no intent to help such conduct. Such a concept would have been a departure from traditional principles of accomplice liability which require aiding and abetting with intent to assist the criminal activity, not just mere knowledge.

While the Committee in our opinion wisely rejected the aforesaid changes, it is regrettable that it did not accept certain others, for which, we believe, a strong case exists. One such proposal was the elimination of the Logan Act. The Logan Act was passed in 1799 during the unfortunate era of the Alien and Sedition Acts, and was designed to punish anyone who without authority interfered in the foreign relations of the United States. But it contains vague and indefinite terms, and its constitutionality has been judicially questioned. *Walden* v. *British Petroleum Co.*, 231 F.Supp. 72 (S.D.N.Y. 1964). Certainly it has a chilling effect on the exercise of the right of free speech. Moreover, in the 180 years since its enactment, not one person has ever been convicted under the Act. It is a bad law, bad policy, and apparently useless. It is time to give it a decent burial.

The Committee also rejected including in the Code the affirmative defense of entrapment. Twenty-one States now have such a defense in their criminal codes, though it was evolved by the courts originally. There is a big difference between a situation where law enforcement agents set the stage and then passively wait for someone to take advantage of the opportunity to commit a crime and a situation where the agents actually manufacture a crime themselves and actively induce someone to take part in it. Rep. Seiberling offered an amendment to incorporate in the Code the approach to the defense of entrapment recommended by the Brown Commission and the American Law Institute (in the Model Penal Code). Known as the "objective approach," it recognizes that prosecutions should not be based on police misconduct in inducing people to commit crimes that would not otherwise have been committed. The focus of this approach is on the propriety of the police conduct, not on the predisposition of the defendant to commit a crime. It would motivate police officials to engage in responsible enforcement techniques.

H.R. 6915 is the latest stage in a monumental undertaking. It is a considerable improvement over the Senate version, S. 1722, which was, in turn, a considerable improvement over S. 1 and "son of S. 1" (S. 1437), its counterparts in the 94th and 95th Congresses. Such improvements have resulted from the interaction of public opinion, the legal profession, Federal law enforcement agencies, citizens organizations, and the Judiciary Committees of the House and Senate. We seriously doubt, however, whether there is adequate time left in the waning days of this Congress to provide the kind of careful, informed deliberation that is needed to bring forth a final product that will indeed advance the cause of liberty, justice and the rule of law.

H.R. 6915 needs further scrutiny of the sort to which its predecessors were subjected. The opportunity for the House to provide such scrutiny at this stage of this session is virtually nil. The likelihood of responsible, non-partisan consideration diminishes as adjournment approaches. Even if a good bill should emerge from the House, little time will remain for the laborious task of working out a satisfactory conference version with the Senate.

All in all, the wisest course would seem to be to keep this bill off the floor, so that the next Congress can use it as the basis for completing the job in circumstances more likely to be conducive to calm and careful deliberation.

JOHN SEIBERLING.
BILL HUGHES.
JOHN CONYERS.

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SUPPLEMENTAL VIEWS OF REPRESENTATIVE SAM B. HALL, JR., JOINED BY REPRESENTATIVES THOMAS N. KINDNESS, JOHN M. ASHBROOK, M. CALDWELL BUTLER, DANIEL E. LUNGREN, HAROLD S. SAWYER, F. JAMES SENSENBRENNER, JR., AND ROBERT McCLORY

As the sole Member of the Criminal Justice Subcommittee from the 95th Congress to return to that Subcommittee at the start of the 96th Congress to again consider the recodification of federal criminal law, I am fully convinced that this updating of the law is necessary. This does not mean, however, that the bill reported from the Judiciary Committee could not be improved. While I agree with the underlying principle that guided our efforts, that is that existing law should be carried forward except where there was a clear need to change it, I believe that in at least one area, such a need was clearly demonstrated, but ignored.

Despite the use of language by the Subcommittee designed to overturn the Supreme Court's decision in *Enmons* v. *United States*, 410 U.S. 396 (1973), the full Committee has, in effect, said that violence or the threat of violence does not violate federal extortion laws if it is done in the context of a labor dispute. Such a position is, in my opinion, totally wrong, both legally and morally, and is rationally unsupportable. By continuing to use the language on which the Court based its decision and without clarification, the Committee perpetuates the view that illegitimate methods may be used if the goal sought is a legitimate one. Such a view, that the end justifies the means, is totally foreign to the American system of law. To say, as the Court did, that one party to a labor dispute may destroy property, maim, or even kill, or threaten to do such things without committing extortion if they are seeking something that they have a legitimate right to seek, such as higher wages, is preposterous and I believe that the Committee has committed a great error in failing to correct such fallacious thinking. Such an opinion by the Court is bad enough, but to perpetuate such an absurdity is inexcusable.

Certainly, no party can have a legitimate expectation of being allowed to use extortion in labor bargaining, and yet, it would appear that under section 2522 of this bill, both labor and management could do so. The only other position that would be more bizzare is that only one party to a labor dispute could indulge in extortion. The reasons offered to justify this policy fall well short of what is needed for the federal government to condone violence or threats of violence.

First, it was said during debate that the *Enmons* decision was good policy. But what is good about tolerating, even encouraging, extortion and violence? If this is good policy in labor disputes, why not else-

where? In truth, it is bad policy and extortion has rightly been recognized as being against both the public's and the individual's best interests. So why create a privileged area where the normal laws do not apply? Once seeing that such an inequitable situation exists, why not seek to correct it?

Second, it was said that to eliminate the special privilege of an exemption from federal laws on extortion would somehow intrude "into the area of State police." No one is more opposed to the recent expansions of federal authority than I, and yet, I cannot see how equal application of what is and has been a federal law would intrude in any way on the authority of the States. The jurisdictional requirements of section 2522 are quite clear and relatively narrow. It is only where federal jurisdiction exists that prosecution under section 2522 could be brought. Overturning *Enmons* would only make it clear that whenever the jurisdictional requirements are met, even if a labor dispute is involved, federal prosecution is possible. The federal government would not be prosecuting a violation of some State law, but a violation of a federal law against extortion that has been on the books for years and years.

Third, it was said that overturning *Enmons* would "alter the delicate balance that Congress has struck in the area of labor relations and impair the federal government's ability to effectively mediate labor disputes." But how can declaring to all parties to a labor dispute, or any other dispute involving "legitimate" goals, that neither may use violence or threats of violence as a bargaining tool upset whatever "balance" exists, unless only one side uses such methods? How can this equal application of federal law impair mediation? By reducing crime and violence, mediation should be facilitated.

Fourth, it was said that random acts of violence on a picket line, arising from the understandable frustrations of the time, would subject an individual, or even the entire union and its leaders, to federal prosecution. Such an argument ignores the basic definition of the crime found in subsection 2522(a). It is not the acts of violence that are prosecutable under this section; such acts may or may not be covered under federal law. Rather, it is the use of such acts or threats of such acts as tools to obtain property that is prohibited. Section 2522 requires a *knowing* threat or a *knowing* creation of fear that there will be personal injury or property damage, and *thereby* obtaining the property of another. Random violence is clearly not covered. By their very nature, such acts are spontaneous. Unless union officials know about, condone, or even hint at such activities during bargaining, they could not be prosecuted under this section. The punishable conduct is not the act of violence, but the use of such acts or the use of the possibility of such acts as a bargaining tool to obtain a goal.

With his characteristic incisiveness, the gentleman from Ohio, Mr. Kindness, clearly and correctly stated the question before us on this matter: "The issue is not whether to assert federal jurisdiction in the ordinary strike situation where some violence occurs. The issue here is whether the federal law is going to be, as it was established in the Hobbs Act, applied to organized labor as well as to anybody else, that you don't go around in interstate commerce situations saying,

if you don't give me thus and so, I'm going to kill you or your nephew or your whatever, or kidnap somebody or commit aggravated property destruction. . . ." That is the issue that the Committee ducked and which I hope the full House will face squarely by reaffirming what I thought had been made clear by the House Judiciary Committee during the impeachment hearings of a few years ago, that the law applies equally to all regardless of position or status.

SAM B. HALL, JR.
THOMAS N. KINDNESS.
JOHN M. ASHBROOK.
M. CALDWELL BUTLER.
DANIEL E. LUNGREN.
HAROLD SAWYER.
F. JAMES SENSENBRENNER.
ROBERT MCCLORY.

DISSENTING VIEWS OF JOHN CONYERS, JR.

I. Omnibus Criminal Code Reform—Why It's a Bad Idea

A. THE STUDY IN THE 95TH CONGRESS

A most thoughtful analysis of criminal code reform issues was done by the Criminal Justice Subcommittee of our Committee in the 95th Congress, which recommended that omnibus criminal code reform be abandoned in favor of an incremental approach. Page one of that report identified a major flaw of reform efforts up to that point, and the characterizations expressed there are equally true of bills now before the Congress:

> The subcommittee began its analysis of the Senate-passed bill, S. 1437, optimistic that the bill's "reformed" Federal criminal code would be an improvement over current law. The subcommittee conducted a section-by-section analysis and received testimony from a wide variety of individuals and groups. The subcommittee found, however, that little is known of the impact of each change S. 1437 makes upon individual provisions of current law. It appears that, as a result of the omnibus approach, primarily the special interests have been heard. Consequently, the impact of many sections of the bill has not been determined. An even more disturbing result of the failure to thoroughly analyze each individual section is that the overall impact of the bill on the Federal system and on individual liberty is impossible to assess.
>
> In addition to these concerns, the subcommittee's own analysis of S. 1437 led it to conclude that the bill is seriously flawed. Three of the most obvious flaws are: overall expansion of Federal criminal jurisdiction, enhancement of the power and discretion of the prosecutor, and creation of a new, untested sentencing mechanism.

That same report also offered some insightful comments about the proper role of federal criminal laws in our system, and how best to go about reforming such laws:

> There is a tendency to refer to Federal criminal law as if it were a unified body of statutes that serves as the principal set of legal rules governing the lives of people. However, Federal criminal law is not that. In our Federal system, the States are primarily responsible for law enforcement, and the Federal criminal law is a collection of separate and distinct statutes which supplement State criminal statutes. Federal criminal statutes are intended to protect or vindicate substantial Federal interests. Reforms in Federal criminal laws,

therefore, are appropriate dealt with separately, after a careful, thorough and conscientious consideration of all of the policy issues and constitutional questions that each proposed change presents.

B. THE BROWN COMMISSION—LOST IN TRANSIT

The Brown Commission report, transmitted to the Congress and the President in 1971, focused upon protection of the rights of individuals, and reflected a healthy skepticism concerning strong centralized authority and heavy reliance upon the criminal justice system to solve problems which originate outside the criminal justice system. The early bills drafted purportedly to incorporate the Brown Commission recommendations in fact departed drastically from this central theme, incorporating the Nixon Administration's inclination to limit individual freedom and its belief in the imperial authority of the sovereign. For this central reason, members of Congress, both liberals and conservatives, who distrust centralization of authority, successfully opposed the early bills, S. 1, (93rd Congress) S. 1400, (93rd Congress) and S. 1 (94th Congress).

Subsequent versions of the bill in the Senate, including the one under consideration now, retreated from some of the more draconian provisions of S. 1, but never returned to the principles of the Brown Commission. Certain controversial matters, such as the Commission's recommendations for stronger gun control provisions, have never been addressed.

C. H.R. 6915—MULTIPLE CHOICE CRIMINAL CODE REFORM AND CONFUSION

In the House, the bill presently before us is even less the product of a continuum. In 1978, the subcommittee, under the thoughtful leadership of Chairman James Mann, rejected the omnibus approach altogether, in favor of reporting a much less ambitious bill which recodified and cleaned up the existing criminal code, without attempting to make wholesale simultaneous revision in numerous substantive areas. Under the Chairmanship of Robert Drinan, who succeeded James Mann in the 96th Congress, the subcommittee followed still another new approach. This was to swing back in the direction of an omnibus approach, and to construct a bill, piece by piece, by a sort of multiple choice selection process utilizing various proposals and drafts developed over the years. ("How many like the Model Penal Code on this issue? How many for the Brown Commission's recommendation? For S. 1437? The Code of Hammurabi"?) H.R. 6915, the bill now reported by the Committee on the Judiciary, is the product of that process.

The most important and obvious thing that members of the House need to know about this bill is just what it does to the criminal laws of the United States which now exist. Does it merely reorganize and modernize the style and format of Title 18, United States Code, without making substantive changes in the law, or does it attempt to rewrite, from a policy standpoint, most of the provisions of Title 18? The former is commonly referred to as a "codification"; the latter as a "revision" or "reform" bill. In fact, H.R. 6915 is somewhere

in between. That is to say, while it proposes substantive changes to hundreds of provisions of Title 18, it purports to leave even more unchanged.

One difficulty with such an approach is found in the determination of just which provisions are changed and which are left unchanged. In a true codification bill, this problem is frequently reduced by inclusion of a disclaimer provision, which states that only such modifications in existing law as are specifically made are intended. Such a disclaimer provision is not contained in H.R. 6915, and probably is not possible, inasmuch as hundreds of changes are intentionally made, and they are spread throughout the entire bill. Substantial changes are made in such basic provisions of federal criminal law as those relating to federal jurisdiction, general offenses of attempt and conspiracy, and defenses and bars to prosecution. The sentencing laws are completely rewritten in an attempt to reduce judicial sentencing discretion (and thereby, almost inevitably, to increase the plea bargaining powers of prosecutors) in order to avoid disparity in sentencing. In further attempts to move toward "flat time" sentencing, parole eligibility is reduced and "good time" reduction of time served is eliminated. New offenses in the area of fraud against the Government are added, the Federal murder statutes are completely rewritten, as are Federal laws relating to obscenity and to sexual assaults.

D. SOME GAINS, SOME LOSSES, A LOT OF QUESTION MARKS

Compared to present law, H.R. 6915, as reported, is not, overall, either particularly commendable or particularly obnoxious. It contains some improvements, such as the provisions designed to protect civil rights and the revision of sexual offenses to make them applicable to both sexes. It contains a number of objectionable provisions, including a reenactment of the Logan Act (an ancient statute, probably unconstitutional, which purports to make it a crime for U.S. citizens to communicate with foreign governmental officials) and a provision "locking in", by statute, a questionable decision of the Supreme Court defining "obscenity". It also contains countless unknowns, both as to whether intentional changes will produce the effects desired, and as to unintended changes.

E. SENTENCING—THE BIGGEST QUESTION MARK

Proponents of this bill and of the Senate counterpart frequently assert that the sentencing reform provisions are their most significant feature. I agree that sentencing reform is a crucial issue, but the Senate and House bills sentencing approaches are ill-conceived. Among the hidden unknow factors in these proposed approaches to sentencing reform are the following:

1. On the grounds, presumably, that excessive judicial discretion in sentencing is responsible for an unacceptable degree of disparity in sentences being handed out for similar offenses, the bill calls for a Sentencing Committee to establish presumptive sentences within a narrow minimum to maximum range for various offenses and circumstances. However, this Committee will be a part of the Judicial Conference of the United States, the governing body of the U.S. Courts,

and a majority of the Committee members would come from the ranks of the judges whose policies are being questioned. How this Committee would perform is a major question mark. When State legislatures have enacted similar laws, the sentencing guideline setting bodies have tended to establish guidelines that approximate past sentencing practices.

2. If we do establish a system of "truth in sentencing" (a euphemism meaning that the sentence imposed is specific and is served without modification), will courts, legislatures, and the public tolerate sentences which are seemingly much more lenient than sentences presently being imposed, but which in fact will result in no change in sentences actually being served? For example, persons presently being sentenced in the federal system to periods of imprisonment of more than one year serve, on the average, only about 35 to 40 percent of the period to which sentenced. Will we tolerate a 4-year sentence in place of a 10-year one, even though it will result in the same period of incarceration?

3. Maximum penalties authorized under H.R. 6915 are slightly lower than most of the equivalent provisions of present law. However, the bill eliminates "good time" reduction of sentences, which presently can reduce time served by as much as one-third, and calls for the elimination of parole after a transition period. If the guidelines call for sentences at or near the maximum penalties authorized by the penalty provisions, and if the safety valves for adjustment of sentences through parole review and "good time" credit are lost, the Federal prison population could soar, as a result of congressional action, but with no congressional finding or policy statement that we need even higher levels of incarceration than we now have.

4. What effect would this sentencing package have on plea bargaining? There are substantial reasons to believe that it would increase our already unhealthy reliance on plea bargaining between prosecution and the defendant as the primary forum for "trying" most criminal cases. Flat time sentencing provisions, as several recent criminal code revision efforts have demonstrated, give the prosecutor tremendous bargaining power, in that sentences are relatively inflexible, and flexibility must come through the decision as to which violations to charge. One Indiana judge, asked what he thought of that State's new flat time sentencing law, is reported to have replied: "It's great, I haven't had to try a case in 2 years." The question is, in this respect, should judges retain at least some degree of adjudicative authority, or should authority be effectively transferred to prosecutors by giving them excessive plea bargaining power?

F. THE DECISIONMAKING PROCESS IN H.R. 6915: DECISIONS FIRST, GROUND RULES LATER

While many provisions of Title 18 are reenacted without substantive change, it is important to note that the decisions to leave these provisions unchanged were not made in advance of the revision process, but during it. These decisions were, for the most part, made in subcommittee drafting sessions. Some provisions were retained as they are because the subcommittee reviewed and specifically endorsed them. Others were the subject of widespread support for change, but were

left unchanged when the subcommittee was unable to agree on the form that the change should take. Still others were excluded because the subcommittee concluded they were too controversial, and might jeopardize passage of the bill. (From time to time the Department of Justice submitted "hit lists" of provisions which had to go and "non-negotiable demands" for additions. In addition, individual Justice Department staff members had their own lists, which often conflicted with the Department's lists, placing our committee members in the agonizing position of having to decide these issues on the merits.)

The most significant factor, however, in determining which provisions were changed and which were left unchanged was time. While it may seem strange to characterize as "hurried" a subcommittee markup process that involved more than 125 meetings, this in fact was the case, so far as most individual provisions are concerned. The size and scope of the bill are such that it could not be otherwise. Issues which, in the normal legislative process, would be the subject of individual hearings and careful and detailed markup were, in a number of instances, not even touched upon in hearings and were resolved with only cursory consideration in markup. For example, a highly complex amendment was added to the bill requiring States to give "full faith and credit" to child custody decrees of other States. A proposal designed to reduce the problem of so-called parental kidnapping has been before the Congress for several years. It cannot be adequately resolved in 10 or 15 minutes consideration during the course of developing an omnibus bill on Federal criminal law.

In full Committee markup, sponsors of the bill frequently advanced the argument that the Committee should reject amendments to provisions of the bill which reenact, without substantive change, provisions of current law. In our view, this argument is without merit or legitimacy. When the subcommittee made the decision to develop an omnibus bill, rather than following an incremental approach to reform of the Federal criminal law, it forfeited the right to reject consideration of any germane amendment, since matters which are left unchanged are unchanged because of a policy decision to so leave them. Had the subcommittee determined, in the course of establishing its own approach and ground rules, that certain large areas of the law would be left untouched, resistance to major amendments in those areas might be considered. What we have, however, is an after-the-fact declaration that "Since we didn't change that, you can't either." No legislator should be bound by these kinds of ground rules.

Matters which are left unchanged in an omnibus bill are, in effect, ratified, and the likelihood of serious consideration of them by the Congress in the near future is small.

G. H.R. 6915: A LEMMING RACING TOWARD THE SEA OF S. 1722

Considering the lateness with which this bill is being reported to the House, the question arises whether it is essential or wise to attempt to move this bill through the House and to conference with the Senate (which has yet to take up its Criminal Code revision bill this Congress). To move such a bill at this late date, limitations on the amendments which may be offered seem likely, thereby cutting off the full

House from expressing its will on most of the scores of controversial issues raised by the bill.

Another factor which we must realistically consider in determining the fate of this bill in the 96th Congress is that of legislative trade-offs. We know, as legislators, that such negotiations are a normal part of the legislative process. However, in explaining why it is rejected the Senate omnibus approach to reform of the Federal criminal law when it considered the matter throughout the 95th Congress, the Criminal Justice Subcommittee offered some thoughtful observations about the role of the Federal criminal law and legislative "horse-trading":

> Federal criminal laws ought not to be the product of extensive horse-trading. The greater the number of substantive changes made by a bill however, the more likely it is that such trade-offs will occur. The tremendous investment of time, energy and emotion that goes into an omnibus bill results in a tremendous pressure to agree to things in order not to hold up the legislation. This sort of pressure was clearly evident during the Senate debate of S. 1437.

Through legislative trade-offs and other features of the legislative process, we have already witnessed an erosion of better provisions of the bill in subcommittee and full Committee. Provisions which were in the bill earlier, but are now gone, include a repeal of the Logan Act, elimination of one-party consensual eavesdropping through electronic devices, a narrowing of the obscenity offense, and a better definition of entrapment which was designed to discourage misconduct by law enforcement personnel. A modest grand jury reform amendment carried by an overwhelming margin in subcommittee, but was dropped in full Committee at the insistence of the Department of Justice, and several piecemeal extensions of Federal jurisdiction were made into areas where no justification or need had been sufficiently established.

The possibility of legislative trade-off producing bad results becomes most acute, however, when one examines the provisions of the bill, S. 1722, which has been reported by the Judiciary Committee in the other body. While the House obviously must work its independent will on H.R. 6915, it would be unrealistic to do so without regard to what might lie ahead for the bill. S. 1722 contains numerous provisions which have been attacked both as violative of civil liberties and as unduly intrusive on States' role as the traditional and constitutional repository of most criminal justice responsibilities.

S. 1722 retains much of the strong bias in favor of prosecutorial authorities found in the earlier S. 1 bills, including an offense of obstructing government functions by fraud or physical means, a Federal "disturbing the peace" offense, an offense of making a false oral statement, and authority for preventive detention before trial. It abolishes parole, reduces "good time" reduction of sentences, yet retains maximum penalties at or near present law—a combination of provisions likely to dramatically increase sentences to imprisonment and prison overcrowding. It is highly likely a final product of the Congress this year would contain many of these objectionable provisions.

In summary, we have little or nothing to gain, and potentially much

to lose, by attempting to move this bill further in this Congress. Adjournment is scheduled for October 3, and much essential legislation demands the time of the House. Whatever proponents of the bill may assert in its favor, we do not believe they can reasonably assert, given the time and circumstances, that it is essential that this bill be passed this year. Interestingly, the argument heard most frequently in favor of passage of the bill seems to be that it would be a shame not to pass it after all the work that went into it.

When asked why he felt compelled to climb a particularly high, steep, and challenging mountain, one mountain climber explained: "Because it's there." While proponents of H.R. 6915 seem to be arguing for its passage on similar grounds, a rationalization for climbing mountains is not a satisfactory explanation for why bills should be passed. Given the complexity of the bill, the condition of the House calendar, and the lateness of the date, a more appropriate euphemism, relied upon in the subcommittee time and again in quickly passing over present provisions of law and leaving them unchanged in the race to report a bill, should be applied now. This was that, "This has been the law for a long time and the Republic hasn't fallen, so let's leave it the way it is."

II. Shortcomings Regarding Corporate and White-Collar Crime

Many of the provisions contained in H.R. 6915 throw unnecessary obstacles in the way of meaningful deterrence and enforcement in the white-collar and corporate crime areas. For example, in defiance of any logic which comes immediately to mind, section 3331 of H.R. 6915 actually excludes the applicability of the restitution sanction for offenses related to investment, monetary and antitrust offenses as well as to fraud in a regulated industry. These fiscal offenses, typically involving major corporations, are the very offenses which most require the availability of a restitution sentencing alternative. Three years of hearings by my subcommittee have thoroughly documented the absence of meaningful deterrence against such crimes, and the fact that prison sentences are rarely employed in these cases. *Nolo contendre* pleas, consent decrees, and prison sentences of short duration are all that most federal judges are willing to mete out to wealthy corporate defendants. Victims of financial white-collar crimes more often than not remain uncompensated for their financial losses, and will continue to do so unless this exclusion is eliminated.

The hampering of public corruption prosecution by the House bill also defies rationality. For example, the bribery section (sec. 1751) of H.R. 6915 decriminalizes bribes consisting of goods worth less than $100. In other words, for example, a GSA assistant store manager could accept a case of liquor in exchange for buying from a certain supplier without committing any crime under H.R. 6915. Section 1751 also changes current law by requiring that the action influenced a "particular official action." This would allow a Federal official to be put on retainer without committing the crime of accepting a bribe. For example, a corporation could pay an SEC official $10,000 a year to "take care of its interests." So long as no "particular official action" is requested, no crime would be committed. Section 2534 of H.R. 6915

effectively eliminates the basis under which Gov. Marvin Mandel and other public officials have been prosecuted in the past by inserting a new requirement of specific intent which does not exist in current law. Shifting the requisite *mens rea* in political corruption cases would present an almost impossible burden of proof for the prosecution in most instances.

Anyone searching for evidence of provisions reflecting the emerging public outcry to upgrade prosecution of major forms of corporate and white-collar crime anywhere in the hundreds of pages which comprise the so-called House Criminal Code "reform bill" would be searching in vain. It is nothing short of incredible that the House bill—which could be a major determining factor in how well our Federal law enforcement apparatus will be equipped statutorily to combat corporate and white-collar crime for decades to come—fails almost completely to offer any modern approaches to deter and prosecute acts every bit as harmful to the public as so-called "street crimes."

Three years of oversight hearings on corporate and white-collar crime by the Subcommittee on Crime have documented in some detail the nature and scope of America's corporate and white-collar crime problems, which cost the American public (including as victims consumers, the government and the business community) an estimated $200 billion per year compared to $4 billion per year for all property-related street crime. Corporate crime can result in death, disease, or serious bodily injury when it involves the knowing manufacture of products containing concealed lethal defects. Public corruption, one of many forms of white-collar crime, creates public cynicism and disrespect for the law in general and for the criminal justice system in particular. The investigation, detection and prosecution of corporate and white-collar crime have been raised to top priority status by a Department of Justice sorely lacking the resources to do an adequate job in this area. And now, along comes a House bill which may as well have been written in another century, before anyone heard of corporate or white-collar crime.

Consider a few of the kinds of white-collar crime provisions any future Federal criminal code should contain:

A new criminal code should include an amendment empowering the court to assess a fine which is up to twice the gross gain derived or twice the gross loss caused, whichever is greater, in those cases where a defendant business organization is convicted of an offense through which it derives pecuniary gain or which results in serious bodily injury, death, or loss, damage or destruction of the natural environment or of real or personal property. The current "fine" structure is archaic, often resulting (in white-collar crime cases) in fine assessments which fail to deter criminal behavior because they only amount to a fraction of the "ill-gotten gains" from the illicit enterprise. There is precedent for confiscation of ill-gotten gains provided by the Racketeer Influenced Corrupt Organizations Statute ("RICO", 18 U.S.C. 1961–1963), and the treble damage provision of the antitrust laws. By correlating the level of the fine to the crime, we could remove some of the financial incentive to commit corporate crime and insure that we don't underpenalize corporate defendants to whom fixed amount fines would merely be a "cost of doing business."

An "endangerment" provision comparable to section 1617 of the Senate bill, S. 1722, a provision adopted as the result of a compromise agreement between the Business Roundtable and the Justice Department, should be an integral part of any modern Federal criminal code. In its most important aspect, the endangerment section raises what are now misdemeanor violations to the level of felonies for contraventions of six specified health, safety and environmental statutes in those cases where the actor's conduct knowingly places another person in imminent danger of death or serious bodily injury and where such conduct manifests an unjustified disregard for the life of another person. The six statutes are those relating to environmental pollution, mine safety and health, occupational safety and health, hazardous substances, food and drugs, and public health.

Such a provision in any new criminal code would be amply justified as a means of reaching the most serious aspects of non-Title 18 violations dealing with Federal penal statutes involving the health, safety, and environmental well-being of our Nation. Its inclusion would serve as a useful deterrent against actions which involve the knowing placing of persons in danger of death or serious bodily injury.

It is incredible that H.R. 6915 does not even take the intermediate step of increasing the fines for the regulatory criminal offenses found outside Title 18, as does the Senate bill in section 2201 of S. 1722. Typically, under current law, fines for such offenses are expressed in maximum terms, falling in a range from $1,000 to $100,000. Raising such fines would eliminate some of the harm done by the failure to include an endangerment offense in H.R. 6915, since courts then at least would be able to impose appropriately high fines on organizational offenders who commit regulatory crimes in an egregious fashion and who harm the health or safety of citizens in blatant disregard for human life.

The inclusion of an endangerment provision in a new code would not create new Federal jurisdiction. "Endangerment" is simply a penalty enhancement provision designed to deal with the most aggravated and callous forms of existing environmental, health and safety offenses. It does not reach honest businessmen, for no honest businessman commits what is already a Federal crime with the knowledge that he thereby is placing another person's life in imminent danger and with extreme indifference to that fact. It does not broaden the web of the Federal Government's involvement in business for it adds no regulatory jurisdiction to the law. This penalty-enhancement provision would be a reasonable one. It would provide that a person who knowingly endangers human life during the course of committing some other Federal crime is a much more serious offender than a person who merely breaches the law in a technical way.

Any new criminal code also should contain a "notice to victims" section comparable to section 2005 of S. 1722. This provision empowers the court, in imposing a sentence upon a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, to require the defendant to give notice and an explanation of the conviction to the victims of the offense. The court would be empowered to designate the advertising areas, media, and form in which notice is to be given. Such a provision, favored years ago by the Brown Commission and even the Business Roundtable, would

greatly deter consumer fraud and other large-scale, profit-seeking deceptive practices by providing greater opportunity for victimized citizens to attain civil recovery of damages.

This "notice" provision has some analogies in current Federal law. Auto and tire firms must notify the Department of Transportation of certain product defects and DOT can disclose defects to the public. As part of some Federal Trade Commission settlements, companies have agreed to admit in future advertisements that prior representations may not have been accurate. Such a provision would promote the double benefit of deterrence and compensation; companies, anxious about good will and their good name, are especially loathe to have to publicize their misdeeds. They are aware that such publicity can mobilize shareholder activity against errant managers. Such "notice" also alerts potential plaintiffs about their victimization and remedies. According to the Brown Commission's "Working Papers", adverse publicity in appropriate cases might be the most feared consequences of conviction in an era when public relations figure so largely among management concerns. Customers and prospective customers of products or securities might be warned that the corporate defendant had engaged in fraudulent practices. Appropriate notices might be required in proxy statements. Advertisements in trade journals or the general press could be employed.

A "disqualification" amendment would also be needed in a new code, empowering the court to require, as a condition of probation, that a defendant who is a director, officer, or managing agent of a business organization and who is convicted of an offense arising out of his or her employment be disqualified from continuing in his or her employment as such director, officer, or managing agent and be disqualified from exercising similar functions in the same or other business organizations, for a period of time not to exceed the maximum authorized term of probation. There is ample precedent for such a "disqualification" provision. Under current law, persons convicted of certain official misconduct are barred from holding public office. Some state legislation aimed at ending waterfront corruption disqualifies convicted felons from union office. The Landrum-Griffin Act of 1959 (29 U.S.C. § 504(a)) bars convicted felons from holding union office for 5 years following conviction. Persons convicted of certain financial offenses cannot hold specified positions in banks insured by the F.D.I.C. (12 U.S.C. § 1829). Broker-dealers and lawyers can lose their licenses to practice upon criminal conviction. In view of these precedents, it would be consistent to allow courts to prohibit managers who have abused their power from serving in similar positions that would invest them with comparable power, at least during their probationary period. When one holds a position affecting a broad public interest or trust, such strict standards are entirely appropriate.

A rewrite of the criminal code should also add a "judicial oversight" provision, empowering the court, in imposing a sentence upon a defendant business organization, to appoint a Special Master to oversee any relevant operations of the convicted business organization deemed appropriate to insure compliance with any post-conviction order of the court. When ARCO pled "nolo" to an oil spill in 1972, it expected a modest fine. But Justice Department lawyers, annoyed that the ARCO plant in question previously had been involved in a conviction

for an identical violation, proposed instead that the company be put on probation, a condition thereof being that it establish a program within 45 days to handle the oil spillage. Judge James Parsons acknowledged that a corporation could not, like a person, pay visits to a probation officer, but added that a probation officer could pay visits to the corporation. He ordered ARCO to satisfy the spillage program condition of the probation, or he would appoint a special probation officer with visitorial powers to enter the ARCO plant and supervise an oil spillage program. (See *U.S.* v. *Atlantic Richfield*, 465 F.2d, 58 (7th Cir. 1972).) If a court finds an institutional structure that inclines a company to violate the law even after a criminal conviction, it should be able to try to cure that defect to avoid recidivism. Perhaps this would mean the appointment of a law compliance officer within the managerial hierarchy; perhaps a probation officer with the power to help establish procedures to avoid manufacturing and marketing of unsafe products; perhaps a financial "special receiver" with access to all books to check for financial fraud. If the law will send a dangerous person away to jail to protect the community, it should at least be able to send a probation officer to a company in order to protect the community.

We should immediately begin to devise a criminal code that recognizes the importance of providing modern statutory approaches to combatting corporate and white collar crime in the decades ahead. It is obvious that H.R. 6915 is grossly deficient in the corporate and white-collar crime areas, and this deficiency provides yet another reason for scrapping 6915.

III. The Grand Jury: Where a Witness Really Needs Counsel

The Committee on the Judiciary overturned the near-unanimous judgment of the Subcommittee on Criminal Justice that the proposed Federal criminal code should contain a provision allowing the right to witness counsel at grand jury proceedings. The fourth amendment right to counsel as well as the due process clause contemplates a measure of fairness that would be advanced by allowing the grand jury witness to consult with counsel without having to leave the grand jury chamber. The same sound policy which limits overreaching of government conduct during other critical stages of the criminal justice process (*Miranda* v. *Arizona*, 384 U.S. 436 (1966), *Brewer* v. *Williams*, 430 U.S. 387 (1977), *Coleman* v. *Alabama*, 399 U.S. 1 (1970)) should be available to the individual who is summoned by the State for interrogation which may lead to criminal charges.

Within the last few years there has been a trend in which several States, which formerly had excluded attorneys from the grand jury chamber, have passed laws and rules which now permit the presence of witness counsel in grand jury proceedings. These States now number 13. (*Arizona*—Rule of Criminal Procedure 12.5 (1975); *Colorado*—Sec. 1 16–5–204 (1977); *Illinois*—Sec. 38 112.4 (1975); *Kansas*—Chapter 22 Sec. 3010 (1970); *Massachusetts*—Chapter 277 Sec. 14a (1977); *Michigan*—767.19e Rules of Criminal Procedure (1970); *Minnesota*—Rules of Criminal Procedure 18.04 (1975); *New York*—190.52 (1978); *Oklahoma*—22.340 (1974); *South Dakota*—23–30–7 (1978); *Virginia*—19–2.209 (1975); *Washington*—10.27.080 (1971) and *Pennsylvania*—(1979)).

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Under the present Federal system, if a witness seeks to confer with his attorney, he must step down from the witness stand, leave the grand jury chamber, consult with his attorney in the corridor or elsewhere, return and be reminded that he is still under oath, and only then continue his testimony. This process is disruptive, and often puts the witness in a bad light as far as the jury is concerned. The witness may, because of the atmosphere, feel intimidated and reluctant to even exercise his present right of suspending the proceedings while he consults with his attorney outside the chamber.

The subcommittee's near unanimous approval of the provision for right to witness counsel before grand jury proceedings was based on the obvious fairness of witness counsel as well as the recognization that the arguments which have been raised in opposition to allowing this growing practice in the Federal courts are without merit.

For example, among the chief arguments used by opponents of witness counsel before grand jury proceedings is the potential for disruption and delay. However, the experience of the 13 states that have effected the reform has been precisely to the contrary. The clear message from practitioners, including defense counsel, prosecutors and court staff, is that the reform has not resulted in disruption at all, but rather the presence of witness counsel has expedited the proceedings and furthered the ends of justice.

This experience has corroborated the findings of Alfred Nittle that: "Whether in a particular district the grand jury is used frequently or infrequently, whether counsel is allowed for all witnesses or only for some or under restricted circumstances, no public prosecutor of any of the more populous districts of those states which to any extent authorize the presence of counsel, and of whom inquiry was made, has reported any actual disruption of the grand jury's proceedings by reason of the presence of counsel for the witness." (See Hearings on H.R. 94, Subcommittee on Immigration, Naturalization and International Law of the House Committee on the Judiciary, p. 1574 (1977). In addition, the American Bar Association, in a 1977 study of nine states which at that time permitted counsel in the grand jury chamber, stated:

> Some nine States now have statutes allowing counsel to be present in the grand jury room. . . . The section contacted practicing attorneys and prosecutors in these States; none reported problems. In fact, some prosecutors who said they initially fought the procedure now support it as a means of insuring fairness in the system.

Other studies have corroborated these findings. (See the American Criminal Law Review, "Bringing Down the Curtain on the Absurd Drama of Entrances and Exits—Witness Representation in the Grand Jury, Volume 15, No. 4, Springs, 1978.

One of the reasons why there would be virtually no disruption and delay with counsel sitting in the grand jury chamber is that counsel, while present, would not participate in the proceedings, but be available for consultation. The simple remedy for abuse of this right would be exclusion of the disruptive counsel. With respect to delay, one proceeding was interrupted 1,203 times while the witness got up, walked from the chamber, consulted with his attorney in the corridor,

returned, was reminded he was still under oath and proceeded. With counsel sitting next to the witness such long delays would be avoided.

With respect to the argument that allowing counsel to sit next to a witness in the grand jury chamber would impair secrecy, experience shows that the most serious violations of grand jury secrecy occur when unsubstantiated information concerning the nature of the "evidence" against a witness is leaked to the press. Moreover, the breaches of secrecy come from leaks of court officials, the prosecutor or his assistants, or the grand jurors themselves. It is hard to imagine how the presence of counsel could add to breach of secrecy. This is particularly so since the defense counsel already has access to a transcript of the proceedings; if counsel were inclined to breach their duty of confidentiality and thereby violate the Code of Professional Ethics and risk disciplinary proceedings, they already have the resources with which to accomplish this.

The need for counsel by witnesses in a grand jury proceeding is frequently as great or greater than that of an accused at trial. Indeed, the strong opposition of the Department of Justice to this modest proposal for reform seems to bear out this fact. Obviously, the Department feels that witnesses without counsel will conduct themselves in a different manner than they would if they had the full protection of counsel. The present system, under which the witness must leave the grand jury room to consult with counsel, places on him the burden of determining when he needs the advice of counsel. This has the effect of requiring that the witness perform for himself an essential lawyer-like function.

The provision for counsel in the grand jury which was dropped in full Committee was only a very small slice of grand jury reform measures which have been pending in Congress for several years. The Department of Justice's opposition to this proposal and threats to oppose the whole bill if it remained led to a decision to drop the provision. This was a serious mistake and one more important reason why this bill should be defeated.

IV. Repeal of the Logan Act

The Logan Act (18 U.S.C. 953) is legislation at its worst, and the retention of it in the proposed new criminal code is deplorable. H.R. 6915, as reported by the subcommittee, did not contain a reenactment of the Logan Act, and the full Committee initially voted to keep it out. However, in legislation, especially omnibus bills, it seems that if you bring an issue back enough times, you eventually prevail.

There is another rule in the Congress to the effect that when all other sources of information concerning legislation fail, read the legislation. We all know that the Logan Act prohibits private correspondence and communications with foreign governments, and that it has been criticized as being "overly broad". It's instructive to read it and to see just how broad it is:

> Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof,

> with intent to influence the measures or conduct of any foreign government or any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Under the act, any citizen who, "directly or indirectly", "commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof" commits a criminal offense if such communication was done "with intent to influence the measures or conduct" of that government or officer or agent, or to "defeat the measures of the United States".

It is no secret that former Attorney General Ramsey Clark's trip to Tehran was fresh in the minds of the members of the Judiciary Committee when we voted to reinstate this ancient relic in H.R. 6915. However, even if one does not agree that the sort of travel and speech involved in that situation is constitutionally protected, we need to consider just how far this statute reaches in prohibiting speech and discussion by U.S. citizens. A businessman who speaks with the economic affairs officer of a foreign embassy in the United States concerning a possible market for the businessman's products appears to be in contravention of the statute, for he might be found to be attempting to influence the trade and tariff policies of that government. A relative of a U.S. citizen held hostage by a foreign government surely violates the letter of the law by attempting to convince that government to release the hostages.

Both here and abroad, and through correspondence, Members of Congress frequently communicate with high government officials of other countries. The Logan Act is sufficiently broad to potentially bring this sort of communication within the coverage of Federal criminal law. For example, members of the Judiciary Committee will be attending a United Nations World Congress on Crime this month, as will high government officials from around the world. If one of us engages a Chinese official in a discussion of a recent Washington Post report that summary executions are common in China today, can this be construed as an attempt to influence the policies of that nation? If it were done with the express intent of influencing that policy, should it be made a criminal offense?

While admitting that the Logan Act may be overly broad, its defenders claim that there is a saving factor. This saving factor is that we don't use it anyway. It's inconceivable, they point out, that a member of Congress would be prosecuted for discussions with foreign officials, even though his or her conduct might be proscribed by the letter of law. It would be political suicide to prosecute relatives of hostages in Iran for attempting to influence that government, we are told, so don't worry about it. Even if we don't use it, we are told, we still need it, to brandish and use as a threat so our citizens don't go too far. In addition to objecting to giving our government such offensive unconstitutional authority to restrict the rights of speech and travel of our citizens, it should be noted that we cannot assume that prosecutive authority such as this will not be used. While political considerations and public opinion may save members of Congress

and relatives of hostages from prosecution, these same considerations could lead to the use of the Logan Act against citizens whose conduct is no more violative of the letter of the Logan Act, but whose views and conduct are unpopular or even obnoxious to most Americans.

In the 180 year history of the Logan Act, there is no reported case of a prosecution under the statute. In one civil litigation in which it was drawn into question, a federal district court in New York expressed the view that the Act's constitutionality is "doubtful." *Waldron* v. *British Petroleum Company* (1964, D.C. N.Y.) 231 F. Supp. 72, 89.

It may be that if this sleeping giant were to be awakened and put into action, a court would permanently put it back to rest on the grounds of unconstitutionality. It was Congress, however, which created this monstrosity, and it is the Congress which should terminate it. It has no place in a modern criminal code, nor in an ancient one, for that matter.

V. Federal Jurisdiction Should Be Limited To Circumstances Involving Substantial Federal Interests

Federal criminal jurisdiction has developed piecemeal over 200 years, in response to needs and passions of the moment. When these transitory needs and passions subside, the laws, which are permanent, remain. There has been in our nation's history no systematic and comprehensive review by Congress of the proper scope of Federal jurisdiction. Such an undertaking would be not only appropriate, but essential, in any consideration of criminal code reform. However, such a review has not taken place and is not reflected in H.R. 6915.

Short of such a comprehensive review of Federal jurisdiction, steps can be taken to help preserve the proper balance between Federal and State criminal jurisdiction. The most important step is to enunciate a single, simple jurisdictional principle which has been urged by a number of authorities. This principle is that when Federal jurisdiction is based on either of the two broad bases of interstate commerce or use of the mails, the affect on interstate commerce or the use of the mails must play a substantial role in the offense.

Former Federal District Court Judge Henry Friendly, a respected authority on the subject of Federal jurisdiction, summarizes the present state of Federal criminal jurisdiction and the need for review as follows:

> The first step in determining the proper scope of lower federal court jurisdiction must be to consider that central core of cases over which such courts must have power. . . .
>
> The very first subject, enforcement of federal criminal law, takes us into an area of acute controversy. While no one disputes the general proposition that enforcement of federal criminal law is a proper subject of federal jurisdiction, and indeed today that the federal courts should have exclusive jurisdiction over federal prosecutions, there is much debate whether too many matters have not been swept into the federal penal code. There can be no controversy over what, until the Civil War, has been the exclusive subject of federal crim-

inal jurisdiction—"acts directly injurious to the central government"—revenue frauds, interference with or misdeeds by federal officers, counterfeiting United States securities and coins, espionage and treason. There can be equally little argument about the next step taken beyond this, the Civil Rights legislation prescribing criminal sanctions against those who refused to recognize the changes wrought by the Civil War and the three amendments of the Reconstruction period. Again, there is no unreasonable expansion of federal criminal jurisdiction when Congress takes over substantive regulation of a field and decides that criminal as well as civil sanctions are desirable. The antitrust laws and the securities laws are sufficient examples.

A very different question is posed when the primary basis for federal criminal jurisdiction is the use of facilities crossing state lines provided by the federal government or by private enterprises or, for that matter, when the defendant has crossed a state line on his own power. The progenitor appears to have been three provisions in the Post Office act of 1872, making the use of the mails to promote frauds or lotteries, or to disseminate obscenity, federal crimes. The progeny spawned by this statute is enormous; more than three closely printed pages of the index to the Criminal Code are required to list the federal offenses that can result from using the mails to transmit various things, ranging from articles designed for producing abortion to dangerous weapons. The similar development with respect to movement in interstate commerce seems to have begun in 1910 with the Mann Act, followed shortly by the National Motor Vehicle Theft Act of 1919. These statutes also have given rise to a population explosion, often sparked by a *cause celebre* such as the Lindbergh kidnapping. One might have thought the limit was reached in the so-called Travel Act of 1961, but that was not to be so. Congress has since enacted statutes which make certain activities criminal on the basis of its determination that they affect interstate commerce, even though the acts in the particular case were entirely local, and the Supreme Court has sustained this." [1]

Similarly, the National Association of Attorneys General, representing all the States, has persuasively argued in a report to the Congress on the proposed Code that basing federal criminal jurisdiction on minimal effect on interstate commerce is "a radical departure from the traditional parameters used to define federal criminal conduct." They said:

> In order to conform with the traditional distinctions that have been made in this area, we believe that Congress, in reenacting these statutes, ought to require that a direct effect on interstate commerce exist in order to give rise to federal jurisdiction. We do so in the belief that a purely incidental use of, or effect on, interstate commerce is an inappropriate basis for federal action.

[1] *Federal Jurisdiction—A General View*, Columbia University Press, (1973), pp. 55–57.

Unfortunately, the Judiciary Committee did not follow the advice of the Attorneys General and reconsider the necessity of each extension of federal jurisdiction which has been added over the last 200 years. In fact, highly questionable new areas of Federal criminal jurisdiction were added to H.R. 6915. For example, a new offense of stealing blank airline tickets was added, with no explanation why such ticket theft cannot be adequately prosecuted as other theft offenses traditionally are—under State law. An attempt to expand the extortion provisions to cover strikes, picketing, and other job actions by labor unions was voted on nearly a dozen times in subcommittee and full Committee. The results of the votes switched back and forth several times, with the last vote being against such an expansion, but efforts in favor of this unwise extension of Federal criminal jurisdiction are by no means ended. Many provisions of the bill reenact, if not expand, questionable areas of Federal jurisdiction. Arson of any building by use of a destructive device affecting interstate commerce is made a Federal offense under section 2501, which also provides Federal coverage of arson of motor vehicles used in interstate commerce. Since almost all commercial buildings affect interstate commerce, almost all arson of such buildings would be subject to Federal jurisdiction without a showing of a need for such coverage.

Not only is arson of vehicles used in interstate commerce made a Federal offense, but so is the threat to damage such vehicles, and any threat to commit a crime of violence which is communicated by use of the mails or through interstate commerce. (Section 2315).

It is true that section 115(b) calls upon the Attorney General to issue guidelines for the exercise of Federal jurisdiction, which guidelines are to provide for the declination of jurisdiction unless a substantial Federal interest would be served by the prosecution. The problem with this approval is that by giving the Attorney General authority to determine, in administrative guidelines, what constitutes a substantial Federal interest, Congress gives away its authority and responsibility to write the laws. Further, by making the requirement of a substantial Federal interest jurisdictional, the determination of substantiality is for the court to make in individual cases. A determination made in administrative guidelines would be effectively unreviewable by the court and beyond attack by a defendant who questions the Attorney General's definition of "substantial".

VI. Obscenity—In Opposition to Codification of Bad Case Law

The first question regarding obscenity is whether it is expression protected by the first amendment guarantee of free speech and expression. Although the eloquent dissents of Justices Black and Douglas are still persuasive on this issue, as a constitutional matter the issue has been resolved against a constitutional protection of matters found to be obscene. *Roth* v. *United States*, 354 U.S. 476 (1957). Congress nonetheless could determine that criminal laws, particularly Federal criminal laws, regarding obscenity are inappropriate, but the mood of Congress probably will not agree.

The second key question is what should be the scope of Federal criminal law coverage of obscenity? In other words, what definition of obscenity should be applicable? The difficulty, if not impossibility, of

developing a constitutional and practicable definition of obscenity is an argument in favor of no Federal law. Since the 1957 *Roth* case holding that obscenity is not protected by the First Amendment, the Supreme Court has struggled to develop a satisfactory definition of obscenity, and has failed. *Roth* held that "obscene matter is material which deal with sex in a manner appealing to prurient interest" which enjoys no constitutional protection because it is "utterly without redeeming social importance." Determination of what constitutes an appeal to prurient interest was to be made pursuant to "contemporary community standards."

Several times since then, the Court has made adjustments in the definition of obscenity, and has never definitively resolved the matter. The most famous and probably the most revealing observation concerning the definition of obscenity that has emerged from the Supreme Court was Justice Stewart's observation that "Perhaps I could never succeed in intelligibly defining obscenity, but I know it when I see it." *Jacobellis* v. *Ohio* (387, U.S. 184, 197 (1964)).

Miller v. *California* (413 U.S. 15 (1973)) is the most recent, but by no means the last, Supreme Court case redefining obscenity. H.R. 6915 expressly adopts and codifies the obscenity definition contained in this 5 to 4 decision. *Miller* made two major changes from previous law. One was the rejection of national community standards in favor of state or local standards. The other is the rejection of earlier case law (*Memoirs* v. *Massachusetts* (383 U.S. 413)) holding that material can be found to be obscene if it was "utterly without redeeming social value." The *Miller* ruling substituted the requirement that material can be obscene only if "the work, *taken as a whole*, (emphasis added) lacks serious literary, artistic, political or scientific value." Under the previous standard, a slight degree of serious matter or intent would prevent prosecution. Under *Miller*, the value must be more predominant, more serious, and more pervasive.

The question is not which is the more appropriate definition of obscenity, although a national statute should apply a uniform national standard. The question is whether we should lock in, by statute, an evolving definition, one which was approved by a bare 5 to 4 margin on the Supreme Court.

The *Miller* case by no means put the questions of what standards of obscenity are to apply to rest. This is amply demonstrated by the 1977 case of *Smith* v. *United States* (431 U.S. 291), where, in a prosecution for mailing obscene material into Iowa (to postal agents who ordered it), the defendant interposed a defense that, under Iowa statutes, only obscenity which is distributed to minors is punishable, and argued that the "community standards" as enunciated by the legislature for the State of Iowa was not violated. However, the Court ruled that it is the 12 members of Federal jury in the case in question, and not the elected legislature of the entire State, who are to determine the community standards to be applied. In short, the Court ratified Justice Stewart's implicit suggestion that obscenity will be defined only after the fact, on a case by case basis, based upon the trier of fact "knowing it when he sees it." This is hardly adequate compliance with the requirement that citizens be given notice of what constitutes criminal conduct, in advance.

Justice Steven's dissenting remarks in *Smith* are worth noting:

> A Federal statute defining a criminal offense should prescribe a uniform standard applicable throughout the country. This proposition is so obvious that it was not even questioned during the first 90 years of enforcement of the Comstock Act under which petitioner was prosecuted. When the reach of the statute is limited by a constitutional provision, it is even more certain that national uniformity is appropriate.
>
> Indeed, in some ways the community standard concept is even more objectionable than a national standard. As we have seen in prior cases, the geographic boundaries of the relevant community are not easily defined, and sometimes appear to be subject to elastic adjustment to suit the needs of the prosecutor. Moreover, although a substantial body of evidence and decisional law concerning the content of a national standard could have evolved through its consistent use, the derivation of the relevant community standard for each of our countless communities is necessarily dependent on the perceptions of the individuals who happen to compose the jury in a given case.

Deletion of the *Miller* definition would carry out the declared intent of the sponsors of H.R. 6915 to not make changes in this area of the law. It would avoid locking us into, by statute, the most recent and worst definition of obscenity that the Supreme Court has enunciated.

JOHN CONYERS, JR.

DISSENTING VIEWS OF CONGRESSMAN LAMAR GUDGER ON H.R. 6915, THE CRIMINAL CODE REVISION ACT OF 1979

I first encountered the project of recodifying and reforming the Federal criminal laws in the 95th Congress when I served on the Criminal Justice Subcommittee then chaired by the Honorable James R. Mann. I served briefly on the subcommittee in this 96th Congress, but much of the work on the bill had been completed before I joined. I will outline my reasons for opposing H.R. 6915 below, but first I would like to commend the members of the subcommittee and the staff, so ably directed by Mr. Tom Hutchison in this Congress and the last, for their work on H.R. 6915. I must say that this bill is far superior to any other omnibus proposal produced in the House, the Senate or by independent study groups. It is obviously the product of a great deal of careful consideration and reflects very well upon this Committee.

As I stated at the outset of consideration of H.R. 6915 by the full Judiciary Committee, I generally agree with the conclusions expressed in the report of the Mann subcommittee in the last Congress, first, that it is not essential that this legislation be adopted, and second, that the omnibus approach to reform of the criminal law is not desirable. I do not concur with those who lump modernization with recodification as justification for wholesale change in our Federal criminal law, and note that the Mann subcommittee based its conclusion that an omnibus rewrite is not necessary on the testimony of some 110 witnesses. While I believe that many Federal criminal provisions need revision, I do not believe that there is a compelling need for the sweeping changes contemplated by both H.R. 6915 and S. 1722.

Proponents have consistently met complaints about the vast scope and complexity of H.R. 6915 by arguing that we are merely building on the experience of the Brown Commission, the Senate, and our colleagues in the last Congress. Yet, how many of us have read the Brown Commission report? Of this number how many have read the 1500-page Senate report in the 96th Congress, or for that matter, the Senate report in the last Congress? As the Mann subcommittee report says:

> An omnibus reform bill that will substantially change the Federal criminal justice system must be carefully assessed. We must be able to state with reasonable certainty that the new system will be a material improvement over the present one. The broader and more comprehensive the changes made in the legislation, however, the more difficult it is to make such an assessment.

Report of the Subcommittee on Criminal Justice on Recodification of Federal Criminal Law, House Committee on the Judiciary, 95th Cong., 2d sess., Committee Print No. 29, at 4 (1978).

I am not satisfied that I fully understand, nor do I think that anyone on our Committee can fully understand all the changes we have made in existing law, much less what effect these changes will have on the administration of justice in our nation. We must all agree, however, that virtually all felony crimes have been redefined and that any case instituted under the proposed code will be charged in a different form, impose different burdens of proof, require proof of different elements and result in a different sentence than would be the case under present practice. In other words, H.R. 6915 is not merely a recodification of current law but a comprehensive new code which may require decades for the courts to define and refine adequately into an effective jurisprudence. Thus, in view of the extensive impact of H.R. 6915 on the practice of criminal law in our United States Courts, my support for the conclusions of the Mann subcommittee report are reenforced, and I feel that a more deliberate approach to recodification was and is indicated.

My reservations about the omnibus approach grow stronger as I look forward to consideration of H.R. 6915 by the whole House and to conference with the Senate. While I believe an open rule is necessary so that our colleagues will have some opportunity to learn about this important legislation and the many issues it entails, an open rule would allow consideration of many sensitive and controversial amendments encompassing such proposals as Government appeal of sentences, abolition of parole and such new crimes as "reckless endangerment". The Senate bill contains many of these controversial provisions. For example, S. 1722 establishes Government appeal of sentences, it abolishes parole and reduces good time and thus will probably increase the prison population, it provides for preventive detention and creates several new crimes including an "endangerment" provision which would enhance criminal penalties for regulatory offenses. Though H.R. 6915, already representing a radical departure from current law, has avoided many of the dangerous features of S. 1722, there is no assurance that amendments making these features part of H.R. 6915 can be avoided on the floor and in conference. In my view the need for this legislation does not justify the risk that some or all of these provisions could become law. As the Mann report suggests, however, this risk is inherent in an omnibus approach to reform.

In addition to my general objections to the omnibus approach of H.R. 6915, and my feelings that the risks inherent in this approach are not justified by the need for this legislation, I feel that H.R. 6915 should be modified in some specific areas and will discuss them in the order that they appear in the bill.

CAPITAL PUNISHMENT

I voted in favor of amendments offered in the Full Committee markup that would have revised the death penalty provisions of current law to meet the constitutional requirements established by the Supreme Court. As reported, H.R. 6915 repeals all death penalty provisions existing in current law except for the aircraft piracy provision in 49 U.S.C. § 1472(i)(1). I do not agree that either "current law" or the controversial nature of the death penalty justifies the repeal of these

provisions without hearings. Repealing the death penalty provisions as a reflection of "current law" represents exactly the type of interpretation of "current law" that leaves the Committee open to charges of selective revision. Moreover, if including the issue of capital punishment would make the bill too broad in scope, then we should narrow the scope of the bill. We should not pretend that repeal of the death penalty is a recodification instead of giving this important issue the attention it deserves.

PHARMACY ROBBERY

Late in its consideration of section 2521, the Criminal Justice Subcommittee decided not to carry forward the "affecting commerce" jurisdiction for robbery found in current law. *See* 18 U.S.C. § 1951. I do not disapprove of this policy decision on the part of the subcommittee per se, but I do object to one result of this change in current law, and that is the elimination of federal jurisdiction over robbery of a pharmacy. Armed robbery of retail pharmacies is a serious problem in our Nation. Both my colleague from Illinois, Mr. Hyde, and I introduced amendments in the Full Committee markup to preserve Federal jurisdiction over pharmacy robbery when there is a pattern of such robberies in the community. Mr. Hyde's amendment imposed a jurisdictional amount of $500 also. I want to associate myself with the views of my colleague, Mr. Hyde, regarding this issue and to respond briefly to two arguments proposed by opponents of my amendment. Even leading opponents recognize that armed robbery of retail pharmacies is a serious problem; they question only whether it is appropriate for Federal law enforcement agencies to intervene, and whether the type of intervention our Federal Government can afford would be worthwhile.

I believe that Federal jurisdiction in this area is appropriate. Whether we want to admit it or not, the Federal Government is heavily involved in controlling the use of certain drugs, thus making some types of drugs which pharmacists stock very valuable to criminal pushers and users. Anti-theft programs that succeed in preventing burglaries also encourage drug-seeking criminals to resort to armed robbery. It is the strong interest of the Federal Government in controlling the use of certain drugs as reflected in our drug laws and in the policies of the Drug Enforcement Administration that provides the federal nexus which makes this jurisdiction appropriate.

Opponents insist that retaining jurisdiction over pharmacy robbery would amount to no more than an empty promise of Federal enforcement in an area best handled by local law enforcement agencies, and they raise the specter of Federal agents rushing to every pharmacy stickup. This argument mischaracterizes what we are seeking by this amendment. We are not seeking, nor do we expect Federal authorities to investigate many of the drug store robberies that occur each year. However, when a pattern of such robberies occurs, it indicates that the perpetrators might very well be part of a particularly dangerous criminal organization, and that they present a major threat to public safety. In this narrow set of circumstances, our Federal law enforcement agencies can and should investigate to protect the public from robbery-related injury as well as the spread of dangerous drugs. I

believe that this problem is so serious that any Federal assistance would be constructive. I do not agree that we should deprive the Federal authorities of the legal tools they need to act in this area, because they will not be able to investigate every pharmacy robbery. All law enforcement is necessarily prioritized, and it is to be assumed that the Department of Justice would act with discretion.

EXTORTION

No other issue has generated more controversy during our consideration of this bill than the question of whether the Supreme Court's decision in *Enmons* v. *United States*, 401 U.S. 396 (1973) should be perpetuated by section 2522 of the bill. I am persuaded that there is adequate Federal interest to justify a Federal extortion statute and that there is not sufficient reason to totally exclude any group from its purview. I therefore can not support the language of section 2522 which carries forward the *Enmons* decision.

The proponents of the *Enmons* philosophy do not advocate violence or threats of violence in labor-management disputes, nor do they claim that such conduct should go unpunished. They strongly argue, however, that such conduct by labor union members is punishable under State law and should not be prosecutable by Federal authorities. They assert that creation of Federal jurisdiction in this area might lead to Federal harassment of union members and have a chilling effect on union activity. I do not believe that there was a record of prosecutorial abuse prior to the *Enmons* decision, nor do I believe that such abuses will occur hereafter. However, if the fears of the *Enmons* proponents prove justified, then Congress can act later to deal more precisely with the problem; but until such a record of abuse exists, I do not believe that threats against individuals or property to procure labor objectives should be immune from Federal extortion law.

CONCLUSION

The foregoing comments on capital punishment, pharmacy robbery and extortion are illustrative of scores of instances in which the Committee or subcommittee has addressed issues and made policy decisions changing current law and practice according to the sense and judgment of the majority. In each of these instances where I have disagreed with the majority view, I have registered my opposition with my vote. I believe that the issues I discussed are also illustrative of the process by which H.R. 6915 developed. We have dealt here with many highly sensitive issues that have been resolved either by compromise or, failing that, by the adoption of the majority view. On too many occasions, the majority view has prevailed in part because of the perceived necessity to adopt the more popular approach to secure passage of the legislation. I agree with the sentiments expressed in the Mann report where it was said,

> Federal criminal laws ought not to be the product of extensive horse trading. The greater the numbers of substantive changes made by a bill, however, the more likely it is that such trade-offs will occur. The tremendous investment of time,

> energy and emotion that goes into an omnibus bill results in a tremendous pressure to agree to things in order not to hold up the legislation.

Report of the Subcommittee on Criminal Justice on Recodification of Federal Criminal Law, House Committee on the Judiciary, 95th Cong., 2d sess., Committee Print No. 29, at 3–4 (1978).

This sort of pressure is inevitable when the omnibus approach is taken, and we have witnessed it during our consideration of H.R. 6915. Obviously, compromise of this sort is not possible without forfeiting the integrity of present law which has evolved over the history of our Republic through careful and serious discussion by Congress and the courts whenever departure from precedent has been considered.

LAMAR GUDGER.

DISSENTING VIEWS OF HON. HAROLD L. VOLKMER TO H.R. 6915

I did not support the committee's action in reporting H.R. 6915, the Criminal Code Revision Act of 1980, for a variety of reasons. Although I support the concept of codification, I believe that this legislation is not the proper vehicle for such action. My opposition to H.R. 6915 is based upon both general concepts and specific provisions.

THE OMNIBUS APPROACH

H.R. 6915 does not simply codify existing law, but rather is an all encompassing rewrite of the Federal criminal law. Debate during full committee consideration showed that subjective decisions were made as to when to maintain the spirit of current law and when to deviate.

On some amendments proponents of the bill would argue that it should be supported because it retains current law. They would state their goal was not to make changes, but simply to reorganize and put the Federal criminal law in a workable form. On the next amendment, these same proponents would argue that the present law was not satisfactory, and that the proposed amendment would "modernize" the law and bring it up to date. The bill is a mixture of a codification of some current law provisions, with other provisions of substantive law which are changed in the guise of "modernization" and updating the law. This results in legislation devoid of a uniform and cohesive legislative philosophy.

We are dealing with a bill of approximately 500 pages. Because of the mixture of current law with "modernized" provisions, substantive deviations from current statutory law occur throughout. This results in the inclusion of many controversial and complex issues, each of which should be subject to exhaustive legislative scrutiny in separate legislative proceedings. This is not possible with this legislation as our vehicle for consideration.

I favor instead either an incremental approach to codifying our criminal law—where the legislation is divided into workable pieces—or by the mode of a true codification, where no changes in current law are made and leaving out major controversial areas such as the death penalty. This provision has been omitted from the Senate bill, but consideration of separate death penalty legislation is scheduled when the code is completed. These areas should be treated simultaneously with the code through separate legislation. Under either approach we would then be able to work on controversial points separately.

Instead, however, we are utilizing an approach which can lead only to confusion and controversy. The confusion that will result is illustrated by the fact that during the last hour of our 45-hour markup, we were required to spend time discussing the implications of the state

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of mind requirements which would apply to the entire substantive crime provisions of the bill.

For these reasons, I do not agree with the entire philosophy, or lack thereof, behind H.R. 6915.

DEATH PENALTY

One major deviation from current law, is the elimination of the death penalty. This was a conscious decision on the part of the subcommittee. Although the bill's proponents argue that the inclusion of a death penalty is so controversial that it should be considered separately at a later date, this argument begs the point. By providing for up to life imprisonment only for Class A crimes (which in present law also carry a death penalty) the death penalty in Federal criminal law is effectively repealed, thereby raising the issue. If we are to treat it separately, a death penalty bill should be presented simultaneously as the Senate has done instead of saying we will do it later.

As I stated above, I believe that the Criminal Code should reflect current law. The death penalty does exist today in our Federal statutory law. We must remember the Supreme Court has never declared the death penalty, per se, unconstitutional. Rather, the Court decisions on this subject have reversed verdicts imposing the death penalty for procedural defects in the sentencing process. These same Court decisions have outlined for us the procedural mechanics necessary to cure the defects. We should note that since the initial decisions of the Supreme Court on the subject, Congress has enacted portions of the Air Piracy Act which contain both the death penalty and the required procedural safeguards. I submit that this is the current state of Federal law on the issue and that if we are to carry forward current law, death penalty provisions as well as procedural safeguard provisions, can logically be included.

During full committee consideration of this bill I offered an amendment to restore the death penalty, which would have met the court mandated procedural requirements. Although the amendment was defeated, I believe that we should consider this issue in detail. Accordingly, I intend to bring this issue before the full House for its consideration.

Although I believe that this issue should be considered separately, I see no indication that such consideration will take place. No separate death penalty bill has been acted upon by the subcommittee or full committee. Under the provisions of H.R. 6915 the death penalty will be effectively repealed for all Federal crimes, including killing of the President, unless we consider the issue with this legislation.

In these views, I will not argue the merits of the death penalty. The arguments, both pro and con, are well known. I simply believe that if we are going to codify the criminal law, we should include all sanctions currently available.

PROSTITUTION

This legislation is deficient in the sex offense area. H.R. 6915 carries forward only portions of the Mann Act. Omitted are provisions which would cover the voluntary crossing of a State line for immoral purposes. In addition, this legislation only partially recognizes that prostitution represents a significant source of income for organized crime. While the term "prostitution" is referred to in the racketeering sections of this bill, nowhere is the offense defined. I do not believe that we should take a tool in combating "organized crime" away from law enforcement.

To meet these objectives, during full committee consideration, I offered an amendment to create the offense of "engaging in a prostitution business". This amendment is similar to a provision contained in the Senate version of the bill. I intend to bring this issue before the full House for consideration. I believe that my amendment simply closes a gap in this legislation and has the effect of carrying forward current law.

OBSCENITY

After the subcommittee considered the obscenity issue several times and received criticism for failing to include the obscenity offenses, the subcommittee decided, upon reflection, to include such provisions. One section included defines the offense of transferring or exhibiting obscene material. The definition of "obscene material" is taken essentially from court determinations on the subject. This definition is deficient in one respect, however. This deficiency stems from the failure to define the scope of what a "contemporary community" represents.

During committee consideration, I offered an amendment which would have defined "contemporary community" as local community standard instead of Federal standard. This definition was a paraphrase of similar definition contained in the Senate version of the bill.

I believe that a definition of this term is needed to give the courts guidance. A locally drawn jury cannot make a decision based upon a national standard. That is a concept which is vague, to say the least. A local standard would be more reasonable and allow the jury to utilize their own concepts based upon their instructions from the court. Such an amendment tracks current Federal court decisions which use a standard of the judicial district or area from which the jury panel is drawn.

The entire concept of what is obscene and what is not is subject to various interpretations. Decisions should be left to the values of the smallest—most local—unit possible. By utilizing a local standard, we recognize that what may be obscene in Hannibal, Mo., may not be considered such in New York.

By failing to define the term, we are leaving ourselves open to the possibility that an unworkable "national standard" could be applied. This would, in turn, lead to the urban standard being imposed upon rural areas or the reverse. I will attempt to remedy this defect on the floor by offering an amendment defining "contemporary community" as the judicial district or area from which the jury panel is drawn.

FIREARMS

The legislation contains a reenactment of the 1968 Gun Control Act. If this were a true codification, or restatement of current law, this would be fine. However, H.R. 6915, does not do this.

Ever since its enactment, the 1968 Gun Control Act, has been a source of controversy. This is illustrated by the fact that there are 72

bills dealing with firearms which have been introduced in the 96th Congress and which have been referred to the Judiciary Committee. Major gun reform legislation includes H.R. 5225—calling for less gun control—which I introduced and which has 179 cosponsors. In addition there is the Kennedy-Rodino Hand Gun Control Act—calling for more gun control—introduced by Chairman Rodino. Although the philosophy behind these two bills differ drastically, they do have one concept in common. That concept is that the 1968 act needs a major overhaul. To date, there has not even been a hearing on the merits of these bills. There is no indication such hearings will occur.

If we had kept the committee's avowed principle of keeping such controversial issues out of this bill—as the proponents of the bill stated in reference to the death penalty—the 1968 Gun Control Act would have been deferred to a later date. This was not done, however. My amendment to strike these provisions from the bill was defeated with very little debate. This again illustrates the lack of uniform philosophy behind H.R. 6915.

Because there is little possibility of acting on firearms legislation this Congress by following the committee route, I intend, on the floor, to offer provisions of H.R. 5225 as amendments to the firearms chapter of this legislation. A major part of our criminal law, which has been subject to abuse by the Bureau of Alcohol, Tobacco and Firearms, has been given only scanty consideration by our committee. The issue must be met. For detailed explanation of what my proposed amendments would do, I refer members to the September 10, 1979, Congressional Record at pages H7636 through H7638.

SENTENCING

H.R. 6915 contains a major reworking of the entire philosophy behind the sentencing aspects of the criminal justice system. Sentencing alternatives are set out in detail. Ranges of punishment are specified to conform with the offense classifications. The basic theory of determinative sentencing—certainty and uniformity of sentence—is what the final product is supposed to represent. It does not.

A careful review of the provisions of this portion of H.R. 6915, will reveal that certain provisions completely negate the concept of certainty in sentencing. You will first notice that there is no minimum sentence for the various classes of offenses, only maximums. Sentencing guidelines, yet to be promulgated, are supposed to maintain the certainty and uniformity of punishment. This concept is defeated, however, by maintaining parole within the criminal justice system. By continuing parole, we are in effect perpetuating the current system which the legislation sought to change.

The criticisms levied against the current system—no certainty as to the amount of time a convicted offender will serve, favoring the affluent over the poor—can be levied against this legislation. With parole there can be no certainty that a convicted offender will serve a designated time. Those with influence will better be able to utilize the parole mechanism to secure early release. In fact, when you analyze the sentencing provisions of H.R. 6915, all we have accomplished is creating uniform maximum punishment within the various classes

of offenses—maximums, which I might add, are significantly lower than the present law and the Senate levels. The Senate version of the bill, on the other hand, does not have these problems, since the Senate bill abolishes parole.

During full committee consideration of this legislation, I offered a series of amendments designed to correct this defect. First, I offered an amendment which would have removed parole from the legislation. At the same time, Mr. Lungren offered a substitute for my amendment which would have had the effect of "sunsetting" parole when sentencing guidelines go into effect. Both efforts were defeated.

As a result of these actions, I then offered an amendment which would have raised the maximum sentencing levels for felony offenses to the level of the Senate bill. This effort also failed.

Acceptance of any of these amendments would have resulted in sentencing provisions which would have been tighter and closer to the basic underlying philosophy of determinative sentencing. I intend to again raise these issues on the House floor.

CONCLUSIONS

H.R. 6915 is legislation which attempts to do too much. The result, because of the omnibus approach, is a bill completely lacking a uniform underlying philosophy. It is a bill which significantly changes current law in many respects on issues which demand individual consideration. It is a bill, written in a new and complex "codespeak" language which required constant explanation during markup.

Chairman Drinan and the members of the subcommittee deserve to be praised for their heroic efforts on this bill, but they simply "bit off more than they could chew". Unless H.R. 6915 is modified on the floor to reflect current law and a cohesive philosophy, it should not be passed. We cannot afford to simply pass this legislation for the sake of passing a bill. A bill which affects the lives and rights of our citizenry, as this one does, must be our best. H.R. 6915 fails this test.

HAROLD L. VOLKMER.

ADDITIONAL VIEWS OF MESSRS. LUNGREN, KINDNESS, MAZZOLI, HUGHES, VOLKMER, McCLORY, BUTLER, ASHBROOK, HYDE, AND SAWYER

The penalty structure of H.R. 6915, premised upon creation of a Sentencing Committee, is intended to reduce unwarranted disparity between similarly situated defendants. Under the bill, the Committee would establish sentence guidelines for trial judges which would permit deviation only if sufficient aggravating or mitigating circumstances exist to justify such a deviation.

Since guidelines can be meaningful only to the extent that they are applied, H.R. 6915 proposes the institution of appellate review of sentence as an enforcement mechanism. However, the bill's review procedure suffers from a serious design flaw—it provides appellate review to the defendant alone. Sentence review can effectively enforce such guidelines only if it is also made available to that participant in the criminal justice system representing society—the government.

We supported an amendment offered during the Judiciary Committee's consideration of H.R. 6915 which sought to correct that defect and provide some balance to the proposed sentencing guideline system. In fact, it was a very limited amendment. Specifically, it would allow the government to petition for leave to appeal sentences which are below the applicable guideline range and clearly unreasonable. As a further check on possible prosecutorial overreaching, the Attorney General or the Solicitor General would be required to personally approve the filing of such a petition. Finally, the petition would need to be filed substantially prior to the expiration of the defendant's right to file an appeal on the merits to avoid there being any "chilling effect" on defendant's exercise of that right.

The limited nature of the proposed amendment is underscored when compared to the appeal rights afforded the defendant in the Criminal Code Revision bill reported by the Committee. Section 4101 provides that a defendant may, as a matter of right, appeal any sentence which is more severe than the applicable guidelines and may even petition for leave to appeal a sentence within the guidelines if it is "clearly unreasonable". Nevertheless, despite the modest nature of our attempt to permit restricted appeal rights for the government, the amendment was defeated on a 15–16 vote.

Clearly, if sentencing disparity is to be reduced—the central goal of any new sentencing system—some limited form of government appeal must be allowed. Unwarranted disparity occurs today in both directions. Inmates within the Federal Prison system find both unreasonably low sentences and high sentences demoralizing and violative of the principles of equal treatment under the law. Their expectation, and that of the general public, is that prisoners with substantially similar backgrounds and convicted of similar offenses should

not be serving materially different sentences. Permitting only the defendant to appeal a sentence is to ignore the fact that unwarranted disparity exists on the low side as well as on the high side and is equally pernicious.

An example of such an intolerably low sentence was cited by the New York Times in an April 23, 1980 editorial supporting the right of governmental appeal. The case involved a Federal judge in Houston, Texas who sentenced three former police officers, convicted of killing a Mexican-American prisoner, to probation. They were later resentenced to one year and one day only because that was the minimum sentence allowable under the applicable civil rights law. Similar instances of unwarranted leniency frequently occur with regard to white collar and organized crime cases.

We do recognize that there will be fact situations where sentencing below the applicable guidelines will be appropriate. Therefore, it is essential that appellate courts have an opportunity to examine reasons for sentencing below the guidelines as well as above the guidelines. This will permit the development of a body of case law concerning when an aggravating or mitigating circumstance justifies a sentence outside the guideline. The inevitable result of defendant-only appeal is the lopsided development of decisional law frustrating the further refinement of the guideline system.

Numerous organizations, in addition to the New York Times, have recognized the inherent inconsistency of establishing a guideline system, enforced by appellate review, which only permits appeal from sentences above the recommended guideline range. The Judicial Conference of the United States, the U.S. Department of Justice and the National Association of Attorneys General have all taken this position. Likewise it is notable that several states have recently passed legislation permitting government appeal of sentence and Common Law countries such as Canada, New Zealand and India have incorporated the concept in their Criminal Codes.

Notwithstanding the strong support for the right for government appeal of sentences noted above, some argue that this grant of authority would constitute a violation of the constitutional prohibition against double jeopardy. In reality, however, this argument is specious because appeal of sentence is not appeal of acquittal but merely a post-trial motion attacking the propriety of a sentence (i.e., application of the guidelines). It is an appeal of a trial judge's post-verdict ruling of law and could only follow conviction. In holding that double jeopardy does not apply to similar post-verdict rulings of law, the Supreme Court in *Wilson* v. *U.S.*, 420 U.S. 332, stated:

> * * * Correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions. We therefore conclude that when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause. (Pp. 352–353.)

If a trial judge has made an erroneous ruling of law by disregarding the sentencing guidelines and imposing an improper sentence, the prosecution as well as the defense should have a right to appeal that improper sentence.

Far from being a question of constitutional dimension, sentence appeal is a procedural reform based upon considerations of how public policy can most practically be implemented. If sentencing disparity is to be cured without destroying public perception that justice is being done, the convicted criminal cannot be given the sole right to appeal disparate sentences. If sentencing guidelines are to work, the government must be given a reciprocal right to balance their application.

We intend to support such an amendment when offered during Floor consideration of H.R. 6915.

DANIEL E. LUNGREN.
R. L. MAZZOLI.
WILLIAM J. HUGHES.
HAROLD L. VOLKMER.
ROBERT MCCLORY.
M. CALDWELL BUTLER.
JOHN M. ASHBROOK.
HENRY J. HYDE.
THOMAS N. KINDNESS.
HAL SAWYER.

ADDITIONAL VIEWS OF MESSRS. HYDE, McCLORY, RAILSBACK, FISH, BUTLER, MAZZOLI, ASHBROOK, MOORHEAD OF CALIFORNIA, HALL OF TEXAS, VOLKMER, BARNES, AND SENSENBRENNER

Innumerable Federal statutes, both civil and criminal, strictly monitor the sale, possession, and safety of controlled substances. These evidence Congress' firm and continuing determination that a substantial Federal interest warrants intervention by the national government into many drug-related activities. Indeed, by referring to these drugs as "controlled substances," we emphasize the pervasive nature of Federal involvement in this area.

A glaring omission in the Federal scheme of drug regulation is the absence of a Federal offense relating to robberies of pharmacies to obtain controlled substances. Despite clear need, this Committee, unlike its Senate counterpart,[1] failed to include such a provision in its recommended version of the Criminal Code Revision Act of 1980 (H.R. 6915). We strongly disagree with this decision.

The substantial Federal interest in this area is abundantly obvious, not only from existing statutes,[2] but from other provisions in the Criminal Code reported by the Committee.[3] The Federal Government's responsibility in this matter further stems from the fact that Federal intervention in this area may have caused, to a large degree, the recent rash of drug-related pharmacy robberies. An article in The Wall Street Journal, which appeared during the Committee's consideration of this issue, suggests that it is "the success that law enforcement agencies have had against illegal drug traffic that has made the inventory of the neighborhood drugstores a more tempting target for criminals."[4] For this reason, we cannot turn our backs on those who suffer because of the 1,700 pharmacy robberies that occur annually, particularly when the result may be loss of innocent life.[5]

We plan to strongly support any amendment to the Criminal Code offered on the floor of the House which will substantially incorporate the offense that has been included in the Senate version of the bill. Under that version, Federal jurisdiction would lie where a pharmacy was robbed of certain controlled substances valued in excess of $500, but only if the offense was part of a pattern of such robberies in the locality. We believe that this provision accommodates the concurrent Federal and State interests in these crimes and respects the jurisdiction

[1] S. 1722, sec. 1721(c)(8). The Senate Judiciary Committee felt that the specific base of jurisdiction is needed "as a means of emphasizing the particular Federal interest that appropriately attaches to such crimes, especially when they appear to be beyond the capability of local authorities to successfully investigate and prosecute." S. Rept. No. 96–553, 96th Congress, 2d session, 642 (1980).

[2] See, e.g., Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 et seq.; Controlled Substances Act, 21 U.S.C. 801 et seq.

[3] See, e.g., secs. 2711–15 (drug offenses).

[4] June 30, 1980, at 18.

[5] Id.; National Association of Chain Drug Stores, Action-Gram (Apr. 16, 1980).

of the States, by limiting intervention to situations where the harm is substantial and the offense is not isolated.

During the Committee's debate on this issue, one argument advanced in opposition to this offense was the Drug Enforcement Administration's belief that its manpower would be insufficient to handle the additional work generated by such an amendment. The argument fails, however, by virtue of the effective date of the Criminal Code recommended by the Committee—the fourth January 1 after the date of enactment.[6] Certainly, when this Committee acts on future authorization bills affecting the DEA, the needs created by the Criminal Code will be seriously considered, as will similar needs affecting other divisions of the Justice Department.

In sum, because of the substantial Federal interest in controlled substances and the considerable need for Federal efforts to combat the recent crime wave in this area, we oppose the Committee's decision not to include the pharmacy robbery offense in its recommended version of the Federal Criminal Code.

HENRY J. HYDE.
ROBERT MCCLORY.
TOM RAILSBACK.
HAMILTON FISH, JR.
M. CALDWELL BUTLER.
R. L. MAZZOLI.
JOHN ASHBROOK.
CARLOS J. MOORHEAD.
SAM B. HALL, JR.
HAROLD L. VOLKMER.
MICHAEL D. BARNES.
F. JAMES SENSENBRENNER.

[6] H.R. 6915, title III.

ADDITIONAL VIEWS OF MESSRS. LUNGREN, KINDNESS, MAZZOLI, HALL OF TEXAS, VOLKMER, BUTLER, MOORHEAD OF CALIFORNIA, ASHBROOK, HYDE, AND SAWYER

An early and often-stated goal of the Subcommittee on Criminal Justice in recodifying the federal criminal law was to achieve "truth-in-sentencing." There was general agreement to end the existing facade under which a defendant's ultimate prison term is determined not in open court by a judge but rather in shadowy recesses by a faceless parole board. Under the current chimera, a sentence at trial deceives the public, frustrates the purpose of sentencing, and causes the defendant to languish uncertainly for years afterward in prison.

The Subcommittee correctly perceived that a guideline system of sentencing could succeed and "truth-in-sentencing" achieved only if the distorting influence of parole was eliminated. To compensate for parole abolition, the Subcommittee considerably reduced maximum sentences.

Unfortunately, in an excess of caution, the Subcommittee retreated from this sound position to that embodied in H.R. 6915 which is best described as "half-truth-in-sentencing." The bill provides that a defendant, even though sentenced under guidelines, becomes eligible for parole after serving one-half his term (parole eligibility currently begins generally at service of one-third). The full Judiciary Committee confirmed this position by a vote of only 17 to 12, despite the fact that maximum sentences had not been increased to account for the renewed role of parole.

Unwarranted disparity resulting from the unstructured discretion of sentencing judges is clearly a major problem with today's criminal justice system. The solution for this problem is the institution of sentencing guidelines. But the undermining effect of parole retention on a guideline system is obvious—since decisions as to sentence length would merely be transferred from the judge applying guidelines to the parole board presumably under no such constraints. Defendants will not serve the terms assessed them publicly at trial but instead will dangle indefinitely in limbo awaiting action by the parole system. That is the evil of the current system universally criticized as a major cause of prison unrest.

By producing a guideline/parole hybrid, H.R. 6915 misses an opportunity to achieve sentence reform and chooses instead to perpetuate the conditions demanding reformation. If the reform required is to succeed, the parole board must be abolished as is the case under counterpart legislation in the Senate (S. 1722). To retain the very factor that distorts current sentences is to prevent improvement.

Much has been said of the "safety valve" purpose served by parole retention—its supposed value in controlling the growth of prison

population. But, if the necessity ever arises, this can be accomplished more expeditiously by expanding the role of the U.S. Pardon Attorney or by clarifying the power of the trial court to modify sentences. It is folly to retain the very institution that has prompted cries for reform from all corners.

We argue not for the immediate abolition of parole, since it must exist for a time at least with respect to those who have been sentenced under the current system. But rather, we will propose an amendment to phase out parole so that the new guideline system will be given a chance to succeed. If the current system is misshapen because of parole, the answer is to reshape the system without it. To undertake reform but retain parole for the sake of familiarity is to let an old friend take us hand-in-hand off a precipice and into the pit of failure.

DANIEL E. LUNGREN.
R. L. MAZZOLI.
SAM B. HALL, Jr.
HAROLD L. VOLKMER.
M. CALDWELL BUTLER.
CARLOS J. MOORHEAD.
JOHN M. ASHBROOK.
HENRY J. HYDE.
THOMAS N. KINDNESS.
HAL SAWYER.

ADDITIONAL VIEWS OF MESSRS. SENSENBRENNER AND VOLKMER

One of the most objectionable features of the Criminal Code Revision Act of 1980 (H.R. 6915), as reported by the Committee on the Judiciary, is its failure to adequately provide for one of the most potentially effective and just forms of punishment available to modern society—the death penalty.[1] As we understand the Committee's approach to the recodification effort, the goal is to make more ordered and modern Federal criminal statutes, while minimizing changes from current law. From this premise, the Committee has concluded that, because existing death penalty provisions have either been declared unconstitutional [2] or likely would be if challenged,[3] the inclusion of that punishment in the Code would constitute its restoration, and, as such, a significant departure from existing law. We disagree. Capital punishment is not only consonant with, but mandated by the purposes of recodification. Furthermore, by failing to resolve this issue at such an opportune moment, we abdicate our legislative responsibilities and give aid and comfort to continuing judicial activism and usurpation in this area of the law.[4]

Our quandary had its inception in *Furman* v. *Georgia*, 408 U.S. 238 (1972), where the Supreme Court held, in a one-paragraph per curiam decision, that the imposition and carrying out of the death penalty in the particular cases involved, and pursuant to specified State statutes, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution.[5] Each

[1] Only aircraft piracy which results in death remains punishable by death. 49 U.S.C. 1472 (i), (n). Existing law provides that capital punishment may also be imposed for offenses under the following: 18 U.S.C. 34 (willful destruction of aircraft, motor vehicles or their facilities where death results); 18 U.S.C. 351 (Congressional assassination; Congressional kidnapping where death results); 18 U.S.C. 794 (gathering or delivering defense information to aid a foreign government); 18 U.S.C. 844 (certain explosives offenses where death results); 18 U.S.C. 1111 (first-degree murder within the special maritime or territorial jurisdiction or the United States); 18 U.S.C. 1114 (first-degree murder of judges and certain law enforcement officials); 18 U.S.C. 1716 (mailing prohibited articles where death results); 18 U.S.C. 1751 (Presidential or Vice Presidential assassination; Presidential or Vice Presidential kidnapping where death results); 18 U.S.C. 1992 (willful train wrecking where death results); 18 U.S.C. 2031 (rape within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. 2113 (bank robbery where death results); 18 U.S.C. 2381 (treason).

[2] See, e.g., *U.S.* v. *Kaiser*, 545 F.2d 467 (5th Cir. 1977) (18 U.S.C. 1111 held unconstitutional for lack of standards to guide sentencing).

[3] See e.g., 18 U.S.C. 844 (lacks guidelines).

[4] During Committee debate, in addition to the proposition that the death penalty frustrates the goals of recodification. the argument was advanced that the death penalty should not be included in the Code because it would be too "controversial" and, as such, should be dealt with in separate legislation. However, since the Committee has placed its imprimatur upon other controversial provisions (e.g., expungement of criminal records for first offenders [Section 8123]), and since it failed to embrace the Senate's strategy of simultaneously reporting a separate capital punishment bill (S. 114), the argument is not persuasive.

[5] The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishment inflicted.*" (Emphasis added.) The due process clause of the Fourteenth Amendment makes this guarantee applicable to the States as well as to the Federal Government. *Robinson* v. *California*, 370 U.S. 660, 666 (1963).

of the five concurring Justices [6] and the four dissenters [7] filed a separate opinion, creating substantial confusion about whether the death penalty was unconstitutional under any and all circumstances, or, if not, what statutory scheme might make it constitutional by virtue of being "uncruel" or [8] "usual." For our purposes, the most relevant and noteworthy portions of this infamous decision are the comments of Mr. Justice Rehnquist and Mr. Justice Powell on the judicial and legislative spheres of influence in this area. While Mr. Justice Rehnquist lamented the Court's failure to approach the Eighth Amendment issue with "the deepest humility and genuine deference to legislative judgment," [9] Mr. Justice Powell, though sympathetic with the notion of judicial restraint, aptly pointed out that a trespass of this nature does not come uninvited:

> * * * [T]he sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process. *Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many might decry their failure either to abolish the penalty entirely or selectively, or to establish standards for its enforcement.* But impatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers. * * *

408 U.S. at 464–65 (emphasis added).

We concur with the premise that such impatience does not justify the judiciary's penetration into affairs not its own. Nonetheless, it is clearly an impetus and we believe that this Committee's failure to fulfill its constitutional responsibilities in this matter will only serve to fuel the fire of judicial impetuosity. If the Supreme Court becomes the principal progenitor of law governing punishment, we have only ourselves to blame.

Opinions issued by the Court since the *Furman* decision have consistently reinforced the traditional notion that the punishment of death is not unconstitutional.[10] The only issues remaining are: (1) the appropriateness of the penalty in relation to the gravity of the offense committed, and (2) the procedure pursuant to which the penalty is ultimately imposed. For this reason, the death penalty under existing Federal law is effectively null and void only to the extent that it is unconstitutionally applied to offenses for which it would be a grossly severe punishment or is imposed under inadequate procedural safeguards. A Criminal Code which does not continue the penalty with technical constitutional corrections is a radical departure from current law that flies in the face of the Committee's purported recodification goals.

We believe that a death penalty imposed under the following conditions is clearly constitutional and we intend to support any amend-

[6] Douglas, Brennan, Marshall, Stewart, and White, JJ.
[7] Burger, C. J., Blackmun, Powell, and Rehnquist, J.J.
[8] The use of the word "and" in the clause means that a penalty fails only where it is both cruel and unusual.
[9] 408 U.S. at 468.
[10] See, e.g., *Coker* v. *Georgia*, 433 U.S. 584, 591 (1977) ("It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment. . . ."); *Gregg* v. *Georgia*, 428 U.S. 153, 169 (1976); *Proffitt* v. *Florida*, 428 U.S. 242, 247 (1976); *Jurek* v. *Texas*, 428 U.S. 262, 268 (1976); *Roberts* v. *Louisiana*, 428 U.S. 325, 331 (1976).

ment designed to accomplish this purpose when the Criminal Code is considered on the floor of the House: [11]

(1) The punishment makes a measurable contribution to acceptable goals of punishment, but is not grossly out of proportion to the severity of the crime.[12]

(2) The penalty is not mandatory.[13]

(3) A separate hearing on the appropriate penalty is conducted, wherein all relevant evidence on both sides is considered.[14]

(4) The penalty is only imposed where one or more specified aggravating factors are found to exist beyond a reasonable doubt and where mitigating circumstances, established by a preponderance of the evidence, are found to be either absent or not to outweigh the aggravating factors. The party determining the sentence is not restricted to consideration of only mitigating factors specified in the statute.[15]

(5) The defendant is given the right to appeal the sentence and the appellate court must determine, not only that the evidence supports the findings accompanying that sentence, but that the sentence was not imposed because of prejudice or arbitrary factors. Furthermore, the appellate court must find that the sentence is not excessive in light of the circumstances surrounding the crime and the particular defendant.[16]

Although the merits of capital punishment are not strictly relevant for purposes of this discussion,[17] a brief description thereof is warranted to emphasize the dear price of legislative timidity. In repealing the death penalty, we sacrifice its contributions to deterring violent crime and effecting retribution.

The debate over the precise deterrent effect of capital punishment is of long standing and promises to continue indefinitely. Certainly some studies have been most persuasive in demonstrating its capacity for deterring crime, although none has escaped criticism.[18] Nevertheless, in spite of the lack of overwhelmingly convincing evidence, common sense suggests that where the perpetrator of a planned homicide is not criminally insane, the existence of the ultimate punishment must have the intended effect in more cases than not. Particularly in situations where the defendant has nothing to lose except his life, the possibility that he may suffer that penalty must of necessity be a factor in his calculations.[19] It is difficult to imagine that each execution fails to deter at least one murder of an innocent, particularly where it is sur-

[11] During Committee deliberations, two amendments aimed at achieving continuity with current law were offered, but were rejected by the Committee. The features outlined herein are the essential elements of S. 114.
[12] *Coker* v. *Georgia*, 433 U.S. at 592.
[13] *Woodson* v. *North Carolina*, 428 U.S. at 301.
[14] *Gregg* v. *Georgia*, 428 U.S. at 190–92.
[15] *Gregg* v. *Georgia*, 428 U.S. at 196–98; *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978).
[16] *Gregg* v. *Georgia*, 428 U.S. at 204; *Proffitt* v. *Florida*, 428 U.S. at 258.
[17] Again, under the parameters outlined by the Committee, the goal is not to create new law, but to restate that which exists. Thus, the merits of current law are irrelevant.
[18] See, e.g., studies cited in *Gregg* v. *Georgia*, 428 U.S. at 184–85 n. 31.
[19] The facts involved in *Coker* v. *Georgia*, where the Supreme Court held the death sentence for rape of an adult woman unconstitutional, are illustrative on this point. The defendant committed the rape promptly after escaping from prison where he was serving three life terms, two 20-year terms, and one 8-year term of imprisonment for raping and murdering one woman and raping and severely beating another. The victim's husband testified at the trial that the defendant had threatened to kill his wife if the police tried to apprehend him because "he said he didn't have nothing [*sic*] to lose—that he was in prison for the rest of his life, anyway. . . ." 433 U.S. at 609 n. 4.

rounded by the massive publicity evidenced in recent years. This alone would justify the penalty in our view, although the number of instances of deterrence is probably far greater.[20]

Recent statistics reflecting a sharply rising crime rate are cause for grave concern and emphasize the need for immediate implementation of a punishment which will deter the commission of future offenses. Preliminary figures from the FBI's Uniform Crime Report, released in April of this year, evidence an overall increase in crime of 8 percent for 1979, and the increase with respect to violent crimes is even more striking. The incidence of murder and aggravated assault increased by 9 percent and forcible rape, by 12 percent. In cities with populations of 500,000 to 999,999, the murder rate rose by an astonishing 17 percent.[21] This shocking crime wave suggests that the death penalty is more appropriate and needed than ever.

Although the retributive effects of capital punishment have been belittled as "barbaric" by some critics, they serve the important purpose of meting out justice, particularly where the offense is carried out in a calculated, cold-blooded, vicious, demeaning or heinous manner. There is overwhelming public approval of this punishment[22] and the Supreme Court has consistently supported the goal of retribution when it has been challenged on constitutional grounds.[23] As Mr. Justice Stewart so wisely noted in the landmark *Furman* case:

> * * * The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

408 U.S. at 308. The Committee's inaction in this matter will do nothing to thwart the understandable urges of many wronged individuals to take matters into their own hands.

The death penalty is sometimes criticized because of the speculative possibility that a guiltless party might suffer its irreversible impact. The specter of that eventuality is disturbing, of course, but it does not outweigh the benefits accruing from capital punishment to the innocent citizens that we elected representatives are bound to protect with every weapon available to us under the Constitution. We therefore respectfully, but vigorously, dissent from the Committee's decision to virtually erase the death penalty from the Federal criminal law.

F. JAMES SENSENBRENNER.
HAROLD L. VOLKMER.

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[20] Unfortunately, the prevented murder cannot be documented and will never be included in the statistics bandied about.
[21] 126 Congressional Record S7377 (daily ed. June 18, 1980) (remarks of Sen. Thurmond).
[22] An NBC News poll taken in November 1978, found that 66 percent of those interviewed favored the death penalty for those convicted of murder. Harris and Gallup polls taken around the same time demonstrated similar results. Id. at S7376–77.
[23] See, e.g., *Gregg* v. *Georgia*, 428 U.S. at 183–84.

SHOWING DISPOSITION OF PRESENT PROVISIONS OF TITLE 18, UNITED STATES CODE, IN H.R. 6915 AND S. 1722*

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
1	Offenses classified	§ 111	§§ 3107, 3702.
2	Principals	§ 401	§§ 501–3.
3	Accessory after the fact	§ 1311	§§ 1711, 1712.
4	Misprision of felony	§ 1311	§ 1713.
5	United States defined	§ 111	
6	Department and agency defined	§ 111	§ 101.
7	Special maritime and territorial jurisdiction of the United States defined.	§ 203	§ 113.
8	Obligation or other security of the United States defined.	§ 1746	§ 2546.
9	Vessel of the United States defined	§ 203	
10	Interstate commerce and foreign commerce defined	§ 111	§§ 101.
11	Foreign government defined	§ 111	§§ 101 (15), 1507.
12	United States Postal Service defined	Deleted	(See § 101.)
13	Laws of States adopted for areas within Federal jurisdiction.	§ 1862	§ 2761.
14	Applicability to Canal Zone; definition	Deleted	No longer applicable.
15	Obligation or other security of foreign government defined.	§ 1746	§ 2546.
31	Definitions	§ 111	§§ 101, 2504. (See also § 2725.)
32	Destruction of aircraft or aircraft facilities	§§ 1701–1704, 1611–1613, 1001	§§ 2501–03, 2315.
33	Destruction of motor vehicles or motor vehicle facilities.	§§ 1701–1704, 1611–1613, 1001	§§ 2501–03, 2315.
34	Penalty when death results	§§ 1601–1603	§ 2501.
35	Imparting or conveying false information	§ 1616	§§ 2315–16. (See also § 1744.)
41	Hunting, fishing, trapping; disturbance, or injury on wildlife refuges.	Title VI, §§ 201, 202, 203, 206, reenact in part, §§ 1701–1703.	§§ 2501(c)(2), 2502–03; reenact in part—title II, § 201.
42	Importation of injurious animals and birds; permits; specimens for museums.	Title VI, § 201, 206, reenact in toto.	Reenact in toto—title II, § 202.
43	Transportation or importation in violation of state, national, or foreign laws.	Title VI, §§ 201, 202, 203, 206 reenact in toto.	Reenact in toto—title II, § 203.
44	Marking packages or containers	Title VI, § 201, reenact in toto	Reenact in toto—title II, § 204.
45	Capturing or killing carrier pigeons	Deleted	Deleted

*This chart is intended as a general guide only. It is not intended to suggest that any particular section of proposed title 18 is a "successor" to a particular section of current title 18. For a complete background of the proposed sections, and a discussion of those precedents intended to be carried forward, see text.

† Taken from S. Rept. No. 96-553 at 1489–1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
46	Transportation of water hyacinths	Reenact in toto	Reenact in toto—title [illegible], § 205.
47	Use of aircraft or motor vehicles to hunt certain wild horses or burros.	Reenact in toto	Reenact in toto—title II, § 206.
81	Arson within special maritime and territorial jurisdiction.	§§ 1701, 1001	§ 2501(c)(1).
111	Assaulting, resisting, or impeding certain officers or employees.	§§ 1302, 1357–58, 1611–1614, 1823.	§§ 2311–14, 1757, 1701. (See also § 2723.)
112	Protection of foreign officials, official guests, and internationally protected persons.	§§ 1611–1615, 1622–1623, 1823. —reenact in part; title VI, §§ 201, 203, 207.	§§ 2311–16, 2723; reenact in part—title II, § 211. (See also § 1502.)
113	Assaults within maritime and territorial jurisdiction	§§ 1001, 1611–1614,1823	§§ 2301–14, 2331. (See also § 2723.)
114	Maiming within maritime and territorial jurisdiction	§ 1611	§§ 2311. (See also § 2314.)
151	Definitions	§ 1735	§ 2535; reenact in toto—title II, § 221.
152	Concealment of assets; false oaths and claims; bribery.	§§ 1341–1343, 1735, 1751	§§ 1741, 2531(e)(18), 2535.
153	Embezzlement by trustee, receiver or officer	§ 1731	§§ 1743, 2531(e)(18), 2535.
154	Adverse interest and conduct of referees and other officers.	Reenact in toto	Reenact in toto—title II, § 222.
155	Fee agreements in bankruptcy proceedings	Reenact in toto	Reenact in toto—title II, § 223.
201	Bribery of public officials and witnesses	§§ 111, 1321–1322, 1351–1352	§§ 1721–22, 1751–52.
202	Definitions	Title 18 app	Reenact in toto—title II, § 231.
203	Compensation of Members of Congress, officers and others, in matters affecting the Government.	Reenact in part, §§ 1351–1354	§ 1760.
204	Practice in Court of Claims by Members of Congress	Reenact in toto	Reenact in toto—title II, § 232.
205	Activities of officers and employees in claims against and other matters affecting the Government.	Reenact in toto	Reenact in toto—title II, § 233.
206	Exemption of retired officers of the uniformed services	Reenact in toto	Reenact in toto—title II, § 234.
207	Disqualification of former officers and employees in matters connected with former duties or official responsibilities; disqualification of partners.	Reenact in toto	Reenact in toto—title II, § 235.
208	Acts affecting a personal financial interests	Reenact in toto	§ 1759.

209	Salary of Government officials and employees payable only by United States.	Reenact in toto	Reenact in toto—title II, § 237.
210	Offer to procure appointive public office	§ 1355	§ 1755.
211	Acceptance or solicitation to obtain appointive public office.	Reenact in part, § 1355	§ 1755; reenact in part—title II, § 238.
212	Offer of loan or gratuity to bank examiner	Reenact in toto	Reenact in toto—title II, § 239.
213	Acceptance of loan or gratuity by bank examiner	Reenact in toto	Reenact in toto—title II, § 240.
214	Offer for procurement of Federal Reserve Bank loan and discount of commercial paper.	§§ 1351–1354, 1751	§ 2555.
215	Receipt of commissions or gifts for procuring loans	§ 1751	§ 2555.
216	Receipt or charge of commissions or gifts for farm loan, land bank, or small business transactions.	§ 1751	§ 2555.
217	Acceptance of consideration for adjustment of farm indebtedness.	§ 1351–1353	§§ 1751–54.
218	Voiding transactions in violation of chapter; recovery by the United States.	Reenact in toto	Reenact in toto—title II, § 241.
219	Officers and employees acting as agents of foreign principals.	Reenact in toto	§ 1326(a)(1).
224	Bribery in sporting contests	§§ 1753, 111	§ 2553.
231	Civil disorders	§§ 1311, 1821–1822, 1832, 1001	§§ 1701, 2722, 2732; partially deleted. (See also § 1711.)
232	Definitions	§ 111	§§ 111, 2734. (See also § 2725.)
233	Preemption	§ 206	§ 117.
241	Conspiracy against rights of citizens	§§ 1002, 1501, 1601–1603	§§ 1102, 2101, 2103–05.
242	Deprivation of rights under color of law	§§ 1502, 1601–1603	§§ 2101–02.
243	Exclusion of jurors on account of race or color	Reenact in toto	Reenact in toto—title II, § 251.
244	Discrimination against person wearing uniform of armed forces.	Reenact in toto	Reenact in toto—title II, § 252.
245	Federally protected activities	§§ 111, 206, 1503–1505, 1511, 1601.	§§ 2103–05, 2111.
246	Deprivation of relief benefits	§§ 1503, 1504, title 18 app	§ 2106.
285	Taking or using papers relating to claims	§§ 1301, 1343, 1731–1732	§§ 1743, 2531(e)(2).
286	Conspiracy to defraud the government with respect to claims.	§§ 1002, 1301, 1343, 1731	§ 2531(e)(2).

† Taken from S. Rept. No. 96-553 at 1489-1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
287	False, fictitious or fraudulent claims	§§ 1343, 1731	§§ 1742, 2531(e)(2).
288	False claims for postal losses	§§ 1343, 1731	§§ 1741–42, 2531(e)(2).
289	False claims for pensions	§§ 1343, 1731	§§ 1741–42, 2531(e)(2), 2541–42.
290	Discharge papers withheld by claim agent	Reenact in toto	Reenact in toto—title II, § 261.
291	Purchase of claims for fees by court officials	Reenact in toto	Reenact in toto—title II, § 262.
292	Solicitation of employment and receipt of unapproved fees concerning Federal employees' compensation.	Reenact in toto	Reenact in toto—title II, § 263.
331	Mutilation, diminution and falsification of coins	§§ 1001, 1741–1742	§§ 2531, 2541–42.
332	Debasement of coins; alteration of official scales, or embezzlement of metals.	§§ 1731, 1742	§§ 2531(e)(2), 2541–42.
333	Mutilation of national bank options	Reenact in toto	Reenact in toto—title II, § 271.
334	Issuance of Federal Reserve or national bank notes	§ 1744	§ 2542.
335	Circulation of obligations of expired corporations	§ 1744	§§ 2541–42.
336	Issuance of circulating obligations of less than $1	Reenact in toto	Deleted.
337	Coins as security for loans	Reenact in toto	Deleted.
351	Congressional assassination, kidnapping, and assault; penalties.	§§ 1001, 1002, 1601–1603, 1611–1614, 1621, reenact in part—§ 3001.	§§ 117, 1771, 2301–02, 2311–14, 2321–22.
371	Conspiracy to commit offense or to defraud the United States.	§§ 1002, 1301	§§ 1703–05. (See also §§ 1511, 1515, 1516, 1729, 1743, 1755, 1901, 2531, 2541–42, 2534, etc.)
372	Conspiracy to impede or injure officer	§§ 1002, 1302, 1357, 1358	§§ 1756, 1757, 2013–14.
401	Power of court	§ 1331	§§ 1731–1737.
402	Contempts constituting crimes	§§ 1331–1335	§ 1735.
431	Contracts by Member of Congress	Reenact in toto	Reenact in toto—title II, § 281.
432	Officer or employee contracting with Member of Congress.	Reenact in toto	Reenact in toto—title II, § 282.
433	Exemptions with respect to certain contracts	Reenact in toto	Reenact in toto—title II, § 283.
435	Contracts in excess of specific appropriation	Reenact in toto	Reenact in toto—title II, § 284.
436	Convict labor contracts	Reenact in toto	Reenact in toto—title II, § 285.
437	Indian contracts for goods and supplies	Reenact in toto	Reenact in toto—title II, § 286.

438	Indian contracts for services generally	Reenact in toto	Reenact in toto—title II, § 287.
439	Indian enrollment contracts	Reenact in toto	Reenact in toto—title II, § 288.
440	Mail contracts	Reenact in toto	Reenact in toto—title II, § 289.
441	Postal supply contracts	Reenact in toto	Reenact in toto—title II, § 290.
442	Printing contracts	Reenact in toto	Reenact in toto—title II, § 291.
443	War contracts	Reenact in toto	Reenact in toto—title II, § 292.
471	Obligations or securities of United States	§§ 1741, 1742	§§ 2541–42.
472	Uttering counterfeit obligations or securities	§§ 1741, 1742	§§ 2541–42.
473	Dealing in counterfeit obligations or securities	§§ 1741, 1742	§§ 2541–42.
474	Plates or stones for counterfeiting obligations or securities.	§§ 1741–1742, 1745, reenact in part.	§§ 2541–43; reenact in part—title II, § 301.
475	Imitating obligations or securities; advertisements	Reenact in toto	Reenact in toto—title II, § 302.
476	Taking impressions of tools used for obligations or securities.	§§ 1731, 1745	§ 2543.
477	Possessing or selling impressions of tools used for obligations or securities.	§ 1745	§ 2543.
478	Foreign obligations or securities	§§ 1741–1742	§§ 2541–42 (additional jurisdiction limitation).
479	Uttering counterfeit obligations or securities	§§ 1741–1742	§§ 2541–42.
480	Possessing counterfeit foreign obligations or securities	§§ 1741–1742	§§ 2541–42 (additional jurisdiction limitation).
481	Plates or stones for counterfeiting foreign obligations or securities.	§§ 1741–1742, 1745	§§ 2541–43.
482	Foreign bank notes	§§ 1741–1742	§§ 2541–42 (additional jurisdiction limitation).
483	Uttering counterfeit foreign bank notes	§§ 1741–1742	§§ 2541–42 (additional jurisdiction limitation).
484	Connecting parts of different notes	§ 1742	§ 2542.
485	Coins or bars	§§ 1741–1742	§§ 2541–42.
486	Uttering coins of gold, silver or other metal	Reenact in part—§§ 1741–1742	§§ 2541–42; partial reenactment—title II, § 303.
487	Making or possessing counterfeit dies for coins	§ 1745	§ 2543.
488	Making or possessing counterfeit dies for foreign coins.	§ 1745	§ 2543.
489	Making or possessing likeness of coins	Reenact in toto	§§ 2541–43.

† Taken from S. Rept. No. 96-553 at 1489–1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
490	Minor coins	§§ 1741–1742	§§ 2541–42.
491	Tokens or paper used as money	Reenact in toto	§§ 2541–42; reenact in toto—title II, § 304.
492	Forfeiture of counterfeit paraphernalia	Reenact in part—§§ 4001, 4004	§§ 8101–04; reenact in toto—title II, § 305.
493	Bonds and obligations of certain lending agencies	§§ 1741–1742	§§ 2541–42.
494	Contractors' bonds, bids, and public records	§§ 1301, 1343, 1741–1742	§§ 1742–43, 2531(e)(2), 2541–42.
495	Contracts, deeds, and powers of attorney	§§ 1301, 1343, 1741–1742	§§ 1742–43, 2541–42.
496	Customs matters	§§ 1343, 1741–1742	§§ 1742–43, 2531(e)(2), 1911, 2541–42.
497	Letters patent	§§ 1343, 1741–42	§§ 1742, 2541–42.
498	Military or naval discharge certificates	§§ 1343, 1741–42	§§ 1742, 2541–42.
499	Military, naval, or official passes	§§ 1301, 1343, 1741–42	§§ 1743, 2541–42.
500	Money orders	§§ 1301, 1731–32, 1741–42	§§ 2531(e)(2), 2541–42.
501	Postage stamps, postage meter stamps, and postal cards.	§§ 1741–42, 1744, 1745	§§ 2531(e)(2), 2541–43.
502	Postage and revenue stamps of foreign governments	§§ 1741–42	§§ 2541–43.
503	Postmarking stamps	§§ 1741–42, 1745	§§ 2541–43.
504	Printing and filming of United States and foreign obligations and securities.	Reenact in toto	Reenact in toto—title II, § 306.
505	Seals of courts; signatures of judges or court officers	§§ 1343, 1741–42	§§ 1729, 1742, 2541–42.
506	Seals of department agencies	§§ 1343–1344, 1741–43, 1745	§§ 1743, 2541–43.
507	Ship's papers	§§ 1741–42, 1001	§§ 1743, 1911, 2541–42.
508	Transportation requests of government	§§ 1741–42, 1001	§§ 1743, 2541–42, 2531(e)(2).
509	Possessing and marking plates or stones for government transportation requests.	§ 1745	§ 2543.
541	Entry of goods falsely classified	§§ 1343, 1411	§ 1911.
542	Entry of goods by means of false statements	§§ 1343,1411, 1414, 4001	§§ 1911, 1742.
543	Entry of goods for less than legal duty	Reenact in toto	§§ 1911; reenact in toto—title II, § 311.
544	Relanding of goods	§§ 1411, 1412, 1414	§§ 1911–12, 8101–04.
545	Smuggling goods into the United States	§§ 1343, 1411, 1412, 1414, 4001	§§ 1743, 1911–13, 8101–04.

546	Smuggling goods into foreign countries	Reenact in toto, 401, 1001	Reenact in toto—title II, § 312.
547	Depositing goods in buildings on boundaries	§§ 1411, 1412, 1413	§§ 1911–13.
548	Removing or repacking goods in warehouses	§§ 1411, 1731, 4001, reenact	§§ 1911, 2531(e)(2), 8101–04; reenact in toto—title II, § 313.
549	Removing goods from customs custody; breaking seals.	§§ 1344, 1411, 1712, 1731, 1732, 1733, 1412, reenact in part.	§§ 1744, 1911, 2511–12, 2531(e)(2); reenact in toto—title II, § 314.
550	False claim for refund of duties	§ 1343	§§ 1743, 2531(e)(2), 8101–04.
551	Concealing or destroying invoices or other papers	§ 1344	§§ 1725, 1743.
552	Officers aiding importation of obscene or treasonous books and articles.	§§ 1411, 1842, 1001	§§ 1911, 2743.
591	Definitions	Deleted	§§ 2118, 101.
592	Troops at polls	Deleted	Deleted.
593	Interference by armed forces	Reenact in part—§§ 1501–1502	§§ 2101–03, 2111–12.
594	Intimidation of voters	§§ 1501, 1511, 1616	§§ 2101, 2103, 2111.
595	Interference by administrative employees of Federal, State, or Territorial governments.	§§ 1503, 1511, 1514, 1515	§§ 2101–02, 2111, 2113, 2115.
596	Polling armed forces	Deleted	Deleted.
597	Expenditures to influence voting	§ 1511	§ 2111.
598	Coercion by means of relief appropriations	§ 1514	§§ 2111, 2113.
599	Promise of appointment by candidate	§§ 1355, 1511	§§ 2111, 2113.
600	Promise of employment or other benefit for political activity.	Reenact in toto	§ 2114.
601	Deprivation of employment or other benefit for political contribution.	Reenact in toto	§§ 2114.
602	Solicitation of political contributions	§ 1516	§ 2116.
603	Place of solicitation	§ 1516	Deleted.
604	Solicitation from persons on relief	Deleted	Deleted.
605	Disclosure of names of persons on relief	Deleted	Deleted.
606	Intimidation to secure political contributors	§ 1515	§ 2115.
607	Making political contributions	§ 1516	§ 2116.
641	Public money, property or records	§§ 1731–33	§§ 2531(e)(2), 2532–33.
642	Tools and materials for counterfeiting purposes	§§ 1731, 1745	§§ 2531(e)(2), 2543.

† Taken from S. Rept. No. 96-553 at 1489-1503.

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Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
643	Accounting generally for public money	§ 1731	§ 2531(e)(2).
644	Banker receiving unauthorized deposit of public money.	§ 1731	§§ 2531(e)(2), 2533.
645	Court officers generally	§ 1731	§§ 2531(e)(2)–(3).
646	Court officers depositing registry moneys	§ 1731	§§ 2531(e)(2)–(3).
647	Receiving loan from court officer	§ 1731	§§ 2531(e)(2), 2533.
648	Custodians, generally, misusing public funds	§ 1731	§ 2531(e)(2).
649	Custodians failing to deposit moneys; persons affected	§ 1731	§ 2531(e)(2).
650	Depositaries failing to safeguard deposits	Reenact in toto	Reenact in part—title II, § 321.
651	Disbursing officer falsely certifying full payment	§ 1731	§ 2531(e)(2).
652	Disbursing officer paying lesser in lieu of lawful amount.	§ 1731	§ 2531(e)(3).
653	Disbursing officer misusing public funds	§ 1731	§ 2531(e)(2).
654	Officer or employee of United States converting property of another.	§ 1731	§ 2531(e)(3).
655	Theft by bank examiner	§ 1731	§ 2531(e)(9).
656	Theft, embezzlement or misapplication by bank officer or employee.	§§ 1731, 111	§ 2531(e)(9).
657	Lending, credit and insurance institutions	§ 1731	§ 2531(e)(9).
658	Property mortgaged or pledged to farm credit agencies.	§§ 1731, 1736	§ 2531(e)(9).
659	Interstate or foreign shipments by carrier; State prosecutions.	§§ 1731–33, 1739, 206	§§ 2531(e)(7), (e)(30), 2532–33, 117.
660	Carrier's funds derived from commerce; State prosecutions.	§ 1731	§ 2531(e)(17).
661	Within special maritime and territorial jurisdiction	§ 1731	§ 2531(e)(1).
662	Receiving stolen property, within special maritime and territorial jurisdiction.	§ 1732–33	§§ 2552–33.
663	Solicitation or use of gifts	§§ 1731–34	§§ 2531(e)(2), (e)(31), 2532, 2533
664	Theft or embezzlement from employee benefit plan	§ 1731	§ 2531(e)(12).
665	Theft or embezzlement from manpower funds; improper inducement; obstruction of investigations.	§§ 1731, 1734, 1723	§§ 2531(e)(33), 2523, 1703, 1757.
700	Desecration of the flag of the United States; penalties	Reenact in toto—§ 206	Reenact in toto—title II, § 331.

701	Official badges, identification cards, other insignia	Reenact in toto	Reenact in toto—title II, § 332, 2545.
702	Uniform of armed forces and Public Health Service	Reenact in toto	Reenact in toto—title II, § 333.
703	Uniform of friendly nation	Reenact in toto	Reenact in toto—title II, § 334.
704	Military medals or decorations	Reenact in toto	Reenact in toto—title II, § 335.
705	Badge or medal of veterans' organizations	Reenact in toto	Reenact in toto—title II, § 336.
706	Red Cross	Reenact in toto—§§ 402–403	Reenact in toto—title II, § 337.
707	4–H club emblem fraudulently used	Reenact in toto	Reenact in toto—title II, § 338.
708	Swiss Confederation coat of arms	Reenact in toto	Reenact in toto—title II, § 339.
709	False advertising or misuse of names to indicate Federal agency.	§§ 401–403; reenact in toto—title 28.	Reenact in toto—title II, § 340.
710	Cremation urns for military use	Reenact in toto	Reenact in toto—title II, § 341.
711	"Smokey Bear" character or name	Reenact in toto	Reenact in toto—title II, § 342.
711a	"Woodsy Owl" character, name, or slogan	Reenact in toto	Reenact in toto—title II, § 343.
712	Misuse of names, words, emblems, or insignia	Reenact in toto	Reenact in toto—title II, § 344.
713	Use of likenesses of the great seal of the United States, and of the seals of the President and Vice President.	Reenact in toto	Reenact in toto—title II, § 345.
714	"Johnny Horizon" character or name	Reenact in toto	Deleted.
715	"The Golden Eagle Insignia"	Reenact in toto	Reenact in toto—title II, § 346.
751	Prisoners in custody of institution or officer	§§ 1313, 1001	§1716.
752	Instigating or assisting escape	§§ 1311, 1313, 1001, 401	§ 1716. (See also § 1711.)
753	Rescue to prevent execution	§§ 1311, 1313, 401	§ 1716. (See also § 1711.)
754	Rescue of body of executed offender	Deleted	Deleted.
755	Officer permitting escape	§§ 401, 1311, 1313	§ 1716; partially deleted.
756	Internee of belligerent nation	Reenact in toto	Reenact in toto—title II, § 351.
757	Prisoners of war or enemy aliens	§ 1117	§ 1319.
792	Harboring or concealing persons	§§ 1311, 401	§ 1711.
793	Gathering, transmitting or losing defense information	Reenact in part—title 50, § 1122	§ 1322; reenact in toto—title II, § 361.
794	Gathering or delivering defense information to aid foreign government.	Reenact in part—title 50, § 1121	§ 1321; reenact in toto—title II, § 362.
795	Photographing and sketching defense installations	Reenact in toto	Reenact in toto—title II, § 363.
796	Use of aircraft for photographing defense installations	Reenact in toto	Reenact in toto—title II, § 364.

† Taken from S. Rept. No. 96-553 at 1489-1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
797	Publication and sale of photographs of defense installations.	Reenact in toto	Reenact in toto—title II, § 365.
798 (1951)	Disclosure of classified information	§ 1123, title 50	§ 1323; reenact in toto—title II, § 366.
798 (1953)	Temporary extension of 794	Reenact in part, § 1121	Inoperative.
799	Violation of regulations of National Aeronautics and Space Administration.	Reenact in toto	Reenact in toto—title II, § 367.
836	Transportation of fireworks into State prohibiting sale or use.	Reenact in toto; see § 1001	Reenact in toto—title II, § 371.
841	Definitions	Reenact in toto [title 15]	Reenact in toto—title II, § 381.
842	Unlawful acts	Reenact in part [title 15] see § 1821.	Reenact in part—title II, § 382. (See also § 2721.)
843	Licenses and user permits	Reenact in toto [title 15]	Reenact in toto—title II, § 383.
844	Penalties	Reenact in part [title 15]; §§ 1601–1603, 1611–1613, 1615–1616, 1701–1703, 1821, 1823, 4001.	§§ 2501(e)(2) and (6), 2721, 2723, 1744, 2301, 2315–16, 8101–04; reenact in part—title II, § 384.
845	Exceptions; relief from disabilities	Reenact in toto [title 15]	Reenact in modified form—title II, § 385.
846	Additional powers of the Secretary	Reenact in toto [title 15], § 3001	Reenact in toto—title II, § 386.
847	Rules and regulations	Reenact in toto [title 15]	Reenact in toto—title II, § 387.
848	Effect on State law	Reenact in toto [title 15]	Reenact in toto—title II, § 388.
871	Threats against President and successors to the Presidency.	§§ 111, 1357, 1615–1616	§§ 1757, 2315–16.
872	Extortion by officers or employees of the United States.	§§ 1001, 1722	§ 2522.
873	Blackmail	§ 1723	§ 2523.
874	Kickbacks from public works employees	§§ 1722–1723	§§ 2522–23, 2556.
875	Interstate communications	§§ 1615–1616, 1722	§§ 2315–16, 2522.
876	Mailing threatening communications	§§ 1615–1616, 1722	§§ 2315–16, 2522.
877	Mailing threatening communications from foreign country.	§§ 1615–1616, 1722–1723	§§ 2315–16, 2522.
878	Threats and extortion against foreign officials, official guests, or internationally protected persons.	Reenact in part title 28; §§ 1615–1616, 1721, 1722.	§§ 2315, 2316, 2522, 1771.

891	Definitions and rules of construction	§§ 111, 1806	§ 2707.
892	Making extortionate extensions of credit	§§ 1002, 1804	§ 2703.
893	Financing extortionate extensions credit	§ 1804	§ 2703.
894	Collection of extensions of credit by extortionate means.	§§ 1002, 1722, 1724, 1804	§§ 2522, 2703.
896	Effect on State laws	§ 206	§ 117.
911	Citizen of the United States	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 391.
912	Officer of employee of the United States	§§ 1303, 1731	§§ 1702, 2531(e)(4).
913	Impersonator making arrest or search	§ 1303	§§ 1702, 2323.
914	Creditors of the United States	§§ 1731, 1734	§ 2531(e)(2).
915	Foreign diplomats, consuls or officers	§§ 1303, 1731	§§ 1702, 2531(e)(4).
916	4–H Club members or agents	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 392.
917	Red Cross members or agents	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 393.
921	Definitions	Reenact in toto [title 15]	§ 2725; reenact in toto—title II, § 401.
922	Unlawful acts	Reenact in part [title 15]; §§ 1731, 1732, 1733.	§ 2722; reenact in part—title II, § 402.
923	Licensing	Reenact in toto	Reenact in toto—title II, § 403.
924	Penalties	Reenact in part [title 15]; § 1822, 1343, 1823, 4001.	§§ 2722–23, 8101–04; reenact in part—title II, § 404.
925	Exceptions: Relief from disabilities	Reenact in toto [title 15]	Reenact in toto—title II, § 405.
926	Rules and regulations	Reenact in toto [title 15]	Reenact in toto—title II, § 406.
927	Effect on State law	Reenact in toto [title 15]	Reenact in toto—title II, § 407.
928	Separability	Reenact in toto [title 15]	Deleted.
951	Agents of foreign governments	§ 1126, reenacted [title 22]	§ 1326(a)(4).
952	Diplomatic codes and correspondence	§ 1205	§ 1504.
953	Private correspondence with foreign governments	Deleted	Reenact in toto—title II, § 145.
954	False statements influencing foreign government	§ 1343	§ 1741.
955	Financial transactions with foreign governments	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 411.
956	Conspiracy to injure property of foreign government	§ 1202	§ 1502.
957	Possession of property in aid of foreign government	§ 1124	Deleted.
958	Commission to serve against friendly nation	§ 1203	§ 1503.
959	Enlistment in foreign service	§ 1203	§ 1503.

† Taken from S. Rept. No. 96-553 at 1489-1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
960	Expedition against friendly nation	§ 1201	§ 1501.
961	Strengthening armed vessel of foreign nation	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 412.
962	Arming vessel against friendly nation	Reenact in toto [title 18 app.], § 1001.	§§ 8101–04; reenact in toto—title II, § 413.
963	Detention of armed vessel	Reenact in part §§ 1204, 4001 [title 18 app.] § 1001.	
964	Delivering armed vessel to belligerent nation	§§ 1001, 1204, 4001	§§ 1506, 8101–04.
965	Verified statements as prerequisite to vessel's departure.	Reenact in toto [title 18 app.]; §§ 1001, 1204, 4001.	§§ 1506, 8101–04.
966	Departure of vessel forbidden for false statements	Reenact in part [title 18 app.]; §§ 1001, 1204, 4001.	§ 1506, 8101–04.
967	Departure of vessel forbidden in aid of neutrality	Reenact in part [title 18 app.]; §§ 1001, 1204, 4001.	§ 1506, 8101–04.
969	Exportation of arms, liquors, and narcotics to Pacific Islands.	Deleted	Deleted.
970	Protection of property occupied by foreign governments.	Reenact in part [title 18 app.]; §§ 111, 1001, 1701–1703.	§§ 2501–03; reenact subsec. (b), (c)—title II, § 414.
1001	Statements or entries generally	§ 1343	§§ 1742–43. (See also §§ 1729, 2531, 1511, 1315, 1515–16, 2541–42, etc.)
1002	Possession of false papers to defraud United States	§§ 1741–1742	§§ 2541–42, 2545.
1003	Demands against the United States	§§ 1343, 1731, 1741–1742	§§ 1742, 2531(e)(2), 2541–42.
1004	Certification of checks	§§ 1744, 1301, 1742	§§ 1742, 2541–42.
1005	Bank entries, reports and transactions	§§ 111, 1343, 1744	§§ 1742–43, 2531(e)(9).
1006	Federal credit institution entries, reports and transactions.	§§ 1301, 1343, 1741–1744, 1751	§§ 1742–43, 2541–44, 2555.
1007	Federal Deposit Insurance Corporation transactions	§ 1343	§§ 1742, 2531(e)(9).
1008	Federal Savings and Loan Insurance Corporation transactions.	§§ 1343, 1741–1742	§§ 1742, 2531(e)(9).
1009	Rumors regarding Federal Savings and Loan Insurance Corporation.	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 421.
1010	Department of Housing and Urban Development and Federal Housing Administration transactions.	§§ 1343, 1741–1742	§§ 1742, 2531(e)(30), 2541–42.
1011	Federal land bank mortgage transactions	§ 1343	§ 1742.

1012	Department of Housing and Urban Development transactions.	Reenact in part [title 18 app.], §§ 1343, 1731.	§§ 1742 2531(e)(2), (29), (30), (32); reenact ¶3—title II, § 422.
1013	Farm loan bonds and credit bank debentures	§§ 1001, 1343	Reenact in toto—title II, § 423.
1014	Loan and credit applications generally; renewals and discounts; crop insurance.	§ 1343	§§ 1742, 2531(e)(2) and (29).
1015	Naturalization, citizenship or alien registry	§§ 1001, 1342–3, 1301	§§ 1741–42, 1515, 2545.
1016	Acknowledgement of appearance or oath	§ 1343	§ 1742.
1017	Government seals wrongfully used and instruments wrongfully sealed.	§§ 1343, 1742	§§ 1742, 2542.
1018	Official certificates or writings	§§ 1343, 1742	§§ 1742, 2542.
1019	Certificates by consular officers	§§ 1343, 1742	§§ 1742, 2542.
1020	Highway projects	§ 1343	§§ 1742, 2531(e)(29) and (30).
1021	Title records	§§ 1343, 1742	§§ 1742, 2542.
1022	Delivery of certificate, voucher, receipt for military or naval property.	§§ 1301, 1343, 1744	§§ 1742, 2531(e)(2).
1023	Insufficient delivery of money or property for military or naval service.	§§ 1301, 1731	§ 2531(e)(2).
1024	Purchase or receipt of military, naval, or veterans facilities property.	§§ 1732–33	§§ 2532–33.
1025	False pretenses on high seas and other waters	§§ 1731, 1734	§ 2531(e)(1).
1026	Compromise, adjustment, or cancellation of farm indebtedness.	§ 1343	§§ 1742, 2531(e)(2) and (29).
1027	False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974.	§ 1343	§ 1742.
1071	Concealing person from arrest	§ 1311	§ 1711.
1072	Concealing escaped prisoner	§ 1311	§ 1711.
1073	Flight to avoid prosecution or giving testimony	§ 1315, 3311	§ 1718.
1074	Flight to avoid prosecution for damaging or destroying any building or other real or personal property.	§§ 1315, 3311	§ 1718.
1081	Definitions	Reenact in toto [title 18 app.]	Reenact in part—title II, § 431.
1082	Gambling ships	§§ 1841, 401	§ 2741.
1083	Transportation between shore and ship; penalties	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 432; § 2741.
1084	Transmission of wagering information; penalties	Reenact in part [title 18 app.] §§ 1841, 205.	Reenact in part—title II, § 433; § 2741.

† Taken from S. Rept. No. 96-553 at 1489-1503.

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Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
1111	Murder	§ 1601	§ 2301.
1112	Manslaughter	§ 1602	§ 2302.
1113	Attempt to commit murder or manslaughter	§§ 1601–02, 1001	§§ 2301–02.
1114	Protection of officers and employees of the United States.	§§ 1601–03	§§ 2301–02.
1115	Misconduct or neglect of ship officers	§§ 1602–03	§ 2302; reenact in toto—title II, § 441.
1116	Murder or manslaughter of foreign officials, official guests, or internationally protected persons.	§§ 1601–03 [titles 22, 28]	§§ 2301–02.
1117	Conspiracy to murder	§§ 1002, 1601–02	§ 2301.
1151	Indian country defined	Reenact in toto [title 25]	Reenact in toto—title II, § 451.
1152	Laws governing	Reenact in part [title 25], § 203	§ 114.
1153	Offenses committed within Indian country	Reenact in toto [title 25]	§ 114, various substantive offenses.
1154	Intoxicants dispensed in Indian country	Reenact in toto [title 18 app.]	Reenact in part—title II, § 452.
1155	Intoxicants dispensed on school site	Deleted	Reenact in toto—title II, § 453.
1156	Intoxicants possessed unlawfully	Deleted	Reenact in toto—title II, § 454.
1158	Counterfeiting Indian Arts and Crafts Board trademark.	Reenact in toto [title 18 app.]	§§ 1742, 2541–42.
1159	Misrepresentation in sale of products	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 455.
1160	Property damaged in committing offense	Deleted	Deleted.
1161	Application of Indian liquor laws	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 456.
1162	State jurisdiction over offenses committed by or against Indians in the Indian country.	Reenact in toto [title 25]	§ 114.
1163	Embezzlement and theft from Indian tribal organizations.	§§ 1731, 1733	§§ 2531(e)(10), 2533.
1164	Destroying boundary and warning signs	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 457.
1165	Hunting, trapping, or fishing on Indian land	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 458.
1201	Kidnapping	§§ 1002, 1621 [title 28]	§§ 2321–23.
1202	Ransom money	§ 1732	§§ 1712, 2532–33.

1231	Transportation of strikebreakers	§ 1506	§ 2107.
1261	Enforcement, regulations, and scope	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 461.
1262	Transportation into State prohibiting sale	§ 1001, reenact in toto [title 18 app.].	Deleted.
1263	Marks and labels on packages	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 462.
1264	Delivery to consignee	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 463.
1265	C.O.D. shipments prohibited	Reenact in toto [title 18 app.]	Deleted.
1301	Importing or transporting lottery tickets	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 471.
1302	Mailing lottery tickets or related matter	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 472.
1303	Postmaster or employee as lottery agent	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 473.
1304	Broadcasting lottery information	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 474.
1305	Fishing contests	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 475.
1306	Participation by financial institutions	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 476.
1307	State-conducted lotteries	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 477.
1341	Frauds and swindles	§ 1734	§ 2534.
1342	Fictitious name or address	§ 1734	§ 2534.
1343	Fraud by wire, radio, or television	§ 1734	§ 2534.
1361	Government property or contracts	§§ 1701–03	§§ 2501(c)(2), 2502–03.
1362	Communication lines, stations, or systems	§§ 1701–03	§§ 2501(c)(10), 2502–03.
1363	Buildings or property within special maritime and territorial jurisdiction.	§§ 1701–03	§§ 2501(c)(1) 2502–03.
1364	Interference with foreign commerce by violence	§§ 1701–03	§§ 2501(c)(5), 2502–03.
1381	Enticing desertion and harboring deserters	§§ 1001, 1116, 1311	§§ 1317–18.
1382	Entering military, naval, or Coast Guard property	§§ 1712–1713	§§ 2511–12.
1384	Prostitution near military and naval establishments	Deleted	Deleted.
1385	Use of Army and Air Force as posse comitatus	Reenact in toto [title 18 app.]	§ 1771.
1421	Accounts of court officers	§ 1731	§ 2531(e) (2) and (3).
1422	Fees in naturalization proceedings	§§ 1351–52	§§ 1751–53, 2531(e)(3), 2533.
1423	Misuse of evidence of citizenship or naturalization	§§ 1215, 1741–44	§§ 1515, 2541–42.
1424	Personation or misuse of papers in naturalization proceedings.	§§ 1215, 1341–43, 1741–42	§§ 1515, 1741–42, 2541–42, 2545.
1425	Procurement of citizenship or naturalization unlawfully.	§§ 1001, 1215, 1741–42	§§ 1515, 2541–42, 2545.

† Taken from S. Rept. No. 96-553 at 1489–1503.

Section	Current title 18 section heading	S. 1722 disposition †	H.R. 6915 disposition
1426	Reproduction of naturalization or citizenship papers	§§ 1215, 1741–42, 1745, 1343	§§ 1515, 2541–43, 2545.
1427	Sale of naturalization or citizenship papers	Reenact in toto [title 18 app.]	§§ 1515.
1428	Surrender of canceled naturalization certificate	Reenact in toto [title 18 app.]	§§ 1515.
1429	Penalties for neglect or refusal to answer subpena	§§ 1332–33	§§ 1732–33.
1461	Mailing obscene or crime-inciting matter	§ 1842	§ 2743.
1462	Importation or transportation of obscene matters	§§ 1411, 1842	§ 2743.
1463	Mailing indecent matter on wrappers or envelopes	Deleted	§ 2743.
1464	Broadcasting obscene language	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 481.
1465	Transportation of obscene matters for sale or distribution.	§§ 1842, 4001	§§ 2743, 3101–04.
1501	Assault on process server	§§ 1302, 1357, 1611–14	§§ 1701, 1757, 2311–14.
1502	Resistance to extradition agent	§§ 1302, 1357	§§ 1701, 1757.
1503	Influencing or injuring officer, juror or witness generally.	§§ 1302, 1321–24, 1326, 1357–8, 1611–1614.	§§ 1721–25, 1729, 1757–58, 2301–16.
1504	Influencing juror by writing	§ 1326	§ 1726.
1505	Obstruction of proceedings before departments, agencies, and committees.	§§ 1321–25, 1357–8	§§ 1721–25, 1729, 1757–58.
1506	Theft or alteration of record or process; false bail	§§ 1325, 1343–44, 1731, 1742	§§ 1725, 1729, 1742–43, 2542.
1507	Picketing or parading	§§ 1328, 1331	§ 1728.
1508	Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting.	§ 1327	§ 1727.
1509	Obstruction of court orders	§§ 1302, 1331, 1335	§§ 1701, 1731, 1735.
1510	Obstruction of criminal investigations	§§ 1301–02, 1321–24, 1351–52, 1357–58, 1111.	§§ 1722–24.
1511	Obstruction of state or local law enforcement	§§ 111, 1002, 1841	§ 2741.
1541	Issuance without authority	§§ 1741–44	§§ 2541–42.
1542	False statement in application and use of passport	§§ 1001, 1216, 1343	§§ 1516, 1742, 2545.
1543	Forgery or false use of passport	§§ 1215–16, 1741–42, [title 18 app.].	§§ 1516, 2541–42, 2545.
1544	Misuse of passport	§§ 1001, 1216 [title 18 app.]	§§ 1516, 2545.
1545	Safe conduct violation	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 491.
1546	Fraud and misuse of visas, permits, and other entry documents.	§§ 1001, 1215, 1302, 1342–3, 1741–2, 1744.	§§ 1741–42, 2541–43, 2545, 1511.
1581	Peonage; obstructing enforcement	§§ 1621–23	§ 2322.

1582	Vessels for slave trade	Deleted	Deleted.
1583	Enticement into slavery	§§ 1621–23	§§ 2321–22.
1584	Sale into involuntary servitude	§§ 1622–23	§§ 2322–23.
1585	Seizure, detention, transportation or sale of slaves	§§ 1622–23, 204	§§ 2322–23.
1586	Service on vessels in slave trade	Deleted	Deleted.
1587	Possession of slaves aboard vessel	§§ 1622–23, 204	§§ 2322–23.
1588	Transportation of slaves from United States	§§ 1622–23	§§ 2322–23.
1621	Perjury generally	§§ 1341	§ 1741.
1622	Subornation of perjury	§§ 1341, 401, 1002	§ 1741.
1623	False declarations before grand jury or court	§§ 1341–2, 1345, 204	§ 1741.
1651	Piracy under law of nations	§§ 203–204, 1731	§ 111.
1652	Citizens as pirates	§§ 203–04, 1101–1102, 1601–03, 1611–17.	§§ 111, 1302, 2301–14, 2521.
1653	Aliens as pirates	§ 204	§ 111.
1654	Arming or serving on privateers	§§ 203–04, 1611–17, 1702–03, 1731.	§§ 111, 1302.
1655	Assault on commander as piracy	§§ 203–04, 1611–13	§§ 111, 1317, 2301–14, 2538.
1656	Conversion or surrender of vessel	§§ 203–04, 1731	§§ 111, 2531(e)(1).
1657	Corruption of seamen and confederating with pirates	§§ 203–04, 1001–02, 1622–23, 1731.	§§ 111, 2521.
1658	Plunder of distressed vessel	§§ 203–04, 1601–03, 1617, 1731	§§ 2301–02, 2531(e)(1).
1659	Attack to plunder vessel	§§ 203–04, 1712	§§ 111, 2501–03, 2511, 2531(e)(1).
1660	Receipt of pirate property	§§ 203–04, 1732	§§ 111, 2533.
1661	Robbery ashore	§ 1721	§§ 111, 2521.
1691	Laws governing postal savings	Deleted	Deleted.
1692	Foreign mail as United States mail	Reenact in toto [title 18 app.]	§§ 101, 111.
1693	Carriage of mail generally	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 501.
1694	Carriage of matter out of mail over post routes	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 502.
1695	Carriage of matter out of mail on vessels	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 503.
1696	Private express for letters and packets	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 504.
1697	Transportation of persons acting as private express	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 505.
1698	Prompt delivery of mail from vessel	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 506.
1699	Certification of delivery from vessel	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 507.
1700	Desertion of mails	Reenact in toto [title 18 app.]	Reenact in toto—title II, §508.
1701	Obstruction of mails generally	§§ 1301–02	§ 1701.
1702	Obstruction of correspondence	§§ 1524, 1702, 1731	§§ 2124, 2502, 2531(e)(6).

† Taken from S. Rept. No. 96-553 at 1489–1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
1703	Delay or destruction of mail or newspapers	Reenact in part [title 18 app.]; §§ 1701–03, 1524, 1302.	§§ 1701, 2124, 2502—03; reenact in part—title II, § 509.
1704	Keys or locks stolen or reproduced	Reenact in part [title 18 app.]; § 1731.	§§ 2531(e)(2), 2532, 1101; reenact in part—title II, § 510.
1705	Destruction of letter boxes or mail	Reenact in part [title 18 app.]; § 1702–03.	§§ 2502–03; reenact in part—title II, § 511.
1706	Injury to mail bags	§§ 1702–03	§§ 2502–03, 2531(e)(6); reenact in toto—title II, § 512.
1707	Theft of property used by Postal Service	§ 1731	§ 2531(e)(2).
1708	Theft or receipt of stolen mail matter generally	§§ 1001, 1702–03, 1731–33	§§ 2124, 2531(e)(6), 2532–33, 2502–03.
1709	Theft of mail matter by officer or employee	§ 1731	§ 2531(e)(6).
1710	Theft of newspapers	§ 1731	§ 2531(e)(6).
1711	Misappropriation of postal funds	§ [Title 18 app.] §§ 401, 1731.	§ 2531(e)(3).
1712	Falsification of postal returns to increase compensation.	[Title 18 app.], §§ 1001, 1343; reenact in part, § 1731.	Reenact in part—title II, § 513; §§ 1742, 2531(e)(2).
1713	Issuance of money orders without payment	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 514.
1714	Foreign divorce information as nonmailable	Deleted	Deleted.
1715	Firearms as nonmailable; regulations	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 515.
1716	Injurious articles as nonmailable	Reenact in part [title 18 app.]; §§ 1001, 1601–02, 1611–13, 1701–03.	Reenact in part—title II, § 516; §§ 2301–02, 2311–14.
1716A	Nonmailable motor vehicle master keys	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 517.
1717	Letters and writings as nonmailable; opening letters	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 518.
1718	Libelous matter on wrappers or envelopes	Deleted	Deleted.
1719	Franking privilege	§§ 1301, 1731	§ 2531(e)(2).
1720	Canceled stamps and envelopes	§§ 1001, 1301, 1731, 1742	§ § 2531(e)(2), 2542.
1721	Sale or pledge of stamps	§ 1731	§ 2531(e)(2).
1722	False evidence to secure second-class rate	§ 1343	§ § 1742, 2531(e)(2); reenact in toto—title II, § 519.
1723	Avoidance of postage by using lower class matter	Reenact in toto [title 18 app.]	§ 2531(e)(2); reenact in toto—title II, § 520.
1724	Postage on mail delivered by foreign vessel	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 521.

1725	Postage unpaid on deposited mail matter	Reenact in toto [title 18 app.]	§ 2531(e)(2); reenact in toto—title II, § 522.
1726	Postage collected unlawfully	§§ 1352, 1731	§§ 1751–52, 2522, 2531(e)(3).
1728	Weight of mail increased fraudulently	§§ 1302, 1731	§ 2531(e)(2).
1729	Post office conducted without authority	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 523.
1730	Uniforms of carriers	Reenact in toto [title 18 app.]	Reenact in part—title II, § 524.
1731	Vehicles falsely labeled as carriers	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 525.
1732	Approval of bond or sureties by postmaster	Reenact in part [title 18 app.], § 1343.	§§ 1742; reenact in toto—title II, § 526.
1733	Mailing periodical publications without prepayment of postage.	§ 1731	§§ 2531(e)(2).
1734	Editorials and other matter as "advertisements"	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 527.
1735	Sexually oriented advertisements	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 528.
1736	Restrictive use of information	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 529.
1737	Manufacturer of sexually related mail matter	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 530.
1751	Presidential assassination, kidnapping and assault; penalties.	Reenact in part [title 28]; § 1601–03, 1611–14, 1621–23, 111, 1001–1002.	§§ 2301–02, 2311–14, 2321–23; reenact (f)–(g)—title II, § 541.
1752	Temporary residence of the President	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 542.
1761	Transportation or importation	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 551.
1762	Marking packages	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 552.
1791	Traffic in contraband articles	§§ 1314, 1401	§ 1717.
1792	Mutiny, riot, dangerous instrumentalities prohibited	§§ 1001–02, 1314, 1831–33	§§ 1717, 2731–33.
1821	Transportation of dentures	Reenact in toto [title 18 app.]	Deleted.
1851	Coal depredations	§ 1731	§2531(e)(2).
1852	Timber removed or transported	§§ 1702–3, 1731–32	§§ 2502–03, 2531(e)(2), 2532–33.
1853	Trees cut or injured	§§ 1702–03	§§ 2502–03.
1854	Trees boxed for pitch or turpentine	§§ 1731–33	§§ 2502–03, 2531(e)(2), 2532–33.
1855	Timber set afire	§§ 1701–03	§§ 2502–03.
1856	Fires left unattended and unextinguished	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 561.
1857	Fences destroyed; livestock entering	§§ 1701–03, 1713	§§ 2502–03, 2512.
1858	Survey marks destroyed or removed	Reenact in toto [title 18 app.]	§§ 2502–03; reenact in toto—title II § 562.

† Taken from S. Rept. No. 96-553 at 1489–1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
1859	Surveys interrupted	§ 1302	§§ 1757, 1758; reenact in toto—title II, § 563.
1860	Bids at land sales	Reenact in toto [title 18 app.], 1001.	Reenact in toto—title II, § 564.
1861	Deception of prospective purchasers	Reenact in toto [title 18 app.]	Reenact in toto—title II, 565.
1863	Trespass on national forest lands	§ 1713	§ 2512.
1901	Collecting or disbursing officer trading in public property.	§§ 1356, 1731	§§ 2531(e)(2), 1756.
1902	Disclosure of crop information and speculation thereon.	§§ 1356, 1525	§§ 1756, 1759, 2125; reenact in toto—title II, § 570.
1903	Speculation in stocks or commodities affecting crop insurance.	§ 1356	§§ 1756, 1759; reenact in toto—title II, § 571.
1904	Disclosure of information or speculation in securities affecting Reconstruction Finance Corporation.	§ 1356	Deleted.
1905	Disclosure of confidential information generally	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 572.
1906	Disclosure of information from a bank examination report.	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 573.
1907	Disclosure of information by farm credit examiner	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 574.
1908	Disclosure of information by National Agricultural Credit Corporation examiner.	Deleted	Deleted.
1909	Examiner performing other services	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 575,
1910	Nepotism in appointment of receiver or trustee	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 576.
1911	Receiver mismanaging property	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 577.
1912	Unauthorized fees for inspection of vessels	§ 1353	§§ 1751–53.
1913	Lobbying with appropriated moneys	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 578.
1915	Compromise of custom liabilities	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 579.
1916	Unauthorized employment and disposition of lapsed appropriations.	§ 1731; reenact in part [title 18 app.].	§ 2531(e)(2); reenact in toto—title II, § 580.
1917	Interference with civil service examinations	Reenact in toto [title 18 app.]	§ 1742; reenact in part—title II, § 581.

1918	Disloyalty and asserting the right to strike against the Government.	Reenact in toto [title 18 app.]	Reenact in part—title II, § 582.
1919	False statement to obtain unemployment compensation for Federal service.	§ 1343	§§ 1742, 2531(e)(2).
1920	False statement to obtain Federal employees' compensation.	§ 1341	§§ 1741–42, 2531(e)(2).
1921	Receiving Federal employees' compensation after marriage.	§ 1731	§ 2531(e)(2).
1922	False or withheld report concerning Federal employees' compensation.	Reenact in part [title 18 app.]; § 1343.	§ 1742; reenact in part—title II, § 583.
1923	Fraudulent receipt of payments of missing persons	§ 1731	§ 2531(e)(2).
1951	Interference with commerce by threats or violence	§§ 1721–22, 1001–1002, 111	§§ 2521–22, 2705; partially deleted.
1952	Interstate and foreign travel or transportation in aid of racketeering enterprises.	§§ 1001–02, 1351, 1321, 1403, 1701, 1811–14, 1841.	§§ 1721–22, 1751–52, 2501, 2522–23, 2551–56, 2704–05; partially deleted.
1953	Interstate transportation of wagering paraphernalia	§§ 1841, 206	§ 2741.
1954	Offer, acceptance, or solicitation to influence operations of employee benefit plan.	§ 1752	§ 2552.
1955	Prohibition of illegal gambling businesses	§§ 1841, 4001	§§ 2741, 8101–04.
1961	Definitions	§§ 1805, 1806, 111	§§ 2707, 101.
1962	Prohibited activities	§§ 1801–04	§§ 2701–03.
1963	Criminal penalties	§§ 4001, 4011	§§ 2701–03, 8101–04.
1964	Civil remedies	§§ 4001, 4011, 4101	§ 8111.
1965	Venue and process	§ 4012	§ 8112.
1966	Expedition of actions	§ 4012	§ 8113.
1967	Evidence	§ 4012	§ 8114.
1968	Civil investigative demand	§ 4013	§ 8115.
1991	Entering train to commit crime	§ 1712	§ 2511.
1992	Wrecking trains	§§ 1001, 1601–03, 1701–03	§§ 2501–03.
2031	Special maritime and territorial jurisdiction	§ 1601	§§ 2331–34.
2032	Carnal knowledge of female under 16	§ 1643	§§ 2331, 2333.
2071	Concealment, removal, or mutilation generally	§§ 1344, 1731	§§ 1743, 2531(e)(2).
2072	False crop reports	§ 1343	§ 1742.
2073	False entries and reports of moneys or securities	§ 1343	§ 1742.

† Taken from S. Rept. No. 96-553 at 1489–1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
2074	False weather reports	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 591.
2075	Officer failing to make returns or reports	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 592.
2076	Clerk of United States District Court	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 593.
2101	Riots	§§ 206, 1831–33	Deleted.
2101	Definitions	§ 1834	Deleted.
2111	Special maritime and territorial jurisdiction	§ 1721	§ 2521.
2112	Personal property of United States	§ 1721	§ 2521.
2113	Bank robbery and incidental crimes	§§ 10 1001, 1601–03, 1611–14, 1712, 1731–32, 1721.	§§ 2511, 2521, 2531(e)(9), 2532-33.
2114	Mail, money, or other property of United States	§§ 1611–13, 1721, 1731	§§ 2521, 2531(e) (2) and (9), 2311–14. (See also § 2723.)
2115	Post office	§ 1712	§ 2511.
2116	Railway or steamboat post office	§§ 1712, 1611–13	§ 2511.
2117	Breaking or entering carrier facilities	§§ 206, 1702–03, 1712	§ 2511.
2151	Definitions	§ 111	§ 1320.
2152	Fortifications, harbor defenses, or defensive sea areas	§§ 1111–12, 1701–03, 1712 [title 18 app.].	§§ 1311–12, 2501–03, 2511–12.
2153	Destruction of war material, war premises, or war utilities.	§§ 1001–02, 1111–12, 1701–03	§§ 1311–12.
2154	Production of defective war material, war premises, or war utilities.	§§ 1111–12, 1002	§§ 1311–12.
2155	Destruction of national-defense materials, national-defense premises or national-defense utilities.	§§ 1002, 1111–12, 1701–03	§§ 1311–12.
2156	Production of defective national-defense material, national-defense premises or national-defense utilities.	§§ 1002, 1111–12	§§ 1311–12.
2157	Temporary extension of sections 2153 and 2154	Deleted	Deleted.
2191	Cruelty to seamen	§§ 1611–13, 1622–23	§§ 2311–14, 2322–23.
2192	Incitation of seamen to revolt or mutiny	§§ 1002, 1632, 1831	§§ 1317, 2322–23, 2538, 2731–33.
2193	Revolt or mutiny of seamen	§§ 1632, 1622–23, 1734	§ 2538.
2194	Shanghaiing sailors	§§ 1001, 1623, 1734	§ 2322–23.
2195	Abandonment of sailors	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 601.
2196	Drunkenness or neglect of duty by seamen	§ 1617	§§ 2311–14, 2501–03; reenact in toto—title II, § 602.
2197	Misuse of Federal certificate, license or document	§§ 1001, 1343, 1731, 1741–42	§§ 1742, 2531(e)(2), 2532–33 2541-42.

2198	Seduction of female passenger	§§1641–42	§§ 2331–32, partially deleted.
2199	Stowaways on vessels or aircraft	§§111, 1714	§ 2513. (See also § 2531.)
2231	Assault or resistance	§§1302, 1357–58, 1611–14, 1823	§§ 1701, 1757–58, 2311–14. (See also § 2723.)
2232	Destruction or removal of property to prevent seizure.	§1325	§1725.
2233	Rescue of seized property	§§1325, 1731	§§ 1725, 2531(e)(2).
2234	Authority exceeded in executing warrant	§§1501–02	§§2101–02.
2235	Search warrant procured maliciously	§1501	§2101.
2236	Searches without warrant	§1501	§2101.
2251	Sexual exploitation of Children	§1844	§2742.
2252	Certain activities relating to material involving the sexual exploitation of minors.	§1842	§2743.
2253	Definitions for chapter	§1844	§§ 2742–44.
2271	Conspiracy to destroy vessels	§§1002, 1701–03, 1731, 1734	§§ 2501–03, 2531(e)(1).
2272	Destruction of vessel by owner	§§1731–34	§§ 2501–03, 2531(e)(1).
2273	Destruction of vessel by nonowner	§§ 1001, 1701–03	§§ 2501–03.
2274	Destruction or misuse of vessel by person in charge	Reenact in part [title 18 app.]; §§ 1301, 1702–03, 4001.	§§ 2501–03, 8101–04.
2275	Firing or tampering with vessels	§§ 1614, 1617, 1701–03	§§ 2311–14, 2501–03.
2276	Breaking and entering vessel	§§ 1702–03, 1712	§§ 2502–03, 2511–12.
2277	Explosives or dangerous weapons aboard vessels	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 611.
2278	Explosives on vessels carrying steerage passengers	§ 1617 [title 18 app.]	Reenact in toto—title II, § 612.
2279	Boarding vessels before arrival	Reenact in toto [title 18 app.]	Reenact in toto—title II, § 613.
2311	Definitions	§§ 111, 1745	§ 101.
2312	Transportation of stolen vehicles	§§ 1732, 1733	§§ 2532–33.
2313	Sale or receipt of stolen vehicles	§§ 1732–33	§§ 2532–33.
2314	Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.	§§ 1732–34, 1741–42, 1745	§§ 2532–34, 2541–43.
2315	Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps.	§§ 1732–33, 1741–42, 1745	§§ 2532–33, 2541–43.
2316	Transportation of cattle	§§ 1732–33	§§ 2532–33.
2317	Sale or receipt of cattle	§§ 1732–33	§§ 2532–33.
2318	Transportation, sale or receipt of phonograph records bearing forged or counterfeit labels.	§ 1746	§§ 2544, 8101–04.

† Taken from S. Rept. No. 96-553 at 1489-1503.

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Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
2341	Definitions	[Title 18 app.]	Reenact in toto—title II, § 621.
2342	Unlawful Acts	§ 1806, [title 18 app.]	§§ 1921–22.
2343	Record keeping and inspection	[Title 18 app.]	Reenact in toto—title II, § 622; § 1922.
2344	Penalties	[Title 18 app.]; § 1806	§§ 1921–22.
2345	Effect on State law	[Title 18 app.]	Reenact in toto—title II, § 623.
2346	Enforcement and regulations	[Title 18 app.]	Reenact in toto—title II, § 624.
2381	Treason	§ 1101	§§ 1301–02.
2382	Misprision of treason	Deleted	§ 1712.
2383	Rebellion or insurrection	§ 1102	§ 1302.
2384	Seditious conspiracy	§§ 1002, 1101–03	§§ 1301–02.
2385	Advocating overthrow of Government	§ 1103	Deleted.
2386	Registration of certain organizations	Deleted	Deleted.
2387	Activities affecting armed forces generally	§ 1116	§§ 1317, 2538.
2388	Activities affecting armed forces during war	§§ 1002, 1116, 1311	§§ 1316–17, 1711.
2389	Recruiting for service against United States	§ 1203	§ 1503.
2390	Enlistment to serve against United States	§ 1203	§ 1503.
2391	Temporary extension of section 2388	Deleted	Deleted.
2421	Transportation generally	§ 1843	§§ 2742–44.
2422	Coercion or enticement of female	§§ 1621–23, 1843	§§ 2321–23, 2742–44.
2423	Coercion or enticement of minor female	§§ 1621–23, 1843	§§ 2321–22, 2742–44.
2424	Filing factual statement about alien female	Deleted	Deleted.
2510	Definitions	§§ 1526, 111, 3108	§ 2126.
2511	Interception and disclosure of wire or oral communications prohibited.	§ 1521	§ 2121.
2512	Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.	§ 1522	§ 2122.
2513	Confiscation of wire or oral communication intercepting devices.	§ 4001	§§ 8101–03.
2515	Prohibition of use as evidence of intercepted wire or oral communications.	§ 3106	§ 6515.
2516	Authorization for interception of wire or oral communications.	§ 3101	§ 6511.

2517	Authorization for disclosure and use of intercepted wire or oral communications.	§§ 3104, 3106	§ 6515.
2518	Procedure for interception of wire or oral communications.	§§ 3102–06	§§ 6511(a)(2), 6512–14, 6515(e), (f), 5162.
2519	Reports concerning intercepted wire or oral communications.	[Title 28]	§ 6516.
2520	Recovery of civil damages authorized	§ 4103	§ 8301.
3001	Procedure governed by rules; scope, purpose and effect; definition of terms; local rules; forms—(Rule).		Deleted—see F.R. Cr. P., rules 1, 2, 54, 57, 58, 59, 60.
3002	Courts always open—(Rule)		Deleted—see F.R. Cr. P., rule 56.
3003	Calendars—(Rule)		Deleted—see F.R. Cr. P., rule 50.
3004	Decorum in court room—(Rule)		Deleted—see F.R. Cr. P., rule 53.
3005	Counsel and witnesses in capital cases	Deleted	§ 5101.
3006	Assignment of counsel—(Rule)		Deleted—see F.R. Cr. P., rule 44.
3006A	Adequate representation of defendants	§§ 3401–05	§ 5101.
3007	Motions—(Rule)		Deleted—see F.R. Cr. P., rules 47, 12.
3008	Service and filing of papers—(Rule)		Deleted—see F.R. Cr. P., rule 49.
3009	Records—(Rule)		Deleted—see F.R. Cr. P., rule 55.
3010	Exceptions unnecessary—(Rule)		Deleted—see F.R. Cr. P., rule 51.
3011	Computation of time—(Rule)		Deleted—see F.R. Cr. P., rule 45.
3012	Orders respecting persons in custody	§ 3511	Deleted.
3041	Power of courts and magistrates	§ 3303	§ 5303.
3042	Extraterritorial jurisdiction	§ 3303	§ 5304.
3043	Security of the peace and good behavior	§ 3509	§ 5305.
3044	Complaint—(Rule)		Deleted—see F.R. Cr. P., rule 3.
3045	Internal revenue violations	Deleted	Reenact in toto—title II, § 631.
3046	Warrant or summons—(Rule)		Deleted—see F.R. Cr. P., rules 4 and 9.
3047	Multiple warrants unnecessary	Deleted	Deleted.
3048	Commitment to another district; removal—(Rule)	F.R. Cr. P., rule 4	Deleted—see F.R. Cr. P., rule 40.
3049	Warrant for removal	F.R. Cr. P., rule 49	§ 5306.
3050	Bureau of Prisons employees' powers	§ 3014	§ 3904(a).
3052	Powers of Federal Bureau of Investigation	§ 3011	§ 5307.
3053	Powers of marshals and deputies	§ 3013	§ 5308.
3054	Officer's powers involving animals and birds	Reenact [title 18 app.]	§ 5309.

† Taken from S. Rept. No. 96-553 at 1489-1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
3055	Officers' powers to suppress Indian liquor traffic	Deleted	Deleted.
3056	Secret Service powers	§§ 1302, 3001, 3103, reenact in part [title 18 app.].	§§ 1701, (a)(6) 5310.
3057	Bankruptcy investigations	Reenact [title 18 app.]	§ 5311.
3058	Interned belligerent nationals	Reenact [title 18 app.]	§ 5312.
3059	Rewards and appropriations therefor	§ 3131	§ 5313.
3060	Preliminary examination	F.R. Cr. P., rule 5(c)	§ 5315.
3061	Powers of postal personnel	§ 3025	§ 5314.
3101	Effect of rules of court—(Rule)		Deleted—see F.R. Cr., rule 41(g).
3102	Authority to issue search warrant—(Rule)		Deleted—see F.R. Cr., rule 41(a).
3103	Grounds for issuing search warrant—(Rule)		Deleted—see F.R. Cr., rule 41(b).
3103a	Additional grounds for issuing warrant—(Rule)	Deleted	§ 6501.
3104	Issuance of search warrant; contents—(Rule)		Deleted—see F.R. Cr. P., rule 41(c).
3105	Persons authorized to serve search warrant	Rule 41(d)	§ 6502.
3106	Officer authorized to serve search warrant—(Rule)		Deleted—see F.R. Cr. P., rule 41(c).
3107	Service of warrants and seizures by Federal Bureau of Investigation.	§ 3011	§ 6503.
3108	Execution, service, and return—(Rule)		Deleted—see F.R. Cr. P., rule 41(c)(d).
3109	Breaking doors or windows for entry or exit	Rule 41(d)	§ 6504.
3110	Property defined—(Rule)		Deleted—see F.R. Cr. P., rule 41(g).
3111	Property seizable on search warrant—(Rule)		Deleted—see F.R. Cr. P., rule 41(b).
3112	Search warrants for seizure of animals, birds or eggs	Reenact [title 18 app.]	§ 6505.
3113	Liquor violations in Indian country	Deleted	Deleted.
3114	Return of seized property and suppression of evidence; motion—(Rule).		Deleted—see F.R. Cr. P., rule 41(e).

3115	Inventory upon execution and return of search warrant—(Rule).		Deleted—see F.R. Cr. P., rule 41(d).
3116	Records of examining magistrate; return to clerk of court—(Rule).		Deleted—see F.R. Cr. P., rule 41(f).
3141	Power of courts and magistrates	§ 3501	§ 6301.
3142	Surrender by bail	§ 3508	§ 6302.
3143	Additional bail	Deleted	§ 6303.
3144	Cases removed from State courts	§ 3501	§ 6304.
3145	Parties and witnesses—(Rule)	Deleted	Deleted—see F.R. Cr. P., rules 5(b), 46, 32(a), 38(b), (c), 39(a).
3146	Release in noncapital cases prior to trial	§ 3502	§ 6306.
3147	Appeal from conditions of release	§ 3506	§ 6309.
3148	Release in capital cases or after conviction	§§ 3503–04	§ 6307.
3149	Release of material witnesses	§ 3505	§ 6308.
3150	Penalties for failure to appear	§ 1312	§ 1715.
3151	Contempt	Deleted	§ 6305.
3152	Establishment of pretrial services agencies	Reenact [title 28]	§ 6331.
3153	Organization of pretrial services agencies	Reenact [title 28]	§ 6332.
3154	Functions and powers of pretrial service agencies	Reenact [title 28]	§ 6333.
3155	Report to Congress	Reenact [title 28]	§ 6334.
3156	Definitions	§ 111; reenact [title 28]	§ 6335.
3161	Time limits and exclusions	Reenact [title 28]	§ 6901.
3162	Sanctions	Reenact [title 28]	§ 6902.
3163	Effective dates	Reenact [title 28]	Deleted.
3164	Persons detained or designated as being of high risk	Reenact [title 28]	§ 6903.
3165	District plans—generally	Reenact [title 28]	§ 6904.
3166	District plans—contents	Reenact [title 28]	§ 6904.
3167	Reports to Congress	Reenact [title 28]	§ 6904.
3168	Planning process	Reenact [title 28]	§ 6904.
3169	Federal Judicial Center	Reenact [title 28]	§ 6904.
3170	Speedy trial data	Reenact [title 28]	§ 6904.
3171	Planning appropriations	Reenact [title 28]	§ 6904.
3172	Definitions	Reenact [title 28]	§ 6907.
3173	Sixth amendment rights	Reenact [title 28]	§ 6905.
3174	Judicial emergency and implementation	Reenact [title 28]	§ 6906.

† Taken from S. Rept. No. 96–553 at 1439–1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
3181	Scope and limitation of chapter	§ 3211	§ 5501.
3182	Fugitives from State or Territory to State, District or Territory.	§ 3202	§ 5502.
3183	Fugitives from State, Territory, or Possession into extraterritorial jurisdiction of United States.	Deleted	§ 5503.
3184	Fugitives from foreign country to United States	§ 3211	§ 5504.
3185	Fugitives from country under control of United States into the United States.	Deleted	§ 5505.
3186	Secretary of State to surrender fugitive	§ 3213	§ 5506.
3187	Provisional arrest and detention within extraterritorial jurisdiction.	§ 3303	§ 5507.
3188	Time of commitment pending extradition	§ 3113	§ 5508.
3189	Place and character of hearing	§ 3212	§ 5509.
3190	Evidence on hearing	§ 3212	§ 5510.
3191	Witnesses for indigent fugitives	Deleted	§ 5511.
3192	Protection of accused	§ 3216	§ 5512.
3193	Receiving agent's authority over offenders	§ 3213	§ 5513.
3194	Transportation of fugitive by receiving agent	§ 3216	§ 5514.
3195	Payment of fees and costs	§ 3217	§ 5515.
3231	District courts	§§ 206, 3301	§ 5901.
3232	District of offense—(Rule)		Deleted—see F.R. Cr. P., rule 18.
3233	Transfer within district—(Rule)		Deleted—see F.R. Cr. P., rule 19.
3234	Change of venue to another district—(Rule)		Deleted—see F.R. Cr. P., rule 20.
3235	Venue in capital cases	Deleted	Deleted.
3236	Murder or manslaughter	§ 3311	§ 5902.
3237	Offenses begun in one district and completed in another.	§ 3311	§ 5903.
3238	Offenses not committed in any district	§ 3312	§ 5904.
3239	Threatening communications	Deleted	§ 5905.
3240	Creation of new district or division	§ 3313	§ 5908.
3241	Jurisdiction of offenses under certain sections	§ 3301	§ 5909.
3242	Indians committing certain offenses; acts on reservations.	§ 203	§§ 111, 114.

3243	Jurisdiction of State of Kansas over offenses committed by or against Indians on Indian reservations.	Reenact [title 25]	§§ 111, 114–115.
3244	Jurisdiction of proceedings relating to transferred offenders.	[Title 28]	§ 5910.
3281	Capital offenses	§ 511	§ 703.
3282	Offenses not capital	§ 511	§ 703(a).
3283	Customs and slave trade violations	§ 511	§ 703; repealed in part.
3284	Concealment of bankrupt's assets	§ 511	§§ 703, 2535.
3285	Criminal contempt	Deleted, see § 1331	§ 1731.
3286	Seduction on vessel of United States	Deleted	Deleted.
3287	Wartime suspension of limitations	§ 511, partially deleted	Deleted.
3288	Indictment where defect found after period of limitations.	§ 511	§ 703(c).
3289	Indictment where defect found before period of limitations.	§ 511	§ 703(c).
3290	Fugitives from justice	§ 511	§ 703(b).
3291	Nationality, citizenship and passports	§ 511, partially deleted	§ 703(a).
3321	Number of grand jurors; summoning additional jurors.	Deleted	Deleted—see F.R. Cr. P., rule 6.
3322	Number; summoning—(Rule)		Deleted—see F.R. Cr. P., rule 6(a).
3323	Objections and motions—(Rule)		Deleted—see F.R. Cr. P., rule 6(b).
3324	Foreman and deputies; powers and duties; records—(Rule).		Deleted—see F.R. Cr. P., rule 6(c).
3325	Persons present at proceedings—(Rule)		Deleted—see F.R. Cr. P., rule 6(d).
3326	Secrecy of proceedings and disclosure—(Rule)		Deleted—see F.R. Cr. P., rule 6(e).
3327	Indictment; finding and return—(Rule)		Deleted—see F.R. Cr. P., rule 6(f).
3328	Discharging jury and excusing juror—(Rule)		Deleted—see F.R. Cr. P., rule 6(g).
3331	Summoning and term	New F.R. Cr. P., rule 6.1	§ 6702.
3332	Powers and duties	New F.R. Cr. P., rule 6.1	§ 6703.

† Taken from S. Rept. No. 96–553 at 1489–1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
3333	Reports	New rule 6.1	§ 6704.
3334	General provisions	New F.R. Cr. P., rule 6.1	§ 6701.
3361	Form and contents—(Rule)		Deleted—see F.R. Cr. P., rule 7(a), (c), (d).
3362	Waiver of indictment and prosecution on information—(Rule).		Deleted—see F.R. Cr. P., rule 7(b).
3363	Joinder of offenses—(Rule)		Deleted—see F.R. Cr. P., rules 8(a), 8.
3364	Joinder of defendants—(Rule)		Deleted—see F.R. Cr. P., rule 14.
3365	Amendment of information—(Rule)		Deleted—see F.R. Cr. P., rule 7(e).
3366	Bill of particulars—(Rule)		Deleted—see F.R. Cr. P., rule 7(f).
3367	Dismissal—(Rule)		Deleted—see F.R. Cr. P., rule 48.
3401	Minor offenses; application of probation laws	§ 3302	§ 7101.
3402	Rules of procedure, practice and appeal	§ 3302	§ 5105.
3431	Term of court; power of court unaffected by expiration—(Rule).		Deleted—see F.R. Cr. P., rule 45(c).
3432	Indictment and list of jurors and witnesses for prisoner in capital cases.	F.R. Cr. P., rule 16(f)	Deleted.
3433	Arraignment—(Rule)		Deleted—see F.R. Cr. P., rule 10.
3434	Presence of defendant—(Rule)		Deleted—see F.R. Cr. P., rule 43.
3435	Receiver of stolen property triable before or after principal.	§ 404	Deleted.
3436	Consolidation of indictments or informations—(Rule)		Deleted—see F.R. Cr. P., rule 13.
3437	Severance—(Rule)		Deleted—see F.R. Cr. P., rule 14.
3438	Pleas—(Rule)		Deleted—see F.R. Cr. P., rule 11.
3439	Demurrers and special pleas in bar or abatement abolished; relief on motion—(Rule)		Deleted—see F.R. Cr. P., rule 12.
3440	Defenses and objections determined on motion—(Rule)		Deleted—see F.R. Cr. P., rule 12(b).
3441	Jury; number of jurors; waiver—(Rule)		Deleted—see F.R. Cr. P., rule 23.

3442	Jurors, examination, preemptory challenges; alternates—(Rule).		Deleted—see F.R. Cr. P., rule 24.
3443	Instructions to jury—(Rule)		Deleted—see F.R. Cr. P., rule 30.
3444	Disability of judge—(Rule)		Deleted—see F.R. Cr. P., rule 25.
3445	Motion for judgment of acquittal—(Rule)		Deleted—see F.R. Cr. P., rule 92.
3446	New trial—(Rule)		Deleted—see F.R. Cr. P., rule 33.
3481	Competency of accused	Deleted	Deleted.
3482	Evidence and witnesses—(Rule)		Deleted—see F.R. Cr. P., rule 26.
3483	Indigent defendants, process to produce evidence—(Rule).		Deleted—see F.R. Cr. P., rule 17(b).
3484	Subpoenas—(Rule)		Deleted—see F.R. Cr. P., rule 17.
3485	Expert witnesses—(Rule)		Deleted—see F.R. Cr. P., rule 28.
3487	Refusal to pay as evidence of embezzlement	Deleted	§ 7301.
3488	Intoxicating liquor in Indian country as evidence of unlawful introduction.	Deleted	Deleted.
3489	Discovery and inspection—(Rule)		Deleted—see F.R. Cr. P., rule 16.
3490	Official record or entry—(Rule)		Deleted—see F.R. Cr. P., rule 27.
3491	Foreign documents	F.R. Cr. P., rule 15	§ 7302.
3492	Commission to consular officers to authenticate foreign documents.	F.R. Cr. P., rule 15	§ 7303.
3493	Deposition to authenticate foreign documents	F.R. Cr. P., rule 15	§ 7304.
3494	Certification of genuineness of foreign document	F.R. Cr. P., rule 15	§ 7305.
3495	Fees and expenses of consuls, counsel, interpreters and witnesses.	F.R. Cr. P., rule 15	§ 7306.
3496	Regulations by President as to commissions, fees of witnesses, counsel and interpreters.	F.R. Cr. P., rule 15	§ 7307.
3497	Account as evidence of embezzlement	Deleted	§ 7301.
3498	Depositions—(Rule)		Deleted—see F.R. Cr. P., rule 17(f).
3499	Contempt of court by witness—(Rule)		Deleted—see F.R. Cr. P., rule 17(g).
3500	Demands for production of statements and reports of witnesses.	New F.R. Cr. P., rule 26.1; rules 17(d), 16(a)(2).	§ 5302.
3501	Admissibility of confessions	§ 3713	§ 7308.
3502	Admissibility of evidence of eye witness testimony	§ 3714	§ 7309.

† Taken from S. Rep. No. 96-553 at 1489-1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
3503	Depositions to preserve testimony	F.R. Cr. P., rule 15	§ 7310.
3504	Litigation concerning sources of evidence	§ 3106	§ 7311.
3531	Return; several defendants; conviction of less offense; poll of jury—(Rule).		Deleted—see F.R. Cr. P., rule 31.
3532	Setting aside verdict of guilty; judgment notwithstanding verdict—(Rule).		Deleted—see F.R. Cr. P., rule 29(b).
3561	Judgment form and entry—(Rule)		Deleted—see F.R. Cr. P., rule 32(b).
3562	Sentence—(Rule)		Deleted—see F.R. Cr. P., rule 32(a, c).
3563	Corruption of blood or forfeiture of estate	Deleted	Deleted.
3564	Pillory and whipping		Deleted.
3565	Collection and payment of fines and penalties	§ 3813	§ 3507.
3566	Execution of death sentence	§ 3841	Deleted.
3567	Death sentence may prescribe dissection	Deleted	Deleted.
3568	Effective date of sentence; credit for time in custody prior to the imposition of sentence.	§ 2305	§ 3706.
3569	Discharge of indigent prisoner	Deleted	§ 3504.
3570	Presidential remission as affecting unremitted part	Deleted	Deleted.
3571	Clerical mistakes—(Rule)		Deleted—see F.R. Cr. P., rule 36.
3572	Correction or reduction of sentence—(Rule)		Deleted—see F.R. Cr. P., rule 35.
3573	Arrest on setting aside of judgment—(Rule)		Deleted—see F.R. Cr. P., rule 34.
3574	Stay of execution; supersedes—(Rule)		Deleted—see F.R. Cr. P., rule 38(a).
3575	Increased sentence for dangerous special offenders	Deleted	Deleted.
3576	Review of sentence	§ 3725	Deleted.
3577	Use of information for sentencing	§ 3714	Deleted.
3578	Conviction records	Title 28	§ 3105.
3611	Firearms possessed by convicted felons	§ 4001	§§ 8101–04.
3612	Bribe moneys	§ 4001	§§ 8101–04.
3613	Fines for setting grass and timber fires	Deleted	Deleted.
3614	Fine for seduction	Deleted	Deleted.
3615	Liquors and related property; definitions	[Title 18 app.]	§ 8101 et seq.; reenact in toto—title II, § 641.

3617	Remission or mitigation of forfeitures under liquor laws; possession pending trial.	Deleted	§§ 8101 et seq.
3618	Conveyances carrying liquor	Deleted	§§ 8101 et seq.
3619	Disposition of conveyances seized for violation of the Indian liquor laws.	Deleted	§§ 8101 et seq.
3620	Vessels carrying explosives and steerage passengers	[Ttile 18 app.]	§§ 8101 et seq.; reenact in toto—title II, § 642.
3651	Suspension of sentence and probation	§§ 2101–05	§§ 3321–24.
3652	Probation—(Rule)		Deleted—see F.R. Cr. P., rule 32(e).
3653	Report of probation officer and arrest of probationer	F.R. Cr. P., rule 32	§§ 3104, 4506.
3654	Appointment and removal of probation officers	§ 3802	§ 4502.
3655	Duties of probation officers	§ 3803	§ 4503.
3656	Duties of Director of Administrative Office of the United States Courts.	Title 28	Reenact in toto—title II, § 720 (as 28 U.S.C. 604(f)).
3691	Jury trial of criminal contempts	Deleted	Deleted.
3692	Jury trial for contempt in labor dispute cases	Deleted	Deleted.
3693	Summary disposition or jury trial; notice—(Rule)		Deleted—see F.R. Cr. P., rule 42.
3731	Appeal by United States	§ 3724	§ 5102.
3732	Taking of appeal; notice; time—(Rule)		Deleted—see F.R. Cr. P., rule 37(a).
3733	Assignment of errors—(Rule)		Deleted—see F.R. Cr. P., rule 37(a) and 30.
3734	Bill of exceptions abolished—(Rule)		Deleted—see F.R. Cr. P., rule 37(a)(1) and 50.
3735	Bail on appeal or certorari—(Rule)		Deleted—see F.R. Cr. P., rule 38(c) and 46(a)(2).
3736	Certorari—(Rule)		Deleted—see F.R. Cr. P., rule 37(b).
3737	Record—(Rule)		Deleted—see F.R. Cr. P., rule 39(b), 51 and 37(a)(1).
3738	Docketing appeal and record—(Rule)		Deleted—see F.R. Cr. P., rule 39(c).
3739	Supervision—(Rule)		Deleted—see F.R. Cr. P., rule 39(a).

† Taken from S. Rept. No. 96-553 at 1489-1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
3740	Agreement—(Rule)		Deleted—see F.R. Cr. P., rule 39(d).
3741	Harmless error and plain error—(Rule)		Deleted—see F.R. Cr. P., rule 7, 12(b)(2), 30, and 52.
3771	Procedure to and including verdict	§ 3702	§ 5103.
3772	Procedure after verdict	§ 3722	§ 5104.
4001	Limitation on detention; control of prisons	Title 28	§ 3901.
4002	Federal prisoners in State institutions; employment	Title 28	§ 3912.
4003	Federal institutions in States without appropriate facilities.	Title 28	§ 3913.
4004	Oaths and acknowledgments	§ 3014	§ 3904(b).
4005	Medical relief; expenses	Title 28	§ 3905.
4006	Subsistence for prisoners	Title 28	§ 3914.
4007	Expenses of prisoners	Title 28	Deleted.
4008	Transportation expenses	Title 28	§ 3915.
4009	Appropriations for sites and buildings	Title 28	§ 3916.
4010	Acquisition of additional land	Title 28	§ 3917.
4011	Disposition of cash collections for meals, laundry, etc.	Title 28	Deleted.
4041	Bureau of Prisons; director and employees	Title 28	§ 3902.
4042	Duties of Bureau of Prisons	Title 28	§ 3903.
4081	Classification and treatment of prisoners	Title 28	§ 3906.
4082	Commitment to Attorney General; residential treatment centers; extension of limits of confinement; work furlough.	§§ 3821–22	§§ 3907, 1716.
4083	Penitentiary imprisonment; consent	Deleted	§ 3908.
4084	Copy of commitment delivered with prisoner	§§ 3511, 3821	§ 3909.
4085	Transfer for State offense; expense	§ 3823	§ 3910.
4086	Temporary safe-keeping of federal offenders by marshals.	§ 3103	§ 3911.
4100	Scope and limitation of chapter	Title 28	§ 5541.
4101	Definitions	Title 28	§ 5556.
4102	Authority of the Attorney General	Title 28	§ 5542.
4103	Applicability of United States laws	Title 28	§ 5543.

4104	Transfer of offenders on probation	Title 28	§ 5544.
4105	Transfer of offenders serving sentence of imprisonment.	Title 28	§ 5545.
4106	Transfer of offenders on parole; parole of offenders transferred.	Title 28	§ 5546.
4107	Verification of consent of offender to transfer from the United States.	Title 28	§ 5547.
4108	Verification of consent of offender to transfer to the United States.	Title 28	§ 5548.
4109	Right to counsel, appointment of counsel	Title 28	§ 5549.
4110	Transfer of juveniles	Title 28	§ 5550.
4111	Prosecution barred by foreign conviction	Title 28	§ 5551.
4112	Loss of rights, disqualification	Title 28	§ 5552.
4113	Status of alien offender transferred to a foreign country.	Title 28	§ 5553.
4114	Return of transferred offenders	Title 28	§ 5554.
4115	Execution of sentences imposing an obligation to make restitution or reparations.	Title 28	§ 5555.
4121	Federal Prison Industries; board of directors	Title 28	§ 3981.
4122	Administration of Federal Prison Industries	Title 28	§ 3982.
4123	New industries	Title 28	§ 3983.
4124	Purchase of prison-made products by Federal departments.	Title 28	§ 3984.
4125	Public works; prison camps	Title 28	§ 3985.
4126	Prison Industries Fund; use and settlement of accounts.	Title 28	§ 3986.
4127	Prison Industries report to Congress	Title 28	§ 3987.
4128	Enforcement by Attorney General	Title 28	§ 3988.
4161	Computation generally	§ 3824	Deleted.
4162	Industrial good time	Deleted	Deleted.
4163	Discharge	§ 3824	§ 3706.
4164	Released prisoner as parolee	§ 3824	Deleted.
4165	Forfeiture for offense	Deleted	Deleted.
4166	Restoration of forfeited commutation	Deleted	Deleted.
4201	Definitio	Deleted	§ 4717.

† Taken from S. Rept. No. 96-553 at 1489-1503.

Section	Current title 18 section heading	S. 1722 disposition†	H.R. 6915 disposition
4202	Parole Commission created	Deleted	§ 4701.
4203	Powers and duties of the Commission	Deleted	§ 4702.
4204	Powers and duties of the Chairman	Deleted	§ 4703.
4205	Time of eligibility for release on parole	Deleted	§ 4704.
4206	Parole determination criteria	Deleted	§ 4705.
4207	Information considered	Deleted	§ 4706.
4208	Parole determination proceeding; time	Deleted	§ 4707.
4209	Conditions of parole	§ 2303	§ 4708.
4210	Jurisdiction of Commission	§ 2303	§ 4709.
4211	Early termination of parole	§ 2303	§ 4710.
4212	Aliens	Deleted	§ 4711.
4213	Summons to appear or warrant for retaking of parolee	Deleted	§ 4712.
4214	Revocation of parole	Deleted	§ 4713.
4215	Reconsideration and appeal	Deleted	§ 4714.
4216	Young adult offenders	Deleted	Deleted.
4217	Warrants to retake Canal Zone parole violators	Deleted	Deleted.
4218	Applicability of Administrative Procedure Act	Deleted	§ 4715.
4241	Examination and transfer to hospital	Deleted	§§ 6126, 6128.
4242	Retransfer upon recovery	§ 3614	§ 6128.
4243	Delivery to state authorities on expiration of sentence	Deleted	§ 6125.
4244	Mental incompetency after arrest and before trial	§ 3611	§§ 6121, 6123.
4245	Mental incompetency undisclosed at trial	Deleted	§ 6127.
4246	Procedure upon finding of mental incompetency	§ 3611	§ 6124.
4247	Alternate procedure on expiration of sentence	§ 3615	Deleted.
4248	Termination of custody by release or transfer	§ 3615	Deleted.
4251	Definitions	Deleted	Deleted.
4252	Examination	Deleted	Deleted.
4253	Commitment	Title 28	Deleted.
4254	Conditional release	Deleted	Deleted.
4255	Supervision in the community	Deleted	Deleted.
4281	Discharge from prison	§ 3824	§ 3919.
4282	Arrested but unconvicted persons	§ 3512	§ 3920.
4283	Probation	§ 3805	Deleted.

4284	Advances for rehabilitation	§ 3824	Deleted.
4285	Persons released pending further judicial proceedings	Title 28	Reenact in toto—title II, § 651.
4321	Board of Advisers	Deleted	Deleted.
4351	Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers.	Title 28	§ 3924.
4352	Authority of Institute; report to President and Congress; time; records of recipients; access; scope of section.	Title 28	§ 3925.
4353	Authorization of appropriations	Title 28	Deleted.
5001	Surrender to State authorities; expenses	§ 3601	§ 5316.
5002	Advisory Corrections Council	Title 28	§ 3923.
5003	Custody of State offenders	Title 28	§ 3918.
5005	Youth correction decisions	Deleted	Deleted.
5006	Definitions	Deleted	Deleted.
5010	Sentence	Deleted	Deleted (but see § 3707).
5011	Treatment	Title 28	§ 3907.
5012	Certificate as to availability of facilities	Deleted	§ 3907.
5013	Provision of facilities	Deleted	Deleted.
5014	Classification studies and reports	Deleted	Deleted.
5015	Powers of Director as to placement of youth offenders	Deleted	Deleted.
5016	Reports concerning offenders	Deleted	Deleted.
5017	Release of youth offenders	Deleted	Deleted.
5018	Revocation of Commission orders	Deleted	Deleted.
5019	Supervision of released youth offenders	Deleted	Deleted.
5020	Apprehension of released offenders	Deleted	Deleted.
5021	Certificate setting aside conviction	Deleted	Deleted.
5022	Applicable date	Deleted	Deleted.
5023	Relationship to Probation and Juvenile Delinquency Acts.	Deleted	Deleted.
5024	Where applicable	Deleted	Deleted.
5025	Applicability to the District of Columbia	Deleted	Deleted.
5026	Parole of other offenders not affected	Deleted	Deleted.

†Taken from S. Rept. No. 96-553 at 1489-1503.

Section	Current title 18 section heading	S. 1722 disposition †	H.R. 6915 disposition
5031	Definitions	§ 3606	§ 6112.
5032	Delinquency proceedings in district courts; transfer for criminal prosecution.	§§ 3601, 3603	§ 6101.
5033	Custody prior to appearance before magistrate	§ 3602	§ 6102.
5034	Duties of magistrate	Deleted	§ 6103.
5035	Detention prior to disposition	§ 3602	§ 6104.
5036	Speedy trail	§ 3602	§ 6105.
5037	Dispositional hearing	§ 3603	§ 6106.
5038	Use of juvenile records	§ 3605	§ 6107.
5039	Commitment	§ 3603	§ 6108.
5040	Support	§ 3603	§ 6109.
5041	Parole	§ 3604	§ 6110.
5042	Revocation of parole or probation	§ 3604	§ 6111.
6001	Definitions	§§ 111, 3115	§ 5705.
6002	Immunity generally	§ 3111	§ 5701.
6003	Court and grand jury proceedings	§ 3112	§ 5702.
6004	Certain administrative proceedings	§ 3114	§ 5703.
6005	Congressional proceedings	§ 3114	§ 5704.

† Taken from S. Rept. No. 96-553 at 1489-1503.

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