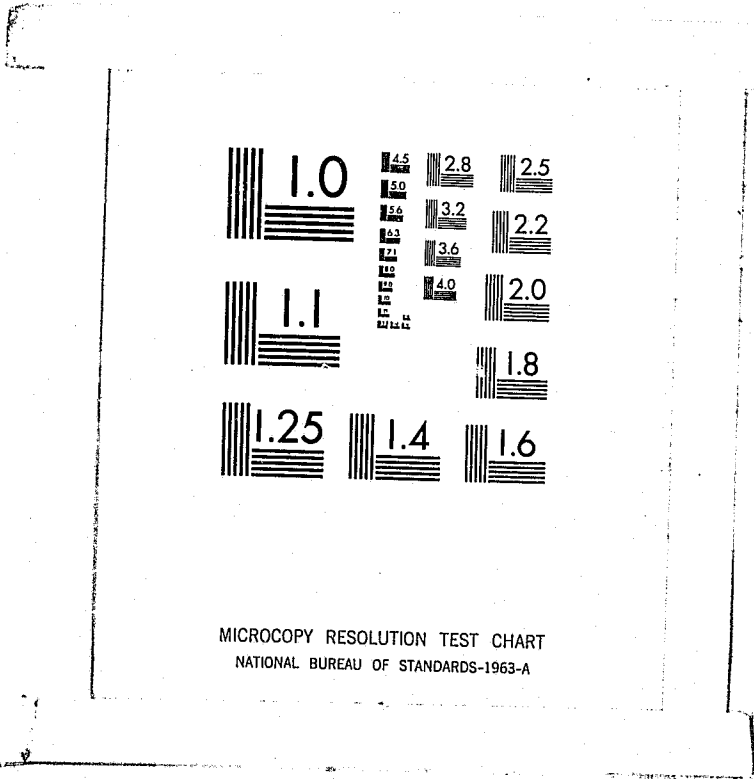


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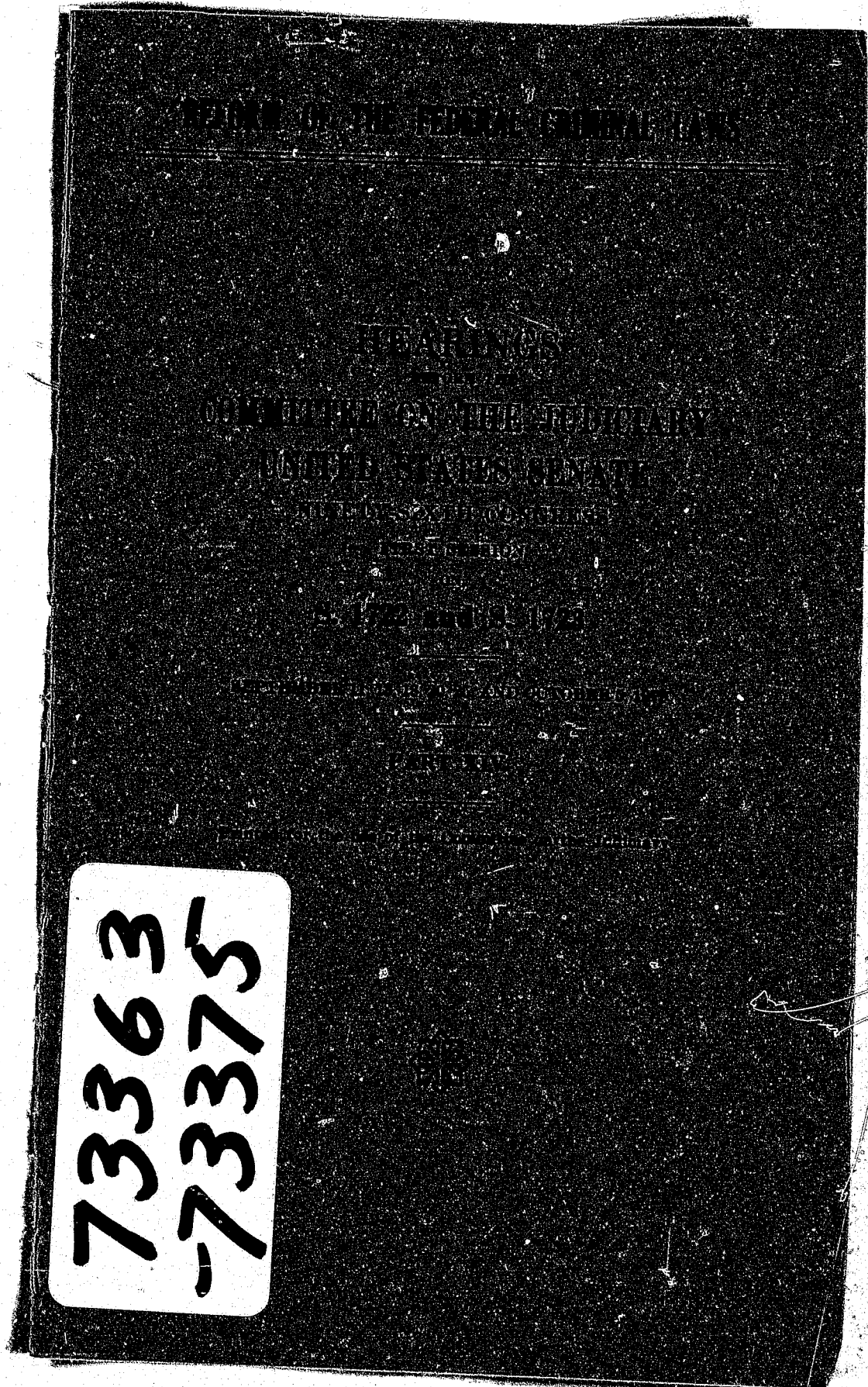
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National Institute of Justice  
United States Department of Justice  
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REFORM OF THE FEDERAL CRIMINAL LAWS

NCJRS

OCT 20 1980

HEARINGS  
BEFORE THE  
ACQUISITIONS  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1722 and S. 1723

SEPTEMBER 11, 13, 18, 20, 25, AND OCTOBER 5, 1979

PART XIV

Printed for the use of the Committee on the Judiciary



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(II)

## CONTENTS

	Page
<b>Hearings held on—</b>	
September 11, 1979	9897
September 13, 1979	9955
September 18, 1979	10039
September 20, 1979	10071
September 24, 1979	10239
October 5, 1979	10357
<b>Text of—</b>	
S. 1722	11089
S. 1723	11485
<b>Statement of—</b>	
Angell, Stephen, National Moratorium on Prison Construction	10583
Baptiste, Robert M., labor counsel, International Brotherhood of Teamsters	10045
Beaudin, Bruce, director, Pre-Trial Services Agency, Washington, D.C.	10340
Bevans, R. Dennis, Alexandria, Va	10057
Civiletti, Hon. Benjamin R., the Attorney General of the United States	9902
Cleary, John J., Legal Aid and Defenders Association, San Diego, Calif.	10093
Cook Robert M., Livestock Marketing Association	10680
Coombs, Prof. Russell M., Rutgers University School of Law	10627
Dershowitz, Prof. Alan, Harvard School of Law	10323 (p. 1033 1/2)
Dopelson, Tom, Council on Skills for Living, Alexandria, Va	10592
Dunn, James R., Federal Public Defender, Los Angeles, Calif.	10357
Freeman, George C., Jr., on behalf of the American Bar Association	9966
Gainer, Ronald G., Deputy Assistant Attorney General in the Office of Improvements in the Administration of Justice, Department of Justice	9902
Green, Mark, director, Public Citizen's Congress Watch	10129 (p. 1013 4)
Green, Richard A., attorney, Washington, D.C.	10081 (p. 1014 4)
Greenhalgh, William, on behalf of the American Bar Association	9966
Harris, Kay, Director, National Capital Office of the National Council on Crime and Delinquency	10299
Herst, Esther, National Committee Against Repressive Legislation	10312 (p. 10315 )
Heymann, Philip B., Assistant Attorney General, Criminal Division, Department of Justice	9902, 9918
Hruska, Hon. Roman L., Omaha, Nebr.	9955
Kennedy, Hon. Edward M., opening statement, September 11, 1979	9898
Kroll, Michael A., UUSC National Moratorium on Prison Construction	10583
Landau, David, counsel, American Civil Liberties Union	10151
Lowe, Ira M., Creative Alternatives to Prison	10592
Mathis, Weldon, International Brotherhood of Teamsters	10045 (p. 1030 5)
Rector, Milton G., National Council on Crime and Delinquency	10299 (p. 1031 2)
Robinson, Prof. David, George Washington University, School of Law	10350
Robinson, Laurie, director, Criminal Justice Section, American Bar Association	9966
Scobie, Dr. Richard, on behalf of the National Moratorium on Prison Construction	10583
Shapiro, Irving S., on behalf of the Business Roundtable	10072, 10851
Shattuck, John H. F., director, Washington Office, American Civil Liberties Union	10151
Smith, Patricia, Women's International League for Peace and Freedom	10039
Teske, David, executive director, Federal Defenders, Inc., Portland, Oreg.	10357
Thurmond, Hon. Strom, opening statement, September 11, 1979	9900
Tillett, S. Raymond, on behalf of the Business Roundtable	10072

IV

	Page
Additional prepared statements submitted for the record—	10752
Administrative Office of the U.S. Courts—	10705
Associated Builders and Contractors, Inc.—	10709
Associated General Contractors of America—	9956, 10690
Brown, Hon. Edmund G. "Pat," Beverly Hills, Calif.—	10691
Building and Construction Grades Department, AFL-CIO, statement by Thomas X. Dunn—	10796
Clancy, James J., attorney, Sun Valley, Calif.—	10071
Cockran, Hon. Thad, a U.S. Senator from the State of Mississippi—	10781
Degnan, Hon. John J., attorney general of the State of New Jersey, letter of Mar. 7, 1979, by Richard W. Berg, deputy attorney general—	9901
Dole, Hon. Robert, a U.S. Senator from the State of Kansas and a member of the Committee on the Judiciary—	10693
Dulles, David, Esq., Washington, D.C.—	10691
Dunn, Thomas X., general counsel, Building and Construction Trades, AFL-CIO—	10872
Gorton, Slade, attorney general, State of Oregon, letter of Oct. 17, 1979, with attachments—	10731
Harvey, Hon. Alexander III, Chairman, Judicial Conference Committee on Administration of the Criminal Law—	9918
Heymann, Philip B., Assistant Attorney General, Department of Justice, statement before House Subcommittee on Criminal Justice, with attachments—	10722
Hoffman, Hon. Walter E., Chairman, Judicial Conference Advisory Committee on Criminal Rules—	10816
Keating, Charles H., Jr., statement on "Working Draft" of the House Subcommittee on Criminal Justice and letter of Oct. 1, 1979, submitting a statement by Prof. William A. Stanmeyer—	10858
Landau, Jack, Reporters' Committee for Freedom of the Press—	10771
Legal Aid Society of New York, Federal Defender Services Unit—	10711
MacBride, Hon. Thomas J., Chairman, Judicial Conference Committee to Implement the Criminal Justice Act—	10752
Metzner, Hon. Charles M., U.S. district judge, Chairman of the Judicial Conference Committee on the Administration of the Federal Magistrate System—	10694
Motion Picture Association of America, Inc., Washington, D.C.—	10750
Newman, Hon. Jon O., U.S. district judge—	10759
Perlik, Charles A., Jr., president, the Newspaper Guild, Washington, D.C., letter of Oct. 5, 1979—	10694
Recording Industry Association of America, Inc., Washington, D.C.—	10851
Shapiro, Irving S., statement before House Subcommittee on Criminal Justice, Sept. 12, 1979—	10905
Schott, Larry A., National director, NORML, letter of Oct. 15, 1979, and statement before House Subcommittee on Criminal Justice—	10819
Stanmeyer, Prof. William A., Indiana University—	10765
Stein, Marshall D., attorney, Boston, Mass.—	10713
Tjoflat, Hon. Gerald Bard, judge, U.S. Fifth Circuit Court of Appeals—	10690
Turner, Stansfield, Director, Central Intelligence Agency, letter of Oct. 11, 1979—	10761
United Electrical, Radio and Machine Workers of America, letter of Sept. 19, 1979, from Lance Compa, UE Washington representative, with statement—	

V

Exhibits—	Page
"(The) Acquittal of Murder, Inc.," Art Buchwald—	10149
"Alternatives to Imprisonment," Ronald Goldfarb—	10619
Amendments to the criminal justice proposed by the Judicial Conference—	10711
Amendments to Standards Relating to Sentencing Alternatives and Procedure, American Bar Association—	10029
American Bar Association, chart comparing ABA policies with provisions of S. 1437 and House bill—	9996
American Bar Association, resolutions—	10015
American Bar Association, Section of Criminal Law, report to the House of Delegates—	10018
American Bar Association, authorized sentences, redraft of section 2001 of S. 1722 and section 3101 of S. 1723—	10015
"(A) Comparison of Prison Use in Great Britain, Canada and the United States," James P. Lynch, Office for Improvement in the Administration of Justice, Department of Justice—	10958
"Counterfeit! L.A.'s Hot Status Crime for the '80's," Townsend Parish and Dianne Grosskopf-Markley, Los Angeles, February 1979—	10940
"Crime and Crime Control: What Are the Social Costs," H. G. Demmert—	10864
"Deterring Poisonous Decisions," the New York Times, May 1, 1979—	10150
"Gang Lives High on Hog Bilking Livestock Markets," Kansas City Star, Nov. 5, 1978—	10688
"Guilty Using Time Instead of Doing It," Neil Hirschfeld, New York Sunday News, Sept. 23, 1979—	10621
Hall, Prof. Livingston, Chairperson, Committee on Juvenile Justice, ABA, Section of Criminal Justice, analysis of juvenile justice provisions—	10024
"Jailing Polluters Is an Idea Whose Time Has Come," William Grieder, the Washington Post, Aug. 5, 1979—	10147
"(A) History of the Exercise of Rulemaking Authority by the U.S. Supreme Court, Office of the General Counsel, Administrative Office of the U.S. Courts—	10723
Kennedy, E., "Toward a New System of Criminal Sentencing: Law With Order," American Criminal Law Review, vol. 16, No. 4 (Spring 1979)—	10967
Latest in Health—Treating Phobias . . . Predicting Schizophrenia . . . Drug Reactions, U.S. News & World Report, May 28, 1978—	10064
Pauley, R., "An Analysis of Some Aspects of Jurisdiction Under S. 1437, the Proposed Federal Criminal Code," Geo. Wash. L. Rev., vol. 47, No. 3, pp. 475-501 (1979)—	11072
<i>Perrin v. United States</i> , 580 F. 2d 730 (5th Cir. 1978), excerpts from brief for the United States on petition for writ of certiorari on interpreting the Travel Act to encompass commercial bribery—	11070
Perry, Robert X., "Pitfalls of Entertaining Government Officials," District Lawyer, Vol. 3, No. 6, p. 25, June/July 1979—	10945
"Punishment Without Prisons," Colman McCarthy, the Washington Post, Nov. 17, 1978—	10619
Questions submitted to witnesses following oral testimony, with responses—	
Baptiste, Robert M., labor counsel, International Brotherhood of Teamsters, questions submitted by Senator Dole—	10936
Business Roundtable, questions submitted by Senator Cochran—	10928
Civiletti, Hon. Benjamin R., questions submitted by Senator Dole—	10936
Dershowitz, Prof. Alan, questions submitted by Senator Dole—	10338
Green, Mark, Congress Watch, questions submitted by Senator Dole—	10935
Green, Richard A., questions submitted by Senator Dole—	10921
Greenhalgh, William, American Bar Association, questions submitted by Senator Dole—	10911
Herst, Esther, National Committee Against Repressive Legislation, questions submitted by Senator Dole—	10322
Rector, Milton G., National Council on Crime and Delinquency, questions submitted by Senator Dole—	10302
Shapiro, Irving S., questions submitted by Senator Dole—	10933
Shattuck, John H. F., American Civil Liberties Union, questions submitted by Senator Cochran—	10921
Smith, Patricia, Women's International League for Peace and Freedom, questions submitted by Senator Dole—	10931



Sentencing Study, "Possible Impact on Sentence Length and Time Served in Prison of Sentencing Provisions of Major Criminal Code Reform Legislation of the 95th Congress," Legislative Reference Service, Library of Congress, June 1978 and November 17, 1978	10642, 10653
"Status of Substantive Penal Law Revision," American Law Institute	10954
Text of S. 1722	11089
Text of S. 1723	11485
"To Rid U.S. Courts of the 'Slovak Syndrome,'" letter to the editor, the New York Times, Sept. 21, 1979, from Judge Jon O. Newman	10998
Trial Judges' Conference, sponsored by Creative Alternatives to Prison, Oct. 14, 1978	10605
<i>United States v. Atlantic Richfield Company</i> , 463 F. 2d 58 (7th Cir. 1972)	10955
<i>United States v. DiFrancesco</i> , petition for writ of certiorari, filed Oct. 5, 1979, S. Ct. No. 79-567	10999
"U.S. Attack on Corporate Crime Yields Handful of Cases," Philip Taubman, the New York Times, July 15, 1979	10144
Wills, Gary, "Creative Alternatives to Prison"	10621

NCJ# 73371  
 Postition Paper and Testimony of the  
 Federal Public and Community Defenders on  
 the Proposed Federal Criminal Code  
 (pp. 10366-10450) (1979)

NCJ# 73372  
 Position Paper and Testimony of the  
 Federal Public and Community Defenders on  
 The Proposed Federal Criminal Code  
 (pp. 10451-10582) (March 1978)

NCJ# 73373  
~~Study of~~ The Possible Impact on Sentence  
 Length and Time Served In Prison of  
 Sentencing Provisions of Major Criminal Code  
 Reform Legislation of the 95 th Congress-~~Study~~  
 (pp. 10642-10652)

NCJ# 73374  
 Sentencing Provisions of Major Criminal  
 Code Reform Legislation of the 95th  
 Congress: Possible Impact on Sentence  
 Length and Time Served in Prison  
 (pp. 10653-10669)

NCJ# 73375  
 Motion Picture Association of America, Inc.  
 and Recording Industry of America Inc.  
 Concerning Film and Record Piracy and  
 Counterfeiting

The committee stands at recess.  
 [At 12:32 p.m., the hearings were adjourned.]

STATEMENT OF HON. BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE  
 UNITED STATES

Mr. Chairman, the opening of this series of hearings marks the formal beginning of the ninth consecutive year of concentrated Senate attention to the reform of our Federal criminal laws. Those of us who have held offices in the Department have been pleased to work with you at length in developing carefully tailored solutions to meet that need. In view of the tremendous progress that has been made over the past 9 years, it is my strong hope that I shall be the last Attorney General who appears before you to encourage the enactment of the Nation's first comprehensive and rationally structured Federal Criminal Code.

The code has been long in developing, and it is now time for its passage. The Federal Government has lagged far behind the States in this important reform. As recently as 1958, Prof. Jerome Hall could write:

"The glaring defect in the criminal law of most states is the disorganization of the statutes. . . . [T]he fact is that in only a few states has anything approaching systematization of the criminal law been attempted. Lawyers and judges are thus handicapped in their work and their effectiveness is seriously impaired." (J. Hall, *Studies in Jurisprudence and Criminal Theory* 254 (1958)).

At this point in our history, however, a total of 35 states and the Commonwealth of Puerto Rico have revised their criminal codes, the most recent revision being the Code of Criminal Justice of the State of New Jersey which became effective 11 days ago. Of those 35 new State codes, three became effective while the National Commission on Reform of the Federal Criminal Laws was developing its "work-basis" for a new federal code, and 28 more came into effect since this Committee first began its consideration of federal code reform in February of 1971. (See, *The American Law Institute, Annual Report* 21 (1979).) The enactment of so many modern state codes in this short period should provide us with quiet testimony that such a project is politically accomplishable, and should provide us with additional resolve to achieve its completion.

If we do not succeed in achieving a new federal criminal code in this current effort, I am concerned that disappointment may turn to cynicism about the unwieldiness of the legislative process and its capacity to accomplish such a major reform—with the result that few responsible citizens will still be willing to expend the energy necessary to champion such an effort. That would be a costly failure for the Nation—both in terms of effective law enforcement and in terms of the fairness of our criminal justice system. Such a coalition of interests in widespread reform may not return soon. It is little recognized today, but the last previous effort for achieving comprehensive federal criminal law reform occurred with the development of a new code in the House of Representatives by Congressman Livingston of the State of Louisiana—in 1828.

We certainly cannot afford to wait another 151 years before again undertaking serious work for a new federal criminal code. The current effort must be brought to a successful conclusion now.

Our common call for a new code—as this Committee recognizes—is not a call for any new code. The code that the nation needs must be balanced, technically precise, improved in its substantive provisions, and complete.

The code must achieve a balance in fairness. It must be fair to the citizens of the nation who justly expect to be able to live their lives free of the fear and the trauma of widespread crime. It must also be fair to individuals who find themselves charged with offenses against the public. We in the Department of Justice are very sensitive to considerations of fairness. I regret that there are still some who tend to consider our agency only as a department of public prosecution rather than a Department of Justice. That is both unfortunate and inaccurate. We are not an agency of individuals who see the law as simply a tool of their profession. We see the law in all aspects of its theory, and its multiple, practical ramifications are emphasized to us because of our daily participation in its application. We see it as investigators, prosecutors, prison authorities, and administrators. We therefore have even greater interest than most citizens in assuring that we can apply it effectively and can do so proudly. We are not interested—nor, I know, is this Committee—in a code that is simply a bag of tools.

for prosecutors, in penal laws that effectively but blindly encompass all questionable conduct, or in criminal statutes that exceed the power necessary for the effective preservation of the rights of the public.

The reach of federal criminal jurisdiction under current statutes is broad. It is broad in part because the reach of federal authority in non-penal areas is broad, and the personnel and the property involved in such governmental operations commonly warrant application of the basic penal laws designed to help protect persons and property. It is broad also because it is intended to serve as a "backstop" to state and local law enforcement efforts—for use in situations in which state and local governments may find it difficult to act effectively because of their geographically limited authority, or, less commonly, because of the effect of the offense on the operation of the state or local government itself. A new code must recognize the need for adequate breadth while maintaining an effective balance between federal and state penal authority. It may be able to reduce the overlap in some areas; it may be required to expand it marginally in others. However, whatever particular modifications are made by the new code, the statutory law must inevitably continue to place reliance upon rational restraint by the executive branch in the application of its "backstop" authority. For our part, we have recently undertaken to develop closer, cooperative working relationships with our state and local counterparts; our common understanding of the extent of our overlapping jurisdictions, and of the best means of assuring their rational operation, will be improved considerably by the clarity imparted by a new federal criminal code.

The technical accuracy and clarity of a new code is crucial to those of us in the Department. I wish I could convey to you the depth of the concern in the Department of Justice—at all levels—with regard to the care to be employed in framing the language of the new provisions. Words and phrases lifted from previous statutes or case decisions may carry with them—for good or for bad—more than their ordinary English meaning; they must, of course, be employed with care, and the drafters should plainly explain their purpose in the accompanying legislative history. Even the placement of commas must be watched; for want of a comma more than one line of cases has been lost. (See, e.g. *United States v. Bass*, 404 U.S. 336 (1971).) Interrelationships with other penal and procedural provisions must be tailored with care. Often it may prove helpful to state the obvious. Moreover, countless thousands of hours of time can be saved in the future if drafting techniques are employed that lead the reader to pertinent provisions with a minimum of effort. These matters—matters of words, of commas, and of format—will consume our attention after enactment as we are the ones who will have to enforce the provisions and prosecute under them. Any new code will provide great opportunity for litigation of its finer details, but the extent of that litigation can be minimized by careful attention at the drafting stage to these seemingly minor matters.

A new code must advance the law if it is to be worthwhile. Codification in the interest of consolidation and simplicity alone would be too costly to undertake. It would be too costly in terms of the time that must be expended in the reeducation of judges, prosecutors, defense counsel, and investigators, who must operate under the provisions of the new code. It would be too costly in terms of the increased litigation that any new code—no matter how carefully drafted—will prompt for some period of time. It would also be too costly in terms of the loss of the opportunity presented by codification to make significant advances in numerous areas of law upon which a consensus can readily be obtained. In sum, we are concerned that, without genuine advances in the law, the expenses of a new code would outweigh its benefits.

Finally, a new code must be a complete code, not a partial code. After the time and ability that have been expended in this effort there is no reason why a new code cannot be enacted as a whole. The need exists, the work has been done, and the state precedent is before us. As Professor George has noted in reviewing the recent history of state codification efforts:

"At an early stage, those who create the drafting organization must decide the scope of the revision effort. The easiest path may appear to be a limited or partial modernization of the criminal law. However, few definitions of crime exist in isolation, so that a fundamental change in the definition of larceny, for example, may have a great impact on crimes like robbery, fraudulent obtaining of property and receiving. Alteration of the language of a homicide statute may affect the scope of traditional defenses like self-defense. Code revision like pregnancy

usually goes to term." (B. J. George, Jr., *A Guide to State Criminal Code Revision*, appearing in E. M. Wise and G. O. W. Mueller, *Studies in Comparative Criminal Law* 65 (1975)).

There is no reason for the federal effort to be a truncated exception.

Mr. Chairman, the criteria that I have just outlined are met by the code introduced last week, as S. 1722, by you and Senators Thurmond, Hatch, DeConcini, and Simpson. The meeting of such criteria takes time, and over the past nine years this Committee has provided the time necessary to the drafting of a genuinely worthwhile code. The process has been an evolutionary one, with exceedingly careful section-by-section, line-by-line, word-by-word review and improvement. The extraordinary cooperation between the majority members of this Committee, the minority members, and the Carter Administration, has provided us all with a prolonged opportunity to appreciate each other's interests and to familiarize ourselves with the evolving details of the joint product. It is as a result of that long, cooperative involvement that I can say with assurance that the Department is satisfied that S. 1722 meets the requisite standards.

This is not to say, of course, that the Department or any one of the principal sponsors might not have preferred to see somewhat different language in particular provisions of the bill. But the compromises made have been principled ones—progressive compromises designed to further the overall goal.

Basically, S. 1722 is drawn from last year's Senate bill which commanded wide public support—including the formal support of this Department and of the Administration as a whole, and the overwhelming support of the Senate itself as evidenced by its 72 to 15 passage of the measure in January of last year.

Many worthwhile changes from last year's bill have been made, several of which were adopted from suggestions first raised in the course of House of Representatives consideration in its parallel effort. I note with favor the current bill's complete abolition of our archaic parole system—an abolition that was strongly urged by former Attorney General Bell on behalf of President Carter. I also note with favor various jurisdictional provisions—provisions encouraging the relinquishment to state authorities of federal jurisdiction over federally owned lands, giving recognition to the need for thoughtful discretion in exercising current federal jurisdiction without adding complexity to the process, and reducing the reach of federal jurisdiction under the proposed consumer fraud offense in light of adequate federal coverage through other means. With regard to white collar crime, I am pleased by the addition of the prohibition against permitting a defendant found individually responsible for an offense to have his fine paid from the assets of his corporate employer.

Some changes from last year's bill, however, the Department does not view with similar favor. These are primarily changes made in certain provisions that will affect the prosecution of white collar crimes. They include the deletion of the provision under which a corporate supervisor could be charged with complicity in an offense committed by his subordinates if he recklessly failed to exercise his supervisory responsibilities; the dropping of the alternative fine of double the defendant gain from the offense; the elimination of the probation condition expressly recognizing the possibility of precluding a corporate defendant from engaging in business directly related to the business offense for which it was convicted; and the retention of the scattered, often disparate attempt and conspiracy provisions appearing in certain of the regulatory laws that remain outside title 18.

I understand that this Committee is subject to a variety of competing pressures in the area of white-collar crime, as in other areas, and that it must strike a reasoned course consistent with practicality and the goals of codification. I hope the Committee recognizes, in turn, that we in the Department have no interest in expanding the criminal laws to reach individual citizens who marginally transgress the complex provisions of our numerous regulatory laws. We are interested only in assuring that the law itself is adequate to its legitimate purpose, and it is to that end that we have worked with you in the development of the numerous white collar crime provisions that have long been included in the proposed new code. As it now stands, even with the recent deletions, the bill makes major strides in providing the nation with the means of bringing white collar crime under control, while avoiding the pitfalls of overinclusiveness. Although there are still additions in this subject area that I hope you will consider—and in the near future I would like to suggest to you the inclusion of new provisions to enable the government to prosecute more effectively vari-

ous kinds of monetary fraud and bribery that occur in federal programs—on balance the new code is a great advance over the current state of the law in this area as well as in others.

We strongly support S. 1722 as the appropriate vehicle for the new federal criminal code that the nation so greatly needs. In area after area, it provides genuinely major advances for our criminal justice system. While it inevitably will undergo further modification before being signed into law, we place with you our strong hope that each further change will be made only to improve the overall product, not simply to accommodate a viewpoint that is not adequately supported in fact or in law. The vehicle is sound, and the time for passage is now. Further issues can await future consideration as separate matters, and their resolution can be accommodated easily by the new code's flexible format. This design for future accommodation is significant since, as noted by Mr. Livingston one hundred and fifty-one years ago in the preamble to his proposed federal criminal code: "No act of legislation can be, or ought to be immutable. Changes are required by the alteration of circumstances; amendments, by the imperfection of all human institutions . . ." (E. Livingston, *A System of Penal Law* (1828).) The code will provide us with a sound basis for a fair and effective system of federal criminal justice—both for now and for long into the future.

Mr. Chairman, my testimony today has been of very general nature, partly because of the great opportunity this Committee has provided in the past for the formal and informal communication of our detailed views, and partly because I recognize that this Committee will, in the course of its further work, feel free to request any additional elaboration on our views with regard to particular issues as they may arise. Some of our views that you have heard before on several particular issues were restated last week by Mr. Heymann in testimony on a draft code pending before the Subcommittee on Criminal Justice of the House of Representatives. Since that draft is also formally before this Committee as S. 1723, for your record I would like to affirm, and to lodge with you, Mr. Heymann's statement and its addendum.

**END**