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This approach is similar to S. 104 in that it provides for the concurrent budget submissions of the Commodity Futures Trading Commission to both the President and the specified committees of the Congress. However, this language does not contain what appears to be a necessary element of such transmissions by an independent regulatory commission—the preclusion of any changes at the direction of the President, the Office of Management and Budget, or any other agency of the executive branch. Nor does the language in this law require the President to include the Commission's original budget submission in his budget when it is submitted, as would be required by S. 704.

The President specifically opposed the inclusion in the commodity commission legislation of the simultaneous budget transmission—as well as a provision for simultaneous transmission of legislative recommendation. He submitted draft legislation on 18 November to amend the Commodity Futures Trading Commission Act of 1974 to "eliminate (the) provisions which encroach on the separation of powers." This draft has not been introduced as legislation in the Senate. However, on 11 December, the House Agriculture Committee reported H.R. 17507, in a manner designed to meet the President's objections. Essentially, this legislation would leave untouched the simultaneous transmission of legislative recommendations, but negate any accomplishments in the area of simultaneous budget submissions. No report has been filed, and no floor action scheduled.

Third. The first major legislation containing language similar to S. 704 was the Consumer Product Safety Act, Public Law 92-573. Section 27(k) (1) of that act provides that:

> Whenever the (Consumer Product Safety) Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that estimate or request to the Congress.

This language enacted the heart of the S. 704 approach, but stops short of:

(a) including the estimates submitted by the Commission in the President's budget, and

(b) clarifying—in terms of the legislation—the role of the Office of Management and Budget vis a vis the traditional role of OMB in budget preparation. S. 704 makes clear that the requests must be the independent views of the agency concerned, and cannot be changed at the direction of any agency of the government. However, consultation with other agencies is recognized as a necessary factor, and is not prohibited.

Fourth. On December 10, the House passed an amended version of S. 1149, the Surface Transportation Act of 1974. Title VI of the House amendment provides that the Interstate Commerce Commission budget shall be treated in the same manner as that of the Supreme Court and the legislative branch, that is, not subject to any change by the President. The President's budget must contain only the original requests of the ICC with respect to its budget estimates.

This approach is similar to the original version of S. 704 calling for direct budget submissions to the Congress by the regulatory commissions. However, this was compromised to avoid a confrontation with the executive branch concerning the "independence" of the regulatory commissions from the executive branch. Additionally, both Justice and OMB agreed that such provisions would effectively destroy two key elements of Presidential responsibility, first, preparation of a comprehensive unified budget reflecting overall policies and decisions based on limited resources and, second, coordination of government policy through the budget. While the Government Operations Committee did not defer to the OMB and Justice views, it nevertheless agreed to follow precedent and provide for simultaneous transmission.

VARIATIONS CONCERNING THE TRANSMISSION OF LEGISLATIVE RECOMMENDATIONS

First. S. 704 provides that whenever an independent regulatory commission:

> . . . submits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony or comments to the Congress. This section would not preclude any communication between the commission or any agency, the President or the Office of Management and Budget.

Second. The Consumer Product Safety Commission has language identical to that proposed in S. 704, except that the language is silent regarding communication between the Commission and any other agency or OMB. This flexibility is considered necessary to insure that agencies may communicate on possible overlapping legislation and coordinate the submission and consideration of legislation.

Third. Public Law 93-495 (amendments to and extensions of provisions of law relating to Federal regulation of depository institutions) provides yet another approach to the limitations of OMB control on legislative recommendations. Section 111 of that act provides that:

> No officer or agency of the United States shall have any authority to require the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, or the National Credit Union Administration to submit legislative recommendations, or testimony, or comments on legislation to any officer, or agency of the United States for approval or comments prior to the submission of such recommendations . . . to the Congress, if such recommendations, testimony, or comments to the Congress include a *statement indicating that the views expressed are those of the agency submitting them and do not necessarily represent the views of the President.*

This is a unique provision concerning the transmission of legislative recommendations.

Fourth. The Commodity Future Trading Commission Act provides:

> Whenever the Commission transmi[ts] legislative recommendations, or testim[ony, or] comments on legislation to the Presi[dent or] the Office of Management and Budget, [it shall] concurrently transmit copies thereof [to the] House (and Senate) Agriculture Comm[ittees]. No officer or agency of the United State[s shall] have any authority to require the Co[mmis]sion to submit its legislative recomm[enda]tions . . . to any officer or agency [of the] United States for approval, comments [or re]view, prior to the submission of such [recom]mendations . . . to Congress. *In insta[nces in] which the Commission voluntarily se[eks to] obtain the comments or review of any [officer] or agency of the United States, the Co[mmis]sion shall include a description of su[ch ac]tions in its legislative recommendatio[ns] which it transmits to the Congress."*

The italic sentence is similar [to the] provision in S. 704 which permits [com]munications between agencies. Ho[wever,] this language requires an identifi[cation] of such voluntarily undertaken a[ctions] included in the recommendation[s trans]mitted to the Congress.

VARIATIONS ON CONTROL OF LITIGAT[ION]

S. 704 permits the independent [regu]latory commissions discretion to [go into] civil court in their own name [and] through their own attorneys. Alt[hough] agencies have varying degrees of [inde]pendence, no new legislative altern[atives] to this proposal have been enacte[d. Un]der the Alaskan Pipeline bill (P. [L. 93-]153) the Federal Trade Commiss[ion was] given the authority to appear i[n any] civil proceeding in its own nam[e and] through its own attorneys, after fo[rmally] notifying and consulting with and [giving] the Attorney General 10 days to ta[ke the] action proposed by the Commissi[on].

This provision has not caused th[e Fed]eral Trade Commission undue ha[rdship]. Although it has been operating [under] this provision for only a short tim[e, it] feels that the language in S. 704 [would] remove this needless restriction. [If the] Justice Department refused to c[onduct] the litigation under the "Pipeline [pro]vision FTC could use its own atto[rneys]. If Justice refused to conduct lit[igation] under the "S. 704" provision, th[e FTC] could use its own attorneys. If [Justice] agreed to conduct the litigation [under] either provision, the FTC would no[t have] to use its own attorneys.

PROPOSED REFORM OF FEDE[RAL] CRIMINAL CODE

Mr. HART. Mr. President, earl[ier this] month I inserted in the RECOR[D some] important testimony given befo[re the] Subcommittee on Criminal Law [con]cerning the proposed reform of th[e Fed]eral Criminal Code.

As I indicated then, I did so bec[ause of] the long delay expected in the p[rinting] of the last volume of hearings in [which] that testimony appears and the i[nterest] expressed by many Senate offic[es and] other interested parties in studyi[ng this] massive proposal with the benefit [of the] best available commentary.

For the same reason, I ask una[nimous] consent that following these re[marks the] testimony presented to the subco[mmit]tee on July 19, 1974, regarding S[. 1 and] S. 1400 and prepared by the C[ourt] Watch organization, be printed [in the] RECORD. This extremely helpful

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randum was presented to the committee by Mr. Ralph Nader, and it provides a detailed, informed analysis of the most troublesome issues and the most important differences among the several proposals before the subcommittee. It repays careful study, and I am sure it will prove very useful to my colleagues in their review of the many areas involved in criminal code revision.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

MEMORANDUM ON PROPOSED FEDERAL CRIMINAL CODE

1. Background

A. The National Commission on Reform of Federal Criminal Laws was established by Congress in 1966 (P.L. 89–901, 80 Stat. 1516) to undertake a complete review of federal criminal law and to propose a new Title 18 of the United States Code. The real starting point, however, was the Model Penal Code, drafted by the Council of the American Law Institute in 1953. The National Commission on Reform of Federal Criminal Laws was chaired by former Governor Edmund G. Brown and is most often referred to as the Brown Commission. The Commission was composed of 12 members. They were: Gov. Brown, Congressman Richard Poff, U.S. Circuit Judge George C. Edwards, Jr., U.S. District Judges A. Leon Higginbotham, Jr., and Thomas J. MacBride, Senators Sam Ervin, John L. McClellan and Roman Hruska, Congressman Abner Mikva and Donald Scott Esq. and Theodore Voorhees Esq. Also serving for a period were Congressman Don Edwards and U.S. Circuit Judge James M. Carter. The Advisory Committee was chaired by Hon. Tom C. Clark and the Staff Director was Louis B. Schwartz. The work product of the Commission includes a Study Draft published in June 1970, three volumes of Working Papers and the Final Draft, submitted in January 1971.

B. S.1 The Criminal Justice Codification, Revision and Reform Act of 1973, was introduced by Senators McClellan, Ervin and Hruska on January 4, 1973. Senator McClellan's introductory remarks and analysis appear on page S. 558 of the Congressional Record of January 12, 1973 (Vol. 119). Sen. McClellan stated that, ". . . (S.1) is far from a final penal Code for the United States . . . we view it only as the preliminary and intermediate work product of 2 years of efforts be the Subcommittee on Criminal Laws and Procedures . . .". Title 1 of S.1 is the revision of Title 18, containing the basic criminal law. Title 2 transfers procedural rules of the present Code into the Federal Rules of Criminal Procedure. Title 3 contains conforming amendments, transferring Title 18 offenses to other more appropriate Titles and amending other Titles in line with Title 18 sentencing scheme. Title 4 includes a severability and effective date clause. Beginning in February of 1971, the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures held hearings on the proposed legislation.

C. S. 1400 was introduced by Senators Hruska and McClellan on March 27, 1973, and is entitled the Criminal Code Reform Act of 1973. Following the submission of the Brown Commission Final Report to the President on January 7, 1971, President Nixon instructed the Department of Justice to undertake an evaluation and to make recommendations. This evaluation resulted in S. 1400. Senator Hruska's introductory comments are found on page S. 5777 of the Congressional Record, March 27, 1973 issue.

D. All the proposals contain the same basic features: jurisdictional elements are separated from the definitions of the offenses and are deleted as elements of the offense, defenses are defined and affirmative defenses for which the defendant has the burden of proof are established, standards of criminal culpability are established and the sentencing scheme is created. The Codes as proposed reach every facet of federal criminal law. Among the topics treated by the proposals are: Federal jurisdiction for criminal offenses, federal jurisdiction as an element of the offense, creation of affirmative defenses, death penalty, insanity defense, immunity of witnesses, wiretapping, entrapment, intoxification, execution of public duty, conspiracy, protection of national security and classified information, espionage, sabotage, bribery and graft, bail, probation, parole, civil commitment, obstruction of a government function both physically and by fraud, rioting, obscenity, inciting the overthrow of the government, civil rights, para-military conduct, various offense relating to elections, corporate liability, unfair commercial practices, securities law, bankruptcy, regulatory offenses, income tax evasion, extortion, loansharking, theft, fraud, environmental spoilation, etc.

Both S. 1 and S. 1400 and Brown classify sentences within the broad classes of felony and misdemeanor. Future memos will refer to these classes. They are presented here for later referral.

	Brown	S. 1 [1]	S. 1400
Felonies:			
Class A	30 yr–$10,000	30/20 yr–$1,000	Life–$100,000.
Class B	15 yr–$10,000	20/10 yr–$1,000	30 yr–$100,000.
Class C	7 yr–$5,000	10/ yr–$500	15 yr–$100,000.
Class D		6/3 yr–$500	7 yr–$50,000.
Class E		1 yr–$100	3 yr–$25,000.

	Brown	S. 1 [1]	S. 1400
Misdemeanors:			
Class A	1 yr–$1,000	6 mo–$50	1yr–$10,000.
Class B	30 days–$500		6 mo–$5,000.
Class C			30 days–$2,500.
Infraction (violation)	$500	30 days–$50	5 days–$500.

[1] The number to the left of the slash (/) is the term authorized for "dangerous special offender." The term to the right is for all others. The fines are on a per diem basis for up to 3 years (1,095 days at $1,000 per day for class A felony, for example, would amount to $1,095,000 maximum fine.

2. Congress watch

Congress Watch is a non-profit organization, organized by Ralph Nader in 1973, and funded by Public Citizen, Inc. Public Citizen, Inc. supports a number of public interest projects including a retired professionals group, tax reform group and a litigation unit. It is supported by voluntary contributions from several thousands of contributors. While the process of reform and codification has been progressing for several years it was only this January and later in March, that legislative proposals were developed and introduced. At that time the importance of the proposals became clear, reflecting as they do, society's evolving standards of public duty. Also, the proposals are not mere codifications but represent the creation of new offenses and the changing of old ones. The concern of Congress Watch is based on several considerations. First, that the criminal laws must adequately and effectively protect the citizens in their personal and economic interests. Secondly, the public must be protected against government actions which are not in the public interest or which are directed against legitimate citizen activity. Thirdly, the criminal laws must not upset or deter Constitutional principles, such as, separation of powers.

Because of the lack of information on the effect that these proposals will have, Congress Watch is undertaking to develop and disseminate research memoranda on these proposals over the next several months and to express, where appropriate, preferences or objections. The research project, already begun, involves lawyers, law school professors and law students from across the country. These memoranda will be available to members of Congress and their staffs, the relevant committees, interested organizations and persons and the press.

Congress Watch is located at 133C Street, S.E., Washington, D.C. 20003. Telephone (202) 546–4996.

On March 22, 1973, H.R. 6046 was introduced. It is identical to S. 1400.

On September 5, 1973, H.R. 10047 was introduced. It contains the majority report of the Brown Commission. Its numbering system corresponds to the Brown Final Report.

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MEMORANDUM ON PROPOSED FEDERAL CRIMINAL CODE NO. 2

SCHEME TO DEFRAUD

S. 1 § 2–8D5—S. 1400 § 1734

Summary.—The Brown Commission deleted the existing mail and wire fraud statutes, leaving prosecution of fraud cases

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to be done under the general theft section (1732). Many consumer groups criticized that approach as making prosecution of mail fraud schemes more difficult, since there would be no offense unless the scheme were successful and since the felony/misdemeanor grading of the offense would depend on the amount of the victim's loss rather than focusing on the defendant's conduct. (See the statements by consumer representatives in Hearings on Reform of the Federal Criminal Laws, Part III-B).

Both S. 1 and S. 1400 follow the suggestions of the consumer groups that a section covering schemes to defraud be added to the Code. The language of both 2-8D5 and 1734 follows that of the present mail and wire fraud statutes (18 USC 1341, 1343), so judicial construction can be carried forward.

Elements of the offense—Sections 1341 and 1343 use the following language: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises," uses the mails (1341) or wire, radio or TV (1343), "for the purpose of executing such scheme or artifice," is guilty of mail (or wire) fraud. Thus, there are two elements: (1) devising or intending to devise a scheme, and (2) using the mails or wire.

Both S 1 and S 1400 use virtually the same language as 1341 in defining the first element of the offense. Both retain the language about a scheme and that about obtaining property by false pretenses.

Since S 1 and S 1400 are intended to cover a broader range of schemes to defraud than just mail or wire fraud, the language regarding the second element of the offense is broader. The second element in S 1400 is engaging in conduct with intent to execute the scheme. S 1 appears to cover more offenses. A person who has (1) devised a scheme is guilty if (2) he *or an accomplice* engages in or causes performance of conduct to effect the scheme. Thus S 1 takes the approach of most conspiracy laws and allows prosecution of all those involved in devising the scheme.

Comment—The difference may not be crucial, since the cases applying 1341 have repeatedly held that a defendant is guilty of mail fraud if he devised a scheme and if his conduct would normally be expected to lead to use of the mails, even though the actual mailing was done by someone else. Thus, since S. 1400 would carry forward the judicial construction of 1341, its coverage could be held to be as broad as that of S. 1. (S. 1 is preferable since the language is clearer).

Jurisdiction—S. 1400 covers schemes to defraud that use the mails, interstate commerce (including wire, radio or TV), or those that induce persons to travel in interstate commerce. Both bills extend jurisdiction to cover the use of instrumentalities of interstate commerce—without necessitating proof of actual interstate phone calls as required by the present wire fraud statute. This is desirable because fraudulent schemers often avoid making interstate calls to escape federal jurisdiction under current law. (See Vincent Broderick, testimony before the Criminal Law Subcommittee, June 13, 1973).

S. 1 covers the same jurisdictional bases that S. 1400 covers, plus (1) cases arising within federal special maritime, territorial or aerospace jurisdiction; (2) cases in which the U.S. owns the property that is the subject of the offense; and (3) cases in which a financial institution owns the subject property.

Comment—It is not clear why S. 1400 is not as broad jurisdictionally as S. 1. But from a consumer point of view S. 1's additional jurisdictional grounds do not seem to add much. Also, it might be useful to amend both sections to cover extraterritorial jurisdiction (S. 1 section 1-1A7, S. 1400 Section 204), so as to cover schemes operated from outside the U.S. that don't fall under one of the enumerated jurisdictional categories.

Penalties—The maximum fine is greatly increased:

18 USC 1341, 1343: $1,000 or 5 years.

S. 1400: Class D felony; $50,000 or 7 years.

S. 1: Class D felony; up to roughly $500,000 (when the day fine is applied to its fullest limits) or 6 years.

Civil Remedies—Many consumer representatives suggested (1) giving the judge discretion to order restitution to victims as part of a judgment of conviction for mail fraud and (2) permitting a preliminary injunction against mail fraud as is now done with stock fraud cases. The advantages of an injunction are that it is specific and that it can be imposed rapidly, before a criminal trial can be concluded.

S. 1 provides for permanent or temporary injunctions in 3-13A1; S. 1400 in 3641. The S. 1 provision is preferable in that it allows "any aggrieved party," as well as the Attorney General, to apply for an injunction.

S. 1 3-13A2(c) provides that a person injured by a scheme to defraud may bring a civil action for damages to recover treble his actual damages plus punitive damages plus attorney's fees. Under S. 1, the judge may require the defendant to make restitution to the victims (section 1-4A1(c)(5)) and/or require him to give notice of his conviction to the persons affected by the conviction (1-4A1(c)(7). S. 1400 appears to have no restitution or damages section, unless restitution can be ordered under the court's authority to impose civil penalties (section 2001(d)). Section 2004 provides a notice sanction.

Comment—S. 1's damages section is good, since it can be used for consumer class action suits. But since a class action requires initiative by the victims, the provision that the judge be able to order restitution is also useful. (However, there might be a problem in identifying the victims if there are many victims.)

Culpability—The cases construed section 1341 to mean that a defendant was guilty if he was "recklessly indifferent" to whether a statement was true or false. Corporation unions and other organizations are liable also.

The general culpability standards of both S. 1 and S. 1400 makes the scheme to defraud sections at least as broad as 1341, since one who is reckless or criminally negligent is culpable, as well as one who acts intentionally or knowingly.

Organization Liability—S. 1 section 1-2A7 would make an organization guilty of any offense engaged in by an agent within the scope of his employment.

S. 1400 section 402 also covers conduct within the scope of the agent's action, implied, or apparent authority, and which he intended would benefit the organization.

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MEMORANDUM ON PROPOSED FEDERAL CRIMINAL CODE NO. 3

ENTRAPMENT

S. 1 section 1-3B2, S. 1400 section 531, Brown section 702

Summary—The key issue in the entrapment defense is whether the test of entrapment should focus on the conduct of the police (an objective test) or on the predisposition of the defendant to commit the offense (a subjective test). The more subjective the test, the less will prosecuto[illegible] police see entrapment as a hindran[illegible] the more will civil libertarians objec[illegible] Brown uses the most objective test, [illegible] the most subjective. S. 1 falls somew[illegible] between the other two.

Objective v. subjective tests: the [illegible] of the entrapment defense.—The t[illegible] Supreme Court cases in this area we[illegible] rells v. US 287 U.S. 435(1932) and She[illegible] US 356 U.S. 369(1958). The test th[illegible] evolved out of those cases is a subjec[illegible] that focuses on whether the defenda[illegible] predisposed to commit the offense. T[illegible] suggested in Brown, on the other ha[illegible] quires an objective look at the con[illegible] the police to see whether that condu[illegible] "likely to cause normally law-abidi[illegible] sons to commit the offense." This ap[illegible] sees the entrapment defense as som[illegible] that will regulate the conduct of pol[illegible] related to due process notions a[illegible] Frankfurter "shock the conscience" t[illegible] character and past criminal record of [illegible] fendant are thus irrelevant.

Some critics of the Brown test arg[illegible] the "normally law-abiding persons" [illegible] slips a subjective element in throu[illegible] back door, in that proof might fo[illegible] whether the defendant is a normal[illegible] abiding person. If that criticism is va[illegible] perhaps takes care of it by taking [illegible] guage from the Model Penal Code [illegible] than from Brown. The test in S. 1 is [illegible] the police conduct created a "sub[illegible] risk that the (prohibited) conduct w[illegible] committed by persons other than tho[illegible] are ready to commit it."

However, S. 1 then introduces a lar[illegible] jective element into its test by addi[illegible] the "risk is less substantial where [illegible] son has previously engaged in simila[illegible] hibited conduct and such conduct is [illegible] to the agent." (Note that this sa[illegible] gaged in", not, "was convicted for e[illegible] in." The inclusion of this subjecti[illegible] ment won't affect the person who [illegible] criminal record, but it may lead to [illegible] tion of a person who has a record [illegible] less of his innocence on this particu[illegible] casion. The overall effect will be t[illegible] much less of a restraint on police [illegible] than the Brown test would.

S. 1400 is even less desirable in t[illegible] test is even more subjective. It says [illegible] fense is available only where (1) [illegible] fendant was not predisposed to com[illegible] offense and (2) he did so *solely* as [illegible] of active inducement by police.

Affirmative defense v. Bar to prosec[illegible] Brown and S. 1400 follow current c[illegible] and establish entrapment as an affi[illegible] defense. S. 1 calls it a bar to pros[illegible] The comments to Brown suggest t[illegible] affirmative defense formulation woul[illegible] the issue a jury matter, as is usual [illegible] now, whereas the bar formulation [illegible] leave entrapment for the court. The [illegible] tage of leaving it to the jury appea[illegible] that the jury has a chance to evalu[illegible] conduct and acquit the defendan[illegible] police conduct shocks the community [illegible] ards of propriety. Much scholarly [illegible] has favored making entrapment a ma[illegible] the court, so that the courts can giv[illegible] better and more explicit standards t[illegible] their conduct in the future. The de[illegible] should have a choice as to whether t[illegible] is heard by the jury or the court. I[illegible] case, the defendant must meet a [illegible] derance of the evidence standard o[illegible]

Other issues—The statute should [illegible] greater detail on burden of proof, w[illegible] the issue, the focus of the proof [illegible] tive v. objective), the meaning o[illegible] "encouragement," and probable caus[illegible] explicit standards on these issues [illegible] guide police conduct more effective[illegible] protect defendants.

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S. 1 exception—S. 1 says entrapment is not bar when the offense involves bodily injury. This exception does not appear major. According to the Working Papers, entrapment is usually involved in vice and narcotics cases, and only rarely in violent crime cases (p. 309). Nevertheless, present case law does not make this exception.

A Plea of not guilty should not be inconsistent with the defense of entrapment. The bar to prosecution approach of S. 1 suggests that not guilty plea is not inconsistent.

U. S. v Russell—The most recent Supreme Court entrapment case, *U. S. v Russell*, 93 S.Ct. 1637, 41 US 4538 (1973), does not affect these proposals. In that case, the Court held that the *Sorrells* and *Sherman* subjective focus on the predisposition of the defendant should still be used. However, the Court rejected all suggestions of a constitutional basis for the entrapment defense and relied on the notion that "Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense, but who was induced to commit them by the government." Thus, the holding does not affect Congress' ability to establish a statutory entrapment defense.

Memorandum on Proposed Federal Criminal Code No. 4

Misapplication of Entrusted Property

S. 1 § 2–8D6, S. 1400 (none), Brown § 1737

Summary—This provision covers a misapplication of entrusted property by a Fiduciary, or in the capacity as a Federal Public Servant, or as an Agent or person controlling a financital institution which was unauthorized and which involved a risk of loss, but which was not done with the intent to steal that is necessary to constitute theft under the general theft provision (2–8D3). An example of this is a person borrowing, without authorization, $4,000 from organization funds to use for his honeymoon. The actor need not lose control of the property to be guilty of this offense. The S. 1 provision is taken directly from Brown. The provision to be desirable as it is written.

S. 1400 has no similar provision. A prosecutor would have to resort to the general theft section (1731), but it is inadequate for this kind of offense in that it covers only situations in which there was an intent to deprive the owner of his rights with respect to the property or to appropriate the property to the actor's or another person's use. This is a serious deficiency in S. 1400. S. 1400 would fail, for example, to cover some existing offences, such as unauthorized loan of public funds (18 USC 653) and willful misapplication of bank funds (18 USC 656).

Jurisdiction—Federal jurisdiction under § 2–8D6 is extremely broad. It is coterminous with jurisdiction over theft under § 2–8D3, which covters federal property, financial institutions, affecting commerce, mails, or property connected to employee benefit plans, public works kickbacks, HUD-insured funds, common carriers, OEO, labor unions, or one of several other jurisdictional bases.

Penalties—This is a class D felony, which carries a six-year maximum term. Brown called this a Class A misdemeanor, which would have a one-year maximum.

Comment—The comments to Brown indicate that this section fits into the second of three tiers of property offenses. The most severe tier is theft, where the offender intended permanently to acquire the property. Misapplication, forgery, fraud, etc., form the second tier, regulatory offenses are the third.

Memorandum on Proposed Federal Criminal Law No. 5

The Regulatory Offense Pr[illegible]

S. 1: § 2–8F6; Brown: § 1006

Summary—The regulatory offense section in S. 1 is designed to provide a consistent penalty scheme for regulatory laws that carry criminal penalties, such as the Meat Inspection Act or the Hazardous Substances Act. It is not a new substantive crime, nor does it make violation of every regulatory statute or rule a crime. It would apply only to those regulatory statutes that specifically incorporate it. The best way to understand its use is to look first at the comparable section offered by the Brown Commission's Proposed Criminal Code, on which the S. 1 provision is based. That approach will highlight some of the problems involved and will offer some starting points for modifying the section.

Brown—Brown § 1006 provided:

(1) The section was to govern the use of sanctions to enforce a penal regulation (only) to the extent that another statute so provides. "Penal regulation" means "any requirement of a statute, regulation, rule or order which is enforceable by criminal sanctions, forfeiture, or civil penalty."

(2) General Scheme of Regulatory Sanctions:

(a) Nonculpable Violations—

Culpability as to conduct or the existence of the penal regulation need not be proved, unless required by the regulation. Penalty: a fine of up to $500; no jail sentence.

(b) Reckless or knowing violation—Culpability as to both conduct and existence of the regulation is required. Penalty: up to 30 days in jail and/or a $500 fine.

(c) Flouting Regulatory Authority—Willful and persistent disobedience of a body of regulatory laws. Penalty: 1 year/$1000.

(d) Dangerous Violations—a reckless or knowing violation that creates, in fact, "a substantial likelihood of harm to life, health, or property, or of any other harm against which the penal regulation was directed." Penalty: 1 year/$1000.

Note that the section would apply only when invoked by another regulatory statute. And, if it were invoked, the section would usually set the penalty for violation of any "penal regulation" contained in, or issued under, the statute.

The purposes of the section were to achieve consistency in penalties among various regulatory laws, and to have penalties set by a Congressional Committee with criminological, rather than regulatory, expertise. It is important to note that Brown designed the regulatory penalty to be incorporated in regulatory statutes which attach criminal penalties not only to violations of black-letter sections in the statutes but also to violations of rules or regulations issued thereunder. The apparent theory was that such malum prohibitum conduct which is proscribed in a body of rules and regulations, rather than in a black-letter statute, is not so clearly cognizable as "wrong" to the potential offender, so it should not be punished severely. Thus, the Brown provision carried penalties that are weaker than many of the penalty provisions authorized by existing statutes. (Many existing regulatory laws, for instance carry 1 year/$5000 penalties. Even the "dangerous" violation in Brown D006 has a much smaller maximum fine.) With that in mind, Brown's guidelines to be used in drafting the conforming amendments suggested the regulatory offenses section be incorporated only in those statutes (labeled here as Group A for simplicity) where the statutory penalty applied to violations of rules and regulations, as well as to violations of black-letter statutory commandments. The guidelines suggested that the penalties prescribed in provisions of other statutes (call them Group B)—those in which criminal penalties attached only to violations of provisions in the statute itself, not to subsequently issued rules—simply be relabeled to mesh with the Code labeling scheme and if necessary, downgraded to a misdemeanor, in accordance with Brown's idea [illegible] only in title 18 of the U.S. Code (and thus not scattered in a number of other sections of the U.S. Code.)

S. 1—S 1 retained the regulatory offense idea in section 2–8F6, but changed it very significantly: the penalties are made much stronger. The wording in 2–8F6 is substantially the same as that in Brown, but the maximum penalties are:

Nonculpable violation—about $50,000 and/or 30 days in jail.

Reckless—$50,000/6 months.

Knowing—$100,000/1 year.

Flouting Regulatory Authority—$500,000/6 years.

Dangerous—$500,000/6 years.

Thus, while a knowing violation under Brown carried a penalty that is often slightly less than under existing law, a knowing violation under S 1 carries a maximum fine that is almost always much greater than present law. The S 1 approach is certainly preferable, in that the fines at least begin to be substantial enough to deter large organizations from violating the law. However, the conforming amendments to S 1 here drafted on the basis of the Brown guidelines, and due to the increase in the penalties under S 1, the effect is precisely the opposite to what the guidelines intended.[1] That is, the "Group A" statutes (the ones which permit impositions of criminal penalties on violations of rules and regulations), to which Brown wanted to attach lesser penalties, would receive under S 1 penalties that are greater than Group B (Statutory Violations) and greater than Group A has under existing law. The penalties for Group B statutes are maintained at current (low) levels.

A possible alternative—One can criticize Brown's idea that a regulatory offense should not be penalized too stiffly because it is hard to keep track of what is right and wrong when right and wrong are defined by a body of changing rules and regulations. However, most such laws are aimed at organizations, rather than at individuals, and organizations at least have the resources to become familiar with the laws and rules. Further, the more relevant criteria for grading such offenses are, as with other laws, the degrees of culpability and the gravity of resulting harm—not the source of the rule. This suggests a two dimensional grid approach for grading the regulatory offense. For instance:

GRAVITY OF HARM[2]

Culpability	Tertiary	Secondary	Primary
Nonculpable		Violation	Misdemeanor.
Reckless	Violation	Misdemeanor.	Class D felon.
Knowingly	Misdemeanor.	Class E felony.	Do.
Flouting regulation authority	do	Class D felony.	Class C felon.

Under this tentative scheme, the culpability standards would be defined as they are in S 1 and Brown. The gravity of harm standards are more difficult to define. Tertiary rules would be those whose purpose is merely administrative convenience, i.e., housekeeping rules. Primary rules are basically safety regulations, whose purpose is protection of life, health, the environment, and possibly some kinds of economic interests (e.g. anti-trust). Secondary rules are those that don't fit in either of the two extreme categories, like rules designed to provide information to consumers and rules protecting other kinds of property. Defining a workable and reasonable set of categories is clearly the most difficult part of drafting such a scheme. Note that any given regulatory law and its accompanying rules and regulations (if any) might well include some proscriptions and prescriptions in each of the three categories. The idea is to leave it to the court (a matter for judge or for jury?) to decide on the proper category. Un[illegible] no dis-

Footnotes at end of article.

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tinction between "Group A" and "Group B" statutes. Both would be governed by the Regulatory Offense section.

Another problem is whether, to constitute a knowing offense, culpability as to the existence of the penal regulation, as well as to the actor's conduct, should be required. One argument in favor of such a requirement is that regulatory offenses are malum prohibitum; one argument against is that ignorance of the law is generally no excuse, so it should not mitigate the offense here. A possible middle ground on this issue is suggested by the Brown Study Draft, which created a presumption that a professional's violation is willful. Slightly modifying the Study Draft idea, one could establish a presumption that culpability as to the existence of the penal regulation is presumed in the case of a person engaged, whether as owner, employee, or other wise, in a business, profession, or other calling subject to licensing or pervasively regulated, when charged with violating a penal regulation applicable to him in that capacity.

Footnotes

1. An example of Group A is the Truth in Lending Act. Its current penalty provision provides that a violator of a statutory prohibition or of a rule or regulation "shall be fined not more than $5,000 or imprisoned not more than one year, or both." Under the S 1 conforming amendment, a violator of a provision of the statute or of a rule issued thereunder, "shall be guilty of a regulatory offense under section 2-8F6." The maximum penalty in the severest regulatory offense category is $500,000/6 years.

An example of Group B is the Robinson-Patman Act. The existing maximum penalty for a violation is 1 year and/or $5,000. Under the S 1 conforming amendment, a violator "shall be guilty of a Class E felony, *except that* the maximum fine shall be $5,000." A Class E felony normally carries a 1 year/ $100,000 maximum penalty.

2. The maximum penalties under S 1 are:

Violation—$54,750.

Misdemeanor—$54,750/6 months.

Class E felony—$109,500/1 year.

Class D felony—$547,500/6 years.

Class C felony—$547,500/10 years.

Alternatively, the judge may impose a fine of twice the benefit derived or twice the loss caused.

Other available sanctions include corporate or individual probation, restitution, disqualification of an individual from holding organizational office, requiring an offender to give notice (such as by advertising) of his conviction to the class of persons affected, and suspension of the right to engage in interstate commerce.

ADDENDUM TO REGULATORY OFFENSE

Another possible way to approach violations of regulatory laws is the S 1400 approach or a variant thereof. S 1400 has no regulatory offense section comparable to that of S 1. It does, though, incorporate certain regulatory law felonies into the criminal code in sections 1765 and 1766. The felonies incorporated consist primarily of adulterated food and drug product violations. Under the S 1400 scheme, these sections are necessary in order to preserve the felony grading of those violations since S 1400 adopts the Brown Commission principle of downgrading any offense in a title outside Title 18 to a misdemeanor. This principle is put into effect through section 2002, Classification of Offenses outside Title 18. Offenses outside title 18 are classified and labeled according to the term of imprisonment they carry under existing law. If the term is more than six months, the offense is classified a Class A misdemeanor. The maximum fine that may then be imposed for such an offense is either 1) the fine authorized by the statute defining the offense, or 2) the maximum fine for an offense of that classification under the Code, whichever is greater.

That scheme could be modified in the following way: 1) Offenses outside title 18 would be classified according to their maximum jail terms, as done in S 1400, but the idea of putting all felonies in title 18 would be dropped. Thus, they would be reclassified as felonies if the existing term is sufficiently high. 2) The maximum fine for such an offense would then be the fine under the original provision, or the fine for an offense of that classification under the Code. Such a change would bring into play the advantages of the new sanction proposed in all three versions—higher fines, notice and disqualification.

S 1400's scheme also includes section 1615, Reckless Endangerment. This section makes it an offense if a person recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Federal jurisdiction exists when the reckless endangerment occurs during the commission (or during the flight from the commission) of *any other offense* over which federal jurisdiction exists, whether defined in title 18 *or elsewhere*. Thus, if a person or corporation violates the Flammable Fabrics Act, which conduct may place another in danger of serious injury, the actor may be guilty of reckless endangerment, S 1400 makes this offense a Class D felony if the circumstances manifest extreme indifference to human life, and a Class E felony in any other case. A possible modification of this section would be to include other sorts of endangering conduct, such as serious danger to the environment or to habitation, in the definition of the offense.

If this offense is to be used as a major vehicle in regulatory violations, it is important that the language defining the offense continue to read "conduct which places *or may place* another person in danger." Otherwise, the reach of the section would be unreasonably limited. For instance, violation of the Flammable Fabrics Act occurs during the manufacture or distribution process. Jurisdiction under section 1615 depends on the reckelss endangerment occurring "during the commission of" the Flammable Fabrics offense. The danger that victim is actually placed in at that point is less than immediate. But as long as it suffices that the first offense *may* place another person in danger, section 1615 has a broad reach.

It may be objected that this approach is undesirable because the penalties are not clearly enumerated along with the statute defining the offense. This argument has some merit, but it should not be accepted too quickly. With regard to the penalty levels (especially the fines), one would expect that the U.S. Code would be updated and annotated in such a way the fine levels and other sanctions of the criminal code would appear along with the statutes defining offenses. That could be achieved even if the regulatory laws were not formally amended to reflect the title 18 penalties. As for the Reckless Endangerment Offense, it should be pointed out that this tends to be more of a common law type offense than a regulatory provision. To require that a violator know that endangering a person's life or safety is an offense does not conform to the traditional jurisprudence of criminal law.

MEMORANDUM ON PROPOSED FEDERAL CRIMINAL LAW NO. 6

DEATH PENALTY

S. 1 section 141E1,2 S. 1400 section 2401,2, Brown section 3601-05

OFFENSES

1. The Brown Commission authorized the death sentence for no offense, not even murder or treason.

2. S. 1 also limits it to these offens

3. S. 1400 authorizes it for

(a) treason, sabotage, espionage i

(1) the defendant has been convic "another offense involving treason, sal or espionage, committed before the t the offense for which a sentence of li prisonment or death was imposable"

(2) the defendant knowingly cre grave risk of substantial danger to na security, or

(3) the defendant created a grave death and

(b) for murder if—

(1) the defendant committed duri offense or in connection with it, tr sabotage, espionage, escape, kidnappin craft hijacking, or arson or

(2) the defendant has been convic another federal or state offense for wh sentence of life imprisonment or death have been imposed or

(3) the defendant had been convicte or more federal or state felonies inv serious bodily injury to another or

(4) the defendant had knowingly c a grave risk or death to another person dition to the victim or

(5) or committed the offense in an cially heinous, cruel or depraved mann

(6) had procured the murder by mo other benefit or had received money or

(7) had murdered the President, a su sor, a foreign dignitary in the U.S. or official, law enforcement officer, employ U.S. penal institution or diplomat.

Exclusion

1. Under Brown the death sentence not be imposed if the defendant was than 18 years old at the time of the of or if the defendant's physical or m condition calls for leniency or there are er substantial mitigating circumstanc "although the evidence suffices to su the verdict, it does not foreclose all d respecting the defendant's guilt."

2. S. 1 does not provide any exclu standards. S. 1 does provide mitigating aggravating circumstances as a guide fo court or jury. The *mitigating* factors murder and treason) are that the defen

(a) was under extreme mental or tional disturbance

(b) was under unreasonable pressur under the domination of another perso

(c) the mental capacity was impaire a result of mental illness, defeat or in cation

(d) was emotionally immature

(e) was an accomplice whose participa was relatively minor

(f) had no significant history of criminal activity and

(g) the crime was committed under cumstances which the offender believe provide a moral justification or extenua which is plausible by ordinary standard mortality and intelligence.

The *aggravating* circumstances in of treason are that the defendant:

(1) knowingly created a great risk of d to another person or of substantial imp ment of national security

(2) violated a legal duty concerning tection of the national security

(3) committed treason for securing be fit.

In cases of murder the *aggravating* cumstances are that the defendant

(1) was previously convicted of ano murder or crime involving the use or th of violence to the person or has a substan history of serious assaults or terrori criminal activity

(2) committed a double murder

(3) knowingly created a great risk death to at least several persons,

(4) committed the murder in an especi heinous, atrocious, cruel, manner or ma

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..sted exceptional depravity by ordinary ..andards of morality and intelligence

(5) the violator was a public servant who ..as holding the defendant or another in of..cial detention.

(6) the violator was a law enforcement ..ficer or

(7) the victim was the President or other ..igh public servant.

..eparate proceeding to determine sentence

All three bills provide for a separate hear..g on the death penalty for which a jury ..ay be waived or impaneled regardless of ..uilty plea or jury trial. Any evidence rele..ant to sentencing may be admitted. Brown ..xplicitly states any evidence inadmissible ..nder the exclusionary rule would be ad..issable.

S. 1 simply states the evidence must be ..elevant. S. 1400 provides that the court ..ust provide the presentence report to the ..overnment and defendant. The standards ..garding the admissibility of evidence ap..ly except for that evidence relevant as to ..hy the death sentence should not be im..osed.

In Brown and S. 1 the burden of proof ..ecessary to expose death penalty is not ..tated. Under S. 1400 the jury returns a ..pecial verdict setting forth its findings as ..) existence of the factors specified by the ..atute (see above). Under S. 1400 if the ..ourt or jury finds by a "preponderance of ..e information" that one or more grievous ..ctors exist and none of the precluding ..ctors exist, the court must sentence the ..efendant to death. If none or even if some ..f the grievous factors exist but one or ..ore of the mitigating factors also exists ..e defendant is sentenced to any other ..ntence authorized (life imprisonment). ..nder S. 1 the defendant would be sentenced ..o life imprisonment also.

Comment

Furman v. Georgia, 408 U.S. 238 (1972), .. the most recent death penalty decision by ..e Supreme Court. There was no single ma..ority opinion. Justice Brennan and Mar..hall reached the result that the death ..enalty, irrespective of the mechanics of ..s application, is cruel and unusual punish..ent. Justice Douglas' position is not as ..lear but it may be safe to assume that he ..ould not favor mandatory imposition on ..onviction nor jury discretion in deciding ..e death penalty. There is no clear indi..ation how Justices Stewart and White ..ould respond to this legislation, if en..cted. Justice Burger, Blackmun, Rhenquist ..nd Powell dissented. Generally both S. 1 ..nd S. 1400 respond to the due process-..airness objection to the death penalty. The ..roponents of the death penalty cite is de..errence effect as the most important ground ..or its existence. However the deterrence ..actor in S. 1 and S. 1400 is not as substan..ial as it would be under a mandatory sys..em due to the ambuity of some of the ..rovisions (e.g. moral justification, extreme ..motional or mental disturbance, unusual ..ressures, heinous, astrocious, cruel manner, ..elatively minor participation. As an arti..le by Daniel Polsby, ***The Death of Capital Punishment?*** (1972 Supreme Court Review ..973) points out the existing evidence makes ..he deterrence justification untenable. The ..vidence is *inconclusive* on the general de..errence effect of capital punishment but ..ersuasively suggests that there is usually no ..uch deterrent effect. The question that must ..e answered by the proponents of the legisla..ion before such sections are enacted is: Can ..he death penalty statute be justified on ..rounds of deterrence when it cannot be ..hown that the death penalty is a greater ..eterrent than prison for major crimes?

MEMORANDUM ON PROPOSED FEDERAL CRIMINAL CODE NO. 7

PARA-MILITARY OFFENSE

S.1 § 2-9D1, S.1400 § 1104, Brown § 1104

Summary

Basically all three drafts make it a criminal activity to engage in or facilitate the acquisition, caching, use, or training in the use of dangerous weapons by or on behalf of a group of 10 or more persons with the intent of influencing the conduct of governmental affairs. The offense is not of an individual acquiring, caching or training but only if it is done:

(a) in connection with a group and

(b) if that group has political motives vis a vis the government.

This raises a question whether, under the First Amendment, groups activity can be outlawed which would be lawful for individuals or groups with non-political objectives. The Brown draft speaks of acquiring or, training in weapons "for political purposes or on behalf of an association of 10 or more persons. S.1 requires intent "to influence the conduct of government public affairs in the United States through the use or threat of the use of such weapons". S.1400 requires that the organization or group have as a purpose the taking over of, the control of or the assumption of the function of an agency of the U.S. government or of any state or local government by force or threat of force. Organizations as dissimilar as the National Rifle Association, Black Panthers and a neighborhood association of armed citizens who have a need for group protection would come under the scope of this section. The Working Papers (at p. 436) note, "the activities prohibited by the draft are limited neither to those with armed insurrection as the object, nor those carried on by organizations under foreign control . . . the Commission should however, consider whether the limitation of the proscription to groups with "political purposes" presents a constitutional or policy danger by permitting wide latitude in executive and judicial discriminations as to what constitutes a "political purpose".

Constitutional problems

Supreme Court cases have strongly indicated that it is highly suspect under the First Amendment to place restrictions on an individuals right of advocacy and association without the strongest showing by the government of imminent violence. These cases tend to indicate that a blanket prohibition of acquiring firearms in conjunction with a politically-oriented organization, without some further requirement that imminent danger results to the community from this action is unconstitutional. In *Brandenburg* v *Ohio* 395 U.S. 444(1969) the court said, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (395 U.S. at 447) and, "(A) statute which by its own words and as applied, purports to punish mere advocacy or to forbid on pain of criminal punishment *assembly with others* merely to advocate the described type of actions within the condemnation of the First and Fourteenth Amendments" 395 U.S. at 449 (emphasis added). *Brandenburg* seems to cast real doubt on the constitutionality of a statute which is aimed directly at political assembly, aimed at the right to associate in an activity which, if done singly, would be perfectly legal. The proposed statutes, however do not prohibit advocacy but actions which are deemed to be per se dangerous. The problem is one of legislating such a description or in looking at the threat on a case by case basis. The offense does not amount to assault, rebellion, sabotage or obstructing a government function by physical force. Presumably it allows the government to protect itself from feeling intimidated by an irate band of armed citizens who have yet to take any overt action which is otherwise illegal. Without any sort of legislative fact finding it is difficult to see what compelling need there is to outlaw what has heretofore been noncriminal association conduct. Both S.1 (§ 3-10C2) and S. 1400 (§ 3127) authorize government wiretapping to acquire evidence on which can be used for a prosecution under this section or any other section of the law.

MEMORANDUM ON PROPOSED FEDERAL CRIMINAL LAW NO. 8

CRIMINAL COERCION

Brown § 1617, S. 1400 § 1723, S. 1 § 2-9C4

Summary

The coercion offense falls with the blackmail-extortion type of offense. It holds a person liable for threatening certain specific acts either with an intent to compel action or to obtain property. The "threatening" aspect raises serious First Amendment questions concerning free speech and the acts which are the subject of the threats raise questions of consumer actions and other legitimate disputes.

S. 1400 provides that:

"A person is guilty of an offense if he knowingly obtains property of another by threatening or placing another person in fear that any person will:

(1) commit any crime;

(2) accuse any person of a crime;

(3) procure the dismissal of any person from employment, or refuse to employ or renew a contract of employment of any person;

(4) wrongfully subject any person to economic loss or injury to his business or profession;

(5) expose a secret or publicize an asserted fact, whether true or false, tending to subject any person, living or dead, to hatred, contempt, or ridicule, or unjustifiably to impair his personal, professional or business reputation or his credit; or

(6) unjustifiably take or withhold official action as a public servant, or unjustifiably cause a public servant to take or withhold official action."

This offense is graded as a Class D felony if the property which is the subject of the offense has a value in excess of $500 or is a firearm, or a U.S. government document or engraving equipment or mail. It is a Class A misdemeanor if the property has a value in excess of $100. In all other cases it is a Class B misdemeanor.

There is federal jurisdiction if the fear is of a federal crime, or involves federal official action or if committed within the special jurisdiction of the U.S. or concerns property owned or under the care of the U.S. or is owned or under the care of a national credit institution, or in any way affects interstate or foreign commerce or involves movement of a person across a state or U.S. boundary or if a facility of interstate commerce is used.

The Brown Commission had a similar offense (§ 1617) the gravamen of which is "with intent to compel another to engage in or refrain from conduct". The Commission provided the affirmative defense for which the defendant would have the burden of proof, that the actor believed the primary purpose of the threat was to cause the other to act in his own best interests, behavior from which he could not lawfully abstain or to make good a wrong done by him or re-

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frain from taking any action or responsibility for which he was disqualified.

S. 1, § 2-9C4, provides that it is an offense if a person intentionally compels or induces another person to engage in conduct from which the other person has a lawful right to abstain, or to abstain from conduct in which he has a lawful right to engage by means of instilling a reasonable fear that if the demand is not complied with, the person or another will cause bodily injury, cause damage to property or subject anyone to physical confinement. This is a Class E felony (up to 1 year and $100 per day.) Federal jurisdiction is established when the offense is committed in the special jurisdiction, concerns a high public official, invokes the piracy jurisdiction or affects commerce.

Comments—S. 1 and Brown both establish the intent in terms of compelling another to do, or refrain from, an act. S. 1400 provides that the intent is to obtain. This is an improvement but S. 1400 defines property to include intellectual property or information. Secondly it should be noted that S. 1 has limited the threats to a well defined area of traditionally considered criminal activity and has a more limited jurisdiction than does S. 1400.

The activity in these proposed statutes reaches not only conduct but speech as well. In that regard First Amendment issues must be considered. Various consumer groups and others expressed the fear that this section (as proposed in the Brown Draft) would deter legitimate conduct. Richard E. Israel, Legislative Attorney of the American Law Division of the Library of Congress wrote (Hearings, supra, at p. 3373): "The issue as to constitutionality on First Amendment grounds thus centers on the adequacy of the affirmative defense provision to limit what is conceded to be a "broad" prohibition involving not only "conduct" but "speech". To be a real limitation, the affirmative defense provision would have to be read as an integral part of the statute as it is to be applied rather than a justification to be raised after the fact in a court proceeding. There are also, as has been noted, problems of vagueness which are raised by the affirmative defense provision."

S. 1400's restriction of the coercion proposal to intent to obtain "property", as opposed to intent to compel "activity", is an improvement. However the expansion of the *kinds* of threats and the exclusion of any mention of defense or affirmative defenses continues the constitutional problems.

S. 1400's use of the term "unjustifiably" in relation to both threats to impair personal, professional or business reputation or credit and to the taking or withholding of official action is similar to the term "wrongfully" in the Hobbs Act (18 U.S.C. § 1951) which has been construed to apply only to inherently wrongful methods. S. 1400 also improves the Brown formula by requiring that the threatened party be placed "in fear". This would seem to exclude the business-consumer bona fide disputes which were the basis of much criticism of the Brown draft.

MEMORANDUM ON PROPOSED FEDERAL CRIMINAL CODE #9

MENTAL ILLNESS

Insanity Defense—S. 1 § 1-3C2; S. 1400 § 502; Brown § 503

1. *Insanity*—S. 1 and Brown follow the formulation of the American Law Institute which denies the defense to sociopaths. S. 1400 eliminates the defense except insofar as it negates an element of the offense charged.

2. *Incompetency to Stand Trial*—S. 1 allows an individual to bypass criminal trial if found to be incompetent. Under S.1400 one cannot avoid trial. Under S.1 § 3-11C4 a person found incompetent may be detained for treatment by the Secretary of HEW until (a) he regains competency or (b) charges are disposed of pursuant to § 3V11C7 or (c) a petition for civil commitment is filed by the Secretary of HEW. Detention is not indefinite and must expire at the end of the time of a maximum sentence for the most serious offense charged. Judicial review is required no later than one year after detention commenced. If found not likely to regain competency within a reasonable time, he must be released within a reasonable time, unless within sixty days HEW files a petition for civil commitment. If found competent, he is released and reenters the criminal process. Only if he is not yet competent, but likely to regain comptency within a reasonable time can a person be committed for more than one year. In S. 1, after the first year review, there is no further requirement for judicial review.

Procedures for Psychiatric Examination on Issue of Sanity: In S. 1 (§ 3-11C2) the court must refer the defendant for a psychiatric examination if he or counsel give notice of his intention to raise the defense. If the defendant objects to the examination, the court issues an order prohibiting use of such evidence at trial.

The examination must be performed expeditiously and copies of the report submitted to the court and copies given to the government attorney, the court, and the defendant. Restraint on the liberty of the person must be minimal. If the panel finds hospitalization is needed, the court may order temporary detention. S. 1400 requires the defendant who wishes to invoke the insanity defense to give written notice either at the time the not-guilty plea is entered or within 10 days thereafter. The court then may order the defendant confined for not more than sixty days for psychiatric study. Copies of the study as to whether the defendant was insane at the time of the offense must be provided to the court, government and defense prosecutors. It is not clear in S. 1400 who pays for this. There is no time limit stated to ensure that the reports are filed promptly. S. 1400's sixty-day examination period is four times as long as S.1's. There is no burden on the psychiatrist to demonstrate a need for hospitalization to the court.

3. *Disposition of Mentally Ill After Conviction:* S. 1 (§ 3-11C2) provides that the court may have the individual referred to the panel of psychiatrists for examination who then report back within fifteen days after examination with copies for the court, government, and defendant. This report should include sentencing recommendations. In S. 1400 (§ 4224) hospitalization of a convicted person suffering from a mental disease or defect requires the court to hold a hearing on motion by either party when there is reasonable cause to believe the defendant is "presently suffering from mental disease or defect for the treatment of which he is in need of custody, care, or treatment in a mental institution." The court may order a psychiatric examination. If the defendant is found to be suffering from a mental disease or defect, the court may commit the defendant to the A.G.'s custody for treatment in a suitable facility. This commitment is equivalent to a provisional sentence of imprisonment for the maximum term authorized for the offense for which the defendant is found guilty. It is not clear whether the court must consider whether there is actually any treatment available at federal facilities or if the non-dangerous defendant would prefer prison. Until the head of the facility to which the defendant is committed decides that he is no longer in need of the institutional services of custody, care, or treatment, the defendant is stuck with the maximum sentence, with no guaranteed periodic review and no right to treatment.

Also, the mandatory hearing for the d[e]fendant who recovers prior to the termin[a]tion of the maximum sentence does not pr[o]vide due process. At this hearing, the jud[ge] may order the defendant to serve the r[e]mainder of the sentence or a portion there[of] in prison, reduce the sentence or place t[he] individual on parole. This is, in effect, [a] second sentencing hearing, yet the propos[ed] statute does not require the court to gi[ve] notice to the defendant, provide counsel, [or] govern the presentation of evidence.

4. *Civil Commitment:* (§ 3-11C8)—Und[er] S. 1 (§ 3-11C8) civil commitment may [be] sought for three kinds of people: (1) tho[se] deemed incompetent to stand trial and foun[d] likely to regain competency, (2) those who[se] official detention is pursuant to a senten[ce] which is about to expire, and (3) those wh[o] have been acquitted by reason of mental il[l]ness or defect. The decision to seek civ[il] commitment is made by HEW after examin[a]tion of the individual to determine wheth[er] the person could create a likelihood of seriou[s] harm by reason of mental illness or defe[ct] unless hospitalized. A hearing is then he[ld] at which the defendant may be committed t[o] official detention, § 3-11C1 (4) defines "[a] likelihood of serious harm." The commit[ment] "shall continue only during such tim[e] as the Secretary is not able to find for th[e] treatment or care of such person" or unt[il] failure to hospitalize the person no longe[r] would create a likelihood of harm (§ 3-11C[8] (f)). S. 1 also provides for annual review b[y] HEW and notice of the annual report to th[e] person and his counsel and provides the righ[t] to petition for a hearing. It can be main[tained] that given the effects of commitmen[t] annual review is not sufficient. Also, the rule[s] of evidence are suspended for the hearin[g] and the burden of proof is unarticulated[.] There is no Fifth Amendment protection fo[r] statements made to psychiatrists that ma[y] be used against them. Nor is there an indi[-] cation that an individual has a right to tria[l] by jury.

S. 1400 (§ 4225) sets forth procedures fo[r] civil commitment for persons who have finished serving the full term of their sentence after conviction. If the person is still suffering at the conclusion of his sentence from a mental disease or defect such that his release would create a substantial danger to himself or to the person or property of others, the A.G. notifies the court to schedule a hearing to determine whether the defendant is sufficiently dangerous to warrant further custody, if other arrangements are not available. There is no provision which prohibits detention of the defendant after expiration of the sentence without an immediate hearing (S. 1 provides that the hearing is to be held at least ninety days prior to the date of the offender's release). Nor is there a provision of warning that statements made to psychiatrists during their examination may be used against him at the commitment hearing. Nor is there a provision respecting the right to trial by jury for civil commitment proceedings. § 4225(e) designates a "preponderance of the evidence" as the burden of proof standard. *In re John Ballay* (—— F. 2d ——, U. S. Cir. May 31, 1973, S. A. No. 71-2023) held that proof must be established beyond a reasonable doubt in civil commitment proceedings. Concerning the likelihood of causing harm, Judge Sprecher in *Tessard v. Schmidt* 349 F. Supp. 1078 (E.D. Wis. 1972) (at p. 1093) said, "the state must bear the burden of proving that there is an extreme likelihood that if a person is not confined, he will do immediate harm to himself or others. Moreover, the dangerousness must be based upon a finding of a recent overt act, attempt, or threat to do substantial harm to oneself or another." Additionally, there is no provision for periodic judicial re[view of hospit]alized patients.

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MEMORANDUM ON PROPOSED FEDERAL CRIMINAL CODE #10

ORGANIZATION LIABILITY; INDIVIDUAL LIABILITY FOR CONDUCT ON BEHALF OF AN ORGANIZATION

S 1 §§ 1-2A7, 1-2A8, S 1400 §§ 402, 403, Brown §§ 402, 403

Summary—This memo will discuss an organization's liability for its conduct and liability of agents for an organization's conduct. Generally speaking, S. 1400 provides for broader liability in both instances than does S 1.

I. *Definitions*—S 1, § 1-1A4 (51) defines organization broadly to include corporations, other sorts of business organizations, nonprofit organizations, governments, government agencies and "any other groups of persons organized for any purpose." S 1400 (sec. 111) uses a similar definition, but excludes governments and government agencies. (Those opposed to governmental liability argue that it is pointless, in that a fine is borne by the taxpayers and in that a "notice" sanction may be unnecessary since the press generally monitors governments better than it does corporations. They also fear politically motivated prosecutions such as a federal prosecution of a local government for the political ambitions of the U.S. Attorney. On the other hand, some argue for at least extending governmental liability to such crimes as regulatory and civil rights offenses, etc. The Working Papers (p. 175) note that current federal law generally does not exclude governments or agencies.)

The definition of agent appears sufficiently broad in both S 1 and S 1400.

II. *Organization Liability*—Before discussing the provisions on corporate liability, it will be useful to discuss two concepts—the scope of a servant's employment and the scope of an agent's authority—which are used in various definitions of organization liability. Subsequent discussion will focus on the development of existing case law on the subject, and then the provisions of the two bills.

(a) "Scope of employment" is a tort law concept relating to master-servant relations.[1] Under the doctrine of respondeat superior, a master is vicariously liable for a tort committed by his servant if it was committed within the scope of the servant's employment. It is not necessary that the master authorized, had knowledge of, or consented to the servant's act for him to be held liable. In fact, the doctrine of respondeat superior is most useful where the act was unauthorized. Generally speaking, an act is committed within the scope of employment if it was of the same general nature as the conduct authorized or incidental to that authorized, and if it was intended to benefit the master's business. A master is usually held liable even if the servant's tort was willful or even if the servant violated or misunderstood the master's clear instructions. However, the doctrine of respondeat superior does not apply to the acts of independent contractors.

(b) The "scope of an agent's authority" is a contract law concept relating to principal-agent relations. The scope of a principal's liability for acts of his agent is more narrow than the scope of a master's liability for a servant's acts. A principal gives power to an agent in a contractual manner that an offeror makes an offer—consent is essential. The power of an agent can be given with any conditions or limitations. Whereas the acts of a servant are acts committed within the course of performing duties for his master, the acts of an agent are acts of consent that the principal shall be bound in a legal transaction such as a contract. A principal is generally liable for those acts of an agent that fall within the agent's "express, implied or apparent authority." Express authority is that given to an agent orally or in writing by the principal. Implied authority is authority implied by conduct, or authority to do acts that would reasonably be expected to accompany acts performed under express authority. Apparent authority is the authority that a reasonable third person would understand an agent to have.

(c) Existing law—Historically, the scope of corporate criminal liability has progressed toward broader liability. Lord Holt, in an anonymous case, 12 Mod. 559 (1701), said that a corporation was not indictable at all, though its members were. The reason for this view was that a corporation, as a fictional entity, is not capable of acting and cannot be imprisoned. Fletcher, 10 Cyclopedia Corporations, section 4942. It was said that any illegal act by a corporate agent was without authority and ultra vires.

That general proposition has been modified over time. The landmark federal case was *N. Y. Central and Hudson R.R. v. U.S.*, 212 U.S. 481 (1909), in which the Supreme Court held that a corporation may be held liable for the criminal acts of its agents and employees if the acts are done within the scope of the agent's employment and on behalf of the corporation. The court seems to use the terms "scope of employment" and "scope of authority" interchangeably. In that case, which involved payment of shipping rebates to sugar companies, using them interchangeably created no problem since the agent's acts were covered by either term. In later cases, the courts sometimes refer to scope of employment, sometimes to scope of authority, sometimes to both. *U.S. v. Armour and Co.*, 168 F 2d 342 (3rd Cir., 1948). *U.S. v. American Radiator and Stand. San. Corp.*, 433 F 2d 174 (3rd Cir.), cert. den. 401 U.S. 948 (1970). *U.S. v. Parfait Powder Puff Co.*, 163 F 2d 1008 (7th Cir.) cert. den. 332 U.S. 851 (1947). *U.S. v. Brunett*, 53 F 2d 219. A recommended jury instruction shows how corporate liability is often defined: A corporation is criminally responsible for "all unlawful acts of its directors, or officers, or employees, or other agents, provided such unlawful acts are done within the scope of their authority, as would usually be the case if done in the ordinary course of their employment, or in the ordinary course of the corporation's business." Mathes and Devitt, Federal Jury Practice and Instructions, section 19.03 (1965). It would appear that the legal concept used to determine the scope of corporate liability properly depends on the nature of the crime—i.e., if the case involves a fraudulent contract, "scope of authority" applies, since corporate liability depends on the agent's power to bind the corporation, whereas if the crime is theft of trade secrets, it is a matter of whether the act was within the agent's scope of employment.

The following cases give some idea of the bounds of corporate liability under existing law. A corporation is not liable if it was not the intended beneficiary of the agent's criminal acts. *Standard Oil Co. of Texas v. U.S.* 307 F 2d 120 (5th Cir., 1962). It is the intent that the corporation benefit, not benefit in fact, that is material. *Old Monastery Co. v. U.S.*, 147 F 2d 905 (4th Cir. 1945). The status of the agent in the corporate hierarchy is immaterial; he need not be a person in high authority. *U.S. v. George F. Fish, Inc.*, 154 F 2d 798, (2d Cir.), cert. den., 328 U.S. 869 (1946). A corporation may be found guilty even though the actor whose conduct is imputed to the corporation as the basis of liability is found not guilty. *Magnolia Motor and Logging Co. v. U.S.*, 264 F 2d 950 (9th Cir., 1959). A corporation may be held liable for the criminal act of an independent contractor, even though the contractor's act was contrary to the corporation's instructions. *U.S. v. Parfait Powder Puff Co.*, 163 F 2d 1008 (7th Cir.) cert. den., 332 U.S. 851 (1947).

III. *Current Proposals on Organizational Liability*—

(A) The Brown version § 402 greatly cuts back on the scope of corporate liability for *felonies*, since it would make the organization liable only if the conduct was authorized, requested, or commanded by persons in certain categories of control of the organization. Brown subsection 1(a) provides that a corporation is liable for "any offense committed by an agent of the corporation within the scope of his employment on the basis of conduct authorized, requested or commanded, by any of the following or a combination of them:"

i) the board of directors,

ii) an executive officer or comparable policy-maker or supervisor,

iii) any person who controls the corporation or is "responsibly involved in forming its policy."

iv) any other person for whose act or omission the statute defining the offense provides corporate responsibility.

Brown does provide for liability for an agent's *misdemeanors and nonculpable offenses*, regardless of authorization, if the conduct was within the scope of employment (1 (c) and (d)). Subsection 1(b) provides liability for failure to discharge an affirmative duty imposed on the corporation.

The minority alternative of 1(a) in Brown provides greater liability. It covers any offense committed in "furtherance of the corporation's affairs" that was "done, authorized, requested, ratified, or recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs," by a person in one of the four enumerated policy-making categories. The "furtherance of affairs" phrase may appear to be broader than "scope of employment," but it's difficult to imagine an act that "furthers affairs" and is authorized or tolerated by higher-ups that would not be within the simple "scope of employment" or "scope of authority" concept. The "reckless toleration" idea goes well beyond the standards of the original 1(a) in Brown, but it is doubtful that it is broader than the basic scope of employment/authority concept of existing law, especially since simple scope of employment may be easier to prove at trial.

(B) S 1 section 1-2A7(a)(1) provides that an organization is guilty of "any offense consisting of conduct engaged in by an agent of the organization within the scope of his employment." Unlike Brown, S 1 appears to be a codification of the core of existing case law. But if the language were narrowly construed, it could be held not to be as broad as existing law, which often uses the "scope of authority" concept. For that admittedly limited reason, the language of S. 1400 (see below) is preferable. Another problem with S. 1 is its coverage of failure by the corporation to act. "Conduct" is defined in section 1-1A4(13) to include omissions as well as acts; therefore 1-2A7(a)(1) would cover a failure to act if the prosecutor could point to a specific corporate agent who should have acted. However, (a)(1) does not seem to cover cases in which an affirmative duty is imposed on "the corporation" and in which the corporation put no one in charge of discharging the duty.

Subsection (a)(2) in S 1 says an organization is also guilty of "any offense for which a human being may be convicted without proof of culpability, consisting of conduct engaged in by an agent of the organization within the scope of his employment." That subsection appears to be only an elaboration, since it covers no acts that (a)(1) does not already cover.

(C) S 1400 § 402 is broader than S. 1. The core of S 1400 is the same as that of S. 1—an organization is liable for criminal conduct of an agent that occurs in the performance of matters within the scope of the agent's

[1] This discussion is based on Seavey, *Principles of Agency*. See also Restatement of Agency 2d Section 229.

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employment" (§ 402(a)(1)(A)). But the second part of (a)(1)(A) adds the phrase "or (matters) within the scope of the agent's actual, implied, or apparent authority." Thus, it codifies existing law well. The inclusion of both phrases insures that attempts to deny corporate liability when the agent's conduct is a question of "authority," rather than "scope of employment," will be unsuccessful.

Subsection (a)(1)(B) says an organization is also liable for conduct relating to matters for which the organization "gave the agent responsibility," and which is "intended by the agent to benefit the organization." Generally, any situation that (B) covers is already covered by (A), but the additional formulation might be useful in insuring corporate responsibility for the acts of independent contractors—provided the definition of "agent" were construed to include independent contractors.

Subsection (a)(1)(D) provides that an organization is liable for an agent's conduct that involves a nondelegable duty of the organization, where the organization is otherwise legally accountable for the offense. The impact of this extension of the provision's scope is unclear, but it may refer to such cases as a financial statement prepared by an outside accountant, or a lawyer's opinion.

Subsection (a)(2) provides liability for a failure to discharge a specific affirmative duty imposed on the organization by law. For example, section 1762 requires a person to report certain dealings in foreign currency. An organization, like a human being, is liable for a failure to do so.

S. 1400 covers in (b)(1) what subsection (a)(2) in S. 1 partly covers. It precludes a defense that the organization does not belong to the class of persons who by definition are the only persons capable of committing the offense directly. Both bills also preclude a defense that the person for whose conduct the organization is being held liable has been acquitted or cannot be prosecuted.

IV. *Personal Liability for Conduct on Behalf of an Organization*—(A) *Existing law:* An agent is responsible for acts he does on behalf of a corporation, and he may be found guilty even if the corporation is not. *U.S.* v. *Dotterweich,* 320 U.S. 277 (1934). Congress may exculpate individuals and hold only the corporation liable, but such an intent is not to be imputed to Congress without clear compulsion.

U.S. v. *Dotterweich,* supra. The Working Papers (p. 177) note that only in exceptional circumstances has Congress established a law under which only the corporation is liable.* In *U.S.* v. *Wise,* 370 U.S. 405, the Court rejected the defendant individual's reading of the Sherman Act that the acts of an officer, however illegal, are chargeable to the corporation but not to the individual.

The above general rule applies to active conduct by the individual. The Working Papers note that it is a question in existing law whether an individual may be held liable for knowing but passive acquiescense, unless the law either imposes an affirmative duty of supervision on him or says that certain officers are guilty of a crime if the corporation is found guilty.

(B) S 1 section 1–2A8 provides for what appears to be a codification of existing law. It holds a human being criminally liable for any conduct he performs or causes to be performed for the organization to the same extent as if he performed it for himself.

Some persons have criticized this section as being so broad that it might reach the assembly line worker who puts a misleading label on a jar. They say that he may be the "actor," but that imposing sanctions on him works no coercive or deterrent effect and seems plainly unfair. In general, though, he won't be liable, since the prosecutor must prove all elements of the offense—culpability, action, [illegible] standard, holding him responsible would work a deterrent effect in the future—hopefully by causing him to blow the whistle on corporate practice, if he knew they were illegal. There is, though, a potential problem here with strict liability offenses: If the law says that anyone who mislabels a drug is liable without regard to his awareness of the result of his conduct or of the existence of the law, will the assembly line worker who unknowingly puts the wrong label on every jar, in accordance with his instructions, be held liable? Is he "responsible"? However, there are few such offenses. Practically speaking, the problem is likely to be taken care of just as it is now—by prosecutorial discretion and the good sense of juries.

(C) S 1400, following Brown, extends individual liability to the same extent as S. 1 and further. Subsection (a)(2), patterned very closely on Brown, provides that an individual who has "primary responsibility" for a duty imposed on the organization by law is liable for an omission to perform that duty to the same extent as if it were imposed directly upon him. This appears to be an extension of existing law. It is desirable in that it places responsibility for performance of the duty at the best point—on the person with primary responsibility for the area of the duty. However, critics claim that the phrase "primary responsibility" is unclear. Does it mean the "actor", officers, board of directors, etc.? Presumably, to have the best deterrent effect, the phrase should be defined to apply to someone in the chain of command who is close to the point of physical performance of the duty, or perhaps better, to the point of decision as to whether the duty is performed, since holding a mere operative liable may be undesirable. Also, when Mark Silbergeld testified on the Brown Draft, (Hearings, at p. 3013), Silbergeld proposed amending this section to read:

Except as otherwise provided, whenever a duty to act is imposed upon an organization by a statute or regulation thereunder, any officer, employee or agent of the organization who has or shares primary responsibility for the subject matter of the duty *or for appropriating or disbursing funds necessary for performance of the duty* is guilty of an offense which is based upon an omission to perform the duty *or to appropriate or disburse funds necessary to perform the required act* to the same extent as if the duty were imposed directly on himself.

Not only is the amendment desirable for extending the reach of the section; it also may help clarify that the purpose of the section is to reach those with some decision-making power, not workers.

Subsection (3) of Brown, on accomplices of organizations, is not carried forward into S. 1400. The subsection does not seem important, since the general complicity provision would seem to cover those situations.

The final extension of individual liability is the subsection 4 providing for liability for "reckless default in supervising conduct of organization." It says that "a person responsible for supervising particular activities who, by his reckless default in supervising those activities, permits or contributes to the occurrence of an offense by the organization is guilty of an offense of the same class," though his offense may be no higher than a misdemeanor. This in effect puts an affirmative duty on supervisors; it is not a vicarious liability provision. It should have a desirable deterrent/prophylactic effect by promoting effective supervision. The provision is highly desirable, in that it encourages effective supervision, by putting legal respo[...] bility where the operating responsibilit[...] Critics argue that this provision will [...] executives afraid to delegate responsib[...] However, it would seem more likely to [...] to more clearly defined lines of autho[...] where needed. In addition it would [...] management which seeks results withou[...] gard to how those results were obta[...] Most importantly, it would mean that [...] gation cannot be mindless, that those [...] delegate and benefit shall share the bu[...] when delegation results in criminal acti[...]

V. *Should Corporations Be Criminally [...] able at All?*

(A) To some persons, the concept [...] corporate entity being criminally liab[...] unclear. Most crime stories and law [...] order speeches tell of individuals. Howe[...] corporate crime cannot be overlooked. [...] extensive; it is done with impunity and [...] cost to victims and society is virtually [...] measurable. As the corporate form of [...] ganization is the most prevalent form of [...] eration, it lends itself easily to use by [...] law-abiding and law-breaking alike. A [...] look at how a corporation, as opposed to [...] agents, commits a crime may be useful. [...] principal operative function is delegat[...] Take for an example the scandal of Eq[...] Funding Corp. of America—one of the lar[...] white-collar crimes in the history of Am[...] can business. In this case, (which is too c[...] plex to fully explain here) various emplo[...] were delegated jobs—each part of which [...] an element of the crime—but each emplo[...] did not necessarily know that nor ben[...] from the offense. A printer made phony [...] curities, another employee drew up ph[...] life insurance papers, another programm[...] all of this into a computer, another sold [...] phony policies to other insurance compa[...] while another used phony securities as [...] lateral on business loans. It was the corp[...] tion itself that committed several alle[...] crimes and that reaped the benefits. [...] course some top executives appear to h[...] also committed crimes. But this does [...] negate the fact that the corporation—act[...] as a corporation in the usual course of [...] business—apparently committed a mass[...] fraud.

Some critics of the imposition of crimi[...] liability on corporations argue that hold[...] a corporation liable for crimes is ineffect[...] as a deterrent because a corporation ca[...] go to jail and any fine that is imposed [...] borne in the end by innocent sharehold[...] or passed along to consumers. These arg[...] ments overlook several crucial factors. Fi[...] to the extent the offending corporation fa[...] competition in its industry, it won't be a[...] to pass the burden of the fine along to co[...] sumers. Secondly, holding stock is a h[...] risk investment and that the corporation e[...] gages in crime is one of the risks. Sha[...] holders should be protected but overlooki[...] crime is not protection. It is allowing beha[...] ior to one group that is denied to anoth[...] Thirdly, shareholders have no right to pro[...] by someone's crime or some corporatio[...] crime. Fourthly, the more a corporatio[...] fines bite into dividends, the more the mark[...] will move away from that corporation's sto[...] and the more pressure will be exerted on t[...] corporate managers to deter future corpora[...] criminal activity.

In fact though, fines are inadequate to d[...] ter or sufficiently punish corporate crim[...] Prosecutor offices are hampered by the co[...] plexity of many cases, the high burden [...] proof, the expert testimony all for a f[...] thousand dollar fine. Fine levels themselv[...] are inadequate. Corporations can feel fr[...] to break laws when the cost of so doing [...] slight, but the rewards—such as avoidi[...] bankruptcy, increasing value of stock, me[...] ger, etc. are great.

Furthermore, corporate liability makes eve[...] more sense if the new, effective and logic[...]

* E.g., *Sherman* v. *U.S.,* 282 U.S. 25 (1930), in which the Court held that the criminal penalties of the Safety Appliance Act did not apply to officers who were state officials responsible for the administration of [illegible] railroad.

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sanctions are provided for as in S 1—restitution, periods of suspension from interstate commerce, notice, and probation with some powers over corporate behavior—are available. Richard Givens, formerly with the U.S. Attorney's office, Southern District of New York, argues against those who say corporate liability serves no purpose (Hearings, page 1553): "My experience is that is does. In numerous cases corporate liability was bitterly contested because of the deterrent effect of publicity of the fact that misconduct has been established." He also argues (p. 1556): 1) Corporations are often taken over by organized crime, 2) a more lenient attitude would directly injure the public—especially the public as taxpayers where fraud against the government is involved not to mention the public as consumers where consumer frauds are involved, and 3) a lenient attitude towards corporations encourages disrespect for the law, by fostering the image that the criminal law does not involve the wealthy and powerful.

MEMERANDUM ON REFORM OF FEDERAL CRIMINAL LAW NO. 11

LIABILITY OF MEMBERS OF CONGRESS AND STAFFS FOR LEGISLATIVE ACTIVITY UNDER PROPOSED CODES

S. 1, and S. 1400

1. Congressional immunity

Congressional immunity from prosecution derives from Article I, section 6 of the U.S. Constitution which provides ". . . They (Senators and Representatives) shall in all cases, except Treason, Felony and Breach of the Peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place." Thus, the Constitution provides that Senators and Representatives are free from arrest except for ordinary criminal activity and that their respective Houses are the only places where they can be questioned, by their peers, for their "Speech or Debate." This provision has recently been interpreted by the Supreme Court in the cases of *U.S.* v. *Brewster*, 408 U.S. 501, 33 L. Ed. 2d 507 (1972); and *Gravel* v. *U.S.*, 408 U.S. 606, 33 L. Ed. 2d 583 (1972); and *Doe* v. *McMillan*, 41 L.W. 4752 (5-29-73). The questions presented are: (a) what is the scope of the Speech and Debate clause, i.e. what are protected activities, and (b) did, or can, Congress delegate to the Executive the power to question Members of Congress in another place, and (c) what are the possible effects of the proposed new federal criminal code on Members of Congress.

The various sections of the proposed bills have serious implications for the press, for citizens and for Congressmen and Senators. While they may attempt to deter or punish unlawful conduct, they appear to provide authority to completely close off sources of information about government activity to citizens and their representatives. The provisions relating to classified information would delegate to non-elected, unrepresentative government employees the power to withhold information and to use severe criminal sanctions for unintended disclosure. This memo does not attempt an exhaustive discussion of the entire government information problem nor an exhaustive legal memorandum on the crimes mentioned. It is intended that Members of Congress, the press and the public be aware of the import of these provisions. The provisions discussed are limited to those cases where the Executive may institute investigatory proceedings such as a grand jury proceeding or criminal prosecution as opposed to the bringing of civil action by private citizens.

In *Gravel*, the issue was the questioning by a grand jury of Senator Gravel and an aide about the acquisition and publication of the Pentagon Papers. In *Brewster*, the issue was former Senator Daniel Brewster's liability for taking a bribe (18 USC 201) in return for a vote in the Senate. In *MacMillan*, the issue was a suit by private citizens to prohibit the publication of a report containing harmful information about their children in the D.C. school system.

In all the cases the issue centered on what conduct constituted "legislative activity" so as to invoke the constitutional privilege.

2. Information

In *Gravel*, the Supreme Court found that immunity does extend to a congressional aide if the conduct would be protected if done by a member. Legislative activity had been defined as meaning whatever a legislator does as a representative of his constituents (*Coffin v. Coffin* 4 Mass: 1 (1808)). The Court found the following acts to be protected activity: conduct, vote and speeches in committee and on the floor. A lower Federal court in *Dowdy v. U.S.* (#72-1614, 4th Cir., March 12, 1973) stated succinctly that *Gravel* held there are two exceptions to legislative immunity: (1) if the Member commits a crime, and (2) if some one else commits a crime.

The Court specifically held that a Member can be questioned on how he obtained materials for a hearing and how he secured unofficial publication of the proceedings of the hearing or meeting. Senator Sam Ervin (D-NC) wrote of the decision (*The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 Va. L.R. 175 (1973)): "A Senator is unprotected when he obtains information for use in a speech or a hearing or when he attempts to bring the result of such activity to the attention of the public," (at 178); and,

". . . the results of the Court's holding effectively blinds Congress to all information except that officially disclosed by the Executive. Neither a Member of Congress nor his aides may obtain a copy of any document a government bureaucrat has decided to withhold—be it battle plan, a report on corruption in the administration or an environmental impact study—or inform the American people of its contents without risking criminal prosecution or at least the harassment and inconvenience of a grand jury inquiry. In the past, despite the administration's efforts to frustrate the congressional oversight function, there remained one open avenue by which Members of Congress could obtain information on the administration's activities. That was when disaffected employees leaked information to the Congress. However, the holding in the *Gravel* case stripping immunity for obtaining such information and for publication of the committee record will discourage all but the most courageous informant from giving legislators information which Congress and the public need but which the administration refuses to release. Furthermore, by the removal of legislative immunity from publication, broadcasts or speeches which seek to inform the public of legislative views, Congress is made not only blind but mute as well. Although words spoken in debate or in hearings are themselves immune, as are the publication of these words in committee prints or the Congressional Record, no republication is permitted." (at p. 187)

What the majority opinion of the Court overlooked was expressed by Justice Douglas and Brennan in their dissents to the *Gravel* decision. Justice Douglas cited the Informing Function, i.e. a Member's informing his constituents and the public about governmental actions as basic to any interpretation of the Speech and Debate Clause. He cited Woodrow Wilson: "Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct." (W. Wilson, *Congressional Government*, 303-304, 1885). Justice Brennan said of the decision, "In my view, today's decision so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are so vital to the workings of our democratic system."

In *Doe v. McMillan* the Court majority answered in part the arguments concerning the informing function in a very limited way, noting that, "We have no occasion in this case to decide whether or under what circumstances, the Speech or Debate Clause would afford immunity to distributors of allegedly actionable materials from grand jury questioning criminal charges or a suit by the executive to restrain distribution where Congress has authorized the particular public distribution." (fn. 11 at 4756). However, the majority decision stated, "We do not doubt the importance of informing the public about the business of Congress. However, the question remains whether the act of doing so, *simply because authorized by Congress*, must always be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' with respect to legislative or other matters before the House", (emphasis added); and later:

". . . we cannot accept the proposition that our conclusion, that general, public dissemination of materials otherwise actionable under local law is not protected by the Speech or Debate Clause, will seriously undermine the 'informing function' of Congress. To the extent that the Committee report is printed and internally distributed to the Members of Congress under the protection of the Speech or Debate Clause, the work of Congress is in no way inhibited. Moreover, the internal distribution is 'public' in the sense that materials internally circulated unless sheltered by specific congressional order, are available for inspection by the press and by the public. We only deal in the present case, with general, public distribution beyond the halls of Congress and the establishments of its functionaries and beyond the apparent needs of the 'due functioning of the legislative process'." (at 4765).

3. Political activities

In *Brewster* the Supreme Court distinguished between legislative and political activity (protected and unprotected by the Speech or Debate Clause). Legislative activity is that done in the course of the process of enacting legislation and includes votes and speeches in committee and on the floor and the motivations behind them (though whether this is always protected is questionable), legislative investigation, and the issuing of subpoenas (*Dombrowski v. Eastland*, 387 U.S. 82 (1967)). Political activities were described as "errands" by Chief Justice Burger that constituents have come to expect from their Representatives including preparing news releases, speeches, intervention before the Executive (*U.S. v. Johnson*, 383 U.S. 169 (1966)), and the making of appointments with agencies. The *Brewster* case is significant for the Supreme Court permitted the Executive Branch to initiate criminal proceedings against a Member of Congress for accepting a bribe to influence his vote on legislation affecting postal rates—so long as evidence concerning his legislative activities was not utilized. In a recent article (Reinstein and Silvergate, *Legislative Privilege and the Separation of Power*, 86 Harv. L.R. 1113, May 1973), the authors state (at page 1116) "the history of the Speech or Debate Clause reveals that the

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privilege was not meant to apply broadly to suits brought by citizens to protect their civil rights from invasion by Congressmen or Congressional committees. Rather it was designed primarily to be invoked by Congressmen in order to prevent executive intimidation and harassment." That, of course, is precisely what the *Brewster* case authorized—the initiation of criminal charges against a disfavored legislator arising out of the conduct of his duties.

The caveat that evidence of his legislative activity not admissable is a question since the Department of Justice had claimed in the District Court that the performance of a legislative function was the issue. The Court said the illegal promise, not the act itself, was important. Justice White, in dissent, noted a difficulty here in connection with campaign contributions. "A Member of Congress becomes vulnerable to abuse each time he makes a promise to a constituent on a matter over which he has some degree of legislative power and the possibility of harassment can inhibit his exercise of power as well as his relation with constituents. In addition, such a prosecution presents the difficulty of defining when money obtained by a legislator is destined for or has been put to personal use. For the legislator who uses both personal funds and campaign contributions in office the choice of which to draw upon may have more to do with bookkeeping than bribery; yet an interchange of funds would certainly render his conduct suspect."

4. ". . . in any other place."

The problem is not one of allowing a guilty congressman to go free. The Constitution gives to each House the responsibility of establishing rules and disciplining members. Chief Justice Burger in the *Brewster* case allowed the Congressman to be prosecuted in the Judiciary. He said (at 525, supra), "Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence. Given the disinclination and limitations of each House to police these matters it is understandable that both Houses deliberately delegated this function to the courts, as they did with the power to punish persons committing contempts of Congress." Whether an individual member can be bound by what may be an unconstitutional delegation of power was not discussed (but see Reinstein and Silvergate, supra). This delegation of power, it was argued, arose from the fact that a Member of Congress was specifically a subject of prosecution in the statute. This is the case in the proposed codes (S. 1 and S. 1400) where public servant is defined to include legislators. Also, "official conduct" in both bills includes "vote" which is not the case under the existing bribery law.

5. Sections of proposed codes of possible use against Members of Congress.

There are many sections of the proposed codes (S.1 and S.1400) which may affect Congressmen in the performance of their legislative function (as defined by the Supreme Court to mean floor debates and committee meetings) and their "political activity", such as preparing for committee and floor debates, communicating with government employees and informing their constituents and the public of government activities. Several proposals are redrafts of existing statutory and case law; others are new. These sections in all probability were drafted with activities other than those of Congressmen in mind. However, there is no exemption of Members from their enforcement. The defense of "Execution of Public Duty" (§ 1-3C3 in S. 1; § 521 in S. 1400) provides in S. 1 that it is a defense if conduct engaged in by a public servant in the course of his official duties and that he believes in good faith that the conduct is required or authorized by law unless he acts in reckless disregard of the risk that the conduct was not required or authorized by law to carry out his duty as a public servant or as a person acting at the direction of a public servant.

It may well be that the proposals if enacted would not be enforced against Members of Congress and their staffs. However, Senator Ervin is instructive when he writes, "Fears are not allayed by the knowledge that until now most Administrations have exercised great restraint in hauling legislators they do not like into court. Effective separation of powers between branches of government must rest not only on good faith and great expectations but also on the firm bedrock of the Constitution. The past is no guarantee of the future." (supra, at p. 181)

A. SECTIONS AFFECTING INFORMATION

1. Espionage

The Brown Commission (§ 1112) limited this offense to cases where national security information is revealed with intent to harm the U.S. Under S. 1 (§ 2-5B7) the information has to be gathered, for or, revealed to a "foreign nation" however friendly with knowledge that it *may be* used to the injury of the U.S. or to the advantage of a foreign power. National security information is defined (§ 2-5A1(10) in S. 1 and § 1112(4)(a) in Brown) as information regarding military capability of the U.S. or a nation at war with a nation which the U.S. is at war; military or defense planning or operations, military communications research or development, communications information; in time of war any other information which if revealed could be harmful to national defense and which might be useful to the enemy; defense intelligence relating to intelligence operations, activities plans, estimated, analyses, sources and methods, and restricted AEC data. It is a Class A offense (death or up to 30 years) if committed in time of war or if the information directly concerns means of defense or retaliation against attack by a foreign power, war plans or defense strategy. Otherwise, it is a Class B felony (up to 20 years imprisonment).

Professor Louis B. Schwartz, former Staff Director of the Brown Commission, in a memo to Senator John McClellan (D-Ark.) of February 20, 1973, wrote: "To scoop in all such information within an espionage offense that embraces non-hostile communication with friendly governments is to clamp a total censorship on such communication." (Note that "war" is not defined either as a state of being at war or as having been legislatively declared.) The S. 1400 definition of national defense information includes the above definition and also includes information regarding military installations and the conduct of foreign relations affecting the national defense. Detailed discussions of the espionage and related provisions appear at Congressional Record, S. 6329 of April 2, 1973, and S. 8508 of May 8, 1973. The Administration's definition of Espionage (§ 1121) provides that the intent necessary is that the information be used or may be used to the prejudice or the safety or interest of the U.S. or to the advantage of a foreign power.

2. National defense information

In S. 1 (§ 2-5B8) it is an offense, if in a manner harmful to the safety of the U.S., a person (a) knowingly reveals national defense information to a person not authorized to receive it, (b) is a *public servant* and with criminal negligence violates a known duty as to custody, care or disposition, (c) knowingly having unauthorized possession of a document or thing containing national defense information, fails to deliver it on demand to a federal public servant entitled to receive it, (d) communicates, uses or makes available to an unauthorized person communications information, (e) knowi[ngly] uses communications information, or communicates national defense informa[tion] to an agent of a foreign power or a mem[ber] of a Communist organization. In tim[e of] war it is a Class C felony (up to 10 yea[rs]); otherwise it is a Class D felony (up [to 7] years). The persons authorized to rec[eive] national defense information are not defi[ned].

In S. 1400 (§ 1122), a person is guilt[y of] an offense if he knowingly *communic[ates]* information relating to the national def[ense] to a person not authorized to receiv[e it.] Note here the word "communicates" ve[rsus] S. 1's "reveals". The Brown Commission i[n its] draft felt that "communicates" would a[pply] to information already in the public do[main] whereas "reveals" means information no[t] in the public domain. § 1123 would mak[e it] an offense, if being in possession or con[trol] of such information, a person reckle[ssly] permits its loss, theft, destruction or c[om]munication to a person not authorize[d to] receive it or being in authorized posses[sion] intentionally fails to deliver it on deman[d,] fails to report to the agency its loss, or c[om]munication or recklessly violates a duty [im]posed upon him by a statute, or execu[tive] order or regulation or rule of the agency [au]thorizing him to possess or control such [in]formation. This is a Class E felony if it [in]volves the reckless violation of a duty (u[p to] 3 years); otherwise it is a Class D felony [(up] to 7 years). Under § 1122, the defendant [need] not be shown to have intended to harm [the] safety or interests of the U.S. or benef[it a] foreign nation. It is no defense that the [in]formation was not harmful to the U.S. [The] Supreme Court has not decided if "c[om]municate" is equivalent to "publish", [New] *York Times v. U.S.* 403 U.S. 713 (19[71]). § 1126 of the proposed bill provides t[hat] communicate means to make available [by] any means to a person or the general pu[blic].

3. Disclosing or receiving classified information

In S. 1400, § 1124, it is an offense for [one] having been in authorized possession w[hile] a public servant (includes a Member [of] Congress) to knowingly communicate cla[ssi]fied information to a person not author[ized] to receive it. Persons receiving the infor[ma]tion are not subject to prosecution un[der] this section. It is a defense if the infor[ma]tion was communicated only to a regul[arly] constituted committee of the Senate or [the] House or to a joint committee pursuant [to] lawful demand, presumably a litigat[able] question. Under this section all classi[fied] information is covered. The prosecut[ion] need only prove that the document [was] classified without revealing the conte[nts] thereof. It is specifically not a defense t[hat] the information was improperly classif[ied.] Classified information is defined in § 1126 as any information, regardless of or[igin,] which is marked or designated pursuan[t to] the provisions of a statute or execu[tive] order, or a regulation or rule thereunde[r, as] information requiring a specific degree [of] protection against unauthorized disclos[ure].

S. 1 contains a similar provision, § 2-[...] in which it is an offense if in violation [of] his duty as a public servant under a stat[ute] or rule, regulation, or order issued un[der] such statute, he knowingly discloses any [in]formation which he has acquired as a pu[blic] servant and which had been provided to [the] government in compliance with the requ[ire]ments of an application for a patent, co[py]right, license, employment, benefit, or [in] connection with the regulation, study or [in]vestigation of an industry or a duty [im]posed by law. Existing law applies only [to] members of the executive branch, depa[rt]ment or agency (18 USC 1905) and perta[ins] to any information coming to him in [the] course of employment or official du[ties] ". . . which information concerns or rela[tes] to trade secrets, processes, operations, st[yle] of work or apparatus or to the identity, co[...]

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fidential satistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation or association or income return or any book containing abstract thereof."

4. Theft

S. 1400, § 111, defines property as "intellectual property or information, by whatever means preserved, although only the means by which it is preserved can have a physical location." S. 1 does not define property to include information. However, both S. 1 and S. 1400 make it an offense if the object of the theft is a government file, record, document or other government paper stolen from any government office or from any public servant. Intent to steal can be established by proof of converting the property to another's use (§ 2-8D3(d)(2)(iii) in S. 1; and § 1731(c)(b)(iii) in S. 1400). § 1732 and § 2-8D4 cover the offense of receiving stolen property.

5. Criminal coercion (See also Memo No. 8)

In S. 1400, § 1723 provides that it is an offense for one to obtain property of another by threatening or placing a person in fear that a person will (a) commit a crime, (b) accuse any person of a crime, (c) procure the dismissal of any person from employment or refuse to employ or renew an employment contract, (d) wrongfully subject any person to economic loss or injury to his business or profession, (e) expose a secret or publicize an asserted fact, whether true or false, tending to subject any person living or dead to hatred, contempt or ridicule or unjustifiably to impair his personal, professional or business reputation or his or credit or unjustifiably take or withhold official action as a public servant. Under S. 1's provision the threats are of bodily injury, damage to property or physical confinement (§ 2-9C4).

The Brown Commission had a similar provision (§ 1617) but provided defenses of the actor's belief, whether mistaken or not, that the primary purpose of the threat was to cause the person to conduct himself in his own best interests or to desist from misbehavior, to engage in behavior from which he could not lawfully abstain, make good a wrong done by him or refrain from taking any actions or responsibility for which he was disqualified. The threats subject of the offense were to commit a crime, accuse anyone of a crime, expose a secret or publicize a fact (as above) or to take or withhold official action as a public servant or cause a public servant to take or withhold official action.

The intent in the Brown Draft was to compel another to engage in or refrain from conduct as opposed to knowingly obtain property in S. 1400. The constitutionality of the Brown formulation, providing as it did for the defendant to prove the above defenses by a preponderance of the evidence, was doubtful. (See Hearings, Reform of Federal Criminal Laws, before the Subcommittee on Criminal Law and Procedure of the Committee on the Judiciary, U.S. Senate, Part III, subpart D, p. 3362.) Richard E. Israel, Legislative Attorney, American Law Division of the Congressional Reference Service, Library of Congress wrote of the Brown formulation, "The issue as to the constitutionality on First Amendment grounds thus centers on the adequacy of the affirmative defense provision which would have to be read as an integral part of the statute as it is to be applied rather than a justification to be raised after the fact in a court proceeding." The Administration proposal not only expands the kinds of threats but removes the defenses that Israel considered vital for the section's constitutionality.

B. OFFENSES RELATING TO PUBLIC SERVANT ACTIVITIES

1. Bribery

S. 1 (§ 2-6E1) and S. 1400 [illegible] Brown Commission Final Draft (§ 1361). It is an offense for a person to offer or give a public servant, or as a public servant to solicit or accept anything of value in return for an agreement or understanding that the recipient's official action as a public servant will be influenced or that the recipient will violate a legal duty as a public servant. This is punishable by up to 5 years in S. 1 and up to 15 in S. 1400. S. 1 establishes a prima facie case exists upon proof that the defendant knew that a pecuniary benefit was conferred by or accepted from a person having an interest in an imminent or pending examination, investigation, arrest or official proceeding or bid, contract, claim and that the interest could be affected by the person's performance or non-performance of his official conduct. A Member of Congress is such a public servant and the definition of official conduct includes voting.

2. Graft

S. 1 (§ 2-6E2); S. 1400 (§ 1352). S. 1 makes an offense of knowingly conferring a pecuniary benefit (a) upon a public servant for employment as a public servant, (b) upon another for exerting special influence (through kinship or by reason of post in a political party) upon a public servant with respect to official conduct or (c) upon a public servant as compensation for advice or other assistance in preparing or promoting a bill, contract, claim or other matter which is or is likely to be before the public servant. A public servant as compensation for advice or other assistance in preparing or promoting a bill, contract, claim or other matter which is or is likely to be before the public servant. A public servant is guilty for accepting a pecuniary benefit for the above activities. This is punishable by up to 3 years. S. 1400 defines the offense as offering or accepting anything of pecuniary value for or because of an official action or a legal duty performed or to be performed or a legal duty violated or to be violated by the public servant or former public servant. This is punishable by up to 3 years, also.

3. Trading in Government assistance

S. 1400 (1353) makes it a misdemeanor for a person to offer a public servant, or for a public servant to solicit or accept compensation for advice or other assistance in promoting or preparing a bill, contract, claim, or other matter which is or may become subject to the public servant's official action.

4. Trading in special influence

S. 1400 (§ 1354) makes it an offense for a person to offer or solicit or accept anything of value for exerting or causing another person to exert special influence upon a public servant with respect to his official action or legal duty as a public servant. Special influence refers to influence by common ancestry or marriage or position as a public servant or as a political party official. This is punishable by up to 3 years.

5. Trading in public office

S. 1400 (§ 1355) parallels the employment aspect of S. 1's graft section and provides for imprisonment up to one year.

6. Speculating on official action or information

S. 1400 (§ 1356) makes it an offense punishable by up to one year imprisonment if as a public servant or within one year thereafter, or in contemplation of his official action or action by the agency with which he has been serving, or in reliance on information to which he has or had access to only in his capacity as a public servant he knowingly acquires a pecuniary interest in any property transaction or enterprise which may be affected by such official action or information or provides information with intent to aid another person to acquire such an [illegible] sion entitled Conflict of Interest.

7. Threatening a public servant

S. 1400 (§ 1357) makes it an offense to knowingly use force, threat, intimidation or deception to influence a public servant in the exercise of his official action. S. 1 (§ 2-6E3) changes the threat to that of committing a crime against a person or property.

8. Retaliation

Both S. 1 (§ 2-6E4) and S. 1400 (§ 1358) make it an offense to injure a public servant or property because of official action.

9. Nondisclosure of retainer

S. 1 (§ 2-6F2) makes it an offense for a person, if, employed or retained for compensation or not to influence another person's conduct as a public servant, he privately addresses without disclosing such employment or retainer, to such public servant any representation, entreaty or argument or other communication with intent to influence such person's conduct as a public servant. This is punishable by up to 1 year.

10. Wiretap authority

Under S. 1 and S. 1400, federal investigators could obtain authority to wiretap Congressional office phones or private lines for some of the above offenses. S. 1 (§ 3-10C2) provides for wiretap authorization for the following offenses, inter alia:

Espionage.

Bribery.

Graft.

Theft.

Receiving Stolen Property.

S. 1400 (§ 3127) provides for authorization for the following offenses:

Disclosing National Defense Information.

Mishandling National Defense Information.

Disclosing Classified Information.

Unlawfully Obtaining Classified Information.

Bribery.

Criminal Coercion.

Theft.

Receiving Stolen Property.

Any personal offense against a Member of Congress.

The above sections are noted merely to inform what activities of Congressmen and Senators are being proposed to be included in the Federal Criminal Code. Options available to Congress concerning legislative immunity include:

(1) Prohibit grand jury investigations and criminal proceedings ". . . in any other place" of legislative activity defined to include any activity relating to the due functioning of the legislative process and the carrying out of a member's obligation to his House and his constituents including speeches, debates, votes, conduct in committee, receipt of information for use in legislative proceedings and speeches made outside Congress to inform the public on matter of national or local importance and the decision-making process behind each of the above activities. Such a provision, as suggested by Reinstein and Silvergate (supra) would provide for a motion to quash a subpoena on these grounds, invoking an automatic stay and requiring the prosecutor to show why the motion should not be quashed.

(2) Establish as a defense to a prosecution the above conduct.

(3) Provide that such offenses (specifically enumerated) are only subject to prosecution in the member's House.

(4) Limit the specific offenses to exclude such legislative activity.

A discussion of the problems of immunity of Members of Congress is found at Hearings, *Constitutional Immunity of Members of* [illegible] Congressional Operations, March 21, 27, 28, 1973.

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