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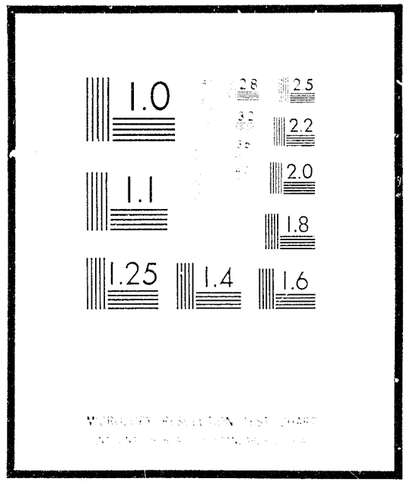

U.S. DEPARTMENT OF JUSTICE
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NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE
WASHINGTON, D.C. 20531

10/8/76
Date filmed

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration

CIVIL RESTRAINTS DESIGNED TO AID IN THE SUPPRESSION OF THE DRUG TRAFFIC - FINAL REPORT

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Final Report Submission
~~73 NI 0029~~
September 1973

SUMMARY DESCRIPTION OF PROPOSAL FOR THE DEVELOPMENT OF CIVIL RESTRAINTS TO COMPLEMENT THE CRIMINAL LAWS IN EFFECTING SUPPRESSION OF THE HEROIN TRAFFIC

This submission consists of three documents. They should be read in the order listed.

1. PROPOSAL FOR A CIVIL STATUTE TO AID IN SUPPRESSION OF THE HEROIN TRAFFIC (A Popular Form Statement)

2. PROPOSED EMERGENCY CIVIL DRUG CONTROL ACT

3. MEMORANDUM OF AUTHORITIES AND EXPLANATION IN SUPPORT OF PROPOSED EMERGENCY DRUG CONTROL ACT

The objective of this project is to structure a complete federal civil statute that will complement criminal law enforcement by reaching upper echelon criminals not now effectively and consistently reached by the criminal law, or likely to be so reached. Basically the concept derives from an estimate that the heroin traffic, insofar as relatively invulnerable to conventional law enforcement, is unvulnerable by reason of the power of concentrated underworld money to corrupt local officials and police, plus intricate organization in which guiding intelligences are kept at such far remove from criminal hands that proofs beyond a reasonable doubt are well-nigh impossible to assemble against careful crime syndicate leaderships. It was familiarity with the development

and workings of the antitrust laws, particularly the Sherman Act where criminal and civil consequences arise from the same operative facts, with only the standards of proof and modes of trial varied, which provided the starting point whence grew the idea that viciously anti-social criminal businessmen also might be vulnerable, as are other businessmen, to civil restraints, provided a range of remedial devices can be developed which will tend to force an election to opt out of the heroin traffic rather than run risks become excessive in relation to the reward. With the big criminal organization curbed or forced out, it long has been the position of the police that ordinary criminal law enforcement effectively can control in situations where criminal heads and hands are one, or not sufficiently separated to provide effective insulation from proofs of criminal complicity.

The statute is narrowly targeted legislation, operative only during presidentially declared emergencies and with several safeguards to assure its operation will be suspended when the interplay of heroin addiction with street crime is sufficiently suppressed that the emergency fairly can be said at end.

The central core of the statute is to declare illegal conspiracies to sell and deliver heroin and other opium based drugs, and their sales or deliveries. The implementation of civil restraints upon findings of these violations will be accomplished through verbatim adoption of the same language as in Sherman Act Section 4, 15 U.S.C. §4. This is to make clear that this immense body of civil antitrust precedents provides an analogy

for development of a corresponding, if different, body of law designed to identify and combat the illicit big business of heroin trafficking.

Once subjected to injunctions contemnors who fail to yield obedience to the terms of their decrees will be further subjected to heavy financial forfeitures plus restraints of increasing intensity. Ultimately these restraints will become so intense as to destroy the effectiveness of crime syndicate leaders to their organizations, but it is estimated that so much will be put in hazard before this point is reached that intelligent decisions to abandon heroin trafficking will be compelled by rational balancing of a prize grown inadequate against a risk to the top men that has grown excessive.

Trials, including contempt hearings (except in rare cases where criminal contempt citation is used), will be to federal district judges, not juries. Federal judges with their life tenures, usually high ethical standards and the community regard in which they are held, probably are the only class of persons in this country capable consistently of facing down both the blandishments and threats of really big crime.

It is not intended to forego criminal prosecutions where these are possible, and it is noted that it often may be desirable to place convicted criminals under civil decree restraints as well, such as now occurs under the Sherman Act. Then, even after having served criminal jail sentences, a control restraining future behavior will continue operative that should prove even more effective than parole restraints.

A range of restraints will be stated in the legislation, in addition to encouraging the courts to develop appropriate restraints on their own as has occurred under the antitrust laws. These restraints will include the placing of personal fortunes at hazard of forfeiture in such fashion as to threaten concealed as well as revealed funds, geographical exclusions from areas, and monitoring attendances upon real recalcitrants. The whole list is considerably more exhaustive than this, but not here spelled out beyond these three. It is believed that financial threat properly handled usually will prove enough; however the Congress should arm the federal courts with a full range of recommended restraints in which it shares the responsibility. There should be no shrinking from the reality that the control of sophisticated organized crime in its heroin trafficking will need restraints which press up to the limits of what is constitutionally supportable, and occasionally a particular restraint even may fail its testing. The nature of this threat to our society, coupled with narrowly targeted emergency legislation, should give a very long reach indeed, though.

There are three important ancillary devices to be provided in aid of the central core of the statute:

A.

A consistent complaint of criminologists who have struggled with the problem of controlling organized crime has been the inability,

through criminal law, of outlawing specific criminal associations and memberships therein. As a criminal law problem it probably is insuperable. However, in the same way that Sherman Act Section 4 cases identify the entity that is an illegal conspiracy, then compel its dissolution, this statute is structured to outlaw crime syndicates that deal in heroin, then proceed against individual notified members who fail to heed the decree in a fashion that will bring them into the ambit of the increasing restraints pattern already noted. The hearsay testimony of police intelligence experts in identifying these rather notorious crime associations is to be specifically authorized, removing from the problems of proceeding against these organizations the common law hearsay evidence rules.

B.

There is incorporated a means of encouraging inner organization informers to inform against top crime leaders through a system of perpetuating their testimony on a basis it can be used in criminal trials only if something happens to the informer. The concept is to provide a lesser syndicate member who is feeling insecure for his life, or who wishes to deal for a lighter sentence in a criminal case and be secure, with a means to increase his security through the giving of testimony that can be used only under this statute so long as he remains personally safe. In effect the objective is to turn a crime boss's reaction

exactly around in the case of these informers from what it now is, and make him actively need to keep them alive and well for his own selfish ends.

C.

In instances where criminal convictions are obtained against minor heroin handlers who are tributary to but not of the inner organization of a crime syndicate, it is proposed to take simple "go and sin no more" injunctive decrees against them as well, then give notice to higher-ups who might deal with such persons of these decrees and their contents. (The same would be done with consent decrees where these could be obtained; in fact, even in the case of formal convictions, consent decree dispositions are more likely than formal decrees based on the adverse findings already made in the criminal cases.) Then, through a system of these notices in conjunction with the operation of Rule 65(d) of the Federal Rules of Civil Procedure, an increasingly pervasive web will be constructed that will make it very dangerous to deal with lesser drug handlers. This restraint probably never will reach higher than the middle range of crime syndicate personnel in its direct effectiveness, but it will throw heroin distribution organizations into a constant and increasing turmoil as the members seek to keep track of who is subject to decree and who not lest they, as knowing aiders and abettors, thereby bring themselves within the ambit of the increasing restraints,

without ever having been subject to an initial decree. Also, this device occasionally might produce an inner organization man willing to make a deal and inform against a higher up when, through carelessness, he compromised his syndicate organization.

CONCLUSION

I have searched my mind over a period of several years and, within the limits of constitutional requirements which circumscribe law enforcement in this country as nowhere else in the world, this is the only structure I can conceive which has the potential to suppress and keep suppressed those aspects of the heroin traffic which effectively can defy conventional criminal law enforcement. In effect, the choice will be to get out of this particularly damaging anti-social criminal activity, or put everything at hazard of judges sitting in equity. And equity is by far the most powerful body of law known to the Anglo-American system -- so powerful that its workings always must be carefully circumscribed, as is done in this statute.

The statute and supporting memoranda should be disseminated to the Senate and House Judiciary Committees, the Attorney General and the attorneys general of the several states. Also, it now is ready to form the basis of a series of seminars under the auspices of the Law

Enforcement Assistance Administration in which its structure and probable effects can be probed by legislators, judges, law enforcement personnel, and persons from the academic world. This next step should be undertaken this fall and winter.

PROPOSAL FOR A CIVIL STATUTE TO AID IN SUPPRESSION OF THE HEROIN TRAFFIC

Big Crime and Law Enforcement

The proof requirements of the criminal law were frozen to the proof beyond a reasonable doubt standard with adoption of United States Constitution in 1787. Our criminal law was, and still is, a system adequate to deal with individual criminals, and with relatively uncomplicated criminal organizations. These have no large resources with which to corrupt law enforcement, while the law of averages practically guarantees that systematic criminality where the head and hands are one, or not at far remove between, will result in arrests, with evidence upon which criminal convictions can be obtained.

Beginning with the rumrunning era in the 1920's there appeared the modern crime syndicate, essentially an American phenomenon which, for about a half-century now, has demonstrated itself practically invulnerable to destruction through conventional criminal law enforcement. The reasons are several. The Big Crime syndicates have money in huge quantity, with which they systematically purchase exemption from local law enforcement. Short of open bribes, political party organizations

in many major states also are placed under obligation through contributions which give entry to officeholders to plead for, and obtain, special treatment.

Second is a discipline, chiefly modeled on the Sicilian Mafia's code of omerta, whereby a perverse sense of "honor", backed with threats of severe physical punishment, even death, are marshalled to ensure the silence of the membership regardless of consequences. Then there is the tactic of intimidating witnesses and juries in cases that do go to trial.

Most important of all, though, is the blunt reality that, given wealth, numbers and brains, any intelligent man bent on crime could structure an organization sufficiently insulated that the criminal law's requirements of proofs beyond a reasonable doubt cannot be approached, much less met. Prosecutors understandably do not seek indictments where there is no reasonable chance of proving the case -- and a responsible position can be taken that it would be unjustifiable harassment to do otherwise.

Thus, if a top boss is wary, if he gives his orders with sufficient care to avoid electronic surveillance, acting only through a completely trusted man with no one else present, then if this order is passed down through two or three more levels in like manner with the order giver identifying the order as his and no more until finally it reaches the action man who will perform the criminal act, there simply cannot come into existence evidence remotely approaching the criminal standard against the men at the top.

The criminal hands, chiefly recruited from among the poor (though, to a distressing extent, also those who do not have the excuse of poverty and lack of prospects) are, and ever will be, in cheap supply. Thus the pushers, the pimps, the numbers runners, the muscle men, the "mules" who carry heroin into this country for their syndicate masters -- all these are expendable. And in fact they are expended in rather impressive numbers, for the criminal law works with considerable efficacy at this level, though sentences tend to be light enough the convicts too soon are back at their criminal work. But enforcement that fails to reach the brains, the pools of illicit wealth, and the conspiratorial entities which the syndicates are, leaves Big Crime essentially unhurt. The criminal law pierces through at the top today only when there has been avoidable carelessness.

The inner organization membership of Big Crime, which effectively supervises and dominates several hundred thousand lesser criminals, consists of no more than about 5,000 men, most of whom are identified. Even of these the great majority are order takers, not ultimate decision makers (though many are capable of moving on up if a boss for any reason no longer is useful to his organization, a thing the bosses know and fear). It probably is true that the order-giving brains of Big Crime are concentrated in less than 50 intelligent, shrewd, amoral, vicious masters.

These men are big businessmen. Their businesses are immense

conglomerates of crime. Gambling, the biggest source of revenue, has been estimated at revenues of seven billion dollars a year. There also are extortion, fencing stolen goods, loansharking, labor union racketeering and prostitution, to name some others. Relatively low on the list -- it probably yields Big Crime revenues on the order of 300 to 500 million dollars a year -- is the heroin traffic. (Heroin today is a five billion dollar illegal enterprise, but most of this sum is retained by the myriad of small dealers and their pushers who take over after the syndicates, as primary importers, break bulk after the initial smuggling, and sell to tributary dealers for ultimate sale to addict consumers by street pushers.)

Big Crime will not be defeated in this country until a way, consistent with the strictures of our Constitution, is developed that is able to reach through to its guiding intelligences. This can be done. This statement, however, is concerned with a proposal less ambitious and more urgent. The experience gained, though, might one day finally break the back of Big Crime.

The activities of Big Crime are bearable in the sense that failure to suppress them does not threaten an immediate social breakdown, except for heroin. This drug is producing a reign of terror in our cities that is caused by addicts desperate to obtain the funds to buy their drug. Existing levels of this criminality are coupled with a rate of increase

which implies escalation in the next decade or so to levels that could produce social breakdown in our major cities. There is really no hope of suppressing this blight through law enforcement unless the Big Crime syndicates can be driven from the traffic, and the way barred to ambitious petty criminal groups with ambitions to grow and replace them.

The way to accomplish this is to make heroin trafficking an unacceptable risk to the statuses of the crime boss chiefs of their syndicates, to their accumulated wealth, and to the very existence of the syndicate associations themselves. Businessmen, including criminal businessmen, will not risk too much to gain too little.

My proposed statute, hereafter explained in some detail, is emergency legislation directed at the narcotic drug heroin alone. It can be amended, but it should not unless another drug threatens comparable social damage. Other drugs, including the opium and morphine bases from which heroin is derived, at present are controlled sufficiently by the Drug Abuse and Control Act of 1970, and the conventional criminal laws. Heroin is not.

Heroin is a uniquely dangerous drug. It is at once psychologically and physically addicting. This means the pleasure it gives is attended

by pronounced physical body craving such as the need for water felt by a man suffering from dehydration. In the case of this drug the craving is peculiarly intense, probably in good part because even though its initial pleasures have receded the need, if the agonies of withdrawal are to be avoided, ever intensifies.

Given an adequate supply of heroin and circumstances where he is not engaged in a constant "hustle" to get the wherewithal to purchase it, inadequate evidence suggests the probable state of a typical addict is one of lethargic passiveness, attaining an almost dreamlike quality in the "high" intervals following each injection. Alcohol, amphetamines or barbiturates, by comparison, are drugs of raw violence in their effects upon users. And here is a critical distinction. It is not while he is sated with his drug, and has an adequate supply for future needs as well, that the heroin addict is dangerous. His condition is exactly otherwise; it is while he is in point of time removed from his last "fix" and engaged in the quest, usually criminal, to assure he will get the next one. (And the typical addict has little or no reserves of cash or heroin, which increases his sense of desperation). Failure to perceive this very critical distinction has produced some misleading comparisons between alcoholics and heroin users which obscure recognition of the special nature of heroin addiction. Heroin is dangerous to society because of the all-compelling drive to obtain it felt by its users.

Even pressed by their need, it is undoubtedly the case that heroin addicts prefer non-violent crimes of stealth to physical assaults. Their desperation is so great, however, and in the situation of most their talents are so limited, that they are driven in numbers to muggings, purse snatchings and armed robberies -- the so-called street crimes. In these situations their victims, preferably the old and the weak who are easier victims, get hurt, even killed. Moreover, burglary, usually classified a non-violent crime of stealth, is a crime of terror to persons whose neighborhoods are so invaded this nighttime crime of stealth becomes a feared prospect to be endured each night anew. Burglary is one of the most common addict crimes.

The overall police evidence is too strong to ignore. It is heroin which has produced the unacceptable levels of fear in large sections of our cities, particularly in the northeast. And the rate of increase in the last decade suggests a doubling of addict population about every four years. This can engulf our cities (and eventually their suburbs) in crime and terror in such degree only the very rich can be secure, living under the protection of hired guards.

Heroin actually is a cheap drug. It is because its production and supply system is complex enough that, interacting with intensive law enforcement, it becomes expensive. Not surprisingly, recognition of this has given rise to proposals by some persons with rather impressive

credentials that heroin simply be legalized, or at least be made available to anyone who is or becomes an addict.

There is no doubt this would totally destroy all financial incentive for organized crime to continue with the traffic. And, subject only to the admonition that a large increase in addict population might in some degree offset the abatement in street crime otherwise to be anticipated, there should be a very substantial decrease in addict-committed crime.

Unfortunately for this seemingly easy solution, there are two hurdles. The first (and it is unsurmountable in any time frame that could be acceptable for getting the heroin-caused crime plague under control) is that there is no chance in the next few years -- and probably no chance for much longer -- that the American electorate could be persuaded to attempt this solution.

The second is that in their reluctance there is an excellent probability the public instinct is right, that an unacceptable tradeoff is involved. Given large quantities of heroin about under at best loose controls, the boredom and recklessness of many of our people, particularly the young, and peer group pressures to "try it," it is no wild surmise we soon might have ten or more millions of addicts. The route from experimentation to addiction is very short with this drug, and its initial pleasures are so intense as to offer a glimpse of paradise, albeit it ultimately tragically false.

It becomes critical to know what would be the human quality of these addicts. Would they be welfare cases, and the rest of society faced with the alternatives of financial breakdown to care for them and their dependents, or, alternately, a rejection of responsibility, resulting in Asiatic attitudes where able men quite literally pass by other men dying of disease and malnutrition with indifference?

Unfortunately there is little hard evidence. The sated heroin addict is lethargic and withdrawn. If this means he is unreliable in reporting for work shifts, that his work at so dull a task as the production lines would contain unacceptable levels of error as a result of inattention, there is a huge problem here. Demanding employments, in the sense of such things as production lines (and not such things as medical practice, or the arts which are not demanding in this sense, though much more intellectual) are the sort of gainful employments on which most addicts would have to rely. If they couldn't meet these requirements they would swell the ranks of unemployables now on welfare. The burden of these, without the addition of an immensely greater mass of heroin victims, already strains the pocketbooks and tempers of taxpayers.

There should be conducted careful studies of the physical and mental qualities, and responsibility attitudes, of heroin addicts who are relieved of the constant hustle to obtain their drug. There are addicts enough now that a pool of subjects is at hand, experimentation with which will not increase their

damage. It would be irresponsibility of the worst sort to let what probably would be an irreversible condition arise in a large segment of our population unless we can predict with certainty it won't happen. This, too, involves an unacceptable time element for the control problem is now.

The possibility of drying up foreign sources of heroin through cessation of poppy cultivation can be dismissed quite shortly. Given peasant poverty, human greed, venal politics, the fact many nations of the world do not effectively control their hinterlands and the consideration opium narcotics have legitimate uses justifying a production many times that needed for illicit heroin, no responsible observer believes any except a minor degree of suppression can be effected by this means. This does not mean foreign opium controls should be abandoned. Everything helps.

Like it or not, then, we are driven back upon internal domestic solutions. And the internal bottleneck where the traffic is vulnerable if it is vulnerable anywhere is the Big Crime syndicate, a type of criminal association which has proved itself quite invulnerable to conventional criminal law enforcement.

If a successful combination of programs suppressing heroin is developed, we must have ready clinics to which the desperate addicts will be driven in their need for physical relief. Straight society needs this protection from the addicts, for the supply will not at once end, only tighten. Also, the existence of the clinics will help in the battle. Though

addicts do not leave their drug willingly, there is a difference between reluctance and desperation in the criminality likely to be caused.

One day, perhaps, an effective heroin antagonist will be developed. One hopes, but that day is not yet. Practical men work with what they have. What we have right now is a prospect of making the heroin supply so tight there will be no surplus with which to recruit new addicts, and beyond that a deficit so great that existing addicts will be forced to the methadone clinics. Because, unfortunately, the psychological aspect of heroin addiction means the rule is once an addict always an addict, the pressure must be unremitting, over many years, not just sporadic. Only so can the condition finally be rooted out.

The Powers of the Equity Side of Our Law

Equity is that branch of Anglo-American common law which developed under the chancellors of England, then the second officer to the king in the realm. Brought into square conflict with the common law developed by the judges of the King's Bench in the early years of the seventeenth century, long before there was a United States, there was established a conclusive principle that the Equity decree prevails when in conflict with what otherwise would be a defendant's right under the law. This superior relationship was fixed into American law as far as the federal government is concerned with adoption of the United States

Constitution in 1787.

The hallmark of historic Equity, and forever the source of its immense powers, is the concept that Equity acts in personam, issuing personal commands as the facts merit. When it acts, Equity acts not to punish for past dereliction, but in terms of the future to restore, then maintain acceptable conditions. It is a fair statement that, having identified an unlawful situation needful of correction, an Equity decree may go to whatever lengths are essential to bring about acceptable conditions, limited only by constitutional restrictions.

Common law Equity developed with many self-imposed jurisdictional limitations, though as common law it always is subject to further development. The common law, while appropriately ever cautious, never should become wholly static. In the last century and the early years of this one there was an unfortunate period of excessive rigidity, a condition long dissipated now.

Equity, on a common law basis, is the source of the decrees being made in the legislative reapportionment cases and in the school desegregation cases. Both of these areas test the constitutional limits of Equity powers and find them to be very great indeed when the demonstrated need for their exercise is sufficient.

Common law Equity normally will not enjoin the commission of a crime, though in exceptional cases where there is a continuing threat of illegal behavior injunctions have issued to prevent continued criminality.

The reasons for this limitation, which is not constitutional, probably had to do with the simple, single act type of criminality which was overwhelmingly the human experience when the historic limitation was laid down, coupled with a sense the decree would be ineffective against this type of criminal anyway. Indeed, how could these criminals often be identified in advance? It also may have in a degree been related to the fastidiousness of early chancellors, who may have been reluctant to reduce Equity to a service of coping with the dregs of society.

Most likely of all, the criminal law probably was adequate to its purpose in the historic period antedating the American Constitution. It is a cardinal principle of common law Equity that it will not take jurisdiction and act when the remedy at law is adequate. A rather overwhelming case can be made today that the conventional criminal law has proved wholly inadequate to control the continuing, predictable future criminal operations of organized crime syndicates.

In addition to common law Equity, there has developed statutory Equity. Statutory Equity is an enacted directive from a legislature to the courts that equitable remedies shall be applied, or withheld, in particular situations, without regard for whether there was common law coverage or abstinence. There is no doubt of the power of legislatures so to alter the law so long as they stay within constitutional limitations.

The classic example is the Sherman Act which at once, operating upon the same facts, is a criminal statute requiring proofs beyond a

reasonable doubt to juries and a civil statute permitting injunctions against probable future anti-competitive behavior after trial to a judge in which violations are established by a mere preponderance of the evidence.

The same general structure is found in the Federal Securities Acts, where felonies are involved on the criminal side. But one need not labor the point. The Congress already is committed to the concept that felonious behavior can be made the subject of civil injunctions as well, both in the Organized Crime Control Act of 1970, and even more specifically in the area of drug controls by the Drug Abuse Prevention and Control Act, also enacted in 1970.

The flaw in these two acts is that, having authorized the remedy, the Congress failed to provide any indications as to how implementation could be accomplished. The legislative histories are not helpful.

Unlike the 1890 Sherman Act, which lay virtually quiescent for two decades before a serious enforcement pattern began to develop, there is no room for leisurely development by federal judges of appropriate restraints in the area of heroin suppression (though such should be encouraged). Here there is a clear and present danger to a compelling national interest -- now. Here the Congress should, indeed must, provide approved remedial devices if early action is to be had. In fact, cases for decree development by the courts have not yet been brought. Criminal enforcement attorneys are not very Equity conscious. They simply do not

think in these terms. A detailed statute and a specific staff somewhat comparable to the civil injunctive decree specialists in the Department of Justice's Antitrust Division are what is needed.

Analysis of the Proposed Statute for Civil Control of the Heroin Traffic

The Act here proposed is very narrowly drawn in order to attain maximum constitutional reach. In the first place it is limited to heroin, trafficking in which is declared to be clear and present danger to our society and its economy when not effectively suppressed. Nor is it legislation of general application, but emergency legislation intended only for temporary applications when the President determines special suppressive effort is needed. It is subject to the safeguard that Congress as well as the President can terminate an emergency implementation, and the yet further safeguard of independent evaluation by a board of state judges willing to perform the service who will pronounce whether there should be an emergency implementation, or termination thereof. With all these limitations, and considering the specific heroin evil at which it is directed, the Act's reach should be at about the maximum possible under our Constitution.

It is possible some of the restraints specified in the Act might fail absolutely; it is more likely they might fail in particular applications. Some, especially the ultimate monitoring restraint, very likely never will

be tested because, long before that stage is reached, the other members of a criminal syndicate would have deposed a crime boss as no longer useful, and even dangerous to have about. Once competent attorneys versed in the rules of Equity have explained to the syndicate bosses the horrendous possible consequences of running afoul of this statute, it is at least unlikely they will permit their positions and fortunes to be hazarded by continuing with trade in heroin. They might even order surreptitious cooperation in "fingering" lesser criminals who do continue in the traffic as a means of more securely establishing their innocence of dealing in the drug.

Thus, though more broadly drafted in its language, the primary target is a very small group of criminal big businessmen -- to use corporate terminology, the chief executive officers of Big Crime. The group probably numbers less than 50 men. To hold the Act to its real purposes cases brought under it are subject to the strict control of the Attorney General, in about the same fashion as are Sherman Act Section 4 cases. (This Sherman Act section, case developments under it in the past three-quarters of a century, and first hand knowledge of how the Sherman Section 4 suits are feared by transgressing business executives were the inspiration for undertaking to develop the proposed Act.)

It is up to the Attorney General to decide if there is enough

evidence with which to proceed criminally. If there is, criminal prosecutions should be preferred. Nor, it is to be noted, are these antagonistic to civil restraints. Indeed, a successful criminal prosecution eliminates the necessity of proving the civil case. That becomes an issue already proved.

There is one exception to the focus on top criminals. By procedures, which in practice probably will take the form of consent decrees, it is proposed to obtain simple "go and sin no more" injunctions against small-time criminals dealing in heroin when these persons are convicted or otherwise are persuaded to accede to the injunction. These decrees simply would command future observance of the violations section of the Act. They are not for the purpose of bringing minor criminals within the toils of a pattern of increasingly intensified restraints if there is disobedience; that exercise would not be worth the effort. Rather the purpose is to lay the basis for giving notice to suspected superiors that these persons are under restraints. If thereafter these superiors directly or indirectly have dealings with these minor criminals who are subject to decree, they then can be treated as aiders and abettors, and themselves contemnors under Rule 65(d) of the Federal Rules of Civil Procedure.

This restraint will throw constant confusion and ever-increasing risk into the business of supplying a heroin distribution system, further increasing the pressure on syndicate bosses to get out of this drug.

Occasionally, too, a middle executive of a syndicate hierarchy may be caught as an aider and abettor. Though the top is not reached, this is a desirable end in itself; also it may occasionally produce an informer, particularly if the middle level man suspects he might be executed for his carelessness.

The usual violations permitting implementation of this Act against small-time criminals will not be conspiracies, but actual physical sales and deliveries of heroin. The top men will be reached when they are reached through proved conspiracies to support sales and deliveries.

The core structure of the statute centers upon conspiracies to traffic in heroin, with an openly expressed legislative invitation to the President to seek persistently to extend the Act's reach beyond the territorial jurisdiction of the United States as he is able through treaties. Proof in these cases never will be easy, but never as difficult as in the corresponding criminal cases to even higher proof standards. Section 4 of this Act is a verbatim copying of Section 4 of the Sherman Act. It is intended thereby to invite exploration of the circumstantial evidence type of proof tactics which have been so successful in the antitrust field. Important, too, not only will the proof standard be less, but trial will be to life tenure federal district judges. Life tenure federal judges constitute probably the one class of persons in this country capable of consistently facing down both the blandishments and the threats of Big Crime.

As aids for obtaining evidence to prove the conspiratorial violations contemplated, this Act contains two important and novel ancillary devices. The first, intended for use only in instances where critical evidences can be obtained against a top boss which could not otherwise be obtained, is authorization for the Attorney General to strike a bargain to the effect that, in turn for informing the evidence given can be used only in the civil suit, unless thereafter the informer meets with foul play. If that happens the evidence can be used for criminal prosecutions. The purpose is to hang the threat of serious criminal prosecutions as swords of Damocles over the heads of the syndicate bosses and make them desire informers against them be preserved instead of executed. This should create a situation where an occasional informer with critical testimony will come forward, such as syndicate members fallen from grace who fear for their lives, convicts who desire to bargain for lesser sentences, and perhaps occasionally outraged mistresses. Even more likely the Big Crime syndicates' bosses will take their organizations out of heroin in preference to risking the emergence of such informers. Remember they do not have the option as to whether they will be criminals. They are that already. Only the evidence to convict for what they already have done is lacking.

Because there is a constitutional right to a speedy trial it is necessary to condition this procedure so that a person accused by the

testimony of such an informer can demand that the evidence be taken before a grand jury for possible indictment at any time. If this alternative is followed the Attorney General is directed to increase the security afforded the cooperating informer. It is much to be doubted demands for speedy criminal trial will be made. The bargain to inform is intended to be made only for evidence of truly damning effect.

The second device is to establish with proofs the existence of a crime syndicate that deals in heroin, proscribe its existence, and then, as contemnors, bring members who were notified of the ban within the Act's web of intensifying personal restraints if they thereafter persist in maintaining their association. (The statute is drawn in terms of a criminal association membership as small as ten persons. This is only for the purpose of reducing a technical proof burden. It is expected the Attorney General would seek to proscribe only crime syndicates of such size and sophistication that the criminal law is inadequate to reach their top men.)

Despite that the existence of the Mafia families and other large syndicates is notorious, criminologists have despaired of attacking the organization themselves, at the same time saying that until this problem is solved organized crime is above the law. It just happens, however, the civil law, in terms of the Sherman Act Section 4 cases, has long experience with identifying the entity of an illegal conspiracy,

then ordering its dissolution. The same can be done here, particularly if expert opinion police intelligence evidence is admitted without having to lay a direct evidence foundation for the opinion testimony. This statute so authorizes, and there is nothing constitutional about the hearsay rule per se. The Congress can, if it wishes, authorize the reception of hearsay evidence for consideration by the trier of fact. The pertinent constitutional limitation is due process, in terms of the overall sufficiency of the evidence.

Once his syndicate association is proscribed a boss is in serious trouble. It is going to be considerably easier to prove he continued with his syndicate than that he committed, or conspired to commit, any specific criminal act. So again his probable reaction once this procedure is understood would be to get out of heroin trafficking. The risks are too great. The whole syndicate operation, not just the heroin business, is put in jeopardy, with the man at the top, because he is the leader, especially exposed.

As they have under the Sherman Act, the federal courts are invited to develop their own decree restraints which will have the effect of inducing the obedience of defendants in the future. The initial decree contemplated against a member of a syndicate command structure would command obedience to the law, thereby singling him out. If the initial case against him was proved by clear and convincing evidence, he could for failure

to obey his decree be subjected to forfeiture of all or such part of his assets, hidden as well as revealed, as the court had decreed. The consequences of this restraint, operative beyond a defendant's lifetime against his estate and his successors, are backed by various ancillary devices designed to ferret out concealed assets and, through treaties now or in the future arrived at, put assets hidden abroad in increasing hazard. This is a threat of such immense proportions to men whose life goal has been accumulation of wealth that it, alone, well could pull the crime bosses up short. After all, what is money worth if it neither can be enjoyed presently nor left to descendants with real certainty they can keep it? Because many of these men are very family conscious, the hazard presented becomes even more horrendous when it is realized it threatens accumulated investments in legitimate business ventures, too, from all sources and for all the past. Yet if the parable of the widow's mite, or the example of a poor man caught up in a peace bond proceeding has validity, why should not all assets of men so viciously anti-social as to engage in the heroin traffic be forfeited even though multiple millions of dollars in wealth were involved?

Beyond these decree terms there are two major intensifying restraints for later applications against syndicate bosses who manage to weather being singled out in an initial decree and remain at the heads of their syndicates (a result few syndicate memberships are likely to permit).

The first is area exclusions, justified by compelling national interest in the clear and present danger to the nation's social and economic structure. This restraint is supported by the Japanese-American exclusion cases of World War II. These cases enunciate good law and are precedents currently in force, distasteful as is the misjudgment that forced some 70,000 loyal American citizens from their areas of domicile.

With this restraint a boss not only is singled out, he is rendered virtually useless by enforced removal from the turf on which he conducts his operations. No syndicate master can survive this.

Nevertheless, as an ultimate restraint for a defendant who might somehow keep power, there can be ordered monitoring attendance by law enforcement agents, of such durations and intensities as a court deems necessary to interrupt communication with his subordinates. This restraint presents a constitutional issue for which there is no analogy in the precedents. It is, however, a constitutional issue unlikely ever to be fought out, for it supposes a crime syndicate with a death wish to create the test. If it is ever fought out the factual case will be strong, involving multiple recalcitrant refusals to obey the court.

The contempts contemplated for usual applications are civil, not criminal. The United States has a proprietary interest in its commerce and social structure sufficient to entitle it to protect that interest with civil contempt process. Also, the measure of criminal contempt is punishment, a set

fine or imprisonment imposed for past conduct to vindicate the authority of the court. Here the objective is to structure and restructure a decree as necessary to coerce obedience in the future and there is no loss until the terms of an already extant decree are violated.

Other restraints specifically to be authorized by Congress are deportations of aliens, forcible detentions for rehabilitation of heroin addicted defendants and the forbidding of certain continued personal associations. This last restraint is questionable, but supportable by a number of older cases enjoining third persons from further association with a spouse in order to protect a marital relationship. None of these are really important devices.

The proposed legislation contains a section entitling a defendant who is notified that adverse litigated fact findings are about to be entered against him to avoid this by volunteering to take, and successfully passing, polygraph tests. The best opinion is that not more than one in ten persons can defeat the test. For the purposes of this law a nine out of ten accuracy is quite sufficient to accomplish the purpose. The section is a concession to defendants in no way essential to the basic structure of the Act.

The severability section is drawn in a stronger style than the standard federal phrasing. So long as this Act substantially survives, or unconstitutionally occurs only in application, it will present a risk to their continued status as masters of their organization, to their fortunes and to the very existence of the syndicates they control which the Big Crime

bosses, as cautious and prudent men, should be unwilling to take. This of course is surmise, which really can be tested only by putting a statute such as this one on the books.

The National Commission on Marihuana and Drug Abuse in its Second Report with which it concluded its existence, at page 237 said, "Innovative ideas should receive serious attention from policy makers, and, if promising and constitutionally permissible, they should be tried." These words were directed to a much less developed earlier version of the statutory structure here proposed.

A Concluding Observation

Inevitably one engaged in the lengthy study and reasoning processes which attended the development of the proposed Act will measure mentally whether the concept could be expanded into a weapon for checking organized crime in its activities other than the heroin traffic.

The answer is that it could be used, but the power is too great and dangerous to be in a statute of general application. On the other hand, as an emergency weapon used only to the extent necessary to redress the balance when the corrupters have been too successful in subverting police, prosecutors and state courts, and confined to organized crime activities which are not politically sensitive, it would have much merit. (As a practical matter the only significant organized crime

activity which would need to be excluded from the reach of injunctions is organized crime activities in the labor union contexts. None of the rest, such as gambling, loansharking, extortion, prostitution and fencing stolen goods are politically sensitive in any legitimate sense.)

These are the bare elements of a statutory plan which could be used to restore conditions grown intolerable so that usual criminal law enforcement procedures again would be sufficiently effective:

1. The statute should be operative so cases could be filed under its provisions only during periods of declared emergencies. Violations to be proved, however, should not be restricted to occurrences in intervals of declared emergency.

2. In this instance the Congress, not the already excessively powerful presidency, should declare the emergency. The emergency would have a set duration of, say, three years for the filing of cases thereunder. Trials of cases filed, and durations of any ensuing decrees, would not be restricted to emergency periods.

3. No area not wholly included in the confines of an individual state should be the subject of a declared emergency, and only two or three emergency implementations for the filing of cases should be permitted at any one time. This is to ensure only a small portion of the nation has within

it courts and government attorney staffs operating in terms of the extraordinary powers conferred.

4. Upon congressional declaration of an emergency the President would be required to appoint, subject to Senate confirmation, a local attorney from the affected area, not of his own political party, to direct the rehabilitation effort. This attorney should be a man of outstanding character and competence, not strongly identified with partisan political activities for at least six years last past. He should be old enough as probably to be beyond personal ambitions for political office.

5. The statute should specify a schedule of congressionally approved restraints. The federal district courts should be invited to develop restraints independently as well.

6. Adequate independent financing for the rehabilitation effort should be provided at the outset, and all federal investigative agencies directed to provide, and state agencies requested to provide, full cooperation to the appointed attorney.

Assistant Attorney General Petersen puts the problem we need to surmount very well:

> Basically, what we're trying to do is remove the experts -- reduce organized crime to the garden variety of crime. We want to get away from

> corruption and the fear of reprisal against witnesses and the obstruction of justice. If we can get it out of being a business and down to the basis of individual crimes committed by individual persons, then we can handle it much better.

The remaining big weapon untried in what thus far has been a losing battle is the power of the ancient branch of our law known as Equity. We should use it now, too.

PROPOSED EMERGENCY CIVIL DRUG CONTROL ACT

1. TITLE

This Act may be cited as the "Emergency Civil Drug Control Act of 197__."

2. PURPOSE AND IMPLEMENTATION

A. Purpose. The Congress finds that the illicit drug traffic within and without the jurisdiction of the United States specified in section 3 hereof adversely affects commerce by reason of destructive effects upon persons addicted, and the communities they inhabit, which direct effects also are attended by indirect adverse effects on persons and communities not directly affected. These adverse effects are so pronounced that there will exist during intervals when trafficking in the drugs subject to this Act is not effectively suppressed, a clear and present danger to the functioning of the national economy and its parts. It is a primary objective of this Act to authorize and encourage the federal district courts to complement criminal enforcement with the development and utilization of appropriate civil restraints, particularly including injunctions, in a manner generally paralleling developments under the Sherman Act

(the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. § 1 et seq.) for the suppression of this traffic. Because an immediate and critical need exists to accelerate the development of restraints which will accomplish this objective, certain specific devices are authorized and recommended by the Congress in section 9 hereof.

B. Emergency Implementation. Except as otherwise agreed by treaty, proceedings under this Act may be initiated only during intervals the President has proclaimed an emergency needful of its implementation to exist, and has not by subsequent proclamation, or the Congress has not by resolution, declared the emergency at end. However, this limitation shall not prevent regular disposition of any complaints filed during an interval of emergency implementation, nor shall it restrict the powers of the federal district courts at all times to maintain in effect decrees entered and modify them to make more or less stringent their terms pursuant to applicable procedures under this Act, or at all times deal with contemnors, including persons who become such by reason of aiding and abetting defendants already subject to decrees under this Act, or who at any time become or continue as members of criminal associations outlawed pursuant to this Act. Evidence proffered in support of a case or other proceeding under this Act shall not be limited to occurrences during intervals of emergency implementation; however there must be proved a

violation of section 3 hereof during an interval of emergency implementation before an initial decree can be entered unless the violations giving rise to the initial decree are aiding and abetting, or criminal association membership violations, in which instances initial decrees can be entered despite the absence of a current period of emergency implementation. The operation of section 10 hereof, concerned with the use in criminal prosecutions of the deposition transcripts there described, shall not be restricted by the absence of a current emergency implementation interval, nor shall the suspensions there described of the running of limitations be so limited.

C. Relation to Criminal Law Enforcement. This Act is intended to complement criminal enforcement. Where evidence is inadequate for federal or State criminal charges, consideration shall be given to bringing civil proceedings hereunder. Also, after successful federal or State prosecutions which establish the factual elements of a violation of this Act as well, consideration shall be given for availing such proofs or admissions of guilt as the basis for subjecting defendants to the restraints of this Act as well. Also, consideration shall be given to obtaining consent decrees in conformity with this Act where possible, whether or not complicity is admitted or has been proved. That a federal or State criminal prosecution has been

filed involving charges that also constitute a violation of this Act shall not limit application of this Act in a wholly independent manner provided that the Attorney General certifies such is desirable, stating the reasons for his determination. Probable excessive lapse of time before a final criminal disposition shall be a valid reason if the criminal defendant is at liberty, on bail or otherwise.

3. PROHIBITED ACTIVITIES

A. Violations by Contract, Combination or Conspiracy. Any contract, combination or conspiracy is unlawful which has among its objectives the sale or delivery of heroin in any State or other area subject to the jurisdiction of the United States where the sale or delivery contemplated is prohibited by State or federal law. Any such conspiracy is unlawful per se, without regard to whether sale or delivery was consummated, or other acts in furtherance of such objectives were committed, provided that for the purposes of this paragraph no law enforcement personnel may be involved in such manner as would raise an entrapment defense in criminal law.

B. Violations by Consummated Sale or Delivery. Any accomplished sale or delivery of heroin, including sale or delivery to (but not from) law enforcement agents, which violates any State or federal law constitutes a violation of this Act, provided that this paragraph is subject to the same entrapment limitation as the previous paragraph.

C. Treaty Based Violations. In instances where the United States by treaties agrees with other nations that the types of activities, or any of them, described in sections 3A and 3B hereof shall be illegal if engaged in to effect the sale or delivery of heroin anywhere in the world, or designated portions thereof, such illegality shall be unlawful under this Act. The Attorney General shall proceed under the authority of this Act to cooperate with the authorities of other nations, either to bring violators to trial under their laws, or to trial in the United States under this Act, as he deems most expedient in particular circumstances of particular cases. The limitation of this Act to intervals of declared emergency shall not apply to cooperation with foreign authorities for the purpose of bringing proceedings under their laws.

4. JURISDICTION OF COURTS

The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing

and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

5. DECREES

A. Initial Decrees. A court before which a complaint seeking an initial decree under this Act is brought may issue an injunction forbidding, in general terms tracking the language of the statute, future violations of section 3 or any part thereof upon proofs by a preponderance of the evidence that the defendant has violated this Act. Such initial decree also may incorporate in addition the financial restraints of section 9A hereof if the court finds the violation alleged to have been proved by clear and convincing evidence. Initial decrees incorporating the section 9A restraints also may be obtained through res judicata and judicial estoppel effects where there have been criminal convictions (including nolo contendere dispositions) in federal or State criminal cases which incorporate the elements of any violations of this Act.

B. Consent Decrees. Consent decrees incorporating terms upon which agreement is reached may be entered into at any time where a decree might have been obtained through litigation. Consent decrees shall be approved by the court before they become effective, but once effective shall be as any other initial decree or modified decree in further proceeding under this Act.

C. Civil Contempts. No person already subject to a decree entered under this Act shall be held in civil contempt thereof except upon clear and convincing proofs to the court the decree has been violated.

D. Modifications of Decrees. A court may modify and make more or less stringent the terms of any decree to the extent it deems necessary to obtain future obedient behavior on the part of a defendant, but after entry of the initial decree, except for changes by consent, more stringent modifications may be made only on proofs the defendant is in civil contempt of the decree to which he currently is subject, provided this shall not operate to limit repeated summary adjustments upward in the extent of the financial restraints in section 9A hereof, or the reimposition of any restraints on particular defendants that had been in effect previously but were reduced or suspended by the court.

E. Civil or Criminal Contempt. Whenever the terms of a decree have been violated it is the intent of Congress that, to the extent feasible, enforcement shall be by civil contempt process, except upon there developing a history of insincere assurances of cooperative conduct that is necessary to successful implementation of a decree, or where civil contempt process is unlikely to produce future obedient behavior because of the particular circumstances or past record of behavior of a defendant, resort to criminal contempt process is appropriate.

Citations for civil and criminal contempt shall be brought under the direction of the Attorney General by the United States attorney serving in the district of the federal district court which made the decree allegedly violated.

6. VOLUNTARY EXONERATION PRIVILEGE

No decree that depends on litigated findings of fact under the procedures of this Act shall be entered against a defendant if that defendant, within ten days of notice from the court of the fact findings proposed to be entered demands, and subsequently is exonerated in polygraph tests. These polygraph tests shall consist of two independent testings by competent operators, randomly selected by the court from lists supplied by the Federal Bureau of Investigation. To exonerate, a test must satisfactorily establish in both testings that, in the opinions of the operators, the defendant probably did not participate in the essential operative facts found. This section shall apply to initial injunctions and intensifying modifications of outstanding decrees, but shall not operate in the latter instances to prevent continuation of existing decree terms, nor shall it apply to reimpositions of restrictions previously at some time ordered and in effect.

Should either or both polygraph operators' opinions result adversely or inconclusively the court shall proceed to enter its decree, provided that if both tests are inconclusive the court shall permit further testings by newly selected operators before entering its decree if demanded.

It shall be the joint responsibility of the Attorney General and the Director of the Federal Bureau of Investigation to devise and maintain a system for these examinations under the supervision of the Federal Bureau of Investigation which is as proof as practically possible against subversion of results. No Federal Bureau of Investigation personnel shall give an examination hereunder, but examinations shall be remotely monitored by Bureau personnel expert in polygraph testing while testings are in progress. Not more than one of the operators employed to give a test may be an employee of any government, including municipalities, and at least one must be a private contract operator. All operators immediately prior to conducting a testing hereunder shall be required to declare on oath or affirmation, on pain of perjury, whether they have been approached directly or indirectly with the possible objective of seeking to influence their evaluation in the case of the examination about to be given. If such is the case an operator so affected shall be disqualified and replaced with another.

7. VIOLATIONS BY AIDING AND ABETTING

A. Aiding and Abetting. Any person who knowingly aids and abets a restrained defendant in acts violative of the decree to which such defendant is subject, or joins in an association outlawed pursuant to this Act, is himself a contemnor in the manner described by Federal Rule of Civil Procedure 65(d). No identity of treatment among defendants

already restrained and persons who have thus aided and abetted is required in framing the decrees and decree modifications which may be entered upon such occurrences, problems of ensuring future obedience from particular defendants always being for the sound discretion of the court. Third persons who become subject to decree restraints for the first time pursuant to this section may be subjected to any and all restraints or combinations of restraints identified in this Act, or developed by the courts, without limitation by reason of lack of a prior history of violations, except that two successive instances of aiding and abetting, or one such instance in combination with another civil contempt under this Act, shall be required before the monitoring attendance restraint described in section 9H may be imposed.

B. Decree Notices to Third Persons. It shall be the responsibility of the Attorney General to develop and institute a system of notices to persons who could be expected to join with defendants who have been subjected to decree restraints under this Act if such defendants violate their decrees, or join in associations that have been outlawed pursuant to section 8 hereof. He shall cause to be made a regular record of the services of such notices, including the terms of the decrees noticed to such persons. The original evidences of these notices and their contents shall be deposited in the Administrative Office of the United States Courts. This notice procedure and its record shall not

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be made public except as notified persons are thereafter proceeded against as knowing aiders and abettors.

8. OUTLAWED ASSOCIATIONS

Any association of ten or more persons in which there exists a formal or informal hierarchy of authority, and its identifiable successor associations whether or not membership remains identical, which is trafficking in drugs in a manner made illegal under section 3 hereof, may be proscribed and its dissolution decreed by the court. Proceedings for such outlawing decree shall be against the association, identifying it by its more notorious popular names. Notices that such proceedings impend shall be served upon known or suspected members to the extent these can be identified and located, which service may be either by personal delivery or mailing and in conformity with due process notice requirements. Any person, whether or not served, shall have standing to appear on the hearing day and may offer evidence of the non-existence of the association alleged or, conceding its existence, evidence which tends to refute its members dealt in drugs in violation of this Act. Whether or not there is opposition, affirmative proofs in terms of clear and convincing evidence must be made of the existence of the association and the illicit trafficking. Evidence of existence may be rested on the opinions of qualified expert witnesses, particularly including police intelligence personnel. It shall not be

necessary to lay any foundation beyond evidences of service background for such testimony, and opinions and conclusions shall not be excluded because all or part of a witness's background depends upon reports regularly made in the course of police work. Proofs an association trafficked in violation of this Act may be accomplished by evidence that two or more of the association's members (which membership includes for this purpose persons who are in tributary status to the association as well as recognized members) have performed acts which violated section 3 hereof, or would have so violated had an emergency implementation been in effect, within four years preceding the filing date of the complaint. Upon proscription of an association by outlawing decree, copies of such decree shall be served upon all persons originally served or that appeared, and upon any other persons it is deemed desirable to notify. A regular notice record of these services shall be made and kept as part of the given notices record described in section 7A.

9. DECREE TERMS AND ENFORCEMENT

It is the intent of Congress that upon finding a defendant in civil contempt of a decree issued pursuant to this Act the court shall exact the consequences for violating the decree according to its terms. Additionally, the court shall proceed to impose such additional restraints by modification of its decree as it deems needful adequately to increase

the probability of future obedience.

The federal district courts are encouraged to develop appropriate restraints, accepting that in this area of law enforcement the constitutional limits must be tested in order to reach and suppress the leadership of the major organized crime syndicates at which this Act primarily is directed. In addition, the following specific restraints are approved on the responsibility of the Congress for application by the courts in their discretion, singly or in such combinations for particular instances as deemed appropriate:

A. Financial Restraints. (1) Conditioned upon obedience to the decree it has made the court may require the posting of (a) a cash bond, (b) a voluntary surety bond, (c) a commercial surety bond, or (d) the designation of an account or accounts of a defendant, to be managed by an acceptable trustee or other nominee, from which capital withdrawals shall not be permitted except on terms from time to time authorized by the court, though earnings may be paid over to the extent not ordered impounded to enlarge the capital account and in any case as needed to meet tax obligations and for necessary living expenses. These alternatives may be applied singly or in combination, including other financial restraints developed by the courts which serve the evident purpose hereof. However at no time shall the restraint ordered exceed a defendant's total net assets, including indirect and beneficial

ownerships of assets, as found by the court upon inquiry using as necessary the methods of discovery. A defendant shall be freed from any physical restraint that has been imposed to compel his cooperation in effecting the financial restraints ordered upon obligating himself as required by the court to an extent within the limits of the net assets ascertained.

(2) Additional to the restraints rested on ascertained assets, there may be concurrently stated, and from time to time summarily revised and restated, an amount of obligation greater than the ascertained assets, amounting to multiple millions of dollars of exposure to potential forfeiture in cases where hidden assets of such magnitude are suspected. This liability shall be in addition to the ascertained obligation. Such undisclosed assets may be decreed forfeited, and thereafter shall be subject to seizure when and as discovered. It shall be a permissible variation in stating this contingent liability to describe the amount subject to forfeiture as a fraction or the whole of the assets owned by a defendant as of the time of entry of the initial or modified decree as the case may be. In all instances of forfeiture proceedings against such assets the burden shall be on the defendant, or successors claiming through him if he is deceased, to prove that assets claimed exempt because not accumulated until after the time of entry of the decree were in fact so accumulated. These forfeitures shall be enforceable

beyond a defendant's own lifetime, against his estate, and against assets or the traceable proceeds of assets, in the hands of descendants and any other persons except bona fide purchasers for full value, which from time to time can be subjected to the jurisdiction of the United States by in rem or in personam legal processes, including extensions of these processes beyond the geographical jurisdiction of the United States by treaty arrangements to reach persons and assets found in the jurisdictions of other nations.

(3)(a) Defendants subject to this section 9A may be ordered by the court to submit sworn reports of their assets, where and however owned, including indirect beneficial entitlements. A proper claim of constitutional privilege against self-incrimination may avoid this reporting, but a privilege so claimed may be considered by the court in evaluating the extent of liability to forfeiture to be imposed upon hidden assets. (b) Defendants may be ordered to specify in advance for a next succeeding month probable sources and amounts of money and other things of value, including credit, on which they anticipate they will directly or indirectly depend for the support of themselves and their dependents during such ensuing month. A persistent pattern of failure of these forecasts substantially to conform with after-the-fact evidences of actual sources used, which discrepancies are not satisfactorily explained, may be considered in evaluating the extent of

liability to forfeiture to be imposed on hidden assets, and may form the basis as well for a contempt citation as appropriate in the circumstances.

(c) Additionally defendants may be ordered to sign authorizations directing known or suspected custodians of assets, including foreign custodians of assets outside the jurisdiction of the United States, to submit a defendant's accounts under a particular custodian's control for inspection, or to deliver over such assets for disposition under this Act, or both. It is intended that in compelling these authorizations all reasonable effort shall be made to penetrate the uses of aliases and nominees to obscure true ownerships to the full extent available evidence permits and other nations will cooperate in terms of treaty undertakings or comity.

(4) Any sums or other assets obtained pursuant to forfeitures for violations of the conditions of decrees shall be paid over to the Surgeon General of the United States, by him to be expended as deemed prudent in research and rehabilitation designed to aid the victims of the drugs mentioned in section 3 of this Act.

B. Transfer of Assets. Defendants may be ordered to obtain advance court approval for the physical transfer out of the United States jurisdiction of United States and foreign moneys, any instruments payable to bearer or otherwise transferrable in such manner as to be collectible outside the United States by a defendant or another for the benefit of a

defendant, and precious metals, gems or any other physical substance having a value to weight ratio in excess of one thousand dollars a pound, in which items a defendant has any direct or indirect ownership. The ownership interests of defendants and those acting in concert with them in such items, when transported in defiance of these requirements, shall be subject to seizure and disposition under the provision of section 9A hereof to the extent there are decree terms for disposition. In the absence of or to the extent there are not such terms the items shall be subject to confiscation.

C. Continued Membership in Proscribed Association. Knowingly maintaining or initiating membership in an association outlawed pursuant to section 8 of this Act shall be a basis for subjecting such persons to an initial decree containing the general prohibition described in section 5A and, if deemed desirable, in addition, the financial restraints described in section 9A. For the purpose of implementing this paragraph there must be proof of the continued existence of the outlawed association and the person's membership therein by clear and convincing evidence. The record in support of the decree proscribing the association shall be admitted as part of the record in this proceeding, but there shall be no requirement to show the proscribed association has continued to traffic in any drugs inasmuch as the association is outlawed for all purposes when proscribed.

D. Area Exclusions. The court may order physical exclusion of a defendant from metropolitan areas, States, or entire regions as deemed necessary effectively to separate a defendant from areas in which he has controlled or participated in control of activities by others violative of section 3 hereof, but no defendant ever shall be reduced to less than a reasonable range of desirable climates and living conditions within a part or parts of the contiguous forty-eight States, provided that such areas need not include any metropolitan areas with a population in excess of one hundred thousand as defined by the Bureau of the Census in the most recent census.

E. Deportation. The court may order the deportation of defendants who are aliens.

F. Rehabilitation. The court may order the forcible segregation for treatment of any defendant who is both addicted to a drug, the illicit trafficking in which is subject to this Act, and who has been a direct or indirect supplier of such drugs for profit. Rehabilitation treatments may not exceed in duration three years, but may be imposed and reimposed as necessary to effect a permanent cure.

G. Forbidden Personal Associations. The court may forbid continued association by a defendant with specified persons, always excluding from the ban, however, direct ancestors and descendants

of the defendant, and of the spouse of such defendant.

H. Monitoring Attendances. When a defendant has been found in civil contempt of an injunction or its subsequent modifications entered pursuant to this Act two or more times, the court may require the defendant to accept the monitoring close attendance of Federal Bureau of Investigation agents for such periods of time and during such hours of the day, including unbroken close surveillance, as it deems necessary to render the defendant incapable of functioning in the command structure of any criminal association of which he is a member, whether or not proscribed by this Act. A person who knowingly aids and abets a defendant subject to decree is thereby, at once, a second violator within the meaning of this paragraph. In imposing this restraint the court shall give due consideration to whether the effect will disrupt the command structure of a criminal association in a manner significant enough to justify this use of law enforcement personnel resources. This restraint may be lifted and reimposed from time to time in summary fashion as the court deems will accomplish the objective of rendering a defendant ineffective in a criminal association hierarchy. Subject to that primary objective the sensibilities of defendants shall be respected to the full extent possible.

I. Time of Effectiveness for Decrees. The operation of decrees

under this Act shall not be suspended pending finality through exhaustion of appeals in the instances of the restraints authorized by Sections 5A, 9A, 9B, 9C and any other decree terms which do not involve personal restrictions upon defendants or orders to forfeit assets previously decreed to be subject to forfeiture.

J. Criminal Contempts. When necessary to discourage with punishment insincere and contumacious conduct, or where civil contempt process is not likely to be effective by reason of the attitudes of particular defendants, a defendant may be cited for criminal contempt and if found guilty imprisoned for periods not exceeding six months in any instance. Juries may convict in these criminal contempts upon determinations of guilt beyond a reasonable doubt by ten of twelve or five of six jurors.

10. OBTAINING EVIDENCE

A. General Provisions. All usual means for obtaining evidence for use in civil litigation are authorized. In addition, all legal evidence gathering methods, devices, tactics and procedures of federal criminal law enforcement are authorized for the purposes of this Act, except that electronic surveillance devices for interceptions of communications may not be used by authority of this Act. However, all evidence legally obtained pursuant to bona fide criminal investigation procedures may be offered in evidence for the purposes of this Act as well.

B. Special Provisions to Encourage Informants. The Attorney General is specially authorized hereby to negotiate with potential

informants whose testimony is deemed of significant importance, and which otherwise probably could not be obtained, on the basis that the testimony given will be used only for the purposes of civil enforcement under this Act, except as grand jury presentments are demanded as hereafter in this section set forth. However, if an informer thereafter is assassinated or has disappeared in circumstances where it is determined by the court the disappearance probably is related to his informing, the deposition described in the next paragraph and the transcript of the testimony actually given by the informer at trial pursuant to this Act may be offered in federal felony prosecutions to prove the guilt of any person who was duly notified, to the extent of all alleged felonious activities that were fairly disclosed in the notice that was given such person prior to the taking of the deposition. Complete transactional immunity from federal and state prosecutions to the extent of involvement in the activities described in the testimony given, shall be granted informers for testimony obtained in this manner.

C. Deposition of Informers. When agreement to testify is reached with an informer the deposition of such informer shall be taken in camera with all due dispatch before a federal district judge, actually sitting for the purpose. Prior to the taking of this deposition identifiable persons who may be affected adversely shall be notified of the alleged felonious activities anticipated to be disclosed by the testimony insofar as these activities pertain to them, and of the time and place of taking the deposition. Notice procedures shall be developed by the Attorney

General consistent with due process requirements for the giving of these notices. Persons served with notice, may appear, confront and cross-examine the deposing informer in person or through counsel. Depositions so taken shall be usable in subsequent criminal proceedings only against defendants who it is shown actually received the notice and had an opportunity to know its contents.

D. Deposit of Depositions. The signed transcripts of deposition testimony shall be sealed and deposited in the Administrative Office of the United States Courts. A sealed copy to be lodged with the court where taken may be opened and inspected under the supervision of the court by the informer, any notified person and any other person the court determines has a legitimate special personal interest in its contents by reason of possible future criminal prosecutions in which the deposition testimony might be used. Such copy promptly shall be resealed when an inspection is completed.

E. The Running of Limitations on Felonies Disclosed. As to any felonies under federal law fairly within the ambit of an informer's testimony the running of limitations shall be suspended as to notified persons unless, at any time after the settling of the deposition record and signing thereof, such person demands prompt presentation of it to a grand jury along with such other evidence as may be available for the purpose of bringing such indictments as the evidence may indicate. Indictments thus brought shall be tried forthwith in regular course of the criminal docket of the court in which the indictment was returned.

F. Security of Informers. When a demand for grand jury presentation deprives an informer of the security inherent in the potential for future criminal prosecutions should he be the victim of foul play, the informer may be relocated and guarded to the extent the Attorney General reasonably deems necessary better to ensure his security. Without becoming an absolute guarantor of such future security the United States hereby accepts a tort claim liability not exceeding $500,000.00, at the suit of a spouse or minor children only, for the decease or disappearance of an informer in circumstances where it is found by a preponderance of the evidence that there was negligent failure to provide adequate security, with resulting decease or disappearance. Upon payment of such a judgment against it the United States shall be entitled to proceed to recover jointly and severally against any persons and their estates double the amount so paid where it is shown by clear and convincing evidence such persons were responsible for the death or disappearance, the double recovery being intended to reimburse the United States for the costs of defending and prosecuting the suits here contemplated.

11. SPECIAL SERVICE OF PROCESS

A. Domestic Process. Whenever it shall appear to the court in which any proceeding under this Act has been brought that the ends of justice require that persons or assets outside the district shall be

brought before the court, the court may cause these to be summoned in the case of parties, subpoenaed in the case of witnesses and attached or garnished in the case of assets anywhere within the jurisdiction of the United States.

B. Foreign Process. To the extent agreed by treaties with other nations the United States may extend its process over persons or assets located outside the jurisdiction of the United States. Also, the courts and officers of the United States shall aid the authorities of other nations as agreed in such treaties in their assertions of jurisdiction over persons or assets within the United States. The cooperation with foreign authorities in extending their process shall be unaffected by the existence or non-existence of a declared emergency under this Act.

12. FORFEITED FOREIGN SITED ASSETS

The Congress herewith invites treaty arrangements where deemed expedient whereby assets seized and forfeited are shared with, or entirely forfeited to the nation in which such assets have their situs, subject only to the admonition that such treaties should bind the contracting nations never directly or indirectly to restore such assets, or their equivalent values, or any parts thereof to their owners, or their nominees, or their descendants, or in any way act in a manner which would tend to compromise in whole or in part the effect of forfeitures made.

13. ADVISORY BOARD OF STATE JUDGES

The President shall organize a procedure whereby there shall be created an advisory board of State judges. This board shall be selected by lot from among the chief or presiding judges of the highest courts of civil and criminal appeals of the several States who are willing and able to serve. The board shall consist of nine judges, three appointed to serve for a term of one year, three for two years and three for three years. Their replacements shall be for terms of three years or, in cases of vacancies by reason of death, resignation or retirement from the bench, so much of an appointed term as remains. The most senior judge in point of continuous service on his court shall be the chairman of the board so constituted. It shall be the function of this board from time to time to advise the President and the Congress when illicit traffickings in any drugs subject to this Act are creating conditions such that, the emergency contemplated by section 2B should be declared; also when, an emergency having been in effect, it should be ended because conditions are sufficiently ameliorated. The determinations of this board shall be advisory only, in no way restricting the powers of the President and the Congress. Board members shall serve without compensation other than actual expenses incurred in meeting together and making their reports, which costs shall be paid by the Administrative Office of the United States Courts. Advice shall be based on the informed judgment of board members as specially competent, interested and aware citizens,

and minority as well as majority views shall be reported. No regular office or staff of employees shall be maintained in support of the functions of the board.

14. CONSTRUCTION AND SEVERABILITY

A judicial determination that any section, or part of any section, of this Act is unconstitutional shall not render the balance of the Act unconstitutional unless it also be determined that the remaining parts of the Act are rendered wholly ineffective to accomplish its purposes in the absence of such section or part thereof. Each actual application of restraints upon a defendant, and each problem of procuring evidence concerning a defendant pursuant hereto, shall be measured in terms of the social problem of suppressing future misbehavior by that particular person in ascertaining whether there is unconstitutionality in application of this Act. Constitutionally objectionable specific applications never shall be a basis for declaring any part of this Act unconstitutional unless it be further determined that all possible applications to all possible defendants also would be unconstitutional. In any instance where otherwise it might be determined that the constitutional separations of powers among the judicial, executive and legislative branches of the Federal government has been transgressed by this Act, such provisions shall be read as no more than legislative recommendations to the branch affected.

MEMORANDUM OF AUTHORITIES AND EXPLANATION IN SUPPORT OF PROPOSED EMERGENCY DRUG CONTROL ACT

The proposed statute, copy attached, could be developed as an amendment to the 1970 Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801-966. For maximum constitutional reach, fullest deterrent effect, and to avoid burying it in an already enormously intricate, difficult to understand statute, however, it is best kept as separate, very narrowly targeted emergency legislation, further limited by a system of checks and balances that will prevent applications for any other purpose than suppressing traffic in the drugs covered by the Act, presently only heroin.

COMMENTARY RELATING TO SECTION 2A -- Purpose

Very important to the Act is the "clear and present danger" concept.* This, when demonstrably present, will support legislation restricting rights that generally enjoy constitutional protection. The chief case enunciating the concept is Dennis v. United States, 341 U.S. 494 (1951), a case

* Another line of cases states that where fundamental rights are involved, restrictions of these can be justified only where there is "a compelling state interest," and the legislative enactments so doing must be narrowly drawn. Roe v. Wade, 93 S. Ct. 705, 728 (1973) and cases there collected. This would seem to be a somewhat less demanding test than the clear and present danger test. There probably would be a compelling state interest in suppressing the heroin traffic which would continue present even though clear and present danger aspects had dissipated. However, it is proposed to implement this Act only for intervals when clear and present danger is present.

permitting restriction of First Amendment free speech, most sensitive of all constitutional guarantees. Viewed from the current 1973 perspective it is doubtful whether advocacy of forceful overthrow of the government by a Communist Party member, without more, is a clear and present danger. But regardless of whether that estimate then was or now is correct, the principle that government may restrict constitutional freedoms when a clear and present danger is factually in existence is not open to serious challenge.

While it must be conceded always that wrong-headed estimates of clear and present danger could be made (for example, if the number of heroin users had declined to a few thousand, and the trend continued downward) it seems most unrealistic that such error would in fact be made, given the several safeguards of this Act. And it is inconceivable any federal court ever would presume to substitute its judgment for a basic policy determination by Congress that the heroin traffic can be a clear and present danger when not effectively suppressed.

It is not enough that opponents of this legislation could produce some opinion evidence of generally qualified experts that heroin is not as damaging as popularly supposed. To make the legislative position unassailable in the courts it is necessary only that reasonable men could differ, and the legislature has chosen the harder view as the basis for its Act.

The President, on September 18, 1972 declared keeping heroin out of this country "just as important as keeping armed enemy forces from landing in the United States." Donald Luria, M. D., a leading authority on the drug problem, in a recent book OVERCOMING DRUGS (1971) at pages 175-176 recommended the severest of treatment for heroin traffickers to curb the very great damage to its victims. In its March, 1973 SECOND REPORT the National Commission on Marihuana and Drug Abuse, throughout and particularly at pages 336-7, recognizes heroin as a specially dangerous and damaging drug, not to be dealt with in lenient fashion. These authorities could be incremented at much length. The contrary view is stated by Andrew Weil, M. D., in his recent book, THE NATURAL MIND (1972), and this position, too, is not without considerable support. But the point is made as far as a legal basis for legislation is concerned once it be shown that at a minimum a valid dichotomy of experts exists.

The flaw, in the event one appears, almost certainly will occur in an emergency implementation that is not justified by the underlying facts, or in maintaining such an implementation after it can no longer be justified by the underlying facts.

The case of Aptheker v. Secretary of State, 378 U.S. 500 (1964) involved refusal to grant a passport to a communist so he could travel freely. Section 6 of the Subversive Activities Control Act, the authority

for this refusal, was found too broad and indiscriminate and the section was held unconstitutional. It is suggested the proposed Act could pass every test posed in Aptheker. That case makes an interesting backdrop against which to test this Act which, in the first place is very narrowly drawn and, in the second, a defendant injures his interests only by committing a violation after he already is subject to decree, and thus on specific warning as to future behavior.

The Act is rested upon the commerce clause, phrased in "affecting commerce" terms as opposed to "in commerce" terms. This permits maximum constitutional reach. Wickard v. Filburn, 317 U.S. 111 (1942). An analogous statutory structure, concerned with the socio-economic aspects of racial segregation was upheld in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257-8 (1964). That the heroin traffic has adverse effects upon the economy in sufficient degree to support an act of Congress restraining it is not open to serious contrary suggestion in any sense related to the power of Congress to pass legislation.

The reasons for the Sherman Act reference are two. First is the consideration that the Sherman Act, 15 U.S.C. §§ 1-7, is at once, in response to the same operative facts, a civil and a criminal statute. While the proposed Act is not, the effect is the same once it is recognized the violations it covers also are violations of federal and state criminal laws.

Second, the Sherman Act cases more thoroughly develop the concept of proof of conspiracies by inferences from patterns of things done than any other body of American case law. Leading civil Sherman Act cases enunciating this concept of proof are Eastern States Retail Lumber Dealer Association v. United States, 234 U.S. 600 (1914), United States v. Masonite Corp., 316 U.S. 265 (1942), and especially Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). Nor has the development of this type of proof been confined to the civil cases. Sherman Act criminal cases to the same effect, except that the standard of proof was the higher criminal standard and the cases were tried to juries instead of judges, are United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) and American Tobacco Co. v. United States, 328 U.S. 781 (1946).

Finally, while the proposed Act specifies congressionally approved restraints to be applied in appropriate circumstances, the Sherman Act § 4 civil decree development is the most elaborate example of court initiatives in this regard to be found in our law. The range of injunctive restraints that have been imposed is reported in 2 Trade Reg. Rep., ¶ 8822 and ¶ 8824, the latter paragraph being concerned with the very extreme divestiture, dissolution and divorcement remedies cases. This philosophy of innovation by the courts to deal with specific situations is to be carried into the proposed Act.

COMMENTARY RELATING TO SECTION 2B --

Emergency Implementation

The emergency implementation intervals, with a congressional check on the executive, the inherent judicial check on both, and the moral check of independent advisory review by the advisory board of state judges contained in Section 13 of the proposed Act are designed to sustain heavier individual restrictions than could a statute of general application. Emergency implementation statutes are not uncommon. The GUIDE TO EMERGENCY POWERS CONFERRED BY LAWS IN EFFECT January 9, 1969 prepared by the Office of Emergency Preparedness, Executive Office of the President, and reproduced by the Library of Congress on October 28, 1971, lists 284 federal emergency measures. Most relate to military defense and preparedness. Some are implemented by the general emergency declared December 16, 1950 and since continue in effect. Others require their own individual proclamations, as would the proposed Act. Of particular interest here are the emergency statutes listed in the guide under the Title 7 Agriculture heading, plainly rested on the commerce power and having no necessary relation to any military or defense crisis. For example, consider 7 U.S.C. §1158 dealing with suspensions of sugar import quotas. This body of emergency law makes it very evident the Congress can, if it wishes legislate a statutory basis for the identification and suppression of heroin-derived national emergencies.

The shared power of termination between President and Congress is drawn from the example of the Canadian War Measures Act, Can. Rev. Stat. Ch. 288 (1952) as superseded for the specific Quebec separatist suppression in 1970-71 by Public Order (Temporary Measure) Act, Bill C-181, 3d Sess., 28th Parl.

Other parts of Section 2B are included to make it clear that the emergency implementation period has to do with restricting what cases can be filed, and the interval in which case filings can be made. Once a case is properly filed it can be completed. Once subjected to a decree it is intended that the effects of the decree shall continue whether or not there is a declared emergency period in effect, also that decree modifications can be made at any time.

The treaty exception is to avoid possible conflict inhibiting enforcement cooperation with foreign governments pursuant to Section 3C during intervals when no emergency implementation is in effect in this country. In short, we could continue to support foreign government procedures, as agreed by treaty, even though no new cases currently could be filed here.

Discussion of the use of depositions under Section 10 in criminal prosecutions is discussed in that section's commentary.

COMMENTARY RELATING TO SECTION 2C --

Relation to Criminal Law Enforcement

This section declares the Act complementary to criminal law

enforcement. The requirement laid on the Attorney General to certify the desirability of parallel civil proceedings where criminal charges have been filed is to prefer criminal proceedings first where there is no special reason for proceeding simultaneously. This is only a policy matter, but generally it is undesirable that civil cases should be decided until criminal cases dealing with identical issues have been resolved provided there is a prompt criminal trial. That the civil equity case can proceed despite that a crime also is involved is established law. Bennett v. Laman, 277 N.Y. 368, 14 N.E. 2d 439, 442 (1938).

The Supreme Court as a matter of court-developed law has committed the federal courts to a broad collateral estoppel doctrine to the effect that a party who has had a full and fair opportunity to litigate an issue may not relitigate it in a subsequent action even though the opposing parties are different. Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971). In short, the doctrine of mutuality, restricting estoppels to situations where the parties are identical was overturned. This decision follows the rule pioneered by the California Court in Bernhard v. Bank of America Nat. Trust & Savings Assn., 19 Cal. 2d 807, 122 P. 2d 892 (1942) which, though yet minority doctrine, is the trend of the future.

Even if this body of court-made law did not exist there would be precedent for Congress to declare such an estoppel in the language of

Clayton Act §5(a), 15 U.S.C. §16(a), where, since 1914, persons injured in their business or property by violations of the antitrust laws, have been enabled to make prima facie proofs through criminal or civil antitrust proceedings brought by the United States against defendants "as to all matters respecting which said judgment or decree [resulting] would be an estoppel or between the parties thereto."

There is no doubt of the authority to use a criminal conviction with its higher proof standard as the basis for establishing the facts of a civil case. Local 167 v. United States, 291 U.S. 293 (1934); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951). This is true even though a guilty plea rather than a litigated finding of guilt is involved. United States v. Ben Grunstein and Sons Co., 127 F. Supp. 907, 909 (D.N.J. 1955). This use of guilty pleas seems sound enough where felonies are involved, though it would be open to question if minor criminal matters such as traffic violations were involved. Annotation 18 A.L.R. 2d 1287, 1290 (1922). Whether state or federal violations, the crimes corresponding with the proposed Act's Section 3 are most serious felonies in which pleas of convenience are unlikely.

There is considerable doubt whether guilt established by pleas of nolo contendere should be permitted to form the basis of an estoppel. They do not under the antitrust law applications. Perhaps the proposed Act's Section 5A usage of these pleas should be eliminated, though if it

becomes a portion of the Act that is invalid there could result situations where nolo pleas would be accepted only where a defendant has subjected himself to an acceptable consent decree for the purposes of this Act.

It is fundamental law that a losing litigant cannot go from state to federal court, or to the courts of another state and relitigate an issue already litigated. Thomas v. Consolidated Coal Co., 380 F. 2d 69 (4th Cir. 1967). Could it follow from this that a state court criminal conviction containing the elements of a violation of Section 3 of the Act might be used to estop the same defendant relitigating the same issues in federal district court where a civil decree is sought if the state conviction is offered in proof the acts complained of had occurred? More particularly, even though the federal courts were not disposed on their own initiative to extend the doctrine of collateral estoppel so far, could the Congress so direct?

The answer seems certain to be affirmative. The states now are bound constitutionally to require evidence beyond a reasonable doubt to sustain criminal convictions. In re Winship, 397 U.S. 358 (1970). Thus the highest civil standards necessarily will be exceeded in any state felony convictions. The rationale which undergirds the Supreme Court's Blonder-Tongue decision surely could apply with equal force here.

No case with facts squarely in point was found, but in some civil

diversity cases, where the federal district courts are in effect sitting as if they were state courts, attempts to relitigate in Washington and Nevada the issue of negligence, already determined against the airline in California federal district court, were refused. United States v. United Air Lines, Inc., 216 F. Supp. 709 (1962). The analogy is very strong. The federal judiciary would be hard put to deny Congress what is simply the rational end product of its own reasoning, if indeed there were any inclination to do this.

Worth noting in conclusion is the consideration that, armed with criminal convictions, it usually should prove possible to obtain negotiated consent decrees. Beyond that, it probably would prove possible to obtain negotiated consent decrees for the purposes of implementing Section 7 of the proposed Act in circumstances where it is not deemed worth the time of the prosecutors and courts to seek convictions against minor defendants. Generally these would be instances of untried charges against minor criminals that have been on the criminal docket so long they grow stale, and are dismissed to clear clogged dockets. Better than simple dismissals would be bargains for consent decrees before such dismissals. A growing pattern of decrees against minor traffickers would prove an increasing embarrassment to the major criminals who deal with them, in consequence of the aider and abettor provisions of Federal Rule of Civil Procedure 65(d).

COMMENTARY RELATING TO SECTIONS 3 -- Prohibited Activities, and 4 -- Jurisdiction of Courts

Section 3A of the proposed Act is closely structured upon Section 1 of the Sherman Act, 15 U.S.C. §1, substituting multiple party conspiracies to sell or deliver heroin for conspiracies in restraint of trade, but with criminal aspects removed leaving this legislation purely civil. The common law conspiracy requiring no further overt act which is implicit in the Sherman Act, Nash v. United States, 229 U.S. 373 (1913); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 n. 59 (1940) is made explicit in the proposed Act.

Section 4 of the proposed Act is verbatim Section 4 of the Sherman Act, 15 U.S.C. §4.

A chief purpose of the deliberately adopted relationship is to obtain a procedure where trial will be to federal district judges, sitting in equity without juries as in Sherman Act Section 4 cases.

Another is to make clear to the courts that proofs of violations in terms of circumstantial evidence, as in the Sherman Act cases where this type of proof has its greatest development, shall be given full consideration, a matter already discussed in the commentary relating to Section 2A.

No attempt will be made here to develop the theories of proof which over the years would be developed by government counsel in trying these cases. These will develop as in the

Sherman Act cases. Proofs always will be difficult, but never as difficult as in the factually identical corresponding criminal conspiracy case. Also, there are ancillary devices in this Act, particularly its Section 10 designed to encourage informer testimony, which will make it possible sometimes to obtain direct insider testimony concerning heroin dealing conspiracies that it has not been possible to obtain through purely criminal enforcement.

Finally, the Sherman Act reference implies the courts and government counsel shall use ingenuity and experimentation in developing appropriate injunctive controls such as have developed in the Sherman Act Section 4 decrees. This Act in its Section 9 specifies a number of restraints for imposition as appropriate, these being discussed in this memorandum under the commentary dealing with that section. But, for flexibility and adjustment to particular situations, which never can be entirely anticipated with legislation, it is desired, also, to preserve and encourage the full inherent equity powers of the federal district courts to make appropriate decrees that will restore and thereafter maintain acceptable behavior. Otherwise stated, as needful the courts, too, are encouraged to test the limits of what is constitutionally permissible in checking the heroin traffic. Considering the savagely anti-social attitudes of the kind of defendants at which the decrees will be aimed, the fullest restraints the Constitution will

permit must be made real hazards to major heroin traffickers if they are to be deterred.

The Supreme Court lately used the enormous decree powers inherent in an equity court to support the reapportionment cases, of which Reynolds v. Sims, 377 U.S. 533 (1964) is the leading example. The school desegregation busing cases are the context for the classic modern statement of the equity powers, Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971) being the landmark decision. This opinion by Chief Justice Burger holds the injunctive remedy may be "awkward, inconvenient and even bizarre" without being invalid, 402 U.S. at 28. And it squarely states that in equity cases "the nature of the violation determines the scope of the remedy." 402 U.S. at 16. Under the rule of this case, given a violation of sufficient gravity federal district courts effectively are invited to fashion decrees, which need be limited in their scope only by the Constitution itself -- but only where and as needful, for it is never the purpose of equity to punish or do more than is essential to restore and maintain acceptable conditions.

This concept of court initiatives to develop decrees appropriate to bring a found violation under control is particularly well stated and reviewed in United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 348 (D. Mass. 1953), affirmed per curiam 347 U.S. 521. The author is Judge Wyzanski, probably the outstanding federal trial bench expert in the

framing of complex equity decrees.

Section 3 is broken into its 3A and 3B segments to keep separate the conspiracy concept, which is primarily aimed at high-level syndicate insiders, and the consummated sale or delivery concept, which is primarily aimed at lower level dealers and street pushers. Decrees against the latter will usually be for the purpose of implementing the aider and abettor provision of Section 7, an ancillary aid to enforcement, and will be obtained on the basis of criminal proofs already made, or even more likely consent decrees negotiated given the relatively minor nature of many of the defendants who actually will be apprehended physically handling the drug. The separation is not essential but, given the differing categories of probable defendants described, separation of conspiratorial acts from direct acts seems desirable.

Federal illegality, rested on a base of state criminal law violations which will vary from state to state, has long been upheld in cases decided under the Connally Hot Oil Act, 15 U.S.C. §§715-715m, before operation of that statute was suspended. Very recent cases upholding the Travel for Racketeering Act, 18 U.S.C. §1952, which is similarly structured, are Spinnelli v. United States, 382 F.2d 871, 890 (8th Cir. 1967) reversed on other grounds 393 U.S. 410, and United States v. Gerhart, 275 F.Supp. 443, 450 (D.C. W.Va. 1967).

It would not be necessary to include crimes under state

law in that sales and deliveries of heroin are always in violation of federal law, except that it is desired to be able to take initial decrees through judicial estoppels based on state court convictions. These decrees usually will be for use in conjunction with the aider and abettor provisions of Section 7, though occasionally there may be a state conviction of a crime boss or chief lieutenant which directly can be the basis of the type of civil decree which is the main objective of the proposed Act.

This brings us to Section 3C, which encourages treaty extensions of jurisdiction. The precedent of the Nuremberg and Tokyo trials, never passed on by the Supreme Court* might, were it followed to the logical conclusion, justify a group of nations in agreeing by treaty to outlaw heroin trafficking everywhere, regardless that it was engaged in on a legal basis wholly within territories outside the collective limits of the signatory nation, by persons who were

* The case of In Re Yamashita, 327 U.S. 1 (1946) involved a Japanese commanding general who failed to control his troops in the Phillipines during World War II, with the result he was charged with atrocities under the law of war by a military tribunal. This made it possible to evade the fundamental issue of these trials, which is squarely posed when a civilian, in his own national territory, commits acts against other men of an inhuman nature, but concerning which there either is no pre-existing law to be obeyed or only some sort of international standards which his own nation does not recognize. Despite this he is tried and convicted. See Taylor, NUREMBERG AND VIETNAM (1972), at pages 78-94, for an opinion by the American Chief Prosecutor at Nuremberg that this country now should hold itself bound by the precedent of those trials.

not citizens of any of the signatory nations. The drug has no medically approved purpose and it destroys many of its victims in a fashion that might justify equating traffic in it with systematic murder of a class of human beings.

But it would be unwise to press the point so far. A post-Nuremberg Supreme Court decision makes it just about certain that this nation's treaty undertakings are subject to constitutional testing. Reid v. Covert, 354 U.S. 1 (1957). To so raise a Fifth Amendment due process issue when such is not necessary would be foolish.

The traditional bases of jurisdiction are citizenship and physical presence within geographical boundaries of a sovereign nation (including high seas jurisdiction based on the flag of registry). In addition it is established that acts done outside a jurisdiction intended to and producing forbidden effects within it will support jurisdiction. Charron v. United States, 412 F.2d 657 (9th Cir. 1969). These three bases of jurisdiction are enough. A group of signatory nations can by treaty pool their citizenships and national territories for the purpose of civilly restraining sales and deliveries of heroin therein, and conspiracies so to do.

With a substantial number of the world's nations so agreeing, the inhibitions upon heroin trafficking would be very great indeed. Even though there remained some geography and persons not reached by treaty, the constant threat of treaty

extensions to cover them too should cause the Big Crime businessman trafficker to avoid commitment to a business with such dangerous prospects.

Presumably the nations representing the most lucrative markets for the heroin traffic would be among the earliest signatories. This, in conjunction with the jurisdictional reach exhibited by the Charron case, would put traffickers in about the same status as the Frenchman, Auguste Ricord, who recently was extradited from Paraguay to stand trial in the United States, despite that never had he been in the United States prior to his extradition.

In its March, 1973 SECOND REPORT the National Commission on Marihuana and Drug Abuse, at pages 231-233 strongly recommends international agreements be used to the extent possible in suppressing the drug traffic. Section 3C of the proposed Act is designed to encourage a series of treaties implementing civil injunctive control devices, a rather more promising alternative than the criminal law when it is considered that illicit gain, the prime objective of opium traffickers, will be the chief target of such treaties. For the threat that will be posed to those gains consider particularly Sections 9A(2), 11B and 12 of the proposed Act.

COMMENTARY RELATING TO SECTION 5 -- Decrees

There is a threshold matter to be disposed of here before entering upon more difficult inquiries. Common law equity normally will not enjoin criminal activities. But this is only policy. In re Debs, 158 U.S. 565 (1895) contains a comprehensive discussion of the matter, concluding that where sufficient reason exists the civil equitable power to restrain "is not ousted by the fact [the acts complained of] . . . are accompanied by or consist of acts in themselves violations of the criminal law. . . ." 158 U.S. at 599. This case could be urged as sound authority for the courts taking the initiative in enjoining organized crime, with its continuing patterns of illegal behavior which the criminal law has proved very inadequate to control for a half century now, and clogs and threatens further to clog the free functioning of the national commerce. But without the aid of detailed legislation by Congress it is unreasonable to expect the federal courts and attorneys alone to undertake so immense a project.

This common law background merits but passing notice. In fact there is a lengthy history of national legislation directing use of civil injunctions to suppress criminal behavior. The Sherman Act, 15 U.S.C. §§1-7, in its sections 1, 2, 3 and 4, since 1890 has made the same illegal behaviors the basis for seeking injunctions, bringing criminal charges,

or both. True, the Sherman Act offense is only a gross misdemeanor (up to one year in jail, or a $50,000 fine, or both). But for an example of a statute giving this same combinat' . of civil-criminal treatments to felonies consider the example of Securities Act of 1933, 15 U.S.C. §§77a-77aa, wherein section 77t provides for injunctions and section 77x for imprisonments not to exceed five years which, under 18 U.S.C. §1 are felonies. Other examples can be produced, but in fact the Congress already is committed to use of the injunctive remedy as a complement to the criminal law in the Drug Abuse Prevention and Control Act, 21 U.S.C. §§801-996. Section 882 is the pertinent section. Unfortunately it is perfunctory in the extreme and ithout any significant legislative history. H.R. Rep. No. 91-1444, 91st Cong., 2d Sess. (1970). It also provides for jury trials of decree violations. To date it is unused, and as it stands there is little prospect for it or any comparable statutory authorization (another inadequate example is 18 U.S.C. §§1962-1964) until and unless a comprehensive scheme of restraints is supplied the courts by Congress.

It is possible the jury trial requirement in the Drug Abuse Prevention and Control Act, 21 U.S.C. §882, traces to 18 U.S.C. §§402 and 3691, classifying as criminal contempts decree violations which also are federal or state law crimes, the situation here. But both sections exempt contempts in suits or actions brought by or in behalf of the United States,

also the situation of the proposed Act. United States v. Onan, 190 F.2d 1, 9 (8th Cir. 1951), cert. den. 342 U.S. 869 states this statutory scheme has no necessary application to civil contempt proceedings, a conclusion certainly supported by the plain language of the statutes.

If it wishes the Congress can write statutes subjecting criminal behavior to injunctive restraints as well. It has done so repeatedly and no example of a case which would so much as cast doubt on the authority so to do is known.

Conceding, then, that Congress has the power, is there any requirement that, because criminal acts are involved, proofs of violations need be made to a standard higher than generally required in civil cases? The Sherman Act standard is no higher than the usual preponderance of the evidence rule. United States v. Schine Chain Theatres, 63 F. Supp. 229, 235 (W.D. N.Y. 1945) affirmed in part, reversed in part on other grounds 334 U.S. 110; United States v. Philadelphia Nat'l Bank, 201 F. Supp. 348, 369 (E.D. Pa. 1962), reversed on other grounds 374 U.S. 321. Were the Sherman Act standard any higher, such surely would have been the subject of forceful comment by a dissenter in Ramsey v. United Mine Workers, 401 U.S. 302 (1971), a 5-4 decision where there was labor union involvement, and a consequent unsuccessful Norris-LaGuardia Act based argument for "clear proof" was advanced. Decision by preponderance of the evidence if the case was a regular Sherman Act case was not questioned.

Actually, the more fundamental problem is one of classification. If the main purpose of the statute is remedial, civil standards of proof apply. If punitive, criminal standards. United States v. Zucker, 161 U.S. 475 (1896); United States v. Regan, 232 U.S. 37 (1914). The Regan case noted the Congress competently may authorize the enforcement of a pecuniary penalty by criminal prosecution or civil action as it chooses. There it chose the civil action. 232 U.S. at 216. This type of reasoning is further developed in Helvering v. Mitchell, 303 U.S. 391 (1938) which upheld civil collection of a 50 percent added tax penalty pursuant to "a distinctly civil procedure" provided by Congress. 303 U.S. at 402-403. Other cases of interest for evaluating whether a statute is remedial and subject to civil standards, or penal, are Trop v. Dulles, 356 U.S. 86, 96 (1958) holding penal a statute depriving a convicted deserter of citizenship, and Wright v. Securities and Exchange Commission, 112 F.2d 89 (2d Cir. 1940), holding civil, and thus subject only to a substantial evidence test, the expulsion of a member of a securities exchange.

The essentially remedial purpose of the proposed Act is writ large throughout. It simply is not possible under it to obtain an initial decree against a defendant which causes reduction in physical freedom or loss of assets (unless he aids and abets a defendant known already to be subject to restraints in which case he is not a mere first-time violator

anyway). And thereafter the statutory scheme is mainly one of progressively intensifying restraints designed to find the level at which obedience will be yielded.

There is a distinction as to content of initial decrees. Where proofs by mere preponderance of the evidence are all that are accomplished, a "go and sin no more" decree tracking and commanding obedience in the future to the strictures of Section 3 is all that can be obtained. Where proofs by clear and convincing evidence are made, or through judicial estoppel effects there are available proofs meeting criminal standards, assets to the extent they actually can be identified can be placed in conditions where their forfeiture will be facilitated should there occur another violation. This last is some inconvenience to defendants but no present loss. It would seem that this "second chance" followed by a "third chance," pattern, under an intensifying decree, structure, demonstrates convincingly its main purpose is to obtain future obedient behavior, not punish past behavior.

The standard of proof adopted throughout the Act except for those initial decrees that do no more than track the law, is the "clear and convincing" standard. This standard, falling between the preponderance of the evidence and proof beyond a reasonable doubt, derives from the law of equity. It is the highest civil standard. It is a burden deliberately placed on

the government, for this is a statute the violation of which has grave, though not criminal, consequences, even as do many decrees of courts of equity. Hence it seems appropriate defendants should enjoy the same standards as those applied by equity courts dealing with such serious concerns as whether fraud is to be found, or oral testimony is to be permitted to override the written word expressed to the contrary. A higher standard of proof deliberately has been assumed here than Congress would be obliged to grant.

Given the essentially amoral and vicious nature of the defendants at which this Act is aimed, even grudging obedience to their decrees cannot be assumed as might be the case with the general run of mankind. To overcome this, the Act depends more on hanging a continuing threat of intensifying modifications of outstanding decrees over them than on the exaction of forfeitures for past disobediences. It is this susceptibility to a pattern of increased restraints once a defendant is singled out by the initial decree entered, and not just the current content of his decree (particularly if it is a simple command to obey Section 3 of the Act) which is especially relied upon to persuade defendants to courses of future obedience.

The decisions are not numerous for intensifying modifications have not been common, but the law is very clear decrees can be modified to the further detriment of defendants as well as modified to relieve them of portions of decree terms. United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968); Chrysler Corp. v. United States, 316 U.S. 556 (1942). In this same general vein consider too United States v.

American Society of Composers, Authors, and Publishers, 341 F.2d 1003 '2d Cir. 1965), where the proposition is advanced that sometimes modifications of a decree obtained by the United States may be more effective than simple contempt proceedings.

The circumstances in which intensifying modifications of decrees can be sought entail proof of violations of defendants' decrees by clear and convincing evidence. Inasmuch as this is the highest civil standard, the only possible objection would be that a particular modification entails a criminal penalty, requiring that criminal standard of proof be met. The commentary relating to Section 9 will deal with the particular restraints enumerated, seeking to demonstrate they are supported by non-criminal precedent analogies in all instances except the monitoring attendances of Section 9H. This restraint represents legally untested pioneering, though it can be shown there are non-criminal detentions even more onerous applied in the current law.

The Act does not forbid, and by its Section 9D rather clearly contemplates that there may be easing modifications as well as intensifying modifications of decrees. It also contemplates summary reimpositions of restraints once in effect but thereafter eased. In the absence of specific language it is assumed the courts would be guided in fact determinations here by the usual preponderance of the evidence rules. But as procedures having distinct clemency aspects are not simple matters of fact finding, it was not deemed desirable to enunciate set standards. It is not intended, however, that

a defendant ever shall gain standing to avoid summary reimposition of any decree terms to which he ever has been subject.

Finally, how of the declared intent of Congress that enforcement by civil contempt process shall be preferred? It was the possibility that this could trench upon the preserve of the judiciary that chiefly prompted the language in Section 14 that provisions of the Act should be read as recommendations rather than commands where constitutional separation of power problems might exist. Cf. Michaelson v. United States, 266 U.S. 42, 64-66. (It is not intended the courts shall be inhibited in cases they deem appropriate from instituting criminal contempt proceedings in purely disciplinary situations where an affront to the dignity of a court must be redressed.)

It will be observed the whole intensifying structure of the Act depends on proven civil contempts for implementation. It would be possible to restructure this into a pattern of motions seeking modifications, followed by evidentiary hearings. The economy and force of the present structure makes it desirable that it be adopted if supportable, however. From the standpoint of defendants, too, this structure is a safeguard they will not enjoy if they can be subjected to modification hearings without a contempt being proved.

If there ever was a contrary rule, it is now clear that the United States is not inhibited by its governmental status from seeking to enforce decrees it has obtained by civil contempt process. McCrone v. United States, 307 U.S. 61, 63 (1939); United States v. United Mine Workers, 330 U.S. 258 (1947);

Annotation, 61 A.L.R. 2d 1083, 1104 (1958). That issue laid to rest, however, there remains a problem of classification. The courts certainly are not going to permit criminal contempts to be labeled civil contempts, and thereby evade the jury trials declared to be the right of defendants in criminal contempts involving more than petty punishments. Cheff v. Schnackenberg, 384 U.S. 373 (1966); Bloom v. Illinois, 391 U.S. 194 (1968).

Nevertheless it is most undesirable juries should be involved in assessing contempt behavior under this Act. The intimidating tactics of defendants such as these are well known and have been the subject of frequent comment by responsible officials. However, were it determined that contempts containing criminal activities had to have criminal dispositions, the Act still could work. A distinction then would need to be drawn between such contempts and other contempt violations of decree terms not involving activities also criminal. And, as already noted, it would be possible to separate the intensifying modification procedures from the contempt processes, using motions for modification followed by evidentiary hearings to accomplish the modifications. This would preserve a civil non-jury status for intensifications regardless of how contempt depositions were handled.

In Shillitani v. United States, 384 U.S. 364 (1966) the Court reviewed its past learning concerning civil and criminal contempts, concluding the test is: What does the court primarily seek to accomplish? 384 U.S. at 390. The

case involved a sentence for refusing to testify after immunity was granted, terminable when the defendant obeyed and hence classified as civil.

Probably the best discussion of the distinction between civil and criminal contempts is that contained in Parker v. United States, 153 F.2d 66 (1st Cir. 1946). Civil contempts are for the purpose of coercing future obedience and the orders are framed to this end. This is the purpose of the Act, operating as it does in terms of intensifying decree terms upon disobediences, always seeking as its objective the minimum level of restraints at which future obedience will be yielded.

18 U.S.C. §§402 and 3691, classify as contempts for jury trial decree violations which also are federal or state crimes. But the plain language of these statutes excepts suits or actions brought by the United States. United States v. Onan, 190 F.2d 1, 9 (8th Cir. 1951), cert. den. 342 U.S. 869. The general congressional stance there indicated is consistent with the structure of the proposed Act. It shows Congress already has resolved the point in favor of non-jury process where the United States is a party. If the Congress directs a preference for civil processes unattended by jury trial, the courts can be expected to give the legislative declaration

much weight in making the classification as to whether the proceedings are civil or criminal.

The proposed Act does not contain affirmative language directing that civil contempts containing the elements of criminal violations shall be tried to the courts without juries. Such language perhaps should be included to make it indisputably certain that no contrary interpretation is possible. That way the only avenue of attack will be on constitutional grounds.

The requisite standard of proof for civil contempts ranges from the highest clear and convincing proof standard down to mere preponderance of the evidence. Annotation, 49 A.L.R. 975 (1927). The Act has placed on the United States the burden of meeting the highest civil standard. This standard, it is to be noted, also is the highest degree of proof required for stripping an attorney of the profession which is at once his life and his livelihood. 7 Am. Jur. 2d, Attorneys at Law §67 (1963). Criminal businessmen should not be entitled to more when the objective is not punishment but future disobedience in an area of law enforcement all must agree is critical beyond most to the national wellbeing.

COMMENTARY RELATING TO SECTION 6 --

The Voluntary Exoneration Privilege

This section is in no sense essential to the proposed Act. It is a concession to defendants who actually may be innocent of wrongdoing, but are enmeshed in a circumstantial evidence conspiracy case that leads the trier of fact to conclude otherwise.

Inasmuch as this matter is neither criminal nor compelled, no Fifth Amendment implications are raised. A defendant, informed of the actual adverse fact findings about to be entered against him (though obviously not of the content of the ensuring decree which may be entered, for this phase of the case yet will remain to be developed as is usual in formulating decrees of any complexity) simply is by this section given an opportunity to escape an adverse decree if, through polygraph testings, he can establish probable non-involvement.

The leading national proponents of polygraph testing,

basing their conclusions on over 35,000 tests, claim that the known margin of error is less than one percent, with about another five percent of the tests rejected as too uncertain in the manifestations indicated to justify conclusions. Reid and Imbau, TRUTH AND DECEPTION 234 (1966). A considerably larger margin of error than this (which in the format proposed always would be in favor of defendants) could be accepted without serious damage to the suppression objective sought. Even if as many as ten percent of those against whom adverse findings were about to be entered could "beat" the test if they took it, the screening still would be abundantly adequate to serve the objective sought.

A collection of papers presented at a University of Tennessee symposium on the polygraph deals with its accuracy. 22 Tenn. L. Rev. 711-74 (1953). Contrary to the cases collected at Annotation, 95 A.L.R.2d 819 (1964) refusing polygraph evidence in criminal cases, a leading commentator on the law of evidence has stated exclusion of polygraph tests from criminal trials is not justified, McCormick, EVIDENCE §174 (1954). No such revolutionary extension as this is proposed here. This matter is civil and voluntary.

Typical of criticisms of the polygraph test (apart from those related to the tendency indirectly to compel what amounts to involuntary adverse testimony if the test is refused) is the type of statistical analysis found

in Skolnick, Scientific Theory and Scientific Evidence: An Analysis of Lie Detection, 70 Yale L.J. 694 (1961). Here, using statistical bases which are deviant from the whole pool of guilty and innocent persons which would be the fair measure of results, a parade of horribles is constructed. The premise is a doubtful one even for criminal trials, for the body of innocents in a fair cross section of these is unlikely to be very large. But regardless of validity in the criminal context, in the context of the proposed Act it simply means that a defendant, against whom the evidence has gone in the best judgment of a federal district judge, is given one last opportunity to show he probably is innocent of wrongdoing.

One reasonably may speculate that, given the psychology of the situation, there will be few offers on the part of defendants found in violation of the Act to take the test. But be this speculation right or wrong, the accuracy of the polygraph is such that it will not be beaten with enough frequency to damage the effectiveness of the civil injunctive control system proposed.

COMMENTARY RELATING TO SECTION 7 --

Violations by Aiding and Abetting

The primary function of this section is to take advantage of the decrees, described in Section 2C, which can be obtained by consent or through judicial estoppel effects upon their convictions, against street pushers and the relatively vulnerable

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lower echelon dealers who supply them. Then, after notice is given, the higher echelon criminals who sell or deliver these persons heroin, or who it can be shown conspired to do so by being part of the supply or financing system whereby sales or deliveries are accomplished, can be treated directly as contemnors in the manner of Federal Rule of Civil Procedure 65(d). Particularly in a heroin trafficking conspiracy, it is quite unnecessary to show that a defendant in the chain of supply had in mind any particular sale or delivery for there is no legal alternative. Poliafico v. United States, 237 F.2d 97, 104 (6th Cir. 1956), certiorari denied 352 U.S. 1025.

These low level decrees would not be for the purpose of bringing minor criminals into the pattern of intensifying decree pressures to coerce their future obedience. Many of them, being addicts themselves, are almost without will to withdraw from an activity that supports their addictions. Also, at this level the calculating business mentality that measures risks against gains is not going to be usual, and even if it were, at this level there is little to protect. Rather the purpose is to convert these minor criminals into an increasing myriad of traps for the more highly placed who deal through them. The consternation and confusion that would be thrown into the heroin distribution systems as the outstanding decree of this nature mounted into the thousands would be enormous. In the case of big organized crime it would provide

an added difficulty and risk which should exert a powerful additional tendency for these groups to get entirely clear of heroin, including even the financing support given lesser criminals who handle it.

Recent New York City statistics show that only 2% of those arrested for drug felonies are sent to prison, and only about 2% of this 2% are sentenced to 15 or more years. Wall Street Journal, January 23, 1973, at page 14. The raw statistics reported did not split out the heroin offenses, but for one or another reasons that will not be inquired into here, there evidently are a great many heroin pushers who are soon back on the streets under no restraints whatever except the inadequate threat of the criminal law from whom it probably would be quite easy to obtain a simple "go and sin no more" consent decree had this been bargained for at the time of arrests.

True enough these procedures are most unlikely to form the basis of an aiding and abetting decree against a top boss, or even the chief lieutenants of a top boss. But it would make it hazardous indeed for the lower rung insider syndicate members, and for the top level tributary wholesalers and distributors of heroin who are next below them. Occasionally, too, these procedures might catch a fish big enough to be capable of informing against top people, and willing to do so under the safeguards of Section 10 of this Act if he believed himself threatened with punishment for his failure. In any

case, to the extent big organized crime organizations were willing to continue to deal in heroin, inexorably if slowly these procedures would tend to work ever closer to the top, unless the persons trapped in them were permanently discarded once subject to a decree.

It is assumed the Attorney General can and would develop notice procedures consistent with the due process requirements of Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) for the purposes of this section and Section 8. Inasmuch as Rule 65(d) binds those having "actual notice by personal service or otherwise," it also should be possible to proceed against aiders and abettors with actual knowledge of an outstanding decree, whether or not served. Hill v. United States, 33 F.2d 489 (8th Cir. 1929), certiorari denied 280 U.S. 592. It is unlikely by reason of problems of proof that persons not served would be proceeded against under Section 7. The case well could be otherwise for continued memberships in criminal associations outlawed pursuant to Section 8, however, by reason of the notoriety such decrees would attain.

Rule 65(d) binds to the injunction parties, their officers, agents, servants, employees and attorneys "and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Under

this rule persons well-knowing of an injunction, but not parties and acting for themselves alone do not become contemnors, for a decree cannot be interpreted to bind the world. Alemite Mfg. Co. v. Staff, 42 F.2d 832 (2d Cir. 1930). (A fact situation like the Alemite case always is pregnant with the risk, of course, that there will result a fact finding that the apparently independent actor is a mere stalking horse for a party subject to decree,)

This raises a question upon which, strangely enough, no squareholding was found. Obviously, absent most peculiar circumstances, sellers or deliverers of heroin, and conspirators to do so, are going to be acting primarily for their own selfish interests. Does the fact they know they are making possible an act which results in the person with whom they deal violating his decree take them out of the independent category and introduce a sufficient element of privity to bring Rule 65(d) into play?

In McGraw-Edison Company v. Preformed Line Products Co., 362 F.2d 339, 344 (9th Cir. 1966), certiorari denied 385 U.S. 919 the court said, "Non-parties may be found in contempt of an injunction provided they have actual notices ofthe injunction and aid or abet in its violations." The case did not have to come to grips with the issue of whether the knowing sale of forbidden items to an enjoined party would make the seller a contemnor, but it does enunciate the aiding and abetting concept of concert and participation.

In United Pharmaceutical Corp. v. United States, 306 F.2d 515 (1st Cir. 1962) the defendant knowingly purchased a drug that another corporation was enjoined from producing, but obtained it from a source independent of the enjoined corporation. Thereby, under the Alemite rule, the defendant avoided being in contempt, but the court very carefully noted that the drug had not been obtained from the enjoined corporation in reaching the result.

It is not reasonable a person can avoid the vicarious contemnor status while deliberately and knowingly dealing with an enjoined person in the very items that that person is by his decree forbidden to deal in. So to hold would suggest an aider and abettor cannot have independent purposes, but must be subservient, serving solely the interests of the enjoined party. That is the definition of an agent, and renders the language of the rule under investigation meaningless surplusage.

This section is probably good as it stands. Nevertheless, prudence may dictate that it be amended, or at least any committee reports attending it explain that aiding and abetting includes knowing participation, direct or conspiratorial, in any sale or delivery of heroin to a defendant already restrained from engaging in such sales or deliveries.

This situation is structured to cast on a person who becomes a contemnor under it the status of a second violator. This is quite proper for he is chargeable with the first injunction. It is not intended, however, that the harsher restraints

thereby made possible actually will be used against mere street pushers and petty dealers. Rather this structuring is for the uncommon situation where an aiding and abetting violation case can be made against significant major criminals engaging in the heroin traffic. Because the monitoring attendance restraint of Section 9H is an exceptionally harsh coercion, it is further limited so it cannot be applied upon just the occurrence of one single aider and abettor violation.

COMMENTARY RELATING TO SECTION 8 --

Outlawed Associations

Criminologists have viewed their inability to attack the big crime syndicates themselves as an almost insuperable barrier to successful assault on organized crime. The matter is discussed at length by Dr. Donald Cressey, one of the nation's leading students of organized crime in his book, THEFT OF THE NATION (1969), which is drawn primarily from his experiences and work with the McClellan Committee's organized crime investigation of the late 1950's. In terms of the criminal law, which really cannot effectively punish an informal association of criminals, he probably is right. But in the Sherman Act Section 4 civil cases, the courts do precisely what the criminal law cannot do. By resort to civil equity this wealth of experience and precedent is available with which to attack these criminal associations.

In the original Sherman Act Section 4 cases the dissolutions ordered usually involved identifiable legal entities. Northern Securities Co. v. United States, 193 U.S. 197 (1904); Standard Oil Co. v. United States, 221 U.S. 1 (1911). But ever since the case of Brown v. United States, 276 U.S. 134, 141-42 (1928) there can be no doubt whatever that if the Congress so provides, even if only by necessary implication, an informal association may be proceeded against by its popular name. As the decision further indicates citing Supreme Court decisions, such already had occurred in the Sherman Act area. A very early example is the leading case of United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), affirmed 175 U.S. 211 (1899). In this section of the proposed Act it is not left to implication, but squarely provided informal associations may be proceeded against by popular name.

Major representative Sherman Act cases in which informal conspiratorial associations have been proscribed are United States v. Hartford-Empire Co., 323 U.S. 386 (1945); United States v. National Lead Co., 332 U.S. 319 (1947) and United States v. Paramount Pictures, 334 U.S. 131 (1948).

The means for proceeding against a voluntary informal association is by service on its officers and such of its members as can be conveniently reached. National Harness M'frs. Ass'n. v. F.T.C., 268 F. 705, 709 (6th Cir. 1920). Again, the proposed Act so provides.

There is thus no room for any reasonable doubt but

that Congress can compel an organized crime association brought before the courts for dissolution if the case against it be proved.

The Act is not intended for use against minor criminal conspiracies, but there is no reason to cast on the United States the purely technical burden of proving a large membership in making its case. This statute would at all times be under the strict control of the Attorney General in its application, and it must be assumed a proper discretion will be used in bringing actions to proscribe the existence of organized groups of criminals. Thus the burden of membership proof is only ten persons.

For a case holding that an illegal conspiracy continues though transmuted in organizational form see United States v. E.I. duPont de Nemours & Co., 188 F. 127, 152 (3d Cir. 1911). The problem as there noted is whether the proofs of the continued existence of what is claimed to be the same conspiracy are adequate to support the findings made.

More difficult than the points just considered is the problem the United States will have in discharging its burden of proving the existence of the association to be proscribed. The organized crime associations are both informal and highly secretive. Nevertheless their existences and identities are quite notorious. Assistant Attorney General Henry E. Petersen is able to declare there are 26 major syndicates in the country,

involving about 5,000 members with about 3,000 of these identified. U.S. News & World Report, June 5, 1972 at pages 64-65. And see Time, April 24, 1972 at page 46 identifying the six major New York City Mafia "families." A rather precise identification of Mafia families nationally is reported by Cressey, THEFT OF THE NATION (1969). The evidence is impressive that as a matter of police intelligence the existences of the organized crime syndicates are beyond reasonable dispute. The problem is to translate this police intelligence into evidence usable in a federal district court.

The hurdle is in the hearsay evidence rule, for it is utterly impossible to put in a record as foundation evidence the totality, or even a small part of the reports, rumors, speculations, etc. which cumulatively will form the basis of any police intelligence expert's opinion. The evidence if it is to come in, must come in without requiring a foundation laid for it.

Tested in its most sensitive aspect, the right of confrontation, the Supreme Court has refused to elevate the hearsay rule from its common law basis to a constitutional prohibition. California v. Green, 399 U.S. 149 (1970). The hearsay rule also has legislated exceptions that are constitutional such as various business records acts, 28 U.S.C. §1732 being the federal example. The proposed Act would be another. In Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971) "the necessity of accepting the particular hearsay" and

"its circumstantial probability of trustworthiness" were said to be factors more important than whether the evidence fell into a traditional exception to the rule. In the area of complex litigation, chiefly concerned with business affairs, the Second Circuit as long ago as 1923 in The Spica, 289 F. 436, stated, "On the matter of proving the activities of a large business, necessity compels a relaxation of the rule that a witness should speak only as to matters of personal knowledge. . . ." In United States v. Aluminum Co. of America, 35 F. Supp. 820 (S.D. N.Y. 1940) the court stated, "Opinion evidence by an acceptable expert resting wholly or partly on information, oral or documentary, recited by him as gathered from others. . . is competent even though the firsthand source from which the information came be not produced in court." The new Federal Rules of Evidence go far with the indicated trend. Consider Rules 702, 703 and 803, not here set out but consistent with these authorities.

A conclusion is inescapable that the Congress can legislate this exception to the hearsay rule and permit the opinion evidence of qualified police intelligence experts on the existence of criminal associations to be received. It is unlikely despite the opportunity afforded that crime syndicate members or their attorneys will come forward to contest the existence of their criminal associations at this stage of proceedings. This will facilitate the proscription of an association, which proscription will represent a considerable hazard for any top boss who continues his

organization. Despite the opportunity to relitigate afforded by Section 9C, there is risk the government may win.

COMMENTARY RELATING TO SECTION 9 -- Decree Terms and Enforcement (Preliminary Comments)

The fundamental authority upon which Section 9 rests is power in the national legislature, bounded only by constitutional limits, to authorize and direct the courts to utilize any decree restraints which will tend to obtain from defendants their future obedient behavior.

The constitutionality element in a statute like this one will change according to whether there exists what reasonable men can denominate a clear and present danger and thereby support an interval of emergency implementation. Also, the validity of decrees will have to meet the test of whether they are reasonable applications to the control problem posed by the situations particular defendants. The important consideration is that it is extremely unlikely this proposed Act can be wiped out as wholly unconstitutional, or that its more serious restraints will wholly fail. That being the case, even if particular defendants win occasional cases on constitutional grounds the Act will continue to stand as a present hazard for crime syndicate members willing to risk involvement in the heroin traffic. Active enforcement against those foolhardy enough to continue (and it is believed they will be few unless the enforcement aim of the Act is deliberately brought lower than the top syndicates, where cool business judgment is less common) should break their will to continue rather shortly.

This Act, though its applications are gradual as consistent with civil coercion, is a fearsome thing for a rich and powerful criminal to become enmeshed in, for it probably will ruin him as master of his own house.

The significant core pattern of intensifying restraints anticipated in application of this Act to major crime bosses is first the financial restraints of Section 9A, then the area exclusions of Section 9D, and finally the monitoring attendances of Section 9H. The courts also are encouraged to experiment with restraints of their own devising, some of which could be severe under this authorization.

Only the core restraints, Sections 9A, 9D and 9H, are discussed under separate headings in this memorandum. Section 9B, concerned with secret transfers of assets out of the United States by defendants, has been structured as an intensifying additional restraint to be imposed upon a defendant who has once disobeyed his decree. Consideration should be given to including this as an element of Section 9A, among the ancillary devices designed to aid in discovering and ultimately forfeiting hidden assets.

Section 9C, concerned with continued memberships in crime syndicates that have been ordered dissolved, is designed to put a natural person defendant in the same position as if a Section 3 violation had been proved against him. The really serious effect from the standpoint of an organized crime

syndicate and its master, is that it brings under attack all syndicate activities, for at this point it is membership in the syndicate, not just heroin dealing, which is the subject of the decree. It is, of course, self-evident that a proscribed informal association of natural persons can be further attacked only by attack on its members. The discussion in the commentary on Section 8 applies here, and will not be repeated. The violation, as stated in Knauer v. United States, 237 F.8, 19-20 (8th Cir. 1916) is, "Instead of withdrawing when it [the association] became illegal, members by remaining such. . . became guilty. . . ."

It is not pretended the burden of proof in a Section 9C proceeding is any but heavy. First the association must be proscribed, then its continued existence and specific memberships therein must be shown -- two separate trials, each requiring clear and convincing evidence. But the ultimate threat is great and real. In addition, the Section 8 and Section 9C procedures can cause a rather constant barrage of unwelcome publicity for men who thrive on secrecy. Would it be possible in such an atmosphere to find so many willing corruptees on the law enforcement side as has been the case?

Section 9E, concerned with deportation of aliens is within the power of Congress to confer on the courts in a matter as serious as proven trafficking in heroin. This will not be an important restraint, however. Virtually all the crime bosses today are American citizens, not aliens.

Section 9F is concerned with the forcible detention for rehabilitation from their heroin addiction of defendants who are addicts. The legal authority for such procedures is in the commentary concerning Section 9D, hereafter. It is unlikely this will be a significant restraint for few, if any, upper-echelon crime syndicate members are heroin addicts. As to lesser criminals who might run afoul of this section, it is not intended to supplant the numerous state procedures designed to cope with the problem. For an example of a state law see 34A McKinney's Consolidated Laws of New York, §§200-214, and particularly §206 therein. Presumably the Attorney General could be relied on to hold this section to the service intended.

Section 9G forbids continued associations with specified persons. There is precedent for courts of equity to issue this type of injunction in the sex triangle cases. Annotation, 175 A.L.R. 481 (1948); Moreland, Injunctive Controls of Family Relations, 18 Ky. L.J. 207 (1930). Refusals to enjoin in these cases are not on constitutional grounds, but because of the discretion in application which characterizes common law equity. Snedaker v. King, 111 Ohio St. 225, 145 N.E. 15 (1924).

Virtually all the sex triangle cases are a generation or more old. It is to be doubted they would be followed today given current attitudes. However, the courts almost certainly would not reach the constitutional issue, but only refuse to intervene as a matter of policy. Thus, though the constitutionality

issue here would be hard fought and close, the restraint is worth including. It is not an initial restraint but an intensifying restraint for situations where recalcitrance has been demonstrated. And, while it probably would not be fully effective to prevent communications among members of a criminal association, it could have powerful effects in threatening the standing of a crime boss as master of his organization. The psychological effect of this restraint in deciding such a man to take his organization out of heroin trafficking could be considerable.

Section 9I is designed to permit stays in the case of decrees, or consequences stemming from decree violations, which produce restrictions on personal freedoms or command forfeitures of assets. The distinction is essentially that between mandatory and prohibitory injunctions. 42 Am. Jur.2d, Injunctions §348 (1969). A defendant suffers no immediate loss upon being commanded to obey the law, discovering his assets and bonding his obedience; hence no necessity of staying that sort of decree pending appeal.

Six man juries are legal juries, Williams v. Florida, 399 U.S. 78 (1970), and jury determination by less than unanimous juries are constitutional. Johnson v. Louisiana, 92 S. Ct. 1620 (1972). Section 9J is designed to take advantage of these decisions. These decisions also should be kept in mind in any revisions of the Act acquiescing in jury trials. And, should

it be decided forfeitures were to be permitted only pursuant to jury verdict, the full thrust of the Johnson case, nine of twelve majority verdicts, should be written into the Act. Should proofs beyond a reasonable doubt in jury trial ever be required for implementation of any part of this Act, the need for nine of twelve verdicts would be an imperative needed revision.

COMMENTARY RELATING TO SECTION 9A -- Financial Restraints

This restraint is to be applied initially in combination with the injunction not to disobey Section 3 in the future. If there is another disobedience then proved, the court could order a forfeiture within the limits of assets subjected to forfeiture, plus intensify the decree by ordering the defendant excluded from the areas in which he has been accustomed to conduct illegal operations. An additional and increased liability to financial forfeiture would be tied to this decree, which forfeiture now could be ordered for violating the area exclusion as well as the strictures of Section 3. Unlike Section 3 violations, area exclusion violations will be quite easy to prove and are not crime related.

In the judgment of the writer, the financial threat that can be posed this way probably is sufficient of itself to cause intelligent, multiple-line big business criminal leaders to opt out of the heroin traffic. These men are engaged in what they do for gain. What is money worth if it cannot be enjoyed, or left to descendants or other successors to enjoy?

Given trials and contempt proceedings before federal district judges sitting in equity, the analogies to the Sherman Act case developments, and the threat new treaty extensions will increasingly contract the desirable areas of the world in which assets can be hidden or enjoyed, a very sobering economic threat appears. If this Act becomes law, the bosses of big organized crime are going to learn from attorneys skilled in the sophisticated equity practice some chilling realities of a system of law from which they hitherto have been immune. There should result great unwillingness to be a test case. There even should be a strong tendency to get out of all drug dealings, for if one deals in drugs other than heroin the risk of an adverse fact finding on heroin is dangerously enhanced, whether or not the found fact is correct. The law necessarily works in terms of facts found, not absolute truth which is inherently unknowable except to God and the actors themselves. This is particularly so where the proof has a substantial circumstantial evidence aspect.

The legal basis for this restraint is rested on an analogy to peace bonds. The proposition is this: If there is constitutional power for mere justices of the peace to put a poor man with very limited assets under the restraint of forfeiting all he has should he fail to obey and keep the peace in the future, there ought be no constitutional reason the Congress may not authorize federal district judges to lay

comparable, even if financially enormously greater restraints, on a much more dangerous class of persons who, by making heroin available to addicts, create a much greater threat to community peace.

The procedure of bonding a man to control his future behavior has ancient roots, long predating the Constitution. Though statutory in all states today, it was one of the powers exercised by magistrates at common law and came into our law as part of the common law heritage. In re Sanderson, 289 Mich. 165, 286 N.W. 198 (1939); Ex parte Garner, 93 Tex. Crim. 179, 246 S.W. 371 (1923); Note, 88 U. Pa. L. Rev. 331 (1940). (This note, critical of the peace bond though accurate in describing its history and legal standing, concludes with a statement which, applied to the proposed Act, would be strong support for using these procedures to check heroin trafficking even though the desirability of the peace bond is debatable.) See also 12 Am. Jur. 2d Breach of Peace, Etc., §§41-51 (1964). The federal peace bond statute is 18 U.S.C. §3043, which assimilates the somewhat varying peace bond procedures of the several states into the federal scheme. It cannot be avoided that by this statute the Congress long has committed the United States to support of preventive bonding procedures.

The peace bond is not criminal. There is no constitutional right to a jury trial. Authorities cited in the

previous paragraph and see also People v. Blaylock, 357 Ill. 23, 191 N.E. 206 (1934) and Ex parte Way, 56 Cal. App. 2d 814, 133 P.2d 637 (1943). The requisite standard of proof for imposition of the bond is civil, not the beyond reasonable doubt standard of the criminal law. Ex parte Luehrs, 152 Tex. Crim. 348, 214 S.W.2d 126 (1948); In re Fenske, 148 Kan. 161, 79 P.2d 829 (1938); Ball v. Commonwealth, 149 Ky. 260, 147 S.W. 953 (1912); Note, 88 U. Pa. L. Rev. 331, 333 (1940). Though these cases support approximately a preponderance of the evidence test for peace bonds, the proposed Act deliberately has set the highest civil standard, clear and convincing proof.

Contrary to the great weight of authority, two recent cases have held that peace bond proceedings are criminal in nature. Santos v. Nahiwa, 50 Haw. 40, 487 P.2d 283 (1971); Roberts v. Janco, 335 F. Supp. 942 (N.D. W.Va. 1971). Both are tainted by facts indicating that indigent defendants actually were jailed by reason of financial inability to comply with the bonds demanded. This feature of the peace bond, not present in the proposed Act, has been the primary source of constitutional criticism. Davidow, The Texas Peace Bond -- Can It Withstand Constitutional Attack?, 3 Tex. Tech. L. Rev. 265 (1972); Steele, Some Questions about the Constitutionality of Peace Bonds, 36 Tex. B.J. 303 (1973); Note, 52 Va. L. Rev. 914 (1966); Note, 88 U. Pa. L.Rev. 331 (1940). Another element of criticism noted in these writings is that action is

taken on suspicion an offense may be committed though it has not occurred. The format of the proposed Act supposes one prior proving by clear and convincing evidence of a prior offense likely to recur, given the nature of the heroin traffic and organized crime.

The use of a bond in support of an injunctive order is an established equity procedure. 42 Am. Jur. 2d, Injunctions, §§310-316 (1969). Established federal procedures already exist placing in the federal district courts authority to forfeit bonds as an incident of the main proceeding. Federal Rule of Civil Procedure 65.1; 42 Am. Jur. 2d, Injunction, §381 (1969).

Courts of equity, having in personam jurisdiction of the defendants before them, have power to command action or non-action in foreign jurisdictions. Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952); 42 Am. Jur. 2d, Injunctions, §252 (1969). Of course, as regards objects physically within a foreign nation, that nation could block dispositions to which it objects, or, on principles of comity, the decree disposition could be supported. The reality is that treaty arrangements are required to make the extraterritorial aspects of decrees, including forfeitures pursuant to them, effective. Sections 3C, 11B and 12 of the proposed Act are designed to encourage foreign nations to cooperate through treaties in effecting these extensions.

The balance of Section 9A is designed to aid in ferreting out or forfeiting hidden assets. It may be desirable to eliminate from the Act the authority of the court to consider silence, rested on the constitutional privilege against self-incrimination, as a basis for evaluating the extend of hidden assets. The power to require sworn statement of assets until the privilege is claimed should be retained, however. It keeps an unwelcome but merited pressure on the types of men at whom this Act is aimed.

COMMENTARY RELATING TO SECTION 9D -- Area Exclusions

By any rational view of man's treatment of man down the ages, civil exclusions of persons from specified areas, leaving a generous range of remaining territory in terms both of area and quality, is mild restraint. It is the concept of citizen liberties guaranteed by a written constitution, a refined, and historically quite new conception going beyond the requirements of civilized behavior, which raises here in the United States serious questions.

Truly severe restraints, imposed as parole conditions upon a convicted felon, raise no comparable difficulties. Evidently the line is a somewhat artificial one which, for acceptance, depends on the ritual of criminal conviction. This consequence the masters of organized crime have been able very consistently to deny society as to themselves, because they are organized to prevent it. Tyler, ORGANIZED CRIME IN AMERICA 219-20 (1962).

The main thrust of this memorandum and the proposed law

it supports is to urge an expansion in law enforcement methods, calling to the aid of society the powers of equity, incorporating from it precedents or procedures which have a reasonable chance to stand constitutional testing.

So viewed, and strictly limited to heroin trafficking which now is and for some years will continue to operate in a zone of effects the courts surely must accept as a clear and present danger, there are powerful analogies in Supreme Court precedents upholding area exclusions for defense reasons. It is at least a rational and reasonable position that heroin addiction has developed conditions of addict-caused crime and terror in many of our cities justifying measures as stern as were upheld in defending the nation from military attack in World War II.

Let it be noted, too, that in the proposed Act the area exclusions are not nearly as stringent as those already accepted in case precedents. Moreover, the legal procedures to identify individual offenders specifically are the detailed and scrupulous ones traditional to equity proceedings. Finally, the proposed Act is replete with check and balance safeguards to terminate its operation when conditions are so far restored that a clear and present danger declaration can no longer be supported. These safeguards were not present in the case precedent analogies relied upon here.

The precedents are those dealing with the exclusion of Japanese-American citizens from the West Coast in World War II. This is one of the least attractive episodes in our national history. But, because the underlying facts are so distasteful,

there resulted a constitutional testing which should be of unusual reliability in predicting the extent of power to deal on a non-criminal basis with men who rationally can be said to present a great danger to the nation. Of course that test was conducted in terms of the war power and the proposed Act is rested on the clear and present danger concept, a distinction. But the President has declared the heroin evil to be comparable to the threat of an invading army, and any historian knows there can be internal hazards threatening domestic chaos equal to the threat of attack by a foreign enemy. Consider that after viewing the heroin-ravaged neighborhoods of New York City the Columnist Stewart Alsop, no alarmist, declared, "Any measure, no matter how radical, which holds out <u>any</u> promise of controlling the heroin malignancy, must be taken, and soon." NEWSWEEK, February 1, 1971 at 76.

The cases are three: <u>Hirabayashi v. United States</u>, 320 U.S. 81 (1943); <u>Korematsu v. United States</u>, 323 U.S. 215 (1944); and <u>Ex parte Endo</u>, 323 U.S. 283 (1944). The last two were decided the same day, when the eventual outcome of the war was clear. <u>Korematsu</u> is the area exclusion decision. <u>Hirabayashi</u>, a case dealing with the legality of a curfew imposed on Japanese-Americans pending their exclusion, needs to be read with care to grasp the factual background and judicial thinking that underly the <u>Korematsu</u> decision.

The Court was unanimous in upholding curfew in <u>Hirabayashi</u>, an opinion by Chief Justice Stone. It divided in <u>Korematsu</u>, an opinion by Justice Black supported by five justices including Justice Douglas and Chief Justice Stone, which upheld the

conviction of a Japanese-American for defying the exclusion order and remaining in the forbidden area. Justice Frankfurter concurred specially. The dissent of Justice Roberts was on the substantially correct gound that incarceration in a concentration camp, considerably more than a mere area exclusion, was what was really involved, a reality that gave Justice Black some difficulty in writing a mere exclusion opinion. Justice Jackson wrote a strange dissent which, in effect, says the courts should refuse to pass on actions of the military and executive branch in the situation posed, a position which becomes even more strange when one considers his role at Nuremberg a few years later. Only Justice Murphy declared area exclusions unconstitutional, and his position likely would have been different had there been procedures to separate dangerous persons from the non-dangerous population instead of excluding them on a mass basis with mere race as the decisive factor.

Under close analysis Korematsu becomes a very powerful precedent for area exclusions in appropriate cases, though the specific facts from which it arose, presented again, might well produce a contrary result. One is entitled to believe on the strength of it that there are circumstances in which area exclusions of individuals will pass constitutional muster. Proof to a high degree of certainty of multiple complicity in heroin trafficking conspiracies reasonably should be one of them.

In Endo the constitutional test was avoided through reading the pertinent orders and statutes involved to mean detention of an admittedly loyal citizen never was authorized, but Justice Douglas, author of that opinion, carefully limited it so that it would not prevent exclusion procedures that were justified. 323 U.S. at 301.

The Supreme Court in Robinson v. California, 370 U.S. 660, 665 (1962), in what can only have been intended as a deliberate judicial dictum, declared, "[A] state might establish a [civil] program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement."

Some 34 states now are reported to have involuntary civil commitment statutes, 24 requiring only a showing of addiction and the other 10 a showing of "dangerousness" as well. SECOND REPORT of the National Commission on Marihuana and Drug Abuse dated March, 1963 at 264. If the heroin addict who is the victim of the supply system can be committed involuntarily through civil procedures for rehabilitation, is it consistent that a person proved to a very high standard of proof to have trafficked in the drug that made such victims cannot be excluded from his area of operations in order that he can be prevented from continuing the damage? An affirmative answer means the victim must endure a much greater

loss of liberty than can be laid upon the antisocial businessman of crime who made him an addict by supplying the drug.

As a practical matter the exclusion of a crime leader should not need to be maintained more than a few years. After that, as a marked man subject to possible reimposition of exclusion if doubts arise concerning his behavior, he would be broken. To avoid this consequence to him it should be preferable for such a man to take his organization out of heroin trafficking, bear down hard on the subordinate membership to obey, and possibly even order cooperation with the authorities in curbing lesser heroin trafficking organizations to improve his credentials as a non-trafficker.

COMMENTARY RELATING TO SECTION 9H --

Monitoring Attendance

At the maximum this restraint means a defendant, while free to move about as he chooses within the geographical area permitted him, would have a federal agent at his side. Some privacy could be afforded, particularly in the bedchamber, but with the agent out of physical earshot electronic surveillance would replace his presence. The purpose is utterly to break the leadership potential of any crime boss who somehow has managed to keep control of his organization through an initial decree and at least one modifying intensification. This restraint, subject to reimposition as needed, probably would not need to be maintained in effect for more than a few

months to accomplish final and lasting results.

It is intended that the stringency of a monitoring attendance could be reduced and continued on a less strict basis as well as entirely suspended. The initial intensifying decree, however, should be at maximum restraint so there could be no argument that a reimposition represented a more serious restraint than had been ordered previously.

Three things are to be specially noted concerning this restraint. First, it cannot be imposed on less than a two-time recalcitrant. Second, it is unlikely the constitutional test will arise. Any crime boss almost certainly will have been broken before this level is reached, making it unnecessary ever actually to apply it. It will, however, be highly effective to coerce obedience even as it stands untested on the books as the ultimate risk. Finally, there is no closely analogous precedent to support this restraint, though non-criminal restraints that arguably are more severe than this one can be identified.

This restraint is unpleasant, but bearable. It is not, objectively viewed, much more severe than the loss or privacy presidential candidates knowingly contend for in their quest for the American presidency. Of course, subjectively, the dignity and status represented would be at opposite ends of the spectrum.

The situation of the addict, actually incarcerated through civil procedures to effect his rehabilitation, not

just closely attended, already has been the subject of comment in the Section 9D commentary.

The case of the detained material witness is an interesting one from the standpoint of this section. Here, to assure evidence in an impending criminal trial or grand jury investigation, it is possible for a court actually to detain a witness who has done no wrong. The federal procedure, found in 18 U.S.C. §3149, is upheld and discussed in great detail in Bacon v. United States, 449 F. 2d 933 (9th Cir. 1971). The basis of the power is that it was a part of the common law in effect at the adoption of the Constitution. That it represents an accommodation between necessity and usual civil liberties suggests that other exceptional accommodations also can be constitutional. It is not just any criminality that is involved in this proposed Act, but a criminality which is at the core of probably the single most damaging criminal activity with which our society is afflicted. Moreover, the targets of this Act are not mere witnesses but actors, and the restraint proposed is less than detention.

Somewhat in the same vein, though not as strong an analogy because criminal suspects are involved, is 18 U.S.C. §3146 authorizing conditions of release in non-capital cases prior to trial which, if not complied with, can result in detention of persons who, since not yet tried, still enjoy

the presumption of innocence.

The chances are good enough that this restraint will stand up in the constitutional testing that it would be a reckless crime boss who would dare the issue. They are not reckless men.

COMMENTARY RELATING TO SECTION 10 --

Obtaining Evidence

Section 10A raises no legal issues. It is within the province of Congress to limit, if it wishes, which among the legal evidence gathering methods, devices and tactics may be used in making cases under the proposed Act. The exclusion of electronic surveillance evidence from among methods directly authorized by this Act is a voluntary disability that is deemed desirable because of a feeling such is not seemly in a civil statute. Were the point pressed, however, any methods of obtaining evidences that are legal under the more demanding criminal standards would seem to be supportable in civil matters.

The balance of Section 10 is quite another matter. If the objective were simple perpetuation of testimony that might become unavailable by reason of death or disappearance of a witness, Federal Rule of Criminal Procedure 15 already would provide a satisfactory procedure. But much more is sought. It is intended that the use of the depositions taken be indefinitely deferred for the protection of informers. The purpose is to reverse the pattern of insider silence enforced by the discipline of death which now so effectively protects

crime syndicate bosses. The legal problem posed is to accommodate the right to a speedy criminal trial with this protection for informers.

Informer protection will be automatic if defendants informed against do not demand the evidence be taken before a grand jury. And, because this method of obtaining evidence is intended to be used only against top bosses and where the content of the evidence so bargained for is an extremely damning nature, it is unlikely the demand for grand jury action will be made.

There is a constitutional right to a speedy trial. Strunk v. United States, 93 S. Ct. 2260 (1973). This right has been said not to arise until a defendant is charged, United States v. Marion, 404 U.S. 307 (1971), but no reliance should be placed on that holding in the context of the proposed Act where it is intended that criminal charging will be indefinitely withheld. The Marion case rationale is primarily rested on the consideration that statutes of limitations terminate criminal liability when suit is not brought, a bar that is deliberately set aside in the proposed Act.

Nickens v. United States, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963), cert. den. 379 U.S. 905 (1964), states that due process is violated when formal criminal charging is oppressively withheld, a conclusion with which this commentary is not disposed to quarrel. Here, however, a critical element

has been added. Knowing the nature of the deposition evidence against them, persons adversely affected are given the option of demanding and obtaining speedy criminal trials if they wish them. This seems an ample compliance with the requirements stated in Dickey v. Florida, 398 U.S. 30 (1970), which overturned a conviction where a demand for speedy trial was not complied with.

The most important decision in this area probably is Barker v. Wingo, 407 U.S. 514 (1972). This case, after noting that the right to a speedy trial is less fundamental than such constitutional safeguards as the right to counsel or to be free from self-incrimination, held that its deprivation is not constitutionally objectionable if it does not prejudice a defendant's ability to defend. It scarcely can be prejudicial when a putative criminal defendant himself holds the power of deciding if he will become an actual criminal defendant, while the government, on the other hand, is disabled from proceeding criminally on the basis of the evidence it holds unless and until a future event, which may never occur, occurs.

The situation is concededly an uncomfortable one. Indeed, that discomfort is the basis of the informer protection intended. But no right to a speedy trial has been denied.

Unless the statute of limitations already has run on

a criminal violation, liability to prosecution can be extended, State v. Ferrie, 243 Va. 416, 144 So.2d 380 (1962). As this case makes plain, statutes of limitations are acts of grace without which the power to prosecute could extend indefinitely. But the problem here is not extension as such. It is whether limitations on past criminal behavior can be suspended selectively as to some probable violators without doing so for all violators.

Under statutes so providing, the running of limitations can be suspended for absence from the state, concealment in avoidance of process, and concealment of the fact a crime has been committed. 21 Am. Jur. 2d, Criminal Law §§159, 160 (1965). With regard to tolling for concealment of a crime see Annotation, 110 A.L.R. 1000 (1937). The analogy of these bases for tolling limitations selectively is compelling. Where the defendant has the power to terminate the inability to prosecute, the government having disabled itself in order to obtain its evidence, one has about the same situation as a concealment.

The federal government has tolled limitations on a selective basis in the case of criminals fleeing justice for many years. 18 U.S.C. §3290. No constitutional barrier is apparent to prevent such tolling from being extended as proposed.

There is no square precedent available, and the legal test of this procedure may be long in coming. Given the caution and prudence of the small group of men at which this section is aimed, there will be much reluctance to create the basis for a test, unless it somehow might be accomplished on a

declaratory judgment basis. However, any such test requires a real and present controversy and the United States has disabled itself from any power to use the evidence unless the informer is assassinated or disappears in circumstances suggestive of foul play, something that may never happen.

It is now substantially established that prior testimony under oath, where there was right of cross examination by the defendant, is admissible. Mattox v. United States, 156 U.S. 237 (1895); Pointer v. Texas, 380 U.S. 400 (1965). The standards to be met are enumerated in the recent case of California v. Green, 399 U.S. 149 (1970) as (1) the accused must be represented at the prior hearing by counsel, (2) the witness must be under oath, (3) the opportunity to cross-examine must be given and (4) the tribunal must be equipped to make record. The proposed Act meets all these standards.

The fact that the prior testimony was taken in a forum where the evidentiary standard was lower than the criminal case in which it is now introduced has not barred use of the prior testimony. Barber v. Page, 390 U.S. 719, 726 (1968), involved prior evidence at a preliminary hearing. In Fleury v. Edwards, 14 N.Y.2d 334, 200 N.E.2d 550 (1964) the use of testimony taken at a prior administrative hearing was upheld.

The proposed Act presents a stronger case than these. Here the prior deposition is usable only against specifically notified persons who will know exactly the extreme gravamen and intended purpose of it if the witness becomes unavailable as a result of foul play. That they may choose not to cross-examine is not chargeable to the procedure, but to the

involvement of the notified persons in prior criminal activities which they will not often wish further to define or challenge for reasons of pure self-interest.

It is not intended by this section to reduce the good faith obligation on the government to show witness unavailability before the prior testimony could be offered. Reynolds v. United States, 98 U.S. 145 (1879); 5 Wigmore, EVIDENCE §1405. It is assumed the Attorney General will develop appropriate notice procedures to advise putative defendants of the nature of their involvements in the prospective testimony, which notice would be given enough in advance to afford an opportunity to prepare cross-examination. These are not problem points and will not be examined in this memorandum.

The grant of complete transactional immunity and not mere use immunity to informers is at once within the power of Congress to grant and probably absolutely essential to obtain informer cooperation in the context proposed to obtain it, for these informers are apt to be deeply involved themselves in some or all of the very serious criminal activities (possibly including even murders) concerning which they will be testifying. It is also another reason the grant should be used in a very sparing fashion and limited to just situations where absolutely critical evidence cannot otherwise be obtained.

The depositions taken will be chiefly concerned with evidence relating to illicit heroin trafficking activities.

It is not intended, however, that subsequent prosecutions be so limited. Any felony of which notice was fairly given that was developed by deposition testimony could be prosecuted should an event occur raising the ban on criminal use of the deposition.

CONCLUDING COMMENTARY

Sections 11, 12, 13 and 14 of the proposed Act merit no separate commentaries. In addition to matters noted in previous commentaries these points are made concerning these sections.

Section 12 is deliberately framed to encourage appeals to foreign avarice as well as principle in the making of treaties to extend jurisdictional reach. From the standpoint of the United States the primary treaty objective is to make as much of the world as possible insecure for defendants and the concealed assets of defendants. If legitimating foreign seizure of their assets through treaties will aid in accomplishing this end (and it should, powerfully), it is a small matter that the situs nation retains some or all assets forfeited.

Section 14 dealing with construction and severability is designed to make it impossible entirely to defeat the Act on constitutional grounds, and just about as impossible totally to defeat any of its parts. The purpose is to keep constitutional failures to just failures in specific applications to specific defendants.

An example of the current standard federal severability section style is 21 U.S.C. §901 in the Drug Abuse Prevention and Control Act of 1970.

END

7 illustrations