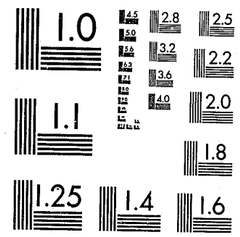

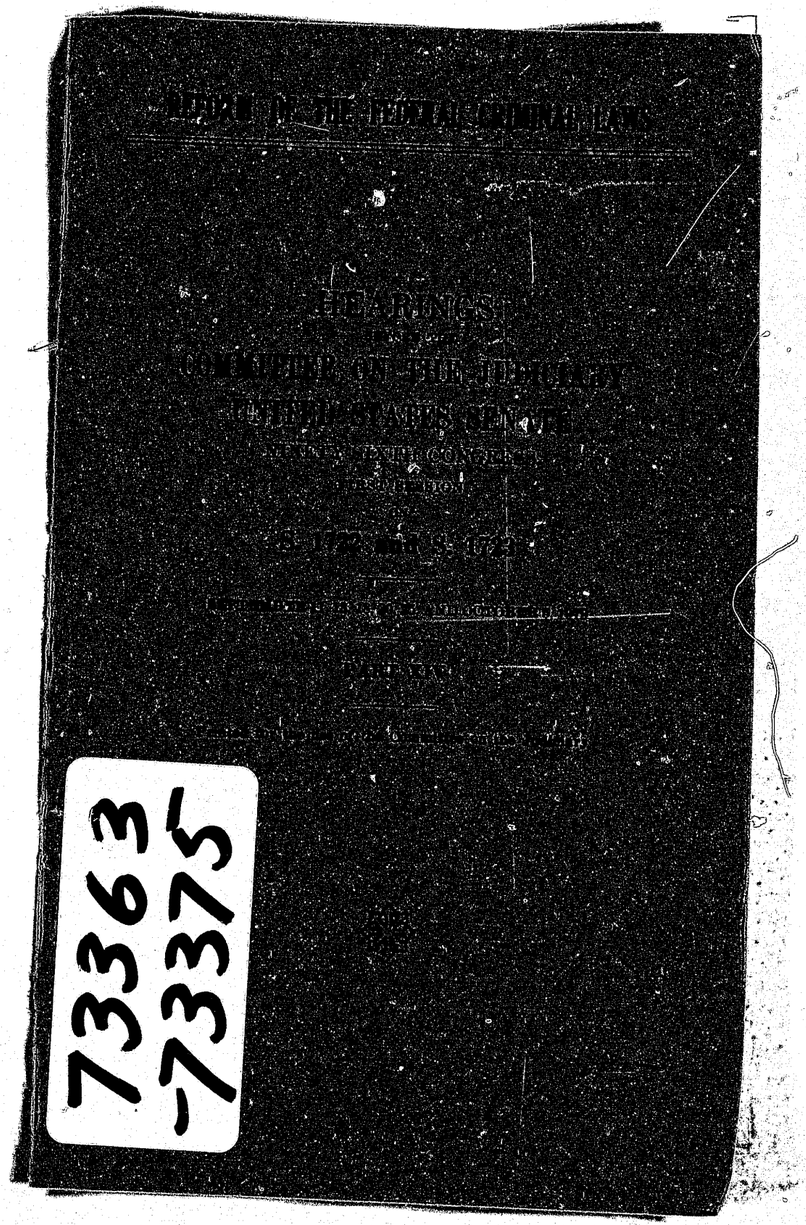

REFORM OF THE FEDERAL CRIMINAL LAWS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1722 and S. 1723

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

PART XIV

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STATEMENT OF JOHN H. F. SHATTUCK, WASHINGTON OFFICE DIRECTOR, AND DAVID E. LANDAU, STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and Members of the Committee, we are pleased to appear before you to offer the comments of the American Civil Liberties Union on S. 1722 and S. 1723, the criminal code legislation introduced in the Senate on September 7. The ACLU is a nationwide, non-partisan organization whose sole purpose is the protection of individual rights and freedoms under our Constitution. The issues that you are considering have a long-standing and far-reaching significance for civil liberties in America, and we come here today with great interest in and concern about the monumental task that you are undertaking.

BACKGROUND

A revision of the criminal laws is probably the most fundamental kind of legislation possible, and the stakes and risks involved in this enormous project are very high. Because the federal criminal law is significant both in its own right and in its potential to serve as a model for the criminal laws of the states, the effort will be worthwhile if it results in putting into practice a coherent approach to crime and punishment that concentrates law enforcement

energies on the crimes against persons and property that plague Americans while rigorously enforcing the limits on government power mandated by the Bill of Rights and our strong civil liberties traditions.

The American Civil Liberties Union's approach to the process of criminal code revision has been to insure that pressure to enact a bill does not result in damaging compromises of civil liberties or expansion of federal law in ways that threaten rights and freedoms protected by the Constitution. If that is what emerges from the deliberations of Congress, we will count it as a significant loss. We are well aware that the process of code revision has already been underway for a decade and understand the impatience of those who seek to complete the process. Nevertheless, the history of that process has been a troubled and disturbing one, and calls for a very cautious and deliberate approach today.

Seven years ago the criminal code effort got off to a bad start in Congress with a bill that rejected many reasonable recommendations of the National Commission on Reform of Federal Criminal Laws (the Brown Commission), and dangerously expanded the criminal law in ways that cut deeply into constitutional rights. The principal redeeming value of this first criminal code effort was its title, "S.1". Of course, S.1, like all criminal code reform efforts, had a variety of superficially attractive features. It simplified definitions, eliminated inconsistencies, and reorganized offenses. It reduced 79 undefined elements of culpability to four defined terms of general application—intention, knowing, reckless, and negligent—and it repealed a variety of obsolete crimes now on the books, including interfering with the flight of government carrier pigeons, seducing a female passenger on a steamship, and writing a check for less than $1.00.

In most respects, however, S.1 was a disaster for civil liberties. It would have vastly expanded the criminal law as an instrument of government secrecy, criminalized many forms of political dissent, restricted freedom of the press, and unnecessarily broadened the powers of federal prosecutors and investigative agencies.

Fortunately, S.1 was not enacted. Its worst features raised such a storm that it died in Committee. In the three years since the demise of S.1, the Senate has drafted and passed a new bill, S. 1437. While it was an improvement over S. 1, S. 1437 also presented grave and unacceptable risks for civil liberties and was strongly opposed by the ACLU and many other interested organizations.

S. 1437 deleted the sections of S. 1 which would have created an Official Secrets Act, the provision allowing a government official charged with crime to invoke the "Nuremberg defense" of following higher orders, and several other similarly dangerous features of the earlier bill. It also contained reforms of existing law, including repeal of the notorious Smith Act, modernization of the federal rape law, expansion of certain civil rights laws to cover women and aliens and a mechanism to reduce disparities among federal sentences (although at the risk of imposing longer sentences and more imprisonment).

On balance, however, the substantial costs of S. 1437 far exceeded its limited benefits. The dangers to civil liberties are clear from the language of the bill and the Judiciary Committee's voluminous report on it. The bill, for example, removed certain factual issues from the province of the jury. It also greatly expanded federal law by permitting for the first time all crimes to be prosecuted as attempts, and making it a new federal offense to "endeavour to persuade" someone to engage in illegal conduct. The bill also expanded the federal law of conspiracy.

Many substantive crimes in S. 1437 were broader than current law and impinged directly on First Amendment freedoms,[1] expanded the scope of federal jurisdiction, and failed to accomplish many minimal reforms of current law recommended by the Brown Commission or others, in such areas as Co-conspirator Liability, Sabotage, Demonstrating to Influence a Judicial Proceeding, Contempt, Interception of Communications, and Making a False Statement. Moreover, several reforms originally in the Senate bill were removed on the Senate floor (e.g., repeal of Logan and Comstock Acts) and new dangers to civil liberties

[1] See, e.g., Obstructing a Government Function by Fraud (§ 1301), Obstructing a Government Function by Physical Interference (§ 1302), Hindering Law Enforcement (§ 1311), Obstructing a Proceeding by Disorderly Conduct (§ 1338), Making a False Statement (§ 1343), Revealing Private Information Submitted for a Government Purpose (§ 1525), Extortion (§ 1722), Disseminating Obscene Material (§§ 1342 and 3311), Failing to Obey a Public Safety Order (§ 1361), Liability of an Accomplice (§ 401(a)), and Engaging in a Riot (§ 1333). This is a representative and not an exhaustive list.

were added before its final Senate passage (e.g., preventive detention and "local community" standards for federal obscenity prosecutions). Finally, and in many way most importantly, the sentencing provisions in S. 1437 created a significant danger that the amount and length of imprisonment at the federal level would be substantially increased.

After passing the Senate, S. 1437 came under close scrutiny in the House Subcommittee on Criminal Justice, which concluded after extensive hearings that the bill was "fraught with pitfalls and not legislatively feasible in the House of Representatives". The bill's costs to civil liberties and state and local autonomy and its substantial impact on the federal judiciary caused the Subcommittee to observe in its Final Report that there are enormous risks in attempting to reach agreement about a wholesale revision of the criminal law. The Report noted that "[t]he tremendous investment of time, energy and emotion that goes into an omnibus bill results in a tremendous pressure to agree to things in order not to hold up the legislation. This sort of pressure was clearly evidence during the debate on S. 1437." The Subcommittee noted that the impact of the Senate bill's expanded inchoate crimes on civil liberties had not been adequately studied, the prosecutorial need for new substantive crimes had not been empirically demonstrated, and the value of combining dozens of "government function obstruction" crimes into a single comprehensive provision had not been weighed against the affect such a provision could have on conduct protected by the First Amendment.

SUMMARY AND RECOMMENDATIONS

This is the context in which we have reviewed the criminal code legislation introduced in the Senate this year. Our conclusion is that the substantive law provisions of S. 1723 move toward striking a reasonable balance between law enforcement and civil liberties, but the corresponding sections in S. 1722 generally do not.

Although S. 1723 in its current form does eliminate many of the substantive provisions of last year's Senate bill which endanger civil liberties, in several areas it contains serious flaws, while in other areas the bill is incomplete. For example, the sentencing provisions are seriously defective in several key respects and should be changed in light of the recommendations made in Part II of our statement. Moreover, since S. 1723 follows on omnibus format, our experience clearly tells us that it will be the target of tremendous "trade-off" pressures—both from S. 1722 and from other proposals—as it moves through the legislative process. Since these pressures are substantial with any omnibus legislation, it will be extremely difficult to maintain the integrity of a bill like S. 1723 which adequately protects civil liberties. But anything less than such a bill would nullify the value of criminal code reform and cause us to oppose the legislation.

We do oppose S. 1722, since this bill carries forward the bulk of the provisions of S. 1437 which threatened civil liberties. Despite several changes which we applaud—e.g., elimination of the crime of Violating a Public Safety Order, inapplicability of the general attempt and solicitation provisions to certain substantive offenses, less expansion of federal jurisdiction, repeal of the Logan Act and elimination of federal preventive detention—S. 1722 incorporates most of the new law which we found objectionable in S. 1437, and adopts few of the salutory reforms contained in S. 1723.

In Part I of our statement we compare some of the substantive law provisions in S. 1722 and S. 1723. We have not been exhaustive in our analysis or coverage of the bills, but have addressed representative provisions which have raised major civil liberties problems in the past.

In the important area of inchoate crimes—where broadly drafted provisions can endanger free speech and association and due process of law—S. 1723 properly preserves current law on criminal attempt by limiting application of the offense to specified crimes. On the other hand, S. 1722 dangerously expands current law by creating a general attempt statute, which we strongly oppose. We also oppose the general conspiracy offense in both bills and urge the Committee at least to expand the list of crimes exempt from conspiracy prosecution to include all crimes involving speech, advocacy or publication. S. 1722 (but not S. 1723) makes two other dangerous changes in current conspiracy law, which we oppose, by (1) implicitly eliminating the requirement that a conspirator must have a specific intent to commit the crime that is the object of the conspiracy, and (2) rejecting the traditional "true agreement" on bilateral approach to the

offense. By contrast, S. 1723 (but not S. 1722) substantially improves two other aspects of conspiracy law by (1) repealing the overbroad and much-criticized offense of conspiracy to defraud the United States, and (2) overturning the notorious "Pinkerton rule" that holds a co-conspirator liable for any "reasonably foreseeable" crime committed by another member of the conspiracy even if the co-conspirator had no actual knowledge of the crime. We strongly oppose the inclusion of a new general crime of solicitation in S. 1722. It is not enough to exempt advocacy offenses from solicitation, since this new crime (which is not contained in S. 1723) penalizes pure speech whether or not it results in criminal conduct.

S. 1722 dangerously expands the liability of accomplices by eliminating the current law requirement that an accomplice have a specific intent that the criminal act committed by the principal take place. S. 1723 properly preserves existing law in this area. In the area of general defenses, S. 1723 would restore the "objective" defense of entrapment, which we endorse because it turns on the nature of the police misconduct rather than the predisposition of the defendant.

The offenses involving national defense—treason, sabotage, espionage, obstructing military recruitment and inciting or aiding mutiny, insubordination or desertion—raise a variety of traditional civil liberties issues. In the area of Treason, both bills generally preserve current law, but S. 1723 makes an important improvement by requiring an intentional state of mind for both alternative forms of Treason, thereby eliminating an anachronism is existing law. In the Sabotage area, we urge the Committee to adopt the approach of S. 1723, which does not penalize conduct undertaken with "reckless disregard" of risk or harm to the national defense, and to further narrow the offense of Impairing Military Effectiveness by limiting its application to a significant impairment of a major weapons systems. We also recommend that the Committee narrow the crime of wartime sabotage by limiting its application, as in S. 1723, to a "congressionally declared war, by eliminating, or better defining, "associate nations", and by adopting the Brown Commission's narrower definition of the military items whose sabotage is prohibited, leaving the damage of non-strategic items to state or other federal law. The current espionage laws are carried forward by both bills, although S. 1723 contains an alternative "classified information" approach to the subject. Despite its major shortcomings, we believe that existing law is preferable to the classified information model.

However, we strongly urge the Committee to reverse the position taken in its Report on S. 1437 and make it clear that the general espionage laws do not cover conduct undertaken without a specific intent to injure the national defense. The "incitement" crime of obstructing military recruitment or induction is overbroad in both bills and its application should be narrowed to conduct which interferes with induction during times of declared war. Similarly, the offense of *inciting or aiding mutiny, insubordination or desertion* should be limited to conduct in peacetime and "incitement" only in wartime.

The offenses involving government processes have long been one of our principal concerns in the criminal code debate. S. 1722 contains two very broad new offenses of general application which are omitted in S. 1723—obstructing a government function by fraud and obstructing a government function by physical interference. We strongly oppose these provisions as virtually limitless in scope and a serious threat to constitutionally protected conduct, and we urge the Committee to adopt the "current law" approach of S. 1723, which prohibits the intentional interference with specific, vital government functions by fraud or force. We endorse the approach taken in S. 1723 to the crime of hindering law enforcement. Unlike S. 1722, S. 1723 follows the recommendation of the Brown Commission and the Model Penal Code by requiring an intentional level of culpability, and it excepts from the definition of "conceal" a refusal to turn over documents or notes. Without these limitations the crime of hindering law enforcement in S. 1722 is open to prosecutorial abuse. We also recommend the addition of an affirmative defense to this crime, codifying case law, that a person cannot be found guilty of hindering when he destroys records before being put on notice that they are of interest to law enforcement authorities.

The offense of demonstrating to influence a judicial proceeding is overbroad in both S. 1722 and S. 1723. In order to strike the proper balance between First Amendment rights and the due process rights of litigants, the offense should be limited to actual disruptions, the protection of non-federal premises such as the residence of a judge should be left to state law, and the use of conspiracy or attempt in conjunction with this offense should be precluded. We also urge deletion of the broad new offense in S. 1722 of obstructing a proceeding by disorderly conduct, and recommend the retention of current law in this area, making it an offense to disrupt judicial proceedings.

S. 1722 exacerbates civil liberties problems in the current law of contempt of court, but S. 1723 makes several important improvements in this area. We oppose (1) the deletion in S. 1722 of the existing limitation on a federal court's power to punish contempt of its authority "and none other", and (2) the authority of a federal prosecutor, with the concurrence of the court, to initiate general contempt prosecutions. We endorse the sharp limitation on the penalty for general contempt in S. 1723. This reform follows the approach of the Brown Commission Study Draft, creating an incentive for prosecutors and judges to invoke the narrower and more specific provisions in the bills covering failure to appear as a witness, refusal to testify or produce information and disobeying a judicial order.

Unlike the general contempt statute, these sections provide notice and procedural safeguards for defendants. By setting the general contempt penalties at $10,000 and 6 months, S. 1722 undermines the incentive to prosecute under the specific offenses. S. 1722 also authorizes subsequent prosecution under another statute for the some allegedly contemptuous statute, which we oppose as a violation of the spirit of the double jeopardy clause. Finally, S. 1722 limits the affirmative defense that a court order was "constitutionally invalid" to the press. We endorse the broader approach in S. 1723 which permits the defense to be invoked in cases where a court order was a constitutionally invalid prior restraint on any "freedom of expression".

S. 1722's perjury provisions expand the power of prosecutors in ways which could encourage prosecutorial abuse. The definition of materiality is expanded, materiality is made a question of law, and the crime of attempt now applies to perjury. In addition, the two witness rule is abrogated. In contrast, S. 1723 carries forward the two-witness rule and improves current law by requiring that the statement be made in reckless disregard of its materiality and substantially reducing the penalty. In the area of false statement to law enforcement officials, S. 1723 take the important step of codifying those case law decisions which have refused to include false oral statements within the scope of current 18 U.S.C. § 1001. S. 1722 would include such statements.

The sections of both bills dealing with civil rights improve current civil rights offenses by 1) adding sex as a category of unlawful discrimination, 2) lowering that state of mind requirement in several sections so that the knowing violation of a person's constitutional rights is prohibited, and 3) broadening the classes of persons protected by the statutes to include all "persons" and not just "citizens". We oppose the lowering in S. 1723 of current felony level penalties for interfering with civil rights where the actor intends bodily injury. We also oppose S. 1723's proposed repeal of 18 U.S.C. § 1231 which prohibits strike-breaking.

As far as the privacy provisions of the bills are concerned, we strongly support the prohibition in S. 1723 of any warrantless interception, disclosure or use of private communications and correspondence without the consent of all parties to the communications. This would close a major loophole in existing law and preclude the use of "one party consent" wiretaps to circumvent the warrent requirement. On the other hand, we oppose a provision in both bills which extends the current law defense to the crime of eavesdropping to any person, whether or not an employee or agent of a common carrier, who while acting in the course of his employment was engaged in "supervisory observing". This would be a significant intrusion into employee privacy.

There are a number of miscellaneous substantive provisions which we would like to comment on. First, in the area of extortion, we urge the Committee to preserve the Supreme Court's decision in *United States* v. *Enmons*, 110 U.S. 396 (1973) which holds that extortion does not cover bona fide strikes and labor disputes even when force or violence occurs during the course of a dispute. In the area of drug offenses, we join the American Bar Association, the Attorney General (when he was head of the Criminal Division) and many others in recommending the decriminalization of simple possession and use of marijuana. The riot sections of S. 1723 contain four improvements of current law, but also two unwarranted expansions. S. 1722 includes the expansions and one improvement. We support the elimination in S. 1723 of interstate travel as a basis for federal jurisdiction over the crime of "inciting or leading a riot"; the raising of the culpability for "leading a riot" from "knowing" to "intentional"; the narrowing of the crime of "engaging in a riot" so that a person must "knowingly engage in violent or tumultuous conduct", and not merely be caught up in a

crowd in which others are engaging in such conduct; and the raising in both bills of the number of persons engaged in violent or tumultuous conduct required to constitute a riot from three to ten. The two expansions of federal riot law that must be eliminated are (1) the "reckless" level of culpability with respect to the surrounding circumstances and the result of "inciting or leading a riot" and (2) the expanded offense of "engaging in a riot". The culpability level should be "knowing". The offense of engaging in a riot should be limited to current law, which covers only federal prisons.

In the area of obscenity we oppose the new general obscenity offense based on widely varying "community standards" in S. 1722.

The ACLU has had a long standing interest in federal sentencing reform. We have carefully studied the sentencing provisions of both bills and have concluded that while including several important reforms, the provisions have a number of fundamental problems that must be cured if we are to have a workable and effective new sentencing system. The reforms include new procedural protections for probationers, appellate review of sentences for defendants, the requirements that judges state on the record their reasons for imposing sentences, a new sentence of conditional discharge and the specific inclusion of community service as a permissible condition of probation.

These reforms, however, do not balance the significant flaws in the sentencing provisions. There is no coherent and consistent standard for the disposition of federal offenders. The system for guiding judicial discretion is inadequate. The bills do not emphasize alternative sentencing to incarceration. Finally, by abolishing parole and good time the bills close the safety valves of the present system and risk even longer periods of incarceration than under current law. Part II of our statement contains a number of specific recommendations in this area.

We now turn to our detailed comparison of S. 1722 and S. 1723.

I. SUBSTANTIVE LAW PROVISION

S. 1722 is a dangerous expansion of federal criminal law. In section after section it either creates new law, expands existing law or erodes various procedural protections for defendants. It invites abuse by law enforcement officials and raises serious questions of due process and notice.

The substantive law provisions of S. 1723, on the other hand, are a substantial improvement over S. 1722 and come close to striking a balance between enforcement of the criminal law and limitation on government power as mandated by the Constitution. Although it has shortcomings and is incomplete, S. 1723, for the most part, preserves the current substance of the federal criminal law while at the same time improving the law in several important ways. Following is an analysis of those sections which we have had time to review since both bills were published.

A. Inchoate Crimes

The question of at what point the law may intervene to prevent criminal conduct by imposing sanctions against activities which lead up to the actual criminal event has always been a difficult one. The ACLU acknowledges the importance of crime prevention and the logic of punishment which protects the innocent public before rather than after completion of the criminal act. At the same time, we believe that the so-called inchoate offenses—attempt, conspiracy, and solicitation—offer unparalleled opportunities for over-zealous law enforcement which invades constitutional guarantees of freedom of the press, free speech, free association with others, and due process of law.

The combination of overbroad inchoate with substantive offenses can lead to constitutionally deficient prosecutions, such as the case against outspoken public critics of the government for conspiracy to incite draft resistance. *See, United States* v. *Spock*, 416 F. 2d 165 (1st Cir. 1969). In such cases the conduct alleged to constitute a criminal offense is removed from any act in itself criminal, and the links connecting them may consist entirely of public and constitutionally protected speech and association. Such prosecutions move far away from the general purposes of the criminal law and the theories under which inchoate offenses have been held punishable. *See Grunewald* v. *United States*, 353 U. S. 391, 402 (1957). "For every conspiracy is by its very nature secret. A case can hardly be supposed where men concert together for crime and advertise their purpose to the world."

Society unquestionably has a stake in punishing or deterring those who engage in criminal activity. But it has an even greater stake in clearly marking the limits of the criminal sanction. Laws which make controversial speech evidence of criminality have no place in our constitutional system.

1. *Criminal Attempt* (§ 1101).—§ 1101 of S. 1723 properly preserves the current law approach to criminal attempt by making attempt an offense whenever it is specifically mentioned in the substantive offenses. In this way Congress can determine, in respect to particular crimes, whether an attempt statute is wise or necessary.

S. 1722, on the other hand, would give the federal government for the first time an across-the-board attempt statute applicable to all other offenses. Do we really want to punish unsuccessful attempt to make a false oral statement, demonstrate to influence a judicial proceeding or disclose government information? Are such prosecutions an intelligent use of limited resources for combatting serious crime? Moreover, punishing attempts to incite unlawful conduct seriously increases the danger of government prosecution for advocacy plainly protected by the First Amendment. The ACLU opposes a comprehensive attempt statute. We urge that current law be maintained and S. 1723's approach to attempt be adopted.

2. *Conspiracy* (§ 1102).—Unlike § 1101 of S. 1723, both bills unfortunately establish a general conspiracy offense. The ACLU strongly urges the Committee to reconsider the need for such a general conspiracy provision in light of the potential it carries for investigatory and prosecutorial abuse, and its tendency to reach activity protected by the First Amendment. The need for a general conspiracy offense law has been questioned by scholars and commentators for many years. See, e.g., Johnson, "The Unnecessary Crime of Conspiracy," 61 Cal L. Rev., 1137 (1973). The better approach would be to limit the application of the conspiracy provision to only those serious offenses posing the gravest danger to society. If the Committee chooses to retain a general conspiracy offense, then we recommend that the list of offenses to which it is inapplicable be expanded to all of htose offenses listed in § 1004(b)(3), e.g., Impairing Military Effective, Obstructing a Government Function by Fraud, Obstructing a Government Function by Physical Interference, etc.

Aside from the issue of a general conspiracy statute, the ACLU has several objections to the conspiracy provisions of S. 1722 which are resolved in S. 1723. S. 1722 seriously erodes the present specific intent requirement. Under current law, in order to be criminally liable for conspiracy to commit a specific offense, an individual must have at least the same mental state relative to the object offense as would be required to convict him of that offense. In addition, the conspirators must understand that committing the crime is a consequence of their agreement, and they must desire commission of the particular offense as the outcome of their agreement. See generally, Marcus, "Conspiracy: The Criminal Agreement in Theory and Practice," 65 Geo. L. J., 925 (1977).

In order to properly limit the scope of conspirator liability, and to preserve its central character as an offense "predominantly mental in composition" [2] it is essential that a precise formulation of the specific intent requirement be incorporated into a conspiracy statute. This is the approach taken by the American Law Institute in the Model Penal Code and S. 1723.[3]

In contrast, S. 1722 fails to address the issue of intent as to the object of crime in either the text of § 1002 or in the Senate Report accompanying S. 1437. S. 1722 provides that one has the mens rea for conspiracy if he "agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes." Under this provision one could be liable for conspiracy to commit an offense without having desired that it be committed.[4]

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[2] Harrow, "Intent in Criminal Conspiracy", 89 *U.Pa.L.Rev.*, 624, 632 (1942).

[3] § 1102(a) of S. 1723 provides that "a person is guilty of an offense if that person and another person, *with intent that a crime (other than attempt) be committed, knowingly agree to engage in the conduct that is required for the crime so intended*, and one of those persons so agreeing intentionally engages, in any conduct in furtherance of the intended crime" [emphasis added].

[4] The Senate Report on S. 1437 has obscured this change in current law discussed above by its treatment of the Supreme Court's decision in *U.S.* v. *Feola*, 420 U.S. 671 (1975). The Senate Report suggests that the Court's decision in that case is dispositive of the matter: "With respect to scienter, the Supreme Court has recently resolved a conflict among the circuits on the issue whether knowledge of the jurisdictional factor in a conspiracy is an essential element of the charge [*Feola*]. The Court held that, save for unusual circumstances, such knowledge need not be proved under 18 U.S.C. § 371. The proposed Code is consistent with this view. . . ." [Senate Report, p. 162].

The Senate Report misstates the relationship of the *Feola* decision to the proposed § 1002.

In *Feola*, the Court was faced with the question of whether a person could be convicted under § 371 for conspiring to "commit any offense against the United States," where the person did not know *that the offense he concededly conspired to commit* happened to be a federal offense. The Court held that there was no specific intent requirement that *Feola* knew the officer he assaulted was a federal agent. Thus, *Feola*, is irrelevant to the proposed § 1002, except insofar as it reaffirmed the principle that intent to commit a crime is required for a conspiracy conviction under § 371.

Under § 1002, a person can be guilty for engaging in conduct that considered by itself is legal. For example, A and B conspire to rob a bank. A asks C to drive A and B to the bank on the pretext of obtaining a loan. C, ignorant of the robbery plans, drives A and B to the bank. Under the literal terms of § 1002, C has now arguably committed a crime by agreeing to engage in conduct, the performance of which would constitute a crime, and engaging in conduct with an intent to effect an objective of the agreement.

A second important change which S. 1723 makes in current conspiracy law is its adoption of the unilateral approach to the offense. At common law, and under the current federal conspiracy statute (18 U.S.C. § 371), the crime of conspiracy is defined as the situation in which "two or more persons conspire. . . ." Thus, an actual agreement is an essential element of the offense and must be established before one is liable for conspiracy. One could not conspire with, for example, an undercover agent. Requiring an actual agreement is consistent with the purposes of conspiracy law, that is, to prevent the formation of dangerous criminal relationships. Separate laws for conspiracy have been justified on the ground that partnership in crime presents a greater danger to society than does an individual acting in isolation. S. 1722 rejects this traditional "true agreement" requirement, and reaches "unilateral" conspiracies. This "unilateral" approach represents an unwarranted departure from current federal conspiracy law, which is consistent with the principles historically invoked to justify separate conspiracy statutes. S 1723 maintains the bilateral agreement requirement.

Finally, S. 1723's conspiracy provision substantially improves current law by eliminating the vague and overbroad offense of conspiracy to "defraud" the government. This dragnet provision has had a checkered history, elaborately recounted in a classic article by Abraham S. Goldstein, "Conspiracy to Defraud the United States", 68 Yale L.J., 405 (1959). This already overbroad provision has been judicially expanded.

S. 1723 has taken the long-overdue action of deleting "defrauding the United States" portion of conspiracy offenses. This move in no way will limit the power of government to prosecute inchoate crimes, since conspiracies to violate any specific criminal statute are still proscribed in both bills. Instead of improving current law by abolishing this crime, S. 1722 broadens the current law on defrauding the government. This is discussed under the section of this statement dealing with § 1301, Obstructing a Government Function by Fraud.

3. *Solicitation.*—S. 1722, includes a general solicitation provision in the revised criminal code. S. 1723 contains no such provision. We agree with S. 1723.

§ 1003(a) makes it a crime to "command, entreat, induce or otherwise endeavor to persuade" another person to do something which constitutes a criminal offense under "circumstances strongly corroborative" of an intent that the other person engage in the prohibited conduct. The solicitor need only intend that the conduct occur; he need not know that it is in fact a crime. Thus under S. 1722 a person could be prosecuted for encouraging someone else to engage in conduct that he thinks is constitutionally protected. By the terms of this all-embracing provision any discussion of political tactics which might involve commission of an offense could be the basis of a criminal prosecution.

Solicitation is an entirely new federal crime. It is unnecessary because other provisions of current law already cover those situations where solicitation actually results in criminal conduct. Thus, at present, if a solicitation is successful, the solicitor could be criminally liable as an accomplice. If the solicitation does not result in the commission of a crime, but the solicitee agrees and thereafter commits an overt act, the solicitor could be charged with conspiracy.

If proposing a solicitation statute, the Brown Commission intended to provide punishment for those who instigate offenses and thereby are truly culpable. (Working Papers, Vol. I at 308). But terms like "endeavor to persuade" cast a much wider net. On their face they ensnare the speaker for nothing more than speech, when no other criminal act has occurred. By deleting the Brown Commission's requirement of an overt act toward the commission of a crime by the person solicited (see Final Report § 1003) § 1003 could be used to punish advocacy which does not result in any lawless action. This broad formulation is squarely in conflict with the First Amendment. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

Although § 1004(b)(2) of the proposed bill renders the offense inapplicable to advocacy crimes (e.g., obstructing military recruitment, inciting mutiny, leading a riot and obstruction of a government function by physical interference), this is hardly sufficient to safeguard against overreaching. Solicitation should not be applicable as a general provision. Rather, Congress should make a determination as to which of those few serious offenses the new crime of solicitation should apply.

The ACLU strongly opposes a general solicitation offense because it is dangerously vague and overbroad and presents a serious potential for investigative and prosecutorial abuse. It will have a severe chilling effect on a variety of First Amendment activities as it makes possible prosecution for pure speech whether or not it results in criminal activity.

B. Accomplice liability

As the Senate Report accompanying S. 1437 points out, accomplice liability in one sense "marks the outermost limits of the criminal law" since, on occasion, it may operate "to hold liable persons who take no part in the conduct and had no agreement with the actor" (Senate Report p. 67). S. 1723, unlike S. 1722, presents a formulation of accomplice liability which condifies current law. The key element in this formulation is a requirement of specific intent that the criminal act take place. See *United States* v. *Peoni*, 100 F.2d U.S. 1 (2d Cir. 1938). Mere knowledge that a crime is to be committed is not enough. S. 1723 contains this intent requirement, but S. 1722 does not.

Without such a requirement, this section, coupled with substantive crime, could subject innocent persons engaged in First Amendment activity to criminal prosecution. For example, a person who assists in organizing a demonstration could be charged as an accomplice if the demonstration later "obstructed a government function." For this reason we agree with S. 1723 that the traditional criminal law standard for accomplice liability should be preserved.

S. 1723 significantly improves current law on co-conspirator liability by eliminating the notorious Pinkerton Doctrine, in accordance with the recommendations not only of the ACLU but of the Brown Commission and the American Bar Association. The Pinkerton rule holds a co-conspirator liable for a crime committed by another member of the conspiracy even though he did not know of or take part in the commission, so long as the resulting crime is a "reasonably foreseeable" result of the conspiracy. The rule has been widely criticized as irrational and unnecessary. See Marcus, "Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-Federal Intent," Vol. 1976 No. 3 Ill. Law Forum, 627, 633–34; "Developments in the Law: Criminal Conspiracy," 72 Harv. L. Rev. 920, 998–999 (1959). It is a radical departure from the fundamental criminal law principle that guilt is personal, not vicarious, and has been frequently abused at the expense of innocent defendants. It allows the government, through the use of a conspiracy dragnet, to convict a conspirator of every substantive offense committed by any other member of the group even though he had no part in or knowledge of it. The abolition of the Pinkerton Doctrine will not deprive law enforcement officials of the ability to prosecute co-conspirators. If the substantive offense is committed with the defendant's assistance, he will be liable as an accomplice. If there has been no assistance, but only an agreement and an overt act toward the commission of the offense, a conspiracy prosecution can still ensue. S. 1722 maintains this abused provision of current law. We recommend its elimination.

C. Offenses Involving National Defense

1. *Treason.*—Both bills generally preserve the current law of treason. 18 U.S.C. § 2381, while eliminating the death penalty.[5] In this respect they satisfy

[5] 18 U.S.C. § 2381 provides: Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000; and shall be incapable of holding any office under the United States.

§ 1101 of S. 1722 provides: (a) OFFENSE—A person is guilty of an offense if, while owing allegiance to the United States, he—(1) adheres to the enemies of the United States and intentionally gives them aid and comfort; or (2) levies war against the United States.

(b) PROOF—In a prosecution under this section, a person may not be convicted unless the evidence against him includes the testimony of two witnesses to the same overt act, or unless he makes a confession in open court.

(c) GRADING—An offense described in this section is a Class A felony.

§ 1301 of S. 1723 provides: (a) Whoever, owing allegiance to the United States—(1) adheres to the enemies of the United States and intentionally gives them aid and comfort; or (2) with intent to overthrow, destroy, or change the form of government of the United States or to severe a State's relationship with the United States levies war against the United States by engaging in armed rebellion or armed insurrection against the United States.

(b) A person may not be convicted of an offense under this section unless the evidence against that person includes the testimony of two witnesses to the same overt act, or unless that person makes a confession in open court.

an important requirement of criminal code revision that no changes in law be made that exacerbate existing threats to civil liberties.

S. 1723 provides an explicit state of mind requirement for both alternative forms of treason, and thereby eliminates an anachronism in existing law. On the other hand, S. 1722 fails to require a specific intent to overthrow the government by levying war against the United States, and is therefore less acceptable. Logic and the history of the treason clause in the Constitution (Art. III, Sec. 3) declare that treason should require specific intent. See Hurst, "Treason in the United States," 58 Harv. L. Rev., 395, 815–18. Betrayal of allegiance and the levying of war connote no less. The treason clause was intended to curb 18th century British excesses, where persons were convicted based on actions or even expressions or advocacy of ideas whose "natural" consequence (as opposed to specific intent) might harm the King or the state.

Both bills carry forward one perceived difficulty in existing law. The phrase "aid and comfort" is vague and could readily impinge on the Firsts Amendment. A troublesome area is propaganda broadcasting. While few would quarrel with the treason convictions of World War II propaganda broadcasters paid by the enemy to engage in a well-conceived program aimed at undermining American morale, a different question is presented by Jane Fonda's visit to North Vietnam to protest U.S. warmaking. The legislative history should make it clear that wartime speech against U.S. policy is not treasonous unless the speaker has a specific intent to betray the United States by assisting the enemy.

2. *Sabotage.*—The federal crime of sabotage is addressed to legitimate federal law enforcement interests in prohibiting conduct intended to seriously impede the national defense. On the other hand, sabotage must be narrowly drawn so as not to impinge on First Amendment activities by anti-war demonstrators or labor organizers. Furthermore, the use of a broad federal sabotage statute related to the national defense is a misuse of federal resources and an incursion on state law enforcement interests. For this reason the crime of sabotage should be limited to situations where the actor has a specific intent to injure the national defense and the target of sabotage is of direct military significance. S. 1723 generally moves toward satisfying these principles. S. 1722 does not.

Unlike S. 1722 and the existing law of sabotage, S. 1723 does not penalize conduct undertaken with "reckless disregard" of risk or harm to the national defense. Instead, the crime of "Impairing Military Effectiveness", requires under S. 1723 that a person "know" that his or her conduct could harm the national defense. Nevertheless, because of the serious threat to civil liberties posed by this provision, we submit that it should be deleted or further narrowed. In addition to affecting the exercise of First Amendment rights, the offense of Impairing Military Effectiveness is not, in our view, responsive to any valid law enforcement objective. State and federal property destruction laws are sufficient to proscribe conduct damaging to most military property. To subject labor or anti-war dissenters to the notoriety, political stigma and additional penalties of a prosecution for "impairing military effectiveness" where no specific intent to injure the national defense need be proved is to facilitate abuse of the federal law of sabotage.

The crime of Impairing Military Effectiveness is particularly dangerous under S. 1722. S. 1722 permits the use of new general attempt and conspiracy provisions to prosecute a person even before he actually engages in specific conduct with a reckless disregard of the risk that its natural consequences could damage property suited for the national defense. It is not at all clear that active opposition to a particular weapons system or the exposure of military cost overruns or inefficiency could not be construed to fall within the overbroad prohibition of S. 1722.

If the crime of Impairing Military Effectiveness is not to be eliminated entirely, it should at least be narrowed further by (1) limiting the offense to circumstances under which a significant impairment of a major weapons system or means of defense, warning, etc. is caused (See § 1312(a)(2)), (2) eliminating the bracketed reference to "associate nations" in § 1312(a), and (3) classifying the offense as a minor felony or misdemeanor where no damage to a major weapons system is caused.

The sabotage section of S. 1723 (§ 1311) is also less threatening to First Amendment rights than the corresponding provision of S. 1722 (§ 1111). In particular, the narrow bracketed term, "congressionally declared war, pursuant to article I, Section 8 of the Constitution", and the use of modifiers such as "substantially" and "significant" are important improvements. In addition, it would

be an improvement to eliminate the references in the sabotage statute to "associate nations", as suggested by the inclusion of this term in brackets in S. 1723, unless the term is narrowly defined to include only nations with which the United States is formally allied during time of war.

Neither bill, however, attempts to define narrowly the items covered by sabotage. Current law covers damage to or defective manufacture of a long list of enumerated items, followed by a broad catch-all phrase encompassing virtually all items "intended" or "suitable" for use in connection with the conduct of war or defense activities. S. 1722 and S. 1723 omit a detailed list, but include "any property used in or particularly suited for use in the national defense", and any facility engaged, in whole or in part, in "furnishing defense materials or services" or "producing raw material necessary to the support of a national defense production or mobilization program", and any public facility "used in, or designated and particularly suited for" use in the national defense. Under this sweeping definition, many clearly non-strategic items of little or no military significance would be covered. As the Brown Commission explained, while damage to such items is "punishable as criminal mischief", it should not be punished as sabotage "except in the improbable event it occurs in circumstances under which military effectiveness will be thereby seriously impaired", in order to avoid "the kind of problem which can arise where essentially innocuous conduct and minor harm is combined with an intent which is proscribed, but which may be more a manifestation of pique than of subversion". See, 1 Working Papers of the National Commission on Reform of the Federal Criminal Law, at 442 (1971).

Accordingly, we recommend the adoption of a narrower definition of the items covered by the sabotage statute, to include only items of direct military significance or whose impairment would directly injure military effectiveness. The language in the bills could be modified, for example, in one of the following ways: (1) limiting the definition of items covered to "military" property and facilities engaged in furnishing "military materials or services", (2) adding the words "direct military significance" as in § 1105 of the Brown Commission's proposed version of the criminal code; and (3) specifically providing that only property or facilities of "direct military significance" or whose impairment would "directly affect United States military effectiveness" are covered by the sabotage statute.

Regardless of what specific language the Subcommittee employs to accomplish these objectives, it is important that the legislative history of the sabotage provisions specify that items of marginal military significance such as typewriters and windowpanes are not to be covered. See, e.g., Working Papers at 443 ("damage to a typewriter, a record player or a locker ordinarily would not be damage to things of "direct military significance"). Such legislative history would provide important guidance to the courts in interpreting the federal sabotage statute.

3. *Espionage.*—Both bills would reenact the existing espionage statutes.

S. 1723 has also bracketed an alternative approach to this subject, which is to revise current law on espionage (§ 1321), dissemination of classified information (§ 1322) and publication of defense information (§ 1323) by substituting "classified information" for "national defense information" as the subject matter of the prohibited disclosures, and adding various defenses of prior publication, or reasonable belief that disclosure was authorized, or (in the case of § 1322 only) an affirmative defense that "the significance of the information for public debate outweighed any harm to the national security caused by its communication". Under this alternative approach, there would also be a bar to prosecution for espionage "that the designation of the information as classified constituted an abuse of discretion under the provisions of law regulating such classification".

While the new espionage defenses in S. 1723 could represent an improvement over existing law, we are opposed to penalizing the disclosure of classified information to unauthorized persons, particularly in the absence of a requirement that the actor intend to injure the national defense. In our view, the political risks and technical complications involved in amending the espionage laws on a "classification model" are too great.

If Congress is to codify the general espionage laws, it should at least make clear that proof of specific intent to injure the national defense is an essential element of the offense. This was not done in S. 1437. Until recently, it was believed that the espionage laws could only be used when there was intent to give advantage to a foreign power or to injure the United States, or reason to believe that information being transferred would be so used. Put differently, it was assumed that the general espionage statutes could be used only to punish classic espionage

and not for behavior incident to the publication of classified information. See H. Edgar and B. Schmidt, Jr., "The Espionage Statutes and Publication of Defense Information", 73 Col.L.Rev., 929 (1973). *Gorin* v. *United States*, 312 U.S. 19 (1941).

When the government indicted Daniel Ellsberg for publishing the Pentagon Papers, it used the espionage laws for the first time to seek to punish activity not related to the transfer of information to a foriegn power. The government did not allege any intent to injure, but simply a transfer to an unauthorized person of information relating to the national defense. In that case the government claimed that the language of 18 U.S.C. § 793 (c) to (f) did not require allegations of intent to injure.

Because, for well-known reasons, the Ellsberg prosecution was thwarted, there was no appellate review of whether the statute was being correctly applied and, if so, whether it was constitutional. However, because the indictment survived a pre-trial motion to dismiss, it is important that Congress, in codifying the espionage laws, reaffirm the position that the statute was not intended to be used to punish conduct leading to publication.

Unfortunately, this Committee, in its report on S. 1437 (Rpt. No. 95-605, Part I), did just the opposite. That report states at page 215 that: "Unlike subsections 793(a) and (b), subsections (c) through (f) do not require an intent to injure or give advantage, but only an awareness of the significance of the information. They are principally prophylactic measures, aimed at deterring conduct which might expose material to foreign eyes rather than against active espionage on behalf of foreigners." As interpreted by the Senate Report, the general espionage laws create an official secrets act under which it is a crime to give any information relating to national defense to any person not entitled to receive it. Such an interpretation would chill debate on national security issues.

At the very least, we urge Congress to adopt the position of the House Judiciary Committee when it last considered a revision of the espionage laws: ". . . unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. (H. Rep. 1895, 81st Cong., 2nd Sess., April 6, 1950, p. 2)."

Alternatively, and preferably, Congress should repeal 18 U.S.C. § 793(c) to (f).

4. *Obstructing Military Recruitment or Induciton.*—Both bills prohibit "incit[ing] others" to avoid military service in time of war with an intent to "hinder" or "interfere with" recruitment or induction. They also prohibit the intentional creation of "a physical interference or obstacle" to recruitment.

This "incitement" offense is dangerously broad. The term "incites" is defined in S. 1722 to mean "to urge other persons to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct." Since the term "war" is not defined, the circumstances in which an incitement to obstruct induction could be prosecuted are nearly limitless. Counselling draft resistance, or signing a "Call to Resist" based on opposition to an undeclared war, or picketing an induction center could all fall within the prohibition as it now stands. Safeguards against such prosecution of speech activities should be adopted by limiting the section to acts of physical interference with induction during times of declared war.

5. *Inciting or Aiding Mutiny, Insubordination or Desertion.*—Both bills make it a crime to aid or abet in "incit[ing]" any member of the armed forces to engage in mutiny, insubordination, refusal of duty or desertion. Given the broad definition of "incites" quoted above, and the inclusion of "induces" within the definition of "abets", this offense is also dangerously broad. Any civilian speech or writing which is critical of United States military activities and is intended or can be expected to be heard or to come to the attention of military personnel would arguably fall within the prohibition. The section would thus have a severe chilling effect on contacts between soldiers and civilians and would cut off unofficial civilian counselling activities on such sensitive subjects as race relations and conscientious objection. At the very least its applicability should be limited to times of declared war.

D. Offenses Involving Government Processes

One of the ACLU's principal concerns in the criminal code revision has been with offenses involving government processes.

Past versions have contained numerous vague and overbroad provisions which have substantially curtailed the free exercise of First Amendment rights. One of

the gauges of a proposed new code is its treatment of this sensitive area. In this regard, S. 1723 again generally draws the proper lines between law enforcement and the Constitution. S. 1722 falls far short in this fundamental area.

1. *Obstructing a Government Function by Fraud.*—A person is guilty of an offense under § 1301 "if he intentionally obstructs or impairs a government function by defrauding the government" in any manner. As the Senate Committee Report accompanying S. 1437 correctly states, this is a new substantive offense patterned after the conspiracy provision of U.S.C. 18 § 371, of obstructing a government function by defrauding the United States. This new offense expands existing law by (1) rendering it a crime to obstruct a government function by fraud even where no conspiracy was involved, and (2) covering the obstruction of any government function as well as financial and other tangible losses by the government as a result of fraudulent schemes. As the Senate Report notes: "It is designed to fill a gap in existing law by reaching all conduct by which a person intentionally obstructs or impairs a government function by fraudulent means. Unlike the provisions in the proposed Code that cover fraudulent activity . . . the proposed section is not directed at the obtaining of property but rather at fraudulent conduct the purpose and effect of which is to obstruct a function of the federal Government". (Senate Report pp. 267-68.)

There is no explicit definition of government function. And, if the language of this section were not broad enough on its face, the Senate Report goes a step further. In discussing the term "government function" the Report states that the Committee intends it to be given an expansive construction, "and the terms 'obstructs' and 'impairs' are intended [to] . . . receive a broad interpretation from the courts." (Senate Report p. 272.)

The most basic civil liberties objection to § 1301 is its remarkable expansion of the scope of federal criminal liability. While the 18 U.S.C. § 371 crime of conspiracy to defraud the United States is itself extremely broad, it is at least limited to situations of conspiracy, which were singled out for attention by the common law because of the danger of concerted action designed to achieve ends contrary to the public interest. § 1301 would eliminate this conspiracy restriction, and criminalize any individual conduct obstructing a government function and fitting within the provision's all-encompassing view of "fraudulent" acts. It moves well down the road toward enabling the state to enforce by felony prosecution a positive duty to facilitate any government function—this in an era in which, in sharp contrast to the post-Civil War years when 18 U.S.C. § 371 originated, every form of human activity has become a government function.

Such a development is contrary to the fundamental philosophy of our legal system—to limit governmental power and make sparing use of legally enforced duties, in order to preserve as wide a sphere for human liberty as possible. Our tort and criminal laws grant remedies only where there is a sufficient combination of injury to some important interest, and personal culpability of the person inflicting the injury. Especially substantial combinations of injury and culpability are required by our legal tradition for the use of "that most coercive of legal instruments, the criminal law." H. Paker, The Limits of the Criminal Sanction 74 (1968).

§ 1301 would establish the principle that every function of modern government involves a public interest weighty enough to invoke felony sanctions in its protection—this despite the fact that Congress has rarely created specific felony sanctions for failure to cooperate with particular governmental functions.

It is impossible to conceive of the full sweep of the behavior criminalized by § 1301. The government's information-gathering functions alone reach every aspect of economic and social life. For example, the current "voluntary" wage-price controls program calls for detailed "voluntary" disclosures concerning prices, profits, and pay—backed, however, by subpoena power. Any misleading statement or omission by a reporting entity could be the basis for felony prosecution under § 1301, despite the great confusion as to the meaning of the ever-proliferating wage-price guidelines and the conflict of loyalties the guidelines program poses for corporate fiduciaries with duties to their shareholders as well as the desire to cooperate with government.

After studying nearly a hundred years of reported cases enforcing it, Dean Goldstein concluded that the phrase "defraud the United States"—

> is too vague to be understood by the man of "common intelligence". (*Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).) It should undoubtedly be held unconstitutional.

68 Yale L.J. at 442. Nothing in § 1301 provides greater specificity than the current language of 18 U.S.C. § 371. Indeed, the Senate Committee Report urges that the concepts of "obstruct or impair" and "governmental function" be given the most expansive interpretation possible. And in the one area where codification might have provided clarification—whether deception is an element of the offense—the language of § 1301 and the commentary of the Report are equivocal.

§ 1301 contains a single, extremely narrow bar to prosecution—if "the offense was committed solely for the purpose of disseminating information to the public". The Senate Judiciary Committee Report, at page 272, explains that this provision is designed to underscore the inapplicability of § 1301 to such cases as the Ellsberg prosecution, but is in a sense unnecessary "since, if the sole purpose underlying the offense was dissemination of information to the public, the actor could not also have harbored an intent to obstruct or impair a government function." This suggests that if a reporter or private citizen obtained a government report by "dishonest means", and, though doing so for the purpose of public dissemination of the report, was also motivated in any degree by the political desire to frustrate or embarrass a government program, he could be prosecuted under § 1301. Clearly, this raises serious dangers of chilling First Amendment activity. Perhaps as troubling is the limitless inquiry into personal political motives that a court might find itself compelled to conduct in order to decide whether the bar to prosecution applied.

These deterrents to the exercise of protected freedoms might be minimized by carefully-drafted limiting language in § 1301. However, the basic problems discussed above, of vast liability and substantive vagueness, could not be cured through amendments. The central issue is whether there is any need for a general criminal liability for obstruction of any government function through means that can be characterized by a capricious notion of "fraud"—as opposed to narrower, focused prohibitions of obstruction of government already on the books—and whether such need as may exist is great enough to outweigh the great expansion in the degree of government intrusion into private liberty that would result from a statute such as § 1301.

In our judgment, S. 1723 is the far better approach. Obstruction of specific government functions by fraud is prohibited under the specific statute dealing with the function e.g., bank fraud, government fraud, etc. Any legitimate prosecution that could be brought under § 1301 can be brought also under the specific section but without the risk to individual rights involved in § 1301.

2. *Obstructing a Government Function by Physical Interference.*—§ 1302 of S. 1722 establishes, for the first time, a general offense of government obstruction which is of unprecedented breadth, and which poses a serious threat to activity protected by the First Admendment. The ACLU recommends that the all-encompassing approach of S. 1722 be rejected and that any obstruction offense be limited in its application to intentional, significant impairments of specified vital government functions as in § 1701 of S. 1723, "Obstructing a Government Function by Force." The ACLU also recommends that where the obstructed government activity is itself unlawful, a showing of such illegality should be a complete defense, whether or not the official was acting in bad faith.

There are currently a number of statutes which impose criminal liability on one who obstructs certain specified government functions. Among the critical functions protected are official actions of judges and employees of penal institutions, actions of U.S. officers executing court orders or carrying out authorized search warrants, and processing the mail. While the interest in uniformity of definition and grading would support consolidation of these offenses into a single statute, there is no justification for the wholesale expansion of the obstruction offense reflected in S. 1437. § 1302 impose criminal liability on anyone who "intentionally obstruct or impairs . . . the performance by a public servant of an official duty . . ." (§ 1302(a)(1).

Insofar as § 1302 could be applied to any interference with any governmental function, regardless of how important it is or the manner in which it is obstructed, it invites selective and arbitrary enforcement, carries the potential to chill protected activity, and is of doubtful constitutionality. § 1302 does not require that an individual know that the function which he supposedly disrupts was governmental. All that need be shown is that an actor was aware of a risk that a government function might be obstructed by the conduct in question. Under the unfettered terms of S. 1722, it would be up to the prosecutor to determine whether a large demonstration on federal grounds or other federal

buildings was or was not obstructing a government function. Virtually every mass demonstration would, at one moment or another, fall within its prohibition. Even an influx of buses carrying demonstrators to a site might constitute a felony.

Moreover, by limiting the availability of the defense to activity which is unlawful and where the public servant acted in bad faith, § 1302 in effect immunizes unlawful government action and criminalizes resistance to it.

§ 1302 of S. 1722 should be abandoned in favor of § 1701 of S. 1723. § 1701 prohibits knowing use of physical force to intentionally obstruct or impair several specific government functions such as the mail, extradition or the execution of a judicial writ of process. This provision maintains current law by limiting the offense to intentional significant impairment of specified vital government functions. Further, the ACLU recommends that the defense of unlawful government action should be available in every case.

3. *Hindering Law Enforcement.*—§ 1311 of S. 1722 and § 1711 of S. 1723 deal with conduct that aids others either to avoid apprehension or prosecution, or to profit from their crimes. By consolidating eleven statutes currently in effect, some of the problems caused by the disparate and inconsistent proof requirements and sentencing provisions of these laws would be alleviated. In doing so, S. 1722 expands current law by reducing the culpability level and including First Amendment activity within its scope. S. 1723 also expands the scope of current law, but contains several essential limitations.

First, in S. 1723 the standard for culpability is intentional. Both the Brown Commission recommendations and the Model Penal Code include such a specific intent requirement which provides an important safeguard against prosecutorial abuse. S. 1722 does not contain this requirement. Second, subsection (c) of S. 1723 excepts from the definition of "conceal" the refusal to relinquish possession of, or reveal the contents of, a document, record or object. This insures the confidentiality of documents which are in the possession of reporters and/or may reveal the identity of confidential news sources. It is a well-known fact that confidentiality of sources is vitally important to a free and effective press. § 1311 of S. 1722 is much broader than S. 1723. Subsection (a)(1)(A) of § 1311 includes the phrase "conceal[ing] his identity," which could serve as the basis for prosecuting a reporter who failed to identify a confidential news source.

S. 1722 substantially expands the meaning of the term "harbor" beyond its traditional definition which was limited to conduct of a clandestine or surreptitious nature. Defined in the Senate Report as any act of providing shelter or refuge, this expansive interpretation of harbor will facilitate prosecution of individuals for political and other non-criminal associations. The ACLU recommends that the definition of the term harbor be limited to clandestine or surreptitious conduct.

Paragraph 2 of § 1311(a) establishes for the first time a general aiding consumation of a crime offense. While the ACLU appreciates the need for such a provision, we feel it should be drafted more carefully. Specifically, only conduct which is closely related to the underlying offense, and which is carried out with knowledge that it has been committed, should be criminal. Therefore, the state of mind with regard to the underlying offense should be raised from "reckless" to "knowing," and the broad language, "or otherwise to profit from a crime," should be narrowed by appropriate language in the text or in the legislative history.

The ACLU strongly opposes the general attempt provision of S. 1437 (See, § 1001). Its application to hindering law enforcement provides only one illustration—albeit a telling one—of the absurd and ill-advised results that such a provision may produce. Since impossibility is no defense under this section, an individual who believes falsely that a law enforcement activity is underway and who intends to hinder it, may be liable for attempted hindering, even though there was no law enforcement activity to be hindered.

We recommend that the Committee make one additional change in the section. A reporter or other person whose records of conversations with third parties may be privileged should not be subjected to prosecution for destroying such records before he or she has been put on notice that the records are of interest to law enforcement authorities. Under *Neal* v. *United States*, 102 F. 2d 6433 (8th Cir. 1939), cert. denied, 312 U. S. 679 (1941), it is a defense that the destroyed records or documents are subject to legal privilege. At the very least, if such destruction takes place before the records are requested, the party claiming the

privilege should not be prosecuted for hindering law enforcement. An additional defense would cure this problem.

4. *Demonstrating to Influence a Judicial Proceeding.*—§ 1328 of S. 1722 and § 1728 of S. 1723 prohibit pickets, parades, display of signs or other demonstrations on the grounds or within 30 meters of a courthouse. Although the ACLU endorses the effort to protect due process rights of litigants, we believe these sections of the bills as presently drafted have three serious flaws. First, the statute should be limited to demonstrations which actually disrupt or intimidate the courts. As drafted, § 1728 has no such limitations and is a form of strict liability.

The courthouse should not be treated differently from other public buildings generally open to the public. A demonstration should not be prohibited unless it disrupts proceedings being conducted within the courthouse by intimidation, unreasonable noise, obstruction of an entry, or the threat of force or propertly damage. For example, the grounds of the Supreme Court should be open to demonstrators seeking to protest the abortion decisions unless the demonstrators disrupt the Court's business. We urge the Committee to include after the phrase "engages in a demonstration," the phrase, "which actually disrupts such proceedings."

A second problem in the section is that its coverage extends to buildings other than courthouses at times when the actual proceeding is not in progress. Presumably, this is intended to cover demonstrations at a judge's or juror's residence. We believe that this part of the offense is not an efficient use of limited federal law enforcement resources. Der.onstrations at private residences which are disruptive in nature will be prohibited by numerous local statutes such as trespassing and disorderly conduct. There is no need to bring in the federal government to such small and isolated incidents.

Finally, the crimes of attempt and conspiracy should not apply to this offense. Under both bills, pickets or demonsrtators could arguably be arrested for a conspiracy to violate § 1328 (1728) before they are within 30 meters of the building. The chilling effect of the application of an inchaote crime to this section cannot be justified by the need to protect judicial proceedings.

5. *Obstruction of Official Proceedings by Fraud.*—S. 1722 contains a bracketed § 1729, "obstruction of official proceedings by fraud." We are troubled by its vague language and have difficulty determining what type of activity not otherwise prohibited under the bill the section is intended to cover.

We recommend the deletion of this new crime.

6. *Contempt Offenses.*—The power of criminal contempt is often subject to judicial abuse and has been too often invoked against controversial defendants and their counsel. Current law leaves the defendant accused of contempt of court more liable to abuse of judicial power that those charged with violating any other criminal statute. This is both because the contempt statute (18 U.S.C. § 401) does not limit the sentencing power of the judge except to preclude the death penalty, as well as the fact that many procedural safeguards are not extended to defendants charged with contempt of court. The general contempt provision of both bills adopts almost verbatim the language of the present law, making it an offense to misbehave in the presence of a court or so near to it as to obstruct the administration of justice. This provision lends itself to abuse in a variety of ways.

First, the term "misbehave" is dangerously vague and overbroad and carries the potential to deter vigorous representation or self-representation which could be the subject of summary punishment under § 1331 (1731). Therefore, the prohibited conduct should be more specifically defined in order to comport with the Fifth Amendment due process-notice requirement. Second, the practice of allowing an offended judge to sentence for a direct contempt committed in his presence should be prohibited since this practice violates the rule that prosecutions for crimes should be tried before disinterested judges.

Third, language in the existing law explicitly limits the court's power to "punish . . . such contempt of its authority, and none other as (1) misbehavior . . ." The underlined language deleted by S. 1722 but included in S. 1723, provides an important safeguard against inappropriate assertion of alleged inherent judicial power.

Fourth, an additional change in the wording of S. 1722 "is designed to facilitate implementation of the Committee's decision . . . to permit either a federal prosecutor, with the concurrence of the court, or the court to initiate appropriate action" (see Senate Report, at p. 341). Allowing a federal prosecutor to initiate an action under this very broad criminal provision is unprecedented, unwarranted and unwise. The potential for abuse resulting from this aggrandizement of federal power would clearly seem to outweigh any potential benefits in discouraging criminal contempt of court.

S. 1722 and S. 1723 take a step toward elimination of some of the notice and procedural problems presented by 18 U.S.C. § 401 by defining several specific contempt offenses which may serve as alternatives to § 401 as a basis for sanctioning certain forms of contempt. Specifically, the bills create separate offenses for Failing to Appear as a Witness, § 1332 (§ 1732); Refusing to Testify or Produce Information, § 1333 (§ 1733); and Disobeying a Judicial Order, § 1334 (§ 1735). Unlike Criminal Contempt, § 1331 (§ 1731), these more narrowly defined contempt offenses would be prosecuted in the same manner as are all other criminal offenses, before an impartial judge with the full compliment of procedural safeguards. Therefore, these additional specific offenses, if used whenever appropriate as an alternative ground for prosecution rather than § 1331 (criminal contempt), would serve to reduce the potential for abuse.

However, S. 1722, unlike S. 1723 encourages the use of the criminal contempt provision in lieu of, or in addition to, these other more specific provisions. The result is that the positive impact of the new provisions is for the most part negated. This unfortunate effect is the result of provisions which would allow penalties under § 1331 which are too high to encourage utilization of the other contempt provisions in many appropriate cases. The study draft of the Brown Commission would properly limit the penalty for misbehavior and violation of petty orders to a $500 fine and/or imprisonment up to five days. These limitations reflect a recognition that the power under a § 1331 catch-all provision is largely retained for use against petty contemptuous conduct, and that other misconduct should be prosecuted under the more specific provisions (§§ 1332–1334), which would afford the defendant greater procedural protection. By raising these limits to $10,000 and 6 months, S. 1722 severely weakens the incentive to prosecute under the specific offenses. The greater the penalty that can be imposed without jury trial and by an interested tribunal, the greater the potential for abuse of the rights of the defendant. Therefore, these limits should be drastically reduced and whenever serious punishment is contemplated a jury trial should be provided (see *Room* v. *Illinois*, 391 U.S. 194 (1968)).

The incentive to over-utilize the criminal contempt provisions, is compounded by § 1331(d) which specifically authorizes successive prosecutions. This provision states that a prosecution under § 1331 is not a bar to a subsequent prosecution under another statute violated by the conduct. Not only does this encourage inappropriate use of § 1331, and lend itself to abuse and harassment, but it also is a violation of the double jeopardy clause of the Constitution (see *U.S.* v. *United States Gypsum Co.*, 404 F.Supp. 619 (D.D.C. 1975)). Therefore, § 1331(d) should be deleted, and subsequent prosecutions should be prohibited.

A further weakness in § 1331 of S. 1722 lies in the extent to which it would permit the suppression of freedom of expression through court orders constituting prior restrains, § 1331(b)(2) does provide that a defense to a charge of criminal contempt based on disobeying a court order will exist if the order was constitutionally valid and constituted a prior restraint on the collection of dissemination of news.

Limiting this protection in the press, however, permits prior restraint of other forms of expression. For example, a judge could issue an injunction against a public meeting or parade, and even though the order was invalid, the meeting would have to await the outcome of the appellate review. Since the Senate bill requires exhaustion of all measures to secure an appeal, prior restraint on expression may well occur. Accordingly, the affirmative defense should be broadened to include all prior restraints on expression as contained in § 1735(b) of S. 1723.[6]

A weakness—probably a drafting oversight—in S. 1723 is its failure to state explicitly that certain conduct which cannot be punished under § 1735 (Disobeying a Judicial Order) as a result of the adoption of the two defenses set forth in § 1735(b) is similarly exempt from punishment under § 1731.

§ 1731, like § 1735 which also provides for punishment of those who disobey court orders, should explicitly adopt these two defenses.

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[6] The defense in § 1735(b) states: "It is a defense to a prosecution for an office (sic) under this section that the temporary restraining order, preliminary injunction, or final order—(1) was invalid and that the defendant took reasonable and expeditious steps to obtain a judicial decision with respect to a stay thereof, prior to the disobedience or resistance charged, and was unsuccessful in obtaining such review or decision within a reasonable period of time; or (2) was constitutionally invalid."

7. *Obstructing a Proceeding by Disorderly Conduct.*—§ 1334 of S. 1722 creates a new substantive offense, Obstructing a Proceeding by Disorderly Conduct. While under current criminal law, disruption of judicial proceedings is an offense (18 U.S.C. § 401, 18 U.S.C. § 1507), this provision would for the first time make it a federal offense to obstruct or impede *any* official proceeding whether it be administrative, judicial, legislative or executive. The ACLU opposes this sweeping expansion in federal law which in many situations may chill First Amendment activity.

§ 1334 makes it an offense to obstruct or impede anp official proceeding by noise which is unreasonable. Since an individual need not know that a proceeding is official and need not intend his conduct to be unreasonable, this section can be used suppress legitimate speech related activity protected by the First Amendment. Because of the implications for First Amendment activity, the ACLU recommends that § 1334 be deleted. Behaviour which obstructs judicial proceedings is adequately covered by other criminal contempt provisions.

8. *Perjury, False Swearing.*—S. 1722 creates two separate perjury offenses: making a material statement under oath that is false (perjury) and knowingly making any statement under oath that is false (false swearing). This is conceptually an improvement over existing law. However, as discussed below, provisions of S. 1722 nullify the practical impact of this conceptual change. Furtbermore, S. 1722 dangerously expands the powers of the prosecutor in ways that could encourage prosecutorial abuses.

§ 1345(b)(2) of S. 1722 provides that a matter is material if it could have impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the matter in which it is made. This definition of materiality unjustifiably expands existing case law. As recognized by the Senate Report on S. 1437, materiality in the context of perjury is now defined as any statement "capable of influencing the tribunal on the issue before it" or which "has a natural tendency to influence, impede, or dissuade [a grand jury] from pursuing its investigation". In contrast, however, S. 1722 makes material any falsification which "could have . . . affected . . . the course . . . of the matter in which it was made". This expanded definition must be considered in light of the extremely broad scope of inquiry permitted in grand jury proceedings.[7] It is difficult to imagine a falsification made before a grand jury that did not have the potential to affect the course of the grand jury inquiry. Thus, by defining materiality so expansively, S. 1722 nullifies the practical impact of the false swearing offense, especially in regard to falsification made before a grand jury.

§ 1345(b)(2) of S. 1722 states, that whether a matter is material under the circumstances is a question of law.

The Senate Report accompanying S. 1437 is inaccurate in its assertion that "[I]t is universally acknowledged that materiality is a question of law for the court". For example, in New York, which has had a perjury statute similar to S. 1437's for over twenty years, materiality is an issue to be decided by the jury. *People* v. *Clemente*, 285 App. Div. 258, 136 N.Y.S. 2d 202 (1954), aff'd per curiam 309 N.Y. 890, 131 N.E.2d 294 1955). In reaching that conclusion, the court in the *Clemente* case held that the jury must be given the opportunity to choose between perjury and false swearing convictions, where either verdict would be permissible on the evidence.

As recognized by the Senate Report on S. 1437, the most likely circumstance in which attempted perjury would be prosecuted is where a witness believes his statement to be false, although the statement is actually true. Senate Report on S. 1437, § 1341, at 364. The Senate Report encourages prosecution in this circumstance, asserting that "[t]here is no valid reason to immunize such a defendant". *Id.* We disagree.

The Supreme Court, in *Bronston* v. *United States*, *supra*, held that a perjury conviction could not be based on literally true statement, even if arguably misleading by negative implication, thus effectively prohibiting the crime of attempted perjury.

The policy reasons supporting this conclusion are substantial. The crime of attempted perjury would enable prosecutors to convict individuals whose statements are true. Further; as the drafters of the Model Penal Code noted, prosecutorial inquiry into subjective dishonesty is both a waste of time and opens a potentially significant new area of abuse.[8] Witnesses who tell the truth on the

[7] *See, e.g., United States* v. *Abrams*, 568 F. 2d 411 (5th Cir. 1978), cert. denied, 98 S.Ct. 3089.

[8] Model Penal Code, Tentative Draft No. 6, Comments § 208.20 at 116–118 (1957).

stand should not be subjected to indictments based on a prosecutor's claim that the witness who told the truth actually intended to tell a lie. For these reasons, we strongly oppose the application of an attempt offense to the substantive crime of perjury.[9]

In contrast to § 1341 of S. 1722, § 1741 of S. 1723 (Perjury) carries forward the two-witness rule. The section also improves upon current law by requiring that the statement be made in a reckless disregard of its materiality and substantially reducing the penalty. This section of S. 1723 therefore, is a substantial improvement over its counterpart in S. 1722.

9. *Making a False Statement.*—§ 1343 of S. 1722 would for the first time make it a crime knowingly to make a false oral statement to law enforcement officials. While judicial authority is somewhat in conflict over whether 18 U.S.C. § 1001 covers oral statements made to law enforcement authorities, compare *United States* v. *Adler*, 380 F. 2d 917 (2nd Cir. 1967), cert. denied, 389 U.S. 1006 (1967) with *Friedman* v. *United States*, 374 F. 2d 363 (8th Cir. 1967), § 1343 resolves this conflict in favor of covering such statements. § 1743 of S. 1723 does not include false oral statement within its coverage.

Even with the limitation that the defense must have known he was speaking to a law enforcement agent, § 1343 of S. 1722 invites abuse by law enforcement officials. This possibility of abuse is particularly great with regard to allegedly false oral statements. Prosecution for perjury requires close examination of the actual words used by the defendant. Since this offense sets up a "my-word-against-yours" situation when the defendant and law enforcement officer are the only two witnesses, the unfair advantage of the officer's presumed credibility in the eyes of the jury makes the fabrication of charges a potential danger.

While it is true that a person must know that the statement given is false, the protection of the voluntariness requirement is seriously weakened by preceding it with the phrase "in fact." This means that no state of mind need be proved with regard to voluntariness. Thus, the government does not have to prove that the defendant knowingly volunteered the statement.

Finally, the term "a government matter" is not defined. The section, therefore, arguably fails to meet the minimum requirement of due process. Although it is possible that a definition might develop in case law, this term, which is the heart of subsection (a)(1) should be specifically defined. There is a substantial danger that the interpretation of this term may well be expanded beyond reason to include, for example, false statements by lobbyists to Congress.

In accordance with the Brown Commission, American Bar Association and S. 1723, false oral statements at the very least should not be punishable unless they are made under oath in an official proceeding. (See Final Report, § 1353(1).)

E. Offenses Involving Individual Rights

1. *Civil Rights.*—Both bills make improvements and refinements in current civil rights offenses, although S. 1723 goes beyond S. 1722 in this area. The principal changes are (1) the addition of sex as a category of unlawful discrimination subject to criminal sanctions, (2) a lowering of the state of mind requirement in several sections so that the knowing violation of a persons' constitutional rights is prohibited, and (3) a broadening of the classes of persons protected by the statutes to include all "persons" and not just "citizens." In several respects S. 1723 provides greater protections for civil rights than the related sections of S. 1722. Most notable is the continuation of current felony level penalties for interfering with a person's civil rights where the actor intends to produce bodily injury (§§ 2101(b), 2103(b), 2109(b), 2105(b)). These provisions of S. 1723 are bracketed but we strongly endorse them and recommend that the felony levels of current law, 18 U.S.C. § 241, be maintained. We oppose the lowering of the civil rights violation penalties in S. 1722 to Class A misdemeanors.

We also oppose the proposed repeal of 18 U.S.C. § 1231, which prohibits strike-breaking. Although there are no reported prosecutions under this provision, its elimination or narrowing would carry the dangerous implication that Congress was sanctioning the use of private force to frustrate strike activities and exacerbate labor disputes. S. 1722 modifies this offense by prohibiting the obstruction of designated labor activities by force or threat of force. The addition of the phrase "bona fide" labor dispute was not commented on in the Senate Report on S. 1437, and has the undesirable effect of legalizing otherwise prohibited violence if the labor dispute is not bona fide. This change appears to serve no legitimate

[9] As with solicitation, this does not address the more general problems related to the offense of attempt.

law. We recommend full reinstatement of the strike-breaking offense without the modifications contained in S. 1722.

2. *Privacy.*—In large degree, the legitimate expectation of confidentiality which one has in oral communications and private correspondence would be protected under S. 1723 (§§ 2121–2124). Any warrantless interception, disclosure, or use of private communications and correspondence is prohibited, absent the consent of all parties to the communication.

Unlike S. 1723, S. 1722 carries forward the approach of S. 1437 and perpetuates the potential for abuse under existing law of oral communications as long as one party "consents" (18 U.S.C. § 2511). The "one-party consent" rule is a direct assault on the prohibition against wiretapping without a judicial warrant. It encourages law enforcement authorities to evade or circumvent the constitutionally-mandated warrant requirement which applies to all wiretapping. "Consent" by one party does nothing to protect the reasonable expectation of privacy of any other party to a communication. In order to protect the reasonable expectation a person has in his oral and written communication, interception, use or disclosure of such communications should be illegal unless all parties consent. The one-party consent rule in S. 1722 and current law is a gaping hole in the Fourth Amendment which renders meaningless the warrant requirement for wiretaps.[10]

Both of the bills depart from current eavesdropping law in one key respect involving the statutory defense to a charge of illegal eavesdropping. Both the Eavesdropping and Intercepting Correspondence provisions of the bills adopt defenses currently available under 18 U.S.C. § 2511 to agents and employees of common carriers acting in the course of employment. However, the bills extend this defense to any defendant, whether or not an employee or agent of the carrier, who while acting in the course of his employment was engaged in "supervisory service observing" (S. 1722, § 1521(b)(2); S. 1723, § 2121(b)(2)). Widely used in a variety of private and public enterprises, the practice of supervisory service observing to train and supervise employees may be abused, with the result that employee privacy is invaded. As the Senate Report on S. 1437 indicates, the use of this practice is generally predicated on the consent of the employee. This would make the new defense unnecessary, and it should be stricken.

3. *Revealing Private Information Submitted for a Government Purpose.* Disclosure by a public servant of information required by the government to be submitted to it under a promise of confidentiality can sometimes be an invasion of the privacy rights of the submitter. Under some circumstances, such conduct should be subjected to federal criminal penalties. However, any statute proscribing such conduct should be drafted to avoid infringement of the rights of free expression possessed by public servants. See generally, Katz, "Government Information Leaks and the First Amendment," 64 *Cal. L. Rev.* 108 (1976). For example, public servants under the First Amendment have the right to criticize publicly government policies without fear or unjustified dismissal. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). § 7102 of Title 5 guarantees government employees an absolute right to furnish information to and to petition the Congress or a member thereof. Furthermore, 18 U.S.C. § 1505 protects the right of federal employees to testify in any investigation or inquiry held by either House of Congress or by a committee thereof. When a requirement of confidentiality and a public employee's right of free expression or petition conflict, the courts must weigh the government's and the public's interest in confidentiality against the rights of expression of the government employee.

§ 1525 of S. 1722 is apparently aimed at assuring the reliability of private information submitted to regulatory and other government agencies by providing that the confidentiality of such information will be maintained. However, this section could be used to insulate documentary evidence of official corruption or other wrong-doing—such as cost overruns on government contracts—from scrutiny and airing by Congress, the press, and the general public. Its language discourages and may even criminalize "whistleblowing".

As introduced, § 1525 contains an affirmative defense if the information constitutes evidence of a violation of a law and was reported to the proper law

[10] Indeed, a number of states now have wiretapping laws in which the consent of one party to a communication does not constitute a defense. *See, e.g., Ill. Annot. Stat.* ch. 38, § 14–2(a) (Cum. Supp. 1978–1979) (Smith-Hurd) (consent of one party insufficient to constitute a defense unless court order obtained); *Nev. Rev. Stat.* §§ 179.410 *et seq.*, 200.620(1) (1973) (no interception of communications allowed at all); *Pa. Stat. Ann.* tit. 18 § 5702(a)(1) (Cum. Supp. 1978–1979) (Purdon) (consent of all parties required for a consent defense).

enforcement officials. This defense is inadequate to protect the rights of government employees. It is also narrower than the defense available under S. 1437, which covered information subject to disclosure under the Freedom of Information or Privacy Acts, as well as information about violations of law. Moreover, an affirmative defense is insufficient protection for whistleblowers. The threat of prosecution will continue to exist and deter the dissemination of vital information to law enforcement agencies and to the public.

Accordingly, § 1525 of S. 1722 should be amended to provide a bar to prosecution when the information disclosed relates to law violations or is subject to disclosure under the FOIA.

F. *Defenses—Entrapment*

§ 706 of S. 1723 contains in brackets the so-called objective entrapment defense the approach adopted in the Model Penal Code and by the Brown Commission. This would be a major reform of current law and we warmly endorse it.

The basis for an entrapment defense is the principle that one should not be convicted for an act which he was entrapped into committing—that is an act that was the product of the creative activity of law enforcement officials or their agents. Since the leading case of *Sorrells* v. *United States*, 287 U.S. 435 (1932) the Supreme Court has closely divided between two competing positions. Under the majority or "subjective" view (which is preserved by S. 1722) the focus of the injury is on the predisposition of the defendant. If the jury finds that he was predisposed to commit the offense, based on an assessment of such factors as reputation and prior criminal record, the defense is unavailable. Thus, a person may be convicted of an offense even if the police conduct which induced the criminal act was clearly unreasonable and would have induced an otherwise innocent person to act the same way. This formulation invites selective law enforcement and is at odds with the principles of equal application and fair administration of the law. Since the defense is unavailable to one found to have a criminal predisposition, police officers will be more likely to utilize improper investigatory techniques against those with a prior record or bad reputation.

Moreover, in the context of an inquiry into the defendant's predisposition, evidence of reputation and prior criminal history will be highly prejudicial and may lead a jury to incorrectly conclude that the defendant must be guilty of the offense charged.

These problems do not exist under the minority or "objective" formulation of the entrapment defense. Under this view, the focus of the inquiry is on the conduct of the law enforcement officials in inducing the criminal activity rather than on the predisposition of the defendant to commit the crime. It reflects a concern with the integrity of the judicial process and a recognition that prosecutions should not be based on improper police conduct which might induce otherwise innocent persons to act criminally. This "objective" formulation provides an incentive for police officials to limit themselves to responsible enforcement techniques in all criminal investigations. Since the focus is not on criminal predisposition, the risk that irrelevant or prejudicial evidence will influence the jury is irrelevant.

Congress has the power to reformulate the entrapment defense and to codify the "objective" approach (see Senate Report p. 117), recommended by the Brown Commission and the American Law Institute. Moreover, the supervisory power of the courts to limit prosecutions based on improper police conduct has long been recognized. (See *McNabb* v. *United States*, 318 U.S. 322 (1943) and *Mallory* v. *United States*, 354 U.S. 449 (1957). We urge the Committee to adopt the bracketed § 706 of S. 1723.

G. *Miscellaneous Provisions*

1. *Extortion.*—Current law on extortion, 18 U.S.C. § 1951, prohibits the "wrongful use" of force or violence or threat to obtain property to which the actor has no legitimate claim. As interpreted by the Supreme Court in *United States* v. *Enmons*, 410 U.S. 396 (1973), the statute was carefully drafted so as not to interfere with bona fide strikes and labor disputes, even when force or violence occurs during the course of a dispute. By use of the term "wrongful" to modify "force, violence or fear", Congress intended to punish conduct as a feneral crime of extortion only "where the alleged extortionist has no claim to that property" [410 U.S. at 400]. In other instances of property damage occurring during the course of a labor dispute, criminal conduct is readily punishable under state law.

Property damage committed or threatened during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective bargaining demands should not be punishable under federal law as a labor union offense. The legislative overruling of *Enmons*, as proposed in S. 1722, would involve federal law enforcement officials in any labor dispute in which picketing "threatened" and property damage occurred and the employer was engaged in interstate commerce. As the Supreme Court noted, this "would make a major expansion of federal criminal jurisdiction" [410 U.S. at 410].[11]

In order to avoid a dangerous expansion of federal law in a way that would impinge on bona fide labor activities protected by the First Amendment and the jurisdiction of the states to enforce their own criminal laws, we strongly recommend that Congress preserve the *Enmons* decision and the current language of 18 U.S.C. § 1951. The most effective way to do so would be to insert the term "wrongfully" as follows in § 2522(a) of S. 1723:

(a) Whoever knowingly and wrongfully threatens or places another person in fear that—

(1) Any person will be subjected to bodily injury or kidnapping; or

(2) That any property will be damaged;

and thereby wrongfully obtains property of another, or attempts to do so, commits a class C felony in the circumstances set forth in subsection (a)(1) and a class D felony in the circumstances set forth in subsection (a)(2).

The S. 1437 provision on extortion, incorporated into S. 1722, was amended by a compromise proposal on the Senate floor. The amendment provides that the pendency of a labor dispute "does not constitute prima facie evidence that property was obtained" by the prohibited conduct, i.e., "threatening or placing another person in fear that . . . any property will be damaged". This amendment does not eliminate the underlying problem of the section. By providing that a pending labor dispute is not "prime facie evidence" that extortion has been committed when property damage is threatened by the dispute, the amendment merely requires a prosector to allege that there is some other evidence of a violation in addition to the labor dispute. Furthermore, the amendment itself implies that extortion is often committed in the context of labor disputes, and is a considerable retreat from the current exception of bona fide labor disputes from the extortion provisions of the Hobbs Act.

2. *Drug Offenses.*—The ACLU joins the American Bar Association and many other organizations and experts in the field in strongly recommending decriminalization of the simple possession and use of marijuana. Indeed, the Attorney General endorsed decriminalization a year ago when he was Assistant Attorney General in charge of the Justice Department's Criminal Division. Based on a wide variety of governmental and private studies, there is no compelling federal interest in continuing to criminalize the use, possession or transfer of marijuana, and there is substantial civil liberties interest in recognizing personal autonomy and privacy by decriminalization.

Unfortunately, both S. 1722 and S. 1723 have adopted S. 1437's inadequate approach toward this subject. As orginally drafted, S. 1437 would have eliminated as a federal offense possession for personal use of 10 grams or less of marijuana. In Judiciary Committee markup two years ago, however, the Senate eliminated this provision and made the possession of up to 30 grams of marijuana an infraction with a maximum fine of $100 but no incarceration.

Beyond marijuana, the ACLU believes that criminal punishment of drug addicts—as distinguished from drug traffickers—is a violation of the Constitution. It is generally established that the possession and use of narcotics is a result of illness rather than criminal intent. See *Robinson* v. *California*, 370 U.S. 660 (1962), holding it unconstitutional to make addiction per se a crime; *Powell* v. *Texas*, 392 U.S. 514 (1968) (Dissenting opinion). Since the Eighth Amendment ban on cruel and unusual punishment forbids punishment for "an irresistible compulsion", we agree with Justice White, concurring in *Powell*, 392 U.S. at 348, when he said, "I do not see how it can constitutionally be a crime to yield to such a compulsion".

[11] As the Court pointed out, "[t]he Government's broad concept of extortion—the 'wrongful' use of force to obtain even the legitimate union demands of higher wages—is not easily restricted. It would cover all overtly coercive conduct in the course of an economic strike, obstructing, delaying, or affecting commerce. The worker who threw a punch on a picket line, or the striker who deflated tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years imprisonment and a $10,000 fine". [410 U.S. at 410.]

3. *Riot.*—Like several of the national security offenses, the federal anti-riot laws tend toward vagueness and overbreadth, sweeping within their terms conduct protected by the First Amendment, failing to give notice of what conduct is properly forbidden, and providing a tool for discriminatory prosecution and suppression of political activity. While both of the bills carry forward the federal anti-riot statutes, S. 1723 would narrow their scope in more ways than S. 1722. Moreover, S. 1722 contains several dangerous expansions of current law which are not present in S. 1723.

At the outset, we strongly recommend against including any anti-riot crime in the federal code. Prior to the Federal Anti-Riot Act of 1968, the offenses of incitement to riot, participation in a riot or other similar acts were dealt with solely under state law through the Assimilated Crimes Act. Indeed, these offenses are common law criminal offenses that were in existence long before any statutory prohibitions within the states, and in several states the common law offenses are still the basis for criminal liability. In accordance with the federalist scheme, we submit that Congress should leave this and other similar criminal prohibitions within the ambit of state law unless there is a particular situation for which state laws are likely to be inadequate or the states are likely to be hamstrung in the enforcement of their own laws. Such an analysis was not made prior to the enactment of the 1968 legislation, and it has not been made since then.

Anti-riot statutes restrict conduct which often involves activity protected by the First Amendment. As a result, these statutes must undergo a stringent examination to determine whether their terms are so broad as to prohibit or "chill" both protected and unprotected activity. See, e.g., *United States* v. *Dellinger*, 472 F.2d 340, 359 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). In addition, statutes of this nature often make use of terms that are sufficiently vague that they fail adequately to apprise reasonable people of the type of activity that is prohibited. See e.g., *Landry* v. *Daley*, 280 F.Supp. 938, 951 (N.D. Ill. 1968).

One area where fine differences in the drafting of antiriot laws are extremely significant is the level of culpability. A requirement of intent or wilfullness can narrow the scope of a law by exempting innocent or inadvertent conduct. See, *United States* v. *Featherston*, 461 F.2d 1119, 1121 (5th Cir. 1972), cert. denied, 409 U.S. 991 (1972) (opinion of Judge Griffin Bell).

S. 1723 begins to narrow the dangerously broad provisions of federal anti-riot law in four key areas. Only one of these improvements is contained in S. 1722. First, S. 1723 eliminates the interstate travel basis for federal jurisdiction over the crime of "inciting or leading a riot". Under current law the scope of jurisdiction could encompass virtually any interstate travel prior to the riotous event, even if there was no original intent or plan to do anything but attend a lawful demonstration. This sweeping jurisdictional grant is a threat to protected speech and travel. It has not been used by federal prosecutors since the notorious Chicago Seven prosecution, and it is properly repealed in S. 1723. This dangerous provision would be carried forward in S. 1722.

Second, S. 1723 raises the culpability level for "leading a riot" (§ 2731(a)(2)) from "knowing" to "intentional". If the culpability level with respect to the surrounding circumstances is also raised from "reckless" to "knowing" by eliminating the bracketed clause, "with reckless disregard for the fact that there is in progress" a riot, the serious dangers in the S. 1437 and S. 1722 version of "leading a riot" will have been removed. Thus, a person who gives directions in attempting to limit violence could not be prosecuted under S. 1723 for leading a riot because he or she is unaware of or miscalculates the type of reaction he or she will get from the crowd.

Third, the crime of "engaging in a riot" in S. 1723 is narrowed so that a person himself must "knowingly engage in violent or tumultuous conduct", and not merely be caught up in a crowd in which others are engaging in such conduct. We strongly endorse the bracketed language in § 2733(a), "during and with intent to further a riot", in order to make clear that this section—unlike its corresponding provision, § 1833, in S.1722—is intended to reach violent conduct which actually exacerbates a riot, and not conduct at its fringe or otherwise unconnected with the riot.

Fourth, both of the bills raise the number of persons engaged in violent or tumultuous conduct required to constitute a riot from three to ten. This is an improvement over current law.

Apart from these improvements (mostly in S. 1723), both of the bills would expand existing law adversely to civil liberties in two important ways. First,

the bills both adopt a "reckless" level of culpability with respect to the surrounding circumstances and the result of "inciting a riot" (§ 2731(a)(1)). This is a dangerous departure from current law—itself already constitutionally suspect—and creates a serious chilling effect on free speech. Thus, a speaker would always have to consider whether, after the fact, someone would say that he disregarded the risk that his speech would have an inflammatory impact, even if he was not actually aware of that risk. It is unusual for an anti-riot crime to omit the intent requirement. The common law crimes of unlawful assembly and riot have a requirement that at least three persons within an assemblage have a common intent to achieve their purpose through violent means. See 71 ALR 2d 875 (1960). Current federal law, with all of its infirmities, contains an intent requirement, as does the District of Columbia law. See *United States* v. *Matthews*, 419 F.2d 117 (D.C. Cir. 1969). In order to make § 2731(a)(1) less amenable to constitutional challenge, the culpability should be raised at least to "knowing" with respect to the surrounding circumstances and the result of conduct.

Second, both bills make it an offense to "engage in" a riot on any federal property. These provisions expand current federal law which prohibits participating in a riot only in federal prison facilities. See 18 U.S.C. § 1792. Since the laws of the state in which a federal enclave is located have always been adequate for governing conduct there, this is an unnecessary and dangerous expansion of federal jurisdiction in an area touching First Amendment rights. § 2733(b)(1) of S.1723 and § 1833(c)(1) of S. 1722 should be deleted.

4. *Obscenity.*—Unlike S. 1722, S. 1723 properly omits any general new crime of disseminating obscene material. In our view, a general federal crime of obscenity impinges directly on First Amendment rights and creates an inappropriate federal law enforcement function.

A definition of obscenity that would both give fair warning of what is prohibited and limit itself to the truly pornographic has defied the best legal minds. In *Miller*, supra, the Supreme Court majority confidently predicted that its newest test would single out protected "commerce in ideas" from punishable "commercial exploitation of obscene material". 93 S.Ct. at 2621. The Georgia Supreme Court responded two weeks later by holding that the widely acclaimed movie, "Carnal Knowledge", was obscene. The constitutional definition of obscenity remains uncertain.

Unfortunately, S. 1722 codifies the approach taken in *Miller*, thus cementing the varying "community standards" test into the federal criminal law.

Furthermore, the bill exacerbates the lack of fairness, definition and uniformity in the *Miller* approach. Under § 1842(b)(4)(i) and the venue provisions of § 3311, the contemporary community standards to be applied are those generally accepted in the judicial district where the offense occurred. § 1842 thus invites a local jury in any district through which or into which the material has passed by mails or commerce to dictate the standards for the rest of the community. The ACLU strongly opposes any federal obscenity statute, but at the very least, the venue provisions must be modified to reduce the liability of defendants to prosecution in every district of the country. The Senate adopted a floor amendment to limit venue in conspiracy cases but did not limit the general venue provision, § 3311(a). It also adopted an amendment which further complicates the meaning of "community standards" by providing that the standards to be applied are those of the "local community in which the obscene material is disseminated." [Emphasis added.]

II. SENTENCING

One benchmark of any proposed revision of the federal criminal code is its attempt to reform the federal sentencing system. Although equally important as the codification of substantive criminal law, sentencing reform is an entirely separate issue. Because sentencing has long been of major importance to the ACLU, our position on these provisions of S. 1722 and S. 1723 should be distinguished from our views on the bill's substantive law section. Unfortunately, both bills recognize but fail to institute several basic reforms. The ACLU opposed the sentencing provisions of last year's Senate bill because they placed inordinate emphasis on incarceration and risked creating a system in which incarcerated persons would serve substantially longer terms of imprisonment than under current law. As discussed below, we urge the Committee to eliminate this risk by rejecting several provisions in the bills and adopting a modified

approach toward sentencing reform. Despite several useful sentencing reforms, we believe that key modifications must be made if the sentencing mistakes of S. 1437 are not to be repeated. A bill which is about to be introduced by Senator Biden, contains several important features which we believe would enormously contribute to the effort to reform the federal sentencing system.

There are three intertwined categories of problems in the current federal sentencing system that must be addressed in any criminal code bill: (1) the excessive and indiscriminate use of incarceration; (2) the absence of a coherent and uniform rationale for the disposition of federal offenders; and (3) unfettered discretion throughout the criminal justice process which results in vast disparities in prosecution, sentence and actual time of release.

A. Overemphasis of incarceration

With the exception of the death penalty, there is no other institution in our society that imposes such a total deprivation of individual rights and liberties upon a person or with more severity than incarceration. As Charles Silberman writes in his important book, "Criminal Violence, Criminal Justice," "the ball and chain and rock pile are gone, along with enforced silence, lock-step marching and other harsh disciplinary methods designed to keep prisoners docile and compliant. Yet, prisons . . . remain brutal, and brutalizing places." In recent years, federal courts have declared the prison systems in Arkansas, Alabama, Oklahoma, Rhode Island, New Hampshire, and Mississippi in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Despite the destructive and debilitating effects of prison, the number of defendants sentenced to prison was 80 percent higher in 1978 than in 1968. The United States now imprisons more people than any other democratic nation. In the famous Alabama prison case, a team of experts re-evaluated every prisoner in the system and concluded that approximately 40 percent of those incarcerated could immediately or shortly be placed in the community. Other experts have found that incarceration does not change the rate of recidivism and, therefore, many prisoners could be released into the community without endangering the public.

Unfortunately, both bills create a significant danger that more people will be sent to prison and for longer periods of time. First there is little statutory encouragement for a sentence other than imprisonment. As early as 1971, the Brown Commission proposed a presumption for probation and against incarceration. We urge the Committee to provide judges with a similar statutory encouragement to impose non-prison sentences. While judges are obliged under both bills to state for the record their reasons for imposing a particular sentence, they should also be required to weigh alternatives to incarceration, and to state for the record their reasons for rejecting probation and imposing a sentence of imprisonment. While S. 1722 recognizes the "general appropriateness of a sentence other than imprisonment" for the first offender who has not been convicted of a serious offense (§ 994(a)), of the bill mandates long terms of imprisonment in a whole range of cases. The Sentencing Commission is directed to specify "a sentence to a substantial term of imprisonment" in cases in which the defendant has prior criminal convictions, has engaged in a pattern of criminal activity, was supervising a racketeering conspiracy, or committed a violent felony while on release pending trial, sentencing, or appeal. (§ 994(g))

S. 1723 does contain a bracketed § 3103(b) which, if adopted would require a judge to impose the least severe measure necessary to achieve the purposes of sentencing, and require that sentences not involving imprisonment are to be imposed unless measures less restrictive than imprisonment have been imposed on the defendant frequently or recently, and have been unsuccessful. We urge the Committee to adopt this provision as the minimum acceptable means of reducing the heavy emphasis on incarceration.

A second problem in this area is the lack of serious attention being given to developing a range of alternatives to incarceration. S. 1723 does provide for a new sentence of conditional discharge. But as far as other alternatives are concerned, they are lost in both bills in a host of other conditions sharply limiting their use. For example, under S. 1723 restitution is only permitted as a condition of a sentence of conditional discharge or probation and under S. 1722 restitution may be imposed only in addition to other sentences and not as an alternative. We urge the Committee to make restitution a separate alternative sentence. Community service is permitted as a condition of probation, but probation is not

a favored sentence. We also urge the Committee to include a directive in the bill to establish a community work program so that judges will not have such a difficult time finding effective alternatives to incarceration.

The third and most important issue in the area of incarceration is the question of parole and good-time. In an ideal situation, the ACLU would advocate the abolition of parole as a release mechanism. The parole system in this country was based on rehabilitation and the indeterminate sentence was thought to be necessary if rehabilitation was to be accomplished. While the rehabilitation model of parole has been widely and, in our view, correctly discredited, today's parole system functions as a crucial safety valve for grossly disparate and disproportionate sentences, occasional prison overcrowding, and cases of serious injustice—e.g. prisoner sentenced for purposes of incapacitation who develops terminal cancer.

Under the new system the sentence imposed will equal the actual time served. But there is no assurance that substantially increased amounts of time being served in prison will not result. There already is substantial evidence that the flat-time, no-parole sentencing schemes adopted in various states have resulted in substantial increases in time served and dangerous increases in the prison population.

Rather than totally abandon one system—parole—for another as yet untried—the Sentencing Committee—we strongly urge the Committee to retain parole release for a transitional period of five years. The extent to which the safety function of parole is necessary and the impact of parole on the entire sentencing system should be evaluated by the Sentencing Committee and reported to the Congress at the end of a three year period. At that time, the Congress can take such other and further action which it then deems appropriate.

A final feature of both bills which virtually guarantees longer sentences is the authorized terms of imprisonment. These terms are for too long in almost all cases and in some cases are many times greater than the average term presently served. While the Sentencing Committee is directed by current actual release time in promulgating its guidelines, the sentence range will depend too much on the make-up and feeling of a Sentencing Committee. To a large extent congressional responsibility in this area has been abdicated. The excessive sentencing maximums coupled with the elimination of parole and a lack of incentives for sentences other than imprisonment, both bills run the substantial possibility of a series of Draconian sentence lengths. We urge a substantial reduction in the authorized terms of imprisonment.

B. Sentencing Rationale

One of the principal defects of the present federal sentencing system is the lack of any articulated philosophy of corrections. Rehabilitation, incapacitation, deterrence and restitution are the most frequently employed theories from which judges pick and choose. Indeed, judges may impose a sentence for any reason they choose or for no reason at all. If two offenders commit the same offense under similar circumstances, one could be sentenced to a long term of imprisonment in order to prevent future crimes, the other could be sentenced to a short term subject to rehabilitation. Five hundred and fifty-four federal judges employing any number of correctional philosophies giving varying weight to each theory in each individual case results in a grossly diparate and unjust system of corrections.

The ACLU urges the elimination of deterrence, incapacitation, and rehabilitation as purposes of sentencing. Sentences should be commensurate with the gravity of the offense and should attempt to reconcile the victim, the community, and the offender. We agree with S. 1723's elimination of rehabilitation as a purpose of imprisonment (§ 3703(b)),[12] but we are concerned about the general list of permissible purposes in § 3102(a) of S. 1723 and §§ 101(b) and 2003(a)(2) of S. 1722.

§ 3102(a) states:

> (a) The purposes of sentencing are to—
>
> (1) Provide punishment commensurate with the seriousness of the offense and to promote respect for the law;
>
> (2) Provide adequate deterrence to criminal conduct;
>
> (3) Protect the public from further crimes by the defendant;

[12] S. 1722 partially elminates rehabilitation as permissible purpose of incarceration. (§ 994(i) & § 2302(a)).

> (4) Provide the defendant with needed education, vocational training, medical care, and other correctional treatment in the most effective manner;
>
> (5) Provide restitution to [victims] [aggrieved parties] for actual damages [or loss] caused by the offense for which the defendant is convicted; and
>
> (6) Reconcile the victim, community and offender.

§ 101(b) states:

> (1) Deter such conduct;
>
> (2) Protect the public from persons who engage in such conduct;
>
> (3) Assure just punishment for such conduct; and
>
> (4) Promote the correction and rehabilitation of persons who engage in such conduct.

When the Sentencing Committee promulgates its guidelines and policy statements, it will be able to freely choose among the various philosophies of corrections. It may design guidelines for robbing to deter other similar offenses, design guidelines for rape to incapacitate the offender, and design guidelines for white collar crime to punish the offender.

Furthermore, the Committee can even utilize different philosophies within a particular category of general crimes. One type of embezzler can be sentenced for deterrence and another for incapacitation. Two different sentences may result.

Compounding this problem is the power of judges to engage in precisely the same discretionary exercise as the Committee. Under § 2003(a)(b) of S. 1722, the judge must consider all of these purposes. Since the judge is permitted to sentence outside the guidelines if there are factors not adequately considered by the Committee, the judge who has a different philosophy of corrections than the Committee either generally or with respect to a particular offense may utilize his or her own personal philosophy on a case by case basis. Moreover, the bill does not limit the judge to the purposes set forth in § 3102 or § 2003(a)(b).

We are concerned, therefore, that both bills cement various and oftentimes conflicting philosophies into law and vest the judge and the Sentencing Committee with broad discretion to implement them. In our view, the disparity created by utilization of different sentencing rationales will continue unabated. For this reason, the safety valve of parole is particularly important to correct the inequities resulting from an overemphasis on a particular sentencing rationale such as incapacitation. Otherwise, an already capricious and harsh system will be exacerbated.

It is for these reasons that we prefer the approach of the Biden bill. The judge is limited to consideration of those sentences which are commensurate with the gravity of the offense. Thus, the purpose of the sentence is directed at the seriousness of the offense and not at other purposes, such as deterrence, incapacitation, or rehabilitation. The judge's personal philosophy will not enter into the decision.

C. Sentencing Disparity

One of the most criticized aspects of the current federal sentencing system is the vast disparities that exist among the sentences of offenders convicted of similar crimes in similar circumstances. These disparities result from the individualized nature of our current sentencing system. One of the proposed remedies for these unjust disparities is the dissemination of data on sentencing practices and uniform sentencing guidelines to guide judges in the imposition of sentences. These guidelines will systematize discretion and thus make the imposition of sentences more consistent. Many complex guidelines systems have been proposed in recent years. Last year, the ACLU criticized S. 1437 guideline systems as inadequate. Because of numerous drafting problems, S. 1437 would have only exacerbated existing sentence disparities. Unfortunately, S. 1722 utilizes the same guideline system and S. 1723 is also an unacceptable vehicle for rationalizing sentences.

Under S. 1722, the Sentencing Commission must consider eighteen separate factors in promulgating categories of offenders and offenses. As described above, many are based on different philosophies making it impossible to rationalize the system. Furthermore, some of the factors are illogical. In determining categories of offenders the Commission must consider "role in the offense" and "mental and emotional condition to the extent that such condition mitigates

the defendant's culpability." These factors are probably considered in categorizing the offense itself. S. 1722 would consider them twice. Age, education, vocational skills, drug dependence, previous employment record, family ties, community ties, criminal history, and degree of dependence upon criminal activity for a livelihood all go to the existing status of the offender and not to the conduct in question. They are also factors which do not fit easily into a systemized guideline. Some factors such as education, vocational skills, community ties are plainly irrelevant to guidelines whose intent is to remove the consideration of arbitrary and capricious factors from the sentencing process. Other factors such as drug dependence, may relate to aggravating or mitigating circumstances in an individual case. The Commission must predict every conceivable combination of factors in its guidelines. If just the eighteen factors listed in the bill are employed, most of the statistical disparity so often complained about will remain. The Sentencing Commission cannot properly deal with all relevant factors without producing an enormously complex and unworkable guideline system.

The effect of the guidelines themselves is very unclear, because § 2003(a)(1) of the bill indicates that guidelines are only one of a number of factors to be considered in sentencing. The sentencing judge, therefore, continues to have broad discretion in deciding what factors, if any, upon which to base sentences. For example, the judge may consider "relevant history and characteristics of the defendant."

§ 2003(a)(2), however, states that judges must impose the guidelines unless there is a specific finding of aggravating or mitigating circumstances not adequately considered by the Committee. Paragraph (2) thus appears to contradict the intent of paragraph (1). If the guidelines are mandatory, then S. 1722 has shifted discretion, not reduced its adverse effects. If the guidelines are merely advisory, then S. 1722 will probably not have much of an effect on the system. Virtually every factor now considered will be able to enter the sentencing process at some point, whether through the Sentencing Commission or the sentencing judge. It is difficult to see how S. 1722 reduces the abuse of discretion in the current system.

S. 1723 sentencing system is similarly riddled with problems. S. 1723's Sentencing Committee would be a creature of the Judicial Conference of the United States which is dominated substantially by the Chief Justice. The Judicial Conference is wholly inadequate for the task of comprehensive sentencing guidelines. Moreover, there is virtually no guidance on the content of the guidelines. Under § 4302 the guidelines will be based on "relevant history and characteristics of defendants" and the "nature and circumstances of offenses." The Committee, therefore, could base its guidelines on such irrelevant factors as educational or vocational skills. Even more dangerous, the guidelines could contain serious racial and economic biases.

Under S. 1723, it is also unclear what effect the guidelines will have. § 3103(a) lists the guidelines as only one of several factors. Moreover, the judge can consider the nature and circumstances of the offense and history and characteristics of the defendant. This is the same discretionary exercise the Sentencing Committee undergoes, but if the judge places a different emphasis on the various factors in the sentencing decision, he may under § 3104(d) impose a sentence outside the guidelines. In short, the Sentencing Committee scheme of S. 1723 may have little effect on the broad discretion of judges.[18]

[18] It should be noted that this is an additional reason for retaining parole. The proposed new sentencing guideline system is an experiment. It is impossible to predict precisely how the Sentencing Committee guidelines will impact disparity. If a Sentencing Committee's guidelines allow considerable leeway to individual trial judges for deciding the nature and duration of punishment of particular offenders, individual discretion may play a more dominant role, with the possibility of greater disparity than in the current system because the corrective measure of parole will be eliminated. The same result could occur if the sentencing guidelines are specific but trial judges deviate from them frequently and are not rigorously policed by the courts of appeals.

In our judgment, the Sentencing Commission scheme of the Biden bill offers the most cogent approach to the task of comprehensive sentencing guidelines. There will be an independent Commission with a system-wide approach. The members will represent a broad spectrum of viewpoints in the criminal justice system, for example, the Attorney General and the Chairman of the Parole Commission should be ex officio members and a federal public defender should be on the Committee in addition to federal judges. The sentencing guidelines will be strictly limited to the nature and circumstances of the offense, the defendant's role in the offense, and any aggravating or mitigating circumstances relating thereto, to the defendant's role in the offense. The judge will only be able to consider the guidelines and the presence or absence of any aggravating or mitigating circumstances not adequately reflected in the guidelines.

D. Due Process Rights

Both bills do contain several important improvements over current law in the area of due process rights of offenders. First, § 3104(c) of S. 1722 and § 2003(c) require the court to state specifically on the record the specific reasons for the imposition of sentence. This significant step will help bring honesty and rationality to the sentencing process by requiring judges to state in open court their reasons for a particular sentence. Second, § 3106 of S. 1723 requires a pre-sentence hearing to afford an offender the opportunity to resolve any factual issues affecting sentencing.

Finally, §§ 3347 and 3348 of S. 1723 afford the probationer or an offender given a sentence of conditional discharge fundamental due process rights when a violation of a condition of probation or discharge is alleged. These include timely notice of the charges and of a defendant's rights under the bill, a prompt hearing, right to counsel, right to be apprised of adverse evidence and the right to confront and cross-examine adverse witnesses, the right to appear and testify, and to present witnesses and relevant evidence. The amendments to the Federal Rules of Criminal Procedure in S. 1722 contain similar due process improvements, but we believe these changes should be codified in statute as in S. 1723 since the Rules may be changed at any future date by the Judicial Conference unless Congress specifically disapproves the change.

E. Appellate Review of Sentences

The ACLU endorses the concept of appellate review of sentences initiated by the defendant. We strongly oppose giving such a right to the government.

In recent years, the concept of appellate review of sentences has gained wide support. It is a mechanism to safeguard against arbitrary and excessive punishment, which is prohibited by the Fifth and Eighth Amendments to the Constitution. Appellate review of sentences would lead to the development of a common law of sentencing. This body of case law would clarify the rights of the accused during sentencing proceedings and help to establish appropriate procedures and factors under the Constitution and statute.

If protection against excessive punishment is to be fully afforded, defendants must be able to appeal all sentences, and not just sentences that exceed the guidelines of the proposed Sentencing Committee. Congressman Drinan, Chairman of the House Criminal Justice Subcommittee, testified last year in hearings on S. 1437/H.R. 6869, "it is erroneous to think that no abuses could occur with respect to sentences meted out within the guidelines."

Moreover, abuse could still occur even if a sentence were below the guidelines. There is no reason to assume that sentences imposed either within or below guidelines which have yet to be written will never be excessive. Accordingly, we cannot safely assume that appellate review of sentences imposed below or within guidelines will never be necessary. We urge the adoption of appellate review of *all* sentences upon initiation by the defendant as contained in S. 1723 and the Biden bill.

The need for appellate review of sentences does not cut both ways. There is no parity in the issue of permitting the government to appeal sentences. We have never equated the burden we place on prosecutors with the burden placed on the accused. The burden of proof of guilt beyond a reasonable doubt is unique to the prosecutor. There is no justification for shifting the burden to the defendant to prove that a sentence below the guidelines is appropriate. First, such an option on the part of the government may well operate, or can be used to chill the defendant's right to appeal his conviction on the merits.

Second, this provision is very likely unconstitutional, as violating the double jeopardy clause of the Fifth Amendment by permitting the imposition of a second, increased and heavier punishment for the same offense. The essence of the constitutional argument is that government appeal of sentences would conflict with the fundamental purpose of the double jeopardy clause: to prevent government overreaching by giving the prosecutor only one opportunity for conviction and sentencing. If the government has not succeeded in making its case in this first prosecution, it cannot repeatedly threaten the accused's interest in finality of decision and freedom from additional punishment. The constitutional infirmity of government appeal of sentences was recently affirmed by the United States Court of Appeals for the Second Circuit. In *United States* v. *Di Francesco*, the court ruled that the provision of Title 18 which permits the government to appeal the sentence of special dangerous offenders (18 U.S.C. § 3576) is unconstitutional.

> We cannot perceive, however, how a defendant who, after being sentenced to several years' imprisonment by a district court, might be subject to imposition of a sentence of death upon a government appeal, would be any less placed twice in jeopardy of life or limb than was [a] defendant . . ., who, after acquittal in the court of first instance, was found guilty and sentenced to imprisonment for slightly less than two years upon appeal by the government. That § 3576 subjects a defendant "merely" to a longer term of imprisonment, not to the actual loss of his life, is a difference of degree, not principle, from the example given, for the double jeopardy clause applies equally to all criminal penalties. Under the statute the government, dissatisfied with final judgment in one court, seeks a more favorable result in another tribunal. *Therefore, the conclusion appears inescapable that to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government, is to place him a second time "in jeopardy of life or limb.* [Emphasis added.]

The court went on to say that the double jeopardy protects against a second prosecution for the same offense after acquittal and against multiple punishments for the same offense. At the root of the second and third of these protections the court said, is the idea that when a defendant has once been convicted and punished for a particular crime, fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense. Moreover, the Supreme Court and other courts have emphatically stated in dictum that it would be impermissible to increase a valid sentence. The Second Circuit concluded:

> We do not deny the existence of legitimate governmental interests that might be served by allowing the government to appeal a sentence, e.g., improved uniformity in sentencing. But such interests must be pursued in alternative ways that do not conflict with the Fifth Amendment's guarantee against double jeopardy. [W]here [, as here,] the Double Jeopardy Clause is applicable its sweep is absolute. There are no equities to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination. *Burks* v. *U.S.*, at 11 n. 6. To subject Eugene Di Francesco for a second time to the risk of the entire range of penalties that the law provides for his crimes would violate that constitutional policy.

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