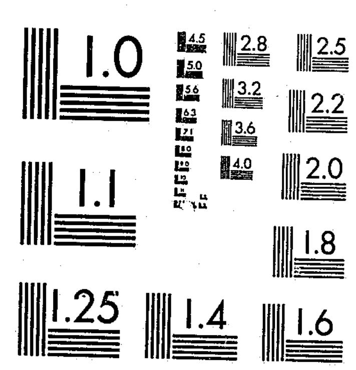

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HEARINGS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

73363
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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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POSITION PAPER AND TESTIMONY

OF THE

FEDERAL PUBLIC AND COMMUNITY DEFENDERS

ON THE

PROPOSED FEDERAL CRIMINAL CODE

PREPARED FOR THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

MARCH, 1978

CONTENTS

SUMMARY OF TESTIMONY

In the guise of streamlining federal criminal law, S.1437 works a number of major changes in the law. The consequences of these changes - on the federal court system and on individuals exposed to it - have not been studied adequately. We have focused on those aspects of the bill which work the most profound and undesirable changes.

Expanded Federal Criminal Jurisdiction

To an extent unprecedented in American jurisprudence, S.1437 lays the groundwork for expansion of federal criminal jurisdiction. The bill will open the federal courthouse door to prosecution of offenses which are now the exclusive province of state authorities. Every liquor store or supermarket robbery, for example, will be subject to federal prosecution.

In its comprehensive review of the state of the law, the Brown Commission observed that historically the Department of Justice pressed federal jurisdiction to its limits despite Congressional intent to the contrary. The Department of Justice has not controlled the exercise of prosecutorial jurisdiction under present law, and there is no indication it will be able to do better under the new code.

If the broad grants of jurisdictional authority are

enacted, one of two sets of circumstances will be true. Either jurisdiction will not be asserted by federal prosecutors or it will. In the former event there is no reason to put the law on the books; in the latter there is a real danger of overwhelming an already overburdened courts and corrections system and usurping state authority.

Culpable States of Mind

Under traditional common law concepts as now embodied in the federal criminal laws, as a general rule one must commit an act with a guilty mind in order to suffer the sanction of the law. In the process of simplifying the scattered and conflicting provisions on criminal intent and culpable states of mind in current statutes, the civil law concept of "recklessness" has been substituted for "knowledge" in a number of existing crimes by virtue of an all-encompassing rule of construction. Whereas presently, in order to convict a person charged with possessing contraband such as stolen property, the government must prove that the person knew the property was stolen, under the new law the burden of proof is reduced substantially. The actor's mental state will now be judged by a quasi-objective standard. The issue will no longer be whether a person knew, but rather did he disregard a risk in a reckless manner as defined in the bill. The chances of convicting innocent or marginally

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involved persons is greatly enhanced as a result.

Offenses Involving Government Processes

Chapter 13 of the bill involves the expansion of several areas of existing law which create a potential for abuse. The expansion of greatest concern provides that a person suspected of criminal activity may be liable for the felony offense of giving false oral statements to law enforcement officers during interrogation about his own involvement in the crime being investigated. The practical effect of this is to place awesome power in the hands of federal agents and to give impetus to inquisition as a means of investigation where no legal duty to speak exists. In fact, the Constitution provides an absolute right to remain silent. The would be safeguards established in an attempt to avoid abuse are ineffective and, indeed, may enhance the potential for misuse.

New offenses are created for false swearing about minor, immaterial matters in official proceedings and for a "one man" conspiracy to defraud the government of a lawful function by misrepresentation. The misdemeanor treatment given false swearing as to matters wholly immaterial to the government inquiry does not alter the fact that criminal sanctions are being applied to activity that has little if

any potential to affect the proceeding.

The amorphous and vague offense of a "one man" conspiracy to obstruct a government function by fraud deprives people of notice of what activity is criminal because of the limitless number and nature of government functions. This uncertainly is also present in current conspiracy law but conspiratorial activity poses a special threat to society that is not present in individual activity which by and large is treated in other provisions of the bill.

Views On The Sentencing Commission

The proposed Sentencing Commission runs the risk of exposing sentencing practices to changing political winds. If the concept of the Sentencing Commission is retained, Federal Defenders urge that its makeup be depoliticized. The limits placed on the Commission's latitudes in structuring the guidelines result in presumptive sentences. The practical effect of presumptive sentences is to transfer the sentencing discretion to the prosecutor in the exercise of the charging decision. The prosecutor's choice of the grade of the offense to file will effectively set the sentence within narrow limits. The Sentencing Commission moves the sentencing decision one step away from the courthouse and one step closer to the police station. Federal Defenders

are opposed to the concept of the Sentencing Commission and suggest other alternatives including sentencing councils of individual district judges as recommended by the ABA Advisory Committee on sentencing alternatives and procedures.

Appellate Review of Sentences

The appellate review of sentences in the federal courts is long overdue. However, the Federal Defenders are opposed to the government's right to seek sentence increases on appeal. Both the Brown Commission and the ABA Advisory Committee on Appellate Review of Sentences have recommended against the right of the government to appeal sentences.

There are compelling arguments against permitting the government to seek sentence enhancement. The government's right to appeal sentences is very likely unconstitutional. Plea bargaining will limit its effectiveness in curbing sentencing disparity. It is a tool which has staggering potential for abuse.

Mandatory Sentences

S.1437 revives the concept of mandatory minimum sentences on certain drug charges which was earlier repealed in the Comprehensive Drug Abuse Prevention and Control Act of 1970. Sections 1811 and 1823 provide that the sentence imposed must run consecutively to any other term of imprisonment

imposed upon the defendant. We submit that the effect of this language will bring about inequitable and oppressive results in a large number of cases.

Prior experience with mandatory minimum sentences in Massachusetts and New York has shown that they fail to deter criminals or reduce recidivism. The earlier federal experience demonstrated a practice by all parties to criminal proceedings of joining in agreements to subvert the mandatory sentence. We submit that the mandatory sentence does not accomplish the objective of removing judicial sentencing discretion, it merely transfer it from the judge to the prosecutor.

Preventive Detention

Section 3503 providing for pretrial preventive detention is repugnant to the fundamental concept of presumed innocence. It is inherent in our American concept of liberty that a right to bail shall generally exist. Preventive detention denies that right.

Mentally Ill Offenders

For the first time in federal law the bill provides for commitment of offenders found not guilty by reason of insanity. There is a very real need for such provision in federal law; however an amendment on the Senate floor

removed from the bill the requirement that the Attorney General provide adequate treatment and hospitalization for such reasons. We urge the Subcommittee to reinstate the bill's original provisions in the area.

I. INTRODUCTION

Mr. Chairman: We thank you for the opportunity to appear before the Subcommittee and express our views on the proposed codification and revision of the federal criminal laws.

The Federal Public and Community Defender programs were authorized under legislation passed in 1970. There are now thirty-seven defender programs in the country's ninety-four judicial districts. In fiscal 1977, we represented people in over 20,000 cases before the federal courts and Parole Commission. During fiscal 1977, about 54,000 defendants appeared in criminal cases in U. S. District Courts. These figures offer some indication of our role in the federal criminal justice system and our familiarity with its operation.

In preparing our testimony we have approached S.1437 from the viewpoint of practicing federal defense lawyers and particularly as lawyers representing the indigent. We have compared the bill, the Report of the Senate Judiciary Committee (no. 95-605) (Senate Committee Report), and the Final Report and Working Papers of the National Commission on Reform of Criminal laws (Brown Commission), with current law in the light of our collective experience.

We agree that there is a dire need to revise and reorganize the federal criminal laws. We disagree on many of the so-called reform provisions of the bill, as set out in the following pages.

We have focused on the areas of the bill which we think work the most profound and undesireable changes in the law. We have tried to highlight those changes, demonstrate their consequences, and where possible to suggest alternative approaches to existing problems.

We have not addressed the proposed amendments to the Federal Rules of Criminal Procedure of §111 because of time constraints. We are quite troubled by some of those provisions, and we will be pleased to furnish supplemental testimony on that subject if the Subcommittee desires.

This presentation is the product of Federal Public and Community Defenders. Those who worked on the committee which produced this position paper are James R. Dunn, Central District of California; Edward F. Marek, Northern District of Ohio; Daniel J. Sears, District of Colorado; Irwin H. Schwartz, Western District of Washington; David S. Teske, District of Oregon.

II. EXPANSION OF FEDERAL CRIMINAL JURISDICTION UNDER S.1437

Historically the federal courts have been courts of limited jurisdiction. Absent a federal interest, civil and criminal litigants were expected to bring their cases in their state court systems. Over the years, however, civil and criminal jurisdiction of the federal courts has increased. In terms of the philosophy of federal jurisdiction and in terms of the real and practical capabilities of our federal courts, too many types of cases now are brought in the federal forum rather than a state forum. Both the Attorney General and the Chief Justice advocate cutting back on federal jurisdiction because of the overloaded condition of the federal courts. The proposed code would compound existing problems by increasing the volume of criminal litigation in the United States District Courts and Courts of Appeals.

As a frame of reference, one should bear in mind that in the year ending September 30, 1977, the Department of Justice brought about 38,000 original criminal proceedings in the United States District Courts. During the same period almost 5,000 criminal appeals were filed in the United States Courts of Appeals. In some courts, criminal

cases consume ninety percent of the available trial time, leaving civil litigants waiting for years for their day in a court. Nor is the problem of workload confined to the courts. The Bureau of Prisons' facilities are badly overcrowded, and the government has been and is being sued from coast to coast to redress inadequate conditions of confinement caused by overcrowding. Recently the General Accounting Office concluded that the United States Attorneys lacked the resources to prosecute fully cases now within their purview. Any increase in new business in the federal system must be carefully studied to determine the ability of the system to deal with it.

In this presentation we endeavor to identify the major areas in which new business would be brought to federal court - cases which can and will be filed in the United States District Court which today are not - and the manner in which the criminal adjudication process will be affected.

In several ways the bill plainly and undeniably creates new federal offenses and extends federal jurisdiction to offenses previously subject only to state prosecution.

1. There is a substantial extension of federal jurisdiction over crimes against persons and property.

2. Regardless of how tenuous a federal interest may be in one offense, it

may serve as the basis for ancillary or "piggy-back" prosecution of a broad range of offenses.

3. As a result of changes in procedure and sentencing, it may be easier to obtain convictions in federal court than state court, inviting forum shopping by law enforcement agencies.

A. Expansion of Federal Criminal Jurisdiction Over Crimes Against Property and Persons

Under current law, there is general federal jurisdiction over some offenses, e.g., trafficking in narcotics, while for others jurisdiction is limited to specified circumstances, e.g., transporting a stolen vehicle across a state line. In the latter situation, stealing a car is a state offense only; the federal offense arises only if the car is taken across a state line. The same pattern is continued in form under §201 of the bill; however in a number of areas the limitations are illusory and federal criminal jurisdiction is expanded substantially.

There are three jurisdictional phrases employed in the bill which appear to be jurisdictional limitations on federal prosecutions, but in reality open the federal courthouse door to prosecutions which are now the exclusive province of state courts. These phrases are:

§§1722(d)(1) and 1723(d)(1), or if any facility of interstate commerce is used in connection with the offense. §§1722(d)(2) and 1723(d)(2).

The significance of these jurisdictional phrases becomes apparent only when considered in light of current law and court decisions.

1. A Crime or Activity Which Affects Interstate Commerce

The affecting interstate commerce formulation closely parallels the Hobbs Act, 18 U.S.C. §1951, which provides, "Whoever in any way or degree obstructs, delays or affects commerce" in specified manners, commits a federal crime. There is a split of authority among the courts of appeals on the scope of that statute. The limited construction is that federal jurisdiction requires proof of racketeering as well as an affect on interstate commerce. United States v. Yokley, 542 F.2d 300 (6th Cir. 1976), and United States v. Culbert, 548 F.2d 1355 (9th Cir. 1977), cert. granted, ___ U.S. ___ (1977). The opposing view is that racketeering need not be proven; any specified act which has any conceivable affect upon interstate commerce is a federal crime. So, in United States v. Gill, 490 F.2d 233, 236 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974), the defendant was

charged with violating the Hobbs Act by "shaking down" a liquor store owner for $300.00. Although reluctantly doing so, the court held that only a minimal affect upon interstate commerce was required, and that the loss of the store owner's $300.00 gave rise to jurisdiction because loss of that sum would tend to reduce the store's ability to purchase beer and liquor from out-of-state producers. Other decisions have held that the affect on commerce can be indirect. United States v. Amato, 495 F.2d 545, 548 (5th Cir. 1974), cert. denied, 419 U.S. 1013 (1974), involved extortion of a local wholesaler. The evidence showed that the wholesaler did not purchase goods from out-of-state, but bought its goods from suppliers who did. The court held that the fact that interstate commerce was twice removed did not preclude federal jurisdiction.

Recently the Department of Justice sought review in the Supreme Court of the Ninth Circuit ruling in Culbert. It is important to consider the issues there involved in terms of the present bill. The Court of Appeals observed that the legislative history of the Hobbs Act "reveals, without question" that Congress intended that law to create jurisdiction only in situations involving racketeering. Culbert at 1357. The contrary interpretation, advocated

by the Department of Justice, the court said, "would justify federal usurpation of virtually the entire criminal jurisdiction of the states." Id. S.1437 codifies the Department of Justice position despite Congressional intent under the Hobbs Act and despite judicial criticism of such expanded jurisdiction.

Under the bill's formulation, every incident of arson, property destruction or robbery which involves a liquor store or supermarket or similar business will give rise to a federal crime. Why should these crimes be made the subject of federal prosecution in addition to state prosecution:

It can be asked why there has not been a flurry of such prosecutions to date if the Hobbs Act is so broadly written. The answer is that, at present, "As a matter of policy, the Department [of Justice] has restricted the use of the robbery provisions of the Hobbs Act to cases which involve organized criminal activity or which are part of some wide-ranging scheme." United States Attorney's Manual, §9-131.10. That self-imposed limitation reflects, we believe, the present ambiguity in the law. S.1437 resolves that ambiguity and opens the door to more prosecutions.

In addition to the sections mentioned, the same juris-

dictional formulation is found in §1735(d)(1) concerning fraud in certain state insolvency proceedings.

2. Use of a Facility of Interstate Commerce or Crossing a State Boundary

Even if a crime has no impact on commerce or any other identified federal interest, the offense may be prosecuted in federal court if a facility of interstate commerce was used, or a person crossed a state boundary in connection with the crime. The Senate Committee Report, at page 632, asserts these jurisdictional provisions represent existing law under 18 U.S.C. §§875 and 1952. That is erroneous; the proposed formulation is broader in several important respects.

First, §1952, popularly known as the Travel Act, was intended by Congress as a weapon to be used against organized crime; there is no such restriction reflected in the S.1437 or the Senate Committee Report. In 1971, the Supreme Court commented that the Travel Act "was aimed primarily at organized crime" and noted that "an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal policy resources" and might result in transforming "relatively minor state offenses into federal felonies." Rewis v. United States,

401 U.S. 808, 811-812 (1971) S.1437's formulation is that kind of expansive Travel Act.

Second, the Travel Act has been construed to require that the interstate aspect of the offense be more than an incidental aspect of the venture. United States v. Archer, 486 F.2d 670, 680 (2nd Cir. 1973); United States v. Isaacs, 493 F.2d 1124, 1146 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974). The proposed code does not carry over that requirement.

Third, the bill's provision apparently contemplates jurisdiction even in the absence of a true interstate contact. Present law uses the phrase "facility in interstate commerce" and that has been held to require an actual interstate contact or communication. United States v. DeSapio, 299 F.Supp. 436 (S.D. N.Y. 1973). One other decision commented that the nature of the contact required was unclear. United States v. Cafero, 473 F.2d 489, n. 13 (3rd Cir. 1973). Under the bill's formulation, the ambiguity is resolved by using the phrase "facility of interstate commerce." It means that a local telephone call or an intra-state flight on an inter-state airline would create federal jurisdiction because both involve use of facilities or interstate commerce. We think it is significant that the

Brown Commission retained the "in commerce" formulation and that there is no explanation in the Senate Committee Report for the more expansive "of commerce" formulation.

These jurisdictional formulations appear in the following sections of the bill:

1321(d)(2) and (3)	- witness bribery
1322(d)(3) and (4)	- corrupting a witness or informant
1323(d)(3) and (4)	- tampering with a witness or informant
1324(c)(3) and (4)	- retaliating against a witness or informant
1351(c)(3) and (4)	- bribery
1352(c)	- graft
1701(c)(8) and (9)	- arson
1702(c)	- aggravated property destruction
1703(c)	- property destruction
1721(c)(7)	- robbery
1734(c)(2) and (3)	- executing fraudulent scheme
1738(e)	- consumer fraud
1751(c)(2) and (3)	- commercial bribery
1753(d)(1) and (2)	- sports bribery

We have not found in the Senate Committee Report an explanation of why federal jurisdiction should be expanded. Why, for example, should bribery of a witness in a state proceeding become a federal matter because one of the parties placed a local phone call to arrange payment? There is no substantial reason.

B. Ancillary Jurisdiction

S.1437 specifies seventeen crimes against persons which

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become federal offenses if committed during the course of another federal offense. The seventeen are: murder §1601, manslaughter §1602, negligent homicide §1603, maiming §1611, reckless endangerment §1617, kidnapping §1621, aggravated criminal restraint §1622, criminal restraint §1623, rape §1651, sexual assault §1642, sexual abuse of a minor §1643, arson §1701, aggravated property destruction §1702, property destruction §1703.

Consider the attenuated federal interest involved under these provisions. Under §1601(e)(4), murder is a federal crime if it is committed during the commission of one of 27 other specified federal offenses ranging from treason to trespass. Regardless of how limited the federal interest is in the underlying crime, it is drawn out still further to allow federal prosecution of the homicide. Consider the following example. Assume a community development association obtains 1% of its annual budget from federal programs. A disgruntled employee throws a Molotov cocktail (a "destructive device" under §111) into the program's store front office. During his escape from the scene the arsonist is accosted by a local police officer, and in an ensuing struggle, the officer is killed. Under §1701(c)(6), the act of arson is within federal jurisdiction

because the property burned was under the care, custody or control of an organization receiving financial assistance from the United States. Then, based on this very limited federal interest in the damaged property, the killing of the policeman becomes a federal matter by virtue of §1601(c)(4). Why should the long arm of the federal government extend so far from matters affecting federal interests?

It is significant to note that the Senate Committee Report indicates there are some 300 of these so-called piggy-back crimes in the bill. In his recent testimony before this Subcommittee, Professor John Quigly of Ohio State University Law School places the number somewhat higher. In fairness, it should be said that the fact that the bill creates 300-350 new crimes does not mean that there will be three hundred or three thousand new cases filed in federal court. However, one of two things will prove true. Either the Department of Justice will make use of the new authority, creating new business in the federal courts, or it will allow the law to remain unused on the books. If the latter is to be the case, there is no reason to enact the law; if the former will be true, then the judgment must be made whether federal interests and the capabilities

of the federal system justify opening the courthouse door to these new cases.

C. Non-Jurisdictional Provisions Which Will Increase Criminal Filings In Federal District Court

There are other sections of the bill which will increase the number of new filings in United States District Courts, although the provisions are not jurisdictional in nature. These changes will permit and tempt United States Attorneys to bring before federal courts cases which previously have been within the exclusive jurisdiction of the states.

1. Reducing the Prosecutor's Burden of Proof

In three related areas the bill alters substantially current proof requirements in criminal cases. That fact alone may increase filings in federal court, but more important, in many areas the proof required for conviction in federal court will be less than required in the state courts, resulting in forum shopping.

First, under current law in the federal and most state systems, the prosecution must establish beyond a reasonable doubt that a defense is not applicable. Under proposed Rule 25.1 Federal Rules of Criminal Procedure, the defendant

would have to prove certain defenses by a preponderance of the evidence. That difference in proof requirements will result in marginal cases being prosecuted in federal court rather than state court.

Second, the bill removes jurisdictional elements of an offense from the jury's consideration. §201(c) and Rule 25.1(b). Under present law, jurisdiction is an element of the offense, and therefore a defendant generally has a right to a jury determination of the issue.

The rationale for this major change in law is that a jury should determine whether or not a defendant has done "something criminal," while the court should decide whether that "something criminal" is punishable by the federal justice system. If matters were so clear cut, there would be no problem, but even under the proposed code there are issues of fact pertaining to jurisdiction upon which the defendant should be entitled to a jury trial.

Going back to the example used earlier, of the arson and homicide in an ancillary jurisdiction situation, the point can be made clear. In the homicide prosecution, the jurisdictional question would be whether or not the homicide occurred "during the commission of" the offense of arson. It is not at all difficult to conceive of the situation in

which a defendant admits the killing, but defends on the ground that the killing was not during the commission of the other offense, but was the result of his refusal to pay protection money to the policeman. Under the bill, that issue would be decided by the court, not the jury. The defendant would be deprived of his right to a jury trial on the one and only issue in dispute in the case, and that development would tempt many prosecutors to opt for the federal forum.

Third, as discussed elsewhere in this presentation, requirements regarding criminal culpability are substantially reduced compared to current law in federal and many state jurisdictions. To the extent that it is easier to obtain a conviction in the United States District Court than in a state court, there will be a choice of the federal forum.

2. Mandatory Minimum Sentences and Forum Shopping

As noted recently by Judge Jon C. Newman, a former United States Attorney for the District of Connecticut, mandatory minimum sentences create a tremendous potential for abuse by the prosecutor in charging and plea bargaining. 63 ABA Journal 1563 (Nov. 1977). The fact that only a minority of states have mandatory minimum provisions similar

to those in S.1437 creates another dimension for abuse. By controlling the forum in which the charges are brought, the full abusive potential of charge or plea bargaining can be brought to bear. There is nothing in the bill to safeguard against such abuse.

D. Prosecutorial Discretion And Jurisdictional Decisions

In §207 of its final report. the Brown Commission considered the relationship of prosecutorial discretion and expanded jurisdiction. The commentary to that section noted that absent statutory limitations on the prosecutor:

> federal jurisdiction is sometimes exercised to an extent not anticipated when legal jurisdiction was established. For example, when bank robbery jurisdiction was extended to all banks insuring deposits with the FDIC, it was intended to permit federal aid in cases where gangs moved from state-to-state robbing small-town banks; to date bank robbery is regarded as primarily a federal crime, regardless of whether there are interstate aspects.

The problem of prosecutorial discretion is not addressed in S.1437.

There is no reason to believe that the same process which occurred in the prosecution of bank robberies will not

occur with other kinds of robberies and other offenses under the broad jurisdictional provisions contained in the bill. The Department of Justice has not been able to control the discretion exercised by the 94 United States Attorneys under current law; there is no reason to believe that it will be able to do any better under the proposed code.

In 1972 Stanford Law Professor Robert Rabin was commissioned by the Administrative Conference of the United States to study prosecutorial discretion in the Department of Justice. In an article based on that study he concluded:

> Although the Justice Department's supervisory capacity provides a potential alternative means of safeguarding against arbitrariness, the Department has failed to develop either an accurate system of aggregate data collection or an effective system of individualized internal review. As a consequence, the Department does not serve as a watchdog over prosecutorial activity. Hence, the present system provides virtually no safeguards against abuse of discretion.
>
> Rabin, "Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion." 24 Stanford L. R. 1036, 1075 (1972).

The United States Attorney's Manual contains guidelines for prosecution of certain federal offenses. Those policy guidelines are regularly violated by the field offices of the Department of Justice, and unfortunately the courts have

routinely held that they are not enforceable by the court. So, in United States v. Chavez, 566 F.2d 81 (9th Cir. 1977), the defendant appealed on the ground that his federal prosecution was in violation of Department of Justice policy. The court held that it was powerless to act although it noted, "it might be otherwise if the Attorney General's policy were something more than in-house rules, and had reached the stage of publication in the Code of Federal Regulations or some equivalent publication."

The practical effect of S.1437 is to give United States Attorneys far greater power without any effective control by Congress or the Department of Justice. S.1437 reflects concern with the need for consistency in application of the criminal sanction. To the extent that inconsistency is viewed as undercutting respect for law and its deterrent effect, expanding jurisdiction without some degree of control over the prosecutorial discretion is counter-productive, for it will result in greater inconsistency in application of the law.

E. Alternative Approaches to Jurisdiction

There are alternative approaches to jurisdiction which should be explored:

First, and most obvious, the expansive jurisdictional

provisions of the bill can be pruned back.

Second, the Attorney General could be required to promulgate judicially enforceable regulations for the exercise of prosecutorial discretion, as suggested by the Chavez court. This approach would bring into the open the now concealed discretionary aspects of criminal enforcement and would facilitate Congressional review.

Third, in areas of concurrent jurisdiction a certification process could be adopted similar to that outlined in §3601, pertaining to federal juvenile prosecutions.

III. CULPABLE STATES OF MIND AND COMPLICITY

A. Culpable States of Mind

The legislative history of S.1437 and its antecedent S.1, has treated Chapter 3, "Culpable States of Mind" as a rather benign and uncontroversial section, and yet it may have a significant and immediate effect on federal criminal practice.

S.1437 introduces into the federal criminal law the traditional civil law concept of recklessness to an extent never before seen; and, with potential results, we believe, that may in some instances have been wholly unintended. By dispensing with the traditional requirement of mens rea, the Senate bill will lessen the government's burden of proof in a substantial number of cases commonly handled by Federal Defenders when representing poor persons in the United States. We agree with the objective of simplifying scattered and conflicting provisions of federal criminal law, but not at the expense of individual consideration of its impact on particular crimes.

The Senate Committee Report relies on the landmark case on criminal intent, Morissette v. United States, 342 U.S. 246 (1952), as support for the format which reduces the

many various elements of intent to only four:

> Justice Jackson characterized the mental element concept in federal law as being "illusive" because of "the variety, disparity and confusion" of judicial decisions. Id. at 252.

It is this very same case, however, which also supplies the most convincing and persuasive arguments for retaining the elements of specific intent or knowledge in some areas where the new rule of construction has substituted the standard of recklessness. In Morissette, an otherwise law abiding citizen with an exemplary character and record had collected spent shell casings which were stacked in a haphazard way on an old government firing range. He realized a few dollars from his amateur salvage operation, and when later confronted by the law, willingly and voluntarily admitted all of the facts involved. He stated that he believed the shell casings had been abandoned. The trial court would not allow Mr. Morrisette to defend on his alleged mental state that he believed the casings to have been abandoned, and therefore had no guilty intent.

In the Supreme Court, Justice Jackson distinguished the strict liability statutes enacted primarily for the benefit of the public welfare, and concluded that the failure of Congress to include a mental element in the

statutory definition of larceny did not mean that the federal crime of larceny was one of strict liability. He concluded that when Congress codified an existing common law crime, it brought with it all of the historical and judicial interpretations of the common law that preceded it, including those requiring a guilty mind:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," . . . Id. at 250-51.

Indeed, when Justice Jackson was using the above words cited in the Senate Committee Report he was not extolling the virtues of simplicity and uniformity. Rather, he was referring to the historical development of the law which had fashioned particular states of mind to fit particular acts so as to insure that punishment would come only to those with a conscious guilty mind:

> The unanimity with which they [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized

> by the variety, disparity and confusion of their definitions of the requisite but illusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised formulae, if not scientific ones for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice of aforethought," "guilty knowledge," "fraudulent intent," "willfulness," "scienter," to denote guilty knowledge or mens rea, to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes. Id at 252. (Emphasis added)

In referring to the then-existing statute on larceny and theft, Justice Jackson did not discuss the concept of recklessness per se. The mental element to be carried over from common law was either knowledge or intent:

> In the case before us, whether the mental element that congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt. For it is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned and unwanted property. Id at 271.

It is the generally accepted belief that Chapter 3 will not affect existing substantive law, but is merely

an attempt to simplify and codify in one place all of the culpable states of mind to be used in the code. Justice Jackson viewed §641, as it related to the theft statutes, in the same light:

> We find no other purpose in the 1940 re-inactment than to collect from scattered sources crimes so kindred so as to belong in one category. Not one of these has been interpreted to be a crime without intention and no purpose to differentiate between them in the matter of intent is disclosed. Id at 266-67.

Contrary to the Morissette model, however, assimilation of the various mental states into Chapter 3 will have a material effect on existing substantive law.

To completely evaluate the impact of Chapter 3 on the new code as a whole, one would need to compare in detail each substantive crime with the rule of construction in §303. This is a task which the defenders have not undertaken on an exhaustive scale; however, we have attempted to predict the impact of Chapter 3 on some of the most commonly occurring crimes in federal practice. Larceny and theft, as illustrated in Morissette, constitute a substantial portion of the business of the federal courts. Other crimes which would be affected are forgery and counterfeiting, narcotics and those crimes generally grouped in the fraud category, in

particular, the false statement cases.[1]

We believe it is impossible to judge the real impact of Chapter 3 on a theoretical level. Rather, the defenders want to impress upon the Subcommittee the practical consequences this chapter may have on the trial of cases common to federal defenders, and to the particular kind of defendants we represent. The following illustrate how recklessness, rather than traditional mens rea, may now become the dispositive issue.

1. Section 1731 - Theft

Section 1731 contains the new provisions on theft and incorporates the old statute referred to in Morissette. Section 1731(a) states that:

> A person is guilty of an offense if he obtains or uses the property of another with the intent: (1) to deprive the other of a right to the property or a benefit of the property; or (2) to appropriate the property to his own use or to the use of another person.

Since the language of the statute itself contains no statement of the culpable state of mind, it must be read with

[1] For example, in fiscal 1977, in the Central District of California, over 40 percent of all the cases handled by the largest federal public defender office in the country fell into these four categories.

reference to the rule of construction in Chapter 3, §303(b). The facts from Morissette illustrate how the issues in the criminal trial change dramatically under the new code. The "conduct" in issue is obtaining or using property. This would be judged by a "knowingly" standard. Mr. Morissette admitted this element. The specific intent aspect of depriving another of a right was also admitted, thus leaving as the only issue in the case the "existing circumstance," i.e., whether or not shell casings were "the property of another". The rule of construction specifies the mental element as recklessness rather than knowing or intentional. Thus, the jury will not be instructed in the traditional concepts of criminal intent. Instead, the issues will be: (1) whether there was a risk that the property might belong to another, (2) whether Mr. Morissette was aware of that risk, and if so, (3) whether the risk was of such a nature and degree that to disregard it constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. Thus, the defendant's culpability and possible criminal punishment is to be judged on a quasi-objective standard as to what a reasonable man would have done under the circumstances, rather than what he actually intended or knew.

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2. Sections 1741, 1742 - Counterfeiting and Forgery

The counterfeiting statute, §1741, covers not only the counterfeiting of government obligations, but also the related offenses of uttering and possessing counterfeited written instruments. Similarly, §1742, "Forgery," covers the uttering and possession of forged written instruments. The "existing circumstance" provision of the rule of construction effects a substantial lessening of the government's burden of proof. This is consistent with the statement in the Senate Committee Report that the focus of the sections is to protect "the integrity of the writings . . ." rather than "the purpose of the actor". Senate Committee Report, p. 714, n. 40. The danger, however, is that as more emphasis is placed on protecting these commercial and financial interests, the crime approaches one of strict liability.

Under current law, although there are instances where courts have approached the recklessness rather than knowing standard, the general consensus is that the actor must have known that the document is a counterfeit or a forgery. See Devitt and Blackmar, Federal Jury Practice and Instructions, Third Ed., §52.08, i.e., "The defendant knew at the time that the obligation was counterfeit, and . . .". Since

under the new bill no state of mind is specifically designated for the existing circumstance in these offenses, §303(d)(2) constructs the state of mind as "reckless". Senate Committee Report, pp. 718, 724.

In the case of counterfeiting this makes it much more likely that an innocent person in possession of a counterfeit bill or bills inadvertently received in normal commerce may be convicted of a crime. While it is true that the offense requires the specific intent "to deceive or harm another person or a government" when the person utters or possesses the instrument, the reckless standard might be used to bootstrap the government into a position of inferring that specific interest. For example, if an innocent party is charged with "knowledge" of the counterfeit nature of the bills by virtue of a recklessness standard, a prosecutor might urge the jury to infer from that fact alone that by passing such a "known" counterfeit bill, the passer did indeed intend to "deceive or harm". Thus, the innocent person who receives a bill that looks a bit peculiar and either does not notice it, or does not consider it sufficiently different to require independent inquiry, may be culpable. This additional scope of the law is more likely to envelop the innocent person, or at best the marginally involved

offender, rather than the person who possesses, utters or manufactures substantial sums of counterfeit money or documents on a large scale. The recklessness standard is all the more likely to result in marginal convictions in view of the fact that the "intent to defraud" language has been deleted from both statutes. The new broader language reads "with intent to deceive or harm another person or a government". According to the Senate Committee it is thus "not necessary that the intent be to deprive another person or a government of property or some other tangible right." Senate Committee Report, p. 714.

The same danger exists in the entirely new §1743, "Criminal Endorsement of a Written Instrument". This law has no counterpart in the present federal codes and is intended to cover the situation where a person signs or endorses a written instrument on behalf of another, when in fact he has no authority to do so. It appears from the written document itself that the person has signed or endorsed as the agent of another person or a government when, in fact, that person had no such agency relationship. The proscribed conduct is not only signing or endorsing, but also uttering or possessing such a written instrument which has been so endorsed without authority. Here, an innocent

holder in due course or one accommodating another would be held to knowledge of the former lack of authority on the recklessness standard, when the appearance of the document itself might not be of such a nature as to place the person on notice. Neither the Final Report of the Brown Commission, nor S.1 as introduced in the 93rd Congress contained this provision. Once again, "the committee is of the view that such conduct, while technically not forgery, poses a comparable threat to the integrity of written instruments and thus deserves treatment similar to that accorded forgery and counterfeiting." Senate Committee Report, p. 723. In other words, although in the process individual defendants may be exposed to prosecution and conviction on a lesser standard of proof, such exposure is justified by the prevailing view that the integrity of the instruments themselves must be protected. The same problem arises again in Section 1744, "Criminal Issuance of a Written Instrument" in paragraph 2 where the offense is to utter or possess a written instrument that has been so issued, i.e., issued without authority.

3. Section 1811 - Trafficking in an Opiate

In the narcotics offenses, §1811 et seq., the prior law of Title 21 is essentially recodified. The existing circumstance to be judged under the new recklessness standard

in the possessory and smuggling cases, for example, is whether or not the defendant was aware that he or she possessed a narcotic. A typical smuggling case at an international border illustrates the point.

The required state of mind under the prior law was knowing. The courts have interpreted "knowingly" to include "conscious avoidance" or "studied ignorance" and have sustained jury instructions that knowledge may be inferred where the defendant "deliberately closed his eyes to what he had every reason to believe was the fact." United States v. Joly, 493 F.2d 672, 674 (2d Cir. 1974); United States v. Oliveras-Vera, 495 F.2d 827, 832 (2d Cir. 1974); Devitt and Blackmar, §14.09. At first blush this might lead one to conclude that under existing law the test is recklessness; however, the fact is that the "conscious avoidance" or "willful blindness" tests are carefully circumscribed exceptions to the knowledge requirement and are to be applied only after the government has established certain facts to justify the instruction. United States v. Jewell, 532 F.2d 697, 702 (9th Cir. 1976) cert. denied, 426 U.S. 951; United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977); United States v. Valle-Valdez, 554 F.2d 911, 913-14 (9th Cir. 1977); United States v. Esquer-Gamez, 554 F.2d

1231, 1235 (9th Cir. 1977). Moreover, the "willful blindness" or "conscious avoidance" test is to be used merely as evidence to infer knowledge, and is in fact a concept inherent in the basic mental state of knowledge rather than recklessness. It is as to this basic mental state of knowledge that the jury receives its primary instructions. The Senate Committee Report acknowledged that "willful blindness" is to be equated with knowledge rather than recklessness:

> The use of the word "belief" in defining "knowing" is also intended to codify the present concepts of "willful blindness" or "connivance," which describe the case of an actor who was aware of the probable existence of a material fact but does not satisfy himself that it does not exist in fact. Senate Committee Report, pp. 59-60.

The next paragraph of the Report commences: "A different order of culpability is present if a person's state of mind is reckless with respect to an existing circumstance or the occurrence of a result," and then goes on to describe the code definition of recklessness in terms of the statutory language. Recklessness is described primarily as "conscious risk creation", "It does not encompass any desire that the risk occur or an awareness that it is practically certain to occur. Acting recklessly does resemble acting knowingly insofar as a state of awareness is involved, but the awareness is

of risk, that is, of probability, rather than substantial certainty." Senate Committee Report, p. 60. Thus, under the recklessness standard, a defendant is exposed to the criminal sanction based on probabilities and the admittedly judgmental standard of the reasonable man as seen by the jury.

Such a standard of culpability in a narcotics case is not likely to assist in convicting the big dealer, but it will ease the government's burden in apprehending those at the fringes of narcotics activity, that is, the low level "mule". While this may be a legitimate objective, the risk to the unwitting and naive is also increased substantially. For those truly innocent, but found in possession of narcotics, use of the standard of recklessness in terms of the real world of federal trials is almost tantamount to automatic conviction. The ability of the prosecutor to use the very words "reckless" invites the jury to convict on a much lesser standard of culpability. And it is only one step further for a prosecutor who is unable in fact to prove that a defendant was "aware of a risk", to be arguing various facts and circumstances which lead him to conclude that the defendant "ought to [have been] aware" of the risk. This, of course, translates into the lowest standard of culpability

of all, simple negligence.

4. Section 1343 - Making a False Statement

The rule of construction also imposes the new standard of recklessness in the false statement cases now collected in Subchapter E, "Perjury, False Statements and Related Offenses", and in particular, §1343, "Making a False Statement". The principal existing circumstance here is whether or not the declarant knew that the statement was false. The issue will arise in a myriad of cases: HUD applications, Social Security applications, Veterans Administration applications, alleged false statements to firearms dealers, alleged false statements in passports, etc. Statements on a form regarding a birthdate, ancestry, prior education or other matter which is either disputed or unclear, but which the person may in good faith believe to be true, now become the subject of prosecution under an objective standard. Despite subjective intent and good faith, if a jury believes that there was a gross deviation from the standard of care that a reasonable person would have exercised in the situation, the declarant may be convicted of a felony. This also raises the spectre of government agents bringing unjustified pressures to bear on persons whom they suspect of other crimes but are unable to convict or charge due to a lack of

evidence of those other matters.

Returning to more general concepts, one must consider again the type of offense and the type of individual defendant that are involved in the vast majority of federal cases in order to appreciate the impact of S.1437. Oftentimes societal interests will demand passage of laws to provide prosecutorial tools to deal with national crises such as organized crime or large scale narcotics trafficking. However, those same tools of prosecution may, when employed in the more routine prosecution, become elements of oppression or unfairness. From the standpoint of a trial lawyer regularly in court with indigent defendants, the simple fact that a prosecutor will now be able to argue recklessness directly to the jury will have a very substantial effect. Whereas case law, precedent and theoretical discussions may lead one to the conclusion that recklessness really covers the same elements of culpability as knowledge, we believe that the average juror will not equate intent to commit a crime with the more common concepts of negligence and recklessness. Jurors will find it much easier to convict in cases where otherwise there would have been legitimate reasonable doubt, if they need only find that the defendant deviated, albeit even a gross deviation, from some standard of a reasonable

man. Many defendants are poor and members of ethnic minorities. Jurors in the federal court come largely from the middle class and are not in the best position to relate to the lifestyle and social pressures bearing on one who lives in the ghetto, or not far above. Placing themselves in the position of the mythical reasonable man, jurors might find it easier to conclude that were they in the place of the defendant, they would not have committed the acts charged. Whereas, in the defendant's social milieu a reasonable man may be something altogether different. Furthermore, this quasi-objective standard of recklessness to be used by the jury will not take into consideration the fact that many of these defendants have very low educational levels and other reduced faculties and capabilities far below those possessed by the jurors. While these might be relevant in determining subjective intent, they lose their significance when the judgment is on an objective level.

It is the position of the Federal Defenders that the Congress restore to at least those crime categories listed in this presentation, the culpability standards of present law. This will not require a wholesale revision of the general scheme of Chapter 3, which indeed has been accepted by many state legislatures and the Model Penal Code. The

rule of construction of Chapter 3 comes into effect only in those instances where a specific culpable state of mind is not listed in the statute, and there is no reason why that cannot be done by inserting the word "knows" in the new statutes. An example of this sort of drafting is found in subchapter B of Chapter 15, "Offenses Involving Political Rights." Under Section 1516 a person is guilty of an offense if:

> (1) as a federal public servant, he:
>
> (A) solicits a political contribution from another person who he knows is a federal public servant; or . . . .

Whether or not one is a federal public servant is the circumstance, and in the absence of the word "knows", the rule of construction would have placed one soliciting a political contribution from another at his peril under a recklessness standard as to whether or not the person he was soliciting was a federal public servant.

Likewise in Section 1517, "Making an Excess Campaign Expenditure", a person is guilty of an offense if "he violates Section 9035 of the presidential primary matching payment account act (26 U.S.C. 9035)." That section states that "no candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitation application

under 320(b)(1)(A) of the Federal Election Campaign Act of 1971. . . ." Since Section 1517 is written in terms of reference to a statute outside of S.1437, and that outside statute uses the word "knowingly", the rule of construction is avoided. Were it not for that fact, the standard applied to a candidate incurring qualified campaign expenses in excess of the expenditure limitation would be recklessness. Therefore, where there is a perceived need to retain specific elements of mens rea in the context of intent and knowledge, it is possible to do so by adding the specific language of limitation and we would urge the subcommittee to do so in those instances mentioned above.

In addition, for purposes of clarity, we suggest that §302(b)(2) add the words "without substantial doubt" after the word "believes". The qualifying language "substantially certain to cause a result" is used in §302(b)(3) dealing with the "result", and the Senate Committee Report itself, p. 59 indicates that the word "believes" is to mean "without substantial doubt". With such a clear explanation of meaning in the Senate Committee Report, we believe the language should be spelled out directly in the statute itself so that one might perceive the meaning without going back to the legislative history.

B. Complicity

1. Liability of an Aider and Abettor Under §401(a)

Beginning from the premise that present law is ambiguous on accomplice liability,[2] S.1437 proceeds to resolve the problem by casting a broader net of liability. We believe there is no present ambiguity, and that the accepted and current standard of accomplice liability should be retained.

At present a person is liable as an aider and abettor if he knowingly acts with intent to promote the criminal scheme. This clearly has been the law since Nye & Nissen v. United States, 336 U.S. 613 (1949). A reading of the two cases cited in the Senate Committee Report demonstrates they do not stand for the minority position asserted.

The S.1437 formulation is at odds with the Brown Commission §401(2) and the Model Penal Code §2.06. The position of those authorities, and of the Supreme Court, is that one is liable as an aider and abettor only if he acts with the intent necessary to prove the crime which he is alleged to have aided. That provision of law should continue in subsection

2 Senate Committee Report, p. 72: Current law is ambivalent on the question of culpability under 18 U.S.C. 2(a). Some cases have approved instructions indicating that the defendant must consciously intend to make the criminal venture succeed. Other cases, however, hold that knowingly aiding a crime is sufficient scienter for criminal liability.

(a)(1) as it is continued in subsection (a)(2). There is no reason for distinguishing between these two related offenses.

2. Codification of the Pinkerton Doctrine

Section 401(b) purportedly "continues and codifies the doctrine of Pinkerton v. United States, . . ." concerning vicarious liability. Senate Committee Report, at 23. This rule of law was specifically rejected by the Brown Commission, Final Report, at 73, yet the Senate Committee Report neither discusses the Commission's reasoning nor offers a reason for continuing this rule.

We believe that §401(b) may actually extend the Pinkerton rule; that it is an unnecessary rule of law; and, that it is one which is difficult to administer.

By codifying the language of the Supreme Court in Pinkerton, the section appears to foreclose questions of the rule's limits which have never been answered. For example, is a person liable for crimes committed before he joined the conspiracy? There is no answer under current law, but under 401(b) the answer would be in the affirmative, although it does not appear that this aspect of the rule was considered.

At pages 155-157 of the Brown Commission's working papers, the limited utility and difficulties of the rule are

detailed. We agree with that analysis and recommend the provision be stricken.

IV.

CHAPTER 13 - OFFENSES INVOLVING GOVERNMENT PROCESSES

There are several provisions in Chapter 13 which substantially change existing law or create new offenses. The change of greatest concern appears in §1343 providing for criminal sanctions for false statements by a suspect to law enforcement officers during a criminal investigation. Other changes deal with the failure or refusal to testify or produce documents in an official proceeding (§1333) and the creation of the new offenses of obstruction of a government function through fraud by a person acting alone (§1301) and false swearing to a non-material matter in an official proceeding (§1342).

A. §1343. Making a False Statement

Present law, 18 U.S.C. §1001, proscribes false statements to government agencies concerning material matters within their jurisdiction. In interpreting §1001 the courts have split over whether non-volunteered false oral statements made during a criminal investigation to law enforcement officers are covered. Both suspects and those not suspected of the criminal activity under investigation have been involved. The area that causes the most concern is

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whether an oral denial of criminal involvement - the "exculpatory no" - by a suspect during questioning should be an offense under proposed §1343, which is modeled after §1001. Section 1001 has also reached volunteered oral statements to an investigative agency falsely accusing another of crime and thereby prompting an investigation.

It should be borne in mind that the main purpose of proposed §1343 and present §1001 is to protect the integrity and resources of government agencies from misuse. They are not designed to reach the moral issue of falsity in general. Section 1343(a)(1)(A) makes it an offense for a person in a government matter to knowingly make a material false oral statement to a law enforcement officer after having been advised that its making constitutes a criminal offense. Subsection (b)(1) gives this offense Class E felony treatment (up to two years imprisonment) while (b)(2) provides for a Class A misdemeanor if the statement was given to a law enforcement officer during an investigation of an offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of the offenses.

The Senate Committee Report specifically states that §1343 is intended to reach statements by suspects.

> Moreover, it [Senate Judiciary Committee] disapproves the so-called "exculpatory no" cases and does not intend to afford such an exception under this statute.
> Senate Committee Report at 374.

This position is contrary to the one taken by the Brown Commission that false statements made during the course of a criminal investigation should not be covered and that only misdemeanor treatment should be provided for volunteered false statements made to an investigative agency which falsely implicate another in a crime. See, Senate Committee Report at 370, n. 58; 375; 376, n. 88.

The Senate Committee Report adopts those judicial decisions which expansively interpret §1001 to include the "exculpatory no" situation and attempts to answer the criticisms of those courts taking a contrary view by the following proposed safeguards: (1) a flat denial of criminal involvement unaccompanied by other false statements by a suspect to a law enforcement officer during a criminal investigation is graded as a Class A misdemeanor, and, (2) the individual making the false statement must know he is making it to a law enforcement officer and must first be advised that making such a statement is an offense.

Section 1343 gives rise to several problem areas that

include Fifth Amendment considerations, the questionable materiality of a suspect's false statements, the ineffectiveness of the proposed safeguards, and the lack of any verbatim transcript.

Fifth Amendment

A question exists whether imposing criminal sanctions for false statements by a suspect to law enforcement officers concerning the suspects culpability in the offense being investigated implicates the declarant's Fifth Amendment right against self-incrimination. The Senate Committee Report rejects any Fifth Amendment implication and cites United States v. Wong, 431 U.S. 174 (1977) wherein the Supreme Court stated that although a person may have a right to decline to answer questions he may not with impunity answer untruthfully. It is significant to note, however, that Wong and related cases not cited by the Senate Committee Report, United States v. Washington, 431 U.S. 181 (1977), and United States v. Mandujano, 425 U.S. 564 (1976), deal with this issue in a grand jury context. Several courts have commented on the Fifth Amendment implications of applying 18 U.S.C. §1001 to the "exculpatory no" situation.[3]

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3 See United States v. Lambert, 501 F.2d 943 (5th Cir. 1974); United States v. Davey, 155 F.Supp. 175 (S.D.N.Y. 1957); United States v. Stark, 131 F.Supp. 190 (D. Md. 1955), all commenting on Fifth Amendment problems in this area. Some courts have declined to extend §1001 on other grounds, United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972); Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962); United States v. Levin, 133 F.Supp. 88 (D. Colo. 1953).

This concern was best expressed by the Fifth Circuit in United States v. Bush, 503 F.2d 813, 818 (5th Cir. 1974),

> This court is well aware of that portion of the Fifth Amendment to the United States Constitution which says, "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ." See United States v. Davey, (D.C.S.D. N.Y. 1957), 155 F.Supp. 175. If, then, under the facts before us would we allow Bush's conviction to stand, Bush will have been convicted by his own words given to an investigating officer of the United States government who, at the time, suspected Bush of unlawful activity.

Materiality

Aside from these Fifth Amendment problems, applying criminal sanctions, whether felony or misdemeanor, to false oral statements by criminal suspects to law enforcement officers raises problems of whether such statements meet the "materiality" requirement of §1343 and its predecessor §1001. Under §1001 and the general perjury statutes the statements must be material before they are punishable. Likewise materiality is an element under §1343. Senate Committee Report at 374. Materiality has been traditionally defined to mean the intrinsic capability of the statement to influence or pervert the lawful function of the agency or proceeding. Materiality goes to the very purpose of §1343

(and §1001) - protection of the lawful functions of the agency from misuse. Without the ability of the false statement to in some manner influence or pervert the function no reason exists (outside of moral repugnance) to punish it. In determining the applicability of 18 U.S.C. §1001 to an "exculpatory no" situation a court in 1959 had occasion to consider the materiality issue. In United States v. Philippe, 173 F.Supp. 582, 584 (S.D. N.Y. 1959) the court stated,

> While the Special-Agent may have been disappointed that defendant would not truthfully answer himself into a felony conviction, we fail to see that his investigative function was in anyway perverted. The only possible effect of exculpatory denials however false, received from a suspect such as defendant is to stimulate the agent to carry out his function. It would be strange to expect that the agent would accept defendant's denials and conclude that his investigation should be closed.

The Senate Committee Report itself recognizes this problem of materiality by providing Class A misdemeanor treatment under subsection (b)(2) for the "exculpatory no" by a suspect to a law enforcement officer. The Senate Committee Report states,

> Although, as previously remarked the Committee does not consider that a person has a right to lie about his own involvement in criminal activity, the somewhat natural propensity to do

> so - particularly in the context of an oral response to a law enforcement agent's on-the-spot interrogation - is deemed to warrant a less severe punishment, since such an exculpatory denial is not as likely as other false statements to be taken at face value and thereby impede or affect the course or outcome of the criminal investigation. Senate Committee Report at 382.

Given this recognition by the Senate Committee Report and judicial interpretation of §1001 a court could likely conclude that these statements are not material.

Ineffective Safeguards

The language used to provide for misdemeanor treatment for the flat exculpatory denial of criminal involvement under subsection (b)(2) is simply too narrowly worded. First, it covers only the false oral statement as to the ultimate conclusion whether "the declarant committed or participated in the commission of such offense." False oral statements by a suspect regarding incriminating information which provide a critical link of evidence pointing towards the commission of the offense would be given felony treatment.

More important, subsection (b)(2) specifically provides that the denial must be "unaccompanied by any other false statement." There is no requirement that these other false statements be material. Experience has shown that it is the

rare individual who will simply deny guilt without an attempted explanation. Persons suspected of criminal offenses rarely choose to remain silent when questioned by investigative agents. Law enforcement officers will be provided with an incentive to solicit other information during questioning of a suspect who has given a flat exculpatory denial (or to ask questions which do not reach the ultimate conclusion of guilt) in order to raise the offense to felony treatment under §1343.

The requirement that the false statement be preceded by a warning that making it is an offense is not meaningful, and indeed may be used to override the suspects desire to remain silent. A suspect's unbelieved denial of complicity in a crime will prompt the giving of this warning by the agent in an attempt to induce the suspect to further waive his right to remain silent.

Verbatim Account

Judicial concern over the lack of a verbatim transcript has been voiced. In declining to apply 18 U.S.C. §1001 to false oral representations to FBI agents the court in United States v. Ehrlichman, 379 F.Supp. 291, 292 (D.C. Cir. 1974), compared the lack of any "guarantee that the proceeding will be transcribed or reduced to memorandum" to a perjury

offense committed in a judicial proceeding where a transcript exists. The court also noted the difficulty in applying the "literal truth" requirement of Bronston v. United States, 409 U.S. 352 (1972) without a verbatim transcript.[4] An investigative agent's account of an interview is substantially less reliable than a verbatim account and raises serious questions of exactly what was said.

Conclusion

Where an individual is believed to be involved in criminal activity and proof of his guilt in the underlying crime does not exist, interrogation resulting in false oral statements of some incriminating matter can provide an indictable offense. This gives powerful incentive to investigation by inquisition of the suspect. Normally, a suspect is interviewed in an isolated setting by two or more law enforcement officers and has, as a practical matter, no effective means to dispute testimony of what was said during the interview. No verbatim account by an impartial person exists.

The coupling of a charge of lying to an investigator with the charge for the underlying offense in an indictment

4 The Supreme Court in Bronston placed great emphasis on exactness of language in traditional perjury prosecutions.

affects the defendant's position in the case. It provides the prosecutor with another charge with which to plea bargain. It can also inhibit a defendant's right to testify in his own behalf. Where in addition to his denial of guilt a defendant is charged with lying to an agent about some additional matter concerning the underlying offense, acknowledging that falsity during testimony assures conviction for the §1343 offense. This could preclude the defendant from testifying in his own defense where he must also admit the earlier falsity to the agent, which was not made under oath.

The attempt by the Senate Committee Report to distinguish §1343 from traditional perjury by downgrading it to a Class E felony (as compared to a Class D felony for perjury) overlooks the fact that it is still a felony offense with all the attendant civil disabilities as well as the possibility of up to two years imprisonment.[5]

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5 The "exculpatory no" situation should be contrasted with statements "volunteered" by an individual to an investigative agency which falsely implicate another in a criminal offense. The harm to the individual falsely accused as well as the perversion of the function and resources of the investigative agency are paramount considerations which warrant criminal sanctions. There remains the situation of a non-suspect giving false declarations to law enforcement officers during the course of a criminal investigation. This typically is an individual who possesses information about another's criminal involvement. Some of the considerations discussed above mitigate against providing criminal sanctions in §1343. This activity could come within the scope of other provisions such as §§1311, 1322 and 1323.

B. §1333. Refusing to Testify Or to Produce Documents

Section 1333(a)(2)(A) provides in part that it is an offense for a person in an official proceeding to refuse to answer a question after a federal court or magistrate has directed him to do so and has advised him that a refusal might subject him to criminal prosecution. Section (a)(2)(B) makes it an offense to fail to comply with an order to produce a book or document. No prior court direction to produce or warning of the consequences of a failure to produce are required. Subsection (b) provides an affirmative defense where a person was "legally privileged to refuse to answer the question or to produce the record, document, or other object." The offenses are graded Class E felonies and are separate from civil contempt under 28 U.S.C. §1826.[6]

Two problems exist with respect to §1333 - one of drafting and one of substance. The language used in defining the affirmative defense is too narrow and no prior court direction to produce documents is required before a failure to comply with an order to produce is an offense.

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6 Civil contempt under 28 U.S.C. §1826 is specifically unaffected under §104(b). See Senate Committee Report at 337.

Affirmative Defense

Subsection (b) provides a defense for a refusal or failure to answer or produce if the person was "legally privileged" to do so. This language is too narrow. The Senate Committee Report states that this defense is to permit refusal to answer or produce on Fifth Amendment privilege grounds as well as on "a proper invocation of attorney-client or other evidentiary privilege recognized by law." (Emphasis added) Senate Committee Report at 355. The language itself appears to exclude other "non-evidentiary-privileged" grounds. But the Senate Committee Report states it is intended that "existing law be adhered to with respect to the myriad of issues which can arise in connection with an obligation to testify or to produce records." Senate Committee Report at 355. Since an expansive reading is intended the language should reflect this by allowing a refusal to answer or produce for "just cause" thereby tracking 28 U.S.C. §1826 and clearly allowing for the judicial interpretation of §1826 to apply. An example of a non-evidentiary privilege where there is "just cause" to refuse to produce is Hale v. Henkel, 201 U.S. 43 (1906), where the Supreme Court held that an individual may refuse to produce documents called for by a subpoena that was so sweeping in its terms

as to violate the Fourth Amendment. Another example occurred when the Supreme Court held in Gelbard v. United States, 408 U.S. 41 (1972), that an individual may refuse to answer questions propounded by a grand jury where those questions were based upon information obtained in an "illegal" wiretap. The Second Circuit has also allowed a limited refusal to answer where a court authorized wiretap may be facially insufficient. See, United States v. Marion, 535 F.2d 697 n. 15 at 704 (2nd Cir. 1976); In Re Persico, 491 F.2d 1156 (2nd Cir. 1975).

The felony grading of §1333(a)(2) and the possibility of strict judicial construction of the affirmative defense provision to limit it to pure evidentiary privileges would permit a prosecutor to proceed under §1333 with its possible two year sentence and avoid possible defenses available to a defendant under 28 U.S.C. §1826(a).

Substantive Change

Section (a)(2)(B) provides for the offense of failure to comply with an "order" to produce a record or document or other object in an official proceeding.[7] The Senate Committee

[7] Under the definitional section (§111) an official proceeding appears to be broad enough to include a grand jury. This is also clear from the Senate Committee Report which refers to grand juries. Senate Committee Report at 353.

Report notes that there is a significant change from existing law in that the offense is complete with the refusal or failure to comply with an order. This is contrasted with subsection (a)(2)(A) which requires a prior court instruction to the witness to answer before the offense is complete. The reason for the difference is that,

> The Committee believes that this difference is justified by the fact that, in the case of an order to produce physical objects or records, the order almost always will arise through the issuance of a subpoena affording time for reflection, consultation with an attorney, and, often for judicial review on a motion to quash. Senate Committee Report at 353.

Contrary to the Senate Committee Report's observation, the service of a "forthwith" subpoena by a government representative leaves no time for reflection and consultation with an attorney. It can call for an appearance with documents within a few hours of service.[8]

Although it is a defense to a charge under subsection (a)(2)(B) that the requested documents were "legally privileged", a prior court instruction to produce would assure an initial judicial determination concerning the "privileged character"

[8] The forthwith subpoena and its possible abuse is demonstrated in In Re Nwamu, 421 F.Supp. 1361 (S.D. N.Y. 1976).

of the documents thereby avoiding an indictment and raising the privileged character of the documents in a later criminal trial.

C. §1301. Obstructing A Government Function By Fraud

Section 1301(a) establishes a new substantive offense for an individual acting alone who "intentionally obstructs or impairs a government function by defrauding the government through misrepresentation, chicanery, trickery, deceit, craft, overreaching, or other dishonest means."

This section, of course, is derived from 18 U.S.C. §371 which proscribes a conspiracy to defraud the government of a lawful function. It is clear from the Senate Committee Report that this statute is intended to reach individual action which has the effect of obstructing a government function by fraud. Additionally, "the various ways in which . . . a government function may be obstructed under this statute are virtually endless." Senate Committee Report at 270. It is recognized by the Senate Committee Report that the Brown Commission did not include in its final report this substantive offense but indicated that such a criminal statute would be appropriate if Congress reached a conclusion that the conduct intended to be reached would not be adequately

covered by other provisions of S.1437. Senate Committee Report at 271, n. 31.

The principal criticism of the conspiracy to defraud facet of 18 U.S.C. §371 has been that it fails to provide reasonable notice of what activity may be construed as criminal. As the Senate Committee Report states, the ways in which such a statute may be violated are "virtually endless." Indeed, a state supreme court has recently held unconstitutionally vague a state statute which tracked this aspect of 18 U.S.C. §371.[9] In a conspiracy context the vagueness may be offset by the greater threat to society from criminal action by two or more individuals. This has been recognized by the Supreme Court. United States v. Feola, 420 U.S. 671 (1975). However, this consideration is lacking in proposed section 1301(a) as it only affects individual action to defraud.

There is no attempt in the Senate Committee Report to meet the observation of the Brown Commission that such an offense should not be created if the conduct could be reached under other sections of S.1437. Much of the conduct reached by §1301(a) would also be criminal under other

9 State ex rel Whitman v. Fox, 236 S.E.2d 565 (W.Va. Sup.Ct.App. 1977). The Court observed that 18 U.S.C.§371 has "miraculously withstood constitutional scrutiny."

provisions. For example, §1343(a)(1)(F) proscribes the fraudulent use of a trick, scheme or devise that is misleading in a government matter and §1734 generally prohibits schemes to defraud. See also Final Report, Brown Commission at 71.

D. §1342. False Swearing

A new offense is created under §1342 for a person who under oath makes a false statement in an official proceeding. In short, this section creates the Class A misdemeanor offense of perjury without the requirement that the false statement be material to the proceedings.

The accepted purpose of traditional perjury statutes (with their materiality requirement) is to prevent impeding the official proceeding. A proceeding can only be significantly affected by false testimony which is material and relevant to the proceeding. This section would cover false swearing regardless of its ability to effect the proceeding. The giving of false testimony on any matter is to be morally condemned, however, there is serious question whether criminal sanctions should be used to attempt to cure all matters in society which are in some way morally reprehensible.

The possible use of this statute can arise in a grand jury setting where a person suspected of criminal activity

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is called to testify. Presently there is no statutory or constitutional requirement for a warning that a subpoenaed person is a target or of Fifth Amendment self-incrimination rights. (The absence of such warnings is not grounds to suppress the perjurious statements in a later prosecution.) See, United States v. Mandujano, 425 U.S. 564 (1976); United States v. Wong, 431 U.S. 174 (1977); United States v. Washington, 431 U.S. 181 (1977). Therefore the unwarned target-witness may be questioned (and answer) on what appear to be insignificant, non-incriminating matters and be subject to indictment. This is even more complicated by the serious question of whether a putative defendant before a grand jury has a Sixth Amendment right to appointed counsel. See Mandujano.

V. SENTENCING PROVISIONS OF S.1437 AND PREVENTIVE DETENTION

A. Views On The Sentencing Commission

We oppose the creation of the Sentencing Commission. The Sentencing Commission goes too far in the direction of presumptive sentences. It is our view that presumptive sentences transfer significant sentencing authority to the prosecutor. By stripping the court of its discretion, we feel the Sentencing Commission will serve neither the public nor the individual.

1. The Case For Judicial Discretion In Sentencing

The Sentencing Commission, mandatory minimums, mandatory consecutive sentences, and the general sentencing scheme of S.1437 constrict the sentencing discretion available to the court by wholesale measures.

The avowed purpose of the measures is to:

> Provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentence disparity . . . 28 U.S.C. §991(b)(1)(B)

The limitations on the breadth of the guidelines used in prison sentences contained in 28 U.S.C. §994(b)(1) virtually create presumptive sentences.[10]

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[10] 28 U.S.C. §994(b) provides:

* * *

If a sentence specified by the guidelines includes a term of imprisonment:

(1) the maximum of the range established for such a term shall not exceed the minimum of that range by more than 12 months or 25 percent, whichever is greater; . . .

We believe any significant loss of the court's ability to dispense individualized justice is a loss for both the public and the individual. Justice is served best by courts which have the latitude to weigh the relevant interests that should be protected in each case, and where they are in conflict, decide which are paramount.

To the extent that the court is limited in its discretion, it is prevented from achieving that goal. It is impossible to legislate specific solutions for all the aberrations of society. Attempts to do so create a new problem of disparity through an inability to dispense individual justice in an array of circumstances. The proposed Sentencing Commission will unduly restrict the court's ability to weigh the appropriate interests and reach a fair decision in an individual case. It is especially apparent that this will be the result when considering the limits Congress has placed on the Commission's powers as discussed below. E.g., §994(b)(1).

The exercise of discretion creates disparity, but some disparity is warranted if the courts are to effectively serve the respective districts which they serve. For example, timber theft is an offense which occurs frequently in the District of Oregon but rarely in the Southern District

of New York. Application of the sentencing objectives of public safety and deterrence would produce a justifiable disparity between these districts for the offense of timber theft.

Some criticism of the court's exercise of its sentencing discretion is justified by historical performance. However, it may not be entirely the fault of the courts inasmuch as Congress has never legislated any objectives, policies, or guidance for the courts to follow. To this end, we feel that the provisions of 18 U.S.C. §2003, which state the factors to be considered in imposing sentences and which require that the reasons for imposing a sentence must be stated on the record, are good steps toward the elimination of unwarranted disparity. Previously, individual judges have largely been left to their own interpretations of both the purpose and the means in sentencing. A legislative statement of common goals and factors to be considered in sentencing will necessarily eliminate much disparity which existed before in the absence of any sentencing goals defined by Congress.

2. The Proposed Sentencing Commission Transfers The Discretion In Sentencing to the Prosecutor In The Exercise of the Charging Decision

Based upon our collective experience, we believe the practical implications of creating the Sentencing Commission and the general sentencing scheme of S. 1437 will be to transfer much of the sentencing authority to the prosecutor.

In the interests of eliminating disparity and in achieving certainty and fairness in sentencing, the Congress intends to destroy a certain amount of sentencing discretion. However, constraints upon the court's discretion will merely transfer the responsibility to other non-judicial components of the government, principally the prosecutor. Where several grades of one offense are available to the prosecutor and where the range of discretion available to the sentencing judge is limited, the prosecutor can determine the sentence within a narrow range with the charging decision.

Placing this discretion with the prosecutor may be severely criticized because it is exercised in an atmosphere of low visibility and is generally not the subject of review. Another strong criticism we have is that it has been placed in the hands of an advocate. The transfer of the sentencing discretion to the charging authority moves sentencing one step away from the courtroom and one step closer to the police station.

The wholesale transfer of discretion to the prosecutor

by S.1437 carries with it the opportunity for abuse. Mandatory minimums and presumptive sentences created by the Sentencing Commission are cases in point. Mandatory minimums present the prosecutor with the opportunity to charge a two-count indictment with a "hard count" and a "soft count", that is, one that carries a mandatory minimum and one that does not. The prosecutor may then offer the defendant an "opportunity" to plead to the soft count of the indictment. The certainty of a pentitentiary sentence (if convicted on the hard count) would deter a majority of defendants in this circumstance from exercising their right to a jury trial. This gives the prosecutor tremendous power to coerce a guilty plea from a not guilty defendant.

Although there are varying views on the appropriateness of plea bargaining, S.1437 will greatly increase its importance. The legislatively imposed limitations on the Sentencing Commission and the narrow discretion available to the court places great importance on the charging decision and on plea bargaining. The charging decision will in most cases dictate the sentencing range available to the court within a narrow zone. While presently most concessions in plea bargaining are charge concessions, they will be in effect sentence concessions under the scheme of sentencing proposed by

S.1437. The question must be asked, does the public want the basic sentencing decision in the hands of the prosecutor? And does the public want the basic sentencing decision made in the atmosphere of low visibility and non-reviewability of plea bargaining? Should the basic sentencing decision be in the hands of the inexperienced prosecutor or with an experienced judge?

It is our view that the narrow range of discretion left to the Sentencing Commission and to the courts by S.1437 does not destroy discretion in sentencing, but merely transfers it to the prosecutor. Therefore, we are opposed to the creation of the Sentencing Commission. Before Congress adopts provisions that would alter the present discretionary balance, we urge a careful study.

3. Problems With The Structure And Powers of The Sentencing Commission

a. The Commissioners, Source of Appointment

Title 28 U.S.C. §991(a), confers all the appointment powers on the President. Three commissioners will be appointed from a list of seven submitted by the Judicial Conference. The majority representation, in terms of numbers and longevity of service, are appointees of the President.

The political nature of the appointees is exposed by Senate Amendment 1132 which requires the appointments to be bipartisan. It is clear that the Presidential appointees will control the Commission. See 28 U.S.C. §994(a) and (e). It must be recognized that with every change of administration (and therefore political philosophy) we may see a shift in sentencing directives being issued by the Commission. We submit that the guidelines used by the court and Parole Commission should be insulated from the political process.

Since the Sentencing Commission is created in the judicial branch, it is appropriate that it reflect the experience and philosophy of the judiciary to the fullest extent. Our recommendation is that at least four members be appointed from a list submitted by the Judicial Conference, thus insuring that the Commission would reflect judicial philosophy. An alternate recommendation is that all Commissioners be appointed by the President from a list submitted by the Judicial Conference.

b. 28 U.S.C. §994(a) and (e) - Four Vote Control

As noted above, the provisions of 28 U.S.C. §994(a) and (e) would allow the four Presidential appointees to control the Commission. The Judicial Conference appointees may constitute little more than window dressing with the four-

vote rule.

We recommend that 28 U.S.C. §994(a) and (e) be amended to require the vote of at least five members of the Commission to establish the guidelines for the courts and the Parole Commission. An amendment of this type would insure that the guidelines reflected views of the judiciary and would further diminish the prospect of the sentencing guidelines being influenced by the political process.

c. Limitations On The Powers of The Commission

There is concern over the limitations on the powers of the Commission as developed below.

1. Range of Guidelines in Prison Sentence Cases. §994(b)(1) limits the range of the guidelines for cases involving a prison sentence. The maximum may not exceed 25% of the minimum sentence or one year, whichever is greater. We feel these limits are unduly restrictive. These narrow limits create presumptive sentences and therefore transfer sentencing authority to the prosecutor as is discussed above.

2. 28 U.S.C. §994(l)-Commission Must Be Guided By Sentence Imposed In Cases Prior to Its Creation.

Title 28 U.S.C. §994(l) requires the Commission to be guided by the average sentences imposed in cases prior to the promulgation of the guidelines under §994(a). If the Commission used these averages of sentenced imposed, it will result in sentences generally about twice as long as are now imposed. for example, the national average for bank robbery sentences is about eleven years, while the Parole Commission guidelines for parole of bank robbers are from 55 to 65 months. Although the Committee Report notes this problem, nonetheless §944(l) requires the Sentencing Commission to be guided by the average sentence prior to its creation. Although we have reservations as to the validity of this concept, if Congress deems it desireable to preserve it, we recommend §944(l) be amended to require that previous averages of sentences served be considered, rather than sentences imposed.

4. Alternate Recommendations to the Sentencing Commission

a. The Sentencing Council

As an alternative to the Sentencing Commission, we recommend the use of the sentencing council as the best means of achieving fairness and of eliminating unwarranted disparity in sentencing.[11] The sentencing council has been used in several districts and its achievements have been well developed in several publications.[12]

The use of the sentencing council involves essentially four steps. First, the presentence reports are distributed to all the judges who will participate in the sentencing conference at least five days beforehand. Second, each judge prepares a study sheet summarizing his attempt to isolate the factors in the presentence report which he felt would be determinitive of the sentence. Third, at the conference each judge suggests in open discussion the

11 The ABA advisory committee's report on Standards Relating to Sentencing Alternatives and Procedures (approved draft 1968) pp. 294-298 joins in this position. The Federal Probation Officers Association also takes this position. See, A Position Paper on the Issue of Sentencing, submitted by Federal Probation Officers Association, May, 1977.

12 See for example, "The Case for Judicial Discretion in Sentencing", Judicature, August 1977 Vol. 61, No. 2; "The Sentencing Process: Better Methods Are Available", Federal Probation, December, 1975; See Authorities Collected at p. 295, ABA Advisory Committee's Report on Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968).

sentence he would impose on the defendant. Fourth, responsibility for imposing the sentence remains with the sentencing judge although he would be influenced by the opinions of his colleagues.

The advantages of the council are that the sentence would be the result of a group judgment which would tend to reduce disparity by the discussion and consensus aspects of the sentencing conference; and second, it provides a means of isolating the factors in the presentence report which should influence the sentencing decision.

We recommend that three to five judges participate in the conference, and in districts with less than three judges, judges in adjoining districts could be consulted.

The required use of a sentencing council in conjunction with the provisions of §2003 setting out factors to be considered in sentencing, and requiring the court to state its reasons for the sentence on the record, will eliminate most unwarranted disparity. As we previously noted, some disparity between geographical regions is not undesireable.

b. Alternate Sentencing Commission Recommendation

A less desirable solution than the sentencing council would be to make the proposed sentencing commission guidelines purely advisory and to depoliticize the makeup of the

sentencing commission.

Although this approach may lessen disparity on a national basis, it does not include the salutary features of discussion and consensus which are advantages of the sentencing council.

However, if Congress follows this approach, we feel that it would substantially reduce the evils of transferring significant sentencing authority to the prosecutor.

B. VIEWS ON THE APPELLATE REVIEW OF SENTENCES

With the exception of the right of the government to appeal sentences, we endorse appellate review of sentences as a means to reach the problem of disparity and the outrageous sentence. Appellate review of sentences in the federal courts is long overdue.

With about 90% of all criminal cases resulting in dispositions where guilt is not contested, the only real issue at stake, in most cases, is the question of appropriate punishment.

> . . . the whole intricate network of protections and safeguards which were . . . [the defendant's] at the trial vanishes and gives way to the widest latitude of judicial discretion . . . Nine out of ten defendants plead guilty without trial. For them the punishment is the only issue, and yet we repose in a single judge the sole responsibility

> for this vital function. Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249, 265 (1962) (remarks of Judge Sobeloff).

Many, if not a majority, of appeals are presently taken because the defendant is dissatisfied with his sentence. Skilled counsel can always find some error in a carefully conducted trial, but a substantial number of these appeals would be avoided, if the conviction were followed by a fair sentence.

> The temptation to the appellate court to seize on such errors for the reason that justice was denied by too severe a sentence has in fact--by the admission of many experienced appellate judges--induced numerous reversals. Overt appellate review should thus serve to focus such contests on what is really at stake, to the benefit both of future sentences and of the law of harmless error. It can also avoid an unnecessary retrial where only the sentence is defective. ABA Report on Standards Relating to Appellate Review of Sentences (Approved Draft 1968), p. 3.

1. Right of the Government to Appeal Sentences

There is no existing law permitting the government to appeal sentences in criminal cases.

a. Provisions in S.1437 Permitting Government Appeal

Changes in Rule 35(b)(2), Fed. R. Crim. P. would permit

the government to move the district court within 120 days after sentence is imposed to modify a sentence imposed in an illegal manner or as a result of incorrect application of the Sentencing Commission guidelines. See Senate Committee Report, p. 1060.

Title 18 U.S.C. §3724(d) permits the government to petition the Court of Appeals for leave to appeal an order granting or denying a motion to correct sentence pursuant to Rule 35(b)(2), Fed. R. Crim. P.

Title 18 U.S.C. §3725(b) creates a right of direct appeal by the government from Class A misdemeanors and felonies if the sentence is under the guidelines or specifies an eligibility for release more favorable than the guidelines issued by the Sentencing Commission. Sentences made pursuant to plea agreements under Rule 11(e)(1)(B) and (e)(1)(C), Fed. R. Crim. P. are specifically excluded by §3725(1) and (2).

These provisions create significant new appeal rights for the government which are not rooted in any historical, statutory or constitutional origins.

b. Major Studies of the Reform of Federal Criminal Law Do Not Recommend Government Appeal of Sentences

The features of S.1437 allowing government appeals are

the subject of considerable controversy. The Senate Committee Report summarily dismissed the controversy:

> Although some persons have challenged the wisdom and validity of permitting an appeal of a sentence by the government, the Committee is convinced that neither objection has merit. Id. 1057.

The ABA Advisory Committee's Standards Relating to Appellate Review of Sentences (Approved Draft 1968) more accurately characterized the criticism of the government's right to appeal sentences by noting:

> Perhaps the most controversial question involved in the decision to provide for sentence review is whether the reviewing court should be authorized to increase the penalty imposed by the sentence court. The question can arise in two forms: whether the state should be allowed to take an appeal seeking an increase; and if not, whether the appellate court should be authorized to increase the sentence when the defendant appeals. Id. 55.

The Senate Committee Report rejects the notion that the court should have power to increase a sentence on the defendant's appeal. Id. 1057, n. 19. However, the provisions of S.1437 allowing government appeal of sentences are contrary to the conclusions of the ABA advisory Committee on Appellate Review of Sentences.[13]

[13] The Brown Commission also took a position against increase of sentences on appeal. See, Working Papers of the National Commission of the Reform of Federal Laws, pp. 1334, 1335; Study Draft of a new Federal Criminal Code, United States National Commission on the Reform of Federal Criminal Laws, p. 311; Final Report of the National Commission on the Reform of Federal Criminal Laws, p. 317.

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> . . . the Advisory Committee has concluded that the state should not be permitted on appeal that could result in an increase of the sentence . ABA Report on Standards Relating to Appellate Review of Sentences (Approved Draft 1968), p. 56.

c. Government Appeal of Sentences Will Not Fulfill Objectives Stated in the Senate Committee Report

The sole reason advanced by the Senate Committee Report in support of the right of government appeal of sentences is to eliminate disparity:

> It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government to appeal and have increased a sentence that is below the applicable guideline and that is found to be "clearly unreasonable." Id. 1057.

It is submitted for reasons developed hereafter that the goal of eliminating disparity will be not achieved by the right of government appeal.

1. The Impact of Plea Bargaining

Since the great majority of cases are disposed of by negotiated pleas of guilty, most competent criminal defense attorneys will insulate the defendant from appeal by the government by including in the plea disposition: (a) an agreement to recommend a sentence or an agreement not to oppose a sentence, Rule 11(e)(1)(B) Fed. R. Crim. P., or (b) an

agreement for a specific sentence, Rule 11(e)(1)(C) Fed. R. Crim. P., or (c) an agreement that the government will not appeal the sentence. See ABA Report on Standards Relating to Appellate Review of Sentences (Approved Draft 1968), p. 57. These situations are specifically excepted from direct government appeal by 18 U.S.C. §3725(b)(1) and (2). Therefore in a majority of cases the defendant will effectively insulate himself from government initiated appellate review of his sentence.

2. Government Appeal Right Acts as Deterrent to Appellate Review of Merits of Conviction

Congress has created an awesome procedural weapon in the prosecutor's arsenal with implications far beyond what may have been intended. The government's ability to appeal a sentence which is under the guidelines is frought with potential for procedural blackmail. One example of the possibilities follows: Assume defendant files a motion to suppress on Fourth Amendment grounds. The district court denies the motion and sentences the defendant to a sentence which is under Sentencing Commission guidelines. The defendant is in the untenable position of risking a greater sentence on appeal if he appeals the validity of his conviction and at the same time the government appeals the sentence. Here the government's right to appeal the sentence

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would have a severe chilling effect on the defendant's right to contest the validity of his conviction. This problem was noted by the ABA Report on Standards Relating to Appellate Review of Sentences (Approved Draft 1968).

> The existence of such power could well have the effect of preventing the defendant from appealing even on the merits of his conviction. The ability to seek an increase could be a powerful club, the very existence of which--even assuming its good faith use--might induce a defendant to leave well enough alone. Id 57.

The limited effectiveness of the government right to appeal as a factor in curbing disparity is outweighed by the potential for misuse. It is our recommendation that Congress adopt the ABA Advisory Committee position.

d. Government Appeal Probably Unconstitutional

The government's right to appeal may not be able to withstand a constitutionality attack on double jeopardy and due process grounds. This concern brought the ABA Advisory Committee on Appellate Review of Sentences to the position against creating the right of government appeal of sentences.[14]

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14 Ocampo v. United States, 234 U.S. 91 (1914); Trono v. United States, 199 U.S. 521 (1905); Kepner v. United States, 195 U.S. 100 (1904) may be read to the conclusion that an appeal by the government resulting in a sentence increase would violate the double jeopardy provision of the Fifth Amendment.

The Brown Commission took a similar position.[15]

The Senate Committee Report in discussing the problem noted:

> With respect to validity, it seems . . . evident that a system, such as is contained in S.1437, in which sentence increase is possible as a consequence of sentence review initiated by the government is not objectionable on constitutional grounds. Id 1057.

The Senate Committee Report supports this conclusion with North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Wilson, 420 U.S. 332 (1975); United States v. Jenkins, 420 U.S. 358 (1975) and brief discussion. It is submitted that the Committee position is an oversimplification of the constitutional question.

Pearce dealt with the constitutional limitations on imposing more severe punishment following reconviction of the same offense after a retrial at the behest of the defendant. Responding to the Fourteenth Amendment argument the court stated:

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15 "As a matter of principle, it could be argued rather convincingly that the government should be entitled to take an appeal seeking an increase if it feels that the sentence of the court is too low. It is clear, however, that such a provision would offend the constitutional prohibition against double jeopardy." Working Papers of the United States National Commission on the Reform of Federal Criminal Laws, p. 1335.

> In the first place, we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials. Id. 722.

The double jeopardy clause protects "against multiple punishments for the same offense". North Carolina v. Pearce, 395 U.S. 711, 717 (1969). United States v. Wilson, 420 U.S. 332, 343 (1975).

> When a defendant has been once convicted and punished for a particular crime, principles of 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. Ex parte Lange, 18 Wall 163 (1874); In re Nielsen, 131 U.S. 176, (1889). When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, 355 U.S. 184, 187-188, (1957). Wilson at 343.

Unlike the appeals in Wilson and Jenkins, supra (where the government would be restored to status quo if it prevailed on appeal) §§3724(d) and 3725(b) appeals would be taken to enhance the punishment. Thus we submit those provisions may very likely be unconstitutional because they

provide for multiple punishment for the same offense.

C. VIEWS ON THE AMENDMENTS TO RULE 35, FED. R. CRIM. P.

I. Existing Law

Rule 35, Fed. R. Crim. P. as presently constituted provides in part:

> The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction.

II. Proposed Amendments

S.1437 proposes several significant changes in Rule 35, Fed. R. Crim. P. Subsections (b) and (c) are the major changes and dovetail with the Sentencing Commission and Appellate Review of Sentences.

Subsection (d) is also new and provides:

> (d) MODIFICATION OF A SENTENCE. --- The court may reduce a sentence, including a reduction to probation. pursuant to the provisions applicable to the initial imposition of the sentence, within 120 days after the sentence is imposed, unless a notice of appeal has been filed for review of the sentence under 18 U.S.C. §3725.

S.1437 as introduced on May 2, 1977, did not contain any provision which was the equivalent of existing law set out above. The Senate Committee Report explained the reasoning behind the withdrawal of general authority from the court to reduce a sentence.

> The general authority of a court to reduce a sentence within 120 days, without demonstrating some error in the imposition of the sentence, is not retained. The extensive provisions for presentence investigations, reports, and recommendations, taken in conjunction with the increased rationality and uniformity provided by sentencing guidelines, makes such a general grant of discretion to reduce a sentence unnecessary.
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> * * *
>
> The need for uniformity, credibility, and certainty in sentencing, which underlie the move toward determinate terms of imprisonment reflected in the Code, makes a general grant of discretion to reduce an imposed term of imprisonment inappropriate. p. 1146.

Subsection (d) was introduced January 30, 1978, by Senator Allen as Amendment 1158. Senator Allen's intent was to continue the present power of the court to modify a sentence by the judge who imposed it, and to expand the court's authority to reduce it to probation.

> MR. ALLEN. This amendment is designed to continue the present

> power of the court to modify a sentence imposed by reducing it so long as such modification is made during a 120-day period following the imposition of the sentence.
> Congressional Record-Senate
> January 30, 1978, S.761.

We agree that the Allen amendment which provides the court with authority to reduce a sentence to probation is appropriate. Allen's amendment, however, does not fully continue the court's present jurisdiction. Subsection (d) does not provide the court with authority to reduce a sentence after the return of a mandate on appeal or denial of certiorari by the Supreme Court.

We believe it is necessary for the court to have authority to reduce sentences within 120 days after the conviction becomes final, for reasons we develop hereafter.

First, the district court loses its jurisdiction after an appeal is taken and during the pendency of the appeal. See, for example, United States v. Burns, 446 F.2d 896 (9th Cir. 1971).

Second, the value of hindsight and further study should not be discounted. Even if the defendant appeals, the judge who imposed the sentence should have the opportunity to correct his mistake on hindsight. He knows the objective of the sentence. He is in the community where the

offense occurred, knows the public reaction, heard the evidence at trial, talked to the presentence report preparer and gave considerable study and thought to the sentence. The district judge is at the best vantage point in the system to impose sentences and to correct his mistake or give further study to a sentence.

Third, the rule also provides for reduction of a valid sentence after appeal or revocation of probation to enable the court to consider circumstances pertaining to the defendant which might have changed since original sentencing. If the defendant has since been rehabilitated, the court may want to change or reduce his sentence. Intervening hardship may warrant the court in taking a second look at the original sentence. A motion for reduction of sentence is essentially a plea for leniency and also affords the judge an opportunity to reconsider the sentence in light of any new information about the defendant or the case.

District Court Judge James M. Burns said it best in his dissent in United States v. United States District Court, Central District of California, 509 F.2d 1352 (9th Cir. 1975)

> I know from my own experience (and from the experience of other District Judges) that even when the motion is filed within 120 days, often a consider-

> able amount of time elapses before the Judge can act. Many District Judges do as I myself do when a Rule 35 motion is received: I ask the Bureau of Prisons for a report on the status, conditions and progress of the Defendant in the institution in which he is confined. It usually takes at least 60 or 90 days for a significant report to be prepared by the Bureau of Prisons. From time to time, the report itself suggests the necessity for exploration and further study of particular aspects of the case. Id. 1357.

We urge reconsideration of Subsection (d), Rule 35, Fed. R. Crim. P. Restoration of the present language is recommended.

> The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction.

D. Mandatory Minimum And Consecutive Sentences

1. Statutory Provisions

Section 1811 provides that a defendant convicted of trafficking in an opiate may not be sentenced to probation but shall receive not less than two years imprisonment without eligibility for early parole release. Such sentence must run consecutively "to any other term of imprisonment

imposed upon the defendant, unless the court finds that, at the time of the offense, the defendant was less than eighteen years old; the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; or the defendant was an accomplice whose participation in the offense was relatively minor."

Section 1823 provides a mandatory two-year consecutive sentence for displaying or using a firearm or destructive device in connection with the commission of a crime and a mandatory one year consecutive sentence for possessing a firearm or destructive device "in connection with" the commission of a crime. The mitigating circumstances justifying suspension of the mandatory provisions are the same as found in §1811. Additionally, if the weapon was used in self-defense and the person had reasonable cause to believe a felony was about to be committed, the mandatory provision is relaxed.

Sections 1811 and 1823 offer no guidance as to when

a sentencing judge must run the mandatory minimum sentence consecutively "to any other term of imprisonment imposed on the defendant. . ." Is any sentence outstanding in a state court proceeding covered as well as any other federal sentence? If a defendant has also been convicted of failure to file a tax return under §1402 in another district, must his two-year drug or firearm sentence be run consecutively to it? The portion of the Senate Committee Report discussing §1823 indicates its derivation from 18 U.S.C. §924(c) which provides for enhanced punishment when an offender carries or uses a firearm during the commission of a federal offense. Since the sentence imposed is to run consecutively to the underlying substantive offense, we may assume that this is the congressional intent behind the language in §1823. No such derivation, however, is alluded to by the committee in discussing §1811. Is any mandatory minimum imposed for trafficking in an opiate to be imposed consecutively to any other offenses before the court at the time of sentencing? The language in §§ 1811 and 1823 is less than artfully drawn and §2304 concerning multiple sentences only adds to the confusion.

2. Prior Experience with Mandatory Minimums

The concept of mandatory minimum sentences is not novel. The federal criminal justice system experienced them under the Harrison Narcotics Act and the Narcotics Drugs Import and Export Act which were replaced in October, 1970, when Congress passed Public Law 91-513, the Comprehensive Drug Abuse Prevention and Control Act of 1970. (Mandatory minimums for conviction of continuing criminal enterprise were preserved under 21 U.S.C. §848.) The clear intent of the Comprehensive Drug Abuse Prevention and Control Act of 1970 repealing many of the mandatory sentences was to give judges greater flexibility in sentencing. House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 91-1444, 91st Cong., 2d sess., (1970)., 1970 U.S. Code Cong. and Admin. News, p. 4576. See United States v. Carabello, 334 F.Supp. 843, 844 (S.D.N.Y. 1971).

In March, 1973, the State of New York proposed mandatory minimums for certain drug offenses. The law passed the New York State Senate on April 27, 1973. See §220.00 et seq., New York Statutes Annot. 1973, as amended;

Vol. 22, Buffalo Law Review (1973), p. 705-736. After 19 months experience with the law, the experts concluded that the measure failed to deter criminals or reduce recidivism while the backlog in the courts increased. A major criticism of the law is that it gets the street dealer behind bars while the large-scale distributor remains free to peddle his wares. "The Mandatory Sentence: Recipe for Retribution," Alper and Weiss, Federal Probation, December, 1977, p. 15-20.

The State of Massachusetts enacted mandatory minimums of one-year for the illegal carrying of firearms. The bill was known as the Bartley-Fox amendment which took effect April 1, 1975. The effect of the new law showed a substantial increase in appellate proceedings and a taxing of the Massachusetts prison system. "'And Nobody Can Get You Out': The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston - Part II,'" James A. Beha, II, Vol. 57, No. 2, Boston University Law Review, p. 323 (March, 1977).

3. Policy Considerations

As previously outlined, the creation of a sentencing

commission imposes restrictions on sentencing discretion, however, all discretion is removed by the mandatory sentence but for a few enumerated exceptions. Because judicial discretion is eliminated, the mandatory sentence tends to prostitute the criminal justice system. Prosecutors threaten its use, and all parties including the courts join in agreements to subvert it. That was a common practice under the former mandatory minimum sentences repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Any offense to which a plea could be justified providing for imposition of a discretionary or lesser sentence would be agreed upon by the prosecution and defense to avoid the extreme sanction of a mandatory sentence. This occurred if the prosecutor had a weak evidentiary case or there were mitigating circumstances. The discretion the mandatory sentence sought to remove once again prevailed.

The Honorable Jon O. Newman, United States District Judge for the District of Connecticut, and a former United States Attorney, displayed a great deal of insight into some of the problems attendant to mandatory minimum sentences when he correctly observed that mandatory sentences "do

not limit discretion, they simply move it around." 63 ABA Jounal 1563 (Nov. 1977). Discretion to select sentences is simply transferred from the judge to the prosecutor. By picking the offense he wishes to file, the prosecutor thereby also selects the sentence to be imposed.

In relating his experiences under the former hard-five mandatory sentence available prior to 1970, he candidly noted:

> As a United States Attorney, I prosecuted defendants under both statutes. If I thought the offense was serious or the offender had a bad prior record, I charged him with violating the five-year statute. If I thought there were mitigating circumstances, I selected the two-year statute. The judge imposed the mandatory sentences, but the prosecutor was selecting them.
>
> Mandatory sentencing is worse than ineffective. It puts in the hands of prosecutors an enormous power that most thoughtful people would rather not give them - the power to coerce an innocent person into pleading guilty. Suppose a legislature specifies ten years for armed robbery and one year for larceny and that you have been arrested for an armed robbery. You are innocent, but the prosecutor offers you a chance to plead guilty to the one-year charge. If you go to trial, it will be on the ten-year charge. Are you so sure you will be acquitted that you will take the risk? Is

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> your answer the same if you happen to have a prior conviction that very likely will cause the jury to disbelieve your truthful denial of guilt?
>
> Prosecutors already have potentially coercive power because they can select the charges to be brought. Coupling this power with mandatory sentencing invites almost certain abuse. (Emphasis added). Id. at p. 1563.

The recent endorsement by the U.S. Supreme Court of the use of reverse plea-bargaining by prosecutors gives license to such abuse. See Bordenkircher v. Hayes, 76-1334, _____U.S._____, 22 Crim. L. Rptr. 2023 (January 18, 1978). The prosecutor may induce a guilty plea to a selected charge by threatening to prosecute the defendant on any and all possible charges including those carrying mandatory minimum and consecutive sentences. Bordenkircher has approved this practice. The prosecutor may not have much of a case under §1811 or §1823, but the threat to effectuate their mandatory sanctions will most certainly bring an accused to his knees. For example, if the prosecutor has fifteen §1811 counts that can be filed, isn't it reasonable to believe a defendant will avoid a minimum of thirty consecutive years in exchange for any lesser

sentence? Accordingly, the judge will be bound by the prosecutor's filing decision.

> Unless limitations on judicial discretion are accompanied by parallel limitations on prosecutorial discretion, the certainty of punishment sought by the advocates of legislative reform will be largely unattainable through the remedies they propose. An Evaluation of the Probable Impact of Selected Proposals for Imposing Mandatory Minimum Sentences in the Federal Courts, James Eaglin and Anthony Partridge, Federal Judicial Center, July, 1977, p. 1.

The list of enumerated mitigating circumstances relieving the courts from the imposition of a mandatory minimum and consecutive sentence is less than complete, and cannot possibly contemplate all the situations where such imposition is ill-advised. The sentencing judge may not be able to justifiably and honestly find that an 18-year-old defendant's participation was relatively minor or that his or her mental capacity was significantly impaired or overcome by duress. He may, however, be faced with one of the following situations: the defendant is the sole provider and support of a family member or sole custodian of a surviving child; the defendant's parent suffers from a crippling disease and requires the care

and treatment of the defendant; or, the defendant cooperated with law enforcement in building a case against a major dealer. Neither prosecutors, defenders judges nor legislators can contemplate all the possible fact situations presenting extreme mitigation which should excuse a judge in the exercise of sound discretion from imposing a mandatory sentence.

Judicial legislation has never been deemed legally proper. Referring to the mandatory provisions under the former Narcotics Act, the U.S. Supreme Court forcused on the problem stating as follows:

> The plain meaning of the provision is that each offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction. (Emphasis added.) Blockburger v. United States, 284 U.S. 299, 305 (1932).

A Colorado federal judge in expressing his concern with mandatory sentences, related a recent case involving an eighteen or nineteen-year-old girl who was convicted by a jury of distributing an opiate. The judge was less

than convinced of her culpability but did not feel he could legally overturn the jury's finding of guilty. Under the facts of the case, the defendant would not have qualified for relief under the enumerated exceptions in §1811. Contrary to the wishes of the government, he granted her probation under the Federal Youth Corrections Act. The young lady worked her way through school and received early termination of probation to celebrate her election to Phi Beta Kappa. She has recently been accepted for admission to Harvard Law School. It is not difficult to conceive what a mandatory two-year prison term under §1811 would have done to this young lady and her efforts toward rehabilitation. Every trial judge who must sentence convicted offenders will proudly tell of the instances when a convicted offender rebounds from a conviction and makes good. If any chance for such success is removed by compelling a mandatory sentence, the responsiveness of the judicial system to treat the human needs of a defendant is greatly reduced. Legislating away the court's discretion can and will in no way assist in reducing the drug problem. Imposing mandatory sanctions

on the masses is a failure to recognize the individual.

> Thus a philosophy which would treat all crimes alike--as if all criminals were alike--descends from de-individualization to de-humanization, carrying with it grave implications not only for the law-breaker but for the law-abiding as well. "The Mandatory Sentence: Recipe for Retribution," Alper and Weiss, Federal Probation, (December, 1977) p. 20.

Some federal judges follow the procedure of accepting sentence bargains and others do not. Rule 11(e)(1)(c), Fed. R. Crim. P. A situation of real inequity will arise from the unevenness in adopting such a practice. In other words, in the district where the rule is followed, the defendant will have the advantage of knowing in advance of sentence whether the mandatory two-year period is going to be imposed. It is expected that the federal judge would make a finding in advance of sentence whether the necessary duress, mental impairment, or other reason excusing imposition of the mandatory period would be found. In those districts in which the federal judges have refused to follow the Rule 11(e)(1)(c) procedure, as in Colorado, a defendant must roll the dice as to whether the judge will make such a finding upon final sentencing that will excuse the manda-

tory sentence. If the judge does not find sufficient reason to forego imposition of the mandatory two-year sentence, it will, in most cases, be too late for the defendant to ask that his plea of guilty be set aside.

Furthermore, the procedure for finding the existence or lack of mitigating circumstances is not specified in S.1437. Three other recent Congresssional proposals provided for an evidentiary hearing to be held after conviction but before imposition of sentence. See S.260 sponsored by Sen. Kennedy, S.2947 by Sen. Burd, and H.R. 2462 by Rep. McClory. S. 1437 is silent as to the procedure to be used.

The deterrent effect of mandatory sentences is in substantial doubt. The Brown Commission was highly critical of the concept of the mandatory minimum sentences, stating flatly that:

> Mandatory minimum penalties are clearly undesirable. While mandatory minimum penalties and restrictions on probation and parole are defended as deterrents, . . . studies point out that, as they actually operate, the certainty of punishment they supposedly offer is illusory. . . .

> Another argument in favor of mandatory minimum sentences in narcotics cases in particular is that they provide leverage, which will induce a suspect to cooperate with law enforcement. It is submitted, however, that, if he fails to cooperate, it is inappropriate to subject him to punishment which is not warranted by the seriousness of his offense, the need to rehabilitate or incapacitate him, or by considerations of deterrence and general prevention. 2, National Commission on Reform of Federal Criminal Laws, Working Papers in Report on Drug Offenses, pp. 1111-12 (1970).

The ABA Project on Minimum Standards for Criminal Justice concluded that each case must have individual consideration:

> Because there are so many factors in an individual case which cannot be predicted in advance, it is unsound for the legislature to require that the court impose a minimum period of imprisonment which must be served before an offender becomes eligible for parole or for the legislature to prescribe such a minimum term itself. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures 142 (1967).

The President's Commission on Law Enforcement and Administration of Justice similarly rejected mandatory minimum sentences:

> Within any classification of offenses, differences exist in both the

> circumstances and nature of the illegal conduct and in the offenders. Mandatory provisions deprive judges and correctional authorities of the ability to base their judgments on the seriousness of the violations and the particular characteristics and potential for rehabilitation of the offender. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in A Free Society, Task Force Report: Narcotics and Drug Abuse p. 11 (1967).

A study by the Federal Judicial Center indicates the impact §1811 would have had on federal sentences imposed in fiscal year 1976. Of 4363 narcotics defendants sentenced in federal courts in fiscal 1976, 2,101 of the sentences were to imprisonment under the Youth Corrections Act or to adult terms of 3 years or more. (Many of the 4,363 sentences were for offenses not included in the analysis.) One hundred forty-four (144) were adult prison sentences of shorter duration than required by §1811, and 199 were sentences other than imprisonment. Thus, of the 343 sentences of shorter duration than the minimum required under §1811, only 80 of the defendants would have been excused from service of the mandatory two years by mitigating circumstances enumerated in §1811.

(See Tables 9 and 10, An Evaluation of the Probable Impact of Selected Proposals for Imposing Mandatory Minimum Sentences in the Federal Courts, Eaglin and Partridge, Federal Judicial Center, July, 1977). In other words, 263 offenders who the court felt justified in giving more lenient treatment would have had to go to jail for at least two years. If another charge had been pending at the time, the two years would have been stacked on to the other sentence. From the figures cited, all that can really be concluded is that over half of the 4,363 sentenced offenders were treated the same in 1976 as they would be under the provisions of S.1437. The other 2,200 offenders would have been sent to prison for the mandatory term unless excused (only 80 fell under the mitigating circumstances enumerated.).

Though the study is less than certain, it does quite clearly show that many offenders will go to jail where the court may have been inclined to treat them much less harshly, in most cases, for good reason.

4. Recommendations

It is our position that mandatory minimum and conse-

cutive sentences serve no useful purpose in solving the crime problem in this country. The deterrent effect of mandatory minimum sentences is in substantial doubt based on the prior experience of jurisdictions instituting them. The compounding effect of compelling the imposition of such sentences consecutively to any other sentence of imprisonment will impose undue hardship and inequitable results in a great number of cases.

If Congress determines a compelling necessity for reinstituting mandatory minimum sentences under §§ 1811 and 1823, we urge removal of the requirement that such sentences be imposed "consecutively to any other term of imprisonment imposed upon the defendant."

We further urge that a provision assuring the defendant a pre-sentence hearing on the existence or nonexistence of the enumerated mitigating circumstances set out in §§ 1811 and 1823 be included.

E. Preventive Detention

1. Historical Background

Amendment VIII of the Constitution of the United States provides, in part, that "[e]xcessive bail shall not be required. . ." U.S.C.A. Const. Amend. VIII.

The primary purpose of bail is to assure the appearance of the defendant at all future court proceedings. If, however, bail is set at a figure higher than that necessary to fulfill the purpose of assuring future court appearance, it is excessive under the Eighth Amendment. Stack v. Boyle, 342 U.S. 1, 5 (1951).

While some courts have ruled that there is no absolute right to bail under the Eighth Amendment, United States ex rel. Vitoratos v. Campbell, 410 F.Supp. 1208, 1211 (N.D. Ohio E.D. 1976), most have held that it is inherent in our American concept of liberty that a right to bail shall generally exist. United States ex rel. Fink v. Heyd, 287 F.Supp. 716, 718 (E.D. La. 1968) cert.den. 396 U.S. 895. A right to bail did not exist at common law. Prentis v. Manoogian, 16 F.2d 422 (6th Cir. 1926). It was dependent on statutory enactment. United States v. Kirk, 534 F.2d 1262 (8th Cir. 1976).

In Carlson v. Landon, 342 U.S. 524 (1952), the Supreme

Court upheld the denial of bail to alien Communists pending deportation proceedings. The Court interpreted the Eighth Amendment, which was derived from the English Bill of Rights Act, to require only "that bail shall not be excessive in those cases where it is proper to grant bail." Id. at p. 545. (Emphasis added.) The court left it to the legislature to define the class of cases in which bail is to be granted.

Since Congress has by statute provided defendants in criminal cases with a right to bail since 1789 [See Judiciary Act §33, 1 Stat. 91 (1789)], the federal courts have not had to confront the constitutional issue head-on. See, e.g. Stack v. Boyle; Pugh v. Rainwater, 557 F.2d 1189, 1194 (5th Cir. 1977).

2. Statutory Provisions

Section 3503 modifies the present Bail Reform Act by providing an option of preventive detention for murder §1601, rape §1641, kidnapping while armed with a dangerous weapon or device §1621, robbery while armed with a dangerous weapon or device §1721, seizure of a hostage by an alleged felon during the commission or attempted commission of a felony or flight therefrom, or the use of such hostage in negotiating release. On the floor of the Senate, §3503 was amended to add the offenses of trafficking in an opiate

if a Class B felony, or other controlled drugs if a Class C felony and committed under certain circumstances.

3. Policy Considerations

The strong emotions aroused by crimes of violence prompt the demands for preventive detention. The answer however, is that not only is the accused presumed to be innocent, he may in fact be innocent. For example, a great number of the prosecutions for armed robbery are dependent on eyewitness identifications, and the number of cases of mistaken identity, are well-documented. An accusation is nothing more than that, often based on hearsay, frequently founded on less than credible evidence. Similar difficulties arise in any one of the offenses covered by §3503.

> Detention before trial deprives a possibly innocent defendant of his liberty, often for substantial periods of time and often in conditions worse than those in which convicted prisoners are kept. See e.g., Note, a Study of the Administration of Bail in New York City, 106 U. Pa. L. Rev. 693, 723-25, 727-29 (1958). (Emphasis added.) "Preventive Detention Before Trial," 79 Harv. L. Rev. 1489 (May, 1966) p. 1489.

The disparity of confinement conditions for pre-trial detainees and post conviction prisoners cited above is quite apparent on the federal level. Many U. S. Marshals

are compelled to contract with local facilities to house federal detainees. Thus, the accused who is unable to make bond may be held in inadequate jail facilities. Confinement in such circumstances adversely affects the attorney-client relation and seriously impairs the defendant's ability to prepare for trial. See Hutton v. Parker, 156 U.S. 277, 285 (1895).

The inclusion of drug offenses in §§1811 and 1812 presents several additional problems. Senator Kennedy apparently intended the provision concerning Class C offenses under §1812 to cover only the large-scale traffickers when he suggested the requirement that the offense is one that is committed as "a pattern of criminal conduct" from which the trafficker derived "a substantial portion of his (her) income." The difficulty is that this classification applies to a large number of small-time peddlers.

Notwithstanding, various statistical analyses studying the commission of crimes by persons awaiting trial on other charges do not support the concerns that a significant portion of the crime rate is attributable to these individuals.

> It may well be . . . that the potential harm is actually not as great as anticipated and that, as has happened with

> other reforms in the criminal law, dire predictions will not be fulfilled." Note, "Preventive Detention Before Trial." 79 Harv. L. Rev. 1496, 1497 (1966).

The Bail Reform Act, presently in effect and carried forward in S.1437, recognizes the presumption of innocence. The standard for release prior to trial is generally more liberal than that applied after conviction. Section 3502 provides that in a noncapital case, an accused shall be released on his personal recognizance or upon the execution of an unsecured bond unless the judge determines that such a release will not reasonably assure the accused's appearance as required. Only if such a release would not assure the appearance of the person may the other conditions of release be imposed. Even then, the requirement of bail bond is the least favored of the alternatives. Wood v. United States, 391 F.2d 981 (D.C. Cir. 1968). See S. Rep. No. 750, 89th Cong., 1st Sess., p. 10. See also H.R. Rep. no. 1541, 89th Cong., 2d Sess., p. 10. Section 3502 incorporates the provisions concerning pre-trial release of the Bail Reform Act presently found at 18 U.S.C. §3146. See United States v. Cramer, 451 F.2d 1198 (5th Cir. 1971); United States v. Smith, 444 F.2d 61 (8th Cir. 1971) cert. den., 405 U.S. 977 (1972).

Section 3504 embodies that portion of 18 U.S.C. §3148 which concerns post-conviction release. A person convicted and awaiting sentence or pursuing appellate remedies is entitled to treatment under §3502 unless the judge has reason to believe that no conditions of release will assure that the defendant won't flee or pose a danger to the community. Thus, the policy in favor of release is maintained. However, if the government is the appellant, §3504(b) accords the defendant automatic consideration under the pretrial release standards.

The legislative history to the Bail Reform Act indicates that Congress considered the problem of preventive detention in 1966. The Report of the House Judiciary Committee stated:

> This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pre-trial period, or because of the fact that he is at large [sic] might result in the intimidation of witnesses or the destruction of evidence. It must be remembered that under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused. 1966 U.S. Code Congressional and Admin. News, p. 2296. (Emphasis added.)

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The function of bail is not to prevent the commission of crime. United States v. D'Argento, 227 F.Supp. 596 (7th Cir. 1964) r'vsd. on other grds. 339 F.2d 925; United States v. Fisher, 79 F.Supp. 422 (S.D. N.Y. 1948). Many judges, however, set bail with that deterrent in mind. Hearings on S.1357, S.646, S.647 and S.648 Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Congress, 1st Sess. 3, 66, 130 (1965). To condone the practice by writing it into law will give license to its misuse.

Though §3503 provides that preventive detention shall not be used unless the judge has reason to believe that the defendant will flee, many prosecutors will recommend, and magistrates and judges will approve, its use on the basis of the charge alone. At the initial bail hearing there is quite often very little information before the court or committing magistrate other than the charge itself. If all that is known about an accused is his alleged participation in the offense, the natural tendency will be the presumptive application of preventive detention.

Preventive detention finds strong appeal when a defendant waits six months to over a year for trial. With

the passage of the Speedy Trial act, however, his guilt or innocence of the charge will be determined fairly expeditiously. 18 U.S.C. §3161, et seq. To lock him up in advance of that determination violates our fundamental concept of justice.

Further, §2003 provides that a sentence adequate to deter criminal conduct and to protect the public from further crimes are factors to be considered in imposing sentence. Thus, if a defendant is found guilty his deterrence from further criminal misconduct will be dealt with at sentencing.

4. Recommendation

The Federal Defenders strongly urge Congress to remove §3503 from S.1437.

VI. OFFENDERS WITH MENTAL DISEASE OR DEFECT

Section 3612 provides that a jury or a judge in a court tried case could return a verdict making one of three different findings in a case where the defense of insanity is asserted. The verdict can be that of (1) guilty; (2) not guilty, or (3) not guilty by reason of insanity. The proposed legislation also provides that a jury may be instructed on the effect of a finding of not guilty by reason of insanity.

It should be noted that there is no provision in the legislation for the automatic commitment of a person found not guilty by reason of insanity. Rather, the procedure to be followed if such a verdict is returned is for the court to hold a hearing for the purpose of determining whether the defendant "is presently suffering from a mental disease as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another." §3613(d). If it were found by "clear and convincing evidence" that the acquitted person met the foregoing criteria then the court would be compelled to commit such person to the custody of the Attorney General. Upon receipt of a person so committed, the Attorney General must then make all reasonable efforts to release the person

to an appropriate official of the state of domicile or to the state in which the person was tried. In the event that neither state was to assume responsibility, the Attorney General is directed to hospitalize the individual in a suitable facility.

An additional improvement is the requirement in §3614 for judicial approval before transfer of a person to a mental hospital if the individual objects to such a transfer. This procedural safeguard is felt important to protect against the stigma of mental illness, the increased restrictions and routines which attend confinement in a mental hospital and the mental suffering of a sane individual who is mistakenly confined with persons who are insane. While it is our position, as will again be repeated in this text, that the language of H.R.6869 best achieves these ends, we nevertheless applaud the recognition of a significant problem which S.1437 discloses.

A. Dangers of Proposed Legislation

1. Apparent Lack of Treatment Facilities for the Insane

While S.1437 as originally introduced, H.R. 2311 and H.R.6869 speak of "mental hospitals" or "other facilities designated by the court as suitable," these terms have been eliminated from S.1437 as passed by the Senate and replaced

in all instances by the phrase "suitable facility." This term is defined in §3616(a)(2) as a "facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant." (Emphasis added.)

It would appear that the definition given to "suitable facility" comports more with traditional penal considerations rather than considerations of care and treatment of the mentally ill. This conclusion finds further support in the fact that the bill fails to place any affirmative burden or responsibility on the Attorney General to maintain facilities for the treatment of the mentally ill. According to the committee report on subsection (d) of §3614, the phrase "suitable facility" is extended even to include the psychiatric section of a prison. See Senate Committee Report at p. 1041.

While the bill emphasizes the importance of having an individual's state of domicile or trial assume responsibility for custody and treatment, there are a significant number of inmates in the federal prison system who are, for varying reasons, not eligible for transfer to a state institution despite their often dire need of psychiatric treatment. One may take, for example, the situation existing

at the United States Medical Center for Federal Prisoners in Springfield, Missouri, which serves as a primary treatment facility for mentally ill inmates in the federal prison system. As of March 7, 1978, there were 264 convicted inmates housed in the Medical Center's psychiatric unit for treatment. In addition to this convicted number of inmates, the Medical Center also receives annually approximately 360 unconvicted inmates for Section 4244 examinations. This latter group of unconvicted inmates, receive priority processing for obvious reasons. The Medical Center doctors frankly admit to the fact that current work loads and limitations on staff make it virtually impossible to treat other than the most acute symptoms of mental illness. There is absent, for example, any sustained program of individual psychotherapy or group therapy at the Medical Center. The primary method of treatment appears to be chemotherapy and there exists serious question as to whether such use of drugs is intended more to facilitate control over the inmate rather than for any therapeutic purpose.

Even putting aside the limited resources discussed

In addition and as of this March 7, 1978, date, 27 persons are also committed at the Medical Center pursuant to 18 U.S.C. §§4246 and 4247; 21 others are currently committed for study under 18 U.S.C. §§5010(e) or 4205(c).

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Even putting aside the limited resources discussed

In addition and as of this March 7, 1978, date, 27 persons are also committed at the Medical Center pursuant to 18 U.S.C. §§4246 and 4247; 21 others are currently committed for study under 18 U.S.C. §§5010(e) or 4205(c).

above, it should be noted that only the Medical Center and a similar institution in Butner, North Carolina, possess any significant capacity for treatment of mental illness. For the most part, resources available at the other federal facilities do not permit going beyond the mere tentative diagnosis of mental illness in a given case sufficient to warrant transfer to the Medical Center.

In addition to the need of treatment facilities for the convicted inmate serving a sentence, there also exist other situations and circumstances in which the Attorney General should be required to provide meaningful treatment for the mentally ill. Section 3615 of S.1437, for example, is concerned with the continued incarceration of imprisoned persons whose federal sentences are about to expire or individuals against whom all federal charges have been dropped as a result of a mental condition which continues to exist. These sections clearly contemplate circumstances in which a mentally ill inmate either convicted or unconvicted may be held in continued federal custody because such person is considered dangerous and because the mental illness may continue long beyond the expiration of the federal sentence or long after the time that a federal charge has been dismissed.

For the reasons outlined above, it is incumbent that meaningful treatment facilities be provided. To this end, it is submitted that a return to the original language of S.1437 and H.R.6869 of "mental hospitals" would be appropriate. At the very least, it should be required that the Attorney General or his designee certify that proper and adequate treatment programs and personnel exist at a facility where incarceration of the mentally ill is planned. In this regard, the committee may wish to consider language similar to that found in the Youth Corrections Act, 18 U.S.C. §5012.[1]

2. Failure to Bar Derivative Use of a Defendant's Statements Made During Examination Ordered Pursuant to this Chapter

Section 3616(g) merely would hold any statement made by a defendant during the course of an examination ordered in connection with §3611 or §3612 inadmissible as evidence against the accused on the issue of guilt in any criminal proceeding. It is submitted that the protection which this section is designed to offer should be enlarged to include not only statements but all evidence obtained as a result of

[1] "No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided."

statements made by the defendant in the course of such an examination.

It would appear that the court in ordering an examination pursuant to §3611 or §3612 wants a well reasoned opinion from the examining physician based on all of the relevant factual information concerning a defendant. For an examining physician to be able to prepare a useful and meaningful report, it would appear essential that he have the cooperation of the defendant. This desired aim, however, is militated against by the fact that any statement made by the defendant during the course of the interview to the doctor or persons working under the doctor's control may be considered as admissions by the defendant. These admissions may relate not only to the crime for which the defendant stands charged, but also with respect to other possible criminal activities. These admissions may be such as to lead to additional evidence of other crimes sufficient to convict.

A further consideration in this regard is the fact that many of the examinations contemplated by the chapter will be done at the request of the government or the court on its own motion. In addition, examining physicians may be chosen by the government or the court. Indeed, such examinations

may be conducted while the defendant is in custody and at a government facility such as the Medical Center for Federal Prisoners. Because of all of these factors, failure to bar derivative use of a defendant's statements made during the course of a psychiatric examination will no doubt raise substantial constitutional questions.

3. Procedural Safeguards for Transfer of Imprisoned Person to Psychiatric Treatment Facility

Section 3614(a) deals with the situation in which a person who is serving a sentence is alleged by the director of the prison or institution where he is being held to be suffering from a mental disease or defect and, therefore, in need of treatment at an appropriate facility. One of the major achievements of the bill as heretofore noted is the requirement of obtaining court approval in certain instances before such a transfer is accomplished.

However, as enacted, subsection (a) provides that a hearing will only be held "if a defendant serving a sentence of imprisonment objects either in writing or through his attorney" and the director of the facility in which he is being held causes a motion to be filed in the district court where the facility is located. The obvious intent of the section is to provide some procedural safeguards before

committing an inmate to a facility designed for treatment of the mentally ill. Yet, this section as enacted by the Senate in §3714(a) places the burden of objecting to such transfer on an inmate who may not fully understand the consequences of the transfer or on his attorney who may never be advised that such a transfer is contemplated.

It is, therefore, believed that the language in the original S.1437 and that found in H.R.6869 in Section 3615(a) is the most appropriate to accomplish the purpose of the act and to avoid the obvious pitfalls of §3714(a) as passed by the Senate.

We also note that there is serious question whether the Senate version of this provision is constitutionally valid. The Supreme Court has agreed to review the due process requirements when an inmate is transferred from a penal institution to a psychiatric treatment facility.'

"(a) Motion to Determine Present Mental Condition of Imprisoned Defendant.--A defendant serving a sentence of imprisonment, or an attorney for the government at the request of the director of the facility in which the defendant is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. . . ."

Miller v. Vitek, 437 F.Supp. 569 (D. Neb. 1977) cert. granted, Vitek v. Miller, 77-888, 22 Crim.L.Rep. 4189. Due process requirements are (a) written notice (b) hearing (c) qualified opportunity to present defense witnesses and cross-examine adverse witnesses (d) independent decisionmaker (e) written statement of facts and reasons (f) availability of legal counsel, furnished by state if necessary, and (g) effective and timely notice of rights.

4. Need for Prompt Hearing Following Psychiatric Evaluation

Section 3616(d) deals with the hearing that will normally be held following a psychiatric examination ordered in accordance with any of the sections of this chapter. One of the primary difficulties with the current law is the delay often occurring between the date of completion of the examination and the date of a hearing to determine the issue of competence or mental state. Once again using the example of the Medical Center for Federal Prisoners, often persons committed to that facility for competency examinations under 18 U.S.C. §4244 frequently remain there for extended periods of time following completion of their staff evaluation and submission of a written report to the court. From time to time this problem of returning an inmate from the institution to his committing court has been the subject of controversy. Authorities at the Medical Center have sometimes taken the position that responsibility for such return lies with the court, as indeed it does, as a primary matter. However, the real responsibility for transportation in the ordinary case lies with the Prisoner Coordination Unit of the United States Marshal's Service.

Whatever the reason for such a delay in the return of

a prisoner, it is submitted that hearings should be required within a reasonable time, and we suggest thirty days, following receipt by the court of the written report of the psychiatric evaluation.

5. Qualifications of Psychiatric Examiners

Section 3616(b) requires that a psychiatric examination ordered in accordance with this chapter be conducted by either (1) a licensed or certified psychiatrist, (2) a team composed of a clinical psychologist and medical doctor, or (3) by "additional examiners." No guidance is contained in either the committee report on S.1437 or the bill as to what is meant by the phrase "additional examiners."

It is felt, moreover, that the requirement that a clinical psychologist only be able to conduct an examination in conjunction with a "medical doctor" is unnecessary. It would also escalate the cost of the examination. As is often the case, most clinical psychologists administer and interpret the various psychological tests upon which the opinion of a psychiatrist is largely based. A skilled clinical psychologist is equally capable of conducting an evaluation. Additionally, the courts of some districts have

For an examination of some of the difficulties of limiting the examination to a person who has a particular label, i.e., a psychiatrist, see Coping with Psychiatric and Psychological Testimony, 2d Ed., J. Ziskin, Ph.D., L.L.B., Law and Psychology Press (1976).

for a number of years utilized the services of clinical psychologists who have trained in forensic psychiatry and psychology and who in many cases are willing to provide their services at a more economical rate than that ordinarily charged by a psychiatrist. It is suggested, therefore, that the requirement that a clinical psychologist participate only as a team member with a medical doctor should be eliminated. This amendment could very easily be accomplished by the striking of the phrase "and medical doctor" from the third line of §3616(b) of S.1437.

6. Danger to "Self" Not a Basis for Hospitalization

The standard for commitment under §3613 (hospitalization of a person acquitted by reason of insanity) §3614 (hospitalization of an imprisoned person suffering from mental disease or defect) and §3615 (hospitalization of a person due for release but suffering from mental disease or defect) is whether the person is presently suffering from a mental disease or defect as a result of which he or she poses a "substantial risk of serious bodily injury to another person or serious damage to property of another."

We frequently encounter the situation where the mental illness may manifest itself, among other things, by self mutilitation or attempted suicide. It is therefore suggested that danger to self should be an alternate basis

for hospitalization under the foregoing subsections. This could be accomplished by simply inserting the phrase "or himself" in the standard so that it reads "substantial risk of serious bodily injury to another person or himself or serious damage to property of another."

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