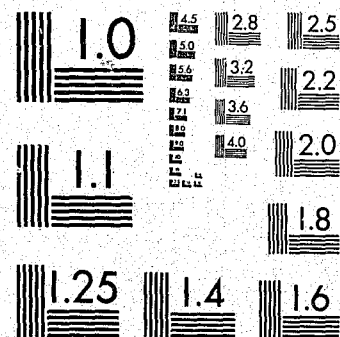


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ACQUISITIONS

STATEMENT OF

WILLIAM FRENCH SMITH  
ATTORNEY GENERAL OF THE UNITED STATES

ON

S. 1630  
PROPOSED FEDERAL CRIMINAL CODE

BEFORE THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

U.S. Department of Justice  
National Institute of Justice

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September 28, 1981

Mr. Chairman, I appear before this Committee today to say that the time has come to reform federal criminal law as a whole. Since entering office just eight months ago, I and my staff have been pleased to work with many members of the Congress from both sides of the aisle to prepare the new criminal Code now before this Committee.

After approximately fifteen years of reform efforts, the time to act has come. During the last decade of deliberation alone, the incidence of violent crime reported to police has increased by 85 percent. Last year, more than 1.3 million violent crimes were reported -- and by some estimates almost half of all violent crimes are not reported. Over half of our citizens say they are now afraid to walk alone in the streets of their own communities.

Although no federal effort represents the full answer to this alarming growth in crime, new and better federal criminal laws will at least contribute to the solution. The proposed recodification of federal criminal law is itself a major contribution to that solution.

The new Code would clarify and rationalize federal criminal law. It would make investigations and prosecutions more efficient. It would do much more than that, however. It contains well over a hundred significant improvements in criminal law.

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The new Code would re-enforce our commitment to better coordination among federal, state, and local law enforcement.

Its provisions on bail reform would help to solve the problems resulting from pretrial release of drug traffickers.

The new Code would aid in the war against drugs and organized crime and bring more effective approaches to bear against the sophisticated financial manipulations of today's criminals.

It would ensure longer sentences of imprisonment for criminals convicted of serious offenses -- and make it possible to know in advance the actual minimum time they will spend in prison.

Its forfeiture provisions -- and its provisions that greatly increase the maximum fines that may be imposed on criminals -- would be a major step toward taking profit out of crime.

The Code also addresses the special problems of victims by requiring restitution from criminals who can afford to pay and by granting compensation from a fine fund for victims of violent offenses.

As a whole, it represents the most significant series of law enforcement improvements ever considered by the Congress.

Mr. Chairman, I am well aware that I am not the first Attorney General to call for the reform of the criminal laws. For over a decade now, a small parade of Attorneys General has appeared before this Committee and has otherwise spoken out in support of the reform of the criminal laws.

Recognition of the need for periodic reform of criminal law to meet changes in criminal behavior is older still. In 1614, Francis Bacon, then Attorney General of England, stated that "the penal laws should be reviewed by a Commission to the end that such as are obsolete and snaring may be repealed and such as are fit to continue and concern one matter may be reduced respectively to one clear form of law". The project he suggested was begun, but was never completed. I hope, with some reason, for greater success.

Similarly, this is not the first Congress to consider reform of the criminal laws. Preceding Congresses have worked diligently on the precursors of the current code reform bill now before this Committee. Earlier still, however, the 21st Congress, over 150 years ago, had before it a genuinely modern, comprehensive federal criminal code prepared by Edward Livingston. According to the reported House debates of that period, the "press of business" precluded congressional consideration. It was not until the current effort was launched approximately 15 years ago that the Congress again was presented with a comprehensive proposal to make fundamental reforms in the federal criminal laws.

What is remarkable about these early efforts is not that they were proposed at the time they were, but that efforts of such importance can lay dormant for so long. Although a great deal can be done administratively to improve the efficiency of

the federal criminal justice system, any major advance depends upon a fundamental streamlining and simplification of the laws themselves.

The proposed Federal Criminal Code now pending before this Committee, S. 1630, is a product shaped both by many members of this Committee who have long perceived the need for reform and by those of us operating within the criminal justice system who are faced with the day-to-day problems of attempting to enforce the existing laws. I would like not only to acknowledge but to stress that point -- this bill is a joint product of an extraordinarily close, harmonious, and productive working relationship between the sponsoring Senators and the Department of Justice. I am impressed by, and grateful for, the courtesy and cooperation afforded us, and I am gratified by the product. You may be assured that this effort has my strong personal support as well as the support of the Administration as a whole.

When I first came to the Department of Justice, the subject of criminal code reform was one of the first items on my agenda for review. After examining the subject with several others in the Department, I directed a group of Departmental attorneys: first, to proceed to work on criminal code reform as an important Departmental priority; second, to work closely with the Congress in improving upon the efforts of the recent past rather than to launch a separate effort; third, to work toward a balanced, bipartisan code that would avoid seriously controversial changes in the law; and fourth -- a point that I

emphasized repeatedly -- to ensure that the evolving code would not simply codify and clarify the law, but would also significantly improve law enforcement.

I was not in office long before becoming persuaded, as had my immediate predecessors, of the basic importance of criminal code reform. Many of you here have been working on the matter longer than I, and I certainly need not recite to you the specific examples of the shortcomings of the existing laws relating to crime, sentencing, and criminal procedure. These have long been matters of public record, and we are repeatedly reminded of them in our daily work. They are well summarized, Mr. Chairman, in your statement upon introduction of S. 1630 a week and a half ago.

It also did not take much time to conclude that the past efforts of this Committee revealed an organization, drafting technique, and general technical quality that could not readily be improved upon. The same proved true, for the most part, with regard to the substantive provisions. Plainly, any changes that would be warranted could be easily accommodated in building upon the code revision bill several of you introduced in the last Congress, just as its provisions and those of its predecessors were based upon the seminal work of the National Commission on Reform of the Federal Criminal Laws.

The need to work toward a balanced, bipartisan bill also appeared self-evident. It was not only practical, it was



desirable. We are a nation of individuals with a wide diversity of views, but recent history has shown that we are largely of one mind in desiring efficient and fair criminal laws. Therefore, the only serious impediment to achieving passage of a rational code would be the inclusion of that handful of criminal law subjects upon which fundamental philosophical differences seem to make agreement impossible, or concerning which widespread misinterpretation or misconception might make inclusion impolitic. For this reason it appeared appropriate to continue the approach that was initiated largely by Attorney General Bell and several members of this Committee -- the approach of severing, for later congressional consideration on their individual merits, those provisions attended by such controversy or confusion.

It was this approach that led in the past to the severing of the issue of capital punishment from the bill -- which I support, as do several of the sponsors, even though we strongly favor separate legislation to provide for the imposition of the death penalty under limited circumstances and under constitutionally supportable procedures. It was this approach that led also to the elimination of the offense of endangerment from the present bill. Moreover, it was this approach that led to the decision not to propose adding Code provisions that would limit the application of the exclusionary rule or that would restrict the opportunities for repeated petitions by prisoners for judicial review of their convictions.

Although the clarity and simplification that will be imparted to the law simply by the process of codification will make a significant contribution to a more effective criminal justice process, more than that is needed. Unless a new code makes genuine improvements in law enforcement, it will fail to achieve one of its most important potential advantages. There are many areas in which the merit of substantive improvements has produced broad bipartisan support. I have repeatedly stressed that this should be one of the fundamental goals of the new Code -- a goal that I believe the current bill achieves to a degree that its predecessors had not. Certainly, earlier bills have proposed important advances for law enforcement, but S. 1630 incorporates a series of improvements that go much further in increasing the Federal Government's capacity to respond to serious crime in our Nation. This is a contribution to the Code in which this Administration has played a major part, and we take pride in this product of our joint efforts.

Because of the stress I have placed on the need for law enforcement improvements in the Code, I would like to outline some of those improvements in the pending bill.

First, as a general matter, many law enforcement improvements stem from the clarity of the Code. As one of many examples, the simplicity of the Code's treatment of intent, and other mental elements that must accompany conduct before it may be considered criminal, would make far clearer exactly what has

to be proved in the course of trial, and would make the process of proof more efficient. This treatment would bring the federal laws into close accord with the laws of most States that have recently modernized their own penal laws. In my own home state, which has not yet succeeded in enacting a new code, prosecutors are still faced with the difficulty of demonstrating malice in a homicide case by proving that the defendant acted with "an abandoned and malignant heart". While we plainly have some abandoned hearts in California, and I dare say some malignant ones, proving that particular combination beyond a reasonable doubt in a criminal trial is a process that no sensible system of justice should require. The current federal requirements are not quite that burdensome, but they are unnecessarily antiquated.

Second, the bill contains a variety of improvements that would help the Federal Government meet the problems of violent crime. The outrage and chilling consequences of such crimes upon our citizens are so great that it would be unconscionable to ignore the shared responsibility of the Federal Government and State governments to meet this threat. I do not mean to minimize the importance of the federal responsibilities with regard to serious large-scale frauds, offenses involving corruption of officials and other areas of traditional federal concentration. I wish only to emphasize that crimes resulting in death, physical disfigurement, and emotional terror -- as opposed to crimes involving loss of money -- carry costs that only victims and

their families can begin to understand. This is a reality to which we must respond.

Under current law, federal jurisdiction over criminals who commit violent crimes is greater than is generally recognized. Moreover, a recent empirical study has revealed that of the career criminals prosecuted by the Federal Government, most of whom have engaged in violent offenses, each commits an average of 40 non-drug offenses for each year he is not incarcerated, and another 160 drug-related offenses -- a total of 200 offenses per year. By improving the federal laws to enable us to reach such offenders more readily, and by concentrating on such offenders with an appropriate proportion of our investigative and prosecutorial resources, we should be able, by these means alone, to have some measurable effect on the level of violent street crime.

The new Code would make the federal effort against violent crime more effective through a combination of individual provisions. Perhaps most significantly, it would permit the Federal Government to prosecute a violent crime committed in the course of any other federal offense, and would accomplish this without inappropriately impinging upon concurrent State authority. In addition, the Code would directly provide federal jurisdiction over murders for hire, and over murders and assaults

committed against a wide variety of federal officials and against innocent bystanders in the course of attacks on officials. It would clarify the provisions of the homicide statutes in a manner similar to that employed in recent State codes, and it would improve the statute covering maiming and serious disfigurement and raise the penalty for such offenses.

The new Code would provide the federal jurisdiction over large-scale arson committed for profit, arson committed against energy production facilities, and arson committed in the course of civil rights offenses. It would expand the anti-terrorizing offense, enact the first federal burglary statute, provide a new offense to reach the leaders of enterprises engaged in organized crime, and provide improved coverage of violent sexual offenses. It would require a mandatory penalty of imprisonment for any criminal who uses a gun or a bomb in the course of committing a federal offense.

The Code would permit judges for the first time to deny pretrial release on bail to violent offenders whose release would endanger the community. It would require convicted offenders to begin serving their sentences immediately after sentencing -- without long delays pending their appeals -- unless their appeals seem well founded. It would permit the transfer to State hospitals of mentally ill offenders whose release would pose a danger to the safety of others. And it would reduce the ability of violent young adults to escape appropriate punishment. It

would even provide more effective means of reaching violence involving American citizens overseas, covering violence against those in American embassies and assassinations by Americans in foreign nations. It also would provide more effective methods for extraditing terrorists and other criminals to nations where they have committed offenses.

Third, the new Code also would make more effective the investigation and prosecution of offenses involving narcotics and dangerous drugs -- offenses that themselves generate innumerable other offenses. The Code would provide increased penalties for large-scale trafficking in heroin, cocaine, and PCP. It would provide a mandatory penalty of imprisonment for anyone trafficking in heroin. A mandatory penalty for most offenses would be unnecessary in light of the Code's sentencing system, but for heroin trafficking, as for the offense of using a gun or bomb, it seems warranted for its potential deterrent impact. The Code would for the first time provide a basis for arresting narcotics dealers who substitute counterfeit drugs in sales to undercover agents. It also would provide a materially improved means of securing the forfeiture of laundered proceeds from narcotics transactions as well as from other lucrative organized crime activities. It would, moreover, permit assistance from the military services in interdicting narcotics being transported to the United States.

Fourth, the new Code would improve laws concerning the criminal misappropriation of taxpayers' monies. It contains new offenses to reach theft, fraud, and bribery involving money supplied for federally funded programs. It contains improved offenses relating to tax evasion, fencing of stolen property, and forgery and counterfeiting. Moreover, it would more effectively reach persons who destroy evidence concerning these and other offenses, and provide for an extended statute of limitations for offenses involving concealed fraud or corruption.

Fifth, the new Code would provide more appropriate attention to the needs of victims and witnesses caught up in the criminal justice process. It would provide a more effective series of offenses reaching intimidation of witnesses, and provide a new injunction procedure to restrain such intimidation. It incorporates a series of provisions providing for restitution from defendants to victims of offenses. For cases in which restitution is not possible, it provides, for the first time, a program -- funded by offenders themselves through the fine collection system -- for the basic compensation of victims of violent offenses who cooperate with officials investigating and prosecuting offenses. Finally, for especially serious cases, it incorporates improved provisions for the protection and relocation of witnesses whose lives are in danger.

Sixth, the new Code contains numerous provisions of general benefit to law enforcement. The facilitation and solicitation

provisions would significantly increase the likelihood of successfully prosecuting promoters and brokers of crime. The conspiracy and the bail-jumping provisions for the first time have penalties scaled to the seriousness of the crime that was the object of the conspiracy or the charge for which bail was set. The provisions of current law concerning court-ordered wiretapping would be modified to permit emergency wiretaps, with subsequent notification to the court, in cases where life is in danger. A new subchapter would facilitate the investigative tracing of telephone calls, and bring the area under the jurisdiction of the courts for prior approval.

Of the improvements in the generally applicable provisions of the Code, perhaps the most important are those related to sentencing criminal offenders. Those provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing.

The purposes of sentences are spelled out for the first time. They would specifically embrace just punishment, deterrence, and protection of the public, and they would lessen the previous emphasis on rehabilitation.

The traditional forms of punishments would be made more effective. Probation would be recognized as a penalty rather than as the absence of a penalty. A variety of potentially



useful conditions of probation would be outlined for judges' consideration. And, perhaps most important, every felon granted probation would for the first time receive a discernible penalty -- he would be required to make restitution to his victims, to work in community service, or to pay a fine. Fines would be significantly increased -- although with limitations based on ability to pay and with safeguards against unfair multiplication of fines -- and for the first time effective procedures would be available for their collection. Imprisonment would no longer involve artificially lengthy terms that are intended to be shortened later at the discretion of parole authorities. Early release on parole would be abolished, and the Parole Commission would be phased out. The imposed terms may appear shorter, but the result should be approximately the same terms actually served in prison for most offenses; longer terms for the most serious offenses; and overall greater honesty, public credibility, and effectiveness in sentences of imprisonment.

The sentencing procedure would be made far more fair -- both to the public and the defendant -- and would be made more certain. Judges would be directed to sentence pursuant to guidelines established by a Sentencing Commission in the judicial branch of the Federal Government. The guidelines would encompass all combinations of aggravating and mitigating circumstances under which offenses may be committed, as well as different characteristics of offenders. For each federal offense, the

guidelines would specify a variety of appropriate sentencing ranges -- encompassing imprisonment, fines, and probation -- depending upon the particular history and characteristics of the defendant in the case and the particular circumstances under which the offense was committed. The judge could sentence outside the guideline range in unusual circumstances, but would have to give specific reasons for such a sentence. If the judge sentenced above the guideline range specified for a case, the defendant could seek appellate review of the reasonableness of the sentence. Significantly, if the judge sentenced below the guideline range, the government could -- on behalf of the public -- obtain appellate review of the reasonableness of the sentence. This sentencing system is a cohesive, innovative package of proposals, and it has our strong support.

I have two additional comments about the proposed Code.

First, while achieving the benefits I have outlined, and numerous others, it maintains a clear sensitivity to the division of law enforcement responsibilities in a federal republic. It recognizes the unimpeded concurrent jurisdiction of the States over almost all conduct that also falls within the federal sphere. It directs the Department of Justice to give consideration to that concurrent jurisdiction in individual cases and to coordinate with State authorities on a regular basis. For the first time, it would provide explicitly for the sharing of investigative information between federal and State agencies. It

would encourage agencies controlling federal lands to return federal criminal jurisdiction to the States with State concurrence. And it would permit States to seek help from federal agents on sparsely policed land owned by the Federal Government. In combination, these provisions would provide the basis for more effective coordination, at all levels of government, against criminal violations.

Second, the benefits that can be achieved by the new Code can be achieved without outlays of new funds. There is nothing magic in this. It is simply a consequence of the fact that we have been laboring for decades under a complex and inefficient criminal justice system -- a system that has been very wasteful of existing resources. During the three-year period before the Code becomes effective, some of our attorneys and other employees, who otherwise would be concentrating on the problems of the current system, would be diverted to train others in the operation of the simpler system the Code will provide. We look forward to the possibility of working with the federal Judiciary in a joint training effort. The costs of the new Sentencing Commission would be covered by the savings achieved in phasing out the Parole Commission. The start-up "costs", therefore, would be the salaries of those who otherwise would be laboring in applying outmoded statutes. The States' experiences with such changeovers have been very encouraging. The increased efficiency of the new federal system, in conjunction with the higher fine

levels, would far more than offset the costs of the training time required for its implementation.

Although, as I noted earlier, I am not the first Attorney General to call for reform of the criminal laws, I will take great satisfaction in being the last -- if last in this instance does not simply mean the latest. Some of you on this Committee, who have been involved in this process far longer than I, undoubtedly share a similar feeling. Given the determination that has been displayed by the sponsors of this bill, and the spark provided by our common recognition of the terrible toll of crime on American citizens, I am confident that this Code will not be allowed to languish.

You have had our full cooperation in the past, and you may count on it in the future to make further refinements and improvements in this bill. We will do our utmost to help you achieve its passage.