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THE MORAL MAJORITY, INC.  
OF WASHINGTON, D.C.

Date: November 24, 1981

Memo To: James A. Baker, III, White House Chief of Staff  
Edwin Meese, III, Counselor to the President

From: Ronald S. Geadin, Vice President Moral Majority Inc.

The following are specific actions that the Reagan Administration can take:

1. Take a firm stand against S.1630.
2. Instruct the Justice Department to not send out the rebuttal prepared by Deputy Assistant Attorney General Ron Gainer conceded as inaccurate (see affidavits).
3. Instruct Roger Pauley, Ron Gainer and Ken Starr and all others at the Justice Department to stop working with the Judiciary Committees for passage of S.1630.

RSG:lr

MORAL MAJORITY COMPARISON OF DC ACT 4-69, S.1630 AS INTRODUCED, AND S.1630 AS AMENDED AND REPORTED FROM THE SENATE JUDICIARY COMMITTEE.

A. DC Act 4-69 reduces the maximum penalty for rape from life imprisonment to twenty years.

S.1630 reduces the maximum federal penalty for rape from death to twelve years. Its House counterpart, H.R.1647, reduces the maximum penalty from death to 13 1/3 years.

S.1630 AS AMENDED AND REPORTED BY THE SENATE JUDICIARY COMMITTEE: CONCEDES, IN SECTION 1641, THAT THE MAXIMUM PENALTY FOR RAPE WAS TOO SOFT BY DOUBLING THE MAXIMUM PENALTY FROM 12 YEARS TO 25 YEARS. THIS IS STILL LESS THAN THE MAXIMUM OF LIFE IMPRISONMENT UNDER CURRENT LAW. BY DOUBLING THE ORIGINAL PENALTY FOR RAPE IN S.1630, THE COMMITTEE HAS CONCEDED THAT THERE IS NO CONSISTENT LOGICAL RATIONALE OR INTERRELATEDNESS WITH REGARD TO THE SENTENCING STRUCTURE IN S.1630 BECAUSE THE COMMITTEE DID NOT COMMENSURATELY INCREASE THE PENALTIES FOR OTHER VIOLENT CRIMES. THIS PROVES THAT S.1630 IS NOT A RECODIFICATION BUT INSTEAD IS A MASSIVE LIBERALIZATION OF THE CRIMINAL CODE. THIS LIBERAL PHILOSOPHY CONTINUES TO BE THE DRIVING FORCE BEHIND THE RUSH TO PASS S.1630.

B. DC Act 4-69 repeals DC laws prohibiting sodomy, bestiality, adultery, fornication, seduction, and seduction by a teacher.

S.1630 may be held to repeal bestiality, adultery, fornication, seduction, sodomy, seduction by a teacher, and incest for purposes of federal law if a court determines that "in light of other federal statutes relating to similar conduct," these laws were intended to be excluded from federal law. At the very least, S.1630 would--

reduce the maximum federal penalty for sodomy from twenty years in the District of Columbia to one year;

reduce the maximum federal penalty for bestiality from twenty years in the District of Columbia to one year;

reduce the maximum federal penalty for seduction by a teacher in the District of Columbia from ten years to one year; and

reduce the maximum federal penalty for seduction in the District of Columbia from three years to one year.

B. - continued

S.1630 AS AMENDED AND REPORTED BY THE SENATE JUDICIARY COMMITTEE: CONCEDED IN SECTION 1861 THAT THE ORIGINAL MAXIMUM PENALTY FOR ALL ASSIMILATED CRIMES OF ONE YEAR WAS TOO SOFT BY INCREASING THE PENALTY TO SIX YEARS. HOWEVER, THE COMMITTEE DID NOT DELETE SECTION 1861 (a) (3) WHICH, BASED ON SENATE COMMITTEE REPORT 96-553, PAGE 910, IS INTENDED TO EXCLUDE MANY STATE LAWS NOW ASSIMILATED INTO FEDERAL LAW BY 18USC13. SPECIFICALLY, TO BE EXCLUDED ARE ALL CONSENSUAL SEX CRIMES SUCH AS SODOMY, FORNICATION, ADULTERY, SEDUCTION OF A STUDENT BY A TEACHER, ETC. EVEN THE COMMITTEE AMENDMENT TO INCREASE THE PENALTY TO SIX YEARS IN MANY CASES REDUCES THE MAXIMUM PENALTIES IN CURRENT LAW.

THIS SECTION CREATES A MAJOR INCONSISTENCY WITH SECTION 1513 WHICH FOR THE FIRST TIME ASSIMILATES ALL STATE ELECTION LAW FELONIES AND IN SOME CASES INCREASES THE MAXIMUM PENALTIES OVER THOSE IN CURRENT STATE LAW. SECTION 1861 AND 1513 TAKEN TOGETHER SHOW THAT THERE IS ABSOLUTELY NO CONSISTENT RATIONALE TO S.1630 BECAUSE IN SECTION 1861 YOU DO NOT ASSIMILATE STATE CRIMES NOW ASSIMILATED AND IN SECTION 1513 STATE LAWS NEVER BEFORE ARE ASSIMILATED AND THE STATE PENALTIES ARE INCREASED.

THE CURRENT LAW 18USC13 SHOULD BE RECODIFIED OR AT LEAST SUBSECTION (a) (3) SHOULD BE DELETED FROM SECTION 1861.

C. D.C Act 4-69 leaves the D.C. statutory rape provisions essentially untouched.

S.1630 reduces the maximum federal penalty for statutory rape from thirty years to six years. H.R. 1647, the House counterpart, would reduce that figure to 3 1/3 years. In both bills, the maximum penalty for a rapist under 21 is one year, and there is no penalty at all if the rapist is within three years (five years in the House bill) of the age of the victim.

S.1630 AS AMENDED AND REPORTED BY THE SENATE JUDICIARY COMMITTEE: CONCEDED IN SECTION 1643 BY DELETING THE WORDS "AND WHO IN FACT IS AT LEAST THREE YEARS YOUNGER THAN THE ACTOR" THAT S1630 DID EFFECTIVELY REPEAL THE AGE OF CONSENT. THEY ALSO CONCEDED THAT A ONE YEAR MAXIMUM PENALTY FOR AN ACTOR BETWEEN 18 AND 21 YEARS WAS TOO SOFT AND NOW THE STANDARD PENALTY WILL APPLY TO 18 TO 21 YEAR OLD PERSONS. HOWEVER, THAT STANDARD PENALTY HAS BEEN REDUCED FROM A MAXIMUM OF 15 YEARS (30 FOR A SECOND CONVICTION) IN CURRENT LAW TO SIX YEARS AND FOR THOSE UNDER 18 THE MAXIMUM IS REDUCED TO ONE YEAR.

THE PENALTY REDUCTION AND MASSIVE PENALTY REDUCTION FOR CERTAIN TEENAGERS GIVE A SEMI-OFFICIAL SEAL OF APPROVAL TO TEENAGE SEX WHICH CAUSES BABIES HAVING BABIES, OR AS FORMER HEW SECRETARY CALIFANO HAS CALLED IT, "THE EPIDEMIC OF TEENAGE PREGNANCY IN AMERICA". THE PENALTY SHOULD REMAIN THE SAME FOR EVERYONE CONVICTED OF THIS CRIME. THERE ARE OTHER PROCEDURES IN S1630 TO DEAL WITH YOUTHFUL OFFENDERS.

D. D.C. ACT 4-69 does nothing relating to abortion.

S.1630 creates a new program which would, among other things, provide federally funded abortions to victims of consensual sexual acts.

S.1630 AS AMENDED AND REPORTED BY THE SENATE JUDICIARY COMMITTEE: SLIGHTLY CHANGED THE LANGUAGE IN SECTION 4115 WHICH IS SAID TO NOT INCLUDE PAYMENTS FOR ABORTIONS. HOWEVER, THE COMMITTEE REFUSED TO ADOPT A FLAT OUT PROHIBITION (HYDE TYPE AMENDMENT) TO FUNDING ABORTION. THIS REFUSAL CONVINCES US THAT SECTION 4115 COULD BE INTERPRETED TO ALLOW ABORTION FUNDING AND ONE MEMBER OF THE JUDICIARY COMMITTEE STAFF HAVE IN MEETINGS CONCEDED THAT THIS INTERPRETATION IS A POSSIBILITY. WE CONTINUE TO INSIST ON A FLAT OUT PROHIBITION BE INCLUDED IN SECTION 4115.

F. D.C. Act 4-69 makes it slightly more difficult to prosecute prostitution.

H.R. 1647 repeals the federal prostitution statute. S.1630 would allow federal prosecution for prostitution only if the individual played a pivotal role in a prostitution business.

S1630 AS AMENDED AND REPORTED BY THE SENATE JUDICIARY COMMITTEE: CONDEDES IN SECTION 1843 BY ADDING "ENGAGES IN PROSTITUTION" THAT S1630 AS INTRODUCED WOULD NOT ALLOW PROSECUTION OF INDIVIDUAL PROSTITUTES. HOWEVER, EVEN AS REPORTED, S1630 MAKES PROSECUTION MORE DIFFICULT BECAUSE THE MANN ACT IS REPEALED. S1630 ALSO REDUCES THE MAXIMUM PENALTY FOR INDIVIDUAL PROSTITUTION FROM FIVE YEARS TO ONE.

WE BELIEVE THE CURRENT LAW (MANN ACT) SHOULD BE RECODIFIED IN S1630.

F. D.C. Act 4-69 does nothing to remove federal court jurisdiction over pornography prosecutions.

S.1630 and H.R. 1647 would explicitly remove the jurisdiction of most federal courts to hear cases such as the Memphis Deep Throat prosecution.

S1630 AS AMENDED AND REPORTED BY THE SENATE JUDICIARY COMMITTEE: ENTIRELY CONCEDES THE VALIDITY OF OUR OBJECTIONS BY STRIKING TWO SENTENCES FROM SECTION 3311. THIS IS ONE OF ONLY \_\_\_\_\_ OF OUR OBJECTIONS THAT WAS COMPLETELY ELIMINATED BY ACTION OF THE COMMITTEE.

G. D.C. Act 4-69 does nothing to loosen child pornography laws.

S.1630 reduces maximum penalties for sexually exploiting a child from ten years (fifteen years for the second offense) to six years (twelve years for the second offense). H.R. 1647 would further reduce maximum penalties to 6 2/3 years under any circumstances. In addition, the Senate bill would repeal the prohibition against explicit pictures of the pubic areas of little children.

S1630 AS AMENDED AND REPORTED BY THE SENATE JUDICIARY COMMITTEE: CONCEDES THAT SECTION 1844 DECREASED THE MAXIMUM PENALTY FOR CHILD PORNOGRAPHY BY INCREASING THE MAXIMUM PENALTY IN THE BILL TO 12 YEARS - 2 YEARS MORE THAN PRESENT LAW FOR A FIRST OFFENSE BUT 3 YEARS LESS THAN THE MAXIMUM FOR A SECOND OFFENSE UNDER CURRENT LAW. S1630 AS AMENDED REPEALS THE HIGHER PENALTY FOR A SECOND OFFENSE. WE BELIEVE THAT THE SECOND OFFENSE SHOULD BE PUNISHED AT A MAXIMUM OF EIGHTEEN YEARS (THE SAME RATIO AS IN CURRENT LAW).

H. D.C. Act 4-69 does nothing to loosen obscenity laws.

S.1630 rewrites federal pornography laws to --

repeal prohibitions against mailing or transporting vile objects and substances;

legalize pornography containing explicit representations of defecation;—

repeal explicit prohibitions against mailing or transporting abortifacients;

scale back federal ability to restrict use of the mails to distribute pornography;

limit the reach of federal law to exclude persons taking materials from the mails or from interstate and foreign commerce with the intent to distribute that material; and

repeal the federal prohibition against mailing matter in wrappers or envelopes containing filthy language on the outside.

S1630 AS AMENDED AND REPORTED BY THE SENATE JUDICIARY COMMITTEE: NOW INCLUDES DEFECATION AS PROSCRIBED OBSCENITY. THE COMMITTEE DID NOT CHANGE SECTION 1842 TO PROHIBIT ANY OTHER OF OUR OBJECTIONS TO THE CHANGES IN THE OBSCENITY LAW. UNDER S1630 AS REPORTED FILTHY WORDS CAN BE ON THE OUTSIDE OF WRAPPERS AND ENVELOPES AND ABORTIFACIENTS ARE STILL ABLE TO BE MAILED. AT THE THE LEAST WE WANT A COMPLETE RECODIFICATION OF THE EXISTING ANTI-PORNOGRAPHY LAWS, 18USC 1461-1465.

I. D.C. Act 4-69 would do nothing to repeal the death penalty.

S.1630 and H.R. 1647 would both remove from the federal criminal code itself all references to the death penalty that currently exist.

S1630 AS AMENDED AND REPORTED BY THE SENATE JUDICIARY COMMITTEE:  
EFFECTIVELY REPEALS THE DEATH PENALTY FOR ALL CRIMES, EVEN MURDER  
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IGNORES THE QUESTION OF THE DEATH PENALTY IS FATALLY FLAWED. THE EX-  
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TUTIONALLY VALID MANNER.

City of Washington }  
District of Columbia }

ss:

AFFIDAVIT

I, the undersigned affiant, being duly sworn, say:

1. On November 13, 1981, Deputy Assistant Attorney General Ronald Gainer stated in a meeting in the office of the Chief Counsel of the Senate Judiciary Committee that section 4115 of S. 1630 could be interpreted to provide for abortion funding, notwithstanding a statement in a memorandum prepared by the Justice Department that "the bill now contains no language that could even arguably be construed to authorize the funding of abortions."

2. On November 18, 1981, the Senate Judiciary Committee amended the strikebreaking section of S. 1630 for the purpose of restoring current law. The Justice Department was, to my knowledge, fully cognizant of this change. Notwithstanding this fact, it continued to circulate a statement concerning the previous language which stated in part: "The criticism is wrong. ... S. 1630, therefore, in the course of codifying all the existing federal criminal laws, carries forward only the existing laws pertaining to strikebreaking."

3. On November 13, 1981, in a meeting in the office of the Chief Counsel of the Senate Judiciary Committee with Deputy Assistant Attorney General Ronald Gainer and six other Senate staff members, I raised the possibility that section 1504 of S. 1504 could be interpreted in such a way as to close sexually segregated YWCA's, women's hotels, and single-sex athletic facilities. While denying this intention, committee staff were not able to rebut the assertion, and eventually agreed to explore revised statutory language. In addition, Deputy Assistant Attorney General Ronald Gainer conceded that it was the intention of the bill to extend sex discrimination criminal penalties to cases which are currently covered only by injunctive relief. Notwithstanding these admissions, the Justice Department has not renounced and, to my knowledge, has continued to circulate a document which states: "It is clear that the inclusion of sex discrimination will not confer new rights."

4. In connection with virtually every issue discussed in the Justice Department document, the statements made in the document contradict statements made during negotiations last year and statements made in last year's committee report. Included in these explicit contradictions are (1) statements that penalties for rape, drug trafficking, and statutory rape have to be decreased in order to maintain the current levels of sentencing, (2) a statement that codification of "recklessness" as the generally applicable state of mind reflects existing federal law, and (3) a statement that the new authority for BATF officials does not represent an extension of current law.

Signed Michael E. Hammond  
Michael E. Hammond

Subscribed and sworn  
to before me on Nov 23, 1981

Signed Jay A. Korman

my Commission Expires  
Sept. 14, 1983

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TUTIONALLY VALID MANNER.

## Criticism 1

Criticism: S. 1630 would --

1. Create an abortion funding program in the procedural and technical amendments.

In cases of both rape and statutory rape, a victim could receive "all appropriate and reasonable expenses necessarily incurred for ambulance, hospital, surgical, nursing, dental, prosthetic, and other medical and related professional services related to physical and psychiatric care..." This is boilerplate pro-abortion language, and has been so held to be in Harris v. McRae, 100 S.Ct. 2671, 2684 (1980); Roe v. Casey, 464 F.Supp. 487, 795, 500, 502 (1978); and Preterm v. Dukakis, 591 F.2d 121, 126 (1st Cir. 1979). Proponents of S. 1630 have steadfastly refused to accept a Hyde amendment to this section, claiming that such an addition was not politically feasible.

Response: The quoted language appears in the bill's provisions that would, for the first time in the federal system, create a compensation program for victims of violent federal offenses (see Sections 4111-4115). The program would be funded by fines collected from convicted defendants and would compensate personal injury victims for their medical expenses and for loss of earnings. In an earlier version of the bill, pregnancy was included under the definition of personal injury to cover victims of rape because it was felt that prenatal and postnatal care should be covered for these offenses. S. 1630 differs from the predecessor bill in that it deletes that definition in order to avoid confusion in the area, while still assuring compensation to rape victims for physical injuries that have nothing to do with pregnancy. Consequently, the bill now contains no language that could even arguably be construed to authorize the funding of abortions, and nothing in the cases cited in the criticism could be construed to mean that "personal injury" includes pregnancy.

RESPONSE

TO RESPONSE: The bill provides "all appropriate and reasonable expenses necessarily incurred for ambulance, hospital, surgical, nursing, dental, prosthetic, and other medical and related professional services relating to physical and psychiatric care, including non-medical care and treatment rendered in accordance with a recognized method of healing."

This is boilerplate abortion funding language, as Harris v. McRae 100 S.Ct. 2671, 2684(1980), Roe v. Casey, 464 F.Supp. 487, 495, 500, 502 (1978), and Preterm v. Dukakis, 591 F.2d 121, 126 (1st Cir. 1979), plus a verbal opinion from Professor Charles Rice of Notre Dame Law School, should all indicate.

Although last year's explicit effort to provide abortions was what called this section to our attention, the deletion of the explicit pro-abortion language in no way lessens the fact that the boilerplate just cited unequivocally provides for abortions in both cases of consensual sexual acts, such as statutory rape, and in cases of second trimester rape in which the pregnancy was not promptly reported. Pro-abortionists have predicted a meteoric rise in the reporting of rapes should this type of provision become pervasive.

It is significant that Paul Summitt, formerly of Senator Kennedy's staff, has steadfastly refused to accept the Hyde amendment on this section.

## Criticism 2

Criticism: S. 1630 would --

2. Deny venue for anti-pornography trials such as the Memphis Deep Throat prosecution.

Deep Throat was specifically prosecuted under conspiracy to violate 18 U.S.C. 1461 and 1462. Responding to its distaste for this form of prosecution, the Levi Justice Department added a provision to the recodification which would have denied venue over this case to the Memphis court because a "substantial portion of the conspiracy" did not occur within Memphis. This provision is carried forward in section 3311 of S. 1630.

Response: Cases like "Deep Throat" could still be prosecuted under S. 1630. The criticism is correct only to the degree that S. 1630 provides that a conspiracy to distribute pornographic material is to be prosecuted in the federal district in which the conspiracy was entered into or in any other district in which a substantial portion of the conspiracy occurred (Section 3311(b)). This certainly does not seem unreasonable. The actual distribution of pornographic material, of course, may be prosecuted wherever it occurs (Section 1842).

The venue provision had been added in previous code bills in which the pornography offense was prosecutable in part only if the distribution was also in violation of State law. Since the offense thus required some material connection with the State in which the offense is to be prosecuted, one of the Senators on the Judiciary Committee proposed a corresponding amendment to provide a rough parallel when only a conspiracy to distribute is involved. (It was not the "Levi Justice Department" that made the proposal.) The State law distinction no longer appears in the pornography offense (Section 1842.)

### RESPONSE

TO RESPONSE: The reason for bringing a prosecution under conspiracy to violate obscenity statutes, rather than the obscenity statutes themselves, is that a conspiracy charge allows you to reach the owner of the movie house, the distributor of the material, and the producer of the material. Since none of these are normally physically present in the jurisdiction in which the material is distributed or the movie is shown, a conspiracy charge is the only way a local court can reach the large scale pornography magnates.

Under this section, a Memphis court, or comparable court, has venue over conspiracy to violate an obscenity statute only if a "substantial portion of the conspiracy" occurred within the jurisdiction. Since this burden of proof can never be sustained by a local prosecutor attempting to reach large scale pornography dealers, the liability of pornographers to be prosecuted nationwide would decline precipitously.

This point is reinforced by the fact that community standards where pornography is produced, such as New York, and prosecutorial attitudes in those areas are considerably more lenient than the jurisdictions to which the pornography is ultimately shipped.

The provision in last year's bill conditioning federal prosecutions on violations of state law is nowhere alluded to in this criticism, and it is difficult to understand why the response gratuitously raised the issue.

Criticism 3

Criticism: S. 1630 would -

3. Rewrite the substantive federal anti-pornography laws to--
- (a) repeal prohibitions against mailing or transporting vile objects and substances;
  - (b) legalize pornography containing explicit representations of defecation;
  - (c) repeal explicit prohibitions against mailing or transporting abortifacients;
  - (d) scale back federal ability to restrict use of the mails to distribute pornography;
  - (e) limit the reach of federal law to exclude persons taking materials from the mails or from interstate and foreign commerce with the intent to distribute that material;
  - (f) repeal the federal prohibition against mailing matter in wrappers or envelopes containing filthy language.

It is clear that the right to possess literature, substances (such as gasoline), and communications (such as threats against the life of the President) is not coextensive with the right to mail that literature, those substances, or those communications. This is not to say that the Miller language has never been used to justify dismissal of a prosecution which falls below both the threshold at which the government can prohibit possession of material and the threshold at which the government can prohibit mailing of material.

In addition, the S. 1630 standards are, on their face, more narrow than the Miller standards, seemingly allowing commercial distribution of representations of defecation, for example.

State statutes which have withstood constitutional test, such as the Texas statute, are infinitely preferable to the S. 1630 formulation because (1) they are broadened to cover articles and substances, rather than merely literature, and (2) they more closely track the broader Miller prohibitions against obscene literature.

18 U.S.C. 1463, prohibiting mailing materials in envelopes containing dirty language is almost certainly constitutional, although S. 1630 repeals it without replacing it with any comparable proscriptions.

Response: S. 1630 rewrites the vague and almost incomprehensible pornography provisions of existing law (18 U.S.C. 1461-1465) in as clear and understandable a manner as the controlling case law will permit (Section 1842). The provisions were drafted in close collaboration with the Criminal Division of the Department of Justice for the express purpose of assuring a particularly effective basis for prosecuting large-scale distributors of pornographic material and those who operate beyond the reach of State criminal laws.

With regard to the criticism in 3(a), it is not apparent that there are any prosecutions that could be brought under current law that could not similarly be brought under S. 1630.

With regard to the criticism in 3(b), acts of defecation (and other non-sexually oriented bodily functions) are not set forth in current law, there have been no such prosecutions, there do not appear to have been any referrals for prosecution, and, in short, it appears to be an imagined problem.

With regard to the criticism in 3(c), the existing statutes had been rendered nullities by intervening court decisions, and their continuance would simply perpetuate a fiction.

With regard to the criticism in 3(d), it appears that any distribution or attempted distribution of obscene materials that can be prosecuted under current law can also be prosecuted, often with greater effect in light of the facilitation and solicitation sections (Sections 401(b); 1003), under S. 1630.

With regard to the criticisms in 3(e) and (f), although there may be some theoretical narrowing of current coverage, it seems to be of no practical prosecutorial effect.

RESPONSE

TO RESPONSE: The response concedes that the new statute would not allow prosecutions of pornographic explicitly depicting acts of defecation, prosecution for mailing or transporting abortifacients, prosecution for mailing matter in wrappers or envelopes containing filthy language or suggestive (though not obscene) pictures, or prosecutions of persons taking materials from the mail or from interstate and foreign commerce with the intent to distribute that pornographic material.

With respect to all the foregoing, Summit suggests that they do not regard these issues as serious problems. It is doubtful that any Senator would share the view that these issues are insignificant.

With respect to Summit's allegation that current law does not prohibit explicit representation, respondent has overlooked 18 USC 1462, which prohibits importation or transportation of "any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture, film, paper, letter, writing, print, or other matter of indecent character."

With respect to Summit's allegation that abortifacients can in no way be regulated or prohibited from being sent through the mails, it is absolutely clear that the Food and Drug Administration, for example, could prohibit the distribution of any dangerous abortifacient, even if a blanket prohibition would be unconstitutional.

With respect to the prohibition against mailing vile or obscene materials, it is obvious that 18 USC 1461's prohibition against mailing "every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance" is not incorporated in any way into S.1630's prohibition against material containing "an explicit representation, or a detailed written or verbal description."

These are just a few of the ways in which distribution or attempted distribution of obscene materials that can be prosecuted under current law could not be prosecuted under the proposed draft. Needless to say, if there is a curtailment in the ambit of substantive law, the new facilitation and solicitation sections are absolutely useless in reaching the conduct.

Criticism 4

Criticism: S. 1630 would --

4. Replace the Mann Act prohibitions against interstate transportation of prostitutes with nearly useless provisions requiring proof that the defendant is conducting a prostitution business.

Current law, which has been used by the District of Columbia to enforce its prostitution laws, prohibits knowingly transporting across state lines "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." (18 U.S.C. 2421) S. 1630 would require proof that the defendant played some important role in a "prostitution business."

Response: Contrary to the S. 1630 provisions being "nearly useless," they were developed in coordination with the Organized Crime and Racketeering Section of the Department of Justice, and are designed to be far more effective than existing law.

Current federal statutes dealing with prostitution are generally aimed at penalizing the use of interstate commerce to facilitate prostitution. Because the thrust of these statutes is jurisdictional, rather than substantive, they are defective in failing to reach some major activities of organized crime, e.g., controlling a chain of "call girl" operations or a network of houses of prostitution, in which federal prosecution is plainly appropriate.

Section 1843 of S. 1630 would focus directly on the operation of a prostitution enterprise, aiming primarily at persons responsible for its operation. It would cover anyone who "owns, controls, manages, supervises, directs, finances, procures patrons for, or recruits participants in," any prostitution enterprise (Section 1643(a)). Moreover, it would not be necessary to prove that the defendant played such a role in the business directly, since, under the bill's accomplice liability provision, a person who aids or abets another in conducting a prostitution business would be equally liable (Section 401). In

addition, the bill's criminal solicitation offense, which has no counterpart in existing law, would apply to this offense (Section 1003). In short, the new offense would reach almost everyone with any real involvement in such an enterprise except, as under current law, for the prostitutes. Finally, unlike existing law, it covers those who exploit males for prostitution as well as females. Why anyone would wish to go back to the limited coverage of the existing Mann Act -- reaching only a defendant who "transports" a "woman or girl" (18 U.S.C. 2421), is not apparent.

RESPONSE

TO RESPONSE: Currently, organized criminal activity operating a network of "call girls" could be reached under 18 USC 2421 through 2423 in a case in which only a single instance of transportation could be proved. In an instance in which more than one instance of prostitution transaction is apparent, a racketeering prosecution would lie.

Under the proposed section, the government would have to prove ownership, management, or some other major role in a regular prostitution business before any federal prosecution under section 1843 would lie. Suffice it to say, with the underlying crime more difficult to prove, a racketeering charge would also be considerably more difficult.

In sum, S. 1630 would raise the requirement of a single transportation of a single woman for the purpose of prostitution to a requirement that the individual play a major role in a prostitution business.

Accomplice liability currently exists at common law, and the proposed recodification would add nothing to this. Furthermore, the addition of the ability to reach women "pimps" is so exotic a circumstance that it doesn't begin to compensate for the enhanced difficulty in prosecuting a person who has transported a prostitute, but can not be proven to have had a more extensive involvement in a prostitution business.

Finally, the inchoate offense of "solicitation" is useless if the underlying substantive offense is substantially narrowed. Only someone who solicited a person to own or manage a prostitution business could be prosecuted under this. Current inchoate law, combined with 18 USC 2421, provides much broader coverage than this.

## Criticism 5

Criticism: S. 1630 would --

5. Reduce maximum prison sentences for the most serious classes of opiate traffickers.

Currently, when a schedule I or II narcotic is involved in a case involving narcotics trafficking, the penalty is ordinarily up to fifteen years in prison. A special parole term of at least three years must also be imposed. If the offender has previously been convicted of any felonious violation of the Drug Abuse and Control Act of 1970 or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, and the conviction has become final, the maximum prison sentence is increased to thirty years plus a minimum special parole term of at least six years. In addition, current law contains "dangerous special drug offender" provisions, authorizing the imposition of up to twenty-five years' imprisonment.

Besides repealing the "special dangerous drug offender" provisions, S. 1630 would set maximum drug penalties of twenty-five years under any circumstances and, generally, twelve years for the first offense.

Response: The real penalties to be served by all classes of opiate traffickers are increased by S. 1630, including those for special dangerous drug offenders.

The criticism of the penalty structure totally ignores several fundamental changes made by S. 1630. First, a prison term imposed under S. 1630 will represent the actual time to be served by the defendant (except for a credit of no more than 10 percent of the term for complying with prison rules). There will be no early release on parole -- the Parole Commission is abolished. Second, if the sentencing judge believes that the defendant should be supervised following completion of his term of imprisonment, he can impose a term of supervised release that is similar to the special parole term in that it follows completion of service of any other sentence (Section 2303). (Unlike current law, this term can be imposed for any felony or for multiple misdemeanors, and not just for drug trafficking offenses.) Third, S. 1630 substantially increases the maximum fine levels so that fines for opiate traffickers can more adequately reflect the gain from the offense -- up to \$250,000 for an individual trafficker and \$1 million for an organization (section 2201(b)).

Under current federal law, 21 U.S.C. 841(a), the maximum term of imprisonment that a judge can assure an opiate trafficker will have to serve for a first offense is 5 years (an illusory 15 year sentence with parole eligibility after one third of the term (see 18 U.S.C. 4205(a)). If the offense is a second federal drug offense, the maximum term of imprisonment a judge can assure is 10 years. Under 21 U.S.C. 845, the penalties for an adult selling drugs to a person under the age of 21 appear to be stringent but are not: while a first offender theoretically could receive double the sentence he would otherwise receive and a second offender could receive a triple sentence -- supposedly 30 years and 60 years respectively -- the real sentence the judge can assure is still only 10 years, the time at which the defendant would become eligible for parole (18 U.S.C. 4205(a)).

Under S. 1630, three categories of opiate traffickers could receive maximum terms of imprisonment of 25 years without parole: first, unlike current law, the higher maximum penalty would apply to large-scale traffickers (those trafficking in more than 100 grams of an opiate) even if they had no previous drug convictions; second, the higher penalty would apply to those who sell to a minor; and, third, the higher penalty would apply to a repeat offender, and for the first time previous State or foreign opiate trafficking offenses, as well as federal opiate offenses, would be considered in determining whether the defendant was a repeat offender. All other opiate traffickers could receive a maximum of 12 years in prison compared to an assured 5 years under current law.

The dangerous special drug offender provisions of current law are also largely illusory. In addition to their other defects, they still permit the parole release of a drug trafficker after service of only 8 1/3 years' imprisonment.

#### RESPONSE

TO RESPONSE: The representations of Summitt in connection with this criticism are seriously misleading.

First, Summitt compares the earliest date at which a parole commission could release an offender serving a maximum sentence under current law with the maximum sentence itself in the proposed legislation.

Current law punishes trafficking in a schedule I or schedule II narcotic with fifteen years for the first offense and thirty years for the second offense. Those penalties are increased to thirty and sixty years respectively in the case of a sale to a child. On top of that, the 25 year penalty is authorized in the case of a "special dangerous drug offender." This represents a maximum of 85 years imprisonment for a person selling a small amount of schedule I or II narcotics to a child. Even if the parole commission exercised the maximum possible leniency over this maximum sentence, which it probably would not, the 28 years of actual minimum service, compares favorably with the 25 year maximum penalty contained in S.1630.

Of course, a defendant would not have to receive a maximum sentence under S.1630. In fact, there is a strong possibility that the sentencing commission will set sentencing levels for so-called victimless crimes in accordance with the standards of leniency which have plagued the East coast of the United States.

One final note: in its effort to "recodify current law," S.1630 reduces maximum penalties for 75 crimes, and increases maximum penalties for 53 crimes. Nowhere in the code other than the sections dealing with drugs, pornography, rape, statutory rape, and various "victimless crimes" incorporated by the Assimilative Crimes Act do the drafters of S.1630 seem to feel it necessary to massively contract criminal penalties in order to take account of the revocation of parole. This suggests three things: (1) The sponsors expect the effects of an eastern establishment sentencing commission to more than offset parole changes. (2) The sponsors foresee a high probability that the parole provisions will be deleted in conference, given that the House bill has no such elimination. (3) The sponsors foresee that judges will give lighter sentences to take account of the lack of parole.

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Criticism 6

Criticism: S. 1630 would --

6. Increase penalties for businesses by, on the average, 99,999%.

Criminal fines are raised from the current level of between \$1000 and \$10,000 in most cases to a new level of \$1,000,000 applying only to organizations. Obviously, this increase is not intended to primarily address street crime (or even organized crime), but rather regulatory offenses violated by large corporations. This will fundamentally expand the ability of the government to use criminal law to go after corporations themselves, as opposed to individual officers within corporations responsible for culpable conduct. Unfortunately, the stockholders and consumers who will suffer from this expanded use of criminal law against organizations will, by and large, not be the persons responsible for the criminal violation.

Response: S. 1630 would significantly increase fine levels for all offenses, not just corporate offenses, and for all defendants, not just organizations, Section 2201(b). Fines today are an underused penalty principally because current fine levels, with rare exceptions, are set so low that they are ineffective as a sentencing option (as a proportion of the average income of an individual or organization, present fine levels are far below what they have been during most earlier periods in our nation's history). The increased fine levels under S. 1630 will afford judges greater opportunity to impose sentences that are appropriate and effective under the circumstances of each case. Whether the offense is committed by an individual bank robber, an organized crime enterprise, a corrupt union, or an otherwise respectable corporation, if it calls for a substantial fine, the bill will permit the imposition of such merited punishment.

It should be noted that S. 1630 contains significant safeguards against the levying of excessive fines, including fines against organizations. A ceiling is placed on the

aggregate of multiple fines for convictions arising out of a single course of action (Section 2202(b)), and, in determining the appropriate amount of a fine, the court is directed to consider the size of the organization, the steps it has taken to discipline the responsible individuals or to prevent a recurrence of the offense, and other equitable considerations (Section 2202(a)(1), (4), (5)). Moreover, if a fine is imposed that exceeds the amount specified in the sentencing guidelines applicable to the case, the defendant may appeal the reasonableness of the fine to a court of appeals (Section 3725(a)).

RESPONSE

TO RESPONSE: Attached is the Olin memorandum outlining potential abuses in the massively increased fine schedule contained in S.1630.

Suffice it to say, due to the relative poverty of most muggers, rapists, and bank robbers, massively increased fines of up to \$1 million are virtually meaningless to them. Increased prison sentences would be of value with respect to these types of criminals, but, as has been seen, most prison sentences are reduced rather than increased.

Rather, the principle effective fines, is to bludgeon corporations into accepting lawsuits in which they concede expansive interpretations of agency statutes. It is significant that, for the first time, corporate fines are explicitly set at a level four times as high as fines applicable to individuals committing the same offense.

OLIN CORPORATION PROPOSALS RE  
S. 1722 and H.R. 6915 --  
FEDERAL CRIMINAL CODE

I

CORPORATE LIABILITY FOR ACTIONS OF EMPLOYEES

A. Introduction

Section 402 of S. 1722 and Section 502 of H.R. 6915 make a corporation criminally liable for any criminal conduct by any of its employees, provided only that such conduct

"occurs in the performance of matters within the scope of the agent's employment, or within the scope of the agent's [actual, implied or apparent] 1/ authority, and is intended by the agent to benefit the organization;"

Various authorities are of the view that at least with respect to "specific intent" crimes (as opposed to "regulatory" crimes), only the intent of a director, officer or policy-making official should be imputed to the corporation. The Model Penal Code takes this position in Section 2.07(1)(c). A similar position is taken by Professors LaFare and Scott, Handbook on Criminal Law, at pages 231-234.

Considerable support is to be found in the case law (but not in any U.S. Supreme Court decision) for the general proposition that corporations are criminally responsible for the illegal acts of lower level employees, acting within the scope of their employment, although there are also cases going the other way. However, the case law provides virtually no support for the more specific proposition that the intent required to commit a specific intent crime can be imputed to the corporation from the intent of a lower level employee, regardless of the corporation's diligent efforts to prevent illegal behavior.

Imputing to the corporation the intent of a lower-level employee who supposedly "intended . . . to benefit the organization" is particularly unfair, given the likelihood that the offending employee will maintain, during the investigation and trial, that his actions were intended to benefit his employer. When committing the offense, however, personal advancement may well have been the dominant motivation. In any event, senior management probably did not desire the dubious benefits that might flow from illegal conduct.

Corporations have been known to voluntarily report illegal conduct by their employees to the authorities. Under such circumstances, prosecution of the corporation is all the more inappropriate. Allowing a corporation to defend against criminal liability on the ground that it exercised due diligence to prevent the offense would not render the corporation immune from adverse consequences of its employees' actions. Under many circumstances a government agency could seek civil penalties; and if third parties were damaged, they presumably have a cause of action.

Congress should not enact broad criminal statutes on the assumption that prosecutors will use sound "prosecutorial discretion" in their application. There are prosecutors who are youthful, politically ambitious, hostile toward "big business," and not averse to the publicity which flows from the indictment of a well-known corporation.

C. The Proposal

Olin proposes that as to crimes requiring criminal intent, the intent of an employee who is not a senior executive (director, officer or policy-making official) not be imputed to the corporation under the following circumstances:

- (a) the offense violated written company policy;
- (b) the corporation made reasonable efforts to disseminate such policy, and the offender was informed of the policy;
- (c) the corporation took reasonable steps to determine compliance with its policy;
- (d) the offending employee was not acting under instructions from, or with the knowledge of, a senior executive;
- (e) the illegal conduct was promptly terminated upon coming to the attention of a senior executive; and
- (f) the corporation took appropriate disciplinary action against the offender.<sup>2/</sup>

The above proposal is not inconsistent with present case law.

II  
SENTENCING

Under existing law, the maximum fine for most felonies is fixed at not more than \$10,000. Section 3502 of H.R. 6915 and Section 2201 of S. 1722 provide that, except as otherwise provided by act of Congress, the maximum felony fine shall be \$1,000,000 for an organization and \$250,000 for an individual. With respect to environmental offenses, each day represents a

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<sup>2/</sup> A similar proposal is contained in Developments in the Law of Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harvard L. Rev. 1227, 1257-1258 (1979).

separate violation. For purposes of prosecutions for submission of false information to the government, each document containing a false statement represents a separate violation.

Indictments with 20 or 50 counts are not uncommon. Indictments with over 100 counts are not unknown. Often, the number of counts is determined more or less arbitrarily by the prosecutor. At \$1,000,000 per count, a corporate defendant would face an enormous exposure, further aggravated by the fact that such fines are not deductible for income tax purposes. Several years may well elapse between the commencement of an investigation and final judgment. During this period, it may well be necessary for the corporation to disclose this exposure in its financial statements or otherwise, hampering its normal operations by raising serious questions about the financial condition of the company.

Among the purposes of the code, as set forth in Section 4301 of H.R. 6915, are "certainty in sentencing" and "eliminating unwarranted disparity in sentencing." The hundred-fold increase in the maximum fine is a major step in the opposite direction, giving the trial judge much greater discretion as to the sentence and even further reducing certainty. Moreover, since the judge cannot be involved in the plea bargaining process under federal procedure, a corporate defendant is faced with a serious dilemma. Assuming the prosecutor were willing to settle for a guilty plea to just one count of a felony indictment, a corporation accepting that offer would expose itself to a fine of \$1,000,000. If, on the other hand, the corporate defendant elects to stand trial on a multi-count indictment, it may ultimately be fined a much greater amount, which could cripple the corporation and perhaps result in its insolvency. Of course, the amount of the fine is the

...the smaller the company, the greater the dilemma.

With respect to imprisonment, Section 2301 of S. 1722 provides that the maximum sentence for a Class E felony is two years imprisonment as opposed to a maximum sentence of life imprisonment for a Class A felony and twenty years for a Class B felony. Similarly, Section 3702 of H.R. 6915 provides that the maximum sentence for a Class E felony is 18 months imprisonment as opposed to a maximum sentence of life imprisonment for a Class A felony and 160 months imprisonment for a class B felony. No comparable gradations are made with respect to maximum fines.

Section 4302(c)(1) of H.R. 6915 provides some limited comfort, in that it states that the sentencing guidelines for payment of a fine shall

"take into consideration the need to avoid unreasonable aggregation of fines imposed with respect to two or more convictions that (i) are based on the same conduct; and (ii) arise from the same criminal episode."

But how much aggregation is "unreasonable"?

The draftsmen consider the present level of fines too low. They are seeking fines which are "economically realistic," which will be more punitive, and which, in their judgment, will have a greater deterrent effect. They must be aware that the typical corporate defendant is not an Exxon or a General Motors. We question whether they really intend to expose a corporation to fines in the many millions, even for a Class E felony. The wording of Section 4302(c)(1) quoted above suggests otherwise. In any event, we urge that the code state clearly in Section 3502 or 4302 of H.R. 6915 that the \$1,000,000 limit shall

apply to "a series of related offenses which arise out of the same transaction or constitute part of a common scheme," regardless of the number of counts. In the alternative, the \$1,000,000 limit should be drastically reduced.

It should be borne in mind that a felony conviction is likely to have grave collateral consequences for a corporation. Depending on the situation, these may include (a) proceedings by federal agencies seeking civil penalties; (b) suspension of export privileges; (c) debarment from obtaining government contracts; (d) damage actions by shareholders and others; (e) in the case of a munitions manufacturer, the loss of U.S. Treasury licenses required to do business; and (f) extensive adverse publicity. It should also be remembered that the persons ultimately bearing the brunt of the burden are the corporation's shareholders, who typically are totally innocent of wrongdoing.

It has been suggested that the present level of fines are not an adequate deterrent to a corporation, that many corporations would regard such fines simply as "the cost of doing business." Such an attitude would be extraordinary. In our view, businessmen are as moral as their fellow citizens in other walks of life. The cost of defending a corporation in a criminal action is likely to be very high, in terms of management effort as well as counsel fees. In addition, the collateral consequences listed above, of which adverse publicity is not the least important, represent strong deterrents to criminal conduct. Finally, one or more employees generally would be subject to

prosecution for the same criminal acts that provide the basis for prosecuting the corporation. This is an exposure not to be taken lightly by the individuals or the corporation.

Peter H. Kaskell  
Vice President - Legal Affairs

Gordon E. Wood  
Director - Washington Office

May 16, 1980

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Criticism 7

Criticism: S. 1630 would --

7. Lower the maximum penalty for rape from death or life imprisonment to twelve years maximum.

Response: The penalty for rape is effectively increased, not decreased. Moreover the offense under S. 1630 is otherwise considerably improved over current law from a law enforcement standpoint. Among other improvements, for the first time the offense would cover violent homosexual rapes -- a particular problem in prisons.

The criticism of the penalty totally ignores two of the most fundamental changes introduced by S. 1630. First, the bill, as noted earlier, requires that the sentence imposed by the judge be the sentence served, with no early release on parole. Second, the bill introduces the concept of permitting the prosecutor to add separate charges for each aggravated form of serious offenses -- for example, a rape in which the victim is severely beaten would be prosecuted under both a rape charge and an aggravated battery or maiming charge, and the combined penalty for the two separate offenses would provide the maximum penalty applicable to the case.

Under the federal law today, the maximum sentence of imprisonment that a judge can assure that a rapist will have to serve for even the more serious forms of rape is 10 years (the illusory life term provided for the offense (18 U.S.C. 2031), as modified by the parole provision that provides eligibility for early release on parole after a defendant has served 10 years of a "life" sentence (18 U.S.C. 4205(a)). Under S. 1630, the maximum sentence of imprisonment that a judge can assure a rapist will have to serve is 12 years, even for a simple rape -- two years more than current law (Section 1641(b), 2301(b)(3)).

More important, though, are the higher penalties assigned for aggravated forms of rape under S. 1630. Under current law, even the more severe forms of rape all carry the same maximum assured prison time -- 10 years. Only if an aggravated rape includes one of several particular forms of maiming can the 10

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years of imprisonment be significantly increased under current law -- but only to a total of 12 1/3 years of assured imprisonment (see 18 U.S.C. 114, 4205). Even if a rape victim is killed, the current law maximum assured imprisonment is only 20 years (see 18 U.S.C. 1111, 4205(a)). Under S. 1630, on the contrary, the assured 12 years imprisonment is increased to 13 years if the victim receives only a slight additional injury; to 18 years if the victim is injured to the extent of unconsciousness, extreme pain, or protracted injury; to 24 years if the victim suffers permanent physical or mental injury; and to the remainder of the criminal's life (since there would be no parole) if the victim is killed (see Sections 1601(a)(3), (d); 1611; 1612; 1613; 1641; 2301(b)). One simple message can get through to rapists and other criminals upon passage of S. 1630 -- under the new federal law "the worse the crime the more severe the penalty."

Other offenses commonly associated with rapes will also increase the maximum penalty under S. 1630. Frequently victims of rape crimes are kidnapped. In such instances under S. 1630, life imprisonment (without parole) would apply if, prior to trial, the rapist does not release the victim alive and in a safe place, or voluntarily cause the discovery of the victim alive. (Section 1621(b)). Similarly, the cumulative effect of an "unaggravated" rape-kidnaping would be a maximum term of 37 years (without parole). Rape in the course of a burglary -- also a common situation -- would carry a combined penalty of 24 years imprisonment (again, of course, without parole).

In summary, then, the S. 1630 penalties for rape permit significantly longer assured terms of imprisonment than current law, and, more importantly, provide step by step increases in the penalty for each increasingly aggravated circumstance under which a rape takes place.

RESPONSE

TO RESPONSE: The question of sentencing has already been discussed in greater detail in connection with point five.

Suffice it to say that

- (1) a simple bill to repeal parole applicable to current sentences would not receive the opposition of any conservatives;
- (2) with the exception of certain contempt of court-related statutes, only one provision in this bill experiences a drop in maximum penalties as severe as the drop in the maximum penalty for rape;
- (3) the sentencing commission is expected to reduce the bill's maximum sentence even further as part of the same permissive attitude toward sexual assault which has led to the severe drop in the maximum penalties;

- (4) parole boards do not automatically release prisoners simply because they are eligible for parole;
- (5) the absolute maximum sentence for rape under S.1630 would be roughly equivalent to the earliest point at which a parole board could release a defendant serving the maximum sentence under current law;
- (6) under current law, rapists can also be prosecuted for assault, kidnapping, etc.; and
- (7) a rape under current law resulting in death can statutorily be punished by the death penalty-- a sentence more severe than anything Summitt can claim for S.1630.

## Criticism 8

Criticism: S. 1630 would --

8. Remove the intraspousal immunity for rape.

--> S. 1630 thereby codifies the statute under which Rideout was prosecuted in Oregon. In that case, as a result of a rapproachment, the defendant was sleeping with his wife during or shortly after being prosecuted for the same conduct. When force is involved, an assault or battery charge is always available to deal with the conduct.

Response: The allegation is correct. The rape section of S. 1630 would cover forcible rape between husband and wife as well as between strangers, but would not cover other kinds of sexual conduct between husband and wife.

RESPONSE

TO RESPONSE: Conceded

## Criticism 9

Criticism: S. 1630 would --

9. Reduce the maximum statutory rape penalties from fifteen years (thirty years for the second offense) to six years (one year if the defendant is under 21, even if the victim is only three or four years old).

In addition, no prosecution would lie at all if the actors were within three years of one another. This provision stirred so much controversy in connection with the D.C. sexual assault law that the City Council was forced to delete it..

Finally, it reverses common law by extricating the defendant if he "believed, and had substantial reason to believe" that the person of "of age," whether she was actually "of age" or not.

Response: The criticism is wrong in part, seriously misleading in part, and correct in part. (Incidentally, the offense under state law and existing federal law involves "consensual" sexual behavior with a young person under circumstances in which it appears appropriate that the law step in to void the person's consent. The offense is called "carnal knowledge" under current federal law and "sexual abuse of a minor" under S. 1630, since many citizens seem to have a misperception of the meaning of the slang term "statutory rape.")

The criticism is wrong in stating that a maximum six year penalty would apply "even if the victim is only three or four years old." Under S. 1630, any sexual act, consensual or non-consensual, with a child less than 12 is treated as forcible rape, and carries the penalty for that offense (Section 1641(a)(3)).

The criticism is misleading in suggesting that the maximum penalty for such child seduction is significantly reduced. In the usual case, involving a defendant who is twenty-one years old or older, the maximum penalty the judge can assure is six years (Sections 1643(c)(1), 2301(b)(4)), while under current law the maximum the judge may assure is five years (the illusory fifteen

year sentence under 18 U.S.C. 2032, with parole eligibility after a maximum of five years under 18 U.S.C. 4205(a)). (A person convicted under the same federal statute twice would be eligible for parole after ten years under current law.) Significantly, the criticism fails completely to recognize that the S. 1630 offense closes a tremendous loophole in current law with regard to a form of the offense that carries far more serious personal and social repercussions -- homosexual seduction of a minor. The current law protects only young females; this offense in S. 1630, like the other sex offenses, is gender-neutral in referring to the participants.

The criticism is correct in that no prosecution would lie if the offense involved only consensual sexual activity between two teenagers whose ages were within three years of each other. Since S. 1630 takes the major step of extending protection to young males as well as females, without the distinction both teenagers would be liable for a federal criminal offense, and there would be no rational basis for deciding which should be prosecuted and which is the victim. There is a serious question whether it is appropriate to interpose the criminal laws in a situation in which either party might be viewed as the victim.

Finally, the criticism is accurate to the extent that it points out the existence of a defense under S. 1630 if the defendant "believed, and had substantial reason to believe, that the other person was sixteen years old or older."

#### RESPONSE

#### TO RESPONSE:

Contrary to Summitt's assertions, a second offender under current law could be punished with a maximum sentence of thirty years. Even assuming the parole commission releases the person at the earliest possible opportunity, there would still be a guaranteed ten year prison sentence. Under S.1630, the maximum sentence would be six years.

Homosexual seduction of a minor can currently be covered in most cases by the assimilative crime statute, 18 USC 13. In the District of Columbia, this would create a maximum prison sentence of 20 years, which would be reduced to six years by this legislation.

Summitt concedes that S.1630 would make the "age differential changes" which made D.C. Act 4-69 so controversial as to require their removal prior to passage.

In comparing this section to the section in D.C. Act 4-69, it was stated correctly that the lower penalties in the statutory rape offense itself apply even if the victim is a three or four year old child. It was not meant to imply that this conduct could not be prosecuted under other provisions of the law.

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Criticism 10

Criticism: S. 1630 would --

10. Reduce maximum penalties for sexually exploiting a child from ten years (fifteen years for the second offense) ~~to~~ six years (twelve years for the second offense).

In addition, it would reduce the coverage of prohibitions against abusing minors to allow pictures of their pubic areas or acts simulating intercourse, bestiality, sodomy, etc. Prosecution of the former could not occur at federal law. Prosecution of the latter would have to occur under the lower penalty of section 1842 (Disseminating Obscene Material).

Response: The criticism again takes considerable license with the reality of criminal penalties. Under current law, the maximum penalty a judge can assure for a first offense is 3 1/3 years of imprisonment and a fine of \$10,000 (18 U.S.C. 2251 - 2253, 4205(a)). Under the comparable provision of S. 1630, the maximum penalty the judge can assure for a first offense is 6 years imprisonment and a fine of \$250,000 (\$1,000,000 if a pornographic enterprise -- such as the motion picture company -- is a defendant) (Sections 1844, 2201(b), 2301(b)(3), (4)). The maximum assurable penalty for a second offense is five years under current law, and twelve years under S. 1630.

Contrary to the criticism, federal coverage of sexual exploitation of minors would not be reduced, nor is it intended to be reduced. Pictures of pubic areas are specifically covered by the reference to "genital organ" in Section 1844(b)(3). All of the simulated sexual acts referred to in the criticism are, as noted, prosecutable under Section 1842, but, contrary to the criticism, the same six year penalty would apply because the case involves a minor (Section 1842(d)(1)).

RESPONSE

TO RESPONSE: Sentencing maximums are discussed at length in connection with points five and seven.

With respect to the question of whether the ambit of the child pornography statute is contracted or not, suffice it to say that an explicit depiction of a "genital organ" is not the same as an explicit depiction of "pubic areas," particularly in the case of a little girl.

Criticism 11

Criticism: S. 1630 would --

11. Codify the Enmons case insulating unions from prosecution under the Hobbs Act.

The insertion of the word "wrongful" under section 1722(c)(2) specifically recodifies the language under which United States v. Enmons, 410 U.S. 396 (1973), was decided. That case held that the federal government could not prosecute under the Hobbs Act for an incident of union violence involving the destruction of a transformer.

Response: S. 1630 carries forward the existing reach of the court-developed rules applicable to labor unions, while engaged in collective bargaining, from application under the principal federal extortion statute as it might otherwise apply to extortionate demands made in connection with collective bargaining (the Hobbs Act, 18 U.S.C. 1951). This approach was taken by the primary sponsors of the bill in order to avoid an admittedly controversial attempt to change current law that should be addressed by separate legislation.

RESPONSE

TO RESPONSE: Conceded.

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Criticism 12

Criticism: S. 1630 would --

12. Expand the jurisdiction of the controversial Bureau of Alcohol, Tobacco, and Firearms.

S. 1630 would extend to BATF inspectors, IRS inspectors, and officers or employees of the Office of Inspector General in the Department of Labor newly created authority to make arrests without warrants with respect to any offense, whether or not within their jurisdiction and whether or not the unlawful activity was discovered "in respect to the performance of (their) duty." It would also extend their authority to encompass enforcement of any type of order and "perform(ance of) any other law enforcement duty that the Secretary ... may designate."

Response: The criticism erroneously assumes that federal law enforcement officers under current law may not arrest for offenses other than those for which they have specific statutory arrest authority. While federal statutes frequently grant officers arrest authority for specific offenses, the statutes do not preclude arrest authority for other offenses. The case law makes clear that, even without specific statutory authority, a federal law enforcement officer may arrest for any offense committed in his presence, and he may arrest for a felony if he has probable cause to believe the person arrested has committed or is committing the felony. See, e.g., U.S. v. Cangelose, 230 F. Supp. 544, 550 (N.D. Iowa 1964); U.S. v. Viale, 312 F.2d 595 (2d Cir. 1963).

To draw strict lines between law enforcement agencies that would preclude a law enforcement officer from making such arrests would be a serious mistake. Officers from several federal agencies frequently work together to investigate organized crime activity. It would seriously hamper such activities if, for example, officers from BATF, IRS, FBI, and DEA were investigating a group for narcotics trafficking, trafficking in obscene materials, supplying machine guns to its members, and evading taxes on its income from these activities, and each officer could

effect an arrest only for an offense under the jurisdiction of his own particular agency. Similarly, if a BATF agent were investigating street trafficking in handguns, he should be able to make an arrest for narcotics trafficking in his presence without taking the chance that the trafficker would disappear while the agent waited for a DEA agent to arrive to make the arrest.

The provisions of subchapter C of chapter 30 in S. 1630 merely codify, using uniform language, the arrest authority of federal law enforcement officers. The officers would remain under the direction of the head of their respective agencies, and the head of the agency could delegate to them such law enforcement functions as the agency had.

RESPONSE

TO RESPONSE:

First, a BATF agent witnessing narcotics trafficking in his presence would be able to make a citizen's arrest of the narcotics trafficker. Thus, the ridiculous examples used for the purpose of trying to achieve massively expanded jurisdiction for a very controversial agency are simple not applicable.

Second, there is no provision in the boilerplate allowing the Secretary to delegate "any other law enforcement duties that the Secretary of the Treasury may designate" which would limit those delegations to powers already delegated the Bureau. In fact, this language is in addition to an explicit restatement of all the powers that BATF has.

The argument that BATF inspectors currently have the authority to arrest for non BATF crimes without a warrant is explicitly contradicted by last year's committee report, which states:

Under subsection (b) of section 3021, these agents are granted the authority to carry a firearm, execute warrants and other federal process, make arrests, ... the limitations contained in current law on internal (sic) investigators' arrest powers without a warrant and the lack of authority for internal revenue criminal investigators to carry weapons, are deleted, first because the committee wishes to achieve uniformity among the major Federal law enforcement agents as to their basic authority and powers, and, second, because the Committee has been informed that internal revenue criminal investigations are required in the course of their duties...

Criticism 13

Criticism: S. 1630 would --

13. Extensively expand federal proscriptions against legitimate corporate anti-strike activities.

Current law prohibits transporting a strikebreaker across state lines. There have been no prosecutions under current law for strikebreaking, as 18 U.S.C. 1231 requires the strikebreaker to be employed for the purpose of obstructing peaceful pickets and then transported across a state line. The new provision contained in section 1506 of S. 1630 would allow the prosecution of any employee who interferes with a peaceful picket, even though the picket was unlawfully trespassing on company property, so long as the employee crossed a state line at some point. Hence, security guards and plant managers would fall within the provision's ambit.

Response: The criticism is wrong. It is based on a mistake as to the scope of current law. 18 U.S.C. 1231 in fact penalizes:

"Whoever willfully transports in interstate or foreign commerce any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with (1) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor, or (2) the exercise by employees of any of the rights of self-organization or collective bargaining; or

"Whoever is knowingly transported or travels in interstate or foreign commerce for any of the purposes enumerated in this section . . . ."

The author of the criticism was apparently aware of only the first paragraph of 18 U.S.C. 1231.

S. 1630, therefore, in the course of codifying all the existing federal criminal laws, carries forward only the existing laws pertaining to strikebreaking. Moreover, it is clear under S. 1630 that an employee is not covered simply because he "crossed a state line at some point"; he must have moved across a state line "in the commission of the offense" (Section 1506(c)). There has been no suggestion of any reason for a broadening of those laws.

RESPONSE

TO RESPONSE: The response is wrong. The example which was originally cited will demonstrate the error of its ways:

A plant manager flies from Detroit to Kansas City in order to supervise a General Motors response to a strike. Pursuant to that plant manager's instructions, a peaceful but unlawful picket is evicted from the plant property.

The plant manager could not be prosecuted under current law, paragraph one, because he is not "employed for the purpose of obstructing or interfering by force or threats with (strike-related activities)." He could not be prosecuted under the second paragraph because he was not "knowingly transported... in interstate or foreign commerce for (the purpose of strike-related activities)." Rather, he traveled across state lines in order to supervise the reaction to a strike. Incidental to this activity, he interfered with a peaceful but unlawful picket trespassing on plant property.

Under S.1630, that person could be prosecuted because he "by force or threat of force, ...intentionally obstructs or interferes with...peaceful picketing," notwithstanding the fact that he did not travel across interstate lines for that purpose.

This has been repeatedly explained to Summitt, who obdurately refuses to understand this elementary concept.

Criticism 14

Criticism: S. 1630 would --

14. Strip the criminal code itself of all death penalty provisions which currently exist.

It is a fallacy to believe that the Supreme Court has held the death penalty unconstitutional with respect to any offense but rape. Rather, the constitutional references to the death penalty currently contained in 18 U.S.C. require a procedural mechanism for constitutionally implementing them. By repealing the death penalty entirely with respect to every offense but one which is continued outside the criminal code (espionage), we are at least sending a strong symbolic message. In addition, we may be making it strategically and practically more difficult to bring the death penalty back.

Response: S. 1630 continues the one federal death penalty provision that meets announced constitutional standards -- the penalty for murder in the course of an aircraft hijacking (49 U.S.C. 1472). The Supreme Court some years ago effectively repealed the death penalty previously provided for 12 other federal offenses, and pursuant to agreement among the sponsors of S. 1630 a bill to provide a constitutionally supportable death penalty in these areas has been introduced for separate consideration. That bill (S. 114) has already been reported by the Senate Judiciary Committee.

RESPONSE

TO RESPONSE: Summitt's response is a fallacy. The death penalty was not repealed. Rather, the court required the implementation of a constitutional mechanism for carrying it out. What Summitt's bill does is repeal all references to the death penalty contained in the criminal code itself. As Summitt knows, the separate free-standing death penalty bill, S. 114, will be killed in the House.

Criticism 15

Criticism: S. 1630 would --

15. Set the stage for massive new civil penalties to enforce regulatory offenses.

Under section 1802, General Motors could be convicted of racketeering if it committed two or more securities violations. Because section 4101 provides for a new private action involving treble damages against anyone who, by a preponderance of the evidence, can be shown to have engaged in racketeering, we will have effectively created a new treble damage remedy for securities offenses. Also, the Attorney General can bring a civil action to restrain racketeering under section 4011, and the decision of the court will be binding on the subsequent court trying the private treble damage action.

Response: The criticism is wrong from beginning to end. The provisions are not new, nor do they have the effects alleged.

These provisions have been in the law for 11 years; they were part of title X of the Organized Crime Control Act of 1970, and now appear as 18 U.S.C. 1961-1968. S. 1630 contains no "new civil penalties," no "new private action," and no "new treble damage remedy." The provision defining a "pattern of racketeering activity" to include a series of acts involving securities fraud (Section 1806(e), (f)(1)) appears in current 18 U.S.C. 1961(1)(D). The provision referring to a private civil action (Section 4101) appears in current 18 U.S.C. 1964(c). The provisions referring to a civil action by the Attorney General (Section 4011-4013) appear in current 18 U.S.C. 1964(b), 1965-1968. Moreover, under neither the bill nor current law could any enterprise, illegal or legal, be convicted of racketeering without proof beyond a reasonable doubt that, among other things, it was engaging in a continuing pattern of illegal activities that are not isolated events (see Section 1806(e); 18 U.S.C. 1961(5)). Finally, the decision in any civil action initiated by the Attorney General is not binding on a court subsequently trying a private damage action; only a prior criminal conviction has such an effect under the bill and under current law (Section 4011(d); 18 U.S.C. 1964(d)).

RESPONSE

- TO RESPONSE:
- (1) Summit concedes all the assertions, but questions whether any of the provisions are new.
  - (2) Concerning Summit's implication that two securities offenses would not be enough to invoke racketeering liability because they do not constitute a "continuing pattern of illegal activities."

## Criticism 16

Criticism: S. 1630 would --

16. For the first time, create a general principle of federal criminal law that a businessman is held liable for his unintentional conduct, even if he believes that the facts are such that he is acting in accordance with the law.

Suffice it to say, this new provision has little to do with mugging, robbery, and burglary, which are seldom done unintentionally. Rather, it is designed to establish a new business responsibility for eliciting facts needed to insure that he is not inadvertently violating one of the myriad regulatory offenses.

Response: This criticism misperceives existing federal law concerning the states of mind necessary for criminal liability, as well as the plain effect of the Code provisions, which are similar to the provisions included in most modern State codes.

Under S. 1630, as under existing law, in certain circumstances a person can be held criminally liable for the results of his conduct even if those results are unintended and notwithstanding his belief that he is acting in accordance with the law. For example, the unintentional killing of another constitutes manslaughter if death occurs as a result of gross recklessness and negligent homicide if it occurs as a result of gross negligence; and a person's belief that it is not an offense to rob a bank in order to support his family does not absolve him of criminal liability.

The criticism is also erroneous in its implication that S. 1630 creates a new obligation on the part of a businessman to inquire whether his conduct violates some regulatory provision. Under Section 303(a)(2), the state of mind required for proof of a regulatory offense is to be determined, not by the provisions of S. 1630, but by the provisions of the statute establishing the regulatory offense. In other words, whether an unintentional regulatory violation is criminal will continue to depend on how the offense is defined under current law.

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RESPONSE

TO RESPONSE: A legal brief on current law with respect to states of mind is attached.

(B) Section 303 (Proof of State of Mind): This section lays down a general rule of criminal liability for reckless commission which is applicable to all crimes, unless the crime specifies to the contrary.

(i) Mr. Shapiro admits that the House version, requiring scienter as a general rule, is preferable to the Senate language, and he hopes for adoption of the House language in conference. There is almost no chance that the House language would prevail in a conference led by Kennedy, Biden, Rodino, and Drinan.

(ii) Steering Committee staff has been at the forefront of negotiations to remove securities and other business offenses from the general rule embodied by section 303. Nevertheless, the inconsistencies created by this patchwork approach create an inherently unstable legal rubric which will invariably be caved in by succeeding Congresses. Eventually, someone will point out that a reckless actor can be sent to prison for selling a fraudulently obtained widget under section 1733, but not a fraudulently obtained security under section 1761. Like any logical contradiction in the law, it will not take long for this one to be ended. Section 303 is surely only intended to be "a foot in the door."

(iii) The existence of section 303 will have unintended and far-reaching effects on how courts look at statutes outside the criminal code, even when those statutes are not technically covered by section 303. Within the past two weeks, the Senate Energy Committee has passed a new-law making it

a Class B misdemeanor to disobey a Bureau of Land Management rule. No state of mind requirement is specified, but a Class A misdemeanor already in existence makes violations of BLM rules unlawful if committed "willfully and knowingly." With section 303 enacted as a general principle of law, there is little doubt that "recklessness" will be read into the new statute, even if the final version of S. 1722 does not technically apply to it.

(iv) The definitions of the requisite states of mind (contained in section 302) are extremely slippery. An actor does not have to "know" something to act with a "knowing" state of mind. If he "believes" (i.e., surmises that there is a greater than 50% chance) that a fact is true, then he "knows" it to be true under section 302. "Recklessness" therefore necessarily covers a situation in which the actor believes he is complying with the law.

(v) In the memorandum attached to the Senator's April 4 letter, sections 1301 (Obstructing a Govt Function by Fraud), 1412 (Trafficking in Smuggled Property), 1413 (Receiving Smuggled Property), 1732 (Trafficking in Stolen Property), and 1733 (Receiving Stolen Property) were intended to illustrate how a reckless state of mind has been inserted into statutes which currently clearly require knowledge with respect to all aspects of the offense. These are intended as samples of dozens of sections in the Code newly invoking a recklessness standard. While these sections may separately have a relatively small impact on business, their collective impact will almost invariably lead to an increased number of convictions of businessmen, particularly small businessmen.

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Criticism 17

Criticism: S. 1630 would --

17. Allow the Attorney General to seize all of a company's earnings from a product if he can prove, by a preponderance of the evidence, that the company has failed to make a statement in its advertising which is derogatory of its product but necessary to clarify the other advertising representations which it made.

There is no requirement under these provisions that the Attorney General demonstrate a factual misstatement of fact on the part of the company in connection with any of the statements requiring "clarification." In addition, any property used for the manufacture of the product or "possessed in the course of" the manufacture of the product could be seized.

Response: This criticism is apparently aimed at Section 1734 (Executing a Fraudulent Scheme) and Section 4001 (Civil Forfeiture of Property). The former section carries forward the fraud provisions of 18 U.S.C. 1341 and 1343. Under the latter section, the Attorney General can obtain the forfeiture of certain property used, intended for use, or possessed in the course of a variety of criminal offenses ranging from counterfeiting to disseminating pornography to fraud.

Under Section 1734, a company would not be criminally liable and subject to the forfeiture provision merely because it failed to "clarify" a misleading representation in its advertising. A criminal conviction could be had only if the failure to "clarify" were accompanied by an intent to execute a scheme or artifice to defraud or to obtain property of another by means of false or fraudulent pretense, representation, or promise -- just as is the case under current 18 U.S.C. 1341 and 1343.

Under Section 4001, even in a case involving active fraud not all property related to the execution of the fraudulent scheme is subject to forfeiture, but only property consisting of the proceeds of the scheme or an instrumentality used to carry it out and designed primarily for that purpose (Section 4001(a)(12)).

RESPONSE

TO RESPONSE:

The fundamental change is that, for the first time, the conduct constituting "consumer fraud" and, by implication, the scienter required in the intent requirement, is nothing more than "a failure to state a fact necessary to avoid making a statement misleading." What this deals with, of course, is a technically true statement which a judge subsequently finds fails to tell the whole story.

Contrary to Summitt's statement, current law contains no provision extending the definition of "fraud" for purposes of 18 USC 1341 and 1343 to "failure to state a fact necessary to avoid making a statement misleading."

Under expansive principles of interpretation which have already been applied in other parts of federal law, a company which runs technically true advertisements could be prosecuted and could have seized any property "used in, and designed to render it primarily useful for, the execution of the scheme or artifice." For a company engaging in an advertising campaign concerning its only product, this represents all the company's assets.

Criticism: S. 1630 would --

18. Repeal a major portion of the Hatch Act, while only reinserting bits and pieces of the Act.

Response: S. 1630 neither repeals nor cuts back the Hatch Act. Rather, in Section 1514 it carries forward the Hatch Act's essential purpose of de-politicizing the granting or withdrawal of federal benefits by making it an offense to grant, withhold, or deprive any person of the benefit of a federal program with intent to influence that person in the exercise of his vote. Other major Hatch Act prohibitions, aimed at protecting federal public servants from misuse of political influence, are preserved in Sections 1515 and 1516. A close reading of those sections makes it clear that the current Hatch Act provisions being carried forward are made more effective, not less so. All remaining Hatch Act provisions -- those of an essentially regulatory nature -- are moved intact to title 18 Appendix where other regulatory provisions also appear (see S. 1630 page 339).

RESPONSE

TO RESPONSE: The Mayberry memo examining this issue in more detail is attached.

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September 3, 1980

Mr. John Charles Houston  
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Dear John:

In response to your August 28, 1980 letter, I submit the following comments in regards to the pending Senate bill affecting the political rights of government employees and other persons receiving government benefits.

Senate Bill - Offenses Involving Political Rights

The Senate bill substantially amends the criminal law provisions of Chapter 29, Volume 18, of the U.S. Code pertaining to Elections and Political Activities by persons involved with the federal government. Presently, Sections 600 and 601 broadly protect against the politicization of the bureaucracy. Specifically, the direct or indirect, actual or threatened, promise or deprivation of any government benefit on account of any political activity is prohibited under the pain of a criminal penalty. This provision would appear to proscribe virtually any kind of political action directed towards a government employee, or other persons covered under Chapter 29, as welfare recipients.

1. Removal Of General Protections

The Senate bill would remove this blanket protection and specify the exact types of activities which would be impermissible. This approach would perforate the present statute, and render it less effective in preventing political abuse within government. Only a broadly worded law can effectively limit indirect coercion. The multitude of human responses possible in the employment relationship in bringing political pressures are only limited by one's imagination.

For example, general political discussion by a supervisor concerning a candidate surely conveys that person's political preferences and expectations concerning employee's assistance. Thus, a strong likelihood exists that provisions of the Senate bill could be circumvented, and the primary purpose of protecting government workers from political coercion frustrated.

In place of Sections 600 and 601, and other provisions in the statute, are Sections 1511-13 concerning obstructing an election, registration, or political campaign; Sections 1514-16 concerning interfering with federal benefits or misuse of authority for political purposes, and Sections 1517-18 concerning soliciting and making campaign contributions. Several specific types of interference in regard to registration and voting would be unlawful; giving or taking of anything of value, including a government benefit as a quid pro quo for voting preference. Moreover, manipulation of employment status predicated upon the making of political contributions is partially regulated, and is discussed in Section 3 of this letter.

## 2. Underdefining the Term "Anything of Value"

The provision in regards to interference with the election process, Sections 1511-13, prohibit a government employee from providing "anything of value" to interfere with a person's prerogative in registering to vote or voting. The term "anything of value" is not defined, except to exclude "nonpartisan physical activities or services to facilitate registration or voting." See Section 1518(a). This definition is less inclusive than that in the Federal Election Campaign Act of 1971, as amended.

The Campaign Act specifies types of political influence (i.e. a contribution) to include a "gift, subscription, loan, advance, or deposit of money, or anything of value." 11 CFR Sec. 100.7(a)(1). "Anything of value" includes "in-kind contributions," as goods or services without charge or under fair market value. Types of goods or services include facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists. 11 CFR Sec. 100.7(a)(iii). Explicitly excluded from the definition of "anything of value" is the value of volunteer time, and, to a maximum of \$3,000, volunteer related expenses, as with the use of real or personal property.

The definition of "anything of value" in the Senate bill was either poorly drafted or left intentionally vague. It is unclear whether in-kind gifts are covered. Unlike the

Campaign Act definition, there is an unlimited exemption for "nonpartisan physical activities or services to facilitate registration or voting." The term "physical" activities is meaningless (what are non-physical activities?), and use of the term "facilitation" of registration and voting is a "wide-open door" for abuse involving compelled volunteerism. This provision expressly legitimitizes the act of an employee requesting that another employee volunteer his time in partisan political activities.

The impact of eliminating general Sections 600 and 601 prohibitions pertaining to general political activity, coupled with the vague wording of "anyting of value" surely would not lead to the depoliticizing of the government, and reveals a strong pro-labor bias in the legislation.

Labor organizations have a ready-made political base with members. Public sector labor leaders on the job site may be able to coerce members into donating their time, and personal promises for so-called nonpartisan registration or voting activities. During the last presidential election, private sector labor expended millions of dollars for such activities on behalf of President Carter. Moreover, districts with large numbers of union members in which close congressional races were anticipated, were targeted for nonpartisan registration and get-out-the-vote drives. Getting the voters to the polls in an otherwise apathetic election year, meant control of these elections. These devises may now become open for the public sector labor union's use at the site of employment.

This problem is especially acute with the growth of powerful public sector unions at a time when members are dissatisfied with management's proposals for wage increases. Therefore, the potential for abuse surpasses political coercion of the worker, and reaches at the heart of government. Union leaders could gain control of government through the use of the political leverage they have with their members, which may determine who is elected to govern. Present government leaders realize this, and may modify their public policy positions to suit the interests of one group over the public welfare.

3. Intermediate Status For Fundraising

Section 602 of the present law strictly prohibits political fundraising by government employees from other government employees. It is noteworthy that members of Congress may not solicit their staff, and this section was stricken from the

proposed law. Section 603 precludes solicitation on government property; Sections 604 and 605 prevent solicitation of welfare recipients or disclosure of the welfare rolls; Section 605 generally stops any type of intimidation to secure political contributions; and Section 607 makes the act of contributing to a fellow government worker a crime.

The Senate bill generally maintains the proscription against solicitation, but abrogates the provisions against collection of unsolicited contributions. A government official still may not use his authority to affect employment status (as to promote or not promote an employee) on the basis of the giving of not giving of a political contribution. However, because of the power one employee has over another, a "fine line" is drawn between soliciting voluntary contributions, which is unlawful, and collecting unsolicited contributions, which is lawful in the Senate bill.

The definitional section of the Senate bill, 1518(d), permits fundraising by government employees by excluding such activities from the meaning of "receiving a political contribution." This provision permits employees to act as a conduit for political contributions, provided a two-prong test is met. The contribution must be "received by mail" and "promptly transferred to a campaign depository." Herein lies a tremendous potential for abuse.

It is extremely unlikely that an unsolicited contribution would be mailed unless it was requested. How would such a person know of this fundraising possibility, unless he was informed. When does dissemination of such information turn into an actual solicitation? I would submit that the inherent inequities of an employment situation, one person having power over job assignments, promotions, salary levels, etc., and in the bestowal of government benefits, lead to the situation that informing a person that he may lawfully mail political contributions is more likely than not tantamount to an actual solicitation. Thus, a new reservoir of campaign contributions would be created - at the expense of unprotected workers. The disclosure of this intermediary function, as required by the Campaign Act, would not obviate the potential for misuse or abuse.

\* \* \*

The Senate bill has not been artfully drafted. The

vagueness resulting would raise serious constitutional questions should anyone be prosecuted under it. The practical effect would be an "opening of the door" to new political practices by government workers and recipients of government benefits. On a day-to-day basis, certain government employees will tell colleagues of a "liberalizing" of the criminal provisions which will affect such persons political activities. Partisan pressures; subtle and otherwise, will be the result. I predict the Department of Justice would have no better of a track record in discovering, and prosecuting offenders under the Senate bill than under the present law.

It may be worthwhile to present written or oral testimony concerning the ramifications of the Senate bill before the Judiciary Committee in both houses of Congress. Proposed recommendations may include:

- 1) Retention of the general Sections 600 and 601 prohibitions,
- 2) Tracking the definitional section from the relevant provisions of the Campaign Act when the same words of art are used, and
- 3) Using more accurately drawn statutory language in general.

If I can be of further assistance, or if you have any questions concerning this opinion letter, please do not hesitate to call me.

Sincerely yours,

*Richard Mayberry*

H. Richard Mayberry, Jr.

## Criticism 19

Criticism: S. 1630 would --

19. Overturn the Barlow case prohibiting warrantless inspections by OSHA in cases in which a plant guard blocks the entry of an inspector conducting an unlawful inspection.

So long as the inspector can prove he is acting in "good faith" (the "clean heart-empty head standard"), the guard can exercise no more resistance against the inspector than a murderer could exercise against a policeman who witnessed the murder.

Response: S. 1630 would not, and is plainly not intended to, overturn the Barlow decision. That case merely required a warrant for the inspection of private business facilities; it did not purport to sanction the use of force to eject a federal inspector who enters upon business premises without a warrant. Section 1302, to which the criticism is addressed, simply adopts a provision -- common to most modern state codes -- stating that physically interfering with government functions is a misdemeanor. In so doing, however, the section improves considerably upon current law in accommodating the concern that seems to underly the criticism: it provides a new defense to a charge of physically obstructing a government inspector if the inspector was acting unlawfully and the interference was reasonably necessary to protect a person or property in the defendant's custody or possession (Section 1302(b)(3)). Contrary to the assertion in the criticism, the inspector's good faith would have absolutely no bearing on the availability of the defense.

RESPONSETO RESPONSE:

A memorandum of law is attached. Summitt has implicitly conceded that this criticism was well taken, and has added a new provision creating a defense in the case of an unlawful inspection. Unfortunately, this defense is so full of loopholes as to be functionally useless. The most serious loophole is a requirement that the person exercising the resistance have custody or possession of the person or property which is being protected. In the case of the plant guard cited in the example, this is probably not the case. At the very least, Summitt is setting the stage for years of litigation on this point.

Section 1302 (Obstructing a Government Function by Physical Interference); Mr. Shapiro states that section 1302 "should not significantly alter the consequences of the Barlow decision because of either an overriding constitutional right or an OSHA inspector's inability to establish good faith when he has no warrant."

Regarding the first assertion, it is absolutely clear that the constitutionality of the search and the ability of the victim of the unconstitutional search to resist are two separate questions. In People v. Briggs, 19 N.Y.2d 37, 224 N.E.2d 93 (1966), the New York Court of Appeals held that a defendant was not privileged to use force to resist an unlawful arrest by a state trooper where the officer held an arrest warrant, even though the warrant was insufficient in law.

Carrying it a step further, it is obvious that a person is not privileged to kill a police officer conducting an unconstitutional search of his home. Furthermore, the Model Penal Code recognizes the ability of the legislature to prescribe by statute the limits of resistance to unconstitutional or unlawful activity.

In the hypothetical case cited in the memorandum, an OSHA inspector, operating with "clean heart and empty head," seeks to conduct a warrantless search of a factory or office. In my opinion, a company could not forcibly prevent him from conducting that search, if he chose to ignore the company's request that he not do so.

This is because section 1302 not only codifies for the first time in federal law a general criminal statute prohibiting "impairment by force or threat of force of) a government function ... involving ... the performance by an inspector of a specific duty imposed by a statute, or by a regulation, rule, or order." In addition, it provides that an adequate defense must establish both that the inspection was unlawful and that the inspector was not acting in good faith.

The Roundtable's counsel on this issue has conceded that my hypothetical is "a close question."

The government could easily overcome the "force or threat of force" threshold if the business went any further than to request that the inspection not be conducted.

As for good faith, the test is met by an inspector operating with a "clean heart and an empty head." Every office and store in America could photocopy the Barlow case, as Mr. Post has suggested; and presumably this would render any inspection "in bad faith." But in view of the fact that inspectors do not tend to clear their activities with the corporate board room or the company's general counsel, this would be something of an impractical precaution. And it would not provide any relief for a company resisting an inspector with a constitutionally overbroad subpoena, which, given the complex state of the law in that area, would almost necessarily be in good faith.

Mr. Post appears to feel the Senator overstates his case when he says that section 1302 "overrules" Barlow. In making that statement, the Senator considered three questions:

(1) Would Barlow have gone to prison if section 1302 had been in effect at the time of his inspection, and if he had persisted in resisting the inspector?

(2) Would section 1302 allow substantial numbers of inspectors to conduct warrantless searches without facing any lawful threat of resistance at the plant gate?

(3) Should Barlow mean something more than an after-the-fact remedy against an unconstitutional search which a company is powerless to prevent?

Anyone answering these three questions in the affirmative would be forced to conclude that Barlow has in fact been effectively overruled.

Criticism 20

Criticism: S. 1630 would --

20. Massively expand the jurisdiction of federal officers on Western lands.

Response: S. 1630 would not "massively expand" the jurisdiction of federal officers on Western lands. The United States Government owns about one-third the land in the United States, but has no criminal jurisdiction over about 90 percent of this area, which is subject to exclusive state jurisdiction. The States, however, frequently do not have sufficient resources to police these federal lands. Federal officers have the same arrest authority for State offenses on these lands as private citizens have, but this arrest authority varies substantially from State to State.

In order to permit state and local authorities to more effectively utilize federal resources to assist them in appropriate instances, S. 1630 in Section 3031 provides that federal law enforcement officers authorized to make federal arrests may make arrests for State or local law violations if they are authorized to do so by the State or local government. Upon making such an arrest on behalf of a State or local government, the federal officer must promptly take the arrested person before the nearest State or local judge.

RESPONSE

TO RESPONSE: Summitt concedes the portion of the point which he understands.

There is no program massively expanding federal jurisdiction in which the states are required to accept the monies or services. Rather, federal jurisdiction has grown in every instance by expanding the federal government's ability to get involved in an area state regulation, and giving the States an opportunity to accept or reject that encroachment.

In addition, various substantive offenses, such as section 1703 and 1823, also contain serious extensions.

## Criticism 21

Criticism: S. 1630 would --

21. Require a businessman to sequester his own records on behalf of a government agency, at a point long before any agency action had been brought against him, if he determined that the record would be useful to the agency if such a proceeding were ever brought.

Response: It is unclear whether this criticism is directed to Section 1325 (Tampering with Physical Evidence) or to Section 1345 (Failing to Keep a Government Record), or to both. In any event, the criticism is without merit.

Section 1325 would carry forward the provisions of current law (18 U.S.C. 1503 and 1505) that prohibit the destruction or alteration of records with a specific intent to impair their availability in an official proceeding before they can be made the subject of a search warrant or a subpoena. Unlike present law, this section would extend to instances in which an official proceeding was not actually pending at the time when the records were destroyed, but there must be proof beyond a reasonable doubt that the defendant knew, at the time that he destroyed the records, that the proceeding was likely to be instituted, as well as proof that the records were destroyed for the purpose of making them unavailable in the proceeding. Thus an embezzler who, upon learning a shortage has been discovered, alters some records or erases a computer tape with the intent to thwart any ensuing investigation, will be subject to the section. At the suggestion of the business community, a special subsection was added to provide that disposing of a record pursuant to a destruction program (in the ordinary course of business) gives rise to a presumption that the destruction was not with any improper intent (Section 1325(b)).

Section 1345 is part of a package of provisions designed to reach fraud and corruption that involves waste of taxpayer's monies. It would prohibit an individual from fraudulently failing to maintain a record required by law to be kept by a State agency or an organization as a condition of receiving a federal contract, loan, or other form of benefit. The provision

will protect taxpayers by facilitating prosecution of persons who fraudulently convert federal program funds and then "cover their tracks" by deliberately, and with fraudulent intent, failing to keep adequate records as required by the program. In such a case, even though the offender succeeds in preventing prosecution for the underlying felony, he will still be subject to misdemeanor punishment for fraudulent conduct aimed at concealing his theft. The key to this offense is, of course, the defendant's state of mind; he must have an intent to defraud.

RESPONSE

TO RESPONSE: Attached are copies of 18 USC 1503 and 1505. The reader can compare this to Section 1325 and decide for himself whether the S. 1630 provision has any precedent in current law.

It is significant to note that, whatever conviction under section 1325 might require, it does not require--

that official proceeding to which material might be of interest to as imminent;

that the proceeding to which the material might be of interest ever occur;

that the record bears on the guilt or innocence of any party or is even material to the proceeding;

that the material represents anything more than something which might be embarrassing to the corporation or might reveal trade secrets;

that the agency had a right to the material;

that the material could have been constitutionally required to be produced;

that the document was within the regulatory or adjudicatory authority of the agency.

A memorandum of law is also attached.

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending, having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 770; Sept. 19, 1962, Pub.L. 87-664, § 6(a), 76 Stat. 551.

(E) Section 1325 (Tampering with Physical Evidence):  
Mr. Shapiro has covered some, but not all of the problems  
with this section. Current law with regard to agency  
authority over company records is embodied in 18 U.S.C.  
1505:

...  
Whoever, with intent to avoid, evade, prevent,  
or obstruct compliance in whole or in part with any  
civil investigative demand duly and properly made  
under the Antitrust Civil Process Act willfully removes  
from any place, conceals, destroys, mutilates, alters,  
or by other means falsifies any documentary material  
which is the subject of such demand... (s)hall be  
fined not more than \$5,000 or imprisoned not more  
than five years, or both.

No case has been called to our attention which would hold  
a person liable for evasion of an investigative demand which  
has not been made (let alone a proceeding which has not been  
initiated), and the clear language of the statute would seem  
to contradict such an interpretation. The result of the  
extension would be that, even before an agency has brought  
charges against a company, a businessman coming across a  
document which might be of interest to that agency if  
charges were brought would be forced to sequester that  
record on behalf of that agency.

Criticism 22

Criticism: S. 1630 would --

22. Overturn the result in Friedman v. United States, 374 F.2d 363 (1967), thereby allowing prosecutions of businessmen for misleading oral statements to an agency with no regulatory or adjudicatory power over the area in which the misstatement is made.

Response: In the Friedman case, the Court of Appeals for the Eighth Circuit held that an oral false statement to the FBI was not covered by the general false statement statute in existing law (18 U.S.C. 1001) because the court construed the statute to cover only false statements made to agencies with regulatory or adjudicative jurisdiction. The Friedman interpretation of the current statute has been rejected by every other federal court of appeals to consider the question. (See, e.g., United States v. Adler, 380 F.2d 917 (1967)) and implicitly by the Supreme Court (see Bryson v. United States, 396 U.S. 64, 70-71 (1969)). S. 1630 follows the approach of the latter cases (Section 1343).

The majority approach represented by the Adler case certainly appears to be the more reasonable one, particularly if -- as is required by Section 1343 but not by current law -- the person making the false statement must know that it is made to a law enforcement officer or a noncriminal investigator and must either volunteer the statement or make it after being warned that making such a statement is an offense. It should be noted that this provision would not penalize the making of a merely misleading or unintentionally false statement; it would reach only a statement that the maker knows to be false.

RESPONSE

TO RESPONSE:

I cite one case in support of my statement of current law. Summitt cites one relevant case and one irrelevant case. This seems like a Mexican standoff.

## Criticism 23

Criticism: S. 1630 would --

23. Write the word "sex" into the criminal penalties for all of the federal civil rights laws, without specifying that "sex" does not mean "sexual preference" or creating a clear defense for a person operating a sexually segregated hotel or athletic facility or making an employment decision on the basis of sex which may or may not be in violation of Title VII of the Civil Rights Act.

Response: Section 1504 carries forward the provisions of 18 U.S.C. 245 that make it an offense to use force or threat of force to injure or intimidate a person attempting to exercise specified civil rights, if the injury or intimidation is prompted because of the person's race, color, religion, or national origin -- and to this existing list of characteristics it adds sex. It adds it in a separate paragraph, however, in a manner that makes it clear that the inclusion of sex discrimination will not confer new rights; it will simply penalize the use of physical force to interfere with the exercise of existing rights. Accordingly, there is no reason for a special defense of the nature suggested in the criticism -- there is no offense absent discrimination in contravention of currently protected rights.

It is clear under existing law that the word "sex" does not mean "sexual preference." See DeSantis v. Pacific Telephone and Telegraph Co., Inc., 608 F.2d 327, 329-30 (9th Cir. 1979) (the prohibition in title VII of the Civil Rights Act "applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.")

RESPONSE

TO RESPONSE: Last year, Senator McClure's staff finally got the Department of Justice to admit that S.1722 language would have criminalized YWCAs, men's or women's public schools and colleges, women's hotels, women's athletic facilities, segregated dangerous work sites with only men, etc., because, using a bouncer, locked door, or any other contrivance to keep men or women out would be "by force or threat of force (bouncer, locked door, etc.)...intentionally...interfer(ing) with (such) person... because of such...person's...sex...in order to intimidate (such) person from...applying for, participating in, or enjoying...employment, ...a public school or public college,... an inn, hotel, motel,...or (any) other place of exhibition or entertainment that serves the public."

After DOJ failed to point out any language that would prevent this interpretation, it promised to remedy the situation.

This year's language is even worse:

- (1) For some reason, "force or threat of force" has been removed from the definition of sex discrimination.
- (2) It is not clear whether the ambiguous language contained in S.1630 ("in violaion of such other person's right not to be subject to discrimination on that account") would be interpreted by a court as an expansive new declaration of sexual rights or as a condition under which criminal penalties could be imposed. If the former, that problem in and of itself would make this the worst bill of the decade.

On the question of gay rights, the Supreme Court has not ruled. Neither has the radical D.C. Circuit Court of Appeals. It is clear that a litigative effort to establish that "sex" means "sexual preference" will be made at the earliest possible moment. We find it particularly unnerving that Summitt is steadfastly unwilling to statutorily exclude "sexual preference" from the definition of "sex," given that he is so adamant in declaring that this is the current law.

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Criticism 24

Criticism: S. 1630 would --

24. Specifically create statutory remedies whereby a court could order corporations convicted of certain regulatory offenses to notify their customers to sue them. —

Response: S. 1630 contains a provision (Section 2005) that will permit a judge, during the sentencing process, to require a defendant (whether an individual, corporation, labor union, or other entity) convicted of criminal fraud to give notice of the conviction to the victims of the offense (who, in cases involving large-scale frauds, may not all be known to anyone other than the defendant) in order to facilitate any private actions that may be warranted for recovery of losses. Without such a provision, many victims of major fraud schemes may not become aware of the fraud (e.g., that the mining stock they purchased is counterfeit) until it is too late to seek restitution, or may not be able to ascertain the perpetrator's whereabouts (e.g., a "fly-by-night" roofing operation). A limitation is placed upon a defendant's obligation if notice would require undue expense. Moreover, it is quite clear that a court today could accomplish the same result as a condition of probation.

RESPONSE

TO RESPONSE: This expressly contradicts the committee report of the last two years. The 1979 report stated:

There are no provisions of the current federal law requiring an offender to give notice of his conviction to his victims. There is, however, an analogous concept contained in present statutes that require motor vehicle and tire manufactures to notify the Secretary of Transportation of defects in their products and permit the Secretary to disclose those defects to the public (15 USC 1402(d)). The extension of the concept to the area of criminal law was proposed by the national commission.

Criticism 25

Criticism: S. 1630 would --

25. Allow all of a company's assets to be forfeited to the federal government because it engaged in a payment to a foreign official which was not considered unlawful or inappropriate in the country in which it was made.

Response: Section 4001 permits the Attorney General to institute a civil action to obtain the forfeiture of property used in connection with certain criminal offenses under the Code. One such offense is commercial bribery (Section 1751), an offense that, among other provisions, includes by cross-reference payments to foreign officials in violation of the existing Foreign Corrupt Practices Act. Contrary to the assertion in the criticism, however, no conviction for commercial bribery could result in forfeiture of "all of a company's assets." Section 401(a)(18) plainly limits forfeiture to property "given or received in violation of" the bribery statute. In other words, only the value of the bribe itself would be subject to forfeiture.

RESPONSE

TO RESPONSE: Summit perceives only one of two possible vehicles under which a company could be proceeded against under the commercial bribery statute. A company charged with more than one violation of section 1751 could also be regarded as a "racket," with all of the attendant consequences of that definition.