U.S. to Support States In Regulating Abortions

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, July 28 — The Justice Department plans to file a brief in the Supreme Court Thursday supporting the power of state and local governments to regulate abortions to some extent without prohibiting them.

The brief as a friend of the court will mark a significant departure because, according to legal experts, it will be the first time the department has filed a brief in the Court concerning an abortion case in which the Federal Government is not a party and no Federal law is involved.

The brief will not take a position on the constitutionality of each of the specific abortion regulations the Court is considering in five separate appeals, according to lawyers close to the case. But it will generally argue that states and localities should be able to regulate abortions where they have sufficiently good reasons.

Janet Benshoof, a lawyer for the American Civil Liberties Union working on one of the cases, was quick to assail the Justice Department's position as "supporting infringement of the constitutional right to abortion," even though the department's position has not yet been disclosed in detail.

Use of Department Assailed

"The Reagan Administration is using the Justice Department as a public relations arm, not as an independent, legal branch of Government, and when they can't get right-to-life legislation through Congress they want to appease the right-to-lifers by having the Justice Department do something for them," she said.

Rex E. Lee, the Solicitor General, whose office handles litigation in the Supreme Court for the Justice Department, would neither confirm nor deny that he planned to file a brief in the abortion cases.

But Miss Benshoof said that one of Mr. Lee's deputies, Kenneth S. Geller, had told her that a brief supporting to a limited extent the positions of the state and local governments on abortion regulations would be filed by Thursday.

Mr. Geller did not deny this, but declined to discuss the brief.

Laws in Three States

The abortion regulations being challenged before the Court range from hospitalization requirements and 24-hour waiting periods to parental consent requirements. They involve laws in Missouri and Virginia and in Akron, Ohio. In 1978 Akron enacted an ordinance designed to provide a national model for local restrictions on abortion.

The Akron ordinance requires, among other things, that a doctor warn the patient before performing an abortion that it could "result in severe emotional disturbances," and tell her that "the unborn child is a human life from the moment of conception."

The Court agreed in May to review the five appeals and set them for argument in the term that begins in October.

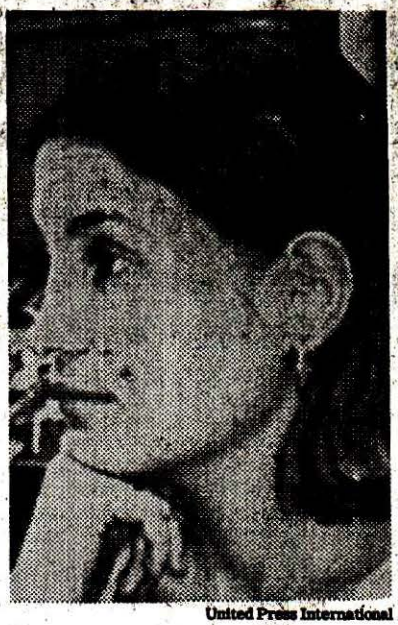
The cases could be an important test of governmental power to limit the constitutional rights of women to have abortions, which the Supreme Court first declared in 1973. President Reagan has urged Congress to ban abortions altogether.

The state and local laws now before the Court would not prohibit abortions. But abortion rights groups, medical groups and others argue that these laws violate the Supreme Court's precedents, which prohibit regulation of abortion in the first trimester of pregnancy, and which strictly limit such regulation in the last trimesters.

The pending cases do not involve efforts to overrule Roe v. Wade, the principal 1973 decision legalizing abortion, but rather to impose restrictions that make abortions more difficult to obtain than other medical procedures or to discourage abortions.

The American Civil Liberties Union and others plan to urge the Court to strike down the restrictions as impermissible burdens on the exercise of a fundamental constitutional right, as it has in the past invalidated procedural impediments set up by the states.

The Court has also indicated, however, that teen-age girls may in some circumstances be required to obtain the consent of their parents or of a judge before having an abortion.



United Press International

Janet Benshoof, American Civil Liberties Union attorney.

E.P.

By P
Spe

WASHIN
ronmental
proposed
that new c
potential dar
ronment befo

Under the
ries that the
risk new che
or partly exe
that they be s
review at le
tion begins.

The low-ris
those produc
the agency
year or less
molecular c
chemicals u
other chemic

The agenc
emptions wo
1,000 chemic
But environm
70 percent o
exempt if the

No Actio

The chang
out the Tox
would not ne
The agency
the propose
and then a
lished and t

John A.
Assistant A
and Toxic
policy "will
sources on
cern and
that new
commerce
risks."

Environm
that the ne
probability
would be i

Ed HARPER SAID THAT
CICCONI told him
that EM concurred
in this brief

F: ABORTION

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

January 20, 1983

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN
WILLIAM P. BARR

SUBJECT: Guidance on the President's Meeting with Pro-Life Groups Tomorrow (Friday, January 21)

Tomorrow, January 21, is the tenth anniversary of the Supreme Court's decision in Roe v. Wade. As you know, the President is meeting with a broad coalition of pro-life groups under the auspices of OPL. Morton Blackwell has prepared a background paper and talking points for the meeting; we have reviewed them, and they are fine.

The President's position should be essentially what it was toward the end of last Congress:

- The President supports a broad range of measures that would restrict abortion.
- The President believes the time for action is now.
- The President will actively assist efforts by pro-life Congressmen to achieve concrete gains this Congress.

The President must be very careful not to appear as if he is using disunity in the movement as an excuse for inaction. In the first place, the disunity is highly exaggerated at this stage; everyone in the movement is desperate for some victory. Moreover, a number of groups are poised to blast the President if he adopts this posture. To underscore this, the Catholic bishops group within the past week or so have circulated a memorandum throughout the grassroots, reviewing the 97th Congress and stating that the President was all too willing to use movement disunity as an excuse for inaction. Not only will the President be castigated, but by adopting this posture, he would lose any influence over events and be forced to act in unfavorable legislative contexts over which he has no effective control.

During the 98th Congress, we should use quiet behind-the-scenes leadership to help orchestrate the development of pro-life initiatives. Both the pro-life movement and this Administration are in desperate need of a victory in this area. Therefore, at least initially, we should encourage small-scale initiatives that will likely garner majority support, such as federal fund cut-offs and fetal experimentation bans.

If, after getting a victory or two under our belt, we have sufficiently laid the groundwork for a more direct attack on abortion, we can be involved in selecting the time, place, and most promising vehicle.

10 JUN 1982

DOCUMENT NO. 072384 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 6/9/82 ACTION/CONCURRENCE/COMMENT DUE BY: OPEN

SUBJECT: Should We Participate in Supreme Court Abortion Cases

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BAUER	☐	☐	OFFICE OF POLICY INFORMATION		
BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	OTHER		
FAIRBANKS	☐	☐	✓ Edwin Meese III	☒	☐
FERRARA	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
MALOLEY	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
UHLMANN	☐	☐	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

Remarks:

Please return this tracking sheet with your response.

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

THE WHITE HOUSE
WASHINGTON

Procedural Note to Ken Cribb:

Ken:

We have attached two formats for Mr. Meese to choose from, one formal and the other less formal.

Please select the one you prefer.

Could you also have a copy of the signed, presuming that one is signed, memo to us for our files.

Maybe we can avoid a Steven's situation. Thanks for all your help.

Emily
EMILY H. ROCK

THE WHITE HOUSE

WASHINGTON

June 9, 1982

MEMORANDUM FOR EDWIN MEESE III

FROM: EDWIN L. HARPER

SUBJECT: Should We Participate in Supreme Court Abortion Cases

Attached is a memorandum from Gary Bauer suggesting that you ask the Attorney General to consider the Administration's intervening in one of the abortion cases which the Supreme Court has taken up. The point of intervening would be to express our belief that the Supreme Court made a mistake in 1973 and abridged a basic federalism concept when overnight it struck down 50 different state laws that had been passed to deal with the abortion issue. In the abortion case dealing with Akron vs. Akron Center for Reproductive Health, the the courts are compounding the 1973 error by not permitting a home rule city to regulate the "hows" and "whens" of abortion within its own jurisdiction.

This could have a positive effect both with our constituency groups interested in the subject of abortion as well as those interested in the basic principle of federalism.

RECOMMENDATION:

That you sign and send the attached memorandum to the Attorney General.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 2, 1982

FOR: EDWIN L. HARPER

FROM: GARY L. BAUER GLB

SUBJECT: Administration Participation in Supreme Court Abortion Cases

The decision by the Supreme Court to hear a group of cases related to the abortion issue in the fall term presents the Administration with an opportunity.

The cases the Court has agreed to hear involve efforts by states and localities to regulate the performance of abortions within their jurisdictions. None of the cases involve efforts to prevent an abortion from taking place. Rather, they involve such things as a requirement that the abortion be performed in a hospital rather than a clinic and that the patient be informed of possible physical consequences of an abortion.

One of the cases arises out of a dispute in Akron, Ohio, a strongly Democratic area that currently has a Republican Mayor -- Roy L. Ray. Akron is currently suffering from economic problems and the city has mixed emotions about being chosen as a test case on a major issue like abortion. If the city loses the case before the Supreme Court, it will pay somewhere between $125,000 and $200,000 in legal fees. (The ACLU has asked for $125,000.) Given the current economic situation, this would be a severe blow to the city fathers.

Although we are not a party to the case, we could file an amicus brief commenting on the issues. The theme in such a brief could be federalism. In it we would argue that the Supreme Court made a mistake in 1973 when it overnight struck down the 50 different state laws that had been passed to deal with abortion in each of the jurisdictions. Having made that mistake, the federal courts are compounding it by not permitting a home rule city such as Akron to regulate the "hows" and "whens" of abortion within its own jurisdiction.

No matter what the court decides, we will have taken a position right-to-life advocates will applaud. If the Court decides in favor of Akron, we will have made friends in a Democratic city in an important industrialized state.

Recommendation: I recommend that we ask the Attorney General's office to take a preliminary look at what options we might have in filing such a brief, likely time frame and other factors. Given the sensitivity of the issue and the need to decide without being pressured from the various interest groups, I suggest the request to the Attorney General come directly from Edwin Meese.

cc: Roger Porter
Michael Uhlmann
Bill Barr

MEMORANDUM

THE WHITE HOUSE

WASHINGTON
June 9, 1982

FOR: WILLIAM FRENCH SMITH
United States Attorney General

FROM: EDWIN MEESE III
Counsellor to the President

SUBJECT: Supreme Court Abortion Cases

As you know, the Supreme Court has agreed to hear several abortion related cases in its fall term. These cases involve efforts by state and local communities to regulate the conditions under which abortions can be performed within their jurisdiction.

It has been suggested that it might be appropriate for the Administration to file an amicus brief in one or more of these cases. Of particular interest is Akron v. Akron Center for Reproductive Health.

Such a brief could argue that the Court was wrong in 1973 to try to set a national policy on such a sensitive issue. Second, the brief could contend that, given Roe v. Wade, the courts should allow the widest latitude possible to state and local communities in regulating abortions.

Could your office take a preliminary look at what options we have in entering this case and let me know the time frame we face as well as other factors, including your opinion of the pros and cons of our involvement? I would like a preliminary recommendation by July 1.

THE WHITE HOUSE

WASHINGTON

June 9, 1982

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: Supreme Court Abortion Cases

As you know, the Supreme Court has agreed to hear several abortion related cases in its fall term. These cases involve efforts by state and local communities to regulate the conditions under which abortions can be performed within their jurisdiction.

It has been suggested that it might be appropriate for the Administration to file an amicus brief in one or more of these cases. Of particular interest is Akron v. Akron Center for Reproductive Health.

Such a brief could argue that the Court was wrong in 1973 to try to set a national policy on such a sensitive issue. Second, the brief could contend that, given Roe v. Wade, the courts should allow the widest latitude possible to state and local communities in regulating abortions.

Could your office take a preliminary look at what options we have in entering this case and let me know the time frame we face as well as other factors, including your opinion of the pros and cons of our involvement? I would like a preliminary recommendation by July 1.

EDWIN MEESE III
Counsellor to the President

Briefing Paper

Health and Human Services (HHS)
Final Rule on Provision of Abortion ✓
Services by the Indian Health Service

Public Law 83-568 (enacted August 5, 1954) provided for the assumption of the responsibility for Indian health care by the Secretary of Health, Education and Welfare. The Continuing Appropriations Act (P.L. 97-51) permits use of HHS appropriations to fund abortion services only in cases where the life of the mother would be endangered if the fetus were carried to term. This statutory restriction is not applicable to Indian Health Service funds under the Department of Interior.

In a final rule sent to OMB for review on December 28, 1981, however, HHS set forth a policy to make abortion services to Indians consistent with other HHS programs.

The proposed rule permitted funds to be used for abortions in cases of rape or incest or when the mother's life was endangered. The final rule imposes more restrictions by removing the rape and incest provisions.

HHS would like to have the regulation published by Friday, the date of a right-to-life march in Washington.

Addendum to Briefing Paper on Family Planning Services

HHS is anxious to issue the proposed regulation in order to make its views known to the public. HHS believes that printed speculation about its contents in the absence of a published proposal is detrimental and would like to assume an offensive posture to support their position.

CHURCH STATE COUNCIL
of Seventh-day Adventists

JOHN V. STEVENS, SR.
President

2686 Townsgate Rd., Westlake Village, CA 91361 Phone (805) 497-9457

CHURCH STATE COUNCIL

John V. Stevens, Sr., President

Mailing: P.O. Box 5005, Westlake Village, CA 91359 • 2686 Townsgate Rd., Westlake Village, CA 91361 • Phone (805) 497-9457

ABORTION - SHOULD LEGISLATION END IT?

Abortion is a subject that has polarized most of American society. Is it appropriate for government to eliminate abortion through legislation? Is the taking of a fetus actually killing, or even worse, murder, and how will offenders be prosecuted and punished?

Those who feel deeply that abortion is killing and who are religious refer to the Scriptures as a basis for eliminating abortion. It is clear from the Bible that God is the Author of life and forms man in the womb. Without Him there is no life. He also gives life to animals, birds, fish and vegetation.

It must be said in fairness on the subject that there are Scriptures which indicate that legal standing as a human being is not granted until birth. "And the Lord God formed man of the dust of the ground, and breathed into his nostrils the breath of life; and man became a living soul." Gen 2:7 It seems quite clear that the breath of life marks the beginning of personhood.

Few religious organizations, if any, have greater regard for human life. Seventh-day Adventists respect for life demands that they do not kill, consequently their official position in war is that they will serve their country, but in a non-combatantcy position. They have lost a number of their members, who usually serve in the Medics, who have gone without sidearms into battle fire to give medical assistance to those who were wounded and dying. They respond because they do love their fellowman, following the example of Jesus who came not to take life but to save it.

Respect for their fellowman and his life led the denomination to begin a medical college at the turn of the century. Today their medical and allied health professions school, Loma Linda University, and 160 hospitals scattered throughout the world testify of their respect for life and their tireless effort to alleviate sickness and suffering. There is a disproportionately high percentage of Seventh-day Adventists in health care serving in the healing ministry.

Believing the Scriptural teaching that the body is the temple of the Holy Spirit and that they are not their own but God's has led the church to hold life in high regard and to follow Biblically based health principles which have resulted in great health advantages for Seventh-day Adventists, who are being recognized by many as enjoying the best health of any group in the world.

Their respect for life has long been established. While the church has no official theological position on abortion it does not deny patients the choice to have selective abortions on a limited basis. God created man with a free will and through Christ's death sought to extend this freedom. The church does not believe in using coersion, force or violence to bring about cultural, social, economic or religious changes, or to deny man the right to use his free will.

Scriptures are actually silent on the matter of voluntary abortion. The closest Scripture comes to it is a passage that deals with involuntary abortion, a miscarriage. It is widely known that the Ten Commandments are found in Exodus 20. The following chapters are a continuation of God speaking on law on many subjects, and the closest we can come to on abortion. In Exodus 21 two men are fighting and in the process a pregnant woman gets jostled and as a result aborts her fetus.

> "If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe." Exodus 21:22-25

God established capital punishment in the Old Testament for premeditated murder (Exodus 21:14). Interestingly enough, if one were guilty of manslaughter, the avenger, usually a relative, had the right to take the life of the one who committed manslaughter.

The manslaughter law was thus written in justice to show people that carelessness that leads to death is serious causing them to be more careful in their deportment lest they lose their own lives. On the other hand, because of God's great mercy, He made provision for a lesser punishment.

He established six cities of refuge where the one guilty of manslaughter could flee to avoid the avenger. Once in the city of refuge he was required to remain there until the death of the High Priest, then he was free to go anywhere he chose. His family could move to the city of refuge with him and there they could live a normal life (see Deuteronomy 19:1-7, Joshua 20:1-6, and Numbers 35:10-29)

The inescapable conclusion of the most obvious meaning of Exodus 21 is that the fetus is not recognized by God, who is speaking, as a human person that gets the same protection under law as one having been born. Until a baby is born it is not a human person. Jewish Hebrew language scholars state unequivocally that the historical understanding of that passage is that it is dealing with a miscarriage, the loss of a fetus.

If God considered the fetus a full human being or a human person, then miscarriage would be punishable by death, for the one causing it accidently would face a manslaughter charge. The husband who is the avenger would have the right to execute or kill the one who caused the micarriage unless the guilty party reached a city of refuge first.

On the other hand, if the miscarriage was brought about on purpose, then the death penalty would surely follow with no provision for the city of refuge. So God calls not for manslaughter or murder punishment, but for a fine. The distinction between the fine for the miscarriage and the penalty for injuring the mother is very clear. The fact that God is speaking and that the passage comes from the statutory portion of the Scripture dealing with law makes it of even greater interest and force.

God has set up provision for life and He carries every fetus through the human womb as he does other lesser creatures. The human fetus should be held in high regard, cherished and protected, but to assume that the taking of a fetus is killing is going beyond what Scripture teaches. A seed grows but does not become a plant until it comes out of the soil, so with the baby.

Under Biblical law spoken directly by God, the husband can only command a fine which is levied by the judge for the carelessness that brought on a miscarriage. The position of the mother is unquestioned as a recognized person, for if any harm followed to her, then the guilty party pays eye for eye, etc. But Scripture does not give the fetus the same recognition as a person who has been born.

In the Senator John East abortion hearings, Yale Professor Dr. Leon Rosenberg voiced his opposition to the proposed human life amendment and its attempt to use science to solve the abortion debate. Rosenberg maintained that the question of when life begins is "not a scientific one, but rather a religious, metaphysical one." Just four days later the nation's most prestigious body of scientists, the National Academy of Sciences, declared that the question of when human life begins is not a scientific one. That brings it squarely to the religious issue.

Based on the distinction between religious moral issues, and social moral issues, abortion is a religious moral issue, for the churches differ in their dogma based on their understanding of Scripture, and the non-churched society is clearly divided. It is appropriate for people who oppose abortion to share these convictions and develop greater respect in society for the unborn. However, it is not appropriate for government to step into a religious controversy and choose sides.

For the government to eliminate abortions in general would be to establish the tenants of one group of churches in preference over the tenants of other churches. This would clearly violate the Establishment Clause of the First Amendment.

CHURCH STATE COUNCIL

John V. Stevens, Sr., President

Mailing: P.O. Box 5005, Westlake Village, CA 91359 • 2686 Townsgate Rd., Westlake Village, CA 91361 • Phone (805) 497-9457

PRAYER IN PUBLIC SCHOOLS
Reassessing Governmental Role

May students pray in public schools? What role may be played by government with regard to prayer in public schools?

The Supreme Court 1962 Engel and 1963 Schempp decisions made clear that the First Amendment prohibits government mandated or sponsored devotions in public schools, even if students not wishing to participate are allowed to leave the room.

A 1980 Massachusettes Supreme Court decision struck down a six-week old prayer law because prayer sessions were "religious in character, for prayer is an invocation to the Deity." Other problems listed in Kent v. Commissioner of Education were the fact that it was under "the aegis of a state statute; was conducted from day to day by teachers employed as public employees in public schools; was carried out on public property during schooltime and as part of the school exercise."

Current legislation raises some very serious constitutional and public policy problems. What could be more intimate in worship than prayer? How can government legislate worship?

While the constitution permits the Congress to restrict the authority of the judiciary, I think it not only unwise, but potentially dangerous to restrict the judiciary's authority on constitutional issues, particularly on the First Amendment and thus lead the way for established state religion and loss of free exercise. It does seem to be a rather severe measure to accomplish something that is questionable at best in terms of what it will do for the youth.

For a student who chooses not to be present for prayer to have to get up and walk out of the classroom puts him at a disadvantage and also an embarrassement. Can you imagine the peer pressure that would exert itself on a young student coming in after prayer by others wondering why this boy or girl isn't willing to be present for prayer? This will create division, rather than respect, toward religion. It is very difficult to imagine Jesus being comfortable with laws being passed that result in this type of prayer. It doesn't seem to square up with the Gospel record.

Let me suggest an alternative that I believe would gather much support in the larger religious community. Presently, most of the churches, their members and their leaders are opposed to prayer in public schools. The suggestion is simply this: A bill could require at the beginning of each day a period of quiet or

silence. It could be two minutes or five minutes or whatever seems appropriate. By carefully and judiciously avoiding any religious terminology, and with no reference in the legislative history of religious motivation for such a bill, I believe that if it were challenged in the courts that it would stand. It could be justified on the basis that today's society demands so much of our time, that students need some time to think reflectively.

During this quiet time, students who desire to pray would have an opportunity to pray silently. Those who do not wish to pray could study, think reflectively, rest or anything they might desire so long as they remained seated and silent. No one would be getting up and walking out, thus this would eliminate that adverse unequal protection feature. The state-employed teacher would not be leading out in prayer. The legislature would not be passing legislation on worship, and the constitutional problems would be absent. Yet, children who want to pray could do so. Consequently, students bowing their heads quietly for prayer and meditation would have a silent witness, particularly if their deportment throughout the day was exemplary. Interest in silent prayer would then grow, I believe. It would be a purely voluntary situation with no government entanglement.

In terms of public policy problems, it should be recognized that the vast majority of America is opposed to current prayer in public school legislation. The poll most frequently quoted supporting such legislation was by Gallup in which he asked: "Do you favor or oppose an amendment to the Constitution that would permit prayers to be said in public schools?" To that question a vast majority responded in favor of such an amendment.

However, the court never prohibited prayer in public school but simply said that government sponsored worship activities were an establishment of religion, and properly so. Legislatures should not pass laws that set up such worship activities, nor should they pass laws that prohibit prayer, thus they do justice to both clauses of the religion provision of the First Amendment.

Another survey was conducted that made it possible for the one querried to understand the issue clearly and opposite results were reported. To the question: "Since the Supreme Court has upheld the right of voluntary prayer, while prohibiting only government sponsored worship activities, should the Constitution be changed to authorize government sponsored prayer in schools?" only 33% responded "yes," while 59% replied "no." Had Gallup chosen a more accurately phrased question for his poll, it is fairly certain most respondents would have agreed with most religious leaders and organizations that such legislation is not needed.

A more important consideration is the constitutionality. Inasmuch as this moral issue is one on which the religious bodies differ based on their doctrine, and on which the unchurched society differs, it is a religious moral issue and would be an establishment of religion should it be made law. Even if there were full agreement in religious circles and the unchurched society, it would still be an establishment of religion because it falls into the category of religious worship, the most crucial of all establishment problems.

Our major concern is that religious morality is something that ought to be fostered, accepted and developed on a voluntary basis as we communicate one with another. Above all, it should not be legislated. History has proven that where religious morality is legislated, social, economic and religious problems grow more rapidly than when this area is left to free choice.

CHURCH STATE COUNCIL

John V. Stevens, Sr., President

Mailing: P.O. Box 5005, Westlake Village, CA 91359 • 2686 Townsgate Rd., Westlake Village, CA 91361 • Phone (805) 497-9457

TAX RELIEF FOR RELIGIOUS AND PRIVATE NON-PROFIT EDUCATION
(The Constitutional Problem and Alternative Solution)

For years there have been efforts by religious organizations to secure either direct or indirect government funding and currently through tax-credits for parents of students attending religious schools. Federal courts have not been favorable to such laws. In Kosydar v. Wolman the three judge district court held tax credits to violate the Establishment Clause. Without opinion, the U. S. Supreme Court has held that the tax credits approved by the Ohio legislature violated the Establishment Clause.

If tax credit legislation passes Congress, it is certain that there will be Constitutional challenges, and it is anticipated that these legislative enactments will be struck down. Taxpayers should not have their tax monies spent to propogate a religious belief contrary to their own. This will surely create public policy problems and discontent.

May I suggest a possible solution by drawing a distinction between government funding of a religious education through tax credits, and merely letting a citizen claim an additional tax deduction?

Here is one alternative: Congress could pass a bill which would authorize parents to deduct tuition costs for education to a non-profit private or religious institution as a charitable contribution, so long as it falls within the maximum allowable deduction. The federal government presently permits a taxpayer to deduct up to 50% of his income to certain charitable organizations. The law could limit such educational deductions to the calendar year during which expenditure is actually made, eliminating any carry-over, thus providing a lid of sorts, and discourage the raising of tuition costs.

Such legislation could avoid the anticipated obvious effort on the part of schools to keep increasing tuition and hence tax credits until they equal the costs. Thus there would be fiscal protection. As a deduction the tax bracket would prohibit a 100% refund. Even though IRS and the courts have not generally looked with favor on parents deducting such expenses as a contribution to a religious or a private non-profit organization, a clear-cut law by Congress in the light of current allowable religious deductions and their ensuing benefits to contributors, is likely to change the attitude of the court.

Presently, church members may give contributions to the church for the pastor's salary from which they receive some direct benefit. Also, by giving to a church budget they are receiving for their contributions personal benefits, such as heat, air-conditioning, light, telephone, water, janitor service, etc. Even children's Sabbath school and Sunday school classes are funded by tax deductible dollars.

Generally, we cannot deduct contributions from which we receive direct benefit. Inasmuch as these church benefits are already being allowed as religious contributions, why not extend such contributions to include religious tuition costs? It would certainly be consistent. This would avoid the direct funding to parents through the tax credit which raises constitutional questions. Public educational costs are deductible through property tax deductions. This would help put public, private non-profit and religious education on a similar base, yet without offending constitutional principles.

Normally, tax credits take money out of the U. S. Treasury and pay directly those who have a small tax or none at all. The alternative tax deduction would prohibit that but still give some benefit to those who are utilizing a separate educational system and paying taxes, yet without a direct Treasury expenditure.

While it is true that the poor would not benefit as much as the rich on the deduction plan, this difference is offset to some degree by the fact that the poor are paying less tax and the rich are paying more. At least, the alternate measure is more likely to pass the constitutional test than a tuition tax credit.

A concern of religious organizations under the tax credit plan is over government regulation that is likely to create problems. Even though Congress may not permit regulation, it is conceivable that court challenges could end up in decisions requiring such regulation. Inasmuch as there is no regulation currently stemming from present religious deductions, it is most likely that the lack of regulation would carry over to the educational deductions, thus alleviating some concern of religious institutions.

QUICK REFERENCE ANALYSIS

ISSUE	TAX CREDIT	TAX DEDUCTION
Potential Fiscal Impact	100%	Limited by Tax Bracket
Constitutionality	Establishment Problem	Likely Constitutional
Church Concern	Government Regulation	Free from Regulation
Hazards	New Ground	Established Principle
Effect on Public Education	Greater Threat Due to Fiscal Impact	Lesser Threat Fiscally

Inasmuch as the religious organizations differ on the matter of tuition tax credits, and the same lack of agreement is seen in the non-churched society, such bills fall into the religious moral issue area and, if enacted into law, would be an establishment. The Seventh-day Adventist Church recognizes the added burden that either the tax credit or deduction would create on society, and the ensuing weakening or perhaps even more detremental effect on public education. It also does not get involved in legislation unless the bill threatens to establish religion, or the bill will resolve a problem stemming from lack of free exercise, in order to not have an undue religious influence on government. Consequently, it is not seeking any such legislative remedy.

There is a current movement to restore America to moral/ethical principles through legislation of moral principles as the law of the land. Targets of such legislation include abortion, humanism, religion in public schools, "gay" rights, economic and foreign policy. The Judeo-Christian ethic (the principles of morality enunciated in the Old and New Testaments) has been proposed as an appropriate source of laws and that its principles be embodied as the law of the land. The propriety of doing so is urged on the following grounds: (1) God will bless a nation which enforces strict moral standards; (2) belief in God is fundamental to this Republic and the Republic was founded on principles of the Judeo-Christian ethic; (3) the great majority of Americans today accept the Judeo-Christian ethic as the basis of morality. The following paragraphs address these contentions. Your endorsement as a moral leader, and your response to this letter, are requested.

I. THE JUDEO-CHRISTIAN ETHIC

The Judeo-Christian ethic states that motive is an essential ingredient of moral behavior. Moral principles are founded on love for God and others. We cannot be moral without such love, and the attempt to do so is denounced as an "abomination." (Deut. 6:5; Lev. 19:18; Matt. 22:36-40; I Jn. 2:3-4; 4:7-8; Prov. 21:27; Isa. 1:10-15; I Sam. 15:22, 23; Matt. 23:13-33) The American government cannot legislate love for God and others. The attempted legislation of principles of the Judeo-Christian ethic would result in outward compliance, without love, which is an abomination.

The Judeo-Christian ethic teaches that moral behavior is impossible without the enabling power of God. God must write moral principles in our minds and renew our hearts. (Heb. 10:16-17; Jer. 31:33) This cannot be accomplished by mandate of the American government.

The Judeo-Christian ethic states that God requires mankind to choose to accept His enabling power on the basis of clear and convincing evidence. (Gen. 2:15-17; Ex. 19:4-6; Josh. 24:1-18; Jn. 3:19; 15:24) God does not compel mankind to honor His principles. That is apparent from the death of Jesus. God gave His only Son rather than employ compulsion. We choose to accept God through the exercise of faith in Jesus. Without faith, it is impossible to be moral. (Rom. 9:31-32; Heb. 11:6) This country's government cannot compel choice or faith in Jesus, therefore cannot effectuate morality.

The Judeo-Christian ethic states that Christians should follow God's method of dealing with non-believers. They should present clear and convincing evidence of the benefits of God's way and call upon non-believers to accept Him by faith. (Deut. 4:5-8) That was the method employed by Jesus and the apostles. Christians should not employ legislative coercion as a substitute for acceptance by faith.

Some Americans urge that Old Testament Israel was governed by strict morality laws which, inevitably, resulted in apparent compliance by some, without love or faith. Strict enforcement of those laws was blessed by God. Would not such laws, therefore, be appropriate in America? The Judeo-Christian ethic distinguished between "Israel" and all other nations. Israel had entered into an agreement with God to keep His laws. The other nations had not so agreed and could not possibly be moral. Therefore, Israel was not to

attempt to coerce compliance by those nations, or enter into any covenant with them. The apostle Paul makes the same distinction between Christians and non-believers today. (I Cor. 5:9-13)

The question remains, "Who is God's nation today?" God had originally called the literal nation of Israel to be His special people, "a kingdom of priests and an holy nation." (Ex. 19:6) [Although God's spiritual kingdom was not identified with literal Israel. Israel's role was that of "custodian" of the laws of God and witnesses to the world. (Rom. 5:13-16; 9:6-8; 2:23-29; 3:1-2)] God later called another nation to be His messengers to the world. That nation is not a temporal State. It is comprised of the redeemed "out of every kindred, and tongue, and people, and nation," who have accepted God by faith, and has here "no continuing city, but seek[s] one to come." (Rev. 5:9; Heb. 13:14; Jn. 18:36) Christians in America cannot, therefore, employ legislative coercion to force non-believers to comply with principles peculiar to the Judeo-Christian ethic. Doing so would violate that ethic.

Instead, God's people, in this country and elsewhere, should warn non-believers of the destruction of temporal States at the return of Jesus, and to prepare to meet God. (Rev. 21:1-4; Jn. 14:1-4) God will bring down the City of God out of heaven and establish His City as the kingdom of this world. God will not establish any temporal State until that time.

The Judeo-Christian ethic reveals the true character of the movement to employ legislative coercion to effectuate compliance with its principles. Throughout the ages, Satan has devised counterfeits of God's way of achieving morality, which attempt to substitute human efforts for the restoring power of God's love. However, the only way to achieve morality is through God renewing our hearts and acceptance by faith in Jesus.

II. THE INTENT OF THE FOUNDING FATHERS

The English colonies in America were founded, in most cases, as havens from religious intolerance. Our forefathers feared political pressure groups which sought to legislate principles peculiar to the Judeo-Christian ethic. (Ex Parte Newman (1858) 9 Cal. Reports 502, 507-508) They recognized the inalienable right of every American to follow the dictates of his or her own conscience. They also knew that they had no monopoly on truth and that freedom to hold dissenting beliefs was essential to arrive at an understanding of truth. Some delegates to the Constitutional Convention of 1787 urged that our Constitution should incorporate principles peculiar to the Judeo-Christian ethic, on the ground that America was a "Christian" nation. The great majority of the delegates rejected the proposal. ("Genuine Information of Luther Martin," The Records of the Federal Convention of 1787, (1937 rev. ed.) vol. 3, App. A, CIVIII, ed. Max Farrand, Yale University Press, 1966) Instead, the delegates drew from a wide range of sources to avoid legislation which reflected any particular ethic. Montesquieu, Rousseau, Delolume, Hume, Aristotle, Hobbes, Harrington, Blackstone, Locke, and Coke, are mentioned or represented in The Federalist Papers.

The same principles should guide legislators in drafting laws today. They cannot incorporate principles peculiar to the Judeo-Christian ethic. Instead, the laws must be drawn from the broadest possible range of sources to avoid enforcing any particular ethic. Similarly, the effect of the laws must not be to promote ideas peculiar to any particular ethic. For example, the commandment, "Thou shalt not kill," is universally recognized and is necessary to the preservation of society. By contrast, a law requiring the observance of Sunday as the Sabbath, is not universally recognized and does further religious ends. Even if such a law were deemed necessary for the good of society, the Judeo-Christian ethic teaches that such a law would violate the principles of that ethic by enforcing religious observances, and would further violate the First Amendment.

Please fill out the enclosed response sheet and return it at your earliest convenience.

NAME: _____

RESPONSE SHEET

Instructions: Please check the box which most accurately states your view and add any qualifying comments.

		YES	NO	COMMENTS
1.	Motive is an essential ingredient of moral behavior according to the Judeo-Christian ethic.	/_/	/_/	
2.	The American government cannot legislate or control motive.	/_/	/_/	
3.	The Judeo-Christian ethic teaches that moral behavior is impossible without the enabling power of God.	/_/	/_/	
4.	The Judeo-Christian ethic states that God does not compel mankind to honor moral principles.	/_/	/_/	
5.	The Judeo-Christian ethic states that Christians in America should not employ legislative coercion to effectuate non-believers' compliance with its principles.	/_/	/_/	
6.	The Judeo-Christian ethic states that America is not God's chosen nation.	/_/	/_/	
7.	The Founding Fathers rejected the contention that our laws should embody principles peculiar to the Judeo-Christian ethic.	/_/	/_/	
8.	Our laws should not have the effect of promoting ideas peculiar to any particular ethic.	/_/	/_/	
9.	The Judeo-Christian ethic states that, even if a law is deemed necessary for the good of America, it is wrong if it enforces religious observance.	/_/	/_/	

F

THE WHITE HOUSE

WASHINGTON

March 15, 1982

MEMORANDUM TO EDWIN MEESE III

FROM: EDWIN L. HARPER

SUBJECT: Abortion Policy

With the most recent action in the Senate on abortion, I think it is appropriate that we fairly quickly have a strategy session on this very sensitive policy issue. Attached is a background memorandum by Gary Bauer and a proposed draft letter which the President might send to the interested parties.

While I feel that sending the letter may be the optimal strategy for us, I think it is worth a few minutes of your discussion time with me, Gary Bauer, and probably Ed Feulner.

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 11, 1982

FOR: EDWIN L. HARPER

FROM: GARY L. BAUER GLB

RE: Presidential Letter Re Abortion

As the likelihood increases that the Senate will debate and vote on one or more of the major anti-abortion measures now pending before it, we need to make certain the President's position is correctly perceived.

If the Senate votes on the Hatch Constitutional Amendment as now written, it is likely that it will fail to get the necessary two-thirds vote. The Helms Human Life Bill is a closer call, but the split in the anti-abortion movement may doom it also.

It would neither be appropriate nor wise for the Administration to support one legislative vehicle over another. However, we must make sure that any subsequent defeat of anti-abortion legislation on Capitol Hill is not placed on the door step of the White House.

With that thought in mind I recommend that the attached letter be sent from the President to Senators Hatch, Helms, Congressman Henry Hyde and the Congressional Right-to-Life Caucus.

Attachment

cc: Roger Porter
Mike Uhlmann

DRAFT

Dear _____:

It seems clear that the Congress is now ready and willing to take action on the abortion issue. I write simply to express my own hope that we will not miss this long delayed opportunity.

A few weeks back I said that "We must, with calmness and resolve, help the vast majority of our fellow Americans understand that the more than one and one-half million abortions performed in America in 1980 amount to a great moral evil and assault on the sacredness of life." Whether or not our fellow citizens will understand the duty we owe to future citizens depends largely on what action the Congress takes.

I know that on this issue as, sad to say, on many others of great importance, there are sharp differences of opinion as to which action is the best one. Naturally, I hope that these differences will be resolved in favor of the common goal.

But most important, it seems to me, is that the Congress debate and vote on one or more of the proposals without delay. And I want you to know that you have not only my best wishes but also my prayers for success.

Sincerely,

RR

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 10, 1982

FOR: EDWIN L. HARPER

FROM: GARY L. BAUER GLB

RE: Abortion Constitutional Amendment Passed by Senate Judiciary

Background: Since January of 1981 the anti-abortion forces have been seriously split over strategy. One faction supports S. 158, the Human Life Bill that declares the unborn child to be a "person" for purposes of the 14th Amendment. Helms is the chief sponsor and he has placed his bill, which needs only a majority vote for passage, on the Senate calendar.

The rest of the movement, including the National Conference of Catholic Bishops, supports S.J. Resolution 110, sponsored by Senator Hatch. It is a Constitutional Amendment that declares there is no right to abortion in the U.S. Constitution and it grants Congress and the States joint authority to regulate it.

Judiciary Votes Out Amendment: Today, March 10, the Senate Judiciary Committee voted out the Hatch Constitutional Amendment by a 10 to 7 vote. In spite of it passing out of the Committee, no one believes that it has the necessary two-thirds vote to pass the full Senate. There are several implications in this development from the standpoint of the President. They are:

1. The chances are now better that one if not both abortion proposals may make it to the Senate floor for a vote.

2. If the Hatch Constitutional Amendment is voted on, and is defeated, some groups, most notably the National Conference of Catholic Bishops, are likely to try to pin blame on the President for failing to actively work for it.

3. There are indications that some Senate liberals would like to vote for the Hatch Amendment, as long as they were sure it wouldn't pass, so that they could defuse the abortion issue in the 1982 election.

4. Pressure is now likely to increase on the President to endorse one of the options before the Senate.

cc: Mike Uhlmann

Abortion

23 JAN 1982

OFFICE OF THE SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

January 22, 1982

EM file

HONORABLE EDWIN MEESE, III
COUNSELLOR TO THE PRESIDENT

Secretary Carlucci asked that you be provided the attached fact sheet on Department of Defense abortion policy.

Very respectfully,

Grant S. Green, Jr.
Colonel, U. S. Army
Military Assistant to the
Deputy Secretary of Defense

Enclosure
a/s

DoD Abortion Policy

Section 757 of Public Law 97-114, dated December 29, 1981 (Department of Defense Appropriations Act, 1982) prohibits the use of any DoD funds to perform abortions "except where the life of the mother would be endangered if the fetus were carried to term." The Department performs and finances abortions only in conformity with the terms of this provision.

In addition, the Military Departments perform abortions in those circumstances where the Supreme Court has recognized a constitutional right of the mother to have an abortion when the mother is assigned to a location where safe abortions are not otherwise available. Such abortions are provided at the expense of the individual in Adak, Alaska and in certain foreign countries -- e.g., Turkey.

Abortion ✓

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

OFFICE OF POLICY DEVELOPMENT
1982 JAN 19 P 4:32

January 19, 1982

EM files

FOR: MARTIN ANDERSON
ED GRAY

FROM: GARY BAUER GB

RE: Talking Points for President's January 22 Meeting with Right-to-Life Leaders

- o I want to commend you for the progress that has been made in 1981 to protect the most defenseless in our society -- the unborn child. I have read the many reports of division in the right-to-life movement, and I am aware of the differences in opinion on how to best end abortion on demand in America. In spite of this division, however, you should not lose sight of the fact that through your efforts there has been, for the first time, comprehensive hearings in Congress on the question of abortion. This in itself is a major victory.

- o I do not intend to take sides in the current controversy over which alternative the right-to-life community should embrace. I would hope, however, that people as dedicated to the same cause as yourselves will not give comfort to your opponents by failing to unite on a proposal or a compromise proposal so that we can stop the present national tragedy.

- o It is imperative that in addition to your legislative activities, you do everything you can to educate the American people on the abortion question. I am convinced the great majority of our citizens will support your cause if they are aware of the facts. I am sure you saw the recent Newsweek issue that devoted its cover story to new research on the unborn. We now know that a fetal heartbeat begins at three or four weeks, that the unborn child moves at six weeks and that the fetus will suck his thumb at eight weeks. I challenge anyone to look at that cover of Newsweek which shows an eight-week-old fetus and tell me that we are not dealing with human life. I have stated many times, including at my press conference this week, that if there is any doubt about whether we are dealing with human life, government must opt on the side of assuming that we are.

- o You have my prayers in 1982 and my pledge to sign pro-life legislation if it reaches my desk or to work with Congress on a Constitutional Amendment if that is the option that the right-to-life movement finally embraces.

F: ABORTION/ Right to Life

Statement by PR to be read by Sec'y Schweiker

I am pleased to welcome the 1982 March for Life to Washington. I know you are aware of my feelings, which I have often expressed, on the question of abortion. I believe that when we talk about abortion, we are taking about two lives -- that of the mother and that of the unborn child.

It is instructive I think that in recent hearings on the Hill, the question of when life begins could not be resolved. That is a finding in and of itself. The fact that doubts continue to exist on this issue lead me to the conclusion that government has the responsibility to opt on the side of life for the unborn, except in those rare cases where the mother's life is in danger.

As I said earlier this week in my press conference, if one were to come upon an immobile body, and it could not be determined as to whether it were dead or alive, you wouldn't get a shovel and start covering it up. If we don't know, then shouldn't we morally opt on the side of life. In my opinion, we should do the same thing with regard to abortion.

The Congress is examining the entire abortion question. There are several pieces of legislation on the Hill ranging from Constitutional Amendments to a Human Life Statute. The fact that these proposals take different approaches should not obscure the more important point that they have the same goal -- to provide greater protection for the most defenseless and innocent among us -- the unborn child.

I look forward to one of these proposals reaching my desk for action.

The Right-to-Life Movement is made up of countless Americans of all backgrounds. Your annual March for Life here in Washington is a symbol of a shared commitment. ~~to protecting the life of the unborn. I also share your dedication to this cause.~~ I wish you well in your efforts to protect the life of the unborn.

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.Sup. 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 lessons 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 pregnency 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 conspiricy to violate obscenity statutes, rather than the obscenity statutes themselves, is that a conspiricy 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 conspiricy 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 conspiricy to violate an obscenity statute only if a "substantial protion of the conspiricy" occured 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 leinient 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 commerical 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 Summitt's allegation that current 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, leud, 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 proscecuted 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 absolutly 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 prosscuting 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 offens 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 mininum 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.

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 LaFave 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.

1/ [illegible] 502 of H.R. 6915

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.2/

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

---

2/ 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

by the trial judge is not appealable. 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

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

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 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 apropriate 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.

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.

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 warrent is explicity 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.

~~22~~ 27

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 seperate free-standing deathpenalty 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 inadvertantly 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.

ATTACH?

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.

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 preponderence 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 18

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 infuence, 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 provisons also appear (see S. 1630 page 339).

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