BRAMES, BOPP & HAYNES
ATTORNEYS AT LAW
800 SYCAMORE BUILDING
10 SOUTH SIXTH STREET
TERRE HAUTE, INDIANA 47807

ARNOLD H. BRAMES
JAMES BOPP, JR.
DAVID D. HAYNES

TELEPHONE
(812) 238-3431

December 14, 1981

Mr. Douglas Johnson, Legislative Director
National Right to Life Committee, Inc.
419 7th Street, N. W., Suite 402
Washington, DC 20004

Re: Criminal Code Revision

Dear Doug:

I have received the information concerning the victim compensation fund which is included in the revision of the criminal code. I agree that this fund would provide for compensation, including abortions, for victims of rape or statutory rape in those jurisdictions where federal criminal law applies.

Funding for these abortions would be available under the definition of "pecuniary loss" which is defined in § 4115 (b)(1)(A) to include "all appropriate and reasonable expenses resulting from the personal injury necessarily incurred for... hospital, surgical...and other medical and related professional services relating to physical or psychiatric care, including non-medical care and treatment rendered in accordance with a recognized method of healing;". A rape or statutory rape involves a personal injury of some sort, even though it might be minor. As a result, the addition of the words "personal injury" do not limit the circumstances in which abortions might be paid for as an "appropriate and reasonable expense" as delineated above. It is likely that this fund will be interpreted to allow for reimbursement of any medical expenses, including abortion, for any rape or statutory rape victim. We are justified, therefore, in our concern concerning this fund as a means of funding abortions for rape victims and probably incest victims where applicable.

If I can be of further assistance in this matter, please let me know.

Sincerely,

BRAMES, BOPP & HAYNES

James Bopp, Jr.

JB:maw
cc: John C. Willke, M.D.

file
Criminal
Code

AMENDMENT NO. 1287 Calendar No. 427

Purpose: To remove alterations in current Federal criminal law, thereby more precisely recodifying title 18 of the United States Code.

IN THE SENATE OF THE UNITED STATES—97th Cong., 2d Sess.

S. 1630

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

February 11 (legislative day, January 25), 1982

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. MCCLURE

Viz:

Section 4115 is amended by inserting at the end thereof the following: "No funds under the provisions of this title shall be used for abortions.".

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

STROM THURMOND, S.C., CHAIRMAN
CHARLES McC. MATHIAS, JR., MD.
PAUL LAXALT, NEV.
ORRIN G. HATCH, UTAH
ROBERT DOLE, KANS.
ALAN K. SIMPSON, WYO.
JOHN P. EAST, N.C.
CHARLES E. GRASSLEY, IOWA
JEREMIAH DENTON, ALA.
ARLEN SPECTER, PA.
JOSEPH R. BIDEN, JR., DEL.
EDWARD M. KENNEDY, MASS.
ROBERT C. BYRD, W. VA.
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZ.
PATRICK J. LEAHY, VT.
MAX BAUCUS, MONT.
HOWELL HEFLIN, ALA.

VINTON DEVANE LIDE, CHIEF COUNSEL
QUENTIN CROMMELIN, JR., STAFF DIRECTOR

SUBCOMMITTEE ON REGULATORY REFORM
PAUL LAXALT, NEV., CHAIRMAN
ROBERT DOLE, KANS.
CHARLES McC. MATHIAS, JR., MD.
ALAN K. SIMPSON, WYO.
PATRICK J. LEAHY, VT.
ROBERT C. BYRD, W. VA.

JOHN F. NASH, JR., CHIEF COUNSEL AND STAFF DIRECTOR

November 10, 1981

Dear Morton:

It was good chatting with you prior to the ceremony in the Rose Garden today. At that time, you stated that the Criminal Code Reform Act was a bad bill and should not be passed. As you probably know, the Administration supports the bill. Indeed, it plays an important role in their anti-crime efforts.

You also mentioned that you had read a memo on the subject. I assume that what you read is the 25-point memorandum which was prepared by Mike Hammond and circulated to a variety of conservative organizations in the hope that it would be used to defeat the proposed new Criminal Code. If the allegations were true, we would all be concerned. The fact is, however, that the allegations are misinformed and mistaken and apparently designed to cause alarm among conservative groups. I am enclosing a memorandum, prepared by this office working in conjunction with the staffs of Senator Thurmond, Senator Hatch and the Department of Justice that attempts to respond to those allegations.

I am also enclosing a copy of recent testimony, given by Attorney General Smith, which may help explain why these attacks are causing Senator Laxalt, the other cosponsors, and the Administration concern. This is an anti-crime bill of major importance. It contains well over a hundred significant law enforcement improvements, and hundreds more of a less significant nature. It is something that conservative groups should be working for, rather than against. I would certainly appreciate any suggestions you may have--and any help that you may be able to provide--in getting that message across to some of our friends who apparently are being misled with respect to this bill.

Again, I appreciate your offer to study these materials. You are in an excellent position to help the Administration and the Senators who have cosponsored S.1630.

Sincerely,

JOCK

JOHN F. NASH, JR.
Chief Counsel & Staff Director
to Senator Paul Laxalt
Regulatory Reform Subcommittee

JFN/sf
Enclosures

Mr. Morton Blackwell
The White House
Office of Public Liaison
191 Old Executive Office Building
Washington, D.C. 20500

Criminal Code

City of Washington
District of Columbia } ss: AFFIDAVIT

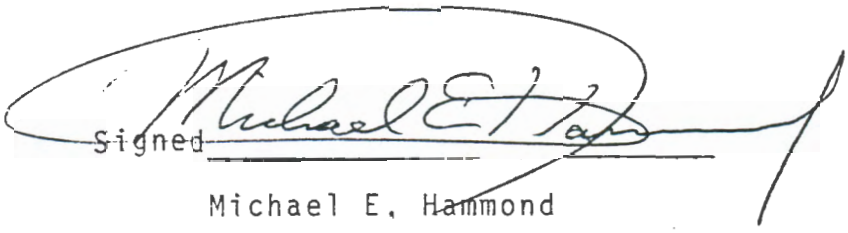
I, the undersigned affiant, being duly sworn, say:

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

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

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

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

Signed 

Michael E. Hammond

Subscribed and sworn
to before me on_____

Signed_____

A RESPONSE TO RECENT CRITICISMS DISSEMINATED BY THE MORAL MAJORITY, INC., AND OTHER GROUPS CONCERNING S. 1630 THE CRIMINAL CODE REFORM ACT OF 1981

Prepared by several of the principal sponsors of S. 1630--Senators Strom Thurmond, Orrin Hatch, and Paul Laxalt--and the United States Department of Justice.

November 4, 1981

A RESPONSE TO RECENT CRITICISMS DISSEMINATED BY THE MORAL MAJORITY, INC., AND OTHER GROUPS CONCERNING S. 1630 THE CRIMINAL CODE REFORM ACT OF 1981

S. 1630, the Criminal Code Reform Act of 1981, was introduced in September 1981 by Senators Thurmond, Biden, Hatch, Kennedy, Denton, DeConcini, Dole, East, Laxalt, Simpson, and Specter. The bill undertakes the monumental task of modernizing the Federal criminal laws. It represents the culmination of over a decade of Congressional effort that has been characterized by conservative-liberal bipartisan cooperation, and by openness and receptivity on the part of the sponsors to suggestions by hundreds of groups and individuals concerning ways of improving the legislation.

The great need for reform of the Federal criminal laws is almost uniformly recognized by those familiar with the present system. The success of S. 1630 in achieving the necessary kinds of reform is similarly recognized. President Reagan has publicly hailed the bill as "the foundation of an effective Federal effort against crime," and the Attorney General has announced that "as a whole, it represents the most significant series of law enforcement improvements ever considered by the Congress."

In October 1981, the Moral Majority, Inc., and some other groups began a campaign against this important legislation. The campaign was based on a 25-point memorandum that contains numerous false and misleading allegations reflecting varying degrees of lack of understanding of current Federal statutes, of existing case law, and of the provisions of the bill. The widespread dissemination of that memorandum makes it necessary to respond in a prompt and forthright manner to the criticisms that have been made against the bill. That is what this document is intended to do.

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 criticism is wrong. The bill provides no compensation of any kind for medical expenses relating to pregnancy -- just expenses relating to personal injury.

The bill 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 -- not from funds in the general Treasury -- and would compensate victims who suffer "personal injury" for their medical expenses and for loss of earnings. In rape cases, it would cover only victims of forcible rapes, and then only to the extent of the personal injuries involved. The language quoted in the criticism simply indicates the range of medical services for which compensation would be permitted when such services are employed in treating personal injuries.

In an earlier version of the bill, pregnancy was included under the definition of personal injury to cover victims of rapes 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 can be construed to mean that "personal injury" includes pregnancy.

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: A case like "Deep Throat" could still be prosecuted under S. 1630, either as a conspiracy or as a completed offense.

The provision criticized simply specifies which federal districts, out of several possible federal districts, should be the ones from which the place for a conspiracy trial is selected. It 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 place of trial should have a reasonable connection with the offense and should be reasonably close to the witnesses. The actual distribution of pornographic material, of course, may be prosecuted wherever it occurs (Section 1842).

Under previous versions of a criminal code bill, but not under S. 1630, the actual distribution of most pornography could be prosecuted federally only in a State in which the distribution was in violation of State law. Since the substantive offense thus required some material connection with the State in which the prosecution was to take place, 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.

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: The pornography offense in S. 1630 (Section 1842) is designed to reflect current law, with its language clarified and with its scope, in one significant respect, extended. The new provisions, like the current federal statutes in this area, are designed primarily to supplement, not supplant, State anti-pornography statutes, and to permit effective federal prosecution in particularly serious cases.

Existing federal law covering the distribution of pornography is so confusing and difficult to apply (see 18 U.S.C. 1461-1465) that it actually hinders rather than assists federal efforts to control obscenity. S. 1630 rewrites the vague and almost incomprehensible pornography provisions of existing law 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, and with the assistance of the Citizens for Decent Literature, 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. Moreover, the bill for the first time would permit prosecution of large-scale distributors under the highly effective racketeering laws (Sections 1801-1803; see Section 1806(f)(1)) which carry much more severe penalties; current law does not provide for this use of the racketeering statutes (see 18 U.S.C. 1961(1)).

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), representations of defecation (and of other non-sexually oriented bodily functions) are not singled out in the current statutes; there appear to have been no prosecutions or referrals for prosecution focusing upon such matters; and, in short, this appears to be an imagined problem.

With regard to the criticism in 3(c), the existing statutes have 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 under S. 1630 -- often with greater effect in light of the new facilitation and solicitation sections (Sections 401(b); 1003).

With regard to the criticism in 3(e), the situation referred to could commonly be prosecuted, either at that stage or at a slightly later stage, as a distribution or as an attempted distribution (see Sections 1001; 1842(e)(2); and the definition of "commission of an offense" in Section 111).

With regard to the criticism in 3(f), obscene matter appearing on a mailed envelope may be prosecuted under the Section's second jurisdictional paragraph (Section 1842(e)(2)).

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. Although the language of the existing Mann Act is broad (it has been used to prosecute such activities as the interstate travel of a Mormon family that still maintains a belief in polygamy, Cleveland v. United States, 329 U.S. 14 (1946)), it is inadequate for its principal purpose -- prosecuting major prostitution enterprises that circumvent State laws. S. 1630 is designed to correct the current deficiencies.

Existing 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, for example, controlling a chain of "call girl" operations or a network of houses of prostitution, in which federal prosecution would be 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 that, as under current law, it would not reach the prostitutes -- persons who are frequently the victims of the operators of such businesses. Finally, unlike existing law, the bill 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.

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 -- parole release and the Parole Commission are 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)).

In current federal law, the real maximum penalties are very low. Under 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 or quadruple sentence -- supposedly up to 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)). (Lest any doubt exist that parole authorities would actually consider releasing an opiate trafficker when he simply becomes eligible for parole -- they not only consider release, they do release. The current U.S. Parole Commission guidelines provide that the longest sentence to be served by a large-scale opiate trafficker with a long history of criminal offenses is only 6 years in prison. The trafficker must be kept in prison, however, until eligible for release under 18 U.S.C. 4205(a) (unless the judge has specified earlier parole eligibility). The time before parole eligibility, therefore, is the appropriate time to use in comparing current maximum sentences with S. 1630's maximum sentences -- which are not subject to early release on parole.)

The dangerous special drug offender provisions of current law are also largely illusory. Prosecutorial difficulties are posed by their complexities, and, even when used, they still permit the parole release of a drug trafficker after service of only 8 1/3 years' imprisonment (18 U.S.C. 3575(b); 4205(a)). (They provide a substitute for, not an addition to, the otherwise applicable maximum sentence).

Under S. 1630, the lowest penalty level for an opiate trafficker permits a maximum penalty of 12 years in prison (Sections 1811(b)(2); 2301(b)(3)) compared to an assured 5 years under current law. Moreover, there are three categories of opiate traffickers that permit maximum terms of imprisonment of 25 years without parole: first, 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 (current law has no comparable provision for large-scale traffickers); 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 a previous

State or foreign opiate offense, as well as a previous federal opiate offense, would subject the defendant to the higher penalty (Sections 1811(b)(1); 2301(b)(2)).

In sum, the real maximum terms of imprisonment provided for opiate traffickers under S. 1630 are approximately 2 1/2 times as long as the real maximum terms assured under current law.

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 businesses (Section 2201(b)). Fines today are an under-used 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). As a result, judges are left under current law with imprisonment as the only form of sentence that will carry a serious penalty, and are compelled to impose such a sentence even though frequently a large fine, if available, would be a preferable penalty. 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 an 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, either as the sole form of punishment or in addition to another form of sentence.

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)). Sentencing guidelines, prepared by a Sentencing Commission and reviewed by Congress, would recommend appropriate fine levels for particular kinds of cases depending upon the seriousness of the offense, the amount of harm done, the criminal history of the defendant, and other relevant matters (see S. 1630 pp. 319-320). Moreover, if a fine is imposed that exceeds the amount specified in the sentencing guidelines applicable to the case, the defendant for the first time would be able to appeal the reasonableness of the fine to a court of appeals (Section 3725(a)). (Today, even with respect to the exceptional, million dollar fines that may be imposed for antitrust violations, no such appeal is possible.)

The availability of these realistic fine provisions constitutes no expansion, fundamental or otherwise, of the government's ability to "go after" corporations rather than responsible officers. As is true under current law, the decision whether to charge a corporation, an individual officer, or both, will depend on the facts of each case.

A final word might be said about the use to be made of collected fines. Under current law, collected fines are deposited in the general Treasury. Under S. 1630, they would be deposited in a Victim Compensation Fund (Section 3811) to help the victims of violent federal offenses defray the medical expenses resulting from their personal injuries (Chapter 41, Subchapter B).

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 definition of 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), and related provisions, involving lesser forms of sexual assaults, would eliminate loopholes in current law under which criminals today can escape prosecutions entirely.

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 (less a maximum credit of 10 percent for good behavior), 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 (Sections 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 no more than 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); and the definition of "serious bodily injury" in Section 111). 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." No longer would a criminal be able to expect virtually a "free pass" for aggravating offenses committed in the course of a rape or other crime.

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 did 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 maximum 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.

Criticism 8

Criticism: S. 1630 would --

8. Remove the intraspousal immunity for rape.

S. 1530 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 it would not cover other kinds of sexual conduct between husband and wife.

This change in the law had originally been proposed by Senators who believed that the principle of intra-spousal immunity from the most serious form of this offense had become archaic. In the last Congress, one of the sponsors of the Code offered an amendment in the Judiciary Committee to restore the immunity principle, but the amendment was overwhelmingly defeated with substantial majorities of both parties in opposition. Several of the sponsors in this Congress had agreed to have alternative approaches to the issue raised again during full Committee consideration -- including an approach that would add a special corroboration requirement to intra-spousal rape but not to rape in other circumstances.

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 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 under the bill is 6 years' imprisonment (Sections 1643(c)(1); 2301(b)(4)), while under current law the maximum the judge can assure is 5 years

(the illusory 15 year sentence under 18 U.S.C. 2032, with parole eligibility after a maximum of 5 years under 18 U.S.C. 4205(a)). (A person convicted under the same federal statute twice and sentenced to the maximum penalty 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 loophole in current law with regard to a form of the offense that carries serious personal and social repercussions -- homosexual seduction of a minor. The current law protects only young females, and then only if the act involves sexual intercourse; this offense in S. 1630, like the other sex offenses, is gender-neutral in referring to the participants, and it covers a broad range of sexual acts (see Section 1646(a)(1)).

The criticism is correct in that criminal prosecution would not be authorized if the offense involved only consensual sexual activity between two teenagers whose ages were within three years of each other. This is a reasonable limitation, particularly in view of the otherwise broadened coverage of the S. 1630 provision. Since S. 1630 takes the major step of extending protection to young males as well as females, if there were no age distinction included in the new statute both teenagers would be liable for a federal criminal offense, and there would be no rational basis for deciding which is the victim and which should be prosecuted. There is a serious question whether it is appropriate to interpose the criminal laws in a situation in which either party might be viewed as the victim.

Finally, the criticism is accurate to the extent that it points out the existence of a defense under S. 1630 if the defendant "believed, and had substantial reason to believe, that the other person was sixteen years old or older." This is a reasonable defense. It would place the burden on the defendant of demonstrating that he honestly believed that the other person was 16 or over, and that his belief was based on some form of persuasive evidence of that fact -- such as a false identification card. (This provision hardly "reverses common law" as claimed, since, as all lawyers are aware, the offense never existed in common 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 present 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 5 years under current law, and 12 years under S. 1630.

Contrary to the criticism, federal coverage of sexual exploitation of minors would not 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 6-year penalty would apply because the case involves a minor (Section 1842(d)(1)).

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 maintains the present law in this area. It carries forward the existing Supreme Court interpretation that exempts labor unions, while engaged in collective bargaining, from prosecution under the principal federal extortion statute as it might otherwise apply to extortionate demands made in connection with such bargaining (18 U.S.C. 1951, the Hobbs Act). This approach was taken by the primary sponsors of the bill in order to avoid an admittedly controversial attempt to change current law.

Several of the sponsors of S. 1630 have introduced separate legislation to eliminate the current exemption for labor unions. That legislation is now pending in the Judiciary Committee as S. 613.

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: S. 1630 would not expand the arrest authority of BATF agents, nor would it expand BATF jurisdiction.

The arrest authority of Treasury Department agents (including BATF agents) is the same under S. 1630 (Section 3021(b)(3)) as it is under existing law (26 U.S.C. 7608(a)(3)). The criticism erroneously assumes that federal law enforcement officers under current law may not arrest for federal offenses other than those for which they have specific statutory responsibilities. While federal statutes frequently grant officers arrest authority for specific offenses, the statutes do not preclude common law 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 committed outside his presence 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). This is all that S. 1630 provides -- a codification of existing arrest authority (Section 3021(b)(3)) for all Treasury Department agents (including those of the Secret Service as well as those of the BATF) (Section 3021(a)), in the course of a general codification, using uniform language, of the arrest authority of all other federal law enforcement agents (Chapter 30). The law is not changed.

The policy being carried forward is a reasonable one. It would be a serious mistake to draw strict lines between law enforcement agencies that would preclude a law enforcement officer from making such arrests. Officers from several federal agencies frequently work together to investigate organized crime activity. It would significantly hamper such joint investigations if, for example, officers from DEA, FBI, BATF, and IRS were investigating a group for narcotics trafficking, supplying machine guns to terrorists, and evading taxes on the 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 certainly should be able to make an arrest for narcotics trafficking in his presence -- instead of having to call in a DEA agent to make the arrest and taking the chance that the trafficker would disappear in the meantime.

With regard to the last sentence of the criticism, the provisions of S. 1630 would not extend the authority of any law enforcement agency to encompass enforcement of "any" type of order (see Chapter 30, Subchapters B and C), and any delegation of law enforcement duties by the head of an agency could of course include only such law enforcement functions as the agency had already been provided by law.

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)).

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: Current federal law purports to allow imposition of the death penalty for thirteen offenses. However, in a series of decisions beginning with Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court has made it clear that capital punishment may not be imposed except pursuant to specific statutory procedures that meet constitutionally prescribed standards. Only one federal statute provides such procedures. As a consequence, the other twelve death penalty provisions in existing law are wholly illusory, and the federal government has not even attempted to apply them since the Furman decision.

Rather than repealing the death penalty, 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). Although the bill does not continue the invalid death penalty references in the other areas, it is untrue that this approach will make it more difficult to restore the penalty. In fact, by focusing attention forthrightly on the lack of current coverage, the bill provides an impetus for action. As a direct result of this impetus, and pursuant to agreement among the sponsors of S. 1630, a separate bill to provide a constitutionally supportable death penalty in the remaining areas has been introduced for independent consideration. That bill (S. 114) has already been reported by the Senate Judiciary Committee, and the sponsors of S. 1630 have agreed that it should receive floor consideration as soon as possible.

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 interrelated by similar distinguishing characteristics and 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)).

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: The criticism is in error. It misperceives existing federal law concerning the states of mind necessary for criminal liability, as well as the plain effect of the S. 1630 provisions, which are similar to the provisions included in most modern State codes (see Chapter 3). The S. 1630 provisions make no general change in the law, and they have nothing to do with regulatory offenses.

Under S. 1630, as under existing law, a person can be held criminally liable for his conduct notwithstanding his belief that he is acting in accordance with the law. For example, 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. Moreover, 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. For example, the unintentional killing of another constitutes manslaughter if death occurs as a result of gross recklessness, and constitutes negligent homicide if it occurs as a result of gross negligence.

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.

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 could 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.

The criticism is wrong with respect to its interpretation of both provisions.

First, 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 a false or fraudulent pretense, representation, or promise -- just as is the case under current 18 U.S.C. 1341 and 1343.

Second, 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 of an instrumentality used to carry it out and designed primarily for that purpose (Section 4001(a)(12)).

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. In fact it expands the coverage of the current law in this area.

The bill in Section 1514 carries forward the Hatch Act's essential purpose of de-politicizing federal benefits by making it an offense to withhold or deprive any person of the benefit of a federal program with intent to influence that person in the exercise of his vote. Moreover, this section expands on the coverage of current law to reach the granting of a benefit for the proscribed purpose, as well as the withholding or withdrawal of a benefit (Section 1514(a)(1)).

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. For example, Section 1515 broadens, or at the least clarifies, 18 U.S.C. 606, from which it is derived, by adding "fails to promote" to the list of conduct prohibited by that statute (Section 1515(a)(1)).

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).

Criticism 19

Criticism: S. 1630 would --

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

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

Response: S. 1630 would not, and is plainly not intended to, overturn the Barlow decision. That case (Marshall v. Barlow, 436 U.S. 307 (1978)) merely required a warrant for the inspection of private business facilities by an OSHA inspector. In a similar kind of situation, the Supreme Court has since held that no warrant is required for an inspection conducted under the Federal Mine Safety and Health Act (Donovan v. Dewey, ____ U.S. ____, June 17, 1981). In any event, Barlow did not purport to sanction the use of force to eject a federal inspector who enters upon business premises without a warrant.

Section 1302, to which the criticism is addressed, simply declares -- as do most modern criminal codes -- that intentional physical interference with a public servant who is engaged in the public's business is a misdemeanor. The section is based on a number of existing statutes which it consolidates and generalizes. In so doing, however, the section improves considerably upon current law in accommodating the concern that seems to underlie the criticism -- it provides a new defense to a charge of physically obstructing a government inspector if the inspector was acting unlawfully and the interference was reasonably necessary to protect a person or property in the defendant's custody or possession (Section 1302(b)(3)). Contrary to the assertion in the criticism, the inspector's good faith would have absolutely no bearing on the availability of the defense.

Criticism 20

Criticism: S. 1630 would --

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

Response: S. 1630 would not "massively expand" the jurisdiction of federal officers on Western lands. It would simply permit State and local authorities to obtain necessary federal law enforcement assistance by, in effect, "deputizing" federal agents.

The United States Government owns vast tracts of land in the United States, but has no criminal jurisdiction over about 90 percent of this area, which is subject to exclusive State jurisdiction. The States, however, frequently do not have sufficient resources to police these federal lands. Federal officers have the same arrest authority for State offenses on these lands as private citizens have, but this arrest authority varies substantially from State to State.

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

Criticism 21

Criticism: S. 1630 would --

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

Response: It is unclear whether this criticism is directed to Section 1325 (Tampering with Physical Evidence) or to Section 1345 (Failing to Keep a Government Record), or to both. In any event, the bases for the provisions are sound.

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

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

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

Criticism 22

Criticism: S. 1630 would --

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

Response: The S. 1630 provision is more limited than the present law in this area.

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

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

Criticism 23

Criticism: S. 1630 would --

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

Response: The criticism is poorly founded. The bill is plainly not subject to the interpretations suggested.

Existing federal law protects a person's exercise of certain civil rights from interference based on the person's sex. Except in the Fair Housing Act (42 U.S.C. 3631), however, the law does not penalize sexually motivated interference with the exercise of those federally protected rights in cases in which the interference is carried out by means of force or threat of force. S. 1630 corrects this omission.

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

It is clear under existing law that the word "sex" in federal statutes does not mean "sexual preference." See DeSantis v. Pacific Telephone and Telegraph Co., Inc., 608 F.2d 327, 329-30 (9th Cir. 1979) (the prohibition in title VII of the Civil Rights Act "applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.") There are no federal court decisions to the contrary.

Criticism 24

Criticism: S. 1630 would --

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

Response: S. 1630 contains a provision (Section 2005) that would permit a judge, during the sentencing process, to require a defendant (whether an individual, corporation, labor union, or other entity) convicted of criminal fraud (not merely "certain regulatory offenses") to give notice of the conviction to the victims of the offense (who, in cases involving large-scale frauds, may not all be known to anyone other than the defendant). Such a provision could facilitate any private actions that may be warranted for recovery of losses. Without such a provision, many victims of major fraud schemes may not become aware of the fraud (for example, that the mining stock they purchased is counterfeit) until it is too late to seek restitution, or may not be able to ascertain the perpetrator's current whereabouts (for example, a "fly-by-night" roofing operation). Such a provision could also serve to alert fraud victims to the advisability of other action on their part (for example, news of the worthlessness of a phony "cancer cure" may prompt a victim to visit a doctor in time for proper medical attention).

It is clear that a court today could accomplish the same result as a condition of probation, but the provision in S. 1630 would permit a court to require such notice in more serious cases as well -- cases in which a fine or imprisonment, rather than simply probation, is warranted (see Section 2001). This is certainly a reasonable extension. As safeguards for a defendant, S. 1630 places a limitation on a defendant's obligation if notice would require unusual expense (Section 2006), and permits a defendant to appeal to a court of appeals for a review of the appropriateness of an order requiring notice (Section 3725(a)).

Criticism 25

Criticism: S. 1630 would --

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

Response: The criticism is wrong. Only the value of the bribe could be made the subject of a forfeiture.

Section 4001 of S. 1630 would permit the Attorney General to institute a civil action to obtain the forfeiture of property used in connection with certain criminal offenses. These offenses include counterfeiting, disseminating pornographic material, smuggling, engaging in a gambling business, labor bribery, and several others (Section 4001(a)). One such offense is commercial bribery (Section 1751), an offense that, among other provisions, includes by cross-reference payments to foreign officials in violation of the existing Foreign Corrupt Practices Act. Contrary to the assertion in the criticism, however, a conviction for commercial bribery could not thereby result in forfeiture of "all of a company's assets." Section 4001(a)(18) plainly limits forfeiture to property "given or received in violation of" the bribery statute. In other words, only the value of the bribe itself would be subject to forfeiture.

As noted, the existing Foreign Corrupt Practices Act is mentioned in S. 1630 only by cross-reference, following the bill's general approach of including, for the purpose of completeness, a reference to all regulatory offenses that carry felony-level penalties. This has no effect on the separate, ongoing work to make changes in the scope of the Foreign Corrupt Practices Act (see S. 708, which recently was reported out by the Commerce Committee).

Department of Justice

STATEMENT OF

WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

ON

S. 1630

PROPOSED FEDERAL CRIMINAL CODE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

September 28, 1981

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I have two additional comments about the proposed Code.

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

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

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

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

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

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