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SENATE

{ REPORT
No. 91-617

ORGANIZED CRIME CONTROL ACT OF 1969

REPORT
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
TOGETHER WITH
INDIVIDUAL AND ADDITIONAL VIEWS
TO ACCOMPANY
S. 30



DECEMBER 18, (legislative day, DECEMBER 16), 1969.—Ordered to be printed

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ORGANIZED CRIME CONTROL ACT OF 1969

DECEMBER 18 (legislative day, DECEMBER 16), 1969.—Ordered to be printed

Mr. McClellan, from the Committee on the Judiciary,
submitted the following

REPORT

together with

INDIVIDUAL AND CONCURRING VIEWS

[To accompany S. 30]

The Committee on the Judiciary, to which was referred the bill (S. 30) relating to the control of organized crime in the United States, having considered it, reports favorably on it, with an amendment in the nature of a substitute, and recommends that the bill as amended pass.

AMENDMENT

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Organized Crime Control Act of 1969."

STATEMENT OF FINDINGS AND PURPOSE

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine

the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

TITLE I—SPECIAL GRAND JURY

Sec. 101. (a) Title 18, United States Code, is amended by adding immediately after chapter 215 the following new chapter:

“Chapter 216.—SPECIAL GRAND JURY

“Sec.

“3331. Summoning and term.

“3332. Powers and duties.

“3333. Reports.

“3334. General provisions.

“§ 3331. Summoning and term

“(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, a grand jury determines by majority vote that its business has not been completed, the court shall enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

“(b) If a district court within any judicial circuit fails to extend the term of a special grand jury upon application made by the grand jury pursuant to subsection (a) of this section, or enters an order for the discharge of such grand jury before it determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order in conformity with the provisions of subsection (a) of this section. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

“§ 3332. Powers and duties

“(a) Each special grand jury when impaneled shall elect by majority vote a foreman and a deputy foreman from among its members.

“(b) It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district which is brought to the attention of the grand jury by the court or by any person.

“(c) Whenever the special grand jury impaneled within any judicial district determines by majority vote that the volume of business of the grand jury exceeds the capacity of the grand jury to discharge its obligations, the grand jury may apply to the district court to impanel an additional special grand jury for that district. Upon any such application and a showing of need, such court shall order an additional grand jury to be impaneled. If the district court declines to hear such an application, or to grant such application after hearing, the grand jury may apply to the chief judge of the circuit for an order impaneling an additional special grand jury for that district. Such chief judge shall hear and determine such application at the earliest practicable time, and shall have jurisdiction to enter thereon such orders as may be required to provide for the impaneling of an additional grand jury within the judicial district for which such application was made.

“(d) Whenever the special grand jury determines by majority vote that any attorney or investigative officer or agent appearing on behalf of the United States before the grand jury for the presentation of evidence with respect to any matter has not performed or is not performing his duties diligently or effectively, the grand jury may transmit to the Attorney General in writing a statement of the reasons for such determination, together with a request for the designation by the Attorney General of another attorney or investigative officer or agent to appear before the grand jury for that purpose. Upon receipt of any such request, the Attorney General shall promptly cause inquiry to be made as to the merits of the allegations made by the grand jury and shall take whatever action he finds appropriate to provide for the United States' prompt and effective representation before such grand jury.

“§ 3333. Reports

“(a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or each extension thereof, submit to the court a report—

“(1) concerning noncriminal misconduct, malfeasance or misfeasance in office by a public officer or employee as the basis for a recommendation of removal or disciplinary action; or

“(2) stating that after investigation of a public officer or employee it finds no misconduct, malfeasance or misfeasance, or neglect in office by him, provided that such public officer or employee has requested the submission of such report; or

“(3) proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings; or

“(4) regarding organized crime conditions in the district.

“(b) The court to which such report is submitted shall examine it and the minutes of the special grand jury and, except as otherwise pro-

vided in subsections (c) and (d) of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subsection (a) of this section and that—

“(1) the report is based upon facts revealed in the course of an investigation authorized by subsection (b) of section 3332 and is supported by the preponderance of the evidence; and

“(2) when the report is submitted pursuant to paragraph (1), subsection (a) of this section, each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraphs (3) or (4) of subsection (a) of this section, it is not critical of an identified person.

“(c) (1) An order accepting a report pursuant to paragraph (1) of subsection (a) of this section and the report shall be sealed by the court and shall not be filed as a public record, subject to subpoena or otherwise made public (i) until at least thirty-one days after a copy of the order and report are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or (ii) if an appeal is taken, until all rights of review of the public officer or employee named therein have expired, or terminated in an order accepting the report. No order accepting a report pursuant to paragraph (1) of subsection (a) of this section shall be entered until thirty days after the delivery of such report to the public officer or body pursuant to paragraph (3) of subsection (c) of this section. The court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report. Unauthorized publication may be punished as contempt of the court.

“(2) Such public officer or employee may file with the clerk a verified answer to such a report not later than twenty days after service of the order and report upon him. Upon a showing of good cause, the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court determines to have been inserted scandalously, prejudiciously or unnecessarily, such answer shall become an appendix to the report.

“(3) Upon the expiration of the time set forth in paragraph (1), subsection (c) of this section, the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility or authority over each public officer or employee named in the report.

“(d) Upon the submission of a report pursuant to subsection (a) of this section, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.

“(e) Whenever the court to which a report is submitted pursuant to paragraph (1) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section,

it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report and it shall not be filed as a public record, subject to subpoena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may extend beyond thirty-six months in order that such additional testimony may be taken or the provisions of subsection (b) of this section may be met.

“(f) As used in this section, ‘public officer or employee’ means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality thereof.

“§ 3334. General provisions

“The provisions of chapter 215, title 18, United States Code, and the Federal Rules of Criminal Procedure applicable to regular grand juries shall apply to special grand juries to the extent not inconsistent with sections 3331, 3332 or 3333 of this chapter.

(b) The table of contents of Part II, title 18, United States Code, is amended by adding immediately after “215. Grand Jury . . . 3321,” the following new item:

“216. Special Grand Jury . . . 3331”

“Sec. 102. (a) Subsection (a), section 3500, chapter 223, title 18, United States Code, is amended by striking “to an agent of the Government” following “the defendant”.

(b) Subsection (d), section 3500, chapter 223, title 18, United States Code, is amended by striking “paragraph” following “the court under” and inserting in lieu thereof “subsection”.

(c) Paragraph (1), subsection (e), section 3500, chapter 223, title 18, United States Code, is amended by striking the “or” following the semicolon.

(d) Paragraph (2), subsection (e), section 3500, chapter 223, title 18, United States Code, is amended by striking “to an agent of the Government” after “said witness” and by striking the period at the end thereof and inserting in lieu thereof: “; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.”.

TITLE II—GENERAL IMMUNITY

SEC. 201. (a) Title 18, United States Code, is amended by adding immediately after part IV the following new part:

“PART V.—IMMUNITY OF WITNESSES

“Sec.

“6001. Definitions.

“6002. Immunity generally.

“6003. Court and grand jury proceedings.

“6004. Certain administrative proceedings.

“6005. Congressional proceedings.

“§ 6001. Definitions

“As used in this part—

“(1) ‘agency of the United States’ means any executive department (as defined in 80 Stat. 948; 80 Stat. 378 (5 U.S.C. sec. 101)), a military department (as defined in 80 Stat. 378 (5 U.S.C. sec. 102)), the Atomic Energy Commission, the China Trade Act

registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board; or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

“(2) ‘other information’ includes any book, paper, document, record, recording, or other material;

“(3) ‘proceeding before an agency of the United States’ means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

“(4) ‘court of the United States’ means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals.”

“§ 6002. Immunity generally

“Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

“(1) a court or grand jury of the United States,

“(2) an agency of the United States, or

“(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House.

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony or other information may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

“§ 6003. Court and grand jury proceedings

“(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States or the Department of Justice, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-

incrimination, such order to become effective as provided in section 6002 of this chapter.

“(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

“(1) the testimony or other information from such individual may be necessary to the public interest; and

“(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

“§ 6004. Certain administrative proceedings

“(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States other than the Department of Justice, the agency may issue, in accordance with subsection (b) of this section, an order requiring the individual to give any testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this chapter.

“(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment—

“(1) the testimony or other information from such individual may be necessary to the public interest; and

“(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

The agency may issue such an order ten days after the day on which it served the Attorney General with notice of its intention to issue the order or upon approval of the Attorney General.

“§ 6005. Congressional proceedings

“(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this chapter.

“(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

“(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that house.

“(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

“(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

“(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.”

(b) The table of parts for title 18, United States Code, is amended by adding at the end thereof the following new item:

“V. Immunity of Witnesses----- 6001.”

SEC. 202. The third sentence of paragraph (b) of section 6 of the Commodity Exchange Act (69 Stat. 160 (7 U.S.C. § 15)) is amended by striking “49 U.S.C. 12, 46, 47, 48, relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses” and by inserting in lieu thereof the following: “(49 U.S.C. § 12), relating to the attendance and testimony of witnesses and the production of documentary evidence.”

SEC. 203. Subsection (f) of section 17 of the United States Grain Standards Act (82 Stat. 768 (7 U.S.C. § 87f(f))) is repealed.

SEC. 204. The second sentence of section 5 of the Act entitled “An Act to regulate the marketing of economic poisons and devices, and for other purposes”, approved June 25, 1947 (61 Stat. 168; 7 U.S.C. § 135(c)), is amended by inserting after “section”, the following language: “, or any evidence which is obtained by the exploitation of information.”

SEC. 205. Subsection (f) of section 13 of the Perishable Agricultural Commodities Act, 1930 (46 Stat. 536; 7 U.S.C. § 499m(f)) is repealed.

SEC. 206. (a) Section 16 of the Cotton Research and Promotion Act (80 Stat. 285; 7 U.S.C. § 2115), is amended by striking “(a)” and by striking subsection (b).

(b) The section heading for such section 16 is amended by striking “: Self-Incrimination”.

SEC. 207. Clause (10) of subsection (a) of section 7 of this Act entitled “An Act to establish a uniform system of bankruptcy throughout the United States”, approved July 1, 1898 (52 Stat. 847; 11 U.S.C. § 25(a)(10)), is amended by inserting after the first use of the term “testimony” the following language: “, or any evidence which is obtained by the exploitation of such testimony.”

SEC. 208. The fourth sentence of subsection (d) of section 10 of the Federal Deposit Insurance Act (64 Stat. 882; 12 U.S.C. § 1820(d)), is repealed.

SEC. 209. The seventh paragraph under the center heading “DEPARTMENT OF JUSTICE” in the first section of the Act of February 25, 1903 (32 Stat. 904; 15 U.S.C. § 32) is amended by striking out “: Provided, That” and all that follows in that paragraph and inserting in lieu thereof a period.

SEC. 210. The Act of June 30, 1906 (34 Stat. 798; 15 U.S.C. § 33), is repealed.

SEC. 211. The seventh paragraph of section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C. § 49), is repealed.

SEC. 212. Subsection (d) of section 21 of the Securities Exchange Act of 1934 (48 Stat. 899; 15 U.S.C. § 78v(c)) is repealed.

SEC. 213. Subsection (c) of section 22 of the Securities Act of 1933 (48 Stat. 899; 15 U.S.C. § 78u(d)) is repealed.

SEC. 214. Subsection (e) of section 18 of the Public Utility Holding Company Act of 1935 (49 Stat. 831; 15 U.S.C. § 79r(e)) is repealed.

SEC. 215. Subsection (d) of section 42 of the Investment Company Act of 1940 (54 Stat. 842; 15 U.S.C. § 80a—41(d)) is repealed.

SEC. 216. Subsection (d) of section 209 of the Investment Advisers Act of 1940 (54 Stat. 853; 15 U.S.C. § 80b—9(d)) is repealed.

SEC. 217. Subsection (c) of section 15 of the China Trade Act, 1922 (42 Stat. 953; 15 U.S.C. § 155(c)), is repealed.

SEC. 218. Subsection (h) of section 14 of the Natural Gas Act (52 Stat. 828; 15 U.S.C. § 717m(h)) is repealed.

SEC. 219. The first proviso of section 12 of the Act entitled "An Act to regulate the interstate distribution and sale of packages of hazardous substances intended or suitable for household use," approved July 12, 1960 (74 Stat. 379; 15 U.S.C. § 1271), is amended by inserting after "section" the following language: "or any evidence which is obtained by the exploitation of such information,".

SEC. 220. Subsection (e) of section 1415 of the Interstate Land Sales Full Disclosure Act (82 Stat. 596; 15 U.S.C. 1714(e)), is repealed.

SEC. 221. Subsection (g) of section 307 of the Federal Power Act (49 Stat. 856; 16 U.S.C. § 825f(g)), is repealed.

SEC. 222. Subsection (b) of section 835 of title 18, United States Code, is amended by striking the third sentence thereof.

SEC. 223. (a) Section 895 of title 18, United States Code, is repealed.

(b) The table of sections of chapter 42 of such title is amended by striking the item relating to section 895.

SEC. 224. (a) Section 1406 of title 18, United States Code, is repealed.

(b) The table of sections of chapter 68 of such title is amended by striking the item relating to section 1406.

SEC. 225. Section 1954 of title 18, United States Code, is amended by striking out "(a) Whoever" and inserting in lieu thereof "Whoever" and by striking out subsection (b) thereof.

SEC. 226. The second sentence of subsection (b), section 2424, title 18, United States Code is amended by striking "but no person" and all that follows in that subsection and inserting in lieu thereof: "but no information contained in the statement or any evidence which is obtained by the exploitation of such information may be used against any person making such statement in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this section."

SEC. 227. (a) Section 2514 of title 18, United States Code, is repealed effective four years after the effective date of this Act.

(b) The table of sections of chapter 119 of such title is amended by striking the item relating to section 2514.

SEC. 228. (a) Section 3486 of title 18, United States Code is repealed.

(b) The table of sections of chapter 223 of such title is amended by striking out the item relating to section 3486.

SEC. 229. Subsection (e) of section 333 of the Tariff Act of 1930 (46 Stat. 699; 19 U.S.C. § 1333(e)), is amended by striking "Pro-

vided, That” and all that follows in that subsection and inserting in lieu thereof a period.

SEC. 230. The first proviso of section 703 of the Federal Food, Drug and Cosmetic Act, approved June 25, 1938, (52 Stat. 1057; 21 U.S.C. § 373), is amended by inserting after “section” the following language: “, or any evidence which is obtained by the exploitation of such evidence.”

SEC. 231. (a) Section 4874 of the Internal Revenue Code of 1954 is repealed.

(b) The table of sections of part III of subchapter (D) of chapter 76 of such Code is amended by striking the item relating to section 4874.

SEC. 232. (a) Section 7493 of the Internal Revenue Code of 1954 is repealed.

(b) The table of sections of part III of subchapter (E) of chapter 76 of such Code is amended by striking the item relating to section 7493.

SEC. 233. (a) Subchapter (E) of chapter 75 of the Internal Revenue Code of 1954 is repealed.

(b) The table of subchapters for chapter 75 of the Internal Revenue Code of 1954 is amended by striking the item “Subchapter E. . . Immunity.”

SEC. 234. Paragraph (3) of section 11 of the Labor Management Relations Act, 1947 (49 Stat. 455; 29 U.S.C. § 161(3)), is repealed.

SEC. 235. The third sentence of section 4 of the Act entitled “An Act to provide that tolls on certain bridges over navigable waters of the United States shall be just and reasonable, and for other purposes”, approved August 21, 1935, (49 Stat. 671; 33 U.S.C. § 506), is repealed.

SEC. 236. Subsection (f) of section 205 of the Social Security Act (42 U.S.C. § 405(f)) is repealed.

SEC. 237. Paragraph (c) of section 161 of the Atomic Energy Act of 1954 (68 Stat. 948; 42 U.S.C. § 2201(c)), is amended by striking the third sentence thereof.

SEC. 238. The last sentence of the first paragraph of subparagraph (h) of the paragraph designated “Third” of section 7 of the Railway Labor Act (44 Stat. 582; 45 U.S.C. § 157), is repealed.

SEC. 239. Subsection (c) of section 12 of the Railroad Unemployment Insurance Act (52 Stat. 1107; 45 U.S.C. § 362(c)), is repealed.

SEC. 240. Section 28 of the Shipping Act of 1916 (39 Stat. 737; 46 U.S.C. § 827), is repealed.

SEC. 241. Subsection (c) of section 214 of the Merchant Marine Act, 1936 (49 Stat. 1991; 46 U.S.C. § 1124(c)), is repealed.

SEC. 242. Subsection (i) of section 409 of the Communications Act of 1934 (48 Stat. 1096; 47 U.S.C. § 409(i)), is repealed.

SEC. 243. (a) The second sentence of section 9 of the Interstate Commerce Act (24 Stat. 382; 49 U.S.C. § 9), is amended by striking “; the claim” and all that follows in that sentence and inserting in lieu thereof a period.

(b) Subsection (a) of section 316 of the Interstate Commerce Act (54 Stat. 946; 49 U.S.C. § 916(a)) is amended by striking the comma following “part I” and by striking “, and the Immunity of Witnesses Act (34 Stat. 798; 32 Stat. 904, ch. 755, sec. 1),”.

(c) Subsection (a) of section 417 of the Interstate Commerce Act (49 U.S.C. § 1017(a)) is amended by striking the comma after “such

provisions" and by striking ", and of the Immunity of Witnesses Act (34 Stat. 798; 32 Stat. 904, ch. 755, sec. 1),".

SEC. 244. The third sentence of section 3 of the Act entitled "An Act to further regulate Commerce with foreign nations and among the States", approved February 19, 1903 (32 Stat. 848; 49 U.S.C. § 43) is amended by striking "; the claim" and all that follows in that sentence down through and including "Provided, That the provisions" and inserting in lieu thereof ". The provisions".

SEC. 245. The first paragraph of the Act of February 11, 1893 (27 Stat. 443, 49 U.S.C. § 46), is repealed.

SEC. 246. Subsection (i) of section 1004 of the Federal Aviation Act of 1958 (72 Stat. 792; 49 U.S.C. § 1484(i)), is repealed.

SEC. 247. The ninth sentence of subsection (c) of section 13 of the Internal Security Act of 1950 (81 Stat. 798; 50 U.S.C. § 792(c)), is repealed.

SEC. 248. Section 1302 of the Second War Powers Act of 1942 (56 Stat. 185; 50 U.S.C. App. § 643a), is amended by striking the fourth sentence thereof.

SEC. 249. Paragraph (4) of subsection (a) of section 2 of the Act entitled "An act to expedite national defense, and for other purposes", approved June 28, 1940 (54 Stat. 676; 50 U.S.C. App. § 1152(a)(4)), is amended by striking the fourth sentence thereof.

SEC. 250. Subsection (d) of section 6 of the Export Control Act of 1949 (63 Stat. 8; 50 U.S.C. App. § 2026(b)), is repealed.

SEC. 251. Subsection (b) of section 705 of the act of September 8, 1950, to amend the Tariff Act of 1930 (64 Stat. 816; 50 U.S.C. § 2155(b)), is repealed.

SEC. 252. In addition to the provisions of law specifically amended or specifically repealed by this title, any other provision of law inconsistent with the provisions of part V of title 18, United States Code (added by title II of this Act), is to that extent amended or repealed.

TITLE III—RECALCITRANT WITNESSES

SEC. 301. (a) Chapter 119, title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1826. Recalcitrant witnesses

"(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of the court proceeding or of the term, including extensions, of the grand jury before which such refusal to comply with the court order occurred.

"(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement, unless there is substantial possibility of reversal. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than 30 days from the filing of such appeal."

(b) The analysis of chapter 119, title 28, United States Code, is amended by adding at the end thereof the following new item:

“1826. Recalcitrant witnesses”.

SEC. 302. (a) The first paragraph of section 1073, chapter 49, title 18, United States Code, is amended by inserting “or (3) to avoid contempt proceedings for alleged disobedience of any lawful process requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a State empowered by the law of such State to conduct investigations of alleged criminal activities,” immediately after “is charged.”

(b) The second paragraph of section 1073, chapter 49, title 18, United States Code, is amended by inserting immediately after “held in custody or confinement” a comma and adding “or in which a contempt referred to in clause (3) of the first paragraph of this section is alleged to have been committed.”

TITLE IV—FALSE DECLARATIONS

SEC. 401. (a) Chapter 79, title 18, United States Code, is amended by adding at the end thereof the following new section:

“§ 1623. False declarations before grand jury or court

“(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any materially false declaration or makes or uses any other information, including any book, paper, document, record, recording or other material, knowing the same to contain any materially false declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

“(b) This section is applicable whether the conduct occurred within or without the United States.

“(c) An indictment or information for violation of this section alleging that the defendant under oath has made contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury of the United States, need not specify which declaration is false. In any prosecution under this section, the falsity of the declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made manifestly contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. Where the contradictory declarations are made in the same continuous court or grand jury proceeding, an admission by a person in that same continuous court or grand jury proceeding of the falsity of his contradictory declaration shall bar prosecution under this section if, at the time the admission is made, the false declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

“(d) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.”

(b) The analysis of chapter 79, title 18, United States Code, is amended by adding at the end thereof the following new item:

“1623. False declarations before grand jury or court”.

TITLE V—PROTECTED FACILITIES FOR HOUSING GOVERNMENT WITNESSES

SEC. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

SEC. 502. The Attorney General of the United States is authorized to rent, purchase, or construct protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

SEC. 503. As used in this title, “Government” means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.

SEC. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.

TITLE VI—DEPOSITIONS

SEC. 601. (a) Chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new section:

“§ 3503. Depositions to preserve testimony

“(a) Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon

notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

“(b) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination, but his failure, absent good cause shown, to appear after notice and tender of expenses shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

“(c) If a defendant is without counsel, the court shall advise him of his rights and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel of his own choice. If it appears that a defendant cannot bear the expense of the taking of the deposition, the court may direct that the expenses of travel and subsistence of the defendant and his attorney for attendance at the examination shall be paid by the Government. In such event the marshal shall make payment accordingly.

“(d) A deposition shall be taken and filed in the manner provided in civil actions. On request or waiver by the defendant the court may direct that a deposition be taken on written interrogatories in the manner provided in civil actions. Such request shall constitute a waiver of any objection to the taking and use of the deposition based upon its being so taken.

“(e) The Government shall make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the Government and which the Government would be required to make available to the defendant if the witness were testifying at the trial.

“(f) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.”

(b) The analysis of chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new item :

“3503. Depositions to preserve testimony”.

TITLE VII—LITIGATION CONCERNING SOURCES OF EVIDENCE

PART A—SPECIAL FINDINGS

SEC. 701. The Congress finds that (1) hearing and reviewing claims that evidence offered in proceedings was obtained by the exploitation of allegedly unlawful acts and is therefore inadmissible in evidence are major causes of undue expense and delay in the administration of justice and distract effort, time, and emphasis of Government officials and the public from fundamental issues; (2) present rules and practices of disclosure incident to hearing and reviewing such claims can and will unduly permit parties to obtain much information unrelated to such

claims and otherwise privileged, inhibit communication by Government informants, endanger the lives and safety of such informants, Government agents and others, cause unjustified harm to reputations of third persons, compromise national security and other criminal and civil investigations, interfere with prosecutions and civil actions, impair Federal-State cooperation in law enforcement, and endanger the security of the United States; (3) when such claims concern evidence of events occurring years after the allegedly unlawful acts, those consequences of litigation and disclosure are aggravated and the claims often cannot reliably be determined; and (4) when the allegedly unlawful act has occurred more than five years prior to the event in question, there is virtually no likelihood that the evidence offered to prove the event has been obtained by the exploitation of that allegedly unlawful act.

PART B—LITIGATION CONCERNING SOURCES OF EVIDENCE

SEC. 702. (a) Chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new section:

“§ 3504. Litigation concerning sources of evidence

“(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States, a State or a political subdivision thereof—

“(1) upon a claim, by a party aggrieved, that evidence is inadmissible because it is the primary product of an unlawful act or of lawful compulsion and grant of immunity, or because it was obtained by the exploitation of an unlawful act or of evidence given under lawful compulsion and grant of immunity, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act or compulsion; and

“(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act or of lawful compulsion and grant of immunity, or because it was obtained by the exploitation of an unlawful act or of evidence given under lawful compulsion and grant of immunity, shall not be required unless such information may be relevant to a pending claim of such inadmissibility, and such disclosure is in the interest of justice; and

“(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act or of evidence given under lawful compulsion and grant of immunity, if such event occurred more than five years after such allegedly unlawful act or compulsion.

“(b) As used in this section—

“(1) ‘State’ means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States; and

“(2) ‘unlawful act’ means any act in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.”

(b) The analysis of chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new item:

“3504. Litigation concerning sources of evidence”.

SEC. 703. This title shall apply to all proceedings, regardless of when commenced, occurring after the date of its enactment. Paragraph (3) of subsection (a) of section 3504, chapter 223, title 18, United States Code, shall not apply to any proceeding in which all information to be relied upon to establish inadmissibility was possessed by the party making such claim and adduced in such proceeding prior to such enactment.

TITLE VIII—SYNDICATED GAMBLING

PART A—SPECIAL FINDINGS

SEC. 801. The Congress finds that (1) illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof; (2) illegal gambling is dependent upon facilities of interstate commerce for such purposes as obtaining odds, making and accepting bets, and laying off bets; (3) money derived from or used in illegal gambling moves in interstate commerce or is handled through the facilities thereof; (4) paraphernalia for use in illegal gambling moves in interstate commerce; and (5) illegal gambling enterprises are facilitated by the corruption and bribery of State and local officials or employees responsible for the execution or enforcement of criminal laws.

PART B—OBSTRUCTION OF STATE OR LOCAL LAW ENFORCEMENT

SEC. 802. (a) Chapter 73, title 18, United States Code, is amended by adding at the end thereof the following new section:

“§ 1511. Obstruction of State or local law enforcement

“(a) It shall be unlawful for two or more persons to participate in a scheme to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business, if—

“(1) one or more of such persons does any act to effect the object of such a scheme;

“(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, who is responsible for the enforcement of criminal laws of such State or political subdivision; and

“(3) one or more of such persons participates in an illegal gambling business.

“(b) As used in this section—

“(1) ‘illegal gambling business’ means a gambling business which—

“(i) is a violation of the law of a State or political subdivision thereof;

“(ii) involves five or more persons who participate in the gambling activity; and

“(iii) has been or remains in operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

“(2) ‘gambling’ includes pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting

lotteries, policy, bolita or numbers games, or selling chances therein.

“(3) ‘State’ means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

“(c) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization, except as compensation for actual expenses incurred by him in the conduct of such activity.

“(d) Whoever violates this section shall be punished by a fine of not more than \$20,000 or imprisonment for not more than five years, or both.”

(b) The analysis of chapter 73, title 18, United States Code, is amended by adding at the end thereof the following new item:

“1511. Obstruction of State or local law enforcement”.

PART C—ILLEGAL GAMBLING BUSINESS

SEC. 803. (a) Chapter 95, title 18, United States Code, is amended by adding at the end thereof the following new section:

“§ 1955. Prohibition of illegal gambling businesses

“(a) Whoever participates in an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

“(b) As used in this section—

“(1) ‘illegal gambling business’ means a gambling business which—

“(i) is a violation of the law of a State or political subdivision thereof;

“(ii) involves five or more persons who participate in the gambling activity; and

“(iii) has been or remains in operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

“(2) ‘gambling’ includes pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

“(3) ‘State’ means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

“(c) For the purpose of this section, if it is found that a gambling business has five or more persons who participate in such business and such business operates for two or more successive days, the probability shall have been established that such business receives gross revenue in excess of \$2,000 in any single day.

“(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchan-

dise; and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

“(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.”

(f) The analysis of chapter 95, title 18, United States Code, is amended by adding at the end thereof the following new item:

“1955. Prohibition of illegal gambling businesses”.

PART D—COMMISSION TO REVIEW NATIONAL POLICY TOWARD GAMBLING

ESTABLISHMENT

SEC. 804. (a) There is hereby established two years after the effective date of this Act a Commission on the Review of the National Policy Toward Gambling.

(b) The Commission shall be composed of fifteen members appointed as follows:

(1) Four appointed by the President of the Senate from Members of the Senate, of whom two shall be members of the majority party, and two shall be members of the minority party;

(2) Four appointed by the Speaker of the House of Representatives from Members of the House of Representatives, of whom two shall be members of the majority party, and two shall be members of the minority party; and

(3) Seven appointed by the President of the United States from persons specially qualified by training and experience to perform the duties of the Commission, none of whom shall be officers of the executive branch of the Government.

(c) The President of the United States shall designate a Chairman from among the members of the Commission. Any vacancy in the Commission shall not affect its powers but shall be filled in the same manner in which the original appointment was made.

(d) Eight members of the Commission shall constitute a quorum.

DUTIES

Sec. 805. (a) It shall be the duty of the Commission to conduct a comprehensive legal and factual study of gambling in the United States and existing Federal, State and local policies and practices with respect to the legal prohibition and taxation of gambling activities and to formulate and propose such changes in those policies and practices as the Commission may deem appropriate. In such study and review the Commission shall—

(1) review the effectiveness of existing practices in law enforcement, judicial administration, and corrections in the United States and in foreign legal jurisdictions for the enforcement of the prohibition and taxation of gambling activities, and consider possible alternatives to such practices; and

(2) prepare a study of existing statutes of the United States that prohibit and tax gambling activities, and such a codification, revision or repeal thereof as the Commission shall determine to be required to carry into effect such policy and practice changes as it may deem to be necessary or desirable.

(b) The Commission shall make such interim reports as it deems advisable. It shall make a final report of its findings and recommendations to the President of the United States and to the Congress within the four-year period following the establishment of the Commission.

(c) Sixty days after the submission of its final report, the Commission shall cease to exist.

POWERS

Sec. 806. (a) The Commission or any duly authorized subcommittee or member thereof may, for the purpose of carrying out the provisions of this title, hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers and documents as the Commission or such subcommittee or member may deem advisable. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission or before such subcommittee or member. Subpenas may be issued under the signature of the Chairman or any duly designated member of the Commission, and may be served by any person designated by the Chairman or such member.

(b) In the case of contumacy or refusal to obey a subpoena issued under subsection (a) by any person who resides, is found, or transacts business within the jurisdiction of any district court of the United States, the district court, at the request of the Chairman of the Commission, shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee or member thereof, there to produce evidence if so ordered, or there to give testimony touching the matter under inquiry. Any failure of any such person to obey any such order of the court may be punished by the court as a contempt thereof.

(c) The Commission shall be "an agency of the United States" under subsection (1), section 6001, title 18, United States Code for the purpose of granting immunity to witnesses.

(d) Each department, agency, and instrumentality of the executive branch of the Government including independent agencies, is authorized and directed to furnish to the Commission, upon request made by the Chairman, on a reimbursable basis or otherwise, such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this title. The Chairman is further authorized to call upon the departments, agencies, and other offices of the several States to furnish, on a reimbursable basis or otherwise, such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this title.

COMPENSATION AND EXEMPTION OF MEMBERS

SEC. 807. (a) A member of the Commission who is a Member of Congress or a member of the Federal judiciary shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission.

(b) A member of the Commission who is not a member of Congress or a member of the Federal judiciary shall receive \$100 per diem when engaged in the actual performance of duties vested in the Commission plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

STAFF

SEC. 808. (a) Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

(1) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title; and

(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed \$100 a day for individuals.

(b) In making appointments pursuant to this subsection, the Chairman shall include among his appointments individuals determined by the Chairman to be competent social scientists, lawyers, and law enforcement officers.

EXPENSES

SEC. 809. There are hereby authorized to be appropriated to the Commission such sums as may be necessary to carry this title into effect.

PART E—GENERAL PROVISIONS

SEC. 810. Paragraph (c), subsection (1), section 2516, title 18, United States Code, is amended by adding "section 1511 (obstruction of State

or local law enforcement” after “section 1510 (obstruction of criminal investigations),” and by adding “section 1955 (prohibition of business enterprises of gambling),” after “section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plans).”

SEC. 811. No provision of this title indicates an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of a State or possession, or a political subdivision of a State or possession, on the same subject matter, or to relieve any person of any obligation imposed by any law of any State or possession, or a political subdivision of a State or possession.

TITLE IX—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

SEC. 901. (a) Title 18, United States Code, is amended by adding immediately after chapter 95 thereof the following new chapter:

“Chapter 96.—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

“Sec.

“1961. Definitions.

“1962. Prohibited racketeering activities.

“1963. Criminal penalties.

“1964. Civil remedies.

“1965. Venue and process.

“1966. Expedition of actions.

“1967. Evidence.

“1968. Civil investigative demand.

“§ 1961. Definitions

“As used in this chapter—

“(1) ‘racketeering activity’ means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment), section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2421–24 (relating to white slave traffic), (C) any act which is indictable under

Title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs punishable under any law of the United States;

“(2) ‘State’ means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof;

“(3) ‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property;

“(4) ‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

“(5) ‘pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter;

“(6) ‘unlawful debt’ means a debt (A) which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to gambling or usury, and (B) which was incurred in connection with the business of gambling or the business of lending money or a thing of value at a usurious rate, where the usurious rate is at least twice the permitted rate;

“(7) ‘racketeering investigator’ means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

“(8) ‘racketeering investigator’ means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

“(9) ‘documentary material’ includes any book, paper, document, record, recording, or other material; and

“(10) ‘Attorney General’ includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

“§ 1962. Prohibited activities

“(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18,

United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

“(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

“(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

“(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

“(e) A violation of this section shall be deemed to continue so long as the person who committed the violation continues to receive any benefit from the violation.

“§ 1963. Criminal penalties

“(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

“(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

“(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferrable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and

the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

“§ 1964. Civil remedies

“(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

“(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

“(c) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

“§ 1965. Venue and process

“(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

“(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

“(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

“(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

“§ 1966. Expedition of actions

“In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine such action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

“§ 1967. Evidence

“In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings shall be open to the public, and no order closing any such proceeding shall be made or enforced.

“§ 1968. Civil Investigative Demand

“(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary material relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

“(b) Each such demand shall—

“(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

“(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

“(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

“(4) identify the custodian to whom such material shall be made available.

“(c) No such demand shall—

“(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

“(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

“(d) Service of any such demand or any petition filed under this section may be made upon a person by—

“(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

“(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

“(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

“(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

“(f)

“(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

“(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

“(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

“(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any

such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

“(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

“(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

“(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

“(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

“(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which

such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

“(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

“(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.”

(b) The table of contents of Part I, title 18, United States Code, is amended by adding immediately after “95. Racketeering . . . 1951” the following new item:

“96. Racketeer Influenced and Corrupt Organizations . . . 1961”.

SEC. 902. (a) Paragraph (c), subsection (1), section 2516, title 18, United States Code, is amended by inserting at the end thereof between the parenthesis and the semicolon “, section 1963 (violations with respect to racketeer influenced and corrupt organizations)”.

(b) Subsection (3), section 2517, title 18, United States Code, is amended by striking “criminal proceedings in any court of the United States or of any State or in any Federal or State grand jury proceeding” and inserting in lieu thereof “proceeding held under the authority of the United States or of any State or political subdivision thereof”.

SEC. 903. The third paragraph, section 1505, title 18, United States Code, is amended by inserting “or section 1968 of this title” after “Act” and before “willfully”.

SEC. 904. (a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

(c) Nothing contained in this title shall impair the authority of any attorney representing the United States to—

(1) lay before any grand jury impaneled by any district court of the United States any evidence concerning any alleged racketeering violation of law;

(2) invoke the power of any such court to compel the production of any evidence before any such grand jury; or

(3) institute any proceeding to enforce any order or process issued in execution of such power or to punish disobedience of any such order or process by any person.

TITLE X—DANGEROUS SPECIAL OFFENDER
SENTENCING

SEC. 1001. (a) Chapter 227, title 18, United States Code, is amended by adding at the end thereof the following new sections:

“§ 3575. Increased sentence for dangerous special offenders

“(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony or in any manner be disclosed to the jury.

“(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, the court shall, before sentence is imposed, hold a hearing before the court alone. The court shall fix a time for the hearing and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. In connection with the hearing, the defendant and the United States shall be informed of the substance of such parts of the presentence report as the court intends to rely upon, except where there are placed in the record compelling reasons for withholding particular information, and shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for a term not to exceed thirty years. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

“(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding thirty years upon any person convicted of an offense so punishable.

“(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony.

“(e) A defendant is a special offender for purposes of this section if—

“(1) on two or more previous occasions the defendant has been convicted in a court of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof for an offense punishable in such court by death or imprisonment in excess of one year, and for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony; or

“(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

“(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In determining under paragraph (1) of this subsection whether the defendant has been convicted on two or more previous occasions, conviction for offenses charged in separate counts of a single charge or pleading, or in separate charges or pleadings tried in a single trial, shall be deemed to be conviction on a single occasion. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct.

“(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

“(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

“§ 3576. Review of sentence

“With respect to any sentence imposed on the defendant after proceedings under section 3575, a review may be taken by the defendant or the United States or both to a court of appeals. Any review by the United States shall be taken at least five days before expiration of the time for taking a review or appeal by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review by the United States after the time has expired. A court extending the time for taking a review by the United States shall extend the time for taking a review or appeal by the defendant for the same period. The court of appeals may, after considering the record, including the presentence report, information submitted during the trial of such felony

and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be increased or otherwise changed to the disadvantage of the defendant only on review taken by the United States and after hearing. Any withdrawal of review taken by the United States shall foreclose change to the disadvantage but not change to the advantage of the defendant. Any review taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

“§ 3577. Use of information for sentencing

“No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

“§ 3578. Conviction records

“(a) There is established within the Federal Bureau of Investigation of the Department of Justice a central repository for written judgments of conviction.

“(b) Upon the conviction of a defendant in a court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof for an offense punishable in such court by death or imprisonment in excess of one year, the court shall cause to be affixed to a copy of the written judgment of conviction the fingerprints of the defendant together with certification by the court that the copy is a true copy of the written judgment of conviction and that the fingerprints are those of the defendant, and shall cause the copy to be forwarded to the central repository.

“(c) Copies maintained in the central repository shall not be public records. Attested copies thereof—

“(1) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof;

“(2) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of a State, any political subdivision, or any department, agency or instrumentality thereof, if a statute of such State requires that, upon the conviction of a defendant in a court of the State or any political subdivision thereof for an offense punishable in such court by death or imprisonment in excess of one year, the court cause to be affixed to a copy of the written judgment of conviction the fingerprints of the defendant together with certification by the court that the copy is a true copy of the written judgment of conviction and that the fingerprints are those of the defendant, and cause the copy to be forwarded to the central repository; and

“(3) shall be admissible in any court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision,

or any department, agency, or instrumentality thereof.”

(b) The analysis of chapter 227, title 18, United States Code, is amended by adding at the end thereof the following new items:

“3575. Increased sentence for dangerous special offenders

“3576. Review of sentence

“3577. Use of information for sentencing

“3578. Conviction records”.

SEC. 1002. Section 3148, chapter 207, title 18, United States Code, is amended by adding “or sentence review under section 3576 of this title” immediately after “sentence”.

TITLE XI—GENERAL PROVISIONS

SEC. 1101. If the provisions of any part of this Act or the application thereof to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby.

SCOPE OF AMENDMENT

The bill, as amended, is divided into 11 titles, embodying a comprehensive, integrated program designed to deal with the menace of organized crime in the United States. Combining the essential features of eight bills aimed at organized crime and referred to the committee, the major provisions of the amendment in the nature of a substitute bill are summarized immediately below.

Findings.—Here the character and scope of organized crime and its impact on the Nation are outlined. The policy of the Congress to seek to eradicate organized crime is then declared.

TITLE I

Grand jury.—This title establishes, in addition to regular grand juries, special grand juries to sit in our major population areas or elsewhere by designation of the Attorney General. Guaranteed a measure of independence, the grand juries are authorized to sit for extended periods (up to 36 months) and are empowered not only to return indictments but also to issue grand jury reports (1) concerning governmental misconduct; (2) making legislative or executive recommendations; and (3) regarding organized crime conditions. Where such reports are critical of identified individuals, elaborate safeguards are provided, including notice, opportunity to present evidence, and judicial review prior to publication.

This title also brings grand jury minutes within the provisions of 18 U.S.C. § 3500, which regulates the pretrial disclosure “statements” of Government witnesses in criminal matters.

TITLE II

Immunity.—This title unifies and expands existing Federal law dealing with the granting of immunity from self-incrimination in legislative, administrative, and court proceedings. All previous legislation is repealed. Under its provisions immunity from use of testimony, rather than from prosecution itself, is afforded. The granting of immunity in court and legislative proceedings is subject to court review,

while notice must be given to the Attorney General prior to its granting in administrative proceedings.

TITLE III

Recalcitrant witnesses.—This title codifies existing Federal civil contempt proceedings designed to deal with recalcitrant witnesses in grand jury and court proceedings, authorizing confinement, without bail, until compliance is made with the order of the court.

This title also makes witnesses who flee State investigative commissions to avoid giving testimony subject to Federal process.

TITLE IV

False declarations.—This title creates a new false declaration provision applicable in grand jury and court proceedings. It makes inapplicable to such prosecutions the two-witness and direct evidence rules and authorizes a conviction based on manifestly contradictory declarations under oath.

TITLE V

Witness protection facilities.—This title authorizes the Attorney General to protect and maintain Federal or State organized crime witnesses and their families. State witnesses may be protected on a reimbursable basis.

TITLE VI

Depositions.—This title authorizes, subject to the constitutional safeguards of assistance of counsel and cross-examination, the taking of depositions in criminal cases.

TITLE VII

Litigation concerning sources of evidence.—This title provides a statute of limitation on determining the derivative evidentiary consequences of law enforcement conduct. Where 5 years have passed between an act and a later event, evidence of which is offered at trial, litigation over causal connection between the act and the evidence of the later event, seeking suppression of the evidence, is foreclosed.

This title also requires court review incident to the disclosure of Government files in connection with a claim of inadmissibility predicated upon unlawful law enforcement conduct or the use of testimony gained by an immunity grant.

TITLE VIII

Syndicated gambling.—This title is broken into five parts:

Part A contains special findings dealing with the effect of syndicated gambling on interstate commerce.

Part B makes it unlawful to engage in a scheme to obstruct the enforcement of State law to facilitate an "illegal gambling business," defined as (1) violating State law; (2) involving five or more persons; and (3) operating in excess of 30 days or having a gross revenue of \$2,000 in any single day. Nonprofit, tax-exempt games of chance are excluded. A fine of \$20,000 or imprisonment for not more than 5 years is provided.

Part C makes it unlawful to engage in the operation of the "illegal gambling business" itself, defined as above. A special "probable cause" finding is made. It provides that where five or more persons operate an illegal gambling business for 2 or more successive days gross revenue of \$2,000 per day has been inferentially established. Any property used in violation of the provision may be seized and civilly forfeited to the United States. A fine of \$20,000 or imprisonment for not more than 5 years is provided.

Part D establishes, effective in 2 years, a Presidential Commission to conduct a comprehensive review of present Federal and State gambling law enforcement policies and their alternatives. Interim reports may be made as advisable; the final report is to be made within 4 years of the Commission's establishment.

Part E makes possible the enforcement of the provisions of parts B and C by court order electronic surveillance and makes clear that State law is not preempted by them.

TITLE IX

Racketeer influenced and corrupt organizations.—This title creates a new chapter in title 18, entitled "Racketeer Influenced and Corrupt Organizations," which contains a threefold standard (1) making unlawful the receipt or use of income from "racketeering activity" or its proceeds by a principal in commission of the activity to acquire an interest in or establish an enterprise engaged in interstate commerce, (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity," and (3) proscribing the operation of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity."

"Racketeering activity" is defined in terms of specific State and Federal criminal statutes now characteristically violated by members of organized crime. The offenses include murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in narcotic drugs, counterfeiting, embezzlement, fraud, and white slave traffic.

"Pattern" is defined to require at least two "racketeering acts," one of which occurred after the effective date of the statute.

A fine of \$25,000 or imprisonment for not more than 20 years is provided for a violation. In addition, provision is made for the criminal forfeiture of the convicted person's interest in the enterprise engaged in interstate commerce.

District courts are authorized to prevent and restrain by civil process violations of the above standard by, among other things, the issuance of (1) orders of divestment, (2) prohibitions of business activity, and (3) orders of dissolution or reorganization.

Provision is made for nationwide venue and service of process, the expedition of actions, civil investigative demands, and the use of court order electronic surveillance and its product.

TITLE X

Dangerous special offender sentencing.—This title provides for increased sentencing (up to 30 years) for dangerous adult special offenders, defined to include (1) a three-time felony offender who was previously incarcerated, (2) an offender whose felony offense was a

part of a pattern of criminal conduct which constituted a substantial source of his income and in which he manifested special skill or expertise, and (3) an offender whose felony offense was in furtherance of a conspiracy with three or more persons to engage in a pattern of criminal conduct in which he would occupy a management level position or employ bribery or force.

Application of the special term is predicated upon a charge by the prosecuting attorney and a hearing before the court following conviction. Provision is made for assistance of counsel, compulsory process, and cross-examination of witnesses. The substance of presentence reports must be disclosed, but no limitation may be placed on the evidence the court may consider in imposing such sentence. Review may be had of the sentence by both the Government and the defendant, but the Government must exercise its option to seek review at least 5 days before the expiration of the time for review by the defendant or not at all. Abuse of the right of review by the Government is made grounds for dismissal. A central repository is established for copies of written judgments of conviction with fingerprints attached, which are made admissible in Federal courts.

TITLE XI

General provisions.—This title contains a severability clause.

STATEMENT IN JUSTIFICATION

The President in his message¹ on "Organized Crime" on April 23, 1969, remarked:

Today, organized crime has deeply penetrated broad segments of American life. In our great cities, it is operating prosperous criminal cartels. In our suburban areas and smaller cities, it is expanding its corrosive influence. Its economic base is principally derived from its virtual monopoly of illegal gambling, the numbers racket, and the importation of narcotics. To a large degree, it underwrites the loan-sharking business in the United States and actively participates in fraudulent bankruptcies. It encourages street crime by inducing narcotic addicts to mug and rob. It encourages housebreaking and burglary by providing efficient disposal methods for stolen goods. It quietly continues to infiltrate and corrupt organized labor. It is increasing its enormous holdings and influence in the world of legitimate business. To achieve his end, the organized criminal relies on physical terror and psychological intimidation, on economic retaliation and political bribery, on citizen indifference and government acquiescence. He corrupts our governing institutions and subverts our democratic processes. For him, the moral and legal subversion of our society is a lifelong and lucrative profession.

* * * * *

Organized crime's victims range all across the social spectrum—the middle-class businessman enticed into paying usurious loan rates; the small merchant required to pay pro-

¹ Doc. No. 91-105, U.S. House of Representatives, 91st Cong., 1st sess. at 1-2 (1969).

tection money; the white suburbanite and the black city dweller destroying themselves with drugs; the elderly pensioner and the young married couple forced to pay higher prices for goods. The most tragic victims, of course, are the poor whose lack of financial resources, education, and acceptable living standards frequently breed the kind of resentment and hopelessness that make illegal gambling and drugs an attractive escape from the bleakness of ghetto life.

The Attorney General in his testimony before the subcommittee observed:

Too few Americans appreciate the dimensions of the problem of organized crime; its impact on all America, and what must be done to reduce—and ultimately eradicate—its sinister and erosive effects. (Hearings at 107-08.)²

I. ORGANIZED CRIME IN THE UNITED STATES

“Organized criminal groups,” the President’s Crime Commission observed in 1967, “are known to operate in all sections of the Nation.” (Report at 191.)³ Nevertheless, the most influential core groups of organized crime, the “families” of La Cosa Nostra, operate in New York, New Jersey, Illinois, Florida, Louisiana, Michigan, Pennsylvania and Rhode Island. The Director of the Federal Bureau of Investigation, J. Edgar Hoover, has estimated overall strength of these gangs at 3,000 to 5,000, of which 2,000 are in the New York area alone.⁴ Combined today in 26 separate groups, these gangs, coupled with their allies and employees, constitute the heart of organized crime in the United States at this time.⁵

Each of these 26 core groups is known as a “family.” Membership varies from 1,000 down to 12. Most major industrial cities have only one family; New York City has five. Family organization is rationally designed with an integrated set of positions geared to maximize profits and to protect its members, particularly its leadership, from law enforcement activity. Unlike the criminal gangs of the past, the organization functions regardless of individual personnel changes; no one individual is indispensable.

The hierarchical structure of the families closely parallels that of Mafia groups that operated for almost a century on the island of Sicily. (See Table No. 1.) Each family is headed by a “boss,” whose primary functions are the maintenance of order and the maximization of profit. Beneath each boss is an “underboss.” He collects information for the boss; he relays messages to him and passes his instructions to underlings. On the same level with the underboss is the “consigliere,” who is often an elder member of the family, partially retired, whose judgment is valued. Below him is the “capodecina,” who serves either as a buffer between the top man and lower level personnel or as a chief of

² Parenthetical page references to hearings are the Hearings before the Special Subcommittee on Criminal Laws and Procedures, of the Committee on the Judiciary, U.S. Senate, “Measures Relating to Organized Crime,” 91st Cong., 1st sess. (1969).

³ Parenthetical page references to report are to *The Challenge of Crime in a Free Society*, Report of the President’s Commission on Law Enforcement and Administration of Justice (1967).

⁴ Testimony of J. Edgar Hoover, hearings before a subcommittee of the Committee on Appropriations, House of Representatives, 89th Cong., 2d Sess. at 273 (1966) (5,000); *Id.*, 91st Cong., 1st Sess. at 556 (1969) (3,000).

⁵ *Ibid.* In 1967, the President’s Crime Commission indicated that there were 24 “family” groups. Report at 193.

an operating unit. As buffer, he is used to maintain insulation from the investigative procedures of the police. To maintain this insulation, the leaders "avoid direct communication with the workers. All commands, information, complaints, and money flow back and forth through" buffers. (Report at 193.)

TABLE NO. 1

BASIC LEADERSHIP STRUCTURE OF SELECTED FAMILIES OF LA COSA
NOSTRA: 1960-69

BOSTON, MASS.

<i>1960</i>	<i>1969</i>
Boss: Raymond Patriarca.	Boss: Raymond Patriarca.
Underboss: Anthony Santaniello.	Underboss: Gennaro Angiulo.
Consigliere: Joseph Lombardo.	Consigliere: Joseph Lombardo.
Capodecina: Joseph Anselmo, Michael Rocco, John Williams, and Henry Tameleo.	Capodecina: Joseph Anselmo; Ilario Zannino, and Edward Romano (acting capodecina).

BUFFALO, N.Y.

<i>1960</i>	<i>1969</i>
Boss: Stefano Magaddino.	Boss: Stefano Magaddino.
Underboss: Fred Randaccio.	Underboss: Joseph Fino.
Consigliere: Vincent Scro.	Consigliere: Vincent Scro.
Capodecina: Jacomino Russolesi, Benjamin Nicoletti, Sr., Roy Carlisi, Pasquale Natarelli, and Joseph Falcone.	Capodecina: Frank Valenti, Benjamin Nicoletti, Sr.; Roy Carlisi, Pasquale Natarelli, and Joseph Falcone.

CHICAGO, ILL.

<i>1960</i>	<i>1969</i>
Boss: Salvatore Giancana.	Boss: Open (Anthony Accardo and Paul DeLucia acting in charge of Chicago "family" due to flight of Salvatore Giancana from United States in 1966, and incarceration of his interim successor Samuel Battaglia).
Underboss: Frank Ferraro.	Underboss: Open (John Cerone acting Underboss).
Consigliere: Jointly held by Anthony Accardo and Paul DeLucia.	Consigliere: Open (Felix Alderiso possibly acting in this capacity).
Capodecina: Ross Prio; Rocco Potenzo; Fiore Buccieri; Joseph Aiuppa; Frank LaPorte, and William Daddano.	Capodecina: Ross Prio; Fiore Buccieri; John Cerone; Joseph Aiuppa; James Catuara, and William Daddano.

DETROIT, MICH.

1960

Boss: Joseph Zerilli.
 Underboss: John Prizola.
 Consigliere: Angelo Meli; Peter Licavoli; Joseph Massei.
 Capodecina: William Tocco; Giacomo W. Tocco; Joseph Bommarito; Matthew Rubino; Raffaele Quasarano; Anthony Giacalone; Dominic Corrado; Anthony Zerilli; Michael Polizzi; and Anthony Besase.

1969

Boss: Joseph Zerilli.
 Underboss: John Prizola.
 Consigliere: Angelo Meli; Peter Licavoli; Joseph Massei.
 Capodecina: William Tocco; Matthew Rubino; Raffaele Quasarano; Anthony Giacalone; Dominic Corrado; Giacomo W. Tocco; Anthony Zerilli; Michael Polizzi; and Anthony Besase.

LOS ANGELES, CALIF.

1960

Boss: Frank DeSimone.
 Underboss: Simone Scozzari.
 Consigliere: Charles Dippolito; Joseph Giammona; Joseph Dippolito; and Joseph Adamo—San Diego.

1969

Boss: Nicolo Licata.
 Underboss: Joseph Dippolito.
 Consigliere: Tommy Palermo.
 Capodecina: Dominic Brooklier; Angelo Polizzi; and Joseph Adamo—San Diego.

NEW JERSEY "FAMILY"

1960

Boss: Nicholas Delmore.
 Underboss: Frank Majuri.

1969

Boss: Samuel DeCavalcante.
 Underboss: Frank Majuri (Joseph LaSelva reported to operate as DeCavalcante's Underboss for Connecticut membership.)

NEW YORK, N.Y.

Joseph Bonanno "Family"

1960

Boss: Joseph Bonnano.
 Underboss: Frank Garofalo.
 Consigliere: John Tartamella.
 Capodecina: Carmin Galante; Natale Evola; Matteo Valvo; Frank LaBruzzo; Thomas DeAngelo; Joseph Netaro; and Nicholas Marangelo.

1969

Boss: Paul Sciacca.
 Underboss: Frank Mari.
 Consigliere: Philip Rastelli.
 Capodecina: Philip Rastelli; Nicholas Marangelo; Armando Pollastrino; Nicholas Alfano; Joseph DiFilippi; Giovanni Fiordilino; Pasquale Gigante; John Morale; Dominick Sabella; Michael Sabella; Sereno Tartanella; Joseph Zicarelli; and Louis Greco.

Carlo Gambino "Family"

1960

Boss: Carlo Gambino.
 Underboss: Joseph Biondo.
 Consigliere: Joseph Riccobono.
 Capodecina: Anthony Anastasio; Domenico Arcuri; Paul Castellano; Joseph Colozzo; Pasquale Conte; Aniello Dellacroce; David Amodeo; Charles Dongarra; Alfred Eppolito; Peter Ferrara; Arthur Leo; Carmine Lombardozzi; Rocco Mazzie; Joseph Paterno; Joseph Silesi; Peter Stinccone; Joseph Traina; Ettore Sapi; and Joseph Zingaro.

1969

Boss: Carlo Gambino.
 Underboss: Aniello Dallacroce.
 Consigliere: Joseph Riccobono.
 Capodecina: David Amodeo; Domenico Arcuri; Joseph Colozzo; Vincent Corrao; Pasquale Conte; Charles Dongarra; James Failla; Peter Ferrara; Joseph Gambino (brother of Carlo Gambino); Anthony Napolitano; Gaetano Russo; Giacomo Scarpula; Paul Castellano; Anthony Scotto; Anthony Sedotto; Peter Stinccone; Giuseppi Traina; Mario Traina; Ettore Zappi; Joseph Zingaro; Olympio Garofalo; Frank Corbi; Frank Perrone; Joseph Paterno; Joseph Silesi; James Eppolito; and Frank Rizzo.

Vito Genovese "Family"

1960

Boss: Vito Genovese.
 Underboss: Gerardo Catena.
 Consigliere: Michele Miranda.
 Capodecina: Anthony Strollo; Angelo DeCarlo; Eugene Catena; Michael Coppola; Peter DeFeo; Frank Tieri; Antonio Carillo; Cosmo Frasca; Rocco Pellegrino; Vincenzo Generoso; Salvatore Celebrino; Vincent Alo; Ruggero Boiardo; John Biele; Thomas Greco; James Angellino; and Frank Celano.

1969

Boss: Open (Gerardo Catena acting in view of death of Vito Genovese).
 Underboss: Gerardo Catena (Thomas Eboli, acting).
 Consigliere: Michele Miranda.
 Capodecina: Vincent Alo; Ruggero Boiardo; Angelo DeCarlo; Antonio Carillo; Salvatore Celebrino; Frank Celano; Peter DeFeo; Cosmo Frasca; Vincenzo Generoso; Michael Generoso (acting); Thomas Greco; Philip Lombardo; Rosario Mogavero; Frank Tieri; Harry Lanza; Rocco Pellegrino; and Salvatore Cufari.

Thomas Luchese "Family"

1960

Boss: Thomas Luchese.
 Underboss: Steve LaSalla.
 Consigliere: Vincent Rao.
 Capodecina: Antonio Corallo; Joseph Laratro; Joseph Luchese; John Ormento; James Plumeri; Joseph Rosato; Salvatore Santora; Carmine Tramunti; and Paul Correale.

1969

Boss: Open (Carmine Tramunti, acting boss).
 Underboss: Steve LaSalla.
 Consigliere: Vincent Rao.
 Capodecina: Antonio Corallo; Joseph Lagano; Joseph Laratro; Joseph Luchese; John Ormento; Joseph Rosato; Chris Funari; and Paul Vario.

Joseph Profuci "Family"

1960

Boss: Joseph Profaci.
 Underboss: Joseph Magliocco.
 Consigliere: Charles LoCicero.
 Capodecina: Harry Fontana;
 John Oddo; Salvatore Mus-
 sachio; Salvatore Badalente;
 John Misuraca; Ambrose Magli-
 occo; Nicoline Sorrentino; Si-
 mone Andolino; John Franzese;
 and Joseph Colombo.

1969

Boss: Joseph Colombo.
 Underboss: Salvatore Mineo.
 Consigliere: Benedetto D'Ales-
 sandro.
 Capodecina: Vincent Aloï; Si-
 mone Andolino; Harry Fontana;
 Nicholas Foriano; John Fran-
 zese; Frank Richard Fusco; John
 Misuraca; Salvatore Mussachio;
 John Oddo; Carmine Persico;
 Nicholas Sorrentino; and Joseph
 Yacovelli.

PHILADELPHIA, PA.

1960

Boss: Angelo Bruno Annaloro.
 Underboss: Ignazio Denaro.
 Consigliere: Joseph Rugnetta.
 Capodecina: Philip Testa;
 John Cappello; Pasquale Massi;
 Joseph Sciglitano; Felix John
 DeTullio; Nicholas Piccolo; Jo-
 seph Scafidi; and John Simone.

1969

Boss Angelo Bruno Annaloro.
 Underboss: Ignazio Denaro.
 Consigliere: Joseph Rugnetta.
 Capodecina: Philip Testa;
 John Cappello; Joseph Lanciano;
 Joseph Sciglitano; Peter J. Mag-
 gio; Nicholas Piccolo; Joseph
 Scafidi; and John Simone.

SAN FRANCISCO, CALIF.

1960

Boss: James Lanza.
 Underboss: Gaspare Sciortino.

1969

Boss: James Lanza.
 Underboss: Gaspare Sciortino.
 Capodecina: Vincenzo Infu-
 sino.

SAN JOSE, CALIF.

1960

Boss: Joseph Cerrito.
 Underboss: Charles Carbone.
 Consigliere: Steve Zoccoli.
 Capodecina: Angelo Marino;
 Emanuel Figlia; Philip Morici;
 and Joe Cusenza.

1969

Boss: Joseph Cerrito.
 Underboss: (Charles Carbone
 deceased and no known replace-
 ment.)
 Consigliere: Steve Zoccoli.
 Capodecina: Emanuel Figlia
 and Philip Morici.

Below the "capodecina" are the "soldati" or the "button" men. They actually operate the particular illicit enterprise, using as their employees the street level personnel of organized crime. These employees, however, have little insulation from the traditional police operations of patrol and detection. They are those who are most often arrested, for, as the President's Crime Commission noted, they "take bets, drive trucks, answer telephones, sell narcotics, tend the stills, work in the legitimate businesses." (Report at 193.)

There is a tendency to view organized crime as embracing only those groups engaged in gambling, narcotics, loan sharking, or other illegal businesses. This is useful since it distinguishes ad hoc youth gangs, groups of pickpockets and professional criminals generally. Nevertheless, there are at least two aspects of high level organized crime that characterize it, as the Crime Commission found (Report at 193), as "a unique form of criminal activity." To this degree, the nature of organized crime is independent of any particular criminal activity.

Two positions in the organized crime group make it substantially different from other criminal operations: the "enforcer" and the "corruptor." Other criminal groups that operate together over a period of time may allocate functions among particular members. But these two positions are not routinely found in other criminal groupings. It is on this basis, therefore, that organized crime groups differ from professional criminal groups generally; it is on this basis, too, that the unique challenge presented by organized crime must be evaluated.

The "enforcer's" duty is to maintain organizational integrity by arranging for the maiming and killing of recalcitrant members or potential witnesses against the group. J. Edgar Hoover, for example, testified about a ". . . particular case where they kidnaped a man they thought was not to be trusted. They hung him on a butcher's hook for 3 days and tortured him until he died."⁶ Today, however, most of the destructive energies of organized crime are no longer dissipated on internal strife; they are concentrated on its outside enemies. The scope of the violence for which organized crime has been responsible is aptly illustrated by the number of known gangland killings in Chicago. Since 1919, there have been over 1,000 such murders,⁷ and while the police clearance rate for homicides generally approaches 90 percent,⁸ here only a handful have been solved. This is an intolerable degree of immunity from legal accountability.

The "corruptor," on the other hand, seeks to establish relations with those public officials and other influential persons whose assistance is necessary to achieve the organization's overall goals. Through these positions, each family seeks to guarantee its continuing existence. Each represents a defense mechanism against the various attempts of society to control the group. Viewed negatively, these functions protect the group; viewed positively, these functions threaten society.

The highest ruling body of the 26 families is the "commission." This body serves as a combination legislature, supreme court, board of directors, and arbitration panel. The commission is the ultimate authority on organizational and jurisdictional disputes. Only the Nation's most powerful families compose it, but it has authority over all. Its composition has varied from nine to 12 men. Currently, seven families are represented: three from New York City, one each from Philadelphia, Buffalo, Detroit, and Chicago. (See Table No. 2.) The commission is not a representative or elected body. Members are not equals. Those with longer tenure, larger families, or greater wealth, all exercise more authority and command greater respect.

⁶ Testimony of J. Edgar Hoover, hearings before a subcommittee of the Committee on Appropriations, House of Representatives, 89th Cong., 1st Sess., at 272 (1966).

⁷ A Report on Chicago Crime for 1968 at 131-33 (Chicago Crime Commission, 1969).

⁸ Crime in the United States—1968 at 8-9 (Federal Bureau of Investigation, 1969).

TABLE NO. 2

MEMBERSHIP "COMMISSION" 1960-69

<i>"Commission"—1960</i>	<i>"Commission"—1969</i>
Vito Genovese: New York City.	Carlo Gambino: New York City.
Carlo Gambino: New York City.	Joseph Colombo: New York City.
Joseph Profaci: New York City.	Paul Sciacca: New York City.
Joseph Bonanno: New York City.	Open (Carmine Tramunti emerging as successor to the deceased Thomas Luchese. "Commission" status not yet decided.)
Thomas Luchese: New York City.	Open (Gerardo Catena acting boss following death of Vito Genovese. Successor and "Commission" status not yet decided.)
Stefano Magaddino: Buffalo, New York.	Stefano Magaddino: Buffalo, New York.
Angelo Bruno: Philadelphia, Pennsylvania.	Angelo Bruno: Philadelphia, Pennsylvania.
Joseph Zerilli: Detroit, Michigan.	Joseph Zerilli: Detroit, Michigan.
Salvatore Giancana: Chicago, Illinois.	Open (Anthony Accardo and Paul DeLucia are acting in charge of the Chicago "family" due to Giancana's flight from the United States in 1966.)

Organized crime leaders moreover, have been notoriously successful in escaping punishment, even in the relatively few cases in which evidence warranting their indictment has been obtained. According to a statistical analysis by the FBI of the Department of Justice's experience reflected in its careers in crime program, members of La Cosa Nostra⁸ have obtained dismissals or acquittals on the charges against them more than twice as often, for their numbers, as ordinary offenders. (See Table No. 3.) Indeed, 17.6 percent of La Cosa Nostra defendants in that study were able to obtain acquittals or dismissals of cases against them five or more times each. (See Table No. 3.)

⁸ The 386 La Cosa Nostra members included in the study were those identified before the subcommittee during its hearings in March and June 1969, as representing the leadership structure of La Cosa Nostra, and those indicted by the Federal Government since 1960. Hearings at 124. See 115 Cong. Rec. S14429 (daily ed., Nov. 17, 1969).

TABLE NO. 3.—PROFILE OF OFFENDERS, 1967-69¹

	Arrested		Select group ²	
	Number	Percent	Number	Percent
Frequency of convictions:				
1.....	34,420	27.7	71	18.4
2.....	18,792	15.1	70	18.1
3.....	13,243	10.6	39	10.1
4.....	9,476	7.6	35	9.1
5 or more.....	27,108	21.8	84	21.8
Total.....	103,039	82.8	299	77.5
Frequency of acquittal or dismissal:				
1.....	23,164	18.6	93	24.1
2.....	9,568	7.7	46	11.9
3.....	4,432	3.6	37	9.6
4.....	2,392	1.9	25	6.5
5 or more.....	3,715	3.0	68	17.6
Total.....	43,271	34.8	269	69.7
Frequency of imprisonment:				
1.....	30,897	24.8	78	20.2
2.....	15,004	12.1	63	16.3
3.....	8,205	6.6	30	7.8
4.....	4,374	3.5	27	7.0
5 or more.....	5,313	4.3	27	7.0
Total.....	63,793	51.3	225	58.3
Frequency of leniency:				
1.....	43,983	35.4	84	21.8
2.....	16,998	13.7	52	13.5
3.....	7,755	6.2	34	8.8
4.....	3,490	2.8	9	2.3
5 or more.....	2,835	2.3	14	3.6
Total.....	75,061	60.4	193	50.0

¹Total number of subjects, 124,374; average age 1st arrest 22.7; average age last arrest, 32.0; average number of arrests during criminal career, 6.9; average criminal career 9 years 3 months.

²Total number of subjects, 386; average age first arrest, 26.3; average age last arrest, 46.9; average number of arrests during criminal career, 7.8; average criminal career, 20 years 7 months.

The President in his message⁹ on "Organized Crime" on April 23, 1969, concluded:

As a matter of national "public policy," I must warn our citizens that the threat of organized crime cannot be ignored or tolerated any longer. It will not be eliminated by loud voices and good intentions. It will be eliminated by carefully conceived, well-funded and well-executed action plans. Furthermore, our action plans against organized crime must be established on a long-term basis in order to relentlessly pursue the criminal syndicate. This goal will not be easily attained. Over many decades, organized crime has extended its roots deep into American society and they will not be easily extracted. Our success will first depend on the support of our citizens who must be informed of the dangers that organized crime poses. Success also will require the help of Congress and of the State and local governments.

II. LAW ENFORCEMENT EFFORTS TO DEAL WITH ORGANIZED CRIME

The President's Commission in 1967 aptly summed up the history of law enforcement's overall efforts to deal with organized crime in these tragic words:

⁹ Doc. No. 91-105, House of Representatives, 91st Cong., 1st sess. at 2 (1969).

Investigation and prosecution of organized criminal groups in the 20th century has seldom proceeded on a continuous, institutionalized basis. Public interest and demands for action have reached high levels sporadically; but, until recently, spurts of concentrated law enforcement activity have been followed by decreasing interest and application of resources (Report at 196).

And what has been true generally is only a little less true on the Federal level.¹⁰

It was in this context, therefore, that when the President called together the National Crime Commission, on July 23, 1965, he asked it to tell him, among other things, why organized crime had continued to grow despite the Nation's efforts to arrest and reverse its development. The Commission identified a number of factors—lack of resources, lack of coordination, lack of public and political commitment, failure to use available criminal sanctions. But the major legal problem related to matters of proof. "From a legal standpoint, organized crime," the Commission concluded (Report at 200), "continues to grow because of defects in the evidence-gathering process." The Commission reviewed the difficulties experienced in developing evidence in this area in these terms:

Usually, when a crime is committed, the public calls the police, but the police have to ferret out even the existence of organized crime. The many Americans who are compliant "victims" have no incentive to report the illicit operations. The millions of people who gamble illegally are willing customers who do not wish to see their supplier destroyed. Even the true victims of organized crime, such as those succumbing to extortion, are too afraid to inform law enforcement officials. Some misguided citizens think there is a social stigma in the role of "informer," and this tends to prevent reporting and cooperating with police.

Law enforcement may be able to develop informants, but organized crime uses torture and murder to destroy the particular prosecution at hand and to deter others from cooperating with police agencies. Informants who do furnish intelligence to the police often wish to remain anonymous and are unwilling to testify publicly. Other informants are valuable on a long-range basis and cannot be used in public trials. Even when a prosecution witness testifies against family members, the criminal organization often tries, sometimes successfully, to bribe or threaten jury members or judges.

Documentary evidence is equally difficult to obtain. Book-makers at the street level keep no detailed records. Main offices of gambling enterprises can be moved often enough to keep anyone from getting sufficient evidence for a search warrant for a particular location. Mechanical devices are used that prevent even the telephone company from knowing about telephone calls. And even if an enforcement agent has a search warrant, there are easy ways to destroy written material while the agent fulfills the legal requirements of knocking on the door, announcing his identity and purpose, and waiting a rea-

¹⁰ For statistics on the Federal program since 1960, see Hearings at 117-123 and 115 Cong. Rec. S14429 (daily ed., Nov. 17, 1969).

sonable time for a response before breaking into the room (Report at 198-199).

The Commission then concluded that under present procedures too few witnesses have been produced to prove the link between criminal group members and the illicit activities that they sponsor. The Commission observed:

Law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's. The public and law enforcement must make a full-scale commitment to destroy the power of organized crime groups (Report at 200).

The President in his message on "Organized Crime" on April 23, 1969, concluded:¹¹

For two decades now, since the Attorney General's Conference on Organized Crime in 1950, the Federal effort has slowly increased. Many of the Nation's most notorious racketeers have been imprisoned or deported and many local organized crime business operations have been eliminated. But these successes have not substantially impeded the growth and power of organized criminal syndicates. Not a single one of the Cosa Nostra families has been destroyed. They are more firmly entrenched and more secure than ever before.

He then went on to describe the present Federal program in these terms:¹²

This administration is urgently aware of the need for extraordinary action and I have already taken several significant steps aimed at combating organized crime. I have pledged an unstinting commitment, with an unprecedented amount of money, manpower, and other resources to back up my promise to attack organized crime. For example, I have authorized the Attorney General to engage in wiretapping of organized racketeers. I have authorized the Attorney General to establish 20 Federal racketeering field offices all across the Nation. I have authorized the Attorney General to establish a unique Federal-State Racket Squad in New York City. I have asked all Federal agencies to cooperate with the Department of Justice in this effort and to give priority to the organized crime drive. I have asked the Congress to increase the fiscal 1970 budget by \$25 million, which will roughly double present expenditures for the organized crime effort.

In addition, I have asked the Congress to approve a \$300 million appropriation in the 1970 budget for the Law Enforcement Assistance Administration. Most of these funds will go in block grants to help State and local law enforcement programs and a substantial portion of this assistance money will be utilized to fight organized crime. I have had discussions with the State attorneys general and I have authorized the Attorney General to cooperate fully with the States

¹¹ Doc. No. 91-105, House of Representatives, 91st Cong., 1st Sess. at 2 (1969).

¹² *Id.*, at 2-3.

and local communities in this national effort, and to extend help to them with every means at his disposal. Finally, I have directed the Attorney General to mount our Federal anti-organized crime offensive and to coordinate the Federal effort with State and local efforts where possible.

He also commented on assistance to State and local governments in these terms: ¹³

Through the Law Enforcement Assistance Administration, and other units of the Department of Justice, the Attorney General has already taken some initial steps:

(1) A program is being established so that State and local law enforcement people can exchange recent knowledge on the most effective tactics to use against organized crime at the local level.

(2) The Justice Department is furnishing technical assistance and financial help in the training of investigators, prosecutors, intelligence analysts, accountants, statisticians—the professional people needed to combat a sophisticated form of criminal activity.

(3) The Justice Department is encouraging municipalities and States to reexamine their own laws in the organized crime area. We are also encouraging and assisting in the formation of statewide organized crime investigating and prosecuting units.

(4) A computerized organized crime intelligence system is being developed to house detailed information on the personalities and activities of organized crime nationally. This system will also serve as a model for State computer intelligence systems which will be partially funded by the Federal Government.

(5) We are fostering cooperation and coordination between States and between communities to avoid a costly duplication of effort and expense.

(6) We are providing Federal aid for both State and local public information programs designed to alert the people to the nature and scope of organized crime activity in their communities.

Finally, the President concluded: ¹⁴

These actions are being taken now. But the current level of Federal activity must be dramatically increased if we expect progress. More men and money, new administrative actions, and new legal authority are needed.

III. LEGISLATIVE PROGRAM: THE ORGANIZED CRIME CONTROL ACT OF 1969

S. 30, the Organized Crime Control Act of 1969, as amended, is divided into 11 titles, reflecting the provisions of eight bills dealing with organized crime that were referred to the Special Subcommittee on Criminal Laws and Procedures:

S. 30 (Mr. McClellan, Mr. Ervin, Mr. Hruska, Mr. Allen, January 15, 1969);

¹³ *Id.* at 3.

¹⁴ *Id.* at 3.

S. 975 (Mr. Tydings, February 7, 1969) ;
 S. 976 (Mr. Tydings, February 7, 1969) ;
 S. 1623 (Mr. Hruska, March 20, 1969) ;
 S. 1861 (Mr. McClellan, Mr. Hruska, Mr. Ervin, April 18,
 1969) ;
 S. 2022 (Mr. Hruska, Mr. Dirksen, Mr. Eastland, Mr. McClel-
 lan, Mr. Mundt, April 29, 1969) ;
 S. 2122 (Mr. McClellan, Mr. Ervin, Mr. Hruska, May 12, 1969) ;
 and
 S. 2292 (Mr. McClellan, Mr. Hruska, May 29, 1969).

As amended, the bill is the product of 6 days of hearings before the subcommittee in March and June, in which testimony was received from various individuals and the following organizations :

American Bar Association.
 American Civil Liberties Union.
 Association of Federal Investigators.
 National Association of Counties.
 National Chamber of Commerce.¹⁵
 National Commission on Reform of Federal Criminal Law.
 National Council on Crime and Delinquency.
 New York County Lawyers Association.
 New York State Bar Association.
 New York State Commission of Investigation.
 Department of Justice.
 Department of Treasury.

In addition, various titles of the bill were circulated for comment to the State attorneys general and professors of law in the fields of criminal law and procedure, equity and antitrust.¹⁶ Statements were also received for the record from other individuals, associations and governmental agencies.¹⁷

TITLE I: THE SPECIAL GRAND JURY

The modern grand jury is a prototype of its ancient British counterpart. Aptly termed a "grand inquest" by the Supreme Court in *Blair v. United States*, 250 U.S. 273, 282 (1919), its powers of investigation are virtually without rival today. Despite attempts in this country to limit the scope of its investigatory powers to what was brought to its attention by prosecutor or court, its common law powers survived largely without limitation in Federal law, where the grand jury is empowered under *Hale v. Henkel*, 201 U.S. 43 (1905), to inquire into and return indictments for all crimes committed within its jurisdiction.

Grand jury reports, often a catalyst for reform, may also be filed on a common law¹⁸ or statutory¹⁹ basis in a number of States, but not under Federal law,²⁰ where this historic right has been restricted.²¹

¹⁵ The Chamber subsequently endorsed in principle several of the major provisions of S. 30, 115 Cong. Rec., S15231 (daily ed., Dec. 1, 1969).

¹⁶ The committee expresses its particular appreciation to Prof. Robert Rodes, of the Notre Dame Law School, for his aid in processing the provisions of S. 1861, to Prof. Robert Dixon, of the George Washington University Law Center, for his aid in processing S. 2122, to Prof. Henry Ruth, of the University of Pennsylvania Law School, for his aid in processing S. 30, and to Associate Dean Peter Low, of the University of Virginia, for his aid in processing title X of S. 30.

¹⁷ The International Association of Chiefs of Police also endorsed several of the measures pending before the subcommittee, 115 Cong. Rec., S12562 (daily ed., Oct. 14, 1969).

¹⁸ See, e.g., *In Re Camden County Grand Jury*, 10 N.J. 23, 89 A. 2d 416 (1952); *In re Camden Co. Grand Jury*, 34 N.J. 378, 196 A. 2d 465 (1961).

¹⁹ See, e.g., N.Y. Code Crim. Proc. § 253-a.

²⁰ See, e.g., *Application of United Electrical Radio and Machine Workers of America*, 111 F. Supp. 858 (S.D. N.Y. 1953).

²¹ See generally Kuh, "The Grand Jury 'Presentment' Foul Blow or Fair Play?" 55 Colum. L. Rev. 1103 (1955), for a review of the case and statutory material.

Ultimately, the power of the grand jury rests on the subpoena. Only through it can witnesses be compelled to appear and the production of books and records be required. Under Federal law, subpoenas issue only out of court, and today the grand jury is generally thought of as an "arm of the court." This means that the jury is subject to the supervisory power of the court. The court impanels it, charges it, chooses its foreman, protects against abuses of its authority, and ultimately discharges it. Usually the life of the grand jury parallels the term of the court, although present Federal law allows the court to impanel a grand jury whenever it is appropriate. The grand jury's term extends until discharge, but not longer than eighteen months, and the number of juries is left to the discretion of the court. A Federal court may also discharge a grand jury at any time "for any reason or for no reason," *In re Investigation of World Arraignments*, 107 F. Supp. 628, 629 (D.D.C. 1952), even though the jury has not finished the business before it.

The conclusion seems inescapable: As an instrument of discovery against organized crime, the grand jury has few counterparts. Nevertheless, despite its broad power of inquiry, the grand jury needs to be strengthened. The President's Crime Commission in 1967 concluded:

[A]n investigative grand jury . . . must stay in session long enough for the unusually long time required to build an organized crime case. The possibility of arbitrary termination of a grand jury by supervisory judges constitutes a danger to successful completion of an investigation. . . . At least one investigative grand jury should be impaneled annually in each jurisdiction that has major organized crime activity. If a grand jury shows the court that its business is unfinished at the end of a normal term, the court should extend that term a reasonable time in order to allow the grand jury to complete pending investigations. Judicial dismissal of grand juries with unfinished business should be appealable by the prosecutor and provision made for suspension of said dismissal order during the appeal.

When a grand jury terminates, it should be permitted by law to file public reports regarding organized crime conditions in the community (Report at 200).

Title I of S. 30, as amended, is primarily designed to implement the recommendations of the President's Crime Commission. It strengthens the Federal grand jury system to deal with organized crime. Modeled in part on present New York law,²² title I is derived from title I of S. 30 as originally introduced by Senator McClellan for himself and Senators Ervin, Allen and Hruska on January 15, 1969.²³ As now drafted, it is the product of the hearings held before the Special Subcommittee on Criminal Laws and Procedures and close consultation with the Department of Justice. Its provisions received the support of a majority of witnesses who testified before the subcommittee. Opposition was, however, expressed to certain of its provisions, mainly to the restoration to the grand jury of the power to write reports, by the American Civil Liberties Union.²⁴ The arguments on this issue were

²² N.Y. Code Crim. Proc. § 253-a.

²³ 115 Cong. Rec., S279 (daily ed., Jan. 15, 1969).

²⁴ Hearings at 456-459. Opposition was also voiced by the Judicial Conference of the United States, 115 Cong. Rec. S13975 (daily ed., Nov. 10, 1969).

summarized by the Department of Justice's letter approving the basic outline of title I in these terms: ²⁵

This proposal would substantially change existing Federal law and procedure. See in general, "*Orfield, The Federal Grand Jury*," 22 F.R.D. 343, 402 (1958). Two cases which are particularly illustrative of present judicial thinking that any grand jury action beyond indicting or refusing to indict is beyond the power of the grand jury are *Application of United Electrical Radio and Machine Workers*, 111 F. Supp. 858 (S.D. N.Y. 1953), and *In Re Petition for Disclosure of Evidence Before October 1959 Grand Jury*, 184 F. Supp. 38 (E.D. Va. 1960). In the former case, the court held that a grand jury report which made recommendations to the NLRB was beyond the powers of the grand jury, an abuse of the principle of separation of powers and a violation of the secrecy provision of Rule 6(e), Federal Rules of Criminal Procedure. In the latter case, the court held that a grand jury report on noncriminal conduct of State officials was likewise beyond the power of the grand jury, an infringement upon the provinces of State and local governments and a violation of the secrecy provisions of Rule 6(e).

While the problem of secrecy under Rule 6(e) can be remedied by statute, the other problems must await judicial testing.

The present proposal also goes beyond that of the President's Commission on Law Enforcement and Administration of Justice which recommended:

When a grand jury terminates, it should be permitted by law to file public reports regarding organized crime conditions in the community.

It is noted that this recommendation restricts the use of a report: (1) until the grand jury terminates, (2) to organized crime conditions, and (3) in a presumably general context. This type of report would apparently be unobjectionable in view of the dicta by the court in *Application of United Electrical Radio and Machine Workers (supra)* at 869, that "We are not here concerned with reports of a general nature touching on conditions in a community. They may serve a valuable function and may not be amenable to challenge."

We believe that considerations of public policy and interest favor some expansion of the grand jury's power in this area, and though we recognize there are constitutional problems involved, we do not believe they are of an insuperable nature.

The history of the growth and development of the grand jury system discloses that the issuing of reports has been a historic grand jury function in England for almost 300 years. The practice of rendering reports on matters of public concern was also followed in the early American colonies, and today, despite the weight of authority against it, reports are authorized either by statute or by judicial decision in such States as New York, California, Illinois, New Jersey, Florida, and Tennessee. Despite this, however, and despite the fact that the grand jury has been described by the

²⁵ For an example of a State grand jury report dealing with organized crime, see 115 Cong. Rec. S 15751 (daily ed. Dec. 5, 1969).

Supreme Court as a "prototype" of its ancient British counterpart, *Blair v. United States*, 250 U.S. 273, 282 (1919), its power to issue reports has not survived intact with its virtually unchallenged investigatory power.

The principal objections to the use of grand jury reports seem to be that they violate the traditional secrecy of grand jury proceedings, they expose grand jurors to libel actions, they violate the principle of separation of powers, and, perhaps most importantly, they charge wrongdoing while effectively denying the use of a judicial forum in which to reply. Upon close examination, the first three of these reasons do not appear to have much merit. The problem of secrecy under Rule 6(e) of the Federal Rules of Criminal Procedure may, of course, be solved by statutory amendment. There is in fact already ample precedent under Rule 6(e) for violation of grand jury secrecy when the general welfare requires it. See, for example, *In Re Petition for Disclosure of Evidence Before October 1959 Grand Jury*, 184 F. Supp. 38 (E.D. Va. 1960), where Federal grand jury minutes were made available to a Commonwealth attorney for use in State grand jury proceedings.

The libel objection can perhaps be discounted as the least troublesome since, in light of recent Supreme Court decisions on this subject, grand jurors actions in this regard are undoubtedly privileged.

The argument that the grand jury reports contravene the principle of separation of powers proceeds on the theory that the grand jury, being an appendage of the court, should not invade the province of the legislative or executive branches and charge them with misconduct or inefficiency. This argument loses much of its force, however, when it is considered that historically the grand jury has for centuries exercised both the reporting and indicting functions, and the exercise of its reporting function is logically no more violative of the separation of powers principle than is the indictment of a governmental official for criminal conduct in the performance of his duties. In criticizing public officers and calling for improvements in the legislative and executive branches, moreover, the grand jury performs a function analogous to the court's function when it notes statutory defects and suggests that the legislature consider amendment. As New Jersey's late Chief Justice Arthur T. Vanderbilt observed, success of the separation of powers doctrine depends to some extent on the interaction and cooperation of the arms of Government, not on their total isolation from each other. See *Vanderbilt, The Doctrine of the Separation of Powers and Its Present Day Significance*, 43-45 (1953).

Finally, on this point, it may be observed that since so much of Title I changes the basic character of the grand jury that in effect it is no longer merely an arm of the court, but a more independent body, the separation of powers argument is no longer a valid objection.

Perhaps the most serious objection to grand jury reports is the charge that they are essentially lacking in fairness since

they make a charge of wrongdoing but deny the "accused" a judicial forum in which to reply. In an attempt to meet this criticism, the New York legislature enacted a statute, New York Code of Criminal Procedure, section 253-a, effective July 1, 1964, which contains elaborate safeguards such as allowing a named individual an opportunity to testify before the grand jury and file an answer prior to the filing of a report, as well as allowing an appeal to a higher court before filing. The constitutionality of this New York statute was upheld in *In Re Grand Jury, January 1967*, 277 N.Y.S. 2d 105 (1967).

Since the present proposal is almost word for word identical in its substantive provisions with the New York statute, we feel that it meets the necessary test of fairness against the charge that it makes an accusation without providing an adequate judicial forum for a denial.

In sum then, we believe this revival of the grand jury's historical report making power, as narrowly circumscribed in this proposal, is constitutionally sound and we support it as being in the interest of good and effective government. (Hearings at 368-369.)

Title I represents the best thinking of the Committee on how the grand jury system must be strengthened, consistent with basic fairness, in order that an effective effort may be made against organized crime in the United States. Its provisions are summarized above²⁶ and analyzed in detail in the section-by-section analysis below.²⁷ As now drafted, the committee recommends that title I pass.

TITLE II: GENERAL IMMUNITY

A grand jury subpoena can compel the attendance of a witness and the production of books and records. Ultimately, however, the grand jury has no power as such to compel the witness to testify or to turn over the books and records. Securing the witness' testimony and having the books and records turned over involve the interaction of the witness' duty to testify and his privilege against self-incrimination.

The modern privilege against self-incrimination applies to any question the answer to which would furnish a link in a chain of evidence, which would incriminate the witness; it need not be answered unless, as the Supreme Court put it in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), "he chooses to speak in the unfettered exercise of his own will." Only testimonial utterances fall within its scope. The privilege is personal; it may not be claimed to protect another. In addition, it protects only natural persons; corporations or unions may not claim its protection. The privilege may be waived by the recitation of incriminating facts; the law requires its waiver when an accused testifies in his own behalf at a criminal trial. Generally, it must be asserted to be claimed, or otherwise it is waived. For the privilege is, as Dean Wigmore put it, "merely an option of refusal not a prohibition of inquiry."²⁸

Nevertheless, like the duty to testify, the privilege against self-incrimination is not an absolute. Should a witness refuse to testify before

²⁶ *Supra* at 32.

²⁷ *Infra* at 141.

²⁸ 8 Wigmore, *Evidence* § 2268 at 388 (3d ed. 1940).

a grand jury, asserting his privilege, the inquiry need not be ended. Under proper conditions, it is possible to displace the privilege with a grant of immunity, thus removing the witness' privilege not to answer. It becomes necessary, therefore, to turn to a consideration of the immunity grant and the process whereby it may be enforced.

Congress first adopted a compulsory immunity statute in 1857. Act of January 24, 1857, ch. 19, 11 Stat. 155. Legally, no attack was successfully mounted upon it. The statute protected against prosecution any matter about which any witness testified before Congress. This type of immunity is known as "transaction immunity." It may be illustrated as follows: should an individual receive "transaction immunity" in a grand jury investigation of narcotics in which he discusses the murder of an informant, prosecution of that individual for murder could not subsequently be undertaken, even though an eyewitness volunteered his testimony wholly independent of the grand jury investigation. The operation of the statute was automatic, it was not necessary to claim the privilege, and this led to dissatisfaction with its operation. In its place, therefore, the Immunity Statute of 1862 was enacted. Act of January 24, 1862, ch. 11, 12 Stat. 333. The new statute, which was limited to congressional proceedings, did not grant immunity from prosecution; it merely purported to protect the witness from having his testimony directly used against him. This type of immunity is known as "use immunity," but the "use" restriction was defective because it was limited to the testimony of the witness; no restriction was placed on the derivative "use" of such testimony. True "use immunity" may be distinguished from "transaction immunity" using the above illustration by noting that a subsequent prosecution for murder could be undertaken using the independent eyewitness testimony, but that no direct or indirect use could be made of the individual's testimony. Six years later the statute was broadened to cover judicial proceedings, and the Statutory scheme finally reached the Supreme Court in 1892 in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). The Court refused to uphold the defective "use" immunity statute, however, noting that the statute to be upheld would have to afford a protection coextensive with the privilege. The Court found the protection inadequate because it did not afford transaction immunity, but merely offered use immunity limited to use of the witness' testimony. The Court observed: "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him . . ." 142 U.S. at 564.

Congress responded to the *Counselman* decision with the Immunity Act of 1893. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443. This time the statute granted immunity from prosecution, not merely from use of the testimony. Once again the constitutional validity of the immunity grant was presented to the Supreme Court. In *Brown v. Walker*, 161 U.S. 591 (1896), the Court, by a closely divided vote, sustained its basic constitutionality. The Court held that where transaction immunity is granted and the criminality attaching by law to the actions of the witness is removed by another law, the privilege ceases to operate. The dissenters suggested that the privilege was intended to accord to the witness an absolute right of silence designed to protect not only from criminality but also disgrace or infamy, something no legislative immunity could eliminate. The majority, relying on English history.

rejected this proposition. Since *Brown v. Walker*, the basic principle of the immunity grant has not been successfully challenged, and Congressional enactments extending the principle, for example, to internal security²⁹ and narcotics³⁰ investigations have been sustained.

Today, however, Federal statutes grant immunity in only a limited number of classes of cases. Usually the witness must claim his privilege, be directed to testify, and then testify before he receives immunity. Normally, the immunity will extend to all matters substantially related to any matter revealed in a responsive answer. Nevertheless, some Federal statutes grant transaction immunity automatically on testimony without a claim of privilege. The danger here of accidentally granting an individual an "immunity bath" is substantial. Other Federal statutes require specific approval of the Attorney General and a court order before the immunity attaches.

Under Federal law, the case-by-case limitation on the power to grant immunity has, however, constituted a major impediment to the effective investigation of organized crime. This led the President's Crime Commission to recommend the enactment of a general immunity statute in these terms:

A general witness immunity statute should be enacted at [the] Federal . . . [level], providing immunity sufficiently broad to assure compulsion of testimony. Immunity should be granted only with the prior approval of the jurisdiction's chief prosecuting officer. Efforts to coordinate Federal, State, and local immunity grants should be made to prevent interference with existing investigations. (Report at 201.)

Up until the recent decisions of the Supreme Court in *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) the proper scope of a constitutionally valid immunity statute seemed to be transaction immunity not use immunity. Apparently, this approach is not required.

Prior to *Malloy v. Hogan*, the privilege was thought to protect only against incrimination under the laws of the questioning sovereign. Under present law, the privilege protects against both State and Federal incrimination. The *Malloy* decision could have spelled the end of valid State immunity statutes. Nevertheless, the Supreme Court indicated in *Murphy* that State immunity statutes were still valid. The Court found that the constitutional privilege was adequately displaced if the witness was protected against direct or derivative use of his compelled testimony. Contrary to the *Counselman* decision, the Court seemed to think that this was possible through the use of the "fruit of the poisonous tree" process of derivative suppression, an analogy borrowed from fourth amendment illegally obtained evidence cases.

If the underlying premise of *Counselman* that there is no way to protect the witness from the derivative use of his compelled testimony has indeed been rejected, it seems that granting immunity from prosecution rather than use of testimony is no longer constitutionally compelled on any level, State or Federal. It is not necessary to give trans-

²⁹ 18 U.S.C. § 3486, as amended, 18 U.S.C. § 3486(c) (Supp. 1965), upheld in, *Ullman v. United States*, 350 U.S. 422 (1956).

³⁰ 18 U.S.C. § 1406 (1964), upheld in, *Reina v. United States*, 364 U.S. 507 (1960).

action immunity against State prosecution to give a valid grant of Federal immunity.³¹

This change in constitutional theory has indeed occurred in the square holding of *People v. La Bello*, a decision of the New York Court of Appeals on April 24, 1969.³² In a case where a police officer was indicted for bribery on independent evidence, after testimony before a grand jury, the court held that it was not constitutionally objectionable under the fifth amendment that a State immunity statute:

. . . only bar[red] the use of the . . . [officer's] testimony or any fruits thereof. Since the police officer's testimony [that was used to obtain the indictment] was in no way derived from anything said by . . . [the officer indicted for bribery] to the Grand Jury and itself established a *prima facie* case of bribery, the indictment was, therefore, based on sufficient and untainted evidence.³³

The reasoning of the Court with regard to Federal constitutional immunity requirements was as follows:

Time has shown that this transaction immunity type of statute was unnecessarily broad, that it gives witnesses an immunity not required by the Constitution and that it has the effect of giving an unnecessary gratuity to crime. Where the people have a completely good case against a defendant without his testimony, there is not a single, sound policy reason, nor is there a constitutional compulsion, requiring that a grant of immunity gain a witness complete freedom from criminal liability for his wrongful acts simply because the acts were at some point mentioned to the grand jury (*People v. Laino*, 10 N.Y. 2d 161, 173). If he is protected from the use of his testimony or the fruits thereof, he loses nothing if he is then convicted on independent and untainted evidence.

In our view, the Supreme Court's decision in *Murphy v. Waterfront Comm.* (378 U.S. 52) has finally resolved the ambiguity raised in *Counselman* on the necessary scope of an immunity statute. (See also *Gardner v. Broderick*, 392 U.S. 273.) Following *Malloy v. Hogan* (378 U.S. 1) which made the self-incrimination privilege applicable to the States, the Supreme Court was immediately confronted with the problem of how to accommodate the possible conflicts among criminal law enforcement agencies arising from our federal system. The Court in *Murphy* held that, as a consequence of its holding in *Malloy*, the Federal authorities would be barred from any prosecutorial use of State "compelled testimony and its fruits" where a witness is granted immunity after asserting his privilege (378 U.S., at p. 79). No transaction immunity was granted as the footnote to Justice Goldberg's opinion at this point makes patent: "Once a defendant demonstrates that he has testified, under a State grant of immunity, to matters related to the Federal prosecution, the Federal authorities

³¹ See generally *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Stevens v. Marks*, 383 U.S. 234 (1966); and *United States v. Blue*, 384 U.S. 251 (1966).

³² 249 NE 2d 412, 24 NY 2d 598 (1969); *Accord, Byers v. People*, 6 Crim. L. Rptr 2022 (Cal. Sup. Ct. 9-16-69).

³³ Id. at 413.

have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.”³⁴

Title II of S. 30, as amended, is a general immunity statute that affords “use,” not “transaction” immunity. It is derived from S. 2122, originally introduced by Senator McClellan for himself and Senators Ervin and Hruska on May 12, 1969.³⁵ Title II of S. 30, as initially introduced, was a general immunity statute, applicable only in grand jury and court proceedings. During the course of the hearings on S. 30, the National Commission on the Reform of Federal Criminal Laws recommended to the President the adoption of a general immunity statute that would reflect the developments in the law, noted above, unify all present immunity provisions, and be applicable in grand jury, court, legislative, and administrative proceedings.³⁶ The President in his message on organized crime of April 23, 1969, commended this proposal to the Congress in these terms:³⁷

[W]e need a new broad general witness immunity law to cover all cases involving the violation of a Federal statute. I commend to the Congress for its consideration the recommendations of the National Commission on Reform of Federal Criminal Laws. Under the Commission’s proposal, a witness could not be prosecuted on the basis of anything he said while testifying, but he would not be immune from prosecution based on other evidence of his offense. Furthermore, once the Government has granted the witness such immunity, a refusal then to testify would bring a prison sentence for contempt. With this new law, Government should be better able to gather evidence to strike at the leadership of organized crime and not just the rank and file. The Attorney General has also advised me that the Federal Government will make special provisions for protecting witnesses who fear to testify due to intimidation.

S. 2122 was introduced to implement these recommendations. H.R. 11157, introduced by Congressmen Poff, Edwards, and Kastenmeier on May 12, 1969, is the companion bill in the House.³⁸ Each of the congressional sponsors of this legislation is a member of the National Commission on the Reform of Federal Criminal Laws. Congressman Poff, its principal draftsman, is the vice chairman.

At the suggestion of the Department of Justice,³⁹ the provisions of S. 2122 were substituted for the language of title II of S. 30, as originally drafted. As now drafted, title II has the support of the Department of Justice. Its provisions also received the support of the majority of witnesses who testified or submitted statements for the consideration of the subcommittee, including various administrative agencies,⁴⁰ whose present practice would be affected by its enactment, although opposition was expressed to the proposed bill by the Amer-

³⁴ 249 N.E. 2d at 414.

³⁵ 115 Cong. Rec. S4918 (daily ed. May 12, 1969).

³⁶ Hearings at 287-90.

³⁷ Doc. No. 91-105, U.S. House of Representatives, 91st Cong. 1st Sess. at 5 (1969).

³⁸ 115 Cong. Rec. H3539 (daily ed. May 12, 1969).

³⁹ Hearings at 370.

⁴⁰ Only the Federal Deposit Insurance Corporation objected to the proposed statute. Hearings at 515. Its position, however, is “not in accordance with the program of the President.” *Ibid.*

ican Civil Liberties Union,⁴¹ which feels that it is both unwise and unconstitutional; the union's position is essentially that of the dissenting Justices in *Brown v. Walker*,⁴² which was rejected by the Supreme Court in 1896.

Title II thus represents the best thinking of the committee in the area of the grant of immunity from the privilege against self-incrimination. Its provisions are summarized above⁴³ and analyzed in detail in the section-by-section analysis below.⁴⁴ As now drafted, the committee recommends that title II pass.

TITLE III: RECALCITRANT WITNESSES

Ultimately, neither the compulsory process of the grand jury nor the immunity grant guarantees that the testimony of the witness will be secured. When a witness' privilege against self-incrimination cannot be claimed, it does not necessarily follow that he will cooperate fully in an investigation. The stage, however, is set for moving the investigation forward through the use of the contempt power.

Under modern law, there is no question that courts have power to enforce compliance with their lawful orders. In *United States v. Barnett*, 376 U.S. 681, 687 (1964), the Supreme Court, Justice Clark for the majority, observed:

The first Congress in the Judiciary Act of 1789 conferred on Federal courts the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . ." 1 Stat. 83. It is undisputed that this act gave Federal courts the discretionary power to punish for contempt as that power was known to the common law. *In re Savin*, 131 U.S. 267 . . . (1889). In 1831 . . . the Congress restricted the power of Federal courts to inflict summary punishment for contempt to misbehavior "in the presence of the said courts, or, so near thereto as to obstruct the administration of justice," misbehavior of court officers in official matters, and disobedience or resistance by any person to any lawful writ, process, order, rule, decree, or command of the courts. Act of March 2, 1831, c. 99, 4 Stat. 487, 488. These provisions are now codified in 18 U.S.C. § 401 without material difference.

Federal law thus expressly confirms this ancient power. When subpoenaed before a grand jury, the witness must attend. The grand jury, however, has no power as such to hold a witness in contempt if he refuses to testify without just cause. To constitute contempt the refusal must come after the court has ordered the witness to answer specific questions. Two courses are open when a witness then refuses to testify after a proper court order: civil or criminal contempt.

Under civil contempt, the refusal is brought to the attention of the court,⁴⁵ and the witness may be confined until he testifies; he is said to carry, as the court noted in *In re Nevitt*, 117 Fed. 448, 461 (8th Cir. 1902), "the keys of the [prison] in [his] own pocket." Usually,

⁴¹ *Id.* at 459-62.

⁴² *Brown v. Walker*, 161 U.S. 591 (1896).

⁴³ *Supra* at 32.

⁴⁴ *Infra* at 144.

⁴⁵ The usual procedures are set out in *In re Hitson*, 177 F. Supp. 834 (N.D. Cal. 1959), *rev'd on other grounds*, 283 F. 2d 355 (9th Cir. 1960).

where the contempt is clear, no bail is allowed when an appeal is taken.⁴⁶ The confinement cannot extend beyond the life of the grand jury, although the sentence can be continued or reimposed if the witness adheres to his refusal to testify before a successor grand jury.⁴⁷

Under criminal contempt, after a hearing,⁴⁸ the witness may be imprisoned, not to compel compliance with, but to vindicate, the court's order. Federal law requires a jury trial if the sentence to be imposed will exceed six months.⁴⁹ No other limit is set on the sentence.

Title III of S. 30, as amended, is derived from title III of S. 30 as introduced. It largely codifies present civil contempt practice. Clarifying amendments have been made at the suggestion of the Department of Justice,⁵⁰ and the provisions have its support. The provisions also received the support of the majority of witnesses who testified before the subcommittee. The testimony of Mr. Paul Curran, chairman of the New York State Commission of Investigation is illustrative:

With this grant of immunity must be coupled the right of compulsory process to produce the witness, and also the right, most importantly, to take appropriate and meaningful action against recalcitrant witnesses. They must know that if, after receiving immunity, they do not testify, they will go to jail until such time as they are prepared to testify. This provision of S. 30 for . . . [a] jail term will make it clear that the Government really means business. (Hearings at 178.)

Opposition to title III was, however, expressed by the American Civil Liberties Union, primarily on the ground that the provision was subject to abuse.⁵¹

Title III thus represents the best efforts of the committee to codify and spell out the powers of the courts to deal with witnesses who are unlawfully withholding information necessary to move forward an investigation. Its provisions are summarized above,⁵² and analyzed in detail in the section-by-section analysis below.⁵³ As now drafted, the committee recommends that title III pass.

TITLE IV: FALSE DECLARATIONS

A subpoena can compel the attendance of a witness before a grand jury or at trial. An immunity grant can displace his privilege against self incrimination. The threat of imprisonment for civil contempt can legitimately coerce him into testifying. But only the possibility of some sanction such as a perjury prosecution can provide any guarantee that his testimony will be truthful.

Today, however, the possibility of perjury prosecution is not likely, and if it materializes, the likelihood of a conviction is not high. Using the available Federal figures,⁵⁴ we see that only 52.7 percent of the defendants in perjury cases were found guilty in the 10 year period from 1956 through 1965. In all other criminal cases, however, 78.7 percent of the defendants were found guilty. The difference is striking.

⁴⁶ See e.g., *United States v. Coplon*, 339 F. 2d 192 (6th Cir. 1964).

⁴⁷ *Shillitani v. United States*, 384 U.S. 364, 371 (1966).

⁴⁸ *Harris v. United States*, 382 U.S. 162 (1965).

⁴⁹ *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966).

⁵⁰ Hearings at 370-71.

⁵¹ Hearings at 463.

⁵² *Supra* at 33.

⁵³ *Infra* at 148.

⁵⁴ 1956-65 Att'y. Gen. Ann. Reps.

Indeed, out of 307,227 defendants only 713 were even charged with perjury during this period. The threat of a perjury conviction today thus offers little hope as a guarantee of truthfulness in the evidence gathering process in organized crime investigations.

To understand the reason for this lack of effectiveness, it is necessary to turn to history. The first statutory reference to the crime of perjury appeared in 1495, 3 Hen. 7, c. 1 (1495). The Star Chamber read this act as authorizing punishment for perjury. Although the crime was theoretically cognizable in the ordinary criminal courts, it was dealt with almost exclusively in the Star Chamber, where the proceedings were presided over by the Lord Chancellor and conducted according to the ecclesiastical law under which a quantitative notion obtained of the credit to be accorded to the testimony of a witness under oath. From this notion, the so-called two witness rule developed, that is, two witnesses to the same fact are necessary to establish it. Lord Chief Justice Hardwicke in *Reex. v. Nunez*, Cas. T. Hard 265, 95 Eng. Rep. 171 (K.B. 1736), summed up the rule: "One man's oath is as good as another's." When the Star Chamber was abolished in 1641, the principles it had established in perjury prosecutions were carried over into the common law.

In perjury cases Federal courts today still follow the two witness rule and its corollary, the direct evidence rule, which requires a conviction for perjury to be based on direct not circumstantial evidence.⁵⁵ The two witness rule, however, is misnamed. Under modern law, it no longer requires the testimony of two witnesses; it merely provides: "that the uncorroborated oath of one witness is not enough to establish the falsity of the (testimony of the) accused . . ." *Hammer v. United States*, 271 U.S. 620, 626 (1926). The corroborating evidence need not independently establish the falsity of the testimony; it is enough if it furnishes a basis to overcome the oath of the accused and his presumption of innocence. The rule has no application, however, to elements of perjury other than falsity. Closely related to these two rules, moreover, are the cases holding that contradictory statements under oath may not be the subject matter of a perjury prosecution without additional proof of the falsity of one of the statements.⁵⁶ Dissatisfaction with these results has led to the adoption of remedial statutes in some States. Nevertheless, on the Federal level, these rules today remain viable. It was in this context, therefore, that the President's Crime Commission concluded in 1967:

Many prosecutors believe that the incidence of perjury is higher in organized crime cases than in routine matters. Immunity can be an effective prosecutive weapon only if the immunized witness then testifies truthfully. The present special proof requirements in perjury cases inhibit prosecution seeking perjury indictments and lead to much lower conviction rates for perjury than other crimes. Lessening of rigid proof requirements in perjury prosecutions would strengthen the deterrent value of perjury laws and present a greater incentive for truthful testimony. (Report at 201-02).

Title IV of S. 30, as amended, is derived from title IV of S. 30^a as introduced. It creates a new Federal false declaration provision that

⁵⁵ See, e.g., *Radomsky v. United States*, 180 F. 2d 781 (9th Cir. 1950). But see *United States v. Collins*, 272 F. 2d 650 (1959), cert. denied, 362 U.S. 911 (1960).

⁵⁶ See, e.g. *United States v. Nesselbaum*, 205 F. 2d 93 (3d Cir. 1953).

will not be circumscribed by rigid common law rules of evidence. Clarifying amendments have been made at the suggestion of the Department of Justice, and the provisions as now drafted have its support. The provisions also received the support of the majority of the witnesses who testified before the subcommittee. The testimony of Mr. Paul Curran, chairman of the New York State Commission of Investigations, is illustrative:

While the threat of imprisonment, or actual imprisonment, will compel a witness to testify, something more is needed to assure that the testimony given will be truthful. The knowledge by the witness that liberalized rules of evidence could well lead to a successful . . . prosecution against him can provide some guarantee that his testimony will be truthful. (Hearings at 178.)

Opposition to title IV was, however, expressed by the American Civil Liberties Union, chiefly on the grounds that insufficient reasons have been advanced to warrant abandonment of the prior practice.⁵⁷

Title IV thus constitutes the best efforts by the committee to fashion a new false declaration provision which will offer greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth. Its provisions are summarized above⁵⁸ and analyzed in detail below.⁵⁹ As now drafted, the committee recommends that title IV pass.

TITLE V: PROTECTED FACILITIES FOR HOUSING GOVERNMENT WITNESSES

Each step in the evidence gathering process dealt with so far in S. 30 moves toward the production of live testimony, testimony that is necessary to bring criminal sanctions into play in the fight against organized crime. Criminal sanctions, in short, do not enforce themselves. Obtaining testimony, however, is only part of the problem. The Attorney General testified in 1965 that even after cases had been developed, it was necessary to forego prosecution hundreds of times because key witnesses would not testify for fear of being murdered.⁶⁰ Tampering with witnesses is one of organized crime's most effective counter weapons. Indeed, the Attorney General indicated that such fear was not unjustified; he testified that the Department, in its organized crime program, lost more than 25 informants between 1961 and 1965. It was in this context, therefore, that the President's Crime Commission tragically concluded:

No jurisdiction has made adequate provision for protecting witnesses in organized crime cases from reprisal. In a few instances where guards are provided, resources require their withdrawal shortly after the particular trial terminates. On a case-to-case basis, governments have helped witnesses find jobs in other sections of the country or have even helped them to emigrate. The difficulty of obtaining witnesses because of the fear of reprisal could be countered somewhat if gov-

⁵⁷ Hearing at 463-64.

⁵⁸ *Supra* at 33.

⁵⁹ *Infra* at 149.

⁶⁰ Testimony of Nicholas deB. Katzenbach, *Invasion of Privacy*, Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., p. 1158 (1965).

ernments had established systems for protecting cooperative witnesses.

The Federal Government should establish residential facilities for the protection of witnesses desiring such assistance during the pendency of organized crime litigation.

After trial, the witness should be permitted to remain at the facility so long as he needs to be protected. (Report at 204.)

Title V of S. 30, as amended, is derived from Title VI of S. 30 as originally introduced. It authorizes the Attorney General to provide protection and security for witnesses and their families in organized crime cases. Clarifying and limiting amendments have been made at the suggestion of the Department of Justice, and the provisions as now drafted have its support. The provisions also received the support of a majority of the witnesses who testified before the subcommittee. The statement submitted by Mr. Frank Hogan, the District Attorney of New York County, is illustrative:

Over the years, it has become essential, in cases involving organized crime, for my office to protect witnesses whose testimony was essential to the prosecution. Were it not for the protection provided to two important witnesses, our conviction in 1961 of a powerful underworld character, Joe Gallo, for the crime of attempted extortion, might not have been possible. Had they not received protection, these witnesses, who knew of Gallo's notoriety for his unbridled use of violence in his efforts to displace Joseph Profaci as underworld boss of Brooklyn, would have been so terrorized that they might have preferred incarceration for contempt rather than risk assassination. Indeed, if they had not been protected, it is highly probable that they might have been eliminated as witnesses through underworld violence.

The protection which we provide from time to time to our witnesses, in cases involving organized crime, places a tremendous strain upon our limited financial resources and our police manpower. I, therefore, especially welcome that feature of the proposal that would extend this protection to witnesses in state proceedings. It would be a great aid to local law enforcement in the area of organized crime. (Hearings at 352.)

Qualified opposition, however, was expressed by the American Civil Liberties Union, chiefly on the ground that the provision might be read as an opening door to preventive detention.

Title V thus represents an effort by the committee to meet society's obligation to protect from underworld vengeance those who meet their duty in giving to society the benefit of their testimony in organized crime cases. Its provisions are summarized above⁶¹ and analyzed in detail below.⁶² As now drafted, the committee recommends that title V pass.

TITLE VI: DEPOSITIONS

As noted above in connection with title V, the most effective weapon available to the leaders of organized crime to frustrate the processes of law enforcement is tampering with evidence in the hands

⁶¹ *Supra* at 33.

⁶² *Infra* at 150.

or mouths of witnesses which was developed through the evidence gathering process. Whoever brings about the result, the mob's objective will have been realized if the witness dies before trial, or becomes too ill or is too injured to testify, changes his testimony in fear or from favor, or merely refuses to testify or produce evidence on grounds of privilege or "no" grounds at all. What is worse, particularly when the witness disappears or turns his coat at the last minute, the prosecution itself will usually be aborted and, under double jeopardy principles, the mob figure will attain permanent immunity from punishment.

Paralleling the attempt of title V to protect Government witnesses themselves from the mob by affording them physical protection and security, title VI seeks to protect the evidence the witnesses have to offer from corruption or other interference or harm by authorizing the taking of pretrial depositions in a form potentially admissible at trial to preserve this testimony. The primary purpose of title VI, therefore, is to remove the chief incentive the mob has in tampering with witnesses or their testimony and to prevent criminal prosecutions, especially in organized crime cases, from being defeated when Government witnesses are, in fact, prevented through murder, assault, intimidation, bribes or other factors, whatever their source, from testifying truthfully at trial. It may also be used, of course, by witnesses in protective custody to make their release feasible.

Title VI of S. 30, as amended, is derived from title V of S. 30 as originally introduced. It authorizes the taking of pretrial depositions. It reflects a recommendation of the Task Force on the Administration of Justice of the President's Crime Commission.⁶³ Clarifying and expanding amendments have been made at the suggestion of the Department of Justice, and the provisions as now drafted have its support. The provisions also received the support of the majority of the witnesses who testified before the subcommittee. The statement of Mr. Frank Hogan, the district attorney of New York County, is illustrative:

The provision that would authorize the taking of a deposition from a prospective Government witness in the interest of justice and under proper safeguards would constitute, if enacted into law, a great aid to Federal law enforcement particularly in the area of organized crime. It would insure the use of the testimony, obtained from a Government witness by deposition, at a subsequent trial in the event of his unavailability as the result of sickness, death, or absence from the country.

Furthermore, this amendment would remove one of the most serious hazards that attend the efforts of law enforcement to prosecute organized crime. Defendants in cases involving organized crime, our experience has shown, often resort to every conceivable device to delay their trials. The passage of time generally operates to the benefit of the defendant since important witnesses may become unavailable by reason of sickness or death or, not in protective custody, may be induced by

⁶³ Task Force on Administration of Justice, President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: The Courts* 43 (1967). Over half the states presently authorize the taking of depositions in criminal cases under some conditions. *Ibid.*

the use of underworld influence to leave the country. The incentive to resort to delaying tactics, therefore, would be considerably reduced, if not eliminated, by the enactment of this proposal.

It would also remove a powerful motive to subject a Government witness to underworld violence. Once the testimony of the witness is obtained and preserved for future use at a subsequent trial, no useful purpose would be served by an attempt to deny the prosecution that testimony through the use of threats or force.

Had there been in existence in New York State, for instance, the authority to take depositions from prosecution witnesses in the public interest, the testimony of one Peter LaTempa, who died on January 12, 1945, from poisoning while in jail, would have been available in 1946 at the trial of Vito Genovese and four codefendants for the crime of murder and would have thus precluded the direction of an acquittal by the court. But under New York law the authority to take testimony from a prosecution witness can only be exercised when a witness is about to leave the State or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial. If power to take depositions had been as broad as that which would be authorized in the public interest by the proposed amendment, the outcome of the Genovese case might have been different. (Hearings at 353.)

Opposition to title VI was, however, expressed by the American Civil Liberties Union, chiefly on the ground that this procedure should not be adopted until full pretrial discovery is available to the defendant.⁶⁴

Title VI represents the best efforts of the committee to develop a constitutionally sound procedure for preserving pretrial the testimony of witnesses in criminal cases. Its provisions are summarized above⁶⁵ and analyzed in detail below.⁶⁶ As now drafted, the committee recommends that title VI pass.

VII: LITIGATION CONCERNING SOURCES OF EVIDENCE

Developing testimony in the evidence gathering process in a form legally admissible under the rules of evidence and having it available at trial materially advance the prosecution. Nevertheless, they do not necessarily produce a conviction. For the forces of crime now shift from defense to tactics of delay, confusion, and attack in the context of the trial itself.

Seldom, of course, is a defense of innocence available to a mob leader when he is ultimately brought into court. And when he cannot defeat the prosecution by illegally tampering with the evidence against him, he turns to an attempt to suppress the evidence legally by showing law enforcement impropriety under the Bill of Rights. If he cannot establish his own innocence, he seeks to obtain his own release or at least work a delay and a confusion of issues by demonstrating a real or fancied violation of constitutional rights. The dual purposes of title VII are, therefore, (1) to protect legal proceedings against delay,

⁶⁴ Hearings at 464-465.

⁶⁵ *Supra* at 33.

⁶⁶ *Infra* at 150.

congestion, expense and distraction caused by the unlimited and unrestrained litigation of tenuous allegations that evidence should be suppressed; and (2) to prevent harm to legitimate public and private interests caused by forced disclosure of confidential files clearly unrelated to pending litigation.

MOTIONS TO SUPPRESS

The most troublesome situation to which title VII is directed arises in a criminal trial in which a leader of organized crime or other defendant claims that evidence to be offered by the Government was unlawfully obtained and should be suppressed. In support of his claim, the defendant must establish three elements: (1) standing,⁶⁷ (2) illegality,⁶⁸ and (3) causal relationship.⁶⁹ Nevertheless, any defendant can make such a claim, simply by filing a motion to suppress Government evidence. Determination of the motion frequently requires the receiving of testimony and other evidence in a pretrial hearing on the motion, legal argument in the trial court, and appellate review. The process is expensive and time consuming, especially so in cases of allegedly illegal electronic surveillance, where there may be lengthy study of the contents of surveillance logs and disputation concerning the significance of their contents, a process becoming unfortunately characteristic of major organized crime prosecutions.

As the Supreme Court acknowledged in *Desist v. United States*, 394 U.S. 244, 251 (1969),

. . . the determination of whether a particular instance of eavesdropping led to the introduction of tainted evidence at trial would in most cases be a difficult and time-consuming task, which, particularly when attempted long after the event, would impose a weighty burden on any court.

Court calendars can ill afford this contribution to the congestion from which they already suffer. Indeed, the President's Commission on Crime in the District of Columbia found that great increases in pre-trial motions were a major cause of a doubling from 1960 to 1965 of the time required to prosecute a District felony case, and suggested that in view of "excessive" delays in criminal cases ". . . greater priority should attach to efforts aimed at accommodating . . . judicial and legislative requirements [regulating the conduct of trials and securing the rights of defendants] with the goal of expeditious handling of

⁶⁷ *Standing*.—He must show that the violation affected his own interests, such as property or privacy, and not merely those of others. See, e.g., *Alderman v. United States*, 394 U.S. 165, 171-80 (1969).

⁶⁸ *Illegality*.—He must establish that a Government agent committed a violation of law for which exclusion of evidence is considered a proper remedy, such as an unreasonable search and seizure. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914); cf. *United States v. Wade*, 388 U.S. 218 (1967).

⁶⁹ *Causal relationship*.—He must establish that the evidence he wishes to suppress was either:

(a) The "primary product" of the violation, see, e.g., *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); or

(b) The indirect "fruit," or something "come at by the exploitation" of the violation, see, e.g., *United States v. Wade*, 388 U.S. 218, 241 (1967); *Wong Sun v. United States*, *supra* at 488; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). That criterion for identifying "tainted" or "poisoned fruit," as it is spelled out in *Wong Sun v. United States*, *supra* at 487-88, is not one of "but for" causation. Evidence derived "from an independent source" or "by means sufficiently distinguishable to be purged of the primary taint," and evidence whose connection to the police illegality has "become so attenuated as to dissipate the taint," do not meet that criterion. See also *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Silverthorne Lumber Co. v. United States*, *supra* at 392. The evidence to be suppressed may be physical or verbal evidence. *Katz v. United States*, 389 U.S. 347, 353 (1967); *Wong Sun v. United States*, 371 U.S. 471, 486 (1963).

criminal cases.”⁷⁰ Delays in disposing of criminal cases including both organized crime and other defendants are unfair, moreover, not only to defendants, but to the public security. While Willie Israel Alderman and his codefendant in the case noted below, Felix (Milwaukee Phil) Alderisio were pressing pretrial motions, trial, and appeal for nearly 5 years, Alderisio, free on bond, and three accomplices defrauded an Illinois bank of nearly \$80,000, according to a Federal indictment returned on July 25, 1969. Finally, this sort of complex and prolonged litigation concerning a peripheral question of admissibility is a distraction from the central question of the defendant’s guilt or innocence.

THE ALDERMAN DECISION

The procedural crisis caused by the filing of motions to suppress was only deepened by the Supreme Court’s recent decision in *Alderman v. United States*, 394 U.S. 165 (1969).

In the *Alderman* case, the Court held that, once a defendant claiming evidence against him was the fruit of unconstitutional electronic surveillance has established the “illegality” and “standing” elements, he must be given confidential materials in the Government’s files to assist him in establishing the “causation” element.⁷¹

The Court rejected the Government’s contention that the trial court could be permitted to screen the files in camera and give the defendant only material which is “arguably relevant” to his claim, saying such screening would be sufficiently subject to error to interfere with the effectiveness of adversary litigation of the question of “causation.”

Because the price of requiring such admittedly indiscriminate disclosure is so inordinately high, the *Alderman* decision must be set aside by congressional action.

CONSEQUENCES OF DISCLOSURE OR NONDISCLOSURE

Where the Government cannot under the circumstances in good conscience make disclosure, a mob leader or other defendant may obtain dismissal of the case against him. Indeed, motions for disclosure often are made in the primary hope that the Government will refuse disclosure. When the Government in June 1969 disclosed 2,000 pages of Mafia conversations recorded by FBI surveillance between 1961 and

⁷⁰ President’s Commission on Crime in the District of Columbia, Report at 256, 266–68 (1966).

⁷¹ The disclosure requirement so far applies to litigation on the “causation” element, not “legality” or “standing”. See *Taglianetti v. United States*, 394 U.S. 316, 317 (1969) (holding that standing can be determined through *in camera* inspection of records); *Giordano v. United States*, 394 U.S. 310, 314 (1969) (concurring opinion stating that question of procedure for determining legality is open); *United States v. Clay*, Cr. No. 67–H–94, U.S. District Court, S.D. Tex., July 14, 1969 (court accepted Government’s assertion that FBI files contained logs of only five overheard conversations of defendant, examined *in camera* one original log, and found to be groundless defendant’s claim that the excerpts from it furnished to defendant did not include all defendant’s conversations in that log). It applies, however, not only in organized crime prosecutions, but also in cases involving spying and subversion by agents of foreign powers and foreign intelligence information vital to national security. Initial disclosure must include the records of the defendant’s overheard conversations, and thereafter the trial court determines the need for further disclosure. *Alderman v. United States*, 394 U.S. 165, 182–85 (1969); *United States v. Clay*, Cr. No. 67–H–94, U.S. District Court, S.D. Tex., July 14, 1969 (court denied discovery relating to FBI practices for communicating the information gained by electronic surveillance on the ground that the defendant had failed after disclosure of logs of surveillance to “show that the information could have been, even in part, relevant to his conviction”). The relevancy of material as to which such further disclosure is sought by the defense may be determined *in camera*. *United States v. Alderman*, Crim. No. 17377, U.S. District Court, D. Colo., July 7, 1969 (court accepted Government’s representation that only one communication was sent from FBI office near site of electronic surveillance [Chicago] to FBI office near site of alleged crime and prosecution [Denver], examined it *in camera*, and determined that “. . . all matters having anything at all to do with this case have been furnished to the defendants.” [Italics supplied.]

1966 in compliance with a motion by a defendant's attorney, it was reported that the attorney was "astonished" as he had made the motion "thinking the Government would never agree to make them public."⁷²

Where the Government actually makes disclosure, several consequences are possible:

(1) Specific pending investigations and prosecutions can be ruined. Disclosure of their existence or of the evidence for them leads to flight by defendants and destruction of evidence. This result, like others mentioned below, is particularly likely in a case in which *Alderman* requires that the defendant be given logs of overheard conversations in which he was not a participant.

(2) Undue strain is placed upon fragile relationships of cooperation between Federal and State law enforcement bodies.

(3) The reputations of third parties receive grave injury, sometimes undeserved and always inflicted without due process, as unevaluated, raw allegations from secret files may find their way into the public domain. A regrettable instance of such injury occurred when *Life* magazine⁷³ published excerpts from transcripts of conversations overheard in 1961 and 1962 through FBI electronic "bugs" installed in *Cosa Nostra* meeting places in Chicago and Miami. As the magazine itself noted, since at least 1962 the transcripts had been "restricted to use as background intelligence only and [had] . . . remained deep in Government files, with access to them tightly controlled"—but after the transcripts were disclosed in court on May 5, 1969, they were, according to *Life*, "shaken loose" and published 3 weeks later, apparently in violation of a protective order. They contained unflattering references to nationally prominent singers, two named Chicago aldermen, and three judges whose names the magazine chose to delete. None of the individuals was a party to any of the published conversations.

(4) In espionage and other national security cases, as Mr. Justice Harlan pointed out in dissent in *Alderman* itself:

. . . the accused may learn important new information even if the turnover is limited to conversations in which he was a participant. For example, he may learn the location of a listening device—a fact that may be of crucial significance in espionage work. Moreover, he will be entitled to learn this fact even though a valid warrant has subsequently been issued authorizing electronic surveillance at the same location. Similarly, the accused may find out that the United States has obtained certain information that his foreign government believes is still secret, even when our Government has also received this information from an independent source in a constitutional way. And he may learn that those in whom he has been reposing confidence are in fact American undercover agents. (394 U.S. at 198.)

(5) The Attorney General in testimony before the subcommittee indicated that the lives and families of undercover agents and citizen informants may be endangered.⁷⁴ Their identities and activities may become known to the defendant and his accomplices. This danger may not be discounted after one reads the *Life* excerpts discussed above, in which a group of men were overheard planning an ax murder and

⁷² *N.Y. Times*, June 15, 1969, p. 52, col. 1.

⁷³ *Life*, May 30, 1969, pp. 45-47.

⁷⁴ Hearings at 142.

reminiscing about three murders one or another of them had previously committed.

(6) Citizens with evidence and information concerning crimes, willing to furnish it in confidence to law enforcement officials, are deterred from doing so by the justified fear that a court later will order an end to that confidentiality.

For many of those reasons, the Attorney General has termed the *Alderman* decision "a great disappointment to the Department."⁷⁵ The Assistant Attorney General in charge of the criminal division summarized some of the consequences of the *Alderman* decision in these terms:

There is little doubt that the requirement for evidentiary hearings on obviously irrelevant materials will have a substantial impact on our prosecutive efforts. Our experience has shown that the ingenuity of defense counsel is unlimited in advancing specious suggestions of the relevance of material which could not conceivably have led to any evidence used at trial. Protracted hearings have ensued because, even though a defendant realizes that he has no chance of proving taint, his most precious commodity is time. I am aware of one case where several defendants, found guilty by a jury more than 4 years ago, have postponed commencement of their sentences for at least 2 of those years as the result of an unavailing lengthy hearing (and appeal) concerning one overheard conversation, and they will presumably be able to further delay incarceration as the result of another hearing (and appeal) which will now be required.

. . . [W]e have yet to discover a single instance where a case claimed by the Government to have been untainted has been proven to be otherwise by the defense. Needless to say, this constitutes a most wasteful consumption of manpower, prosecutive and judicial. Since this problem will now increase as the result of the requirement for additional hearings in cases concluded long ago, our personnel, already spread thin in our current effort against organized crime, will have to be redeployed to handle these matters. It is clear, too, that the problem will not soon disappear, for under the present state of the law there is no "statute of limitations" on when a defendant can raise this issue. Thus, in 1980, for instance, defendants will still be demanding records of overhearings which occurred 20 or 25 years before, and they will still be demanding the protracted hearings which they are now allowed. Of course where an individual was accidentally overheard many years ago on a national security device which cannot be revealed, he will enjoy, in effect, immunity from prosecution, unless we can convince the courts that the surveillances involved were constitutional.

Hearings in these cases have also posed another substantial problem, that is, they have resulted in the disclosure of facts which have been pieced together by defendants in such a way as to enable them to identify sensitively placed and extremely valuable Government informants, with resultant dan-

⁷⁵ Hearings at 142.

ger to the informants' lives. Some hearings in the future may also result in the revelation of overheard conversations which unjustly reflect upon the integrity of persons discussed therein. Our experience has shown that protective orders have not been effective. (Hearings at 144-45.)

The Solicitor General, in an unsuccessful petition for rehearing in *Alderman's* companion case, *Ivanov v. United States*, No. 11, Oct. term, 1967, pointed out that, since often the Government cannot afford to make disclosure, ". . . the result of the decision ' . . . is, in practical terms, to provide . . . [defendants] with immunity from prosecution for all crimes past, present, or future'—and, we may add, to point the way for the well-advised person to obtain such immunity by simply making a telephone call."⁷⁶ In sum, the unlimited disclosure requirement of *Alderman* places too high a barrier in the way of the Government as it attempts to protect law-abiding citizens from crime, particularly organized crime.

Those barriers are indeed too high, since the remedy announced in *Alderman* far outruns the wrong it was designed to remedy in two respects:

(1) It makes no provision for any threshold disclosure criterion, though there are cases in which it is easy to decide on the most cursory in camera screening of files that there is not the slightest possibility of relevance. As Mr. Justice Harlan pointed out in his separate dissenting and concurring opinion in *Alderman*:

. . . it is not difficult to imagine cases in which the danger of unauthorized disclosure of important information would clearly outweigh the risk that an error may be made by the trial judge in determining whether a particular conversation is arguably relevant to the pending prosecution. It may well be, for example, that the number of conversations at issue is very small. Yet though the Court itself recognizes that "the need for adversary inquiry is increased by the complexity of the issues presented for adjudication," . . . it nevertheless leaves no room for an informed decision by the trial judge that the risk of error on the facts of a given case is insubstantial. (394 U.S. at 199-200)

Such cases arise not infrequently, since a person who is not a target of an electronic surveillance can by chance happen into it and speak a few irrelevant words. The Assistant Attorney General has indicated that "an extensive review . . . by the Justice Department" revealed that 6,750 inquiries by the Department attorneys of the FBI to determine whether particular individuals were subjected to electronic surveillance, consuming "an enormous amount of time," led to only 75 to 100 cases requiring hearings on the issue of disclosure and only three dismissals of cases for tainted evidence.⁷⁷ These general statistics are supported by several prominent instances. In *United States v. Clay*, Cr. No. 67-H-94, U.S. District Court, S.D. Tex., July 14, 1969, which the Supreme Court remanded for further proceedings in conformity with the *Alderman* decision, the district court found after a full adversary hearing "that the logs are so totally innocuous they could not have had any bearing on the defendant's conviction under any circum-

⁷⁶ Petition for rehearing at 10.

⁷⁷ Reprinted 115 Cong. Rec. S5816 (daily ed. May 29 1969).

stances." Indeed, after seeing how little full disclosure and an adversary hearing had contributed to consideration of the "causation" issue in the case, the district court concluded that it could have made the determination that the wiretap evidence was innocuous on an *in camera* inspection. Similarly, on July 14, 1969, a Chicago Federal court found in the James Hoffa union welfare fund fraud case, after an *Alderman* hearing, that the wiretap material in question there was irrelevant to the evidence on which Mr. Hoffa was convicted. *United States v. Hoffa*, No. 63-CR-317, N.D. Ill. (Austin, J.)

And when the cases of *Alderman* and *Alderisio* themselves were reheard by the district court, with full disclosure and "two and a half days" of defense interrogation of numerous FBI agents and supervisors connected with the surveillance, the court concluded that there was not a single overheard conversation which *Alderman* had standing to challenge and that, as to the conversations for which *Alderisio* had standing, "[t]here is absolutely no relevancy in any of the material from any of the logs of the electronic surveillance to any evidence offered at the trial of this case." *United States v. Alderman*, Crim. No. 17377, U.S. District Court, D. Colo., July 7, 1969.

(2) It declares no exception for files concerning illegal police conduct occurring long before the event proved by the offered evidence. On its face the *Alderman* rule would, for example, appear to require disclosure concerning any 1964 illegal electronic surveillance of an individual when that individual is tried for a crime not committed until 1995. The passing of a number of years between the time of the police illegality and commission of a crime by the defendant virtually eliminates any likelihood that the two are connected. It makes litigation of the "causation" issue more complex, lengthy, confusing and unreliable. This is illustrated by the case of Emmanuel Blaz Mrkonjic-Ruzic, remanded by the Supreme Court for *Alderman* proceedings, which the Solicitor General's brief described as follows:⁷⁸

In this case, the petitioner, on one occasion 5 years before the date of the crime charged in the indictment, fell into an electronic surveillance and was overheard participating in one brief conversation. It is apparent from an examination of the one and a half line surveillance log entry reflecting that conversation that the overhearing of the conversation could not possibly have provided evidence against the petitioner. It would not take a trial judge 5 minutes to make that determination. Yet, it is also apparent from an examination of that log that the Government could not disclose, except to a court, where his conversation was overheard.

PROTECTIVE ORDERS

Title VII consists primarily of two needed modifications to the inflexible *Alderman* rule: (1) a prohibition against consideration of a "causation" claim where the alleged government illegality preceded the event to be proved by more than 5 years; and (2), for claims not foreclosed by the 5-year provision, the creation of flexible minimum threshold criteria for disclosure. The courts have, and will continue under title VII to have, the power to make "protective orders" for-

⁷⁸ Additional memorandum for the United States, p. 3, *Mrkonjic-Ruzic v. United States*, 394 U.S. 454 (1969).

bidding defendants and their attorneys who obtain disclosure of confidential files from relaying the information to others. Nevertheless, it must be recognized that these protective orders cannot contribute to the conservation of judicial time and resources, contrary to the impressions left by the Court in *Alderman*. They are, moreover, an inadequate substitute for the contribution which can be made by devices such as the 5-year provision and the threshold criterion provision to the prevention of unwarranted disclosure. Indeed, it may often be impractical to make protective orders, in spite of the destructive and unnecessary consequences of public disclosure. When one of the cases remanded by the Supreme Court for further proceedings in the light of its decision in *Alderman*, for example, reached the district court again, the court placed four electronic surveillance logs disclosed to the defense under a protective order, at the Government's request. In the court's words, "[h]owever, it became apparent that it would be impossible to conduct a public hearing and explore the relevance of the logs in light of the protective order. The order was therefore dissolved, and the logs were admitted into evidence." *United States v. Clay*, Cr. No. 67-H-94, U.S. District Court, S.D. Tex., July 14, 1969. As a result, a log containing a statement that one of the defendant's relatives, not a party to the conversation, had been expelled from a religious temple "for being out all night with women" was made available to the public. That invasion of his privacy and reputation was totally unwarranted since, as noted above, disclosure and adversary hearing merely confirmed that the logs were—as they appeared *in camera*—"totally innocuous."

When protective orders have been made and not relaxed, moreover, their inadequacy has been consistently demonstrated. The contents of supposedly confidential wiretap and "bug" transcripts furnished to defendants under court orders have found their way not merely into the hands of a defendant's underworld associates, but into public print. National security information dealing with surveillance of a foreign embassy was disclosed in a December 2, 1966, Washington Post article in spite of a protective order made by the Federal District Court for the District of Columbia.⁷⁹ Again, the wiretap transcripts had remained confidential in the Government's hands for over 5 years until they were produced in court, supposedly in secret, only to appear in the newspaper 3 weeks later.

CONSTITUTIONALITY

There is no constitutional obstacle to the enactment of title VII. The *Alderman* decision was an exercise of the Supreme Court's supervisory jurisdiction over the lower Federal courts and not a constitutional interpretation. See generally *Peters v. Hobby*, 349 U.S. 331 (1955). Like the rule of *Jencks v. United States*, 353 U.S. 657 (1957), modified by 18 U.S.C. § 3500 (1957), the rule of *Alderman* is not beyond legislative remedy. Though the *Alderman* ruling was designed to enforce substantive rights guaranteed by the fourth amendment, it is settled doctrine that the details of implementation of constitutional guarantees often lie below the threshold of constitutional concern. See *Ker v. California*, 374 U.S. 23, 34 (1963).

⁷⁹ See 115 Cong. Rec. S6095 (daily ed. June 9, 1969).

Since the two basic provisions of title VII foreclose only those claims of derivative taint which are too attenuated to warrant litigation, and condition disclosure in connection with suppression motions upon only minimal screening criteria, their impact should fall upon patently dilatory, harassing, and unfounded suppression motions. Thus, they will neither infringe constitutional or statutory rights of individual defendants nor unduly interfere with the deterrent efficacy of the suppression sanction.

Their application beyond Federal criminal cases to State and civil proceedings is necessary to prevent Federal and State agencies from frustrating one another's policies, to promote cooperation between Federal and local law enforcement officers, and to avoid inconsistent treatment of litigants. Congress has the power to act in this fashion. See *Elkins v. United States*, 364 U.S. 206 (1960); *cf.* U.S. Const. amend. XIV, § 5; *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Adams v. Maryland*, 347 U.S. 179, 183 (1954); see generally 18 U.S.C. § 2515.

CONCLUSION

Title VII of S. 30, as amended, is derived from S. 2292, which was originally introduced by Senator McClellan for himself and Senator Hruska on May 29, 1969.⁸⁰ Clarifying amendments have been made at the suggestion of the Department of Justice. As presently drafted, title VII has the broad support of the Department of Justice. The Department's suggestion that the scope of title VII might appropriately be limited to the electronic surveillance area has, however, been rejected by the committee since it was felt that no principled distinction could be drawn between various kinds of allegedly suppressible derivative evidence based solely on the character of the primary suppression ground. The courts themselves have drawn no such distinction⁸¹ and the committee perceived no reason why the Congress should. The committee has also extended the scope of its provisions to deal with claims of inadmissibility which may be expected to arise out of the operation of the immunity provisions of title II. Title VII has the support of the Department of Justice. Opposition, however, was expressed to title VII by the American Civil Liberties Union on the grounds that it was unconstitutional.⁸²

Title VII represents a careful effort by the committee to balance the competing interests of justice, personal security, fair trial, and privacy in a delicate area not only dealing with organized crime, but cutting across the entire administration of justice. Its provisions are summarized above⁸³ and analyzed in detail below.⁸⁴ As now drafted, the committee recommends that title VII pass.

TITLE VIII—SYNDICATED GAMBLING

Each of the titles of S. 30, summarized above, has sought either to procure evidence of organized criminal activity or to secure its ad-

⁸⁰ 115 Cong. Rec. S5810 (daily ed. May 29, 1969).

⁸¹ See, e.g., *Nardone v. United States*, 308 U.S. 338 (1939) (violation of § 605); *Wong Sun v. United States*, 371 U.S. 471 (1963) (violation of fourth amendment); *United States v. Wade*, 388 U.S. 218 (1967) (violation of sixth amendment); *Wayne v. United States*, 318 F. 2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963) (violation of 18 U.S.C. § 3109); *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964) (immunity).

⁸² Hearings at 489.

⁸³ *Supra* at 33.

⁸⁴ *Infra* at 152.

mission at trial. Their impact will be primarily procedural. In contrast, the purpose of title VIII is to give the Federal Government a new substantive weapon, a weapon which will strike at organized crime's principal source of revenue: illegal gambling. This title will make it a Federal offense punishable by up to 5 years' imprisonment and a \$20,000 fine to engage in any large-scale business enterprise of gambling. In addition, it will make it a Federal felony to obstruct enforcement of local laws against gambling by means of bribery and corruption of Government officials, the standard practice of large-scale gamblers.

SYNDICATED GAMBLING

The President in his message on "Organized Crime" on April 23, 1969, said: ⁸⁵

This Administration has concluded that the major thrust of its concerted anti-organized-crime effort should be directed against gambling activities. While gambling may seem to most Americans to be the least reprehensible of all the activities of organized crime, it is gambling which provides the bulk of the revenues that eventually go into usurious loans, bribes of police and local officials, "campaign contributions" to politicians, the wholesale narcotics traffic, the infiltration of legitimate businesses, and to pay for the large stables of lawyers and accountants and assorted professional men who are in the hire of organized crime.

Gambling income is the lifeline of organized crime. If we can cut it or constrict it, we will be striking close to its heart.

It has been estimated that illegal wagering on horseraces, lotteries, and sporting events totals at least \$20 billion each year and may reach as high as \$50 billion. The scope of this source of revenue can be seen from the fact that the total amount of money bet legally in the United States at racetracks is \$5 billion. Analysis of organized criminal betting operations indicates that the profits on \$20 billion worth of illegal gambling total some \$6 or \$7 billion annually.⁸⁶ Obviously, if this source of revenue can be substantially diminished by the prosecution of large-scale operators, a meaningful blow will have been dealt organized crime.

The inevitable companion of flourishing gambling activity, moreover, is the bribery and corruption of local law enforcement officials. The President in his message on "Organized Crime" of April 23, 1969, observed: ⁸⁷

For most large-scale illegal gambling enterprises to continue operations over any extended period of time, the cooperation of corrupt police or local officials is necessary. This bribery and corruption of Government closest to the people is a deprivation of one of a citizen's most basic rights.

This in turn destroys local law enforcement as an effective weapon against organized crime. The criminal activity that flourishes under such conditions affects not only the local community in which it occurs but also other parts of the country, thus becoming a matter of Federal

⁸⁵ Doc. No. 91-105, House of Representatives, 91st Cong., 1st Sess. at 6 (1969).

⁸⁶ Task Force Report: Crime and Its Impact—An Assessment, the President's Commission on Law Enforcement and Administration of Justice at 52-53 (1967).

⁸⁷ Doc. No. 91-105 House of Representatives, 91st Cong., 1st sess. at 5 (1969).

concern. Testimony before the subcommittee by the Department of Justice, for example, revealed that a grand jury investigation conducted by the organized crime and racketeering section attorneys uncovered evidence that local numbers operators had almost every member of the vice squad of a major midwestern city on their payroll.⁸⁸ Low-level officers were reportedly receiving \$250 per month and their superiors as much as \$500. The involvement of the police even included pressure by the chief of the squad placed on a dissident gambler to bring him in line with his fellow numbers operators.

The attention of the subcommittee was also directed at a major city where extensive police corruption has reportedly existed.⁸⁹ Shortly after passage of the wagering tax laws in 1951, efforts were made by agents of the Internal Revenue Service to coordinate their activities with the city's vice squad, but after a large percentage of the joint raids were unsuccessful, investigation disclosed that the vice squad members, almost to a man, were being paid off by lottery operators and bookmakers. Federal authorities were unable to develop viable tax evasion cases, and in the local trials of the police officers involved, numerous members of the police force came forward to testify that they would not believe either the Federal or State officers who testified for the prosecution. None of the local policemen were convicted.

The effect of such police corruption is stultifying on Federal-State cooperation in the campaign against organized gambling. This inability of Federal agencies properly to enforce the statutes within their jurisdiction is an important basis for the Congress to take action in this area.

Existing Federal statutes dealing with the interstate aspects of gambling are, moreover, not broad enough to reach all gambling activity which is of legitimate concern to the United States.⁹⁰ The Department of Justice testified before the subcommittee:⁹¹

Under existing legislation, many Federal investigations of gambling operations end with no indictments because of the lack of evidence of an interstate element. For example, in Brooklyn, a long-term strike force investigation ended in the indictment of only 3 out of 20 suspects because of the absence of evidence of an interstate activity by the other 17. The three who were indicted for violations of 18 United States Code, section 1952, were involved with 17 others in running a multi-million-dollar gambling operation (horse bets and numbers) in the Eastern District of New York (Queens, Long Island, and Brooklyn). The only interstate travel that could be proved was the travel of the three who were indicted from their homes in New Jersey to work in New York. The gambling operation itself involved no interstate travel and the other 17, who all lived in New York, cannot, therefore, be prosecuted federally despite their known participation in this huge gambling operation.

Despite the best efforts made to date by both the Federal and the several State governments, gambling continues to exist on a large scale

⁸⁸ Hearings at 382.

⁸⁹ Hearings at 382.

⁹⁰ See 18 U.S.C. 1084 (interstate transmission of wagering information), 1952 (interstate travel in aid of racketeering), and 1953 (interstate transportation of wagering paraphernalia).

⁹¹ Hearings at 383.

to the benefit of organized crime and the detriment of the American people. A more effective effort must be mounted to eliminate illegal gambling. In that effort the Federal Government must be able not only to deny the use and facilities of interstate commerce to the day-to-day operations of illegal gamblers—as it can do under existing statutes—but also to prohibit directly substantial business enterprises of gambling, and the attendant corruption of State law-enforcement officials.

SCOPE OF LEGISLATION

Title VIII begins with a finding by Congress that illegal gambling has a widespread effect upon interstate commerce and is dependent upon the facilities of interstate commerce for its various illegal operations. The finding is also made that money derived from or used in illegal gambling frequently moves in interstate commerce and that gambling paraphernalia intended for illegal use often moves in interstate commerce. Finally, Congress finds that corruption and bribery of State and local officials responsible for enforcement of criminal laws facilitate illegal gambling enterprises.

The intent of the committee, as noted above, is not to bring all illegal gambling activity within the control of the Federal Government. Title VIII deals only with those who are engaged in an illicit gambling business of major proportions. It defines an "illegal gambling business" as including "pool selling, bookmaking, maintaining slot machines, numbers, and other gambling activity" which—

- (1) is a violation of State law,
- (2) involves five or more persons who participate in the betting, wagering, lottery, or numbers activity; and
- (3) has been or remains in operation for a period in excess of 30 days or has a gross revenue of \$2,000 in any single day.

It is anticipated that cases in which this standard can be met will ordinarily involve business-type gambling operations of considerably greater magnitude than this definition would indicate, however, because it is usually possible to prove only a relatively small proportion of the total operations of a gambling enterprise. Thus, the legislation would in practice not apply to gambling that is sporadic or of insignificant monetary proportions. It will reach only those who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be a matter of national concern.

FEDERAL JURISDICTION

It is well established that Congress is empowered under the commerce clause to prevent criminal activities which take place in or affect interstate commerce. As Mr. Justice Day stated for the Supreme Court in *Caminetti v. United States*, 242 U.S. 470, 491 (1917):

[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

It is equally well established that once Congress concludes that some general activity affects interstate commerce, and enacts a statute regulating participants in that activity, an individual participant will not be heard to claim that his particular segment of the activity does not affect interstate commerce. See, e.g., *Wickard v. Filburn*, 317 U.S. 111

(1942); *cf. Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

It is well established, moreover, that the forces of organized crime operate without regard to state lines.⁹² Illegal gambling operations, as the chief source of revenue for organized crime, constitute the foundation network of criminal activities. Indeed, virtually all gambling operations within the ambit of organized crime have a direct effect on interstate commerce, either through the use of interstate communications facilities, or because equipment utilized has been transported in interstate commerce.

Once it is determined that gambling operations of a certain size may be subject to general regulation under the Commerce Clause, Congress clearly has constitutional power to regulate a particular aspect of gambling operations. Thus, Congress may properly single out for Federal prohibition the element of gambling operations involving the corruption of local law-enforcement officials. The rationale of such an attack on gambling operations is clear. The enforcement of criminal laws against gambling and other illegal activities is generally the responsibility of the States and local governments in our Federal system. While the intent of the committee is not to preempt this responsibility, it is its intent to make it possible for the Federal Government to intervene where local and State governments have become, in effect, incapable of law enforcement by reason of the corruption of responsible officials. This limited Federal intervention should serve to reinforce the powers of the States and local governments in our Federal system, rather than to inject the Federal Government into a responsibility traditionally left to the States.

Several corollary benefits will accrue from the adoption of the direct approach embodied in title VIII:

(1) The investigative manpower requirements will be lessened and governmental efficiency will be improved, since specific proof of interstate commerce will not be required in each case.

(2) As a practical matter, one of the most effective law enforcement techniques against gambling activities involves seizing evidence in the course of a raid on a gambling establishment. To make such a raid, it is necessary to obtain a search warrant based on probable cause to believe that there is a violation of Federal law. To show that gambling is going on at a particular location can be relatively easy—this can be

⁹² There are numerous cases in the Federal courts demonstrating the dependency of substantial gambling enterprises on the facilities of interstate commerce. Some of these cases are as follows:

1. In *United States v. Hawthorne*, 356 F. 2d 740 (4th Cir.), *cert. denied*, 384 U.S. 908 (1966), evidence showed that the facilities of Western Union were used to transfer the proceeds from slot machines, owned by the defendant and operated by his partner in Indiana, from that State to the defendant in West Virginia.

2. In *United States v. Barrow*, 363 F. 2d 62 (3d Cir. 1966) *cert. denied*, 385 U.S. 1001 (1967), the evidence indicated that gambling casino employees traveled to a Pennsylvania casino from their New Jersey homes.

3. In *United States v. Miller*, 379 F. 2d 483 (7th Cir.), *cert. denied* 389 U.S. 930 (1967), the defendants operated wagering pools on the basis of information received through the Western Union sports ticker.

4. In *United States v. Spino*, 345 F. 2d 372 (7th Cir.), *cert. denied* 382 U.S. 825 (1965) the testimony established that the defendant, in charge of certain gambling operations in East Chicago, Ind., was financed by sources in Chicago, Ill.

5. In *In re Ruby Lazarus*, 276 F. Supp. 434 (S.D. Calif. 1967), in October 1965, it was revealed that in Palm Springs, gamblers and underworld figures held what is referred to as the "Little Appalachian" meeting. In attendance were Ruby Lazarus, a Miami Beach and New York City bookmaker, Vincent Alo, Anthony Salerno, New York members of the Cosa Nostra "family" headed by Vito Genovese, as well as Jerome Zarowitz, credit manager of a Las Vegas casino, Caesar's Palace.

6. In *United States v. Zambito*, 315 F. 2d 266 (4th Cir. 1963), *cert. denied*, 373 U.S. 924 (1963), the defendant was convicted of causing others to travel and to carry in interstate commerce gambling paraphernalia to be used in, and with intent to promote, an illegal numbers operation.

done through the testimony of agents who have surveilled the location and observed the kind of traffic in and out of it that is characteristic of a gambling operation. Nevertheless, to show at this investigatory stage that the gambling activity involves the use of interstate commerce or its facilities can be much more difficult. Under the existing statutes, however, a demonstration of this nexus is necessary. In contrast, if a Federal warrant can be obtained and a raid conducted, the Federal agents making the raid are entitled to confiscate and use as evidence documents or other things which they find on the premises. Information thus obtained will often show a sufficient relationship of the gambling enterprise to interstate commerce to bring indictments under other Federal statutes. By so supplementing existing Federal legislation by eliminating the requirement that an interstate element be proved in each case, title VIII offers a promise of conserving investigative manpower requirements and an opportunity of concluding successfully investigations that have been thwarted in the past and cases that have not been subject to prosecution in Federal courts for lack of proof of a specific interstate aspect.

NATIONAL GAMBLING COMMISSION

With the enactment of title VIII, the extension of Federal jurisdiction into the field of syndicated gambling will have reached its constitutional limit. Federal concern over the use of interstate facilities to promote gambling has a long history,⁹³ but Federal concern with operations of the syndicates themselves and the attendant failure of State and local law enforcement to meet the challenge of professional gambling began only with the Attorneys General Conference on Organized Crime in 1950.⁹⁴ It is clearly time, therefore, to take stock of where our Nation is and what directions it should take in the future. Title VIII thus ends with the establishment of a Commission To Review National Policy Toward Gambling. The Commission will come into existence 2 years after the effective date of the title and make its report 4 years later. The Commission will be composed of 15 members, four from the Senate, four from the House of Representatives, and seven appointed by the President. The Chairman will be designated by the President. The Commission will be entitled to subpoena witnesses and hold hearings. The Commission will have as its duty "to conduct a comprehensive study" of existing Federal, State, and local policy with respect to gambling and "to formulate and propose such changes" as it shall deem appropriate.

Title VIII of S. 30, as amended, is derived from S. 2022, which was originally introduced by Senator Hruska for himself and Senators Dirksen, Eastland, McClellan, and Mundt, on April 29, 1969.⁹⁵ Clarifying and other amendments have been made with the approval of the Department of Justice.⁹⁶ As presently drafted, title VIII has the support of the Department of Justice.

Title VIII constitutes the committee's best efforts to extend to Federal law enforcement the new substantive tools it needs to respond to the special challenge posed by syndicated gambling and its attendant

⁹³ See, e.g., *In Re Rapier*, 143 U.S. 110 (1892), sustaining the former provisions of 18 U.S.C. § 1302, which prohibits mailing lottery tickets; *Champion v. Ames*, 138 U.S. 321 (1903), sustaining the Federal Lottery Act of 1895, 23 Stat. 968.

⁹⁴ See Hearings at 498-505.

⁹⁵ 115 Cong. Rec. S4332 (daily ed., April 29, 1969).

⁹⁶ See Hearings at 390, 412.

corruption. Its provisions are summarized above⁹⁷ and analyzed in detail below.⁹⁸ As now drafted, the committee recommends that title VIII pass.

TITLE IX: RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Titles I through VII of S. 30, as amended, may be characterized as procedural, while title VIII is substantive. In contrast, title IX has both procedural and substantive aspects. It has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. It seeks to achieve this objective by the fashioning of new criminal and civil remedies and investigative procedures.

SUBVERSION OF LEGITIMATE ORGANIZATIONS

There is rising awareness, in official circles and among all of our people, of the depth of penetration of the forces of organized crime into the fabric of our society and our commercial life. A special committee of the American Bar Association has concluded:⁹⁹

The evidence is clear that organized crime which takes billions of dollars—mostly in cash and mostly untaxed—annually from the American public, has broadened its operations by infiltrating and taking over legitimate businesses. . . . Organized crime, therefore, is a major threat to the proper functioning of the American economic system, which is grounded in freedom of decision. When organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it used in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest on economic superiority.

The magnitude of the problem makes it clear that all legitimate methods of combating organized crime must be utilized.

INFILTRATION OF LEGITIMATE BUSINESSES

In most cities, organized crime now dominates the fields of jukebox and vending machine distribution.¹ Racketeers in one midwestern city control, or have large interests in 89 businesses with total assets of more than \$800 million and annual receipts in excess of \$900 million. Laundry services, liquor and beer distribution, nightclubs, food wholesaling, record manufacturing, the garment industry and a host of other legitimate lines of endeavor have been invaded and taken over. The Special Committee to Investigate Organized Crime in Interstate Commerce, under the leadership of Senator Estes Kefauver, noted in 1951 that the following industries have been invaded: advertising, amusement, appliances, automobile, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drugstores, electrical equipment, florists, food, football, garment, gas, hotels, import-export, insurance, jukebox, laundry,

⁹⁷ *Supra* at 33-34.

⁹⁸ *Infra* at 155.

⁹⁹ Report of Antitrust section of the American Bar Association on S. 2043 and S. 2049 (1968), reprinted in Hearings at 559.

¹ See generally S. Rept. No. 1139, Select Committee on Improper Activities in the Labor Management Field, U.S. Senate, 86th Cong., 2d sess. at 733-866 (1960).

liquor, loan, news services, newspapers, oil, paper products, radio, real estate, restaurants, scrap, shipping, steel surplus, television, theaters, and transportation.²

Often it is the small or marginal businessman who is most easily subject to invasion by organized crime. Organized crime seems to act like a vulture that preys on those otherwise made vulnerable by many of the economic developments of the last half century. It is most disturbing, however, to learn that organized crime has begun to penetrate securities firms and the Stock Exchange itself. J. Edgar Hoover has testified: "We have over 30 pending cases (March 1, 1969) involving thefts of securities from brokerage houses. Close associates and relatives of La Cosa Nostra figures are known to be involved in at least 11 of these cases."³ Apparently no area is immune.

Control of business concerns has been acquired by the sub rosa investment of profits acquired from illegal ventures, accepting business interests in payments of gambling or loan shark debts, but, most often, by using various forms of extortion. Paul J. Curran, Chairman of the New York State Commission of Investigation, testified before the Subcommittee:

From gambling narcotics, and loan sharking . . . [organized crime] has extended its tentacles into the field of commerce and industry. It has utilized its vast resources to infiltrate diverse kinds of legitimate businesses. In our investigations, the commission has found that the means used by racketeers to penetrate and to gain control of legitimate business, or simply to engage in extortion, ranged from old-fashioned muscle and violence to such more sophisticated techniques as using a big underworld name as a salesman, or merely mentioning such a name as being connected with a particular company, or "borrowing" money with no intention of ever repaying the "loan." (Hearings at 175.)

After takeover, defaulted loans are often liquidated by professional arsonists burning the business and then collecting the insurance or by various bankruptcy fraud techniques, which are called "scam." An estimated 250 such scam operations are pulled off each year, netting around \$200,000 per job. Often, however, the organization, using force and fear, will attempt to secure a monopoly in the service or product of the business. When the campaign is successful, the organization begins to extract a premium price from customers. Purchases by infiltrated businesses are always made from specified allied firms. With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can thus be effectively eliminated and customers can be effectively confined to sponsored suppliers.

² S. Rept. No. 307, Special Committee to Investigate Crime in Interstate Commerce, U.S. Senate, 82d Cong., 1st sess. at 170 (1951).

³ Testimony of J. Edgar Hoover, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 91st Cong. 1st sess. at 559 (1969).

The President in his message on "Organized Crime" on April 23, 1969, declared:⁴

The syndicate-owned business, financed by illegal revenues and operated outside the rules of fair competition of the American marketplace, cannot be tolerated in a system of free enterprise.

TAKEOVER OF LEGITIMATE UNIONS

Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions.⁵ Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.

INADEQUACIES OF PRESENT REMEDIES

Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. That attack must begin, however, with the frank recognition that our present laws are inadequate to remove criminal influences from legitimate endeavor organizations. The traditional approach has been to seek through fine and imprisonment to deter or prevent the perpetration of criminal behavior. As the efforts of the Federal Government have increased, many of the Nation's most notorious racketeers have indeed been imprisoned, and many local organized crime endeavors have been substantially curtailed. Nevertheless, the stark fact remains: Not a single one of the "families" of La Cosa Nostra has been destroyed through criminal prosecutions.

The President in his message on "Organized Crime" of April 23, 1969, observed:⁶

The arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail.

The Attorney General in testimony before the subcommittee said:⁷

While the prosecutions of organized crime leaders can seriously curtail the operations of the Cosa Nostra, as long as the flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted.

⁴ Doc. No. 91-105, House of Representatives, 91st Cong., 1st sess. at 6 (1969).

⁵ See generally S. Rept. No. 1417, Select Committee on Improper Activities in the Labor or Management Field, U.S. Senate, 85th Cong., 2d sess. (1958); S. Rept. No. 62, Select Committee on Improper Activities in the Labor or Management Field, U.S. Senate, 86th Cong., 1st sess. (1959); S. Rept. No. 139, Select Committee on Improper Activities in the Labor or Management Field, U.S. Senate, 86th Cong., 2d sess. (1960).

⁶ Doc. No. 91-105, House of Representatives, 91st Cong., 1st sess. (1969).

⁷ Hearings at 112.

What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

NEW REMEDIES

Title IX recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

Criminal approach

Fine and imprisonment as criminal sanctions are not new. The use of criminal forfeiture, however, represents an innovative attempt to call on our common law heritage to meet an essentially modern problem. In English law, goods and chattels were automatically forfeited to the Crown upon conviction of felony; lands were forfeited upon attainder, and this common law rule was carried into the New World by the colonists. Instances of criminal forfeiture, moreover, are noted in early American reports.⁸ The use of the ancient doctrine of criminal forfeiture embodied in title IX may be aptly explained by reference to the Department of Justice comments on the proposed statute:⁹

The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is *in rem* against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense. Examples of such forfeiture provisions are those contained in the customs, narcotics and revenue laws. Such statutes have been uniformly upheld against the objection that they violate due process on the grounds that they are wholly preventive and remedial and are designed to aid the enforcement of the particular laws in question and to restrain violations thereof. In upholding such a statute in *Goldsmith-Grant Company v. United States* 254 U.S. 505 (1921), the Supreme Court held at 511: "But whether the reason for sec-

⁸ See, e.g., *Camp v. Lockwood*, 1 U.S. 393 (Court of Common Pleas of Philadelphia County, 1788), where the plaintiff, Ablathar Camp, was prevented from suing on a debt, as it was "already vested by confiscation in the State of Connecticut." The vesting was occasioned by a conviction of treason. Although the forfeiture was seldom enforced because of a lack of chattels in the hands of felons, a prominent instance occurred in New York in 1766, where the defendant's goods were forfeited upon conviction for manslaughter. See Goebel & Naughton, *Law Enforcement in Colonial New York*, 715, 716; Scott, *Criminal Law in Colonial Virginia* 107-10.

⁹ In other areas, the courts have recognized that the powers of equity are better suited than those of the criminal courts for the elimination of unlawful conduct. See *Olopton v. State*, 105 S.W. 994 (Tex. 1907) (suit under statute to enjoin bawdy house).

tion 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisdiction of this Country to be now displaced.”

Under the criminal forfeiture of section 1963, however, the proceeding is *in personam* against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or imprisonment, but also by forfeiture of all interest in the enterprise. The concept is derived from the practice well known in the early law where upon conviction of treason and certain other felonies the party forfeited his goods and chattels to the crown. *The Palmyra*, 12 Wheat. 1, 25 U.S. 1 (1827), opinion of Mr. Justice Storey at 14. According to Blackstone, the only valid reason for this type of forfeiture is that since all property is derived from society, any member of society who violates the fundamental contract of his association by transgressing society's laws forfeits his right to that property, and the state may justly resume that portion of the property which the laws have previously assigned him. *Commentaries*, Ch. 8, 299-300. XVI.

While there is some indication that this concept of criminal forfeiture was in usage in the colonies, the First Congress by Act of April 20, 1790, abolished forfeiture of estate and corruption of blood, including in cases of treason. That statute, as revised, is found in 18 U.S.C. § 3563 which states: “No conviction or judgment shall work corruption of blood or any forfeiture of estate.” From that date to the present, therefore, no Federal statute has provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States. Section 1963(a), therefore, would repeal 18 U.S.C. § 3563 by implication.

It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of Congressional wisdom rather than of constitutional power. See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), opinion of Mr. Justice Frankfurter at 441, holding that whether proscribed conduct is to be visited by a criminal prosecution or by other remedies is a matter of legislative choice. (Hearings at 407.)

Through this new approach, it should be possible to remove the leaders of organized crime from their sources of economic power. Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence.

Civil approach

There is no doubt that the common law criminal trial, hedged in as it is by necessary restrictions on arbitrary governmental power to protect individual rights, is a relatively ineffectual tool to implement economic policy. It must be frankly recognized, moreover, that the infiltration of legitimate organizations by organized crime presents more than a problem in the administration of criminal justice. What is ultimately

at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adapting the civil remedies developed in the antitrust field to the problem of organized crime. As a special committee of the American Bar Association observed:¹⁰

The time-tested machinery of the antitrust laws contains several useful and workable features which are appropriate for use against organized crime.

Title IX thus brings to bear on the infiltration of organized crime into legitimate business or other organizations the full panoply of civil remedies, including a civil investigative demand, now available in the antitrust area. The use of such remedies as prohibitory injunctions and the issuing of orders of divestment or dissolution is explicitly authorized. Nevertheless, it must be emphasized that these remedies are not exclusive, and that title IX seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil.¹¹ Punishment as such is limited to the criminal remedies, noted above.

Ample precedent exists in the antitrust laws for these procedures. In the landmark decision *United States v. DuPont & Co.*, 366 U.S. 316, 326-27 (1961), the Supreme Court said of the remedy of divestiture:

The key to the whole question of antitrust remedy is, of course, the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. But courts are authorized, indeed required to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest.

If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result.

It must be remembered that the Court here was speaking of remedying an economic concentration of power, which potentially might have an adverse effect upon our economy. Title IX attacks a far more heinous threat, the use of force, threats of force, enforcement of illegal debts, and corruption in the acquisition or operation of business. If Du Pont and other related companies can be forced to rid themselves of General Motors ownership, almost without regard for the economic consequences, then it must surely follow that the removal of criminal elements from the organizations of our society by divestiture is justified. The situation may be said to cry for legislation to accomplish that result. The criminal surely can lose his right to own or hold office in a business or other enterprise as easily as can the essentially honest, but potentially too powerful, businessman.

¹⁰ Hearings at 557.

¹¹ See *Respass v. Commonwealth* 131 Ky 807, 115 S. W. 1131, 1132 (1909) (suit to enjoin gambling house):

. . . [T]he remedy in equity is purely preventative. The chancellor does not punish the defendant for what he has done. This is left to the criminal courts. . . .

These provisions should effectively remove the criminal figure from the particular corrupt organization. In a like manner, through a remedy such as the prohibition of engaging in the same kind of activity in the future, the criminal element will not only be removed from an area of activity, they will also be prohibited from using the know-how acquired to start the same type of business or other organization again under a different name.

Here, too, the antitrust laws furnish ample precedent for the use of this sort of civil remedy. In *United States v. Grinnel Corp.*, 384 U.S. 563, 579 (1966), the district court had decreed that one Fleming should be enjoined from working for any of the corporate defendants to an antitrust suit because of constant flouting of the antitrust laws, even though no predatory practices were found to exist. The Court, while it reversed on a factual aspect of the case, acknowledged that the remedy was available if appropriate facts were found:

Defendants urge and the Government concedes that the barring of Mr. Fleming from the employment of any of the defendants is unduly harsh and quite unnecessary on this record. While relief of that kind may be appropriate where the predatory conduct is conspicuous, we cannot see that any such case was made out on this record.

If predatory conduct may be made the basis for such a prohibition, then surely murder, extortion, and other crimes are more than equal grounds for the prohibition.¹²

In each of these illustrative cases, the courts have emphasized that the prohibition is not a penalty against any individual. It is instead a protection of the public against parties engaging in certain types of businesses after they have shown that they are likely to run the organization in a manner detrimental to the public interest. In the spirit of this background, title IX, it must be again emphasized, is remedial rather than penal. It is based upon the judgment that parties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest. To protect the public, these individuals must be prohibited from continuing to engage in this type of activity in any capacity.

Finally, the Department of Justice had this to say of the civil aspects of title IX:

These time tested remedies . . . should enable the Government to intervene in many situations which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure . . . with its lesser standard of proof, non-jury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity.

¹² Additional authority for prohibiting persons or organizations from engaging in certain types of legitimate activities may be found in *United States v. Swift & Co.*, 286 U.S. 108 (1932), and *De Veau v. Braisted*, 363 U.S. 144 (1960), as well as numerous disbarment cases. Compare *Mugler v. Kansas*, 123 U.S. 623 (1887) (padlock statute upheld). Authority for remedies such as dissolution is found in *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959).

Finally, these remedies are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the Court to insure that its decrees are not violated. (Hearings at 408.)

Title IX of S. 30, as amended, is derived from S. 1861, which was originally introduced by Senator McClellan for himself and Senators Ervin and Hruska on April 18, 1969.¹³ In turn, S. 1861 was the product of the subcommittee's hearings on S. 1623, which was introduced by Senator Hruska on March 20, 1969.¹⁴ Clarifying, limiting, and expanding amendments have been made with the approval of the Department of Justice. As presently drafted, title IX has the support of the Department of Justice. Opposition was expressed, however, by the American Civil Liberties Union chiefly on the grounds that the proposed statute was susceptible of abuse.¹⁵

Title IX represents the committee's careful efforts to fashion new remedies to deal with the infiltration of organized crime into legitimate organizations operating in interstate commerce. Its provisions are summarized above¹⁶ and analyzed in detail below.¹⁷ As now drafted, the committee recommends that title IX pass.

TITLE X: DANGEROUS SPECIAL OFFENDER SENTENCING

Titles I through VII of S. 30, as amended, seek to strengthen evidence gathering processes and trial procedures in organized crime cases. Titles VIII and IX fashion new substantive provisions and innovating criminal and civil remedies to meet the challenge of organized crime. As important as the new criminal provisions of those titles are, however, they deal only with the preliminary and intermediate stages of the criminal process in organized crime prosecutions. They leave untouched, once a conviction is obtained, the crucial question of penal disposition.

The primary purpose of title X, therefore, is to see to it that convicted felons prone to engage in further crime are imprisoned long enough to give to society reasonable protection. While the central thrust of the title is against organized crime, its impact can be expected to be significant across the criminal justice system as it faces the dangerous offender. Title X also has the purpose of improving the rationality, consistency, and effectiveness of sentencing by testing concepts of limiting and guiding sentencing discretion through the development of sentencing criteria, procedures and appeals.

Title X defines the "habitual," "professional," and "organized" criminal conduct which will subject a dangerous offender to an enhanced term (up to 30 years), establishes procedures for determining on notice and hearing the applicability of such a term, authorizes consideration of relevant information in sentencing, and grants dangerous special offenders and the Government a right of appeal from the result

¹³ 115 Cong. Rec. S3856 (daily ed., Apr. 18, 1969).

¹⁴ 115 Cong. Rec. S2991 (daily ed., Mar. 20, 1969), S. 1623, in turn, was based on S. 2048 and S. 2049, 90th Cong., 1st sess. (1968), sponsored at that time by Senator Hruska. It was these two bills "and all similar legislation having the purpose of adopting the machinery of the anti-trust laws to the prosecution of organized crime," that were "endorsed" by the Anti-trust Section of the American Bar Association in 1968. Hearings at 556-558.

¹⁵ Hearings at 474-478.

¹⁶ *Supra* at 34.

¹⁷ *Infra* at 157.

of special sentencing. It leaves intact present law concerning the death penalty and existing mandatory minimum penalties.

SENTENCING

Federal judges in criminal cases have long imposed sentences with little legislative guidance regarding the relevance of facts, the principles and standards to be applied, or the purposes to be served in the selection of each penalty. They have determined facts concerning defendants' criminal and personal histories by informal procedure, and they have been largely free from appellate review since the prevailing Federal doctrine is that appellate courts lack the power to review the merits of a sentence. See, *e.g.*, *United States v. Martell*, 335 F. 2d 764, 767-68 (4th Cir. 1964). A special committee of the American Bar Association¹⁸ thus commented:

[B]y comparison to the care with which the less-frequent problem of guilt is resolved, the protections in most jurisdictions surrounding the determination of sentence are indeed miniscule . . . [I]n no other area of our law does one man exercise such unrestricted power.

Many have long been uneasy with the knowledge that, among those committing an offense and subject to the exercise of discretion to choose from a single range of sentencing alternatives, there are defendants for whom long imprisonment is essential and others for whom it is unjust. The legislative response has been to enact, as particular abuses have occurred and have been recognized, various laws designed to limit sentencing discretion. Dealing usually with only one offense or type of offense, special laws have been passed requiring imposition of minimum sentences, limiting maximum sentences, or forbidding probation. As a result, this criticism by the President's Crime Commission applies with considerable force to the present Federal system:

In most places sentencing codes have been enacted piecemeal over many years, and the grading of offenses in terms of seriousness is replete with anomalies and inconsistencies. (Report at 142.)

Although the National Commission on Reform of Federal Criminal Laws is now conducting studies and drafting proposed legislation, years may be expected to pass before the Congress can consider comprehensive reform of sentencing powers and procedures. In the meantime, past attempts to establish sentencing powers at compromise levels have left the Federal courts with sentencing power that is both inadequate and excessive. A special American Bar Association com-

¹⁸ Advisory Committee on Sentencing and Review, ABA Project on Minimum Standards for Criminal Justice, "Standards Relating to Appellate Review of Sentences" 1-2 (Tentative Draft April 1967) [hereinafter cited as ABA App. Rev.]. The tentative draft has been approved by the ABA House of Delegates, with amendments authorizing sentence increase on sentence review taken by a defendant. Special Committee on Minimum Standards for the Administration of Criminal Justice, ABA Project on Minimum Standards for Criminal Justice, "Standards Relating to Appellate Review of Sentences" (Supplement March 1965) [hereinafter cited as ABA App. Rev. Supplement].

mittee was right in concluding that existing maximums, for Federal offenses generally, are probably too high for most offenders.¹⁹ Nevertheless, existing maximums in many cases are insufficient and ineffective when applied to habitual, professional or organized criminals. The FBI statistical study summarized in Table No. 3 supra, revealed that the criminal careers of La Cosa Nostra members averaged 20 years, 7 months, while those of offenders generally averaged 9 years, 3 months. The 20-year figure presents a sharp contrast with the maximum sentences now authorized for the crimes most often committed by La Cosa Nostra members. The subcommittee's study of data on the Department of Justice's sentencing experience disclosed that two-thirds of La Cosa Nostra members indicted by the Department since 1960 faced maximum jail terms of only 5 years or less.

Furthermore, the existing maximum terms have not often been imposed even upon organized crime offenders. Since 1960, the date meaningful statistics began to be collected, the combined efforts of the various Federal investigative agencies have resulted in 235 Federal indictments involving 328 defendants identified as members of La Cosa Nostra.

Of these 328 defendants, 73 to date have been found not guilty or have had the cases against them dismissed. Ninety-six are awaiting trial or sentencing. Twenty-one have been sentenced under statutes carrying mandatory sentences, chiefly violations of the narcotics laws. Nine have been sentenced for contempt, civil or criminal, which carries no maximum. Fifteen have received no jail term whatsoever, only fines or probation. Eighty-five have been sentenced to jail terms less than the maximums, and 29 have been sentenced to the maximum terms possible.

In percentage terms, 14 percent of those convicted (21 out of 150) have been charged and convicted under statutes requiring mandatory sentences. Of the remainder, 65 percent have received jail sentences (85 out of 129), but only 23 percent have received the maximums possible (29 out of 129), while 12 percent have received no jail term whatsoever (15 out of 129).

Of those who have received jail terms, but less than the maximums, the range has been from 1.66 percent of the maximum (30 days out of a possible 5 years for tax evasion) to 75 percent of the maximum (15 years out of a possible 20 years for extortion). The median sentence (halfway mark) has been 40 percent of the maximum (e.g., 2 years out of a possible 5 years for interstate racketeering), while the bulk of the sentences have ranged from 40 to 50 percent of the maximums.

The result of this haphazard development of excessive, inadequate, and wholly discretionary sentencing has been dismal. Individual defendants have had imposed upon them palpably excessive or insufficient or inconsistent sentences, doing injustice sometimes to defendants and sometimes to society. The Task Force Report on Courts of the President's Crime Commission concluded that in sentencing "the existence of unjustified disparity has been amply demonstrated

¹⁹ Advisory Committee on Sentencing and Review ABA Project on Minimum Standards for Criminal Justice, "Standards Relating to Sentencing Alternatives and Procedures" 13-14 (Tentative Draft December 1967) [hereinafter cited as ABA Sentencing]. The tentative draft has been approved by the ABA House of Delegates with minor amendments. Special Committee on Minimum Standards for the Administration of Criminal Justice, ABA project on minimum standards for criminal justice, "Standards Relating to Sentencing Alternatives and Procedures" (Supplement September 1968) [hereinafter cited as ABA Sentencing Supplement].

by many studies." (Report at 23.) Mr. Justice Stewart, prior to his elevation to the Supreme Court, wrote for the Sixth Circuit in *Shepard v. United States*, 257 F. 2d 293, 294 (6th Cir. 1958):

Every year numerous appeals come before this court which accentuate a seriously urgent problem—the disparity of sentences in Federal criminal cases. . . . Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives. . . . It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this important dimension of fundamental justice.

Finally, it must be recognized that the fairness and wisdom of a sentence are as important in the protection of society as in that of the defendant. As Mr. Justice Cardozo wrote, "[J]ustice, though due to the accused, is due to the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

The result of our present approach to sentencing has been a serious interference with the ability of sentences to achieve the objectives that they should advance and that ultimately justify punishment by the State.²⁰ Its failure in fact effectively to serve those purposes is reflected in the conclusion of the President's Crime Commission that—

the most striking fact about offenders who have been convicted of the common serious crimes of violence and theft is how often how many of them continue committing crimes. Arrest, court, and prison records furnish insistent testimony to the fact that these repeated offenders constitute the hard core of the crime problem. (Report at 45.)

Indeed, for offenders capable of being rehabilitated, disparate sentences and the absence of appellate review are serious impediments to rehabilitation.²¹ Nevertheless, those who give excessive emphasis to rehabilitation as a goal of our penal law have shown, as an American Bar Association study in 1952 concluded, "little realistic concern about the organized and well-habituated criminals who incessantly exploit the community."²² Milton M. Rector, the director of the National Council on Crime and Delinquency, has observed:²³

. . . [T]he lucrative profits of racketeering and the strong binding ties among the members of organized crime make rehabilitation an extremely slim possibility. . . .

. . . A presentence investigation of an "unimportant" numbers runner, bookie, or gambling operator may reveal him as a stable individual; if it also reveals him as a salaried employee of a criminal organization, he should be incarcerated for as long a time as possible under the law. Maximum imprisonment inflicts heavy costs on the syndicate for his family's support and other "fringe benefits," in addition to

²⁰ The President's Crime Commission concluded that the "action taken against lawbreakers is designed to serve three purposes beyond the immediately punitive one. It removes dangerous people from the community; it deters others from criminal behavior; and it gives society an opportunity to attempt to transform lawbreakers into law-abiding citizens." (Report at 7.)

²¹ A.B.A. App. Rev. at 25-26.

²² J. Comm'n on Organized Crime, ABA, *Organized Crime and Law Enforcement* 141 (1952).

²³ Rector, "Sentencing the Racketeer," 8 *Crime and Del.* 386-389 (1962).

legal fees and bail which the organization must provide to maintain its operations. His ties to the organization and his financial needs make it improbable that he will want or be allowed to seek other employment until he himself is too expensive a risk. Despite his otherwise apparent eligibility for a fine, suspended sentence, or probation, he must be regarded as a capillary feeding the heart of organized crime and be committed for the purpose of increasing the operation costs of the business of crime and racketeering.

This is the least that the courts and correctional agencies can do. The rest is up to the public. . . .

For such offenders and for professional and habitual criminals, the most applicable purpose of punishment is protection of the public against further criminal conduct by incapacitation through incarceration or long-term close supervision. The failure to serve that purpose, when a prison term suitable for an ordinary offender is imposed upon an organized crime leader, is obvious. The source of that failure lies, in large part, in inadequate maximum terms for special offenders, lack of standards for identifying them, and unavailability of appellate power to increase inadequate individual sentences.

HABITUAL OFFENDER

Title X authorizes special prison terms for "habitual" offenders, since there is no doubt that commission of prior offenses and failure to respond to prior correction are sound bases for predicting further recidivism.

The F.B.I. statistical analysis summarized in Table No. 3, *supra*, revealed that 68.4 percent of those arrested by Federal authorities after receiving two or more felony convictions went on, after the Federal arrest, to accumulate an average of 4.3 new arrests per offender. Since that analysis disclosed also that nearly 60 percent of La Cosa Nostra members, upon new convictions of Federal felonies, would qualify as "recidivists," title X would have major impact both upon La Cosa Nostra and upon other hard-core repeaters.

Present Federal statutes include enhanced penalties for repeated violations of certain specific laws. See, *e.g.*, 18 U.S.C. § 2114. But Federal law includes no general recidivist statute. Among the States, on the other hand, recidivist laws are common. Approximately 45 States now have general recidivist statutes. The performance of these State statutes, however, has been a disappointing paradox: They have been less effective than has been hoped in deterring crime and incapacitating repeaters, yet in some cases they have resulted in sentences of unconscionable severity. The combination of ineffectiveness and occasionally excessive harshness that has been typical of repeater statutes has resulted from two characteristics:

(1) In most cases, they have carried mandatory sentences. At the present time, among the 45 States having general recidivist statutes, about 23 punish criminals with mandatory or discretionary life imprisonment after a third or fourth felony conviction, while some make recidivists ineligible for parole or suspended sentences. At least 21 States' recidivist laws carry mandatory sentences.²⁴

²⁴ A.B.A. Sentencing at 166. See, *e.g.*, Ind. Ann. Stat. § 9-2207 (1956) (mandatory life sentence on third conviction); Wyo. Stat. Ann. §§ 6-9, 6-10 (1959) (10 to 50 years for third conviction, life for fourth).

(2) The State recidivist laws ordinarily have not included a requirement that the defendant be dangerous.²⁵ Since it is dangerousness, usually, which justifies a long term, and since not every recidivist is likely to repeat unless given an extended sentence, the statutes have cast too wide a net.

Prosecutors and courts, considering the statutes too severe largely because of their mandatory sentences, have interpreted them narrowly and sometimes have actually refused to apply them. In West Virginia, for example, where a life sentence is mandatory on a third conviction, a study of 983 defendants eligible under the statute disclosed that only 79 were sentenced to life as recidivists.²⁶

Prosecutors, unsympathetic with the harsh results dictated by such laws, have employed them, instead, to achieve high rates of convictions, by using the express or implicit threat of recidivist proceedings in bargaining for guilty pleas to lesser charges with lesser sentences. Ironically, recidivist laws have thus led to lighter punishments than otherwise might have been imposed.

Title X's habitual offender provisions are designed to avoid the pitfalls of the State laws. Its provisions focus specifically on those felons whose prior convictions make them likely to repeat, since they apply only to a defendant who has had at least two serious prior convictions and at least one prior imprisonment, and who is found to be dangerous. They create no new mandatory minimum sentences, and they permit parole. The authority they confer can be expected to be used, and used effectively, in part because they are drawn so as to prevent abuse of that authority.

PROFESSIONAL OR ORGANIZED CRIME OFFENDER

Habitual offender sentencing, however, meets only part of the problem. The drafters of the Model Penal Code observed:²⁷

The extended term should not . . . be available only in dealing with offenders whose resistance to correction is established by a record of convictions. The professional criminal (who may have escaped previous conviction) . . . may present an equal problem of control.

When it is possible to identify defendants whose criminal conduct is so motivated that further crimes are especially likely, they should be sentenced accordingly. While sentencing policies and principles can be and, within limits, should be developed and modified in common law fashion through appellate opinions, as has been done, for example, in Norway, it is preferable that the primary criteria be stated in legislation.

An American Bar Association study in 1952 indicated that—

In several [European] countries special provisions are made for the "professional" criminal, aggravating the seriousness

²⁵ An exception is Minnesota, which has enacted new legislation authorizing imposition of a sentence not exceeding the maximum available for the offense multiplied by the number of prior felony convictions within the past 10 years, but not exceeding 40 years, if the court finds after a "summary hearing" "[t]hat the defendant is disposed to the commission of criminal acts of violence and that an extended term of imprisonment is required for his rehabilitation or for the public safety." Minn. Stat. Ann. §§ 609.155, 609.16 (1964).

²⁶ Brown, "West Virginia Habitual Criminal Law," 59 W. Va. L. Rev. 30, 37 (1956); see W. Va. Code Ann. § 61-11-18 (1966).

²⁷ Model Penal Code § 7.03, Comment at 41 (Tent. Draft No. 2, May 3, 1954).

of the offence and penalty in the case of certain property crimes from which the offender gains his livelihood. . . . Provisions of this sort may be found in the Netherlands, Hungary, Denmark, Great Britain, Czechoslovakia, Austria, Poland, Italy, and Switzerland.²⁸

It went on:²⁹

In no country has [there been] . . . found any special provisions for gamblers, racketeers, or organized criminals as such. Neither the legislation nor the treatment measures employed provide closely pertinent solutions to these problems in the United States. The attention to the professional criminal as such in several countries, however, with the aggravation of the offense or the penalty, appears to be sound policy.

At the conclusion of the report, this recommendation was made:³⁰

Where there is evidence that the offender makes a business of crime, or conspires with others to commit organized crimes, this should raise the level of the offense and aggravate the penalty.

The concept of authorizing increased prison terms for special offenders has come to be widely accepted. It has been endorsed, in principle, by the Department of Justice,³¹ the President's Crime Commission,³² the Model Penal Code,³³ the Model Sentencing Act,³⁴ and the American Bar Association's Committee on Minimum Standards in Sentencing.³⁵

The A.B.A. Sentencing Committee's support for the enactment of special terms is subject to the condition that "[p]rovision for such a special term will be accompanied by a substantial and general reduction of the terms available for most offenders" A.B.A. Standards on Sentencing, § 2.5(b)(i). The committee rejects the notion that simultaneity is necessary or even practical, and considers it preferable to enact title X at this time, while dealing with any general sentence reduction later, when the work of the Commission on the Reform of Federal Criminal Laws is completed. When a statute authorizing extended terms for defined classes of criminals has been enacted and its constitutionality upheld, it will be time enough then to consider proposals to reduce the maximum sentences now authorized for ordinary offenders. (See Hearings at 346.)

While special offender sentencing and appellate review of such sentences will increase the involvement of the prosecutor in the sentencing process, such involvement, exercised with discretion and integrity, can be an asset rather than a liability in the administration of justice. Inevitably, legislative and judicial development of sentencing criteria and imposition of more complex procedural requirements on sentencing will have the tendency to require adversary participation by the Government. Title X contemplates Government participation in sentencing, however, not regularly, but in a well-defined

²⁸ I Comm'n on Organized Crime, ABA, *Organized Crime and Law Enforcement* 134 (1952).

²⁹ *Id.* at 137.

³⁰ *Id.* at 166.

³¹ Hearings at 375-77.

³² The Challenge of Crime in a Free Society, Report of the President's Commission on Law Enforcement and Administration of Justice at 143, 203 (1967).

³³ Model Penal Code § 7.03.

³⁴ Model Sentencing Act § 5.

³⁵ ABA Sentencing at 214-25.

class of cases. In fact, it may well serve as a laboratory to see whether prosecutors can properly assist judges in applying new sentencing criteria, yet not abuse the role of adversary.

SENTENCING PROCEDURES

State and Federal sentencing procedures for ordinary cases vary from one jurisdiction to another but, by and large, they are informal and brief.³⁶ Although States having recidivist laws apply them through procedures which are more formal and complex than for ordinary cases, recidivist procedures also vary from State to State, and are generally less rigorous than trial procedure.

Ordinary sentencing requires the determination of facts with consequences to a defendant not different in kind from those embraced in special offender sentencing. Nevertheless, special offender sentencing lends itself to somewhat more formal litigation of fact issues, since some of its sentencing criteria are statutory and limit the court's sentencing power. The procedures established by title X for sentencing special offenders, therefore, have been designed to protect the defendant's and the Government's interests in accurate factfinding and to maximize sources of sentencing information, but to guard against the unnecessary formalization of sentencing procedures.³⁷ They include express guarantees of rights to notice, hearing, substantial presentence report disclosure, counsel, compulsory process, cross-examination of witnesses who appear, and record findings and reasons for the sentence. Many of those provisions were added during the course of the hearings and following the receipt of the report of the Department of Justice, which observed:

. . . [N]o attempt is made [in title X] to define the defendant's right to be informed of and to refute the evidence on which the court's determination is made. Nor is the court apparently required to make any written findings other than the conclusory finding on which the extended sentence is based.

We believe there is a substantial risk that this procedure would be held to violate due process under the rule announced in *Specht v. Patterson*, 386 U.S. 605 (1967). In that case which dealt with a post-conviction proceeding under a State Sex Offenders Act, the court said: "Due process, in other words, requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examination, and to offer evidence of his own. And there must be findings" adequate to make meaningful an appeal that is allowed. 386 U.S. at 610.

While it is not entirely certain that all of these procedures would be required prior to the imposition of an extended penalty for a specific crime (as distinguished from a sex offender commitment that is triggered by, but separate from,

³⁶ See F. Cohen "Sentencing, Probation, and the Rehabilitative Ideal: The View from *Mempa v. Rhay*," 47 Texas L. Rev. 1 (1968).

³⁷ In the new Minnesota statute authorizing an extended prison term for "dangerous offenders," [t]he procedural requirements have been simplified and the criminal trial approach abandoned. This is constitutionally permissible." Minn. Stat. Ann. §§ 609.155, 609.16. Advisory Committee Comment at 149 (1964); see generally *id.* at 148-50, 162-63.

the conviction for a crime), it is probable that more is required before imposing an extended sentence than is necessary to ordinary sentencing procedure. Short of a full jury trial, it is not clear what the procedural requirements for extended sentencing are.

In order to strengthen the procedures of this proposal against successful constitutional attack, it is suggested that it be amended to provide the following procedural safeguards in addition to its provisions for notice and hearing: (1) a requirement that the defendant be furnished a copy of the presentence report with the names of confidential sources deleted where necessary; (2) the right to counsel and opportunity to cross-examine any witnesses presented by the Government; (3) the right to compulsory attendance of witnesses on the defendant's behalf; (4) a requirement that the court state the basis for imposition of extended sentence.

On the other hand, it is not felt that either a public hearing or strict adherence to the rules of evidence is required. The imposition of sentence on the basis of a preponderance of the evidence also appears to be consistent with due process.

The lack of direct precedent makes it virtually impossible to predict whether these procedures would survive constitutional challenge. On balance they seem fair and consistent with the due process requirements outlined in *Specht (supra)*, and it is certainly arguable that they meet the necessary constitutional requirements. (Hearings at 376-77.)

The conduct making the defendant a "professional" or "organized crime" offender under title X is closely related to the felony for which he is to be sentenced. Title X thus treats such conduct not as separate offenses, but as a circumstance of aggravation in the commission of the felony for which the defendant is to be sentenced. Because of this relationship, the "special offender" conduct may be necessarily or incidentally proven in the course of the full and formal trial on the merits of the felony. Since rules of evidence permit or require the Government, for example, to prove the history and circumstances of a conspiracy with which a defendant is charged, or the existence of which is a predicate for admissibility of evidence, the trial of a conspirator whose conduct makes him a "special offender" under title X often will establish that he is such a "special offender." In other cases, the formal trial on the merits may establish some but not all of the required elements, and the less formal sentencing proceeding will be necessary to embellish the circumstances of the crime already established, adding information about the defendant, his crime, and the context in which it was committed. Sentencing judges traditionally have relied both upon circumstances proven in the trial and upon information acquired during the sentencing process. See Model Penal Code § 7.03, comment at 43 (Tent. Draft No. 2, May 3, 1954). The starting point for measuring the appropriateness of a particular sentence and the sentencing procedure used for its imposition, therefore, is not confined to the bare essential elements of the offense, but includes all facts established through the full procedure of the trial on the merits. In addition, the sentencing procedures established by title X include guarantees of most rights enjoyed in the trial itself. For

these reasons, relatively long sentences under title X can be expected to satisfy constitutional standards.

The procedural approach of title X is, in the opinion of the committee, sound. The A.B.A.'s Sentencing and Review Advisory Committee stated:³⁸

[The] Advisory Committee fails to see why the method of the criminal law as employed at trial must be carried over into the sentencing phase, or if it must, why the procedure for sentencing repeat or dangerous offenders is the only case where this must be so.

The comment to the Model Penal Code concludes that, where a court is considering imposing a special offender sentence,³⁹

. . . fairness demands a hearing focused on the precise question of the existence of the grounds for such a sentence, with notice to the defendant of the ground proposed. We do not think the matter otherwise intrinsically different than the question as to sentence within ordinary limits, as distinguished from the longer term. . . .

And the President's Crime Commission Task Force on Courts⁴⁰ concluded that in sentencing hearings:

the right to challenge material presented to the court can be afforded without encumbering the sentencing proceeding with rigid evidentiary rules and formal procedures.

APPELLATE REVIEW OF SENTENCES

Although other means exist for reducing the incidence of disparate and unwise sentences, sentence review seems to be the most effective technique and at least a necessary complement to such measures. Executive clemency is an inadequate remedy for individual excessive sentences and cannot be used to correct inadequate sentences. Legislative specification of precatory sentencing principles and judicial sentencing seminars are helpful in reducing sentencing disparities among judges, but they are ineffective with respect to the judge who has supreme confidence in his intuitive grasp of human nature, his ability to predict behavior, or his wisdom in sentencing generally.⁴¹

Sentence review can, moreover, serve important purposes other than that of avoiding disparate and unsound sentences. In addition to correcting excessive or insufficient sentences, appellate review of sentences can contribute to rationality in sentencing by making sentencing decisions more public and promoting the evolution of sentencing principles, enhance respect for our system of justice, relieve pressure

³⁸ A.B.A. Sentencing at 263.

³⁹ Model Penal Code § 7.08, comment at 55 (Tent. Draft No. 2, May 3, 1954).

⁴⁰ Task Force on Administration of Justice, the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* at 20, 21 (1967).

⁴¹ Occasionally, more extreme measures have been tested. The New Jersey Supreme Court wanted more uniform and severe sentences in organized crime cases, but lacked the power to revise sentences. It ordered, therefore, that all gambling cases tried by any judge be assigned to a single judge in each county for sentencing, and it wrote an opinion recommending heavy sentences for organized crime offenders. See *State v. DiStasio*, 229 A. 2d 636 (N.J. 1967); *State v. Ivan*, 162 A. 2d 851 (N.J. 1960). It is clear that those actions were compatible with the Federal Constitution, yet title X's method of securing consistent and sound sentences is more respectful of the majority of trial judges, and more protective of a defendant's interest in avoiding arbitrariness.

on appellate courts now lacking sentence review power to find grounds to reverse convictions on which unconscionable sentences were imposed, and aid rehabilitation of defendants by affording opportunities to object to sentences.

The President's Crime Commission stated:

Authority for appellate review of legally imposed sentences has been expressly granted by the legislatures of 12 States and by Congress for the military courts. In addition, the appellate courts of a few States have construed their laws to grant such authority. However, in at least 31 States and the Federal system sentencing power is vested solely with the trial judge. (Report at 145-46)⁴²

CONSTITUTIONALITY OF REVIEW

The constitutionality of appellate increases in sentences has been the subject of much discussion but little litigation.⁴³ Commenting on the provisions of Title X, the Department of Justice said:

Two constitutional problems at issue here are the double jeopardy question involved in allowing an appeal by the prosecutor, and the due process question involved in allowing an increase of sentence where the defendant appeals.

As to the first, while recent authorities appear to cast some doubt on the constitutionality of this provision, cf. *Patton v. North Carolina*, 381 F. 2d. 636, 645-46 (C.A. 4, 1967), cert. denied, 390 U.S. 905 (1968) and *Whaley v. North Carolina*, 379 F. 2d 221 (C.A. 4, 1967), the Supreme Court has upheld an increase in sentence following an appeal by the defendant in at least three cases: *Flemister v. United States*, 207 U.S. 372 (1907); *Ocampo v. United States*, 234 U.S. 91 (1914); *Stroud v. United States*, 251 U.S. 15 (1919). Consequently, it would seem that if these cases are still good law today then the Government should be able to seek an increase in sentence on appeal without violating either due process or the Fifth Amendment ban on double jeopardy.

The constitutional issue of whether a defendant may be given an increased sentence when he appeals may be decided in two cases now on the docket of the Supreme Court. In these cases, *North Carolina v. Pearce*, No. 413, 1968 Term, and *Simpson v. Rice*, No. 418, 1968 Term, the issue is squarely presented whether a defendant may be given an increased sentence after his first sentence has been set aside for one reason or another.

⁴² A.B.A. App. Rev. at 2-3, 7-8, 21-31. But cf. *Brown v. United States*, 359 U.S. 41, 52 (1959), overruled on other grounds, *Harris v. United States*, 382 U.S. 162 (1965), cert. denied, (Supreme Court can review discretion in Federal Criminal Contempt sentence); *Yates v. United States*, 356 U.S. 363 (1958) (same); *United States v. Wiley*, 278 F. 2d 500 (7th Cir. 1960) (sentence within statutory limits set aside and remanded for arbitrariness or clear abuse of discretion); *United States v. Rao*, 296 F. Supp. 1145, 1148, (S.D.N.Y. 1969) (dictum) (court of appeals can vacate sentence based "upon clearly erroneous criteria" rather than "constitutionally permissible factors"), citing *United States v. Mitchell*, 392 F. 2d 214, 217 (2d Cir. 1968) (Kaufman J., concurring). Four States—Connecticut, Maine, Maryland, and Massachusetts—permit sentence increase on sentence appeal by a defendant. See A.B.A. App. Rev. at 55.

⁴³ On the State level, the highest courts of Connecticut and Massachusetts have sustained increases on defendant's sentence appeals, against double jeopardy objections. *Kohlfuss v. Warden of Connecticut State Prison*, 149 Conn. 692, 183 A. 2d 626 (1962), cert. denied, 371 U.S. 928 (1963); *Hicks v. Commonwealth*, 185 N.E. 2d 739 (Mass. 1962), while the highest courts of Maine and Maryland have not ruled upon the constitutionality of their statutes permitting sentence increase on appeal.

In order to avoid the question of due process posed by this provision, it is suggested that this proposal be amended to provide that if the Government fails to exercise its right of appeal within a specified number of days, e.g., 10 days, then no increase of sentence may be allowed upon appeal by the defendant after the Government has exercised its option whether to appeal or not. (Hearings at 377.)

In light of the inclusion of specific procedural provisions, discussed below,⁴⁴ it is necessary here to refer only to the issue of double jeopardy, and since title X permits sentence increase only when the Government acts affirmatively to take a review, it will be necessary here to discuss the double jeopardy issue only in reference to Government appeal to increase a sentence.

In *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the Supreme Court observed that the double jeopardy guarantee—

has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

And in *Green v. United States*, 355 U.S. 184, 187-88 (1957), the Court observed:

The underlying idea [of the fifth amendment double jeopardy provision] . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁴⁵

Nevertheless, no U.S. Supreme Court decision has held Government appeal from sentences to be double jeopardy. The analogous precedents in the area, moreover, are consistent with a decision that it is not double jeopardy, and the policies underlying the clause would seem to justify such a decision.

A defendant whose sentence is increased on sentence review taken by the Government is not, in the language of the Fifth Amendment, "twice put in jeopardy." Instead, concerning his sentence, the defendant is once in jeopardy continuing until termination of an orderly process of sentence review and revision. Failure of the Government to take sentence review terminates the sentencing proceeding and jeopardy as to sentence, but when sentence review is taken it con-

⁴⁴ *Infra* at 166-167.

⁴⁵ The decisions interpreting and applying the clause have relied upon a variety of "conceptual abstractions," *United States v. Tateo*, 377 U.S. 463, 466 (1964), while the reasons for them have been "variously verbalized." *North Carolina v. Pearce*, *supra* at 720-21. Legal scholars and a few Supreme Court decisions have articulated principles governing the applicability of the clause on the basis of their "implications . . . for the sound administration of justice" in view of "defendants' rights as well as society's interest." *E.g.*, *id.* at 721-22, n. 18; *United States v. Tateo*, *supra* at 466; *Wade v. Hunter*, 336 U.S. 684 (1949); *Bozza v. United States*, 330 U.S. 160 (1947). The interests of Government and defendant underlying various applications of the double jeopardy rule, the principles for application of the rule, and the consistency of this approach with the history and policy of the Fifth Amendment, are analyzed and supported in Mayers & Yarbrough, "Bis Vexari: New Trials and Successive Prosecutions," 74 Harv. L. Rev. 1 (1960); Van Alstyne, "In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant," 74 Yale L. J. 606 (1965); Comment, *Twice In Jeopardy*, 75 Yale L. J. 262 (1965); Note, *Double Jeopardy: The Reprosecution Problem*, 77 Harv. L. Rev. 1272 (1964).

tinues both jeopardy as to sentence and the sentencing process from which jeopardy arises.

The chief case which might be thought to be analogous authority against this line of analysis is *Kepner v. United States*, 195 U.S. 100 (1904), which held Government appeal from an acquittal to be double jeopardy and apparently rejected the concept of continuing jeopardy for appeal from an acquittal. The Supreme Court in the past, however, has refused to apply the *Kepner* doctrine in situations where logic and consistency would seem to require its application.⁴⁶ Consequently, it may be expected that the Court will not extend *Kepner* to strike down Government sentence appeals. Its failure so far to carry *Kepner* to its logical conclusions may be attributed to a frank recognition by the Court that there is ample ground for a contention that permitting Government appeal even from an acquittal would be more consonant with the double jeopardy clause than the contrary rule announced in *Kepner*. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 323 (1937); *Kepner v. United States*, *supra* at 135 (dissenting opinion).

Nevertheless, whether or not *Kepner* remains the law for Government appeal from an acquittal, there is no justification for extending it to Government sentence appeal. Any weakness in the concept of "continuing jeopardy" as a justification for Government appeal from an acquittal, or reversal of an acquittal on a defendant's appeal, *Green v. United States*, 355 U.S. 184 (1957), is absent when that concept is used to support Government sentence appeal, since sentencing proceedings are relatively brief and simple, and since any further evidence and arguments after appeal would be complementary rather than repetitive. Sentence appeal by the Government, therefore, does not conflict with the double jeopardy policy of preventing harassment of a defendant through expense, delay, embarrassment, anxiety and ordeal. Nor does sentence appeal by the Government involve double punishment, prohibited by the double jeopardy clause, since the maximum sentence authorized by law for a crime sets a ceiling on increases.

Federal court decisions of double jeopardy questions in two analogous areas provide affirmative support for the consistency of Government sentence appeals with the double jeopardy clause. The Supreme Court itself recently held that, except for requiring credit for punishment served to be given upon resentencing, ". . . the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction" following reversal on a defendant's appeal. *North Carolina v. Pearce*, *supra* at 719. In reaching that decision the Court relied upon past precedents,⁴⁷ but distinguished *Green* saying (*id.* at 720 n. 16):

⁴⁶ See *Bryan v. United States*, 338 U.S. 552, 560 (1950) (retrial, after reversal of conviction on guilty verdict following erroneous denial of motion for directed verdict, is not double jeopardy); see also *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824) (Government can retry defendant on whose guilt or innocence first jury could not agree).

⁴⁷ *Stroud v. United States*, 251 U.S. 15 (1919); *United States v. Tateo*, 377 U.S. 463 (1964); *Bryan v. United States*, 338 U.S. 552, 560 (1950).

The Court's decision in *Green v. United States*, 355 U.S. 184, is of no applicability to the present problem [of the application of the double jeopardy clause to a longer sentence on reconviction]. The *Green* decision was based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was acquitted.

The *Pearce* decision has significance here because it rejected the commonly held broad view that under the double jeopardy clause any sentence pronounced in a case sets a ceiling which cannot be exceeded except by traditional trial court revision during the term of court. See *United States v. Benz*, 282 U.S. 304, 306-307 (1931) (dictum).

The Court did observe, moreover, that to hold that the double jeopardy clause restricted the imposition of a single lawful punishment for an offense retried after reversal, higher than that first imposed, would be to cast doubt on the validity of the principle of *United States v. Ball*, 163 U.S. 662, 672 (1896), that the double jeopardy clause does not limit retrial after reversal of a conviction.⁴³

The second set of analogous precedents deal with trial court revision of sentences. Decisions in Federal criminal cases generally have held that the double jeopardy clause permits a sentencing court to increase its sentence any time until, but not after, the defendant begins serving

⁴³ This statement is particularly significant in view of the Court's exclusive reliance upon *Ball* rather than *Kepler* for its double jeopardy reversal in *Benton v. Maryland*, 395 U.S. 784 (1969), and its recent and sound disparagement of the "waiver" approach to double jeopardy problems. *E.g., id.* at 796; *Green v. United States*, 355 U.S. 184, 191-92 (1957). A "waiver" rationale would make government sentence review, like the *Kepler* review of guilt, a violation of double jeopardy, since the defendant takes no action which could be called a waiver, and would treat *Pearce* and *Ball* as consistent with the double jeopardy clause, since those defendants' appeals constituted waivers. If, on the other hand, the result in *United States v. Ball*, *supra*, is not justified by the theory of "waiver," it must be explained as a recognition that jeopardy can be unitary and continuous pending appellate review and disposition. Likewise, the fall of the "waiver" theory from favor indicates that the vital concepts in *Pearce* are not "at the defendant's behest" but are "wholly nullified and the slate wiped clean," "unexpired portion of the original sentence will never be served," and "an otherwise lawful single punishment." *Pearce* at 721. These concepts equally well serve to justify Government sentence appeal against double jeopardy attack, and more generally to implement an approach to double jeopardy issues based on a concept of "continuing jeopardy" until a reasonable process of writing on the "slate" has been completed. If "waiver" is not the principle, moreover, which *Pearce* and *Ball* share to the extent that a contrary decision in *Pearce* would have undercut *Ball*, and if that principle instead is continuing jeopardy, then the application of that principle would again treat *Ball* and *Pearce* as consistent with the double jeopardy clause, since the defendants' appeals continued the litigation and the jeopardy, and it would also uphold government sentence review. In addition, it might or might not actually result in *Kepler's* overruling, depending on the importance placed by the Court on the policy of limiting harassment, delay and expense, and therefore on the strictness of the limits on the Government's right to set procedures. There was error in the first *Kepler* trial prejudicial to the Government, while in *Ball* there was none. The reliance in *Benton* on *Ball* rather than *Kepler* must have been motivated by this distinction (and not, for example, by the fact that *Benton* involved appeal by a defendant), which is a significant distinction only on the view that jeopardy can continue in order to afford a reasonable opportunity to review rulings adverse to the Government. In sum, the Court's use and discussion of *Ball* in *Benton* and *Pearce* are consistent with a concept of "continuing jeopardy" not plainly foreclosed by *Kepler*, pursued in a manner designed to avoid reconsidering the validity of *Kepler* itself.

the sentence.⁴⁹ To the extent that those decisions are relevant to appellate review of sentences, they are consistent with the constitutionality under the double jeopardy clause of Government sentence appeal.

The decisions applying the dictum of *United States v. Benz*, 282 U.S. 304, 306-07 (1931) (double jeopardy sets limits of sentence save revision only during term by trial court), must be understood as applying the double jeopardy clause in view of the absence of statutory or case law authorization for sentence increase by an appellate court. Since, according to statutory and common law, only the trial court can consider increasing the sentence, it was necessary to determine when the sentencing proceeding in the trial court had ended and the sentence had therefore become final. The beginning of service of sentence was a sensible point in time to select for various reasons, including the ability of the trial court to defer sentencing and the service of the sentence until the trial judge felt he had exhausted his need to consider the sentence. The time when the sole sentencing proceeding ended, once fixed, then marked the end of sentence jeopardy. Thus, those decisions did not consider whether statutory provision of appellate review of sentences would, by postponing sentence finality, also postpone the end of sentence jeopardy.

This view of those decisions, moreover, is supported by the analogous case of *Bozza v. United States*, 330 U.S. 160 (1947). There the Supreme Court found persuasive procedural reasons, where a trial court had imposed a sentence less than a mandatory minimum, for delaying the finality of trial court sentencing proceedings beyond the beginning of service of sentence. 330 U.S. at 165-67. See Act of June 29, 1932, 47 Stat. 381. Once that special rule of sentence finality had been established, the Court had no difficulty holding that the double jeopardy clause was not violated by an increase of a sentence being served in such a case.

Other Federal and State courts and commentators likewise have concluded that failure to impose a mandatory minimum penalty may be corrected by increasing the sentence after its service has begun,

⁴⁹ See, e.g., *United States v. Sacco*, 367 F. 2d 368 (2d Cir. 1966); *United States v. Adams*, 362 F. 2d 210, 211 (6th Cir. 1966); *Vincent v. United States*, 337 F. 2d 891 (8th Cir. 1964), cert. denied, 380 U.S. 988 (1965); *United States v. Benz*, 282 U.S. 304, 306-307 (1931) (dictum); cf. *Ex parte Lange*, (18 Wall.) 85 U.S. 163 (1873).

Sometimes a defendant from whose sentence the Government takes a review under title X will be released under 18 U.S.C. § 3148 pending review; clearly, he has not begun to serve his sentence, so the double jeopardy clause is no bar to a sentence increase. Cf. *United States v. Byars* 290 F. 2d 515, 516 (6th Cir.), cert. denied, 368 U.S. 905 (1961) (dictum) (double jeopardy clause permits trial court to increase sentence when defendant is free pending appeal from his conviction, since service of sentence has not begun); *United States v. Mandracchia*, 247 F. Supp. 1 (D. N. H. 1965) (ditto).

When the defendant would be confined under 18 U.S.C. § 3148 pending title X sentence review taken by the Government, his confinement is not service of his sentence, within the meaning of the constitutional decisions or of 18 U.S.C. § 3568. Compare A.B.A. App. Rev. at 3741. His situation is like that of one detained under 18 U.S.C. § 3148 awaiting trial for a capital offense or sentence or pending appeal or certiorari, and analogous to that of one detained under 18 U.S.C. § 3146 awaiting trial: (1) each of them is confined to assure his future presence and, in some cases, to protect society; (2) each of them receives credit against any final sentence for time spent in custody, 18 U.S.C. § 3568, see *North Carolina v. Pearce*, supra. Compare *Sawyer v. United States*, 376 F. 2d 615 (8th Cir. 1967) (Fifth Amendment not violated when defendant given maximum sentence is denied credit for time in custody from arrest to sentencing pursuant to denial of bail lawful due to joinder of capital charge), with *Dunn v. United States*, 376 F. 2d 191 (4th Cir. 1967), and *Stapp v. United States*, 367 F. 2d 326 (D.C. Cir. 1966) (interpreting 1960 amendment to 18 U.S.C. § 3568, requiring credit for time in custody pending proceedings, as applying to all sentences though it mentions only mandatory minimum sentences, so as to avoid Fifth Amendment arbitrariness), and *Short v. United States*, 344 F. 2d 550, 554-56 (D.C. Cir. 1965) (opinion of Bazelon, C.J.) (constitutional or other law may require credit for time in custody due to denial of constitutional right to bail); (3) the eventual result for each of them could be a determination that no sentence is to be imposed; and (4) the possibility of a maximum sentence remains open for each of them under the double jeopardy clause. See *North Carolina v. Pearce*, supra.

without violating the double jeopardy clause.⁵⁰ In terms of the policies underlying the double jeopardy rule, Government appeal from failure to impose a mandatory minimum sentence cannot be persuasively distinguished from Government appeal from a sentence on the ground that in sentencing the court, for example, excluded admissible information or abused its discretion. Thus, the beginning of service of a sentence should not be considered *per se* the end of the first sentence jeopardy by force of the Constitution alone—jeopardy may or may not end then, depending upon the availability of review procedures. See *North Carolina v. Pearce*, *supra* at 713–21 and n. 12 (rejection of double jeopardy limit on sentence after retrial applies even where sentence first imposed has been partly served or fine paid, except that credit is required).

Professor Peter Low of the University of Virginia Law School, the reporter to the ABA study on sentencing, in his testimony before the subcommittee, carefully analyzed the double jeopardy arguments and precedents and then offered these observations:

. . . [T]here would seem to be ways of putting the increase power so that it would be very difficult to suggest constitutional infirmity. One would be to permit the sentencing court only to “recommend” a sentence to the appellate court, the “recommendation” to become final if neither side appealed within so many days. If an appeal were taken by either side, the issue could then be resolved *de novo* by the appellate court. A second way would be to analogize the situation to 18 U.S.C. § 4208(b) (commitment for study) and have the trial court impose a sentence that would be “deemed” to be for the maximum, with a recommendation that the appellate court “reduce” the sentence to a certain level, a recommendation that would become the sentence if neither side appealed, but which would not bind the appellate court if an appeal was taken.

Both of these devices are clearly artificial, and in substance obviously involve no more than would be involved if a direct appeal of the sentence were allowed to the Government. But the fact that they can be suggested with some plausibility, and that it would be difficult to say that they offended any principles rooted in the double jeopardy clause, is suggestive of the fact that the proposal here may well be constitutional. (Hearings at 196.)

The committee agrees with Professor Low that no such artificial technique should be or need be employed. As Professor Low concluded before *Pearce* was decided, a reaffirmation of *Stroud* and a distinguishing of *Green* for sentence increase after conviction reversal, both accomplished in *Pearce*, would establish the consistency of Government sentence appeal with the double jeopardy clause. Thus Professor Low informed the subcommittee, after the *Pearce* decision, that in view of *Pearce* “. . . the double jeopardy and equal protection arguments that could be made against an increased sentence on appeal

⁵⁰ *E.g.*, *Hayes v. United States*, 249 F. 2d 516 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); *McDowell v. Swope*, 183 F. 2d 856 (9th Cir. 1950). The procedure for correction can be appeal by the Government. *State v. Stang Tank Line*, 264 Wis. 570, 59 N. W. 2d 800, 801–02 (1953); *cf. State v. Witte*, 243 Wis. 423, 10 N. W. 2d 117 (1943) (jeopardy continues and permits Government appeal until facts and law are finally determined).

are weakened if not completely destroyed.”⁵¹ Since double jeopardy precedents and policies are consistent with Government sentence appeal, it should be enacted if it will improve public justice. Again in Professor Low’s words:

. . . that is the consideration that ought to control that issue, is it wise, is it desirable, as a matter of your legislative judgment to do this. I think the constitutional door has not been closed. . . . (Hearings at 211-212.)

It would be an error, moreover, to enact authority only to reduce sentences or to review them only at the instance of defendants. If defendants could appeal sentences and the Government could not, and especially if courts of appeal could lower but not raise sentences, sentencing principles could be expected to develop in an unbalanced way, since opinions of appellate courts reviewing sentences will be used as valuable guides for trial judges. The ways that search and seizure law developed during a period when the Government could not appeal suppression orders⁵² demonstrates that the danger of skewed law is a real one. The Congress and some State legislatures recently have found it necessary, both to protect individual prosecutions and to correct the skewed accumulation of search and seizure precedents, to enact laws authorizing government appeals from suppression orders. It would be unwise to lay groundwork for creation of a similarly unbalanced set of sentencing precedents.

The basic reason, however, for authorizing increase as well as decrease in sentence on appeal is that, as Professor Peter Low testified before the subcommittee, there is force to the contention that “. . . in principle it is not sound to place limitations on a reviewing court which may prevent the doing of justice in a concrete case. . . .” (Hearings at 192.) In part for that reason, in September of 1964 the U.S. Judicial Conference discussed fully and approved a bill to empower Federal appellate courts to increase or decrease lawful but inadequate or excessive sentences.⁵³ More recently, the President’s Crime Commission reached these conclusions:

There must be some kind of supervision over those trial judges who, because of corruption, political considerations, or lack of knowledge, tend to mete out light sentences in cases involving organized crime management personnel. Consideration should therefore be given to allowing the prosecution the right of appeal regarding sentences of persons in management positions in organized crime activity or groups. Constitutional requirements for such an appellate procedure must first be carefully explored. (Report at 203.)

Having carefully explored the constitutional issues involved, it is the opinion of the committee that the provisions of title X are not only legislatively wise, but constitutionally sound.

⁵¹ Hearings at 544.

⁵² Under prior law, the Government could not appeal a pretrial motion to suppress evidence granted in favor of a defendant even if it terminated the prosecution since it deprived the Government of what it needed to secure a conviction. See *DeBella v. United States*, 369 U.S. 121 (1962). Such appeals are now authorized under 18 U.S.C. § 3731 (1969).

⁵³ 1964 Dir. of Admin. Ofc. of U.S. Courts Ann. Rep. 86.

CONCLUSION

Title X of S. 30, as amended, is derived from title VIII of S. 30 as originally introduced. It is also based on S. 976, introduced by Senator Tydings on February 7, 1969.⁵⁴ Clarifying and other amendments have been made at the suggestion and with the approval of the Department of Justice. The provisions of title X, as now drafted, have the support of the Department. A majority of the witnesses who testified before the subcommittee approved; in principle, the provisions of title X. The testimony of Mr. Milton Rector, Director, National Council on Crime and Delinquency, is illustrative:

The National Council on Crime and Delinquency, primarily through its Council of Judges, has spent a number of years in trying to see how we could more effectively define in law the matter of dangerousness, how dangerous to the community is the person who commits a crime, and to try to build into criminal law for the point of sentencing specific criteria which could be tested, but by which judges could, after conviction, with all the protections of due process . . . have clearly stated criteria upon which he could, if finding that the defendant were dangerous, give an extended term. The definitions of dangerousness in S. 30 are really, we believe, more precise than those in the Model Sentencing Act of the Council of Judges. We very strongly support this concept. (Hearings at 253.)

Opposition, however, was expressed by the American Civil Liberties Union⁵⁵ and the Committee on Federal Legislation of the New York County Lawyers Association⁵⁶ principally on the grounds that the provisions were unconstitutional.

Title X represents the best efforts of the committee to draft fair and effective sentencing provisions that are consistent with basic constitutional protections and that will afford society and the accused every protection possible in a difficult and delicate area of the law. Its provisions are summarized above⁵⁷ and analyzed in detail below.⁵⁸ As now drafted, the committee recommends that title X pass.

AGENCY REPORTS

Attached hereto and made a part of this report are department and agency reports on the several titles and provisions of S. 30, as amended:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 8, 1969.

HON. JOHN L. McCLELLAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: Upon the conclusion of my statement before the Subcommittee on Criminal Laws and Procedure of the Committee on the Judiciary on March 18, 1969, in support of the objectives of S. 30,

⁵⁴ 115 Cong. Rec. S1436 daily ed. Feb. 7, 1969.

⁵⁵ Hearings at 467-474.

⁵⁶ Hearings at 216.

⁵⁷ Supra at 34-35.

⁵⁸ Infra at 162.

I advised you that I would send you the written views of the Department on it upon completion of our study of the bill.

I am pleased to submit the attached memorandum setting forth in detail our views on the various provisions of S. 30, and I shall be happy to have appropriate representatives of the Department available to testify regarding this matter at your pleasure.

Please let me know if I can be of any further assistance to you and the subcommittee in effecting enactment of this vitally needed legislation.

The Bureau of the Budget has advised that there is no objection to the submission of the views contained in this memorandum.

Sincerely,

JOHN N. MITCHELL,
Attorney General.

DEPARTMENT OF JUSTICE COMMENTS ON S. 30

TITLE I—GRAND JURY

Title I makes various changes in the law affecting the summoning, term, and powers of grand juries which would strengthen the powers and independence of grand juries. While we support most of the provisions contained in this title, we have alternate proposals to offer as to certain others. Our views with respect to each section of this title will be set forth separately.

Section 101 seeks to amend 18 U.S.C. 3321 (number of grand juries; summoning additional jurors) by adding at the end thereof the following new sentence: "Members of a grand jury shall be selected in accordance with the provisions of chapter 121." This provision refers to the chapter of title 28 which specifies the manner of selecting juries. For clarity it is recommended that the phrase "Title 28" be added after the words "Chapter 121."

Section 102 would amend 18 U.S.C. 3322, which incorporates by reference rule 6(a), Federal Rules of Criminal Procedure, which provides that "The Court shall order one or more grand juries to be summoned at such times as the public interest requires," to require the convening of a grand jury at least once during each 18-month period by each district court. While the Department favors the convening of a grand jury at least once during each 18-month period where the needs of justice require it, we are not aware that any serious problem exists in this regard in any district.

The difficulty we have experienced in some districts, however, is obtaining a sufficient number of grand juries to accommodate at the same time the general needs of the district and the special needs of the typically lengthy organized crime investigation. To remedy this problem, we recommend that present section 3322 of title 18 be amended to provide in addition that a grand jury be impaneled in each district court in which the Attorney General certifies in writing to the chief judge of the district that in his judgment such a grand jury is necessary because of major organized crime activity in the district.

We, therefore, recommend that the first sentence of the proposed revision of section 3322 of title 18 be amended to read as follows:

Section 3322—Summoning and term

(a) Each district court shall order one or more grand juries to be summoned at such time as the public interest requires, or whenever the Attorney General certifies in writing to the chief judge of the district that in his judgment a grand jury is necessary because of major organized crime activity in the district.

Section 102 would also amend section 3322 of title 18 to provide that a grand jury may, by majority vote, extend its term of 18 months for additional periods of 6 months, not to exceed a total term of 36 months. This provision appears to be desirable on several grounds. It would have the effect of stimulating prosecutors and investigators to take effective and timely action against organized crime in their districts. It would also insure that grand juries would stay in session long enough for the unusually lengthy period of time often required to build an organized crime case. Lastly, it would eliminate the possibility of arbitrary termination of a grand jury by supervisory judges.

Section 103 would amend section 3324 of title 18, which incorporates by reference rule 6(c) of the Federal Rules of Criminal Procedure, in five respects. Rule 6(c) presently states that "The court shall appoint one of the jurors to be foreman and another to be deputy foreman." There then follow other provisions which are not affected by the proposed amendment.

The proposed section 3324(a) would provide that "Each grand jury when impaneled shall elect by majority vote a foreman and deputy foreman from among its members." While this proposal changes the existing rule, this is purely a matter of statutory law and policy. This provision appears to be desirable in that it increases the independence of the grand jury by removing it from any possible restrictive influence present as a result of selection by the court or at the court's direction by court personnel. In practice, the court or his delegate (the court clerk) examines the case history of each juror as to his education, profession, civic activities, etc., and many are interviewed personally. By this process a foreman and deputy foreman are selected. This screening process, however desirable, makes a person foreman who is acceptable to the court even though such a person may not reflect the attitudes or have the concerns of the community at large or the grand jury in particular.

Proposed section 3324(b) provides that "It shall be the duty of each grand jury impaneled within any judicial district to inquire into each offense against the criminal laws of the United States alleged to have been committed within the district which is brought to the attention of the grand jury by the court or by any person." This provision is a statutory recognition of existing case law holding that the inquisitorial powers of a grand jury are virtually unlimited and that the grand jury can initiate a case on its own and investigate any alleged violation of Federal law within its jurisdiction. See *Hale v. Henkel*, 201 U.S. 43 (1906); *Blair v. United States*, 250 U.S. 273 (1919); *United States v. Harike-Hanks Newspapers*, 254 F. 2d 366 (C.A. 5), cert. denied, 357 U.S. 938 (1958); *In Re Grand Jury Investigation (General Motors Corp.)*, 32 F.R.D. 175 (S.D.N.Y.), appeal dismissed, 318 F. 2d 533 (C.A. 2), cert. denied, 375 U.S. 802 (1963); *United States v. Smyth*, 104 F. Supp. 283 (N.D. Calif. 1952); *United*

States v. Gray, 187 F. Supp. 436 (D.C.D.C. 1964). Consequently, we can see no objection to this proposal.

Section 3324(c) provides that no person shall be deprived of opportunity to communicate to the foreman of a grand jury any information concerning any offense against the criminal laws of the United States alleged to have been committed within the district. Section 1504 of title 18, United States Code, presently makes it an offense for anyone to attempt to influence the action or decision of any grand or petit juror upon any matter pending before it by a written communication. This provision is apparently intended to make it clear that no violation of this section is committed by a person who merely communicates to the foreman of a grand jury any information regarding any offenses against the laws of the United States. This provision could well encourage wider public participation in the fight against organized crime and we, therefore, support it.

Section 3324(d) provides that when the grand jury determines by majority vote that the volume of its business exceeds its capacity to fulfill its obligations, it may apply to the district court to impanel an additional grand jury. Upon such application and a showing of need, the district court shall order an additional grand jury to be impaneled. If the court refuses to hear the application or refuses to impanel a new grand jury, the grand jury may appeal to the chief judge of the circuit who shall have jurisdiction to order a new grand jury impaneled. This provision seems reasonable, especially since the grand jury must make a showing of need to the court before the request may be granted. We support this provision.

Section 3324(e) provides that whenever a grand jury determines by majority vote that any attorney or investigative officer or agent appearing on behalf of the United States before the grand jury for the presentation of evidence with respect to any matter has not performed or is not performing his duties diligently and effectively, the grand jury may transmit to the Attorney General a written request, along with the reasons therefor, for a new attorney, agent, or investigator. The Attorney General is then required to promptly inquire into the merits of the application and to take appropriate action to provide for prompt and effective representation on behalf of the United States.

The Department is opposed to this provision on several grounds. First, it is felt that the provision is unnecessary since sufficient control over such personnel already exists in the Department. As a practical matter, moreover, the grand jury can at present undoubtedly make such a complaint to the Attorney General and appropriate action will be taken where merited. Second, it is felt that placing such an express power in the grand jury has too great a potential for mischief and might well tend to unduly limit the discretion of attorneys charged with investigation of unpopular or sensitive matters. Third, this provision could also be expected to invite the making of unfounded, though perhaps good faith, complaints in those hard or close cases where the layman grand jury refuses to accept the legal judgment of an experienced prosecutor that the evidence is insufficient as a basis for an indictment. For these reasons, then, the Department does not feel that this provision should be enacted.

Section 104 would amend chapter 215 of title 18, United States Code, by adding at the end thereof a new section, section 3330, entitled

“Reports.” This new section 3330 would allow the grand jury, on majority vote of its members, to submit to the court a report: (1) concerning noncriminal misconduct, nonfeasance, or neglect in office by a public officer or employee as the basis for a recommendation of removal or disciplinary action, or (2) stating that after investigation of a public officer or employee it finds no misconduct, nonfeasance, or neglect in office by him, provided that such public officer or employee has requested the submission of a report, or (3) proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings. Such a report shall be submitted to the court who will approve and accept it for filing only if the above requirements are met and if the report is based on facts revealed in the course of an authorized investigation and is supported by the preponderance of the evidence. A report concerning noncriminal misconduct of a public official can be accepted only if the named individual had been afforded an opportunity to testify before the grand jury prior to the filing of the report. Any other report must not be critical of a named individual.

A public official may file an answer to a report critical of him and may also file an appeal to the circuit court. At the expiration of an appropriate time as set forth in the provision the U.S. attorney must deliver a true copy of the report for appropriate action to the public officer or agency having removal or disciplinary power over the public officer named therein, but if a criminal action is pending the court may seal the report until the matter is disposed of. If the court is not satisfied that all these requirements are met, it may direct that additional testimony be taken before the same grand jury, or it may direct that the report be sealed and not filed as a public record. Finally, this provision defines public officer or employees as “any officer or employee of the United States, or any State or political subdivision, or any department, agency, or instrumentality thereof.”

This proposal would substantially change existing Federal law and procedure. See in general, *Orfield, The Federal Grand Jury*, 22 F.R.D. 343, 402 (1958). Two cases which are particularly illustrative of present judicial thinking that any grand jury action beyond indicting or refusing to indict is beyond the power of the grand jury are *Application of United Electrical Radio and Machine Workers*, 111 F. Supp. 858 (S.D.N.Y. 1953), and *In Re Petition for Disclosure of Evidence Before October 1959 Grand Jury*, 184 F. Supp. 38 (E.D. Va. 1960). In the former case, the court held that a grand jury report which made recommendations to the NLRB was beyond the powers of the grand jury, an abuse of the principle of separation of powers and a violation of the secrecy provision of rule 6(e), Federal Rules of Criminal Procedure. In the latter case, the court held that a grand jury report on noncriminal conduct of state officials was likewise beyond the power of the grand jury, an infringement upon the provinces of State and local governments and a violation of the secrecy provision of rule 6(e).

While the problem of secrecy under rule 6(e) can be remedied by statute, the other problems must await judicial testing.

The present proposal also goes beyond that of the President's Commission on Law Enforcement and Administration of Justice which recommended:

When a grand jury terminates, it should be permitted by law to file public reports regarding organized crime conditions in the community.

It is noted that this recommendation restricts the use of a report: (1) until the grand jury terminates, (2) to organized crime conditions, and (3) in a presumably general context. This type of report would apparently be unobjectionable in view of the dicta by the court in *Application of United Electrical Radio and Machine Workers (supra)* at 869, that "We are not here concerned with reports of a general nature touching on conditions in a community. They may serve a valuable function and may not be amenable to challenge."

We believe that considerations of public policy and interest favor some expansion of the grand jury's power in this area, and though we recognize there are constitutional problems involved, we do not believe they are of an insuperable nature.

The history of the growth and development of the grand jury system discloses that the issuing of reports has been an historic grand jury function in England for almost 300 years. The practice of rendering reports on matters of public concern was also followed in the early American colonies, and today, despite the weight of authority against it, reports are authorized either by statute or by judicial decision in such States as New York, California, Illinois, New Jersey, Florida, and Tennessee. Despite this, however, and despite the fact that the grand jury has been described by the Supreme Court as a "prototype" of its ancient British counterpart, *Blair v. United States*, 250 U.S. 273, 282 (1919), its power to issue reports has not survived intact with its virtually unchallenged investigatory power.

The principal objections to the use of grand jury reports seem to be that they violate the traditional secrecy of grand jury proceedings, they expose grand jurors to libel actions, they violate the principle of separation of powers, and, perhaps most importantly, they charge wrongdoing while effectively denying the use of a judicial forum in which to reply. Upon close examination, the first three of these reasons do not appear to have much merit. The problem of secrecy under rule 6(e) of the Federal Rules of Criminal Procedure may, of course, be solved by statutory amendment. There is in fact already ample precedent under rule 6(e) for violation of grand jury secrecy when the general welfare requires it. See, for example, *In re Petition for Disclosure of Evidence Before October 1959 Grand Jury*, 184 F. Supp. 38 (E.D. Va. 1960), where Federal grand jury minutes were made available to commonwealth attorney for use in State grand jury proceedings.

The libel objection can perhaps be discounted as the least troublesome since, in light of recent Supreme Court decisions on this subject, grand jurors' actions in this regard are undoubtedly privileged.

The argument that the grand jury reports contravene the principles of separation of powers proceeds on the theory that the grand jury, being an appendage of the court, should not invade the province of the legislative or executive branches and charge them with misconduct or inefficiency. This argument loses much of its force, however, when it is considered that historically the grand jury has for centuries exercised both the reporting and indicting functions, and the exercise of its reporting function is logically no more violative of the separation

of powers principle than is the indictment of a governmental official for criminal conduct in the performance of his duties. In criticizing public officers and calling for improvements in the legislative and executive branches, moreover, the grand jury performs a function analogous to the court's function when it notes statutory defects and suggests that the legislature consider amendment. As New Jersey's late Chief Justice Arthur T. Vanderbilt observed, success of the separation of powers doctrine depends to some extent on the interaction and cooperation of the arms of Government, not on their total isolation from each other. See Vanderbilt, *The Doctrine of the Separation of Powers and Its Present Day Significance*, 43-45 (1953).

Finally, on this point, it may be observed that since so much of Title I changes the basic character of the grand jury that in effect it is no longer merely an arm of the court, but a more independent body, the separation of powers argument is no longer a valid objection.

Perhaps the most serious objection to grand jury reports is the charge that they are essentially lacking in fairness since they make a charge of wrongdoing but deny the "accused" a judicial forum in which to reply. In an attempt to meet this criticism, the New York Legislature enacted a statute, New York Code of Criminal Procedure section 253(a), effective July 1, 1964, which contains elaborate safeguards such as allowing a named individual an opportunity to testify before the grand jury and file an answer prior to the filing of a report, as well as allowing an appeal to a higher court before filing. The constitutionality of this New York statute was upheld in *In Re Grand Jury, January 1967*, 277 N.Y.S. 2d 105 (1967).

Since the present proposal is almost word for word identical in its substantive provisions with the New York statute, we feel that it meets the necessary test of fairness against the charge that it makes an accusation without providing an adequate judicial forum for a denial.

In sum then, we believe this revival of the grand jury's historical report making power, as narrowly circumscribed in this proposal, is constitutionally sound and we support it as being in the interest of good and effective government.

In accord with recommendation of the President's Commission, we would suggest that the grand jury also be allowed to file general reports on organized crime conditions in the community. This would be accomplished by adding the following new subsection at the end of the proposed new section 3330(a):

(4) regarding organized crime conditions in the district, provided it is not critical of an identified or identifiable person.

Finally, in order that the regular business of the grand jury may be conducted with dispatch and without interruption, and in secrecy, we would recommend that this proposal be amended to include the phrase "upon the conclusion of its term." In line with this suggestion, the first sentence of new section 3330(a) would be amended to read, in pertinent part as follows:

a majority of its members, may, upon conclusion of its term, submit a report . . .

TITLE II—IMMUNITY

Title II of S. 30, entitled "Immunity", would amend Chapter 1 of Title 18, United States Code, to add new Section 16, "Compelling of testimony and other evidence with respect to Federal offenses."

This provision would authorize the United States Attorney, with the approval of the Attorney General or an Assistant Attorney General designated by him, to apply for a court order to compel testimony in a Federal grand jury or court proceeding involving a violation of any Federal law, and in return immunity for the witness would result. While specific immunity provisions are presently scattered throughout the United States Code, this provision would for the first time provide for compelling testimony in proceedings involving any violation of Federal law.

This provision, moreover, unlike most previous immunity provisions does not grant total immunity from prosecution with respect to matters testified to, but merely provides that the evidence given shall not directly or indirectly be used in any future prosecution.

In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the Supreme Court held that an immunity statute which merely provided that the evidence compelled could not be used against the witness in any criminal proceeding was insufficiently broad to comply with the guarantee of the fifth amendment. The court reasoned that the testimony which was compelled might nevertheless be used "to search out other testimony" to be used against him in a criminal proceeding, 142 U.S. at 564. The court concluded that "no statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States." 142 U.S. at 585.

Since *Counselman*, Federal immunity statutes have been phrased in terms which would bar any prosecution for or on account of any matter as to which testimony was compelled, see *e.g.*, 49 U.S.C. §46. However, in two recent decisions, *Murphy v. Waterfront Commission*, 378 U.S. 52, 79-80 (1964), and *Marchetti v. United States*, 390 U.S. 39, 58-60 (1968), the Supreme Court has indicated that complete immunity from future prosecution is not essential and that a witness' privilege against self-incrimination would not be violated if he were compelled to testify under an assurance that the evidence he gave could not be used against him either directly or indirectly, *i.e.*, as an investigative lead, in a State or Federal prosecution.

In view of the Court's expression in *Murphy* and *Marchetti*, it would seem that the use restriction concept contained in title II furnishes all the immunity the Constitution requires.

In his special message to the Congress of April 23, 1969, dealing with organized crime, President Nixon stated the need for a new broad general witness immunity law to cover all cases involving violation of a Federal statute, and he commended to the Congress for its consideration the recommendations of the National Commission on Reform of Federal Criminal Laws. The National Commission's proposed general immunity statute, unlike the present proposal which is limited to "any case or proceeding before any grand jury or court of the United States," would create a single, integrated immunity provision

applicable to grand jury-court proceedings; formal administrative hearings by an independent agency or within the executive branch; and congressional investigations. Like the present proposal, however, the protection offered the witness is a restriction against use of incriminating disclosures or their fruits in any criminal case rather than absolute immunity from prosecution.

Under this proposal, in all three types of proceedings the Attorney General would receive notice of intent to obtain an immunity authorization. For grand jury-court proceedings the approval of the Attorney General is required upon a certification of need by the U.S. attorney. For administrative hearing matters, the public interest assessment and power to issue a direction to testify are left with such agency officials as may be specified by statute, and notice must be given to the Attorney General at least 10 days prior to the direction to testify. For congressional investigations the direction to testify is made by the U.S. district court upon application by a duly authorized representative of either House of Congress, and notice of the application must be served on the Attorney General at least 10 days prior to the time the application is made. Upon request of the Attorney General the court must defer the direction to testify for no longer than thirty days from the date of such notice to the Attorney General.

One of the obvious merits of this proposal is its provision for notice to a central law enforcement point, the Attorney General, as a means of attempting to insure that the "public interest" being promoted by one agency will not subvert the "public interest" being promoted by another agency.

Accordingly, the Department of Justice recommends enactment of the immunity proposal of the National Commission on Reform of Federal Criminal Laws in lieu of the proposal contained in title II of this bill.

TITLE III—RECALCITRANT WITNESSES

Title III would amend chapter 19 of title 28, United States Code, by adding at the end thereof a new section 1826, "Recalcitrant witnesses". It provides in subsection (a) that a witness in any court or grand jury of the United States who refuses without just cause to comply with an order of the court to give testimony in response to a question or with respect to any matter may be summarily ordered to confinement until such time as the witness is willing to testify.

This proposal seeks to codify the civil contempt aspect of existing law as it applies to grand jury and court proceedings in the area of refusal to give testimony. *United States v. Coplon*, 339 F. 2d 192, 193-94 (C.A. 6 1964); *Brown v. United States*, 359 U.S. 41, 55 (1959) (dissenting opinion); *Shillitani v. U.S.*, 384 U.S. 364 (1966).

The only difficulty we have with this provision is its lack of specification as to the outer limits as to how long confinement should be. Since under the principles governing civil contempt a witness can no longer be confined after it becomes impossible to comply with the court order, e.g., when the court proceeding is concluded or the grand jury discharged, it would seem that this limitation should be spelled out in the statute. It is recommended therefore that subsection (a) of this provision be amended by adding at the end thereof the following language: "but in no event shall such period of confinement exceed the life of the court proceeding or of the term of the grand jury before which such failure or refusal to comply with the court order occurred."

This title also proposes to add a new subsection (b) to section 1826 which states that "No person confined pursuant to subsection (a) shall be admitted to bail pending determination of an appeal taken by him from the order for his confinement." While we do not believe that this provision is really necessary in view of the fact that the court presently has authority to deny bail where the appeal is frivolous, *United States v. Coplon, supra*, we can see no objection to it since bail on appeal is not subject to the eighth amendment.

In order to take into account the exceptional case where substantial grounds for appeal may exist, e.g., where the constitutionality of title II, Immunity, is challenged, or where the confinement is attacked as seeking incarceration rather than bonafide testimony, it is suggested that the addition of a provision for a time limit within which the appeal must be heard would be in the interests of justice. In line with this, it is suggested that the following sentence be added at the end of proposed new section 1826(b):

Any appeal from an order of confinement under this section shall be disposed of within 30 days from the filing of such appeal.

TITLE IV—FALSE STATEMENTS

Title IV would add a new subsection, section 1623, to chapter 79 of title 18, United States Code, creating an additional felony provision for perjury or subornation of perjury before a court or grand jury. The penalty provided is a fine of not more than \$10,000 or imprisonment for not more than 5 years or both. The proposal is intended to supplement, not supplant, the existing statutes dealing with perjury and subornation of perjury, 18 U.S.C. 1621, 1622, which provide for a fine of not more than \$2,000 and/or imprisonment for not more than 5 years.

The purpose of this title, according to Senator McClellan, is to "abolish the outmoded two-witness and direct evidence rules in perjury cases, and [to] provide for the prosecution of persons making contradictory statements under oath, without requiring proof of the falsity of one of the statements." (115 Cong. Rec. S 280.) The theory behind this apparently is that since title IV would create a new Federal crime dealing with false statements before courts or grand juries, the common law rules of evidence applicable to perjury prosecutions generally would not be applicable to it.

Prosecutions for perjury are subject to certain peculiar rules of proof. The two-witness rule requires that to obtain a conviction for perjury there must be testimony of two witnesses to the falsity of defendant's statement or testimony of one witness plus corroboration. "[I]t is most accurately stated in the negative fashion that Wigmore employs 'one witness, without corroborating circumstances does not suffice.'" *United States v. Goldberg*, 290 F. 2d 729, 733 (C.A. 2, 1961).

The direct evidence rule is that perjury must be proved by direct evidence, and not merely by circumstantial evidence, as to the falsity of the statement. *Radomsky v. United States*, 180 F. 2d 781 (C.A. 9, 1950). However, the direct evidence rule, as applied, has come to mean merely that where circumstantial evidence is relied on, the inference from the fact proved to the conclusion of falsity must be unusually strong, *United States v. Collins*, 272 F. 2d 650, 652 (C.A. 2, 1959).

Abolition of the two-witness and direct evidence rule has been recommended by the President's Commission on Law Enforcement and Administration of Justice, and by Dean Wigmore. *Evidence*, sections 2040-41 (3d ed. 1940). On the other hand the two-witness rule was affirmed by a unanimous Supreme Court in *Weiler v. United States*, 323 U.S. 606 (1945). While there are meritorious arguments on both sides of the question, we are inclined to agree the recommendation of the President's Commission that abolition of these rules is desirable.

We have some doubt, however, that the form of the proposed provision is adequate to accomplish the objective sought. Instead of amending the present perjury statute, this provision creates a separate crime, yet one nearly indistinguishable from perjury and it is feared that the courts are likely to conclude that the new crime is so similar to perjury that the same restrictive evidentiary rules must apply. Cf. *United States v. Hammer*, 271 U.S. 620 (1926). Consequently, we believe that legislative abrogation of these evidentiary rules requires specific language in the statute. In order to accomplish this objective, therefore, we suggest that this proposal be amended by adding at the end thereof the following new subsection (e) as follows:

(e) In any prosecution brought under this section, the falsity of the statement or testimony set forth in the indictment or information may be established by the uncorroborated testimony of one witness, or by circumstantial evidence alone.

It is noted that subsection (a) of the false statement provision omits the requirement of materiality, but that subsection (d) thereof specifically mentions "material to the issue or point in question." We believe subsection (a) should be amended to include the word "material" since we do not believe that false statements as to immaterial matters should be punishable.

Subsection (d) of this provision would, in cases of inconsistent statements under oath, relieve the Government of the necessity of proving which one is false as is now required by such cases as *McWhorter v. United States*, 193 F. 2d 982, 983-84 (C.A. 5, 1952). Since, however, in light of the opinion in *United States v. Goldberg*, 290 F. 2d 729, 734 (C.A. 2, 1961), *McWhorter* may not be good law today; we can see no objection to overruling this by statute. Under this provision the prosecutor by being allowed to plead and prove the case in the alternative may show the falsity by logical inconsistency. In *United States v. Buckner*, 118 F. 2d 468 (C.A. 2, 1961), the court declared:

It seems strange that in the Federal courts an indictment for perjury may not yet be drawn in the alternative and that there may not be a conviction for deliberately making oath to contradictory statements unless the prosecutor shows which of the statements was false.

It is noted that subsection (d) is limited to statements made "in the same continuous trial." We would suggest that this be broadened to include the phrase "or same continuous grand jury proceedings" since the interest in obtaining truth is no less before the grand jury than at trial. Such an amendment, moreover, would be consistent with the tenor and policy of S. 30's emphasis on strong and effective grand jury proceedings. It would also be consistent with title IV itself which in all other places concerns itself with petit and grand jury proceedings.

Finally, it is noted that this provision is not as inclusive as the present Federal perjury statute in that subsection (a) is limited specifi-

cally to "any trial, hearing, or proceeding before any court or grand jury" and thus not only are pretrial depositions, affidavits, and certificates excluded but also administrative and legislative hearings or proceedings. The committee may wish to consider whether it would not be appropriate at this time to amend the present perjury statute, 18 U.S.C. 1621, and thereby by express language abolish the peculiar evidentiary rules applicable to perjury generally in all types of proceedings to which the statute is presently applicable.

TITLE V—DEPOSITIONS

Title V would amend chapter 223 of title 18, United States Code, by adding at the end thereof a new section 3501, "Depositions". This provision would allow the Government to take depositions for the purpose of preserving the testimony of Government witnesses. The depositions would be taken after the filing of an indictment or information, and the defendant would be given an opportunity to be present with counsel and to cross-examine the witness. The deposition would be admissible in evidence at the trial, subject to the rules of admissibility of evidence, in the event the appearance of the witness cannot be obtained because the witness is dead, or is out of the United States, or is unable to attend or testify because of sickness, or the Government has been unable to procure the attendance of the witness by subpoena. Provision is also made for the payment by the Government to the defendant's attorney and to a defendant not in custody, expenses of travel and subsistence for attendance at the examination. The Government is also required to make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the Government and which the Government would be required to make available if the witness were testifying at the trial.

This provision extends to the Government a right that a defendant in a criminal case already enjoys under existing law under rule 15, Federal Rules of Criminal Procedure. Although there is no direct authority in the matter, the extension of this right to the Government should not itself run afoul of the Constitution. Where, as in this provision, the defendant's sixth amendment rights to representation by counsel and confrontation of witnesses are well preserved by allowing an opportunity to be present with counsel and to cross-examine the deponent, this provision should pass constitutional muster, *Mattox v. United States*, 156 U.S. 237 (1895). (See *Pointer v. Texas*, 380 U.S. 400, 407 (1965); *Motes v. United States*, 178 U.S. 458, 472 (1900); *Jones v. California*, 178 F. 2d 458, 472 (C.A. 9, 1966).)

It is noted that proposed section 3501 contains one important provision not included under rule 15. Thus, under rule 15, while a defendant can depose any necessary witness who might not be able to attend the trial, he has no right to inspect the statements of a prospective witness before trial. (*United States v. Berman*, 24 F.R.D. 26 (1959); *Johnson v. United States*, 260 F. 2d 345 (1958).) However, under 18 U.S.C. 3500, the defendant can get such statements after the witness has testified on direct examination. Under the proposed bill if the Government deposes a prospective witness, it must make available for the use of the defendant at the time of the examination any statement of the witness in the possession of the Government

which it would be required to make available to the defendant if the witness were testifying at the trial. It is felt that this requirement is necessary to protect the defendant's right to effective cross-examination of the witness.

We feel that this provision's extension of the right to take depositions to the Government will provide an extremely useful tool in the effective trial of all criminal cases, but particularly in those involving organized crime cases where there is a substantial danger that the witnesses will not be available at the time of trial.

TITLE VI—PROTECTED FACILITIES FOR HOUSING GOVERNMENT WITNESSES

Title VI authorizes the Attorney General to rent, purchase, or construct such facilities as are necessary to provide secure and safe housing for Government witnesses and potential Government witnesses and their families in legal proceedings and investigations against persons alleged to have participated in organized criminal activity. It also provides that the Attorney General may offer the use of these facilities to such persons when in his judgment their testimony or willingness to testify would place them in jeopardy through illegal efforts to prevent them from testifying or punish them for testifying. It also defines "Government" to mean either the Federal or State Government, thus bringing within its scope witnesses in State proceedings. An appropriation of \$1 million is authorized for the fiscal year ending June 30, 1969, for carrying out this proposal.

The question of protecting Government witnesses is not one of law but of practicality. In view of the nature of organized crime there can be no doubt regarding the need for protection of witnesses. In pursuit of its ends the members of organized crime syndicates will ruthlessly eliminate anyone who stands in the way of success in any criminal enterprise and will destroy anyone who betrays the secrets of the syndicate.

While the Department wholeheartedly supports the theory behind title VI, we believe that instead of limiting the Department to the renting, purchasing, and constructing of housing facilities, the Congress should consider a broader range of uses for the expenditure of funds in this area. The most substantial item which should be allowed for is perhaps the salaries and expenses of the U.S. marshal's office which provides protection for most such witnesses. In addition, we believe that there should be authorization of appropriations for the care and protection of such witnesses to be used in whatever manner is deemed most useful under the special circumstances of each case. Such a provision would provide the necessary flexibility to adequately deal with this problem.

The Bureau of the Budget and the Department of Justice have undertaken a study of the potential costs of title VI in response to Senator McClellan's letter of March 17, 1969 to the Director of the Bureau. While that study is not yet completed, we believe it desirable that the bill not specify a particular appropriation authorization amount or limit the authorization to a single fiscal year.

It is also noted that this title speaks in general terms of providing such protected facilities to witnesses and potential witnesses in "investigations which might lead to legal proceedings." In view of the

enormity of the expenses involved in the care and protection of witnesses and informants in this area generally, we do not wish this title to be construed as shifting the responsibility for the expenses of informants which are presently being borne by the several investigative agencies of the Government, including the Federal Bureau of Investigation, the Internal Revenue Service, the Bureau of Narcotics and Dangerous Drugs, and others.

Finally, it is noted that this title authorizes the Attorney General to provide secure and safe housing facilities for the use of both State and Federal witnesses. In view of the enormity of the costs and other practical problems involved in the protection of witnesses, the Department believes it to be inappropriate for it to assume the responsibility for the protection of State witnesses and feels that this responsibility should be assumed by the States. While, therefore, we do not believe that the Attorney General should be authorized to provide for the care and protection of State witnesses, we would not be opposed to granting him authority to offer the use of housing facilities, on a reimbursable basis, in limited situations where the States cannot provide adequate facilities to its witnesses, provided all other arrangements and expenses for the protection and care of such witnesses, such as guards, subsistence, medical care, et cetera are made and borne by the States.

TITLE VII—DECLARATION OF COCONSPIRATORS

This title would amend chapter 223 of title 18, United States Code, by adding at the end thereof a new section 3502, "Admissions of co-conspirators."

This provision would make admissible into evidence in a criminal action in which it is alleged that two or more defendants participated as coconspirators in the commission of a criminal offense, an extrajudicial declaration made by one such defendant against any other defendant if the court determines that: (1) the declaration was made by the defendant during his participation in the conspiracy, (2) there are in existence facts and circumstances from which its trustworthiness may be inferred, (3) the declaration relates to the existence or execution of the conspiracy, and (4) the declaration was made during the time in which such other defendant participated in the conspiracy.

This provision appears to codify in all but one respect the present law as to the admissibility in evidence of the declarations of coconspirators in conspiracy cases. All aspects of the present rule are retained save the requirement of "furtherance." In lieu of this, there is substituted the requirement that such a declaration must "relate to the existence or execution" of the conspiracy, and that to render it admissible the court must find that "there are in existence facts and circumstances from which its trustworthiness may be inferred."

The "conspirator's hearsay exception" is a firmly established exception to the general rule against the use of hearsay to establish criminal liability. *Krulewicz v. United States*, 336 U.S. 440, 443 (1949). The exception has come to rest in American jurisprudence on agency principles, as articulated by Mr. Justice Storey in *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 469 (1827), and the exception remains as yet unquestioned by the Supreme Court. See *Bruton v. United States*, 391 U.S. 123, 128 n.3 (1968).

The rationale behind this proposed change apparently is that the "furtherance" requirement of this exception is of somewhat ill defined meaning, but apparently an outgrowth of the agency rationale which is sometimes stated in terms of *res gestae* language, but which many other courts interpret so broadly as to apply to anything that relates to the conspiracy. Since this reduces the requirement to relevancy, and since all evidence must be relevant, it is reasoned that the "furtherance" requirement is thus eliminated in substance if not in form. This being so, it is felt that something more, namely, the element of trustworthiness should be required.

The logic of this argument is quite compelling, and the substitution of the element of trustworthiness of relevant evidence for the furtherance requirement would appear to be not only more realistic in terms of current judicial interpretation but also more consistent with the policy behind this exception to the general rule of exclusion of hearsay evidence.

Criminal law conspiracy principles have been most effective in organized crime prosecutions, and there can be no doubt that the "coconspirator's hearsay exception" has been a vital factor in their success. The continued vitality of this coconspirator rule is absolutely essential in conspiracy prosecutions of all types. Since the agency rationale which currently supports this exception is subject to increasing criticism by the courts and by the authorities in the field, it would seem only prudent to move away from this rationale toward a more realistic basis for the exception, that is from agency to trustworthiness.

The movement to eliminate the furtherance requirement began with Professor Morgan's examination of the soundness of the vicarious liability rationale in an article in 42 *Harvard Law Review* 461 (1929). As a result of Professor Morgan's article the furtherance requirement was eliminated both in the *Uniform Rules of Evidence*, Rule 63(9), and in the *Model Code of Evidence*, Rule 508(b). It has also been approved by Professor McCormick, *Evidence*, Section 244 (1964).

The ambiguity of the furtherance requirement has caused considerable difficulty in the admission of testimony in conspiracy prosecutions, and more often than not a narrow construction of the term results in the exclusion of the Government's evidence. Few opportunities for appellate review of the principle have been occasioned since the Government has no right of appeal.

On the other hand, a conflict among the circuit courts exists in the cases of *United States v. Birnbaum*, 337 F. 2d 490 (C.A. 2, 1964), where Judge Lumbard applies a strict agency construction to the furtherance requirement, and in *International Indemnity Company v. Lehman*, 28 F. 2d 1 (C.A. 7, 1928), *cert. denied*, 278 U.S. 648, which is classically cited for the virtual abandonment of the furtherance requirement in favor of the test of relevancy.

In view of these authorities then, and in view of the apparent reality that many courts have discarded the furtherance requirement in favor of relevancy, it would seem that this is an appropriate time to codify this principle. Perhaps an even more cogent reason for discarding the furtherance requirement which is based on agency and shifting the basis of the exception to trustworthiness, however, is the portent in several recent Supreme Court decisions, *Pointer v. Texas*, 380 U.S. 400

(1965); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Barber v. Page*, 390 U.S. 719 (1968); and *Bruton v. United States*, 391 U.S. 123 (1968), that the Supreme Court may be moving toward reexamination of the present theory sustaining the admissibility of coconspirator's statements based on agency principles. These cases, while dealing with coconspirator's statements sought to be admitted after the termination of the conspiracy, indicate that the right to confrontation under the sixth amendment still permits some traditional hearsay exceptions, based upon necessity and trustworthiness. In view of these decisions, therefore, it would seem that this would be a prudent time to enact this provision.

TITLE VIII—SPECIAL OFFENDER SENTENCING

Title VIII would amend chapter 227 of title 18, United States Code, by adding at the end thereof four new sections (secs. 3575-3578) dealing with the punishment of special classes of offenders.

This title provides, upon conviction of a felony, for increased punishment for three categories of special offenders—habitual offenders, professional offenders, and organized crime offenders. Habitual offenders are defined as those with two or more previous felony convictions. Professional offenders and organized crime offenders are defined at greater length, but less precisely. In each case the U.S. attorney must give notice to the defendant prior to trial that he intends to proceed against him as a special offender. If the trial results in a conviction, there is a subsequent hearing to determine whether the defendant is a special offender. If the court determines that he is, the defendant may be sentenced to up to 30 years imprisonment and is not eligible for suspension of sentence, parole, or remission, or reduction of the sentence for any cause until he has served at least two-thirds of the term imposed. Sentences will be subject to appellate review by either the Government or the defendant and the appellate court may increase or decrease the sentence. Finally, in sentencing under these provisions the court is allowed to receive and consider any and all evidence without regard to the manner in which such evidence was obtained.

The imposition of increased penalties for special classes of offenders is a procedure which has been approved for some time, and the Department believes that such a procedure is desirable. Title VIII, however, as presently drafted, raises serious problems in three general areas—specificity of definitions for categories of offenders, procedures for making determinations, and the appeal provisions.

As to the first, title VIII adequately defines a habitual offender and gives adequate notice for hearing on the recidivist issue in line with State statutes which have been held constitutional. *Epperson v. United States*, 371 F. 2d 956 (1967); *Kendrick v. United States*, 238 F. 2d 34 (1957); *Rider v. Crouse*, 357 F. 2d 317 (1966); *Byers v. Crouse*, 339 F. 2d 550 (1964); *Oylers v. Boles*, 368 U.S. 448 (1962).

The definition of professional offender appears to be so vague as possibly to violate due process. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). It includes no limits and can easily be read to include any criminal. Such a category is too broad and may be held to violate not only due process but the equal protection clause as well because of a lack of justifiable distinction warranting extra punishment for this

category of offenders. In addition, increasing the punishment for this category seems to be punishing status and not a particular criminal act, which was held unconstitutional in *Robinson v. California*, 370 U.S. 660 (1962). But see *Lanzetta (supra)* which indicated a person could be punished for being a gangster (status) if the definition was not too vague. And see *Powell v. Texas*, 392 U.S. 514 (1968) which held that a chronic alcoholic could be punished for being in a public place (status plus overt act).

In order to withstand a constitutional attack on grounds of vagueness, therefore, it is felt that the definition of professional offender must be made more specific and must emphasize a pattern of specific past criminal activity and conduct in opposition to the legal structure of society as a whole, rather than emphasis on his income from a source other than legal. This could perhaps best be approached by adopting the approach taken in the Model Sentencing Act which allows for extended sentences for dangerous offenders on grounds, *inter alia* that:

(c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons.

The definition of organized crime offender, on the other hand, is much more specific than professional offender and does not appear so vague as to violate due process, and appears to define the type of person sought to be covered by this Title with a fair amount of accuracy.

It is suggested that one method of solving the problem would be to develop a single definition for both professional offender and organized crime offender which would comprehend any person convicted of a felony involving extortion, narcotics, gambling, prostitution, bribery, etc., or other felony, which was committed as part of a continuing illegal business or activity in which he acted in concert with one or more persons and occupied a position of organizer or other supervisory or management position, or was an executor of violence. This approach would adopt in part the criteria set forth in the above-quoted reference to the Model Sentencing Act.

The second objection to this title is that the procedures for making a determination may also violate due process. Although there is a provision for a hearing, the court is evidently not limited to the evidence submitted during the trial and the hearing in determining whether or not the defendant is a special offender, since the determination may be made on the basis of the presentence report to which the defendant apparently would not have access. Similarly, it is pointed out that no attempt is made to define the defendant's right to be informed of and to refute the evidence on which the court's determination is made. Nor is the court apparently required to make any written findings other than the conclusory finding on which the extended sentence is based.

We believe there is a substantial risk that this procedure would be held to violate due process under the rule announced in *Specht v. Patterson*, 386 U.S. 605 (1967). In that case which dealt with a post-conviction proceeding under a State Sex Offenders Act, the court said:

Due process, in other words, requires that [the defendant] be present with counsel, have an opportunity to be heard, be con-

fronted with witnesses against him, have the right to cross-examination, and to offer evidence of his own. And there must be findings adequate to make meaningful an appeal that is allowed. 386 U.S. at 610.

While it is not entirely certain that all of these procedures would be required prior to the imposition of an extended penalty for a specific crime (as distinguished from a sex offender commitment that is triggered by, but separate from, the conviction for a crime), it is probable that more is required before imposing an extended sentence than is necessary to ordinary sentencing procedure. Short of a full jury trial, it is not clear what the procedural requirements for extended sentencing are.

In order to strengthen the procedures of this proposal against successful constitutional attack, it is suggested that it be amended to provide the following procedural safeguards in addition to its provisions for notice and hearing: (1) a requirement that the defendant be furnished a copy of the presentence report with the names of confidential sources deleted where necessary; (2) the right to counsel and opportunity to cross-examine any witnesses presented by the Government; (3) the right to compulsory attendance of witnesses on the defendant's behalf; (4) a requirement that the court state the basis for imposition of extended sentence.

On the other hand, it is not felt that either a public hearing or strict adherence to the rules of evidence is required. The imposition of sentence on the basis of a preponderance of the evidence also appears to be consistent with due process.

The lack of direct precedent makes it virtually impossible to predict whether these procedures would survive constitutional challenge. On balance they seem fair and consistent with the due process requirements outlined in *Specht (supra)*, and it is certainly arguable that they meet the necessary constitutional requirements.

The third problem with this title is in connection with proposed section 3577 which provides for appellate review of sentence by both the Government and the defendant, and allows an increase of sentence when either the Government or the defendant appeals.

Two constitutional problems at issue here are the double jeopardy question involved in allowing an appeal by the prosecutor, and the due process question involved in allowing an increase of sentence where the defendant appeals.

As to the first, while recent authorities appear to cast some doubt on the constitutionality of this provision, cf. *Patton v. North Carolina*, 381 F. 2d. 636, 645-46 (C.A. 4, 1967), *cert. denied*, 390 U.S. 905 (1968) and *Whaley v. North Carolina*, 379 F. 2d 221 (C.A. 4, 1967), the Supreme Court has upheld an increase in sentence following an appeal by the defendant in at least three cases: *Flemister v. United States*, 207 U.S. 372 (1911); *Ocampo v. United States*, 234 U.S. 91 (1914); *Stroud v. United States*, 251 U.S. 15 (1919). Consequently, it would seem that if these cases are still good law today then the Government should be able to seek an increase in sentence on appeal without violating either due process or the fifth amendment ban on double jeopardy.

The constitutional issue of whether a defendant may be given an increased sentence when he appeals may be decided in two cases now on the docket of the Supreme Court. In these cases, *North Carolina*

v. *Pearce*, No. 413, 1968 term, and *Simpson v. Rice*, No. 418, 1968 term, the issue is squarely presented whether a defendant may be given an increased sentence after his first sentence has been set aside for one reason or another.

In order to avoid the question of due process posed by this provision, it is suggested that this proposal be amended to provide that if the Government fails to exercise its right of appeal within a specified number of days, for example, 10 days, then no increase of sentence may be allowed upon appeal by the defendant after the Government has exercised its option whether to appeal or not.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., June 3, 1969.

HON. JOHN L. McCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further response to your letter of March 17, 1969, requesting information regarding the costs of protecting government witnesses, for use in connection with hearings on S. 30, a bill entitled "The Organized Crime Control Act of 1969."

You asked for the following information:

- (1) The cost of providing and administering protective facilities for witnesses (both Federal and State) broken down by (a) Federal, (b) State, and (c) Federal-State joint facilities;
- (2) The potential liability of Government for failure to protect; and
- (3) The cost of present Federal witness protection efforts.

Title VI of S. 30 would authorize the Attorney General to construct, purchase, or rent such facilities as may be necessary to provide protection for witnesses or potential witnesses and their families in proceedings against any person alleged to have participated in an organized criminal activity, when in the judgment of the Attorney General, such protection is necessary for the safety of the witness or his family from illegal efforts to prevent him from testifying or punish him for testifying. The Attorney General may offer the witness the use of such facilities for as long as he determines that jeopardy to the witness' life or person continues.

In attempting to respond to your request for information about costs for providing and administering witness protection facilities, we offer the following considerations.

First, it is difficult to project the estimated cost of witness protection even reasonably accurately. There are many variables that account for this: the volume and nature of future criminal activities; the extent of the government's success in bringing legal proceedings against such criminal activities; the number of witnesses for the government in such proceedings; the likelihood that the Attorney General might determine the need for protection of witnesses; the number of protective personnel required; the Attorney General's decision as to the type of facility he believes to be adequate for the protection of the witness, its location and availability; and finally, the length of time the Attorney General believes the facility should be available for the use of the witness.

While historical data on the actual costs of such witness protection efforts are of some use in projecting future costs, we do not have avail-

able data for the costs of these efforts in the States. Furthermore, we are unable to project with any degree of precision, the potential impact on the future level of criminal activity of recent Federal efforts to intensify the war on organized crime or the potential impact of the enactment of S. 30.

We are unable to obtain State costs for protecting witnesses. However, we do not believe the requested cost breakdown among Federal, State, and Federal-State joint facilities is essential to developing an estimate of the cost of providing and administering protective facilities for witnesses. Given identical facilities located within the same geographic area, there should be no significant differences in the costs, apart from possible minor differences in salaries of Federal and State protective personnel.

We believe it very unlikely that the Attorney General would determine a need for construction of a special facility for witness protection since this would represent the most costly and least efficient method of obtaining what is essentially part-time space. Notwithstanding that belief, we have determined that, on the basis of current average costs (excluding land acquisition costs) of building construction to the Federal Government—\$30 to \$35 per square foot for a typical Federal office building to \$40 to \$45 per square foot for a maximum security correctional institution, a witness protection facility could probably be built at a cost not greater than \$35 per square foot. This average cost would vary, of course, among different sections of the country.

As you know, extensive use is made currently of facilities located on Department of Defense installations for protecting Federal witnesses. The military installation, because of its restricted access is ideally suited as a facility for protecting witnesses. The cost to the Department of Justice for the use of these facilities has been minimal (Defense rarely has billed the Justice Department for any such expenses). Since the Department of Justice provides its own protective personnel and pays directly for the subsistence costs of the witnesses, the only cost to Defense is for the maintenance of the structure. More extensive use can and should be made of these facilities. On the basis of past experience, we would provide no significant increase in costs related to an increased use of Defense installations.

The other alternative available to the Attorney General is the rental of facilities for protecting witnesses. As indicated above, facilities, usually private residences or apartment units, have been rented in the past for this purpose at costs that vary considerably. The Bureau of Customs reports that the annual cost to the Bureau in 1969 for maintaining one apartment and one private residence for witness protection is \$2,911, while the Internal Revenue Service reports an annual cost of \$6,823 for maintaining one private residence. Presumably, these differences in costs reflect, in part, regional variances in the price of space rental and differences in the quality of the facilities available. The advantage of renting protective facilities is that the rental usually can be quickly terminated when a need develops for shifting the protected witness to some other location or the need for the facility no longer exists. While the government can dispose of a facility it has purchased or constructed, considerable difficulty might be encountered in efforts to locate a market for a witness protection facility.

The largest element of cost in providing protection to Government witnesses has been the cost of salaries and related expenses (e.g., travel, per diem, overtime) for Federal protective personnel. These costs represent 79 to 86 percent of the total expense for witness protection services. Thus, the major cost for increased witness protection would be reflected in the cost of protective personnel—not in the cost of additional facilities. The average cost of protective personnel per protected-witness-day for the period from 1967 to 1969 has ranged between \$47 and \$87, while total costs per protective-witness-day have ranged from \$58 to \$101. An examination of individual agencies reveals an even wider range in the average costs per protected-witness-day—from \$51 in the Bureau of Customs (Fiscal Year 1968) to \$295 in the Secret Service (Fiscal Year 1969). The largest single variable in these costs appears to be the number of protective personnel involved in the protection of a witness. Some factors which determine the number of protective personnel assigned are the seriousness of the threat to the witness, the nature of the criminal act being prosecuted, the proximity of the witness to the threatening force, and the availability of protective personnel in each agency.

For purposes of projecting witness protection costs, we have used the number of indictments brought as the best available indicator of the number of protected-witness days.

In 1968, indictments were obtained against 1,166 individuals in organized crime and racketeering cases. On the basis of an estimated 5,990 protected-witness days during fiscal year 1968, an average of 5.1 protected-witness days was required to bring each indictment. A straight line statistical projection of organized crime indictments since 1961 results in estimated indictments in 1969 of 1,427 and in 1970 of 1,597. On the basis of our understanding of actual experience thus far in fiscal year 1969, these estimates are relatively high, presumably a reflection of the influence on the calculation of the rather dramatic increase in organized crime indictments in the last 3 to 5 years. While we expect that the number of indictments will continue to rise, we believe that the increasing length of time required to develop adequate criminal cases may possibly have a slowing effect on the future rate of increase.

Assuming that the number of organized crime indictments were to increase by 261 to 1,427 in fiscal year 1969, and using the average of 5.1 protected-witness-days for each indictment at an average cost per protected-witness-day of \$101, the increase over fiscal year 1968 would be \$130,300 or a total cost for Federal witness protection efforts of \$735,000. (Our enclosed table shows actual costs through March 1969.)

We have asked the Department of Justice to report to you, separately, on the issue you raised concerning the Government's liability for failure to protect witnesses.

The enclosed tabulation, which was developed from data provided by the Department of Justice and the Treasury Department, responds to your request for a third study showing the cost of present Federal witness protection efforts.

I hope you will find this information helpful in your final drafting of S. 30.

Sincerely,

PHILLIP S. HUGHES,
Deputy Director.

ESTIMATED COSTS OF FEDERAL WITNESS PROTECTION, FISCAL YEARS 1967, 1968, AND 1969

	Subsistence and other witness expenses	Rental of quarters	Transporta- tion, moving, and storage	Protective personnel expenses	Total
Fiscal year 1967:					
Department of Justice.....	\$9,996	\$1,575	\$1,161	\$65,772	\$78,504
Treasury Department.....	23,115	6,823		123,082	153,020
Total, fiscal year 1967.....	33,111	8,398	1,161	188,854	231,524
Fiscal year 1968:					
Department of Justice.....	34,268	11,600	7,715	462,451	516,034
Treasury Department.....	25,865	6,823		55,959	88,647
Total, fiscal year 1968.....	60,133	18,423	7,715	518,410	604,681
Fiscal year 1969: ¹					
Department of Justice.....	56,803	7,646	12,792	361,253	438,494
Treasury Department.....	19,028	9,734	285	39,257	68,304
Total, fiscal year 1969 (through Mar. 31, 1969).....	75,831	17,380	13,077	400,510	506,798

¹ Data is for $\frac{3}{4}$ of the current fiscal year 1969.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., August 11, 1969.

HON. JOHN L. McCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the Department of Justice's views on S. 1861 a bill designed to prohibit the infiltration of legitimate organizations by racketeers. As you were advised by Assistant Attorney General Will Wilson during his appearance before the subcommittee on June 3, 1969, the Department had initiated an intensive study of this bill. This study is now completed, and I am submitting to you the Department's views on this bill's innovative approach to the problem of racketeer infiltration of legitimate business.

The Department favors the objectives of S. 1861, and believes that with some possible revisions its combination of criminal penalties and civil remedies, which has been highly effective in removing and preventing harmful behavior in the field of trade and commerce, may be effectively utilized to remove the influence of organized crime from legitimate business. While, then, we believe this bill has great merit, we do have problems with respect to certain of its provisions as presently drafted. These problems involve certain of the definitions contained in section 1961, and the breadth of the prohibition contained in section 1962(a).

Section 1961 is a definition section, containing the definition of such terms as racketeering activity, interstate commerce, State, person, enterprise, pattern of racketeering activity, unlawful debt, racketeering order, racketeering investigation, racketeering violation, racketeering investigator, and documentary material.

It is felt that the definition of the term "racketeering activity" contained in section 1961(1)(A), "any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than 1 year," is too

broad and would result in a large number of unintended applications, as well as tending toward a complete federalization of criminal justice. It is suggested, therefore, that section 1961(1)(A) be redefined as follows:

(1) The term "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, usury, or dealing in narcotic drugs, marihuana or other dangerous drugs, which is indictable under State law and punishable by imprisonment for more than 1 year.

It is felt that by thus narrowing the definition of the class of applicable State crimes in terms of their generic meaning, the definition of "racketeering activity" contained in section 1961(1)(A) will be both broad enough to include most State statutes customarily invoked against organized crime, yet narrow enough to be constitutional. *United States v. Nardello*, 393 U.S. 286 (1969).

Section 1961(6) defines the term "pattern of racketeering activity" as follows:

The term "pattern of racketeering activity" includes at least one act occurring after the effective date of this chapter.

The term "pattern" indicates that what is intended to be proscribed is not a single, isolated act of "racketeering activity," but at least two such acts. In order to clarify this purpose, it is suggested that the term be redefined as follows:

(6) The term "pattern of racketeering activity" means at least two acts, one of which occurred after the effective date of this chapter.

Turning to the substantive provisions of the bill, section 1962 contains three general types of prohibited racketeering activities. Under subsection (a) it shall be unlawful for any person who has knowingly received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of an interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Under subsection (b) it shall be unlawful for any person to acquire or maintain, directly or indirectly, any interest in or control of an enterprise engaged in or the activities of which affect interstate or foreign commerce through a pattern of racketeering activity or through collection of unlawful debt.

Under subsection (c) it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

It is felt that the provisions of subsection (a) are so indefinite as to intent as to raise serious constitutional problems. Under the language of the subsection as presently drawn, it is not clear whether the prohibition is aimed primarily at the person who is an active participant in illegal enterprises or at the person who does business with such a participant, or both. If the provision is intended to reach the person who knowingly receives income derived directly or indirectly from a pattern of racketeering activity in which he did not participate, there are problems not only of vagueness of definition but also of proof.

Since indirect derivation is covered, the subsection appears to cover receipt in a legal transaction where the recipient has reason to believe that the person who paid it to him, or perhaps even a more remote party, obtained it illegally. How far back in the chain may one go to find an illegal source of funds? Furthermore, since money is fungible, is the prohibition intended to extend only to income which can somehow be identified with particular racketeering transactions, or must one who does business with or performs services for a person with a criminal reputation assume that some part of any payment he receives represents illicit profits?

If the prohibition is given a narrow interpretation, as seems likely, it is doubtful that it would cover more than is presently covered by 18 U.S.C. 3, accessory after the fact, and 18 U.S.C. 4, misprision of felony. To the extent it is given a broader interpretation, it might well be held to be void for vagueness. See *United States v. Cohen Grocery Company*, 255 U.S. 81 (1921); *Screws v. United States*, 325 U.S. 91, 94-98 (1945).

Since the prohibition is intended to be aimed primarily at the person who is an active participant in illegal enterprises, it is felt that this problem of vagueness can be remedied by amending subsection (a) to insert the following language after the phrase "from a pattern of racketeering activity":

in which such person has participated as a principal within the meaning of section 2, title 18, United States Code.

This resolution of the problem is in accord with the decision of Judge Hand enunciated in *United States v. Peoni*, 100 F. 2d, 401-402 (2nd Cir. 1938) holding that complicity ought to equal a stake in the venture, which is now the majority rule of the circuits. But see the opinion of Judge Parker in *United States v. Backum*, 112 F. 2d 635, 637 (4th Cir. 1940).

While perhaps not rising to the level of a constitutional defect, it is felt that subsection (a)'s total ban on the acquisition of any interest in an enterprise, including the purchase of even a single share of stock, is unnecessary and beyond the scope of the evil at which the legislation is aimed. Accordingly, it is recommended that this total stricture be modified so as to allow the purchase of securities on the open market for ordinary investment purposes by amending subsection (a) to insert the following provision at the end thereof:

Provided, That a purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be a violation of this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their associates in any pattern of racketeering activity after such purchase do not amount in the aggregate to 1 percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

The prohibitions contained in section 1962 of the bill appear to be broad enough to cover most of the methods by which ownership, control, and operation of business concerns are achieved. While there are unquestionably considerable problems of proof involved in the tracing of funds known to be derived from racketeering activities to

their eventual investment in a business enterprise in establishing a violation of subsection (a) of section 1962, no such problems exist with respect to proving violations of subsections (b) and (c) thereof, since investment of such funds need not be an element of these offenses. Some violations of subsections (b) and (c) may by their very nature also constitute violations of the Hobbs Act, 18 U.S.C. 1951, or the Travel Act, 18 U.S.C. 1952. Since however, the thrust of the prohibitions contained in section 1962 is aimed at a "pattern of racketeering activity," that is, two or more acts of racketeering activity, the multiple violations of these statutes involved in the proof under subsections (b) and (c) may be treated as a separate offense.

Section 1963 contains criminal penalties for violations of section 1962. These include, in addition to a fine of not more than \$10,000, or imprisonment for not more than 20 years, or both, forfeiture of all interest in the enterprise. The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is in rem against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense. Examples of such forfeiture provisions are those contained in the customs, narcotics, and revenue laws. Such statutes having been uniformly upheld against the objection that they violate due process on the grounds that they are wholly preventive and remedial and are designed to aid the enforcement of the particular laws in question and to restrain violations thereof. In upholding such a statute in *Goldsmith-Grant Company v. United States*, 254 U.S. 505 (1921), the Supreme Court held at 511:

But whether the reason for section 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisdiction of this country to be now displaced.

Under the criminal forfeiture provision of section 1963, however, the proceeding is in personam against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or imprisonment, but also by forfeiture of all interest in the enterprise. The concept is derived from the practice well known in the early law where upon conviction of treason and certain other felonies the party forfeited his goods and chattels to the crown. *The Palmyra*, 12 Wheat. 1, 25 U.S. 1 (1827), opinion of Mr. Justice Storey at 14. According to Blackstone, the only valid reason for this type of forfeiture is that since all property is derived from society, any member of society who violates the fundamental contract of his association by transgressing society's laws forfeits his right to that property, and the state may justly resume that portion of the property which the laws have previously assigned him. *Commentaries*, ch. 8, 229-300, XVI.

While there is some indication that this concept of criminal forfeiture was in usage in the colonies, the First Congress by act of April 20, 1790, abolished forfeiture of estate and corruption of blood, including in cases of treason. That statute, as revised, is found in 18 U.S.C. 3563 which states: "No conviction or judgment shall work corruption of blood or any forfeiture of estate." From that date to the present, therefore, no Federal statute has provided for a penalty of forfeiture

as a punishment for violation of a criminal statute of the United States. Section 1963(a), therefore, would repeal 18 U.S.C. 3563 by implication.

It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of congressional wisdom rather than a constitutional power. See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), opinion of Mr. Justice Frankfurter at 441, holding that whether proscribed conduct is to be visited by a criminal prosecution or by other remedies is a matter of legislative choice.

Section 1964 contains civil remedies for violation of the prohibitions contained in section 1962. These include injunctive relief, divestiture and dissolution. The Attorney General or an Assistant Attorney General designated by him may institute proceedings to prevent and restrain violations of section 1962, and a final decree or judgment rendered in favor of the United States in any such criminal proceeding shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States. These civil remedies are buttressed by other provisions of the bill, patterned on the antitrust laws, which provide for broad venue and process (sec. 1965), expedition of actions upon certification to the court by the Attorney General that in his opinion the case is of general public importance (sec. 1966), open depositions and a "use restriction" immunity provision similar to those contained in S. 30 and S. 2122 (sec. 1967), and a civil investigative demand similar to that contained in 15 U.S.C. 1312-14, which is used by the Department in civil antitrust action. Under the provisions of section 1968, whenever the Attorney General has reason to believe that any person or enterprise under investigation may be in possession of documentary material relevant to a civil racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing and cause to be served on such person, a civil investigative demand requiring such person to produce such material for examination. This section also provides for the custody of such material by the Government, its return upon completion of examination to the producer, and a judicial enforcement proceeding whenever any person fails to comply with any civil investigative demand.

While the criminal penalties provided in section 1963 will doubtless have a deterrent effect on racketeer infiltration of legitimate business enterprises, the principal utility of S. 1861 may well be found to exist in its civil remedies provisions—injunction, divestiture and dissolution—contained in section 1964, supported as they are by the broad discovery and procedural devices contained in sections 1965 through 1968. We have no objection to any of these provisions, and note that they are substantially identical to existing provisions of the antitrust laws. There is ample precedent for application of these civil remedies to the conduct sought to be prohibited by this bill in decisions of the Supreme Court upholding similar civil remedies in antitrust cases. The remedy of divestiture of interest was upheld in the landmark decision in *United States v. Dupont & Co.*, 366 U.S. 316, 326-27 (1961). Prohibition against engaging in certain types of legitimate

activities was approved in such cases as *United States v. Swift & Co.*, 286 U.S. 106 (1932), and *Deveau v. Braisted*, 363 U.S. 144 (1960). Authority for dissolution may be found in *International Boxing Club of New York v. United States*, 258 U.S. 242 (1959). See also the recent decision of the Supreme Court in *Utah Public Service Commission v. El Paso Natural Gas Co.*, decided June 16, 1969, a Clayton Act case where the Court decreed complete divestiture "without delay," emphasizing at page 7 of the slip opinion that "the pinch on private interests is not relevant to fashioning an antitrust decree, as the public interest is our sole concern."

These time tested remedies, particularly when used in conjunction with the civil investigative demand contained in section 1968, should enable the Government to intervene in many situations which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure under which section 1964 actions are governed, with its lesser standard of proof, non-injury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity. Finally, these remedies are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the Court to insure that its decrees are not violated.

With the amendments which I have suggested, then, the Department favors the enactment of this bill and believes that it can make a substantial contribution to the Government's program for eliminating the serious threat which organized crime's entry into legitimate business poses to the proper functioning of the American economic system.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., August 11, 1969.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 1861, to amend title 18, United States Code, to prohibit the infiltration or management of legitimate organizations by racketeering activity or the proceeds of racketeering activity, where interstate or foreign commerce is affected, and for other purposes.

The bill would make applicable to racketeering activities certain equitable remedies developed in antitrust law for the purpose of preventing the infiltration of legitimate organizations by racketeers. The Department is in general agreement with this objective. We have, however, the following recommendations with regard to specific provisions of the bill.

Section 2(a) of the bill would add a new chapter 96 to title 18 of the United States Code. The proposed section 1961(6) of title 18 would define the term "pattern of racketeering" to include at least one act occurring after the effective date of the chapter. For clarification, we recommend that "of racketeering activity" be inserted after "act" on page 5, line 4.

The proposed section 1961(11) would define the term "racketeering investigator" to mean any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect the proposed chapter. Since section 1961(1) would include in the definition of the term "racketeering activity" any act which is indictable under sections 471, 472, and 473 of title 18 (relating to counterfeiting), the Department recommends that the definition of "racketeering investigator" in section 1961(11) be expanded to include "any attorney or investigator employed by the Department of the Treasury." The U.S. Secret Service of this Department has investigative jurisdiction over crimes relating to counterfeiting of coins, obligations, and other securities of the United States, and of course, the Treasury is engaged in the drive against organized crime on a full partnership basis with the Department of Justice. Those agents of the Secret Service serving on strike forces, for example, and conducting counterfeiting investigations would certainly be properly called "racketeering investigators."

Section 1963(c), in providing for forfeiture of property, would also provide on page 8, lines 6-10:

"Such duties as are imposed upon the *collector of customs* or any other person with respect to the disposition of property under the *customs laws* shall be performed under this chapter by the Attorney General, or any Assistant Attorney General designated by the Attorney General." [Emphasis added.]

The Department objects to this provision and recommends the following language in lieu thereof:

"Such duties as are imposed upon customs officers or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Secretary of the Treasury or his delegate."

In section 1962, page 6, line 10, the word "by" should read "of".

In section 1967, page 11, line 25, "self-discrimination," should apparently read "self-incrimination".

Section 1968(a)(7) would provide that a "racketeering investigator" shall serve as such upon designation by the Attorney General. Thereafter, subparagraph (iii) would provide on page 16, lines 6-11:

"While in the possession of the custodian, no material so produced shall be available for examination, without the comment of the person who produced such material, by any individual other than a *duly authorized officer, member, or employee of the Department of Justice.*" [Emphasis added.]

Consistent with the above recommendation that "racketeering investigator" be defined to include Treasury agents who would as such be eligible for designation by the Attorney General as racketeer document custodians, and consistent with the status of the Treasury Department as a full partner of the Department of Justice in the drive against organized crime, the language of subparagraph (iii)

should be modified so as to include "any duly authorized officer, member, or employee of the Department of the Treasury." This would also require that subparagraph (v), page 17, line 17, be amended to insert "or Department of the Treasury" following "Department of Justice".

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

ROY T. ENGLERT,
Acting General Counsel.

SMALL BUSINESS ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR,
Washington, D.C., August 20, 1969.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of April 28, requesting the views of the Small Business Administration on S. 1861.

S. 1861 is designed to combat the infiltration of legitimate business by organized crime. In substance, the bill would make it unlawful for any person to invest in such a business any money knowingly derived by him from "racketeering activity," as that term is defined therein. Criminal penalties and civil remedies would be established.

It is hardly necessary to say that we have strong sympathy with the objectives of this legislation. However we are not qualified to evaluate the merits of the specific means proposed in the bill for the achievement of these objectives. With respect to that aspect of S. 1861, we would be guided by the views of the Department of Justice.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

HILARY SANDOVAL, Jr.,
Administrator.

DEPARTMENT OF JUSTICE,
July 18, 1969.

HON. JOHN L. McCLELLAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR McCLELLAN: This is in response to your letter of June 6, 1969, requesting my views on several questions you have posed regarding certain of the proposals contained in S. 30.

In view of the provisions of title I which would allow extension of the grand jury's 18-month term to 36 months, I agree that it might be advisable to include language which would permit issuance of an earlier report in special situations. This would be accomplished by amending the first sentence of proposed section 3330(a) to read, in pertinent part, as follows:

"(a) A grand jury impaneled by any district court, with the concurrence of a majority of its members, may upon completion of its original term, or any extension thereof, submit a report"

Your suggestion that title I be amended to require the impaneling of a special grand jury in each district having a population in excess of 4 million people, but authorizing the Attorney General to request special grand juries "elsewhere" appears to be acceptable, except for the "elsewhere" qualification. Since our experience has been that special grand juries are most often required in the larger, busier districts, we would suggest that the Attorney General be authorized to request special grand juries in any district, including those where a grand jury is required because of the 4 million population figure, where he certifies that a serious organized crime problem exists. This could be accomplished by amending the first sentence of the proposed revision of section 3322 of title 18 to read as follows:

"(a) Each district court shall order one or more grand juries to be summoned at such time as the public interest requires, except that in each district having a population in excess of 4 million people, the district court thereof shall order a grand jury to be summoned at least once in each period of 18 months. In addition, whenever the Attorney General certifies in writing to the chief judge of the district that in his judgment a grand jury is necessary because of major organized crime activity in the district, the district court thereof shall order a grand jury to be summoned."

During my appearance before the subcommittee on June 3, in commenting upon another provision of title I which would permit the grand jury to petition the Attorney General for replacement of an attorney or investigative agent, I indicated that the Department was opposed to this provision, but that we would like an opportunity to consider some possible alternate language. After due consideration of the matter, however, we are unable to suggest any suitable alternate language, and we, therefore, reiterate our opposition to this provision on the grounds previously stated in the Attorney General's written comments to the Subcommittee on S. 30.

With respect to title IV, despite the line of cases such as *United States v. Marchisio*, 344 F. 2d 635 (2nd Cir. 1965), holding that the special evidentiary rules relating to perjury are not applicable to the general false statement provision contained in 18 U.S.C. 1001, we adhere to the view that express language setting aside these rules is required with respect to the instant provision which would create an additional penalty for perjury but is nearly indistinguishable from the perjury provision contained in 18 U.S.C. 1621. While the Courts of Appeals which have ruled on this matter in relation to Section 1001 have rejected these rules (but see dissent of Judge Bazelon in *Gold v. United States*, 237 F. 2d 764 (C.A.D.C. 1956) at pages 765-767 expressing the view that Section 1001 is virtually identical to perjury, and *Fisher v. United States*, 231 F. 2d 99 (9th Cir. 1956), holding that the question is a close one), the Supreme Court has not yet ruled on the question. In order to remove any doubt as to the legislative intent in this matter, therefore, it is suggested that the safer procedure would be to abolish these outmoded evidentiary rules by explicit language in the statute such as we have previously suggested in our written comments on this provision of S. 30.

Inclusion of the phrase "proceedings before or ancillary to any court or grand jury" in the false statement provision would in our opinion adequately bring within the coverage of the provision pre-trial depositions such as that contained in S. 1861.

With respect to title V, dealing with pretrial depositions, we would favor a provision here authorizing the jury to consider prior inconsistent statements as substantive evidence either where the statement was originally given under cross-examination or where the witness was available for cross-examination at the trial. As you have pointed out, such a rule has been suggested by the Model Code of Evidence, the Uniform Rules of Evidence, the proposed Rules of Evidence for the United States District Courts and Magistrates, and a number of leading commentators. We believe that the opportunity for effective cross-examination present in both of these situations affords a sound basis for making them exceptions to the hearsay rule which are constitutionally acceptable.

As to title VI, dealing with the protection of Government witnesses, we believe that the following language would achieve the objective of granting the Attorney General broader discretion in this matter:

"The Attorney General of the United States is authorized to rent, purchase, or construct protected housing facilities and to otherwise provide for the health, safety, and welfare of witnesses and persons intended to be called as witnesses by the United States, and the families of witnesses and persons intended to be called as witnesses by the United States, in legal proceedings instituted by the United States against any person alleged to have participated in an organized criminal activity whenever, in his judgment testimony from, or a willingness to testify by, such a witness or person intended to be called as a witness by the United States would place his life or person, or the life or person of a member of his family or household in jeopardy."

You have also asked for my comments on how the definitions of both "organized crime offender" and "professional offender" contained in the special offender sentencing provisions of either S. 30 or S. 976 could be made more definite. As was stated in our written comments on S. 30, the definition of "organized crime offender" appears to be sufficiently definite to define the type of person sought to be covered with a fair degree of accuracy. We feel, however, that the definition is a complicated one and that proof of its many elements will be difficult to establish. In our judgment, proof of the element of "a structured division of labor" will be particularly difficult to establish. In view of this, therefore, we would suggest that this element be deleted from the definition of "organized crime offender" in S. 30.

We also stated in our written comments on S. 30 that the definition of "professional offender" appears to be so vague as to violate due process. While it may be possible to make it more definite by tying it in more closely to a pattern of conduct rather than a source of income, we are unable to suggest any language which we feel would make it constitutionally acceptable. In view of the manifest difficulty in attempting to frame appropriate language for this definition, therefore, we would suggest that the category of "professional offender" be deleted from the bills. It would seem, in any event, that many "professional offenders" would be covered by the "habitual offenders" provisions of title VIII of S. 30, or in some cases by the organized crime offenders provisions of this same title.

During my appearance before the subcommittee on June 3, and during my discussion of S. 2022, which would make it unlawful to participate in an illegal gambling business, I agreed at your suggestion

to draft a forfeiture provision which would cover the equipment or money used in the operation of such an illegal gambling business. I am, therefore, pleased to submit the following provision as an amendment to title II of S. 2022 which it is believed will accomplish the objective sought:

“(e) It shall be unlawful to have or possess any property including money, intended for use in violating the provisions of this section or which has been so used, and no property rights shall exist in any such property. Such property shall be seized and forfeited to the United States. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property.”

“All provisions of law relating to the seizure, summary and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws: the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof; *Provided*, that such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.”

Please advise me if I can be of further assistance to the subcommittee in connection with these matters.

The Bureau of the Budget has advised that enactment of this legislation, amended as suggested, is in accord with the program of the President.

Sincerely,

WILL WILSON,
Assistant Attorney General.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, D.C., July 24, 1969.

HON. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: By letter dated July 18, 1969, the Corporation expressed to you its views with respect to S. 2122, 91st Congress, a bill to amend title 18, United States Code, to prescribe the manner in which a witness in a Federal proceeding may be ordered to provide information after asserting his privilege against self-incrimination and to define the scope of the immunity to be provided such witness with respect to information provided under an order. The letter concluded with a paragraph indicating that we had been unable to obtain the views of the Bureau of the Budget with respect to the letter in time to meet your schedule.

On July 22, 1969, the Bureau of the Budget telephoned to us the following advice regarding our letter:

"The Bureau of the Budget has advised us that while there would be no objection to the presentation of whatever report we deemed appropriate, the enactment of legislation along the lines of S. 2122 would be in accord with the program of the President and the recommendation of the Corporation contained in its report is not consistent with S. 2122."

The language quoted should be substituted for the last paragraph of the Corporation's letter of July 18, 1969.

Sincerely,

K. A. RANDALL, *Chairman.*

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, D.C., July 18, 1969.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request for the views of the Corporation on S. 2122, 91st Congress, a bill to amend title 18, United States Code, to prescribe the manner in which a witness in a Federal proceeding may be ordered to provide information after asserting his privilege against self-incrimination and to define the scope of the immunity to be provided such witness with respect to information provided under an order.⁵⁹

Among other things, the bill would authorize an agency of the United States (including the Federal Deposit Insurance Corporation), in the case of any individual who had been or might be called to testify or provide other information at any proceeding before it, to issue an order requiring the individual to give any testimony or provide any other information which he refused to give or provide on the basis of his privilege against self-incrimination. An agency could issue such an order only if in its judgment (1) the testimony or other information might be necessary to the public interest and (2) the individual had refused or might likely refuse to testify or provide other information on the basis of his privilege against self-incrimination. An agency could issue such an order no earlier than 10 days after the day on which it served the Attorney General with notice of its intention to issue the order.

Under the provisions of the bill, whenever a witness refused, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before an agency and the person presiding over the proceeding communicated to the witness the issuance of an order requiring the testimony or other information, the witness could not thereafter refuse to comply with the order on the basis of his privilege against self-incrimination. However, no testimony or other information compelled under the order—or any information directly or indirectly derived from such testimony or other information—could be used against the witness in any criminal case except

⁵⁹ Favorable comments on S. 2122 were received from the following additional agencies: Atomic Energy Commission, Civil Aeronautics Board, Federal Power Commission, Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, National Transportation Safety Board, Railroad Retirement Board, Securities and Exchange Commission, and Subversive Active Control Board. See hearing at 522-524.

a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

These provisions of the bill would replace the last sentence of section 10(d) of the Federal Deposit Insurance Act (12 U.S.C. 1820(d)) which currently provides that—

“No person shall be excused from attending and testifying or from producing books, records, or other papers in obedience to a subpoena issued [by the Board of Directors of the Corporation in connection with examinations of insured banks] on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.”

The scope of the immunity provided witnesses in proceedings before the Corporation therefore would be converted by the bill from immunity of witnesses from prosecution for all matters related to their testimony to immunity from use of the testimony, or its fruits, against the witnesses in criminal cases.

The Corporation recommends that the specific grant of immunity contained in the fourth sentence of section 10(d) of the Federal Deposit Insurance Act be retained.

As you know, one of the chief functions of the Corporation is to insure the deposits of all banks which are entitled to the benefits of deposit insurance by statutes. All banks that are members of the Federal Reserve System—including national banks chartered by the Comptroller of the Currency under Federal statutes and State-chartered banks admitted to membership in the Federal Reserve System—acquire Federal deposit insurance upon certification to the Corporation by either the Comptroller of the Currency or the Board of Governors of the Federal Reserve System. State-chartered commercial banks that are not members of the Federal Reserve System and mutual savings may become insured upon application to and approval for insurance by the Corporation's Board of Directors.

In performing its insurance function, the Corporation—in cooperation with State supervisory authorities—is authorized to examine insured State banks that are not members of the Federal Reserve System. The Corporation's examiners also are authorized to make special examinations of State members banks and of national and district banks whenever in the judgment of the Board of Directors such examinations are necessary to determine the condition of such banks for insurance purposes. Through proper bank examination, the Corporation is able to determine the condition of each bank and thereby to appraise the risks being assumed in insuring its deposits.

In making examinations of insured banks, examiners appointed by the Corporation are empowered, pursuant to section 10(b) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1820(b)), to make a “thorough” examination of all of the affairs of a bank and its affiliates and are directed to make a full and detailed report of the condition of the bank to the Corporation. The enactment of S. 2122 in its present form could be construed as repealing by implication the

visitation powers conferred upon the Corporation by the Federal Deposit Insurance Act and could have the effect of seriously hindering the Corporation in the performance of its statutory responsibility for conducting—through its examiners—a “thorough” examination of all of the affairs of a bank and its affiliates.

The enactment of legislation that would convert the scope of the immunity provided witnesses in proceedings before the Corporation from immunity of witnesses from prosecution for all matters related to their testimony to immunity from use of the testimony, or its fruits, against the witnesses in criminal cases might also make it more difficult for the Corporation to obtain information from individuals that relates to the risks being assumed by the Corporation in insuring bank deposits.

Moreover, in order for the Corporation properly to perform its function, it is essential that all records of a bank be immediately available to the Corporation’s examiners during their regular examination of insured State nonmember banks and that the Corporation not be required to serve the Attorney General with notice of its intention to issue an order requiring testimony or other information at least 10 days before the issuance of such an order. As a matter of fact, it is the Corporation’s belief that banks applying for and approved for insurance under the provisions of the Federal Deposit Insurance Act consent to making all their records available to the Corporation and its examiners and that such records are not privileged as against the Corporation. In our opinion, repeal of the specific grant of immunity contained in the fourth sentence of section 10(d) of the Federal Deposit Insurance Act would undermine to some extent the concept of examination and supervision by consent and would seriously impede the examination process.

For the foregoing reasons, the Corporation recommends that section 204 of the bill be deleted. In order to conform other provisions of the bill to our suggested amendment, the proposed section 6005(1) of title 18, United States Code, should be redrafted so as to delete the words “the Federal Deposit Insurance Corporation.”

During hearings on the proposed “Financial Institutions Act of 1957,” the Corporation recommended repeal of the specific grant of immunity contained in the fourth sentence of section 10(d) of the Federal Deposit Insurance Act. A review of that recommendation in the light of more recent experience, however, suggests that retention of the specific grant of immunity contained in that sentence is desirable as a useful supervisory tool.

In support of its request for retention of the specific grant of immunity contained in the fourth sentence of section 10(d) of the Federal Deposit Insurance Act, the Corporation notes that the general thrust of S. 2122 is directed at organized crime. Whenever, during the course of an examination of an insured State nonmember bank, the Corporation’s examiners discover possible criminal violations, it submits reports concerning those violations to the United States Attorney. Subsequent investigations of those violations are handled by the Department of Justice and the general immunity provision proposed by S. 2122 would apply to those investigations.

We have been unable to obtain the views of the Bureau of the Budget with respect to this report in time to meet your schedule.

Sincerely,

K. A. RANDALL, *Chairman.*

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., September 9, 1969.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 2292, a bill "to amend Chapter 223, title 18, United States Code, to regulate litigation concerning sources of evidence, and for other purposes."

The bill would add a Section 3503 to Title 18. Subsection (a) of Section 3503 would preclude a court's consideration of a defendant's claim that evidence is inadmissible as derived from an allegedly illegal act, if the event to which the evidence relates occurred more than five years after the allegedly illegal act. Subsection (b) of Section 3503 would preclude a court from ordering the disclosure to a defendant of information illegally obtained by the government, unless the court first finds that the information may be relevant to the determination of the admissibility of evidence and that the disclosure is in the interest of justice.

We strongly favor the enactment of the provisions of Section 3503(a). We also favor the enactment of an expanded section incorporating a modified version of the provisions of Section 3503(b), recognizing that its primary value will lie in its near-term application.

We suggest, however, that the general scope of the bill be modified so that the illegal acts encompassed by it include only unlawful electronic eavesdroppings or wiretappings. As presently drafted, the bill may be interpreted to cover unlawfully-obtained confessions. Since the primary concern prompting the proposed legislation stems from the current status of the law applicable to hearings on electronic surveillance matters, and since Fifth Amendment considerations may be expected to raise independent problems, it appears that a limitation in scope would permit the accomplishment of the principal purpose of the legislation while rendering it less susceptible to collateral difficulties.

If the illegal acts encompassed by the bill are so limited, it would appear appropriate that the provisions be enacted as an amendment to the current Section 2518(10)(a), rather than as a separate section. Section 2518(10)(a) is directed to the same general problem, and currently contains one of the express provisions of the proposed Section 3503(b). For the sake of convenience, however, we will address our following comments to the provisions of the proposed bill in its present format.

SECTION 3503(a)

Section 3503(a) provides that no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was come at by exploitation of an allegedly illegal act, if such event occurred more than five years after such allegedly illegal act.

The factual situation which would be reached by the subsection is a very limited one. From the reference to evidence "come at by exploitation" of an illegality, the phrase employed by the Supreme Court in *Wong Sun v. United States*, 371 U.S. 471, 488, and from the remarks of Senator McClellan in introducing S. 2292 on May 29, 1969, we understand that this subsection is not intended to apply to evidence obtained directly through an illegal act, but is intended instead to apply only to evidence allegedly discovered through leads developed from directly-obtained evidence. Consequently, the subsection as written would preclude a defendant from challenging the source of government evidence in very few situations. A defendant would still be able to challenge the admissibility of all evidence allegedly obtained directly through an illegal act. A defendant would still be able to challenge the admissibility of all evidence allegedly obtained indirectly through an illegal act where the event to which the evidence relates has occurred prior to the illegality. A defendant would still be able to challenge the admissibility of all evidence obtained indirectly through an illegal act even in the situation where the illegality precedes the event to which the evidence relates, as long as the intervening period is less than five years.

The limited factual situation in which the subsection would preclude a defendant from obtaining a hearing on a claim that evidence was unlawfully obtained, is a situation where a defendant's chance of establishing taint is highly remote at best. Where government evidence is claimed by a defendant to have been indirectly derived from an illegal act, and thus be to inadmissible as "fruit of the poisonous tree", the government may avoid suppression by making either of two showings. First, it may demonstrate that knowledge of the same evidence

was also gained from an independent source, *Costello v. United States*, 365 U.S. 265, 280; *Nardone v. United States*, 308 U.S. 338, 341; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392. Second, even if there was in fact a causal connection between the obtaining of the evidence and the original illegality, the government may demonstrate that the relationship between the two had become attenuated as to dissipate the taint. *Alderman v. United States*, 394 U.S. 165, 180-181; *Wong-Sun v. United States*, 371 U.S. 471, 487; *Nardone v. United States*, *supra*, at 341. Where a surveillance is found to have been unlawful, the Federal government has always made every effort to ensure that no evidence thereby obtained, either directly or indirectly, is ever used in a criminal prosecution. Consequently, in cases where a crime is committed and then an unlawful surveillance occurs, the government has almost always been able to show that the derivation of allegedly tainted evidence in fact was either independent or attenuated.

In cases where an unlawful surveillance precedes the commission of the crime involved, there is a substantially reduced likelihood that the former would have led to evidence of the latter, and the decided cases reflect this. See, e.g., *Desist v. United States*, 394 U.S. 244, 247 n. 5; *United States v. Clay*, (S.D. Tex., Cr. No. 67-H-94, decided July 14, 1969). In cases where an unlawful surveillance precedes the commission of the charged offense by a period of time of five years or more, the chance that the surveillance led to proffered evidence of the offense is highly impossible. We are aware of no such case where evidence offered by the government was found to be tainted. As a practical matter, evidence obtained through a surveillance five years before a charged offense can provide, as to that offense, only general background information concerning the perpetrator—the kind of general information that is usually duplicated by similar information from several independent sources over such a protracted period of time, at least when the subject is one of continuing interest to law enforcement officials as in most such situations. In any event, whether or not similar evidence is accumulated from independent sources over the five-year period, the passage of time itself has such an attenuating effect that any causal thread between the old illegality and the evidence of the later offense can hardly be found to demonstrate an “exploitation” of illegality within the meaning of *Wong Sun*.

In view of the limited situation covered by the subsection, and the high degree of improbability that a defendant would be able to establish in such a situation that proffered evidence was tainted, the subsection will very seldom, if ever, permit the introduction of evidence which could not have been found admissible under prior law. Consequently, the practical effect of the subsection will not be to avoid limitations on admissibility, but only to avoid fruitless hearings on admissibility. Such hearings, in the factual circumstances reached by the proposed statute, appear to be sought more often for purposes of delay than for legitimate purposes. By avoiding the costs in time and manpower that such hearings can be expected to require in the future, the proposed subsection could substantially promote the efficient administration of justice and yet impinge to a minimum upon the availability of hearings for good-faith claims.

Since the principal, underlying reason for enacting this subsection is the inherent baselessness of claims of evidentiary taint when five years has passed between the illegality and the offense, we suggest that a more specific finding be made on this point. Section 1(3) now sets forth a finding “that when such claims concern evidence of events occurring years after the allegedly illegal acts, those consequences of litigation and disclosure are aggravated and the claims seldom appear valid and often cannot reliably be determined.” This could be read as a legislative finding that there are some valid claims that the proposed Section 3503(a) would sacrifice to the need for judicial economy. As noted previously, we are aware of no prior cases where evidence of events has been held to have been tainted by illegal acts which occurred five years or more before the events in question. We suggest, therefore, that the phrase “seldom appear valid and” be deleted from Section 1(3). We also suggest that a subsection (4) should be added to Section 1 of S. 2292, stating “that experience has shown that when the allegedly illegal acts have occurred more than five years prior to the event in question, there is virtually no likelihood that the evidence offered to prove the event has been come at by the exploitation of that illegality.”

We note that the proposed Section 3503(a) invites an analogy to a statute of limitations, and that a qualified analogy has in fact been acknowledged (115 Cong. Rec. S 5814 (daily ed., May 29, 1969)). One of the bases for statutes of limitations is that a party who has slept on his rights for so long as to impair the availability of countervailing evidence should be precluded from raising the matter belatedly. No corresponding theory of fault or laches is available in the

situations to which 3503(a) would apply. A more commonly-acknowledged basis for such statutes of limitations, however, is the pragmatic need to spare the courts from the litigation of stale claims, whether meritorious or fraudulent, which cannot reliably be determined because of the erosion of evidence by the passage of time. This basis is totally independent of any concept of fault, and is fully applicable to the situation covered by Section 3503(a).

In any event, the principal basis for Section 3503(a) is the fact that in the situations covered there is no real possibility of the evidence being "come at by exploitation" of an allegedly illegal act. The subsection amounts to a direction that as a matter of law no evidence of an event can be found tainted by an alleged illegality anteceding the event by such a prolonged period of time. The subsection is thus akin to a conclusive presumption as well as a statute of limitations. While most statutory presumptions are rebuttable, such presumptions usually concern facts pertaining directly to the issue of guilt or innocence, not, as here, the availability of a hearing on the patently dubious applicability of a rule excluding reliable evidence. Even in a situation where an exclusionary rule might ordinarily be available, the Supreme Court has found in another context that, since the validity of the guilt-determining process is not affected, a defendant has no vested right to an invocation of the rule where considerations of judicial efficiency weigh against it and where advancement of the purpose of the rule would be minimal. *Desist v. United States*, 394 U.S. 244; *Linkletter v. Walker*, 381 U.S. 618. Both such factors obtain in the situation covered by Section 3503(a).

SECTION 3503(b)

Section 3503(b) provides that, upon a claim that evidence is inadmissible because it is the direct or indirect product of an allegedly illegal act, information in connection therewith shall not be ordered disclosed unless it is found (1) that such information "may be relevant" to the determination of the admissibility of such evidence, and (2) that such disclosure is "in the interest of justice".

We understand from the remarks of Senator McClellan in introducing the bill that the phrase "may be relevant" is intended to denote a lesser standard of relevance than the phrase "arguably relevant" as propounded by the Department in recent briefs before the Supreme Court, but to denote a standard requiring more than a mere speculation as to relevance. We also understand that the phrase "in the interest of justice" is intended to limit the disclosure of information which may be relevant by considerations such as the danger to informants, the harm to reputations of third parties, and the interests of national security.

This subsection would, of course, modify the procedural practices set forth by the Court in *Alderman v. United States*, 394 U.S. 165. We concur in the interpretation that the *Alderman* ruling was not predicated upon constitutional grounds, but upon the Court's supervisory powers. In the portion of the opinion dealing with this issue, the Court at no point stated that the prescribed practice was required by the Fourth Amendment. The only reference to the Fourth Amendment was in the statement that the practice delineated would reduce the incidence of error in assessing taint by "guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." *Id.*, at 184. This reference makes it apparent that the relationship between the Amendment and the practice is reasoned as follows: the Fourth Amendment is effectuated by an exclusionary rule to deter violations; the exclusionary rule, in order to be effective, requires that the sources of allegedly tainted evidence be scrutinized; adequate scrutiny will better be assured by the practice of disclosing the information in question to the defendant in order that he might point out the portions deemed to be relevant. The practice is thus a judicially-developed means of aiding in the assaying of evidence purportedly subject to exclusion, not an inflexible requirement of the Fourth Amendment. This fact is emphasized by language indicating that the Court viewed its ruling as a balanced exercise of judicial discretion rather than the pronouncement of a constitutional mandate:

"We think this resolution will avoid an exorbitant expenditure of judicial time and energy and will not unduly prejudice others or the public interest." *Ibid.* Moreover, it appears that the Court may have intended to apply the announced practice not only to situations involving past electronic eavesdropping but situations involving past wiretapping, a form of search which was proscribed only by statute (47 U.S.C. 605), not the Fourth Amendment, as to all past instances which took place prior to December 18, 1967, the date of the decision in *Katz v. United States*, 389 U.S. 347. *Kaiser v. New York*, 394 U.S. 280; see *Desist v. United*

States, 394 U.S. 244. In any event, even in some cases where the Court has announced a specific rule of procedure to be required by the Constitution, it has indicated that future legislative alternatives could be found equally acceptable. See *United States v. Wade*, 388 U.S. 218, 239; *Miranda v. Arizona*, 384 U.S. 436, 467. Hence, even as to a constitutionally-based rule, the way is often clear for Congress to meet the need in a different manner or, for that matter, to reassess the facts from which the need was presumed. Certainly in the present instance there is no bar to action by Congress.

We suggest, however, that instead of adding the provisions of subsection (b) to the existing statute and case law governing claims that evidence is tainted, it might be more useful to incorporate the substance of these provisions and of other provisions herein suggested in a comprehensive codification of all significant aspects of this motion and hearing procedure. Such a provision should include directions taking into accounts the following considerations:

(a) Upon the filing by a defendant of a motion alleging that evidence concerning the charged offense may be the product of an unlawful electronic surveillance, the government should be required to conduct an examination of its investigative files in order to determine the factual basis for the allegations made in the motion, and should further be required to respond to the merits of the issues concerning the existence of the alleged illegality and the standing of the movant to raise the matter. (Although the Department of Justice of the past two and one-half years has conducted such examinations as a matter of policy even in cases where no motion has been filed (see the Supplemental Memorandum for the United States in *Schipani v. United States*, No. 504, O.T. 1966), we suggest that defendants should be assured such an examination by a specific requirement of law rather than have to rely upon the continued viability of a current policy. However, since the primary concern for adopting that policy was the pre-1965 employment of electronic surveillance devices principally to monitor organized crime activities at a time when no warrant procedure was available, and since the cases which might possibly be affected by such pre-1965 monitoring are becoming progressively fewer with the passage of time, there is no reason for expending time and manpower upon such examinations as a routine procedure in all criminal cases. By requiring such a specific examination and response in any case where a defendant raises a reasonable allegation on the point, all interests of procedural fairness would appear to be accommodated.)

(b) The court should then, if necessary, resolve the issues of illegality and standing, making such determination *in camera* where deemed advisable. (The propriety of *in camera* consideration of such preliminary matters was indicated in *Giordano v. United States*, 394 U.S. 310, and *Tagliametti v. United States*, 394 U.S. 316.)

(c) If it is acknowledged or if the court determines that an unlawful electronic surveillance in fact took place, and if it is further acknowledged or if the court further determines that the movant is a person with standing to raise the matter, the court should then order the government to turn over its records of such electronic surveillance to the movant, unless the government first files an affidavit by the Attorney General certifying that to turn over the records of the intercepted communications would be prejudicial to the public interest. (Such provision would make explicit the necessity of first resolving the issues of illegality and standing before proceeding to the issue of taint.)

(d) Upon the filing of such an affidavit by the Attorney General the government should be required to deliver records of the electronic surveillance to the court. The court should examine the records *in camera* and determine if any portion of the records may be relevant to the evidence in question. Upon a finding that such information is not relevant, the motion should be denied. Upon a finding that the information may be relevant, the court should determine whether under the circumstances of the case the interest of justice requires that the records be delivered to the movant. If the court determines that delivery is not required, the motion should be denied. If the court determines that delivery is required, the court, after first according the government the option of dismissing the prosecution, should order the relevant portions of the records to be delivered to the movant. (Such a provision would require that all surveillance records be turned over to the defendant when the government's objection to such delivery goes merely to relevancy. See *Kolod v. United States*, 390 U.S. 136. This would provide a defendant with access to the questioned records in many more situations than the proposed 3503(b), but, since valid allegations of the existence of unlawful electronic surveillance will decrease substantially during the next few years, especially if the provision of 3503(a) is enacted, the burden on the Department will not be unacceptably heavy when balanced by the occasional possibility of

added procedural fairness. Only in the relatively few cases where such an affidavit will be filed, will the "may be relevant" provision and the "interest of justice" provision of the proposed 3503(b) become applicable.)

(e) If such records are turned over to the movant as ordered under paragraph (c) or paragraph (d) above, the movant should be required to specify with particularity those portions of the records which he claims led to the evidence alleged to be inadmissible. If, upon examination, the court determines that the specified portions of the records could have led to the government's evidence, the court should order an evidentiary hearing.

(f) At an evidentiary hearing ordered under paragraph (c) above, the movant should have the opportunity to demonstrate by specific evidence that a substantial portion of the government's evidence is the fruit of the illegality. Upon such a demonstration, the government should be given the opportunity to show that any causal connection between information obtained through the illegality and the government's evidence had become so attenuated as to dissipate the taint, or to show that the evidence in fact had an independent origin. "The burdens here should be phrased to accord with current law. See *Alderman v. United States*, 394 U.S. 165, 180-181; *Wong Sun v. United States*, 371 U.S. 471, 487-488; *Costello v. United States*, 365 U.S. 265, 280; *Nardone v. United States*, 308 U.S. 338, 341; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392.)

The preceding formulation could help clarify the law as well as supply needed modifications. Two of those modifications are versions of the relevancy provision and the "interest of justice" provision now appearing in Section 3503(b). These warrant further comment.

Concerning the question of relevancy, the Department in the *Alderman* case had argued that where the government believes that records of electronic surveillances are wholly irrelevant to the case, the records should be inspected *in camera* by the trial judge, and only if determined to be arguably relevant should they be ordered delivered to the defense. The procedure was argued to be analogous to that found appropriate in other situations involving competing interests, including the scope of a subpoena duces tecum (*Westinghouse Electric Corporation v. City of Burlington*, 351 F. 2d 762 C.A.D.C.); *Boeing Airplane Company v. Coggshall*, 280 F. 2d 654 (C.A.D.C.), various situations in the field of pretrial discovery (see F.R. Crim. P., Rules 16 and 17(c); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 401-410 (dissent of Brennan, J.)), the Jencks statute (18 U.S.C. 3500(c): *Palermo v. United States*, 360 U.S. 343, 354), and discovery of prior grand jury testimony by government witnesses (*Dennis v. United States*, 384 U.S. 855, 875). The Court, however, concluded that surveillance records should be turned over to a defendant without prior *in camera* scrutiny for relevancy by the trial judge. The reason given for the holding was that, in the view of the Court "the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case".

We continue to believe that, as argued in the *Alderman* case, the procedure of *in camera* screening in at least some instances has much to recommend it. We also believe that the Court's dual concerns—the possibility of error and the burden on the district courts—can be met by the provisions of Section 3503(b) with suggested additions. As to the possibility of error, the suggested requirement that the Department turn over surveillance records to a defendant unless an affidavit is filed by the Attorney General will minimize the number of cases in which an evaluation by a court will have to be made, and even in those cases the qualified requirement that the records be turned over if they simply "may be relevant" will further reduce the margin for error. As to the burden on the district courts imposed by the occasional necessity of examining unusually lengthy records, the number of such cases will here again be minimized by the suggested affidavit requirement, and an additional provision for assistance to a district court could alleviate the burden in the occasional case where the problem does arise. Such assistance could be provided either by another district judge, a procedure approved in *Baker v. United States*, 401 F.2d 958, 978 n. 90 (C.A. D.C.), or by a United States magistrate. Section 636(b)(2) of Title 28 of the United States Code specifies that a United States magistrate may be appointed for the purpose of "assistance to a district court in the conduct of pretrial or discovery proceedings in civil or criminal actions." Unlike a ruling on an issue affecting the reliability of the guilt-determining process, a ruling affecting the applicability of the exclusionary rule to plainly trustworthy evidence is a function of a nature which appropriately may be delegated. Certainly the deterrent purposes of the exclusionary rule can be served as well by the possibility of an adverse ruling of a magistrate as by the possibility of an adverse ruling of a judge.

Concerning the question of "the interest of justice," the Department in *Alderman* had stressed the importance of protecting the lives of informants, the reputations of third parties, and the interest of national security. The Court concluded that those concerns could be met with the employment of protective orders under which a defendant and his counsel would be precluded from divulging the contents of the materials delivered to them. Experience has shown, however, that such orders are not always effective. Moreover, in at least one case where the government turned over materials to a defendant in reliance upon such a protective order, the court itself has later made the material public, *sua sponte*, without prior notice to the government. In such an instance the government for all practical purposes loses its important option of dismissing the prosecution in lieu of permitting the publication of the materials. Despite a court's good faith belief that publication in such an instance would jeopardize neither individuals nor the nation, it must be recognized that there are situations in which only the government has the related information which will flag the danger to others inherent in the materials, not all of which may have been thought necessary to develop at the time of the initial, successful application for a protective order. Additionally, another difficulty in the general use of protective orders lies in the fact that although such an order may be granted, a court may thereafter accede to a defendant's demand that the ensuing evidentiary hearing be public, and the information subject to the order may then be employed openly for use in cross-examination. See *United States v. Clay*, (S.D. Tex., Cr. No. 67-H-94, decided July 14, 1969). This practice effectively demolishes any value such orders may have. Hearings in such special instances should be closed. See *Baker v. United States*, 401 F. 2d 958, 978 (C.A. D.C.).

Although the enactment of the provisions of Section 3503(b) will reduce the need for reliance upon the protective order procedure, it will not eliminate it. A court may determine, for instance, that the potential damage to the reputation of a third party is outweighed by the possible relevance illegally obtained records may have to proffered evidence, but only to the extent that such records should be disclosed to the defendant and his counsel, not to the public. We suggest, therefore, that specific provision be made in the modified subsection both for the use of protective orders and for the employment of closed hearings.

In summary, from the standpoint of the Department, there is no constitutional bar to Section 3503(b), the provision for an *in camera* determination of relevance in certain instances is desirable, and the requirement that the mere possibility of relevance be weighed against other interests before ordering disclosure is similarly desirable. In view of the number of current cases in which such hearings are occurring, the provisions of the subsection would effect a measurable savings in badly-needed prosecutive and judicial manpower and would provide a degree of protection to valid, recognized interests which is now unavailable. We note, however, that if the provisions of Section 3503(a) are enacted, the number of cases which would be affected by the provisions of Section 3503(b) may be expected to decrease materially in the next few years. Most of the current cases involve surveillances which had been conducted in organized crime cases at a time when no warrant procedure was available. The last of such warrantless surveillances, except in the area of national security, was terminated in early July of 1965, pursuant to the Presidential directive of June 30, 1965. Consequently, after the current affected cases have been adjudicated, the new cases to which the provisions of Section 3503(b) would apply would be, for the most part, cases in which a surveillance pursuant to a warrant under 18 U.S.C. 2518 for some reason is found to be defective, or cases in which a warrantless surveillance was employed pursuant to the national security exception. Such cases are expected to be few in number. Moreover, as to such cases, the "interest of justice" provision of Section 3503(b) is already available through the comparable provision currently appearing in 18 U.S.C. 2518 (10) (a) (iii). Nevertheless, we believe that the near-term value of the provisions of the subsection, as we suggest it be modified, clearly justifies its enactment.

For the above reasons, the Department of Justice recommends that the provisions of S. 2292 be enacted with the suggested changes.

The Bureau of the Budget has advised that there is no objection to the submission of the views contained herein from the standpoint of the Administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

SECTION-BY-SECTION ANALYSIS

TITLE I

Section 101.—The section adds a new chapter, 216, “Special Grand Jury,” to title 18.

Section 3331(a) requires, in addition to regular grand juries, the summoning of special grand juries. It also regulates the term of service of each such grand jury.

Special grand juries are required to be summoned at least once every 18 months in judicial districts containing more than 4 million inhabitants. This includes almost every area of major organized criminal activity in the United States. (See Hearings at 409.) The Attorney General is given discretion to have special grand juries summoned in other districts where warranted in his judgment by organized crime conditions. The ordinary term is 18 months, subject to extension or contraction, depending on completion of its business. The maximum term, as extended, is 36 months, subject to section 3333(e) below.

Section 3331(a) is an extension of the power of the grand jury. With an increasingly complex society, especially where organized crime is involved, it becomes necessary to insure that grand juries are allowed to sit until completion of their work, although there must be a limit on how long they may sit. The grand jury is the better judge of the completion of work. It has also become necessary that special grand juries to investigate organized crime be called on a regular basis.

Section 3331(b) provides that if a district court refuses to extend, or prematurely terminates, the term of a special grand jury, upon a majority vote of the jury, an appeal may be taken to the chief judge of the circuit. The term of the jury will continue during the appeal. It thus obviates the problem of a conflict as to the length of a term by allowing the chief judge of the circuit to resolve the question where the district judge becomes involved in a dispute with the jury. It is anticipated that his distance from the dispute will promote objectivity. The chief judge is also much less likely to be subject to local influence than either jury or judge.

Section 3332(a) provides for election of a foreman and deputy foreman by the jury. Present Federal law requires the judge to appoint these officers. Fed. Rules Crim. Proc. Rule 6(c). This change for special grand juries is made to promote independence of the jury and insure that it is more of a separate body than merely an arm of the court. Election is now the practice of selection of petit jury foremen in most districts.

Section 3332(b) defines the scope of the power of the special grand jury to investigate “offenses against the criminal laws of the United States” It reflects present law. See *Hale v. Henkel*, 201 U.S. 43 (1906); *Blair v. United States*, 250 U.S. 273 (1919). Collateral inquiry which results in a report is contemplated under section 3332. However, this section makes it clear that investigations are to be conducted only into criminal offenses against the United States, and not for the sole purpose of report writing.

A provision that no person shall be deprived of opportunity to communicate information to the special grand jury foreman, found in § 3324(c) when S. 30 was introduced, has been deleted to prevent the drawing of any negative inference concerning regular grand juries.

The deletion does not change the intent of title I. Nothing in 18 U.S.C. § 1504 should be understood to qualify the right to transmit knowledge of offenses to the special grand jury. See *Brack v. Wells*, 184 Md. 86, 40 A. 2d 319 (1944); *United States v. Smyth*, 104 F. Supp. 283, 287-99 (N.D. Cal. 1952). In order to minimize demands on his time, the foreman could require such communications to be in writing.

Section 3332(d) authorizes the jury on majority vote to seek one or more additional special grand juries by providing a procedure for calling to the attention of the court the need for an additional jury. On a showing of need, such special grand juries must be impaneled. Review to the chief judge of the circuit is provided for failure to summon additional juries.

Section 3332(e) provides a procedure for the special grand jury to inform the Attorney General of inadequate performance of law enforcement officers working with the grand jury. The Department of Justice objected to the inclusion of this provision. (See Hearings at 367.) The committee feels, however, that the Department's fears that it will be abused are unwarranted. As with many of the other sections, the special grand jury is given no power to remedy poor performance; it is, however, given a statutory opportunity to voice its complaints. It is then expected that the appropriate bodies will take whatever remedial action is called for under the circumstances. The provision does not mandate what action should be taken. It does assure that the jury will be aware of recourse if dissatisfied.

Section 3333(a) provides that upon the completion of the original term of 18 months or upon the completion of each extension and at the final termination of the special grand jury a variety of reports may be issued by a special grand jury. The provisions are modeled on New York law. See N.Y. Code Crim. Proc. § 3, 253-a.

Section 3333(a)(1) provides for reports concerning noncriminal misconduct, malfeasance, or misfeasance in office by a public officer or employee as the basis for a recommendation of removal or disciplinary action. (See Hearings at 331.) The special grand jury itself is given no power to act on its recommendations. One of the original purposes of the grand jury was to provide a check against corruption by the King's officials. This has carried over into modern times. Grand jury investigations are authorized for the specific purpose of examining official misconduct in at least 19 States. This section provides for a report on misconduct, even if an indictment is not forthcoming as a result of an investigation. As official corruption is the bedrock of organized crime, this section is of primary importance.

Section 3333(a)(2) provides that an official who knows that his department is being or has been investigated may request a report showing no misconduct, malfeasance or misfeasance on his part. This provides protection for innocent parties in an office or department which is the subject of a special grand jury investigation.

Section 3333(a)(3) authorizes reports containing recommendations for remedial action by one of the several branches of Government. This has been a historical function of the grand jury. This power is not inconsistent with the principle of separation of powers in Government. As other provisions make the special grand jury largely independent of each of the three branches, there can be no violation of this principle.

Section 3333(a)(4) authorizes reports on organized crime conditions. It is one of the primary reasons for the report power. This allows notice to the citizenry of the danger presented to a community by a largely hidden enemy and the effect of organized crime activities in the community or its life. Although it is not contemplated that they be critical of named individuals, it is intended that they may be comprehensive and include social, economic, and other data. Such reports hopefully will serve as a catalyst for reform.

Section 3333(b) provides for judicial review of reports before they become a public record. The district court must first find that the report complies with the standards of section 3333(a), noted above. This insures that reports are confined to the subject matter there set forth; it also guarantees that investigations will not be carried out with the sole intent of making reports.

Section 3333(b)(1) provides that each report must have been formulated on facts revealed incidental to an authorized investigation of the possible violation of Federal law. No limitation is placed on the character of evidence the grand jury may consider. This rule reflects present practice. *Blue v. United States*, 384 U.S. 251 (1966). The report must be supported, however, by a preponderance of the evidence. This is subject to judicial review.

Section 3333(b)(2) provides that before a report critical of an individual may be filed under section (a)(1) as a basis for recommending removal or disciplinary action, the individual named in the report must have been given an opportunity to testify. This subsection further provides that reports under paragraphs (2), (3), or (4) of subsection (a) must not be critical of named persons. Criticism of individuals is, therefore, limited to paragraph (1) of subsection (a), which deals with public officers. There the individual may himself testify. He may also suggest supplementary witnesses to the special grand jury. Failure to conduct reasonable additional investigation would cast doubt on whether the report should be made public.

Section 3333(c)(1) provides that reports under paragraph (1) of subsection (a) are not to be made public in any event until 31 days after service on each person named in the report. The report is further not to be made public until review of the order had resulted in freeing of the report. This insures that no report shall be made public until full review has been obtained. The report cannot be filed unless an answer is filed, or tardy, and the public officer or body having jurisdiction over each public officer or employee named in the report has had 30 additional days to examine the report. (See Hearings at 331.)

Section 3333(c)(2) allows the named person to file an answer to the report within 20 days of service of the report and the order accepting the report. Upon a showing of good cause an extension of time may be granted. Provision is made for limited publication and unauthorized publication incident to preparation of a reply. Subject to the court's power to pare irrelevant, prejudicial, and scandalous material, the answer will become an appendix to the report. Thus, an individual may himself testify prior to filing and answer fully any allegations made therein after filing. Thus, he may prevent the filing and refute before publication.

Section 3333(c)(3) provides for the delivery of the report to appropriate officials prior to the report becoming public under paragraph (1) of subsection (c). The official has 30 days to examine the report

before it becomes public. Nothing in title I requires any particular action to be taken on the basis of the report.

Section 3333(d) allows the court to delay making any report public if fair consideration of a pending criminal matter would be prejudiced. This gives additional protection to criminal defendants against prejudice, even where the report is publishable. The report, however, must ultimately be released.

Section 3333(e) provides that if the court is not satisfied that the prerequisites of subsection (b) of section 3333 as to accuracy and opportunity to testify are met, it may seal the report subject to subsequent compliance with the requirements of subsection (b). The court may direct the taking of additional testimony where needed. The term of the grand jury may be extended for this limited purpose.

Section 3333(f) defines "public officer or employee" as an officer or employee of the United States or a State or subdivision thereof. Federal grand jurors are citizens of the State and local community as well as of the Nation. Their right, subject to review, to comment on those affairs should be just as broad. (See Hearings at 330-31.)

Section 3334 provides that to the extent the special grand jury provisions are not inconsistent with the regular grand jury provisions, the law applicable to any regular grand jury will apply. Thus, special grand juries will be, except as noted above, selected and otherwise regulated by the same rules as regular grand juries.

Section 102—Section 102 (a)-(d) amends section 3500, chapter 223, title 18, United States Code, the so-called Jencks Act, which regulates the pretrial disclosure of "statements" of Government witnesses. See *Jencks v. United States*, 353 U.S. 657 (1957). In addition to certain minor language changes, section 3500 as amended, would include grand jury minutes within the definition of "statement." The disclosure of such statements is now governed by varying practices in the circuit courts of appeals. Compare *United States v. Hernandez*, 290 F. 2d 86 (2d Cir. 1961) with *United States v. Micele*, 327 F. 2d 222, 226-27 (7th Cir.), cert. denied, 377 U.S. 952 (1964); *Ogden v. United States*, 303 F. 2d 724, 741-42 (9th Cir. 1962); *United States v. Bertucci*, 333 F. 2d 292, 297 (3d Cir.), cert. denied, 379 U.S. 839 (1964); *Berry v. United States*, 295 F. 2d 192, 195 (8th Cir.), cert. denied, 368 U.S. 955 (1962). A uniform statutory procedure would be substituted for these diverse practices. There is no intention, however, to require that grand jury testimony be recorded. This follows the prevailing present practice of making recordation optional. *United States v. McCaffrey*, 372 F. 2d 482 (10th Cir.), cert. denied, 387 U.S. 945 (1967); *Penelli v. United States*, 403 F. 2d 998 (10th Cir. 1968); *Schlinsky v. United States*, 379 F. 2d 735 (1st Cir.), cert. denied, 389 U.S. 920 (1967). The statute is intended to come into operation only if such recordation is undertaken.

TITLE II

Section 201.—This section amends title 18, United States Code, by adding a new part V, entitled "Immunity of Witnesses."

Section 6001 contains definitions.

Subsection (1) defines "agency of the United States" to mean any executive department or military department and certain independent agencies. The agencies enumerated are those having immunity granting power under present law. Delegation of the immunity power within the agency is intended to follow present practice within the agency for the delegation of comparable powers.

Subsection (2) defines "other information" to include books, papers, and other materials. The phrase is used in contradistinction to oral testimony. It would include, for example, electronically stored information on computer tapes. Its scope is intended to be comprehensive, including all information given as testimony, but not orally. The phrase is also used in other sections of the proposed Act. See title IV, proposed 1623(a). The meaning is intended to be the same throughout.

Subsection (3) defines "proceeding before an agency of the United States" to include proceedings characterized by compulsory process designed to elicit testimony or other information.

Subsection (4) defines "court of the United States" in all embracing terms.

Section 6002 contains the basic immunity from self-incrimination granting authorization. Proceedings before or ancillary to grand juries, courts, agencies of the United States, or before either House of Congress, joint committees, committees or subcommittees thereof are covered. A pretrial deposition hearing, for example, would be "ancillary to" a court proceeding. (See Hearings at 409, 411.) The witness must claim his privilege to receive immunity. The proposed provision is not an "immunity bath." See *United States v. Monia*, 317 U.S. 424 (1943). Refusal to testify following communication of the immunity order warrants contempt proceedings. No oral testimony or other information secured from a witness can be used against him in a criminal proceeding. This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. (See Hearings at 326.) It is designed to reflect the use-restriction immunity concept of *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) rather than the transaction immunity concept of *Counselman v. Hitchcock*, 142 U.S. 547 (1892). The witness is also protected against the use of evidence derivatively obtained. The statutory language is phrased in the terms of present law. See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. See *United States v. Monia*, 317 U.S. 424 (1943). It is included out of caution to insure that such immunity is not given. See *United States v. Orta*, 253 F. 2d 312 (5th Cir.), *cert. denied*, 357 U.S. 905 (1958).

Section 6003 sets out the procedure to be followed in court and grand jury proceedings. Immunity orders may be obtained prospectively. This sets aside the result that obtained in *In Re McElrath*, 248 F. 2d 612 (D.C. Cir. 1957). The court's role in granting the order is merely to find the facts on which the order is predicated. The statutory language is "shall." Review that second judges prosecutive discretion is not authorized. Compare *In Re Bart*, 304 F. 2d 631 (D.C. Cir. 1962). With the approval of the Attorney General, Deputy Attorney General or an Assistant Attorney General who is designated by the Attorney General, the United States Attorney may seek a court order. He must be satisfied that the testimony is needed in the "public interest" and the witness must have refused or be likely to refuse to testify, claiming self-incrimination.

Section 6004 sets out the procedure to be followed in administrative hearings. A 10-day waiting period must be followed from the date the Attorney General is served with a notice of intention to grant immunity until the grant is made unless the Attorney General notifies the agency otherwise sooner. The Attorney General, therefore, has 10 days to object informally to the grant of immunity, although approval

should be granted in less time in most situations. The Attorney General is not given a veto power. The agencies' discretion to confer immunity is subject to the same test applicable to the Attorney General, noted above. It is expected that the Attorney General and the responsible agency, however, will be able to work out any differences they might have with regard to the immunity grant. Court intervention is not required.

It is anticipated that, upon enactment of the bill, the Attorney General will take such steps as are necessary to insure that appropriate procedures are followed by each agency to designate who may issue immunity orders and in what circumstances they may be issued. It is assumed that the Attorney General will take such other steps as are necessary to insure that his office is familiar with the immunity-granting procedures of each agency, in order that issuance of such orders might be expedited and no orders will be issued without authorization by any agency.

Section 6005 sets out the procedure to be followed in congressional proceedings. A court order must be obtained based on an affirmative vote of a majority of members present in a proceeding before either House or a two-thirds vote of the members of the full committee in a proceeding before a committee. Ten days' notice must be given to the Attorney General prior to seeking the order. The court must defer issuance up to 20 days at the Attorney General's request. As in administrative proceedings, however, the Attorney General is not given veto power. Nor is the court given any power to withhold the order if the factual prerequisites are met.

Section 202.—This section makes a technical amendment to the Commodity Exchange Act.

Section 203.—This section repeals the immunity provision of the U.S. Grain Standards Act.

Section 204.—This section makes a conforming amendment to the act of June 25, 1947. It makes the language of the act reflect the use-restriction immunity concept, noted above. See proposed §6005, above.

Section 205.—This section repeals the immunity provision of the Perishable Commodities Act.

Section 206.—This section repeals the immunity provision of the Cotton Research and Promotion Act.

Section 207.—This section make a conforming amendment to the Bankruptcy Act of July 1, 1898.

Section 208.—This section repeals the immunity provision of the Federal Deposit Insurance Act.

Section 209.—This section makes a conforming amendment to the act of February 25, 1903.

Section 210.—This section repeals the immunity provision of the act of June 30, 1906.

Section 211.—This section repeals the immunity provision of the Federal Trade Commission Act. Repeal of this provision of the Federal Trade Commission Act accomplishes repeal of the immunity provisions of other acts that include this provision by incorporation by reference. *See, e.g.*, 49 Stat. 649, 7 U.S.C. §222; 48 Stat. 37, 7 U.S.C. §610(h); 49 Stat. 977, 27 U.S.C. §202(c). The same result is accomplished in other sections. *See, e.g.*, section 213 below, and 49 Stat. 33, 15 U.S.C. §715(h).

Section 212.—This section repeals the immunity provision of the Securities Exchange Act of 1934.

Section 213.—This section repeals the immunity provision of the Securities Act of 1933.

Section 214.—This section repeals the immunity provision of the Public Utility Holding Company Act of 1935.

Section 215.—This section repeals the immunity provision of the Investment Company Act of 1940.

Section 216.—This section repeals the immunity provision of the Investment Advisers Act of 1940.

Section 217.—This section repeals the immunity provision of the China Trade Act.

Section 218.—This section repeals the immunity provision of the Natural Gas Act.

Section 219.—This section makes a conforming amendment to the Act of July 12, 1960.

Section 220.—This section repeals the immunity provision of the Interstate Land Sales Full Disclosure Act.

Section 221.—This section repeals the immunity provision of the Federal Power Act.

Section 222.—This section repeals the immunity provision contained in 18 U.S.C. § 835.

Section 223.—This section repeals the immunity provision contained in 18 U.S.C. § 895.

Section 224.—This section repeals the immunity provision contained in 18 U.S.C. § 1406.

Section 225.—This section repeals the immunity provision contained in 18 U.S.C. § 1954.

Section 226.—This section makes a conforming amendment to 18 U.S.C. § 2424.

Section 227.—This section repeals 18 U.S.C. §2514 four years after the effective date of this Act. (See Hearings at 403-04.)

Section 228.—This section repeals 18 U.S.C. § 3486.

Section 229.—This section repeals the immunity provision of the Tariff Act of 1930.

Section 230.—This section makes a conforming amendment to the Federal Food, Drug and Cosmetic Act of 1938.

Section 231.—This section repeals the immunity provision in § 4824 of the Internal Revenue Act of 1954.

Section 232.—This section repeals the immunity provision in § 7493 of the Internal Revenue Code of 1954.

Section 233.—This section repeals the immunity provision of Subchapter (E) of chapter 75 of the Internal Revenue Code of 1954.

Section 234.—This section repeals the immunity provision of the Labor Management Relations Act of 1947.

Section 235.—This section repeals the immunity provision of the act of August 21, 1935.

Section 236.—This section repeals the immunity provision of the Social Security Act.

Section 237.—This section repeals the immunity provision of the Atomic Energy Act of 1954.

Section 238.—This section repeals the immunity provision contained in the Railway Labor Act.

Section 239.—This section repeals the immunity provision of the Railroad Unemployment Insurance Act.

Section 240.—This section repeals the immunity provision of the Shipping Act of 1916.

Section 241.—This section repeals the immunity provision of the Merchant Marine Act of 1936.

Section 242.—This section repeals the immunity provision of the Communications Act of 1934.

Section 243.—This section repeals the immunity provisions of the Interstate Commerce Act.

Section 244.—This section repeals the immunity provision of the Act of February 19, 1903.

Section 245.—This section repeals the immunity provision of the act of February 11, 1893.

Section 246.—This section repeals the immunity provision of the Federal Aviation Act of 1958.

Section 247.—This section repeals the immunity provision of the Internal Security Act of 1950.

Section 248.—This section repeals the immunity provision of the Second War Powers Act of 1942.

Section 249.—This section repeals the immunity provision of the act of June 28, 1940.

Section 250.—This section repeals the immunity provision of the Export Control Act of 1949.

Section 251.—This section repeals the immunity provision of the Tariff Act of 1930.

Section 252.—This section is a residuary repealer. All provisions of law dealing with granting of immunity inconsistent with the provisions of title II are repealed to that extent. Registration statutes which confer immunity from use of information furnished are not inconsistent with title II. See, *e.g.*, 18 U.S.C. §2424; 26 U.S.C. §5848. Consequently, they are not disturbed by this section.

TITLE III

Section 301.—This section amends chapter 119, title 28, United States Code, by adding a new section, section 1826, entitled “Recalcitrant Witnesses.”

Section 1826 (a) becomes applicable to any proceeding before or ancillary to any court or grand jury proceeding in which a witness unjustifiably refuses to testify or produce other information. “Court of the United States” has the same meaning as in Fed. R. Crim. Pro. 54(a)(1). A proceeding “ancillary to” would include a pretrial deposition hearing. See title II, proposed section 6002, above. Other information is explicitly made to include books, documents and records. See title II proposed section 6001(3), above. When such failure takes place before the court, or when such failure takes place before a grand jury and is then brought to the court’s attention, the court is authorized to summarily confine the witness at a suitable place until the witness is willing to give such testimony. The procedure is designed to codify present practice. See *Giancana v. United States*, 352 F. 2d 921 (7th Cir.), *cert. denied*, 382 U.S. 959 (1965). The confinement is civil, not criminal; its purpose is to secure the testimony through a sanction, not to punish the witness by imprisonment. Confinement is, therefore, limited to the court proceeding or the term or extensions thereof of the grand jury. The statute is explicitly made to

include extensions. See *Shillitani v. United States*, 384 U.S. 364, 371 n.A (1966).

Section 1826(b) provides that bail shall not be granted pending the determination of an appeal taken from an order of confinement. Granting bail would undermine the purpose of civil confinement. This provision is designed to make mandatory what is now present practice. See *United States v. Coplon*, 339 F. 2d 192 (6th Cir. 1964); *United States v. Testa*, 326 F. 2d 730 (3rd Cir. 1964), *cert. denied*, 376 U.S. 931 (1964). Only where there is a substantial possibility of reversal may a court grant bail here. This clause is designed to permit an appellate court to act to alleviate a manifestly erroneous confinement. Disposition of the appeal is mandated as soon as practicable, but not more than 30 days from the filing.

Section 302.—This section would amend 18 U.S.C. § 1073, the Interstate Flight to Avoid Prosecution Act.

The statute now provides a Federal jurisdictional basis for permitting the use of Federal law enforcement personnel to deal with individuals who flee State jurisdiction to avoid criminal process or the duty to testify in criminal proceedings. As amended, the statute would extend to witnesses who flee to avoid testifying before State agencies authorized under State law to investigate criminal activities independent of criminal proceedings. Flight to avoid service of process or to avoid testimony after service would be included.

TITLE IV

Section 401.—This section amends chapter 79, title 18, United States Code, by adding a new section, section 1623, entitled “False Declarations Before Grand Jury or Court.”

Section 1623(a) provides that whoever knowingly and materially falsely swears in any proceeding before or ancillary to any court or grand jury or uses any book, paper, or record containing a materially false declaration may be fined \$10,000 or imprisoned for not more than 5 years or both. “Court of the United States” has the same meaning as in Fed. R. Crim. Pro. 54(a)(1). Language changes have been made in the provision as introduced to achieve economy of words, but the concept of “material” has been added. (See Hearing at 372.) “A proceeding ancillary to” is intended to parallel other provisions in the statute. See title II, proposed section 6002, above. The same distinction is made between oral and other testimony. See title II, proposed section 6001(2), above.

An original subsection (b) would have provided penalties for subordination of false declarations. The committee believes that this is adequately handled by 18 U.S.C. § 2, since the proposed provision is not intended to be an enactment of common law perjury.

Section 1623(b) makes the provision applicable whether the statement or conduct occurs within or without the United States. See 18 U.S.C. § 1621.

Section 1623(c) provides that it is not necessary to allege in an indictment or information under this section which of two contradictory declarations is false. The declarations may be in the same proceeding or one may be in one proceeding while the other occurs in a later proceeding. Proof of falsity may also be made by showing logical inconsistency. These provisions are intended to be contrary to pres-

ent practice under 18 U.S.C. § 1621. See *United States v. Buckner*, 118 F. 2d 468 (2nd Cir 1941). Recantation may be a bar to a prosecution under this provision if at the time the admission is made, the false declaration had not substantially affected the proceeding or it had not become manifest that such falsity has been or would be exposed. See N.Y. Penal Law § 210.25. This provision codifies dictum in present case law under 18 U.S.C. § 1621. See *United States v. Norris*, 300 U.S. 564, 573, 574 (1937).

Section 1632(d) provides that proof beyond a reasonable doubt under this provision is sufficient for conviction. See *Ariz. Rev. Stat. Ann.* § 13-566. No number of witnesses or special kind of proof is necessary. This provision is contrary to present practice under 18 U.S.C. § 1621. See *Hammer v. United States*, 271 U.S. 620 (1926); *Weiler v. United States* 323 U.S. 606 (1945). It is included out of caution. (See Hearings at 372, 409, 411.)

TITLE V

Section 501.—This section authorizes the Attorney General to provide security for potential witnesses and their families in organized crime proceedings. The proceedings themselves need not be criminal. See title IX, proposed section 1964, below. It is necessary only that legal proceedings be involved and that the underlying factual situation embrace organized criminal activity.

Section 502.—This section gives the Attorney General broad authority to determine the particular facility to be afforded and the length of time the facilities should be available. This authority extends to providing for the health and welfare, and to offering all needed facilities to witnesses, and to their families or members of a household. Use of such facilities may continue so long as necessary for protection, and the grant of authority is sufficiently broad to allow for relocation. There is no requirement that anyone accept such an offer by the Attorney General. (See Hearings at 465-466.)

Section 503.—This section defines "government" to include not only Federal, but State and local departments and agencies. It provides, however, for optional reimbursement by other government agencies to the Federal Government if facilities or security are provided to State, local, or other Federal agencies by the Justice Department. The type of reimbursement contemplated is for out-of-pocket cost of the Department of Justice. Should the facilities of military bases be used for protection, for example, reimbursement would be necessary only to the extent that identifiable separate costs were incurred in the care and maintenance of the witness or others. In instances where the State is able to provide guards or to make arrangements for medical care, the Attorney General could require the State to bear this portion of expenditures or provide personnel and make direct arrangements, whichever is the most practical course.

Section 504.—This section authorizes the appropriation of such funds as from time to time are necessary to carry out the provisions of this title. (See Hearings at 545-47.)

TITLE VI

Section 601.—This section amends chapter 223, title 18, United States Code, by adding a new section, section 3503, entitled "Deposi-

tions to preserve testimony." It will abrogate present Fed. R. Crim. P. 15. Admissibility of depositions, however, is to follow previous law. Except where the contrary is indicated, the new provision is modeled on rule 15, and it is intended to reflect present practice under rule 15. Existing rules relating to appellate practice are, for example, retained. See *In re United States*, 348 F. 2d 624 (1st Cir. 1965); *Madison-Lewis Inc. v. MacMahon*, 299 F. 2d 256 (2d Cir. 1962). The new provision is applicable only to criminal proceedings.

Section 3503 (a) authorizes a court-ordered deposition at the behest of a party to a criminal proceeding where it is in the interest of justice due to exceptional circumstances and notice is given to the other parties after the initiation of criminal proceedings. "Court" has the same meaning as in Fed. R. Crim. P. 54(a)(1). The deposition may cover testimony and books, papers and other materials. See title II, proposed section 6001, above. Such depositions may be taken not only at the instance of the government or the defendant, but also on the motion of a material witness to secure his release from custody.

The deposition may be taken only to preserve testimony of the movant's own witness. Discovery is not authorized, and depositions should not be routinely taken in routine cases. "Due to exceptional circumstances it is in the interest of justice" is intended to cover every ground for authorizing a rule 15 deposition for a defendant now recognized. In addition, it is intended to cover for example, the existence of a substantial risk that the witness will die, become seriously ill, be killed or injured, hide or leave the jurisdiction, be kidnaped or be bribed or improperly influenced. Compare R.I. Gen. Laws Ann. sec. 9-18-9. Likewise, it would cover the common risks of destruction, loss, damage, or alteration of documentary or real evidence. A specific definition of "exceptional circumstances" was not included in the provision, since the committee did not wish unnecessarily to confine the exercise of the court's discretion.

Section 3503(b) requires the moving party to give reasonable written notice to each other party containing the deponent's name and address, and the time and place for the deposition. The court is permitted to change the time or place. It also requires the production at the deposition of any defendant in custody.

The failure of a defendant, absent good cause shown, to attend a deposition on notice and tender of expenses is a waiver of all rights to attend or to make objections based on his absence. There would be no waiver, for example, where an automobile collision prevented him from attending. *Parker v. United States*, 184 F. 2d 488, 489-90 (4th Cir. 1950). The test of waiver is intended to be the same as for waiver of presence at trial. See *Diaz v. United States*, 233 U.S. 442 (1912). Voluntary absence from trial constitutes such waiver. See *Parker v. United States*, *supra* at 489 (dictum); *Kanner v. United States*, 34 F. 2d 863 (7th Cir. 1929) (dictum). The scope of the waiver is intended to include all objections that might have been made had the defendant appeared with counsel and fully participated in the examination. See *State ex rel. Drew v. Shaughnessy*, 212 Wis. 222, 249 N.W. 522 (1933); compare *Barber v. Page*, 390 U.S. 719, 725 (1968). Although not required, the better practice might be to require

the appearance of the defendant to establish the character of the waiver. See *United States v. McPherson*, No. 22, 312, D.C. Cir., Oct. 2, 1969; *In re Hunt*, 276 F. Supp. 112 (E.D. Mich. 1967); *United States v. Barracota*, 45 F. Supp. 38 (S.D. N.Y. 1942).

Section 3503(c) provides for the appointment of counsel or waiver of counsel where counsel is not retained. Payment of travel expenses of defendant and counsel is authorized for indigents.

Section 3503(d) provides that depositions shall be taken and filed as in civil actions. Fed. R. Civ. P. 26(c) affords a right of cross-examination in civil depositions; this right is, therefore, guaranteed here. Written interrogatories are limited to the request or waiver of a defendant. Such a request or waiver constitutes a waiver of any objections based on its being so taken. See proposed § 3503(b), above.

Section 3503(e) requires the production at the deposition of any statement of the witness in the possession of the government which would have had to be made available at trial. The conditions of production would be the same. (See Hearings at 373; 18 U.S.C. §3500.)

Section 3503(f) provides that objection to receiving in evidence a deposition or part thereof may be made as provided in civil actions. Here it is well to note that the standards governing the *taking* of a deposition are not the same as the standards for *using* such deposition at trial. Failure to make this distinction is common. (See Hearings at 217, 250.) A lawfully obtained deposition may not, for example, be substituted, without more, for the testimony of a witness otherwise present, able and willing to testify as to the same matters at trial.

TITLE VII

Section 701.—This section contains the special findings relating to the conditions with which the proposed legislation is designed to deal. Clause (1) notes that trial and appellate suppression litigation is a major cause of undue expense and delay in the administration of justice and distraction from fundamental problems. Clause (2) notes that present disclosure rules in suppression cases can and will result in undue revelation of irrelevant and privileged information, inhibit cooperation by informants and endanger them and Government agents, harm the reputations of innocent persons, compromise investigations, prosecutions and civil actions, interfere with Federal-State law enforcement cooperation, and endanger the security of the Nation. Clause (3) notes that when suppression claims concern evidence of events occurring years after alleged illegality, those adverse consequences are aggravated and the claims seldom appear valid and often cannot reliably be determined. Clause (4) notes that there is virtually no likelihood that a causal connection will exist between unlawful or other acts and that which occurs 5 or more years later.

Section 702.—This section amends chapter 223, title 18, United States Code, by adding a new section, section 3506, entitled “Litigation concerning sources of evidence.”

Section 3504(a) provides that in any trial or other proceeding before any court or other body of the United States, a State or a political subdivision thereof (1) upon a claim by a party aggrieved that evidence is inadmissible as the direct or indirect product of illegality or an immunity grant the opponent shall affirm or deny the occurrence of the illegality or immunity grant; (2) disclosure of information for a determination if evidence is inadmissible because the primary product

of an allegedly unlawful act or an immunity grant or obtained by the exploitation of such an act or an immunity grant shall not be required unless such information may be relevant to determination of a pending claim of inadmissibility and such disclosure is in the interest of justice; and (3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an allegedly unlawful act or of evidence given under an immunity grant if such event occurred more than five years after such act or grant.

Section 3504(a) reflects the distinction between a "direct" and an "indirect" product of allegedly unlawful conduct. Paragraph (3) is limited to "evidence . . . obtained by the exploitation" of an allegedly unlawful act or of evidence given under an immunity grant. See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). It does not apply to evidence directly procured by an allegedly unlawful act or an immunity grant. The contrary position stated in the Hearings at 490 is incorrect.

The five-year period of time begins when the allegedly illegal act is committed or the evidence is given under the immunity grant and is measured to the point in time when the event occurs, which the proffered evidence tends to show. It does not end when the Government learns of the event or of the evidence, when the evidence is offered in court, or when the defendant makes his motion to suppress. The contrary position stated by a witness in the Hearings at 489-90 is incorrect. For example, paragraph (3) would not prevent the consideration of a claim that a 1962 illegal search and seizure was the indirect source of evidence establishing the 1966 net worth starting point of a defendant being tried under the net worth theory for evading 1969 taxes. The "event" would be the 1966 assets, not the 1969 tax evasion.

Paragraph (2) covers the disclosure of information in connection with a claim alleging that either a "direct" or an "indirect" product of unlawful conduct or an immunity grant may not be introduced. See generally *Wong Sun v. United States*, *supra* at 484. Two standards are established for determining when disclosure may be ordered. Their combined effect is to set aside the practice mandated by *Alderman v. United States*, 394 U.S. 165 (1969).

The first is contained in the phrase "may be relevant." This standard is lower than "arguable relevance" or "relevance." It requires, however, more than mere speculation as to relevance. It is intended to act as an absolute floor preventing disclosure except where a reasonable likelihood of relevance appears.

The second is contained in the phrase "the interest of justice." This standard operates as a sliding scale permitting the court or agency to take into account every factor relevant in considering whether to make disclosure, such as the likelihood of danger to informants or agents, the likelihood of harm to the reputation of a third party, the constitutional or statutory source of the rule of law allegedly violated in obtaining the evidence, the likelihood that harm to the national security would be caused by disclosure, and the amount and content of the information disclosure of which is sought. See *Roviaro v. United States*, 353 U.S. 53 (1957); *McCray v. Illinois*, 386 U.S. 300 (1967); *United States ex rel. Coffey v. Fay*, 344 F. 2d 625 (2d Cir. 1965).

Paragraph (2) standards are stated as limitations on the paragraph (2) prohibition only. Paragraphs (2) and (3) carry no negative implica-

tion. Neither requires a disclosure order in any case. Nor does any other language in proposed section 3504 contain an implication creating new grounds for disclosure or suppression or extending existing ones to new forums. Paragraphs (1) and (2) are inapplicable to a case to which paragraph (3) applies. Paragraph (1) is an exception to paragraph (2).

Application of paragraph (2) will ordinarily require in camera inspection of information. Occasionally, circumstances may require the presentation of evidence in addition to the in camera inspection, but such cases should be exceptional. In *Aiuppa v. United States*, 394 U.S. 310 (1969), for example, a subject of an organized crime electronic surveillance happened to be arrested by a forest ranger for violating migratory bird laws. In that case and in many others, in camera inspection or a brief hearing, or both, often may demonstrate beyond any doubt that disclosure need not be ordered.

The language used in defining the types of proceedings, types of forums, and jurisdictions in which section 3504 is applicable was taken from 18 U.S.C. § 2515. The only exception is that section 3506 omits legislative committees. Civil as well as criminal proceedings are covered, regardless of whether a government or governmental body or officer is or is not a party or witness. Where a conflict between section 3504 and another provision dealing with disclosure is presented or is alleged to exist, the provisions of section 3504 are intended to control. See, e.g., 18 U.S.C. § 2518(10)(a), § 3500.

Section 3504(b) defines "State" comprehensively. It then defines "unlawful act" to make it clear that it includes, for example, acts of private citizens, as well as acts of Federal or State officials, in violation of any constitutional, statutory, administrative, or court-made rule. See, e.g., *Miller v. United States*, 357 U.S. 301 (1958). It is limited, however, to violations of Federal, as opposed to State or local, law.

Lastly, it should be noted that nothing in section 3504(a)(1) is intended to codify or change present law defining illegal conduct or prescribing requirements for standing to object to such conduct or to use of evidence given under an immunity grant. See, e.g., *Giordano v. United States*, 394 U.S. 310 (1969); *Alderman v. United States*, 394 U.S. 165 (1969). Nevertheless, since it requires a pending claim as a predicate to disclosure, it sets aside the present wasteful practice of the Department of Justice in searching files without a motion from a defendant. See *Schipani v. United States*, No. 504, October term 1966, Supplemental Memorandum for the United States at 4-5; 115 Cong. Rec. S5816 (daily ed. May 29, 1969). The Department's responsibility under *Brady v. Maryland*, 373 U.S. 83 (1963), remains untouched.

Section 703.—This section makes section 3504 applicable to all proceedings and parts of proceedings occurring after its enactment, regardless of when they were begun. One exception to that rule is created: Paragraph (3) above does not apply to any "indirect" product claim where the state of the record at the time of enactment is such that consideration of the claim requires neither further disclosure nor a further evidentiary hearing. Application of the bill to pending proceedings is prospective and does not violate the ex post facto clause of the Constitution, since the bill governs only procedure and evidence and not the definition of nor punishment prescribed for crime. See *Hopt. v. Utah*, 110 U.S. 574, 589 (1884).

TITLE VIII

PART A

Section 801.—This section contains the special findings justifying the provisions of this title. Clause (1) is the basic finding that illicit gambling affects interstate commerce and involves a widespread use of interstate commerce and its facilities. Clauses (2)–(4) state the finding that illegal gambling is dependent upon interstate commerce facilities for such purposes as obtaining odds, making and accepting bets, and laying off bets. Clause (5) states the finding that illegal gambling enterprises are facilitated by the corruption and bribery of State and local officials or employees who are responsible for execution or enforcement of criminal laws.

PART B

Section 802.—This section amends chapter 73 of title 18, United States Code, by adding a new section, section 1511, entitled “Obstruction of State or local law enforcement.”

Section 1511(a) provides that it shall be unlawful for two or more persons to participate in a scheme to obstruct the enforcement of the criminal laws of a State or political subdivision thereof with intent to facilitate an illegal gambling business if: (1) one or more of such persons does any act to effect the object of such scheme; (2) one or more such persons is an official who is responsible for the enforcement of the criminal laws of such State or political subdivision; and (3) one of such persons participates in an illegal gambling business.

The scope of section 1511 is intended to be wide. “Scheme to obstruct” was chosen instead of “conspiracy to obstruct” to broaden the impact of the provision. (See Hearings at 397; *United States v. Backum*, 112 F. 2d 635, 637–38 (4th Cir. 1940).) Language changes have been made in this provision and in its companion provision below not to change meaning, but to secure economy of words. The officials covered by the provision are not to be artificially limited, and participation in the illegal gambling business is to be understood comprehensively. It would not, however, include the player himself in an illegal game.

Section 1511(b) (1)–(3) define an illegal gambling business to include poolselling, bookmaking, maintaining slot machines, roulette wheels, or dice tables and conducting lotteries, policy, bolita or numbers activity which (i) is a violation of the law of a State or political subdivision thereof, (ii) involves five or more persons who participate in the betting activity, and (iii) has been or remains in operation for a period in excess of 30 days or has a gross revenue of \$2,000 in any single day. See proposed section 1955(b), below. “State” and “gambling” are also defined comprehensively.

Section 1511(c) excludes from the operation of the section games of chance conducted by tax exempt organizations where no part of the gross receipts inures to the benefit of any individual. See proposed section 1955, below.

Section 1511(d) provides for a fine of not more than \$20,000, or imprisonment of not more than 5 years, or both, for a violation of the section.

PART C

Section 803.—This section amends chapter 95, title 18, United States Code, by adding a new section, section 1955, entitled “Prohibition of illegal gambling business.”

Section 1955(a) provides that whoever participates in an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than 5 years or both.

Section 1955(b) (1)–(3) define an “illegal gambling business,” as above, as gambling or numbers activity which (i) is a violation of the law of a State or political subdivision thereof, (ii) involves five or more persons who participate in the betting activity, and (iii) has been or remains in operation for a period in excess of 30 days or has a gross revenue of \$2,000 in any single day. See proposed section 1511, above. “State” and “gambling” are also defined comprehensively.

Section 1955(c) establishes for the purposes of this provision a “probable cause” finding. (See Hearings at 401.) Where it is shown that a gambling business has five or more persons who participate in or derive income from an illegal gambling business and such business operates for two or more successive days, the probability shall have been established that such business receives gross revenue in excess of \$2,000 in any single day. It is intended that search warrants and arrest warrants may be more easily obtained through the use of this legislative determination of probable cause based on the general experience of the Department of Justice. The finding, however, goes solely to probable cause. It is not intended to prejudge the issue of guilt at trial.

Section 1955(d) provides that any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. The language included is the standard forfeiture clause. See 18 U.S.C. § 2513.

Section 1955 (e) excludes from the operation of the provision games of chance conducted by tax-exempt organizations where no part of the gross receipts inures to the benefit of any individual. See proposed section 2511, above.

PART D

Section 804.—Subsection (a) of this section establishes 2 years after the effective date of this title a Commission on the Review of National Policy Toward Gambling.

Subsection (b) of this section establishes the composition of the Commission at 15 members, four appointed by the President of the Senate, two of whom shall be members of the majority party and two of whom shall be members of the minority party; four appointed by the Speaker of the House of Representatives, two of whom shall be members of the majority party, two of whom shall be members of the minority party; and seven appointed by the President of the United States.

Subsection (c) of this section authorizes the President to designate a chairman and provides that the filling of vacancies shall be done in the manner in which the original appointment was made.

Subsection (d) of this section provides that eight members of the Commission shall constitute a quorum.

Section 805.—Subsection (a) of this section provides that it shall be the duty of the Commission to conduct a comprehensive review of

existing Federal, State and local policy in reference to gambling and formulate such changes as the Commission may deem appropriate. Such study shall include (1) a review of the effectiveness of existing policy, and (2) preparation of a review of existing statutes of the United States.

Subsection (b) of this section authorizes the Commission to make such interim reports as it deems advisable and a final report to the President and to the Congress within the 4-year period following the effective date of the establishment of the Commission.

Subsection (c) of this section provides that the Commission shall cease to exist 60 days after the submission of its final report.

Section 806.—Subsection (a) of this section authorizes the Commission or a subcommittee to hold hearings, administer oaths, and require testimony by subpoena.

Subsection (b) of this section authorizes contempt proceedings before United States district courts to enforce orders of the Commission.

Subsection (c) provides that the Commission shall be an “agency of the United States” for the purposes of granting immunity. See title II, proposed section 6001, above.

Subsection (d) of this section authorizes other governmental agencies to cooperate in the furnishing of statistical and other data to the Commission.

Section 807.—Subsection (a) of this section provides that Commission members who are Members of Congress or a member of the Federal judiciary shall serve without additional compensation but shall be reimbursed for travel and other expenses.

Section 808.—Subsection (a) of this section provides that the chairman shall have power to appoint and fix compensation of an executive director and such other personnel as he deems necessary and procure the temporary and intermittent services of consultants at a rate not to exceed \$100 per day.

Subsection (b) of this section provides that the chairman shall include under his appointments individuals determined to be competent social scientists, lawyers and law enforcement officers.

Section 809.—This section provides that there may be appropriated to the Commission such sums as may be necessary to carry this title into effect.

PART E

Section 810.—This section amends 18 U.S.C. § 2516 by including within the list of specific offenses for which the interception of wire or oral communications under court order is permitted the proposed sections 1511 and 1955.

Section 811.—This section makes explicit the intent of Congress that no provision of this title shall be understood to preempt the field of gambling regulation or to relieve any person of any obligation imposed by any law of any State or possession or a political subdivision.

TITLE IX

Section 901.—This section amends title 18, United States Code, by adding a new chapter, entitled “Chapter 96.—Racketeer Influenced and Corrupt Organizations,” containing sections 1961-68.

Section 1961 contains definitions.

Subsection (1) defines "racketeering activity" to include those crimes most often associated with organized crime, especially those associated with the infiltration of legitimate organizations. Those crimes are murder, kidnapping, gambling, arson, robbery, bribery, extortion, narcotic violations, counterfeiting, usury; mail, bankruptcy, wire and securities fraud, and obstruction of justice. The state offenses are included by generic designation, *Cf. United States v. Nardello*, 393 U.S. 286, 296 (1969). The Federal offenses are included by specific reference. The term "racketeering activity" is a key statutory term. Under proposed section 1962, below, the racketeering activity is one of three prerequisites to commission of an offense. If there is no racketeering activity, there can be no violation of the provisions of this title.

Subsection (2) defines "State" comprehensively.

Subsection (3) defines "person" broadly to include any individual or organization that may hold any property interest. Thus, any "person" who violates the prohibitions of proposed section 1962 is subject to the remedies of proposed sections 1963 and 1964, below—including forfeiture, divestiture, dissolution, prohibition of future holding of interest, and other remedies.

Subsection (4) defines "enterprise" to include associations in fact, as well as legally recognized associative entities. Thus, infiltration of any associative group by any individual or group capable of holding a property interest can be reached.

Subsection (5) defines "pattern of racketeering activity" to require at least two acts of racketeering activity, as defined above.

The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

The concept "pattern" is thought to provide no due process constitutional barrier to criminal sanctions, as a "racketeering activity," defined above, must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute. See *United States v. Nardello*, 393 U.S. 286 (1969).

One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder. Anyone who has engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter.

Subsection (6) defines "unlawful debt" to mean debts unenforceable because incurred in connection with illegal gambling or an usurious transaction. This, in effect, includes loan-sharking as a racketeering activity in connection with acquisition or conduct of a legitimate organization. In order to limit the effect of this definition to cases of clear "loan-sharking," the usurious rate must exceed the permissible annual rate by 100 percent. If the maximum permissible rate is 10 percent, the usurious rate must be 20 percent or more. This

eliminates the possibility of "inadvertent" usury caused by court decisions holding loans usurious not previously thought to be usurious in regular business transactions.

Subsection (7) defines "racketeering investigator" to mean any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter. (See Hearings at 548.)

Subsection (8) defines "racketeering investigation" to mean any inquiry conducted by a racketeering investigator to determine if there has been any act in violation of the proposed chapter or any final order, judgment, or other decree of any court duly entered in any case or proceeding arising under this chapter.

Subsection (9) defines "documentary material" to include any books, papers and other materials. See title II, proposed section 6001(2).

Subsection (10) defines "Attorney General" to include the Attorney General of the United States, the Deputy Attorney General, or any department or agency employee designated by the Attorney General or Deputy Attorney General to carry out the powers of the proposed chapter. This provision takes advantage of other agency administrative personnel and their expertise in preventing or remedying the prohibited activities. Such matters may well come to the attention of administrative bodies other than the Department of Justice. In such event, the value of agency investigations, using their personnel and investigative techniques with which they are familiar, is obvious. The committee believes, however, that it is proper to confine ultimate power and responsibility for proceedings in the Attorney General.

Section 1962 establishes a threefold prohibition aimed at the infiltration of legitimate organizations.

Subsection (a) makes it unlawful to invest funds derived from a pattern of racketeering activity, as defined in section 1961 (1) and (5), or collection of unlawful debt as defined in section 1961(6) in any enterprise engaged in interstate or foreign commerce. The funds must have been derived by the investing party from activity in which he participated as a principal. (Hearings at 405-6. See 18 U.S.C. § 2; *United States v. Peoni*, 100 F. 2d 401, 402 (2d Cir. 1938).) An exception has been provided for investment of funds where there is no resulting control in law or in fact to the investor. This provides for the possibility of "legitimate investment" and draws a line of practical administration.

Subsection (b) prohibits acquisition or maintenance of an interest in an enterprise through the proscribed pattern or collection of unlawful debt. There is no one percent limitation here as in subsection (a) because (a) focuses on legitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition through the proscribed pattern or collection. Consequently, any acquisition meeting this test is prohibited absolutely.

Subsection (c) prohibits the conduct of the enterprise through the prohibited pattern or collection. Again, there is no limitation on the prohibition.

Subsection (d) makes conspiracy to violate (a), (b), or (c) equally subject to the remedies of sections 1963 and 1964, below. See *Singer v. United States*, 323 U.S. 338 (1945).

Subsection (e) provides that a violation is a continuing offense so long as one of the acts in the pattern produces a benefit to the offender.

While the general criminal statute of limitations is 5 years, 18 U.S.C. § 3282, certain offenses which produce a continuing result are also treated as a continuing offenses. Conspiracy is such an offense. See *United States v. Borelli*, 336 F. 2d, 376 (2d Cir. 1964) *cert. denied*, 379 U.S. 960 (1965); see also *Bramblett v. United States*, 231 F. 2d 489 (9th Cir. 1958). For a statutory provision making an offense continuing, see 18 U.S.C. § 3284. In addition, it should be noted that there is no general statute of limitations applicable to civil suits brought by the United States to enforce public policy, nor is the doctrine of laches applicable. *United States v. Beebe*, 127 U.S. 338, 344 (1888); *United States v. Insley*, 130 U.S. 263, 266 (1888); *United States v. Eastman Kodak*, 230 F. 522 (1916); *appeal dismissed on motion of appellants*, 255 U.S. 578 (1921); *United States v. General Instruments Corporation*, 87 F. Supp. 157 (1949).

Section 1963 provides criminal penalties for the violation of section 1962, above. Subsection (a) provides the remedy of criminal forfeiture. Forfeiture trials are to be governed by the Fed R. Crim. P. But see Fed. R. Crim. P. 54(a)(5). The language is designed to accomplish a forfeiture of any "interest" of any type in the enterprise acquired by the defendant or in which the defendant has participated in violation of section 1962. For the purposes of this section, 18 U.S.C. § 3563, insofar as it is applicable to forfeiture is no longer the law. (See Hearings at 407.) A \$25,000 fine and imprisonment for not more than 20 years are also provided.

Subsection (b) provides for restraining orders, prohibitions, and performance bonds to prevent preconviction transfers of property to defeat the purposes of the new chapter.

Subsection (c) provides rules governing the forfeited property. In general, it incorporates by reference the long-tested customs law provisions. It adds a provision that those rights which are not exercisable or usable by the United States expire. The United States is required to dispose of property as promptly as it is practical, with due regard for the rights of innocent persons, and shall have voting or management rights in the interim as provided by the court.

Section 1964 provides civil remedies for the violation of section 1962, above.

Subsection (a) contains broad remedial provisions for reform of corrupted organizations. Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons. Because the action is remedial, not punitive, the result in *One 1958 Plymouth Sedan v. Pennsylvania* 380 U.S. 693 (1965), would not obtain here.

Subsection (b) allows performance bonds and restraining orders to prevent frustration of the aims of the chapter. See proposed section 1963(b) above. Actions are to be brought by the Attorney General, as defined in section 1961(10). The court is directed to expedite actions hereunder.

Subsection (c) provides specifically for collateral estoppel between criminal judgments and civil actions.

Section 1965 contains broad venue provisions and process powers. They are modeled on present antitrust legislation. See 26 Stat. 210, 15 U.S.C. § 5; 69 Stat. 282, 15 U.S.C. § 15a; 38 Stat. 736, 15 U.S.C. § 23; and 76 Stat. 551, 15 U.S.C. § 1314(a).

Subsection (a) establishes venue wherever the defendant resides, is found, has an agent, or transacts his affairs, without regard to the amount in controversy.

Subsection (b) provides nationwide service of process on parties, if the ends of justice require it.

Subsection (c) provides nationwide subpoena power for witnesses. A court order on good cause shown is required for issuance if the witness resides more than 100 miles from the court.

Subsection (d) provides for service of process wherever the person is found or resides.

The committee believes that these broad provisions are required by the nationwide nature of the activity of organized crime in its infiltration efforts.

Section 1966 allows the Attorney General, as defined in section 1961(10), to obtain the maximum practical expedition of those cases of general public importance.

Section 1967 provides for open depositions.

Section 1968 provides for civil investigative demands. This is the civil counterpart of the grand jury. The provisions of this section were adapted from the Antitrust Civil Process Act, 76 Stat 548, 15 U.S.C. § 1311 *et seq.* The device has proven valuable in antitrust proceedings, where its use is analogous. The following substantive changes were made:

“Attorney General” in section 1968 has a broader meaning here than in antitrust law. See section 1961(10), above. This broadens the investigating function of the Attorney General.

“Person” is defined in section 1961(3) to include natural persons.

Subsection (a)(1) of section 1968 deletes the requirement that a person be “under investigation” before documents relevant to an investigation can be obtained from him.

Subsection (a)(6) of section 1968 makes a verified return only *prima facie* proof of service.

Subsection (b)(4) of section 1968 omits reference to contempt on the ground that it is redundant. Reference to appealability is omitted because the committee believes that appeals should be limited in general as under existing law. No reference to applicability of the Federal Rules of Civil Procedure is made since Rule 1 makes the rules applicable here.

Section 902.—This section amends 18 U.S.C. § 2516 by including within the list of specific offenses for which the interception of wire or oral communications under court order is permitted, the proposed section 1963.

It also amends 18 U.S.C. § 2517 to permit evidence obtained through the interception of wire or oral communications under court order to be employed in civil actions. See proposed section 1964.

Section 903.—This section amends 18 U.S.C. § 1505 to make obstruction of a demand under section 1968 a crime. This parallels obstruction of the Antitrust Civil Process Act.

Section 904.—This section provides that the provisions of this title shall be liberally construed to effectuate its remedial purposes.

It also provides that nothing in this title shall supersede any provision of Federal or State law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

Finally, it includes a saving clause paralleling a similar clause in the Antitrust Civil Process Act.

TITLE X

Section 1001.—This section amends chapter 227, title 18, United States Code, by adding four new sections, numbered 3575 through 3578. Section 3575 is entitled “Increased sentence for dangerous special offenders.” Section 3576 is entitled “Review of sentence.” Section 3577 is entitled “Use of information for sentencing.” Section 3578 is entitled “Conviction records.”

Section 1001 applies to sentencing for offenses committed after enactment, even though conduct relevant to the sentence occurred prior to enactment. Such application is not *ex post facto*. *Gryger v. Burke*, 334 U.S. 728, 732 (1948); *McDonald v. Massachusetts*, 180 U.S. 311, 313 (1901); compare *Chewning v. Cunningham*, 368 U.S. 443, 447 (1962) (dictum). In addition, it is permissible to consider conduct for which the defendant once could have been prosecuted, but which is now barred by the statute of limitations. See *United States v. Doyle*, 348 F. 2d 715, 721 (2d. Cir.), *cert. denied*, 382 U.S. 843 (1965).

Section 3575 establishes authority, standards and procedures for imposition of extended terms of imprisonment on dangerous special offenders.

Subsection (a) provides that whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over 21 years of age has reason to believe that the defendant is a dangerous special offender, see proposed subsections (e) and (f) below, the attorney may sign a reasonable time before trial or acceptance of plea and amend a notice (1) specifying that the defendant is a dangerous special offender who upon conviction is subject to the imposition of a sentence under subsection (b) below, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender, and that the allegation shall not be disclosed to the jury.

The provisions of subsection (a) may be invoked not only by a U.S. attorney, but also by other attorneys representing the United States. “Court of the United States” has the same meaning as in Fed. R. Crim. P. 54(a)(1). The offense charged must be a felony. See 18 U.S.C. §1. The defendant must be over 21 years of age. This would include any defendant who had his twenty-first birthday prior to the day on which he committed the felony; it would also include a continuing offense, so long as it terminated or continued after the defendant’s twenty-first birthday. The proceeding may not be initiated unless there is “reason to believe” the defendant is a dangerous special offender. See *Minnesota v. Probate Court*, 309 U.S. 270 (1940). Notice of the special offender allegation at or after charge and before trial or acceptance of plea is constitutionally timely. See *United States v. Clardy*, 204 F. 2d 624 (3d Cir. 1953); see generally *Oyler v. Boles*, 368 U.S. 448, 452 (1962); *Chandler v. Freitag*, 348 U.S. 3, 8 (1954). Where an offer to plead is made but no dangerous special offender notice has been appended, a delay should normally be granted on request to the prosecutor before plea acceptance and sentence, so that he may decide if a special offender notice should be filed. Similarly, the notice is freely amendable, but where amendments are made continuances should be granted to meet the test of “reasonable time.” No disclosure to the jury should be made of the allegation. See *Spencer v. Texas*, 385 U.S. 554 (1967). There is, however, no objection to the judge

in a jury or non-jury case reading the allegation, since it is not among the sources of information upon which any judgment may be reached; it is for this purpose the equivalent of an indictment, not evidence. Compare Fed. R. Crim. P. 32(c).

Subsection (b) provides that upon a plea or verdict the court shall before sentence hold a hearing, fixing the time and giving 10 days notice to the Government and the defendant. In connection with the hearing, the parties shall be informed of the substance of such parts of the presentence report as the court intends to rely upon except where compelling reasons are placed in the record; they shall also have rights to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear. A duly authenticated copy of a former judgment shall be prima facie evidence of such former judgment. See Iowa Code Ann. section 747.6 (1966). If it appears by a preponderance of the information, including information submitted at trial or the hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for a term not to exceed 30 years. Otherwise it shall sentence the defendant in accordance with the penalties prescribed for such felony absent aggravation. The findings of the court, including an identification of the information relied upon, and its reasons, shall be placed in the record.

No distinction is made in invoking the special sentencing provision between plea and verdict. See generally *United States v. Jackson*, 390 U.S. 570 (1968). The special term is imposed in lieu of the ordinary term. The normal fine may still be imposed. The court and not a jury must make the required finding. See generally *State v. Losieau*, 184 Neb. 178, 166 N.W. 2d 406 (1969); Model Penal Code § 7.03 (P.O.D. 1962); Model Sentencing Act § 12; A.B.A. Sentencing § 1.1, at 3, 261-62. The Government and the defendant must be informed of the substance of those parts of the presentence report on which the court intends to rely. The precise language and confidential sources need not be disclosed, and "compelling reasons," if placed in the record, can justify the withholding of particular information. Discretionary disclosure of the entire report, however, is not precluded. Compare Fed. R. Crim. P. 32 (c)(2); Model Penal Code § 7.07 (P.O.D. 1962). Assistance of counsel is guaranteed. See *Chandler v. Fretag*, 348 U.S. 3 (1954); cf. *Mempa v. Rhay*, 389 U.S. 128 (1967); *Townsend v. Burke*, 334 U.S. 736 (1948). The right to compulsory process is guaranteed, but it is qualified by the limited scope of disclosure of the presentence report and of cross-examination. No limit on the discretionary power of the court to curtail the presentation of evidence in the hearing and the examination of particular witnesses should be read into the authorization for compulsory process and limited cross-examination. No effect on the right of allocution is intended. See generally Fed. R. Crim. P. 32 (a)(1); *Hill v. United States*, 368 U.S. 424 (1962); *Green v. United States*, 365 U.S. 301 (1961). The scope of confrontation and cross-examination afforded exceeds what the committee feels to be the requirements of the fifth and sixth amendments under due process. See *Williams v. New York*, 337 U.S. 241 (1949). The requirements of *Specht v. Patterson*, 386 U.S. 605 (1967), are inapplicable, since no separate charge triggered by an independent offense is at issue. Only circumstances of aggravation of the offense for which the conviction

was obtained are before the court. *Cf. Gryger v. Burke*, 334 U.S. 728, 732 (1948); *Graham v. West Virginia*, 224 U.S. 616 (1912); *Moore v. Missouri*, 159 U.S. 673, 677 (1895). Hearsay information may be appropriately discounted, although considered. See *United States v. Doyle*, 348 F. 2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); proposed section 3577, below. The court ordinarily should obtain a study of the defendant under 18 U.S.C. §4208(b) and consider it a source of information on which to base the sentence imposed under §3575 (b).

Subsection (c) provides that this section shall not prevent the imposition and execution of a sentence of death.

Subsection (d) provides that the court shall not impose upon a dangerous special offender a sentence less than any mandatory minimum.

Subsection (e) sets out the meanings of "special offender."

Paragraph (1) defines special offender to include a defendant who on at least two previous occasions has been convicted of an offense punishable by over 1 year's imprisonment, and who has been imprisoned for at least one such offense.

This provision is designed to deal with the habitual offender. See generally *Chewning v. Cunningham*, 368 U.S. 443 (1962); *Gryger v. Burke*, 334 U.S. 728, 732 (1948); *Graham v. West Virginia*, 224 U.S. 616 (1912). The offender is being neither tried nor punished for past offenses; his latest offense is merely considered aggravated by special circumstances. *Moore v. Missouri*, 159 U.S. 673, 677 (1895). Such sentencing is not cruel and unusual punishment. *McDonald v. Massachusetts*, 180 U.S. 311, 313 (1901). "Imprisonment" includes imprisonment in prison or jail or under 18 U.S.C. §5010.

Any proceeding which results in a disposition traditionally considered a "conviction," including a court-martial or a proceeding under chapter 402 of title 18 not set aside under 18 U.S.C. § 5021, is considered a "conviction." Juvenile proceedings under chapter 403 of title 18 are not included. Invalid convictions are not regarded. See *Burgett v. Texas*, 389 U.S. 109, 115 (1967). Neither are judgments on which direct appeals are pending. Convictions for which pardons on the ground of innocence have been obtained are also excluded. *Cf. United States v. Salas*, 387 F. 2d 121 (2d Cir. 1967), *cert. denied*, 393 U.S. 863 (1968). The convictions must have been obtained on at least two occasions and have resulted in at least one imprisonment, although the order of the convictions and imprisonment is not relevant. Jointly tried or jointly charged offenses count as only one offense.

Paragraph (2) defines special offender to include a defendant who committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and which manifested special skill or expertise. In support of such findings it may be shown that the defendant has had income or property not explained as derived from a source other than such conduct.

This provision is designed to deal with the professional offender, who may neither be a recidivist nor play a leadership role in organized crime. The requirement of pattern precludes the application of the provision to an isolated offense. Elements of the pattern may or may not have been the subject of prior judicial proceedings. *Cf. Williams*

v. *Oklahoma*, 358 U.S. 576, 584-87 (1959); *Williams v. New York*, 337 U.S. 241, 244 (1949). The circumstances of the conduct itself must demonstrate that the offender is a professional possessing special skill or expertise, from which it may be inferred, for the purpose of "dangerousness," see subsection (f), that subsequent use of that skill is likely. The phrase "skill or expertise" is meant broadly and would include, for example, knowledge of established channels for fencing stolen property or forming alliances with accomplices. See generally Task Force on Assessment, President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Crime and Its Impact—An Assessment* 96-101 (1967). Finally, the pattern must be a substantial source of the defendant's income, from which it may be similarly inferred that such conduct will continue in the future. In making these determinations the court may consider the defendant's unexplained wealth or income. Cf. *Holland v. United States*, 348 U.S. 121 (1954); *United States v. Johnson*, 319 U.S. 503 (1943). The defendant himself is not required to offer the explanation. Compare *Griffin v. California*, 380 U.S. 609 (1965). The provision merely sets out a permissible inference similar to the inference from unexplained possession of stolen property. See *Wilson v. United States*, 162 U.S. 613, 619 (1896).

Paragraph (3) defines special offender to include a defendant who committed such felony in furtherance of a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction and did, or agreed that he would, act in a specified leadership position or use force or bribery as all or part of such conduct.

This provision is designed to deal primarily with the organized crime offender. Those who personally play or are to play leadership roles or are the enforcers or executors of violence are singled out for special sentencing treatment. Those who give and those who receive bribes are also covered. The word "bribe" is not used in a narrow or technical sense, and should be interpreted broadly. The degree of aggravation in the sentence in each case must be determined by the court from all the facts and circumstances in the context of these statutory standards and within the outside limits of the penalty range. The sophistication of the organization, its division of labor, the complexity of its goals, and its contemplated time span are all factors to consider. See, e.g., *Franzese v. United States*, 392 F. 2d 954 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969).

The phrase "pattern of conduct" covers continuing, repetitive, intermittent, sporadic, or other conduct in which two or more similar or different criminal acts bear relationships to one another which are relevant to the purposes of sentencing, regardless of the nature of the relationships. The variety of such relationships precludes more detailed specification of them in the bill. See proposed section 3575(e)(2), above.

Subsection (f) provides that a defendant is "dangerous" if confinement longer than that ordinarily provided is required to protect the public from further crime by him. "Dangerous" is not limited to a particular type of offense. Crimes against property or persons and "victimless" offenses, such as gambling, would be included. See

A. B. A. Sentencing at 149. "Dangerous" may be inferred, although not necessarily, from the establishment of the requirements of subsection (e).

Each of these above definitions describes specific conduct aggravating a specific offense. None attempts to punish status or define a crime. Cf. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Compare *Robinson v. California*, 370 U.S. 660 (1962), with *Powell v. Texas*, 392 U.S. 514, 542 (1968).

Subsection (g) provides that the time for appealing the conviction of one sentenced after special offender proceedings is measured from the imposition of the original sentence. Delay in appealing the conviction until either party's appeal of the sentence is exhausted is not permitted. The result reached in *Corey v. United States*, 375 U.S. 169 (1963), under 18 U.S.C. § 4208(b) would not obtain here. The provision envisions that review of both sentence and conviction will be heard together. The scope of review encompasses all factual and legal questions, substantive and procedural, as well as the exercise of discretion.

Section 3576 provides that the Government or the defendant may seek court of appeals review of the sentence imposed following a special hearing. The review by the Government must be taken at least 5 days before expiration of the time for taking a review or appeal by the defendant. Review must be diligently prosecuted. The time for taking a review may be extended by up to 30 days. Any extension of the Government's time must be granted before the ordinary time expires and accompanied by an equal extension for the defendant. The court of appeals considers the entire record and may affirm the sentence, impose or direct the imposition of any sentence that the sentencing court could have imposed, or remand for further proceedings and imposition of sentence. A sentence may be changed to the disadvantage of the defendant only on review taken by the Government and after hearing. Withdrawal of review taken by the Government forecloses only change to the disadvantage of the defendant. Review by the Government may be dismissed for abuse of the right to take such review.

The Government may obtain review of the failure to impose any special sentence or the sentence imposed. Where the sentence is vacated and remanded for new proceedings subsequent review is contemplated. A defendant found to be a dangerous special offender, but given a sentence less than the maximum authorized for ordinary offenders, may take a sentence review. An extension of time does not require a showing of "excusable neglect." Compare Fed. R. App. P. 4(b). The court may extend the defendant's time after it has expired, but not the Government's. Compare Fed. R. App. P. 4(b). The requirement that a court extending the Government's time extend the defendant's "for the same period" means that the defendant always will have five days more in which to take a review or appeal than the Government has to take a review. Except for providing that the Government's time to seek review expires 5 days before the defendant's, requiring diligent prosecution by each party to a review, and liberalizing and regulating extensions of time as described above, the provision is silent regarding the timetable for sentence review.

Applicable court rules at present give the defendant 10 days to seek review. Fed. R. App. P. 4(b). Section 3576 would give the Government 5 days absent extension. The five-day lag, the limitations on increasing sentences, and the authority for dismissal for abuse obviate any due process objections to Government appeal. *Cf. North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969).

Section 3577 provides that no limitation shall be placed on the information which a court may receive and consider for the purpose of imposing an appropriate sentence.

This provision is designed to assure that a sentencing court will be able to obtain all pertinent information. See generally *Williams v. New York* 337 U.S. 241, 247 (1949). It applies in all Federal criminal cases, not only those to which sections 3575-76 apply. Appropriately evaluated hearsay is permissible. See proposed section 3575(b), above. The exclusionary rules developed for trial on the issue of guilt are not to be applied. Compare 18 U.S.C. § 3146(f). The result which obtained in *Verdugo v. United States*, 402 F. 2d 599, 608-13 (9th Cir. 1968), and the approach used in *Armstrong v. United States*, 256 F. 2d 294, 296-97 (4th Cir.), *cert. denied*, 358 U.S. 856 (1958), are no longer to obtain.

Section 3578 establishes within the Federal Bureau of Investigation a central repository for written judgments of conviction. Upon conviction of any offense punishable by death or more than 1 year's imprisonment in a Federal court the defendant's fingerprints and a copy of the judgment against him are forwarded by the court to the repository. Access to the repository is limited to law enforcement purposes. State agencies may draw upon the repository only if State law requires their participation in it. Attested copies of the judgments are made admissible in Federal courts.

The effective operation of the special offender provision, particularly proposed § 3575(e)(1), will be aided by the availability of unimpeachable records. This section, therefore, establishes a repository for conviction judgments tied to fingerprints. "Conviction" means a final conviction, on which no direct appeal is pending. Federal participation is mandated, while State participation in the certification program, either sending in records or withdrawing information, is made subject to State law. No change, however, would be made in the present Federal procedures in dissemination of other items of identification information. The records of the repository are made admissible where a seal of attestation is present. No further authentication is necessary to prove the fact of conviction. Compare 28 U.S.C. § 1732; see generally *United States v. Re*, 336 F. 2d 306, 311-14 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964). Matching of the fingerprints on the conviction with those of the individual to be sentenced or against whom the conviction is to be used, for example, as impeaching evidence, will still have to be done.

Section 1002.—This section amends 18 U.S.C. § 3148 to extend to defendants awaiting special sentencing review the bail provision now applicable to persons charged with capital offenses or convicted and awaiting sentence or consideration of appeal or certiorari.

TITLE XI

Section 1101.—This section provides that if any provisions of this act or the application thereof to any person or circumstance be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic and existing law in which no change is proposed is shown in roman):⁶⁰

TITLE 18.—UNITED STATES CODE—CRIMES AND CRIMINAL PROCEDURE

PART II.—CRIMINAL PROCEDURE

* * * * *

Chapter 216.—SPECIAL GRAND JURY

Sec.

3331. *Summoning and term.*3332. *Powers and duties.*3333. *Reports.*3334. *General provisions.***§ 3331. Summoning and term**

(a) *In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, a grand jury determines by majority vote that its business has not been completed, the court shall enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.*

(b) *If a district court within any judicial circuit fails to extend the term of a special grand jury upon application made by the grand jury pursuant to subsection (a) of this section, or enters an order for the discharge of such grand jury before it determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the*

⁶⁰ In the interest of economy, the committee felt it unnecessary to reprint here the Organized Crime Control Act of 1969 in its entirety. Therefore only parts adding to or changing existing law are shown.

continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order in conformity with the provisions of subsection (a) of this section. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

§ 3332. Powers and duties

(a) Each special grand jury when impaneled shall elect by majority vote a foreman and a deputy foreman from among its members.

(b) It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district which is brought to the attention of the grand jury by the court or by any person.

(c) Whenever the special grand jury impaneled within any judicial district determines by majority vote that the volume of business of the grand jury exceeds the capacity of the grand jury to discharge its obligations, the grand jury may apply to the district court to impanel an additional special grand jury for that district. Upon any such application and a showing of need, such court shall order an additional grand jury to be impaneled. If the district court declines to hear such an application, or to grant such application after hearing, the grand jury may apply to the chief judge of the circuit for an order impaneling an additional special grand jury for that district. Such chief judge shall hear and determine such application at the earliest practicable time, and shall have jurisdiction to enter thereon such orders as may be required to provide for the impaneling of an additional grand jury within the judicial district for which such application was made.

(d) Whenever the special grand jury determines by majority vote that any attorney or investigative officer or agent appearing on behalf of the United States before the grand jury for the presentation of evidence with respect to any matter has not performed or is not performing his duties diligently or effectively, the grand jury may transmit to the Attorney General in writing a statement of the reasons for such determination, together with a request for the designation by the Attorney General of another attorney or investigative officer or agent to appear before the grand jury for that purpose. Upon receipt of any such request, the Attorney General shall promptly cause inquiry to be made as to the merits of the allegations made by the grand jury and shall take whatever action he finds appropriate to provide for the United States' prompt and effective representation before such grand jury.

§ 3333. Reports

(a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or any extension thereof, submit to the court a report—

(1) concerning noncriminal misconduct, malfeasance or misfeasance in office by a public officer or employee as the basis for a recommendation of removal or disciplinary action; or

(2) stating that after investigation of a public officer or employee it finds no misconduct, malfeasance or misfeasance, or neglect in office by him, provided that such public officer or employee has requested the submission of such report; or

(3) proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings; or

(4) regarding organized crime conditions in the district.

(b) The court to which such report is submitted shall examine it and the minutes of the special grand jury and, except as otherwise provided in subsections (c) and (d) of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subsection (a) of this section and that—

(1) the report is based upon facts revealed in the course of an investigation authorized by subsection (b) of section 3332 and is supported by the preponderance of the evidence; and

(2) when the report is submitted pursuant to paragraph (1), subsection (a) of this section, each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraphs (3) or (4) of subsection (a) of this section, it is not critical of an identified person.

(c)(1) An order accepting a report pursuant to paragraph (1) of subsection (a) of this section and the report shall be sealed by the court and shall not be filed as a public record, subject to subpoena or otherwise made public (i) until at least thirty-one days after a copy of the order and report are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or (ii) if an appeal is taken, until all rights of review of the public officer or employee named therein have expired or terminated in an order accepting the report. No order accepting a report pursuant to paragraph (1) of subsection (a) of this section shall be entered until thirty days after the delivery of such report to the public officer or body pursuant to paragraph (3) of subsection (c) of this section. The court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report. Unauthorized publication may be punished as contempt of the court.

(2) Such public officer or employee may file with the clerk a verified answer to such a report not later than twenty days after service of the order and report upon him. Upon a showing of good cause, the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court determines to have been inserted scandalously, prejudiciously or unnecessarily, such answer shall become an appendix to the report.

(3) Upon the expiration of the time set forth in paragraph (1), subsection (c) of this section, the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility or authority over each public officer or employee named in the report.

(d) Upon the submission of a report pursuant to subsection (a) of this section, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.

(e) Whenever the court to which a report is submitted pursuant to paragraph (1) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report and it shall not be filed as a public record, subject to subpoena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may extend beyond thirty-six months in order that such additional testimony may be taken or the provisions of subsection (b) of this section may be met.

(f) As used in this section, "public officer or employee" means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality thereof.

§ 3334. General provisions

The provisions of chapter 215, title 18, United States Code, and the Federal Rules of Criminal Procedure, applicable to regular grand juries shall apply to special grand juries to the extent not inconsistent with sections 3331, 3332, or 3333 of this chapter.

* * * * *

TITLE 18.—UNITED STATES CODE, CHAPTER 223— WITNESSES AND EVIDENCE

* * * * *

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) [to an agent of the Government] shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

* * * * *

(d) If the United States elects not to comply with an order of the court under [paragraph] subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; [or]

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness [to an agent of the Government] and recorded contemporaneously with the making of such oral statement [.] ; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

* * * * *

TITLE 18.—UNITED STATES CODE—CRIMES AND CRIMINAL PROCEDURE

PART V.—IMMUNITY OF WITNESSES

Sec.

6001. Definitions.

6002. Immunity generally.

6003. Court and grand jury proceedings.

6004. Certain administrative proceedings.

6005. Congressional proceedings.

§ 6001. Definitions

As used in this part—

(1) "agency of the United States" means any executive department (as defined in 80 Stat. 948; 80 Stat. 378 (5 U.S.C. § 101), a military department (as defined in 80 Stat. 378 (5 U.S.C. § 102), the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. § 143), the Civil Aeronautics Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. § 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. § 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: The Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, U.S.C., the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,

and the person presiding over a proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or

evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States or the Department of Justice, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this chapter.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

§ 6004. Certain administrative proceedings

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States other than the Department of Justice, the agency may issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this chapter.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

The agency may issue such an order ten days after the day on which it served the Attorney General with notice of its intention to issue the order or upon approval of the Attorney General.

§ 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress or any committee or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give any testimony

or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this chapter.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

* * * * *

Commodity Exchange Act § 6, 69 Stat. 160 (1955), 7 U.S.C. § 15

(f) . . . For the purpose of securing effective enforcement of the provisions of this Act, and for the purpose of any investigation or proceeding under this Act, the provisions, including penalties, of the Interstate Commerce Act, as amended and supplemented [(49 U.S.C. 12, 46, 47, 48), relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses,] (49 U.S.C. § 12) relating to the attendance and testimony of witnesses and the production of documentary evidence, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture (or any person designated by him), the commission, and any referee designated pursuant to the provisions of this Act, and to any person subject thereto.

* * * * *

United States Grain Standards Act, 82 Stat. 768, 7 U.S.C. § 87f(f)

§ 17. Enforcement provisions—

* * * * *

[(Refusal to testify; prohibition

[(f) No person shall be excused from attending and testifying or from producing documentary evidence before the Secretary, or in obedience to the subpoena of the Secretary, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any indi-

vidual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *

Federal Insecticide, Fungicide, and Rodenticide Act § 5, 61 Stat. 168

SEC. 5. For the purposes of enforcing the provisions of this Act, any manufacturer, distributor, carrier, dealer, or any other person who sells or offers for sale, delivers or offers for delivery, or who receives or holds any economic poison or device subject to this Act, shall, upon request of any employee of the United States Department of Agriculture or any employee of any State, Territory, or political subdivision, duly designated by the Secretary, furnish or permit such person at all reasonable times to have access to, and to copy all records showing the delivery, movement, or holding of such economic poison or device, including the quantity, the date of shipment and receipt, and the name of the consignor and consignee; and in the event of the inability of any person to produce records containing such information, all other records and information relating to such delivery, movement, or holding of the economic poison or device. Notwithstanding this provision, however, the specific evidence obtained under this section, or any evidence which is obtained by the exploitation of information, shall not be used in a criminal prosecution of the person from whom obtained.

* * * * *

Perishable Agricultural Commodities Act § 13, 46 Stat. 536 (7 U.S.C. 499m(f))

* * * * *

【(f) No person shall be excused from attending, testifying, answering any lawful inquiry, or deposing, or from producing any documentary evidence, before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary or any such officer or employee, in any cause or proceeding, based upon or growing out of any alleged violation of this Act, or upon the taking of any deposition herein provided for, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he is compelled under oath so to testify, or produce evidence, documentary or otherwise, before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary, or any such officer or employee, or upon the taking of any such deposition, or in any such cause or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *

Cotton Research and Promotion Act § 16, 80 Stat 285 (7 U.S.C. 2115)

Investigations: Power to Subpena and Take Oaths and Affirmations:
Aid of Courts【: Self-Incrimination】

SEC. 16. 【(a)】 The Secretary may make such investigations * * *
【(b) No person shall be excused from attending and testifying or

from producing books, papers, and documents before the Secretary, or in obedience to the subpoena of the Secretary, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any order, or rule or regulation issued thereunder on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *

Act To Establish a Uniform System of Bankruptcy Throughout the United States § 7, 52 Stat. 847 (11 U.S.C. 25)

Chapter III.—BANKRUPTS

SEC. 7. Duties of Bankrupts. . . . (10). at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is obtained by the exploitation of such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge: * * *

* * * * *

Federal Deposit Insurance Act § 10, 64 Stat. 882 (12 U.S.C. § 1820(d)

SEC. 10. * * *

(d) In cases of refusal to obey a subpoena issued to, or contumacy by, any person, the Board of Directors may invoke the aid of any court of the United States within the jurisdiction of which such hearing, examination or investigation is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, records, or other papers. And such court may issue an order requiring such person to appear before the Board of Directors, there to produce records, if so ordered, or to give testimony touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or carries on business or wherever he may be found. 【No person shall be excused from attending and testifying or from producing books, records, or other papers in obedience to a subpoena issued under the authority of this Act on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled.

to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】 * * *

* * * * *

Act of February 25, 1903 (Making appropriations, etc.), Ch. 755, 32 Stat. 904 (15 U.S.C. 32)

DEPARTMENT OF JUSTICE

(Para. 7)

* * * 【: *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.】

* * * * *

Act of June 30, 1906, Ch. 3920, 34 Stat. 798 (15 U.S.C. 33)

【That under the immunity provisions in the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled "An Act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.】

* * * * *

Federal Trade Commission Act, ch. 311, 38 Stat. 722 (15 U.S.C. 49)
SEC. 9.

* * * * *

【No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in abedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *

Securities Act of 1933, 48 Stat. 86 (15 U.S.C. 77v(c) (15 U.S.C. 78v(d))

SEC. 22.

* * * * *

[(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.]

* * * * *

SEC. 21. Securities Exchange Act of 1934 48 Stat. 899 (15 U.S.C. 78u(d)).

* * * * *

[(d) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.]

* * * * *

Public Utility Act of 1935, 49 Stat. 831 (15 U.S.C. 79r(e))

SEC. 18.

* * * * *

[(e) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, documentary

or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *

Investment Company Act of 1940, 54 Stat. 842 (15 U.S.C. 80a—41(d))

* * * * *

SEC. 42.

* * * * *

【(d) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *

Investment Advisers Act of 1940, 54 Stat. 853 (15 U.S.C. 80b—41(d))

* * * * *

SEC. 209.

* * * * *

【(d) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *

China Trade Act, 1922, 42 Stat. 953 (15 U.S.C. 155(c))

* * * * *

SEC. 15.

* * * * *

[(c) No person shall be excused from so attending and testifying or deposing, nor from so producing any book, paper, document, or other evidence on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no natural person shall be prosecuted or subjected to any penalty of forfeiture for or on account of any transaction, matter, or thing, as to which, in obedience to a subpoena and under oath, he may so testify, except that no person shall be exempt from prosecution and punishment for perjury committed in so testifying.]

* * * * *

Natural Gas Act, 52 Stat. 828 (15 U.S.C. 717m(h))

* * * * *

SEC. 14.

* * * * *

[(h) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.]

* * * * *

Federal Hazardous Substances Labeling Act of 1960, 74 Stat. 379 (15 U.S.C. 1271)

* * * * *

SEC. 12. For the purpose of enforcing the provisions of this Act, carriers engaged in interstate commerce, and persons receiving hazardous substances in interstate commerce or holding such hazardous substances so received shall, upon the request of an officer or employee duly designated by the Secretary, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any such hazardous substance, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any record so requested when such request is accompanied by a statement in writing specifying the nature or kind of such hazardous substance to which such request relates: *Provided*, That evidence obtained under this section, or any evidence which is obtained by the exploitation of such information, shall not be used in a criminal prosecution of the person from whom obtained: * * *

* * * * *

Interstate Land Sales Act of 1968, 82 Stat. 596 (15 U.S.C. 1714(e))

* * * * *
 SEC. 1415.
 * * * * *

[(e) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memorandums, and other records and documents before the Secretary, or in obedience to the subpoena of the Secretary or any officer designated by him, or in any cause or proceeding instituted by the Secretary, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.]

* * * * *
 Federal Power Act, 49 Stat. 856 (16 U.S.C. 825f(g))
 * * * * *
 SEC. 307.
 * * * * *

[(g) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.]

* * * * *
 TITLE 18.—UNITED STATES CODE—CRIMES AND
 CRIMINAL PROCEDURE

§ 835. Administration

* * * * *
 (b) The Commission is authorized to make such studies and conduct such investigations, . . . [No person shall be excused from complying with any requirement under this paragraph because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (49 U.S.C. 46), shall apply with respect to any individual who specifically claims such privilege: *Provided, however,* That before any person may be required to appear

and testify or produce documentary evidence, he shall be advised by the Commission that he must specifically claim such privilege.] . . .

* * * * *

TITLE 18.—UNITED STATES CODE—CRIMES AND CRIMINAL PROCEDURE

Chapter 42.—EXTORTIONATE CREDIT TRANSACTIONS

Sec.
891. * * *
892. * * *
893. * * *
894. * * *

[895. Immunity of witnesses.]

* * * * *

[895. Immunity of witnesses

[Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter is necessary to the public interest, he, upon the approval of the Attorney General or his designated representative, may make application to the court that the witness be instructed to testify or produce evidence subject to the provisions of this section. Upon order of the court the witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor may testimony so compelled be used as evidence in any criminal proceeding against him in any court, except a prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.]

* * * * *

Chapter 68.—NARCOTICS

Sec.
* * * * *
[1406. Immunity of witnesses.]
* * * * *

[§ 1406. Immunity of witnesses

[Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

[(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

[(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

[(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a), is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.]

* * * * *

Chapter 95.—RACKETEERING

§ 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

[(a) Whoever] *Whoever* being—

* * * * *

[(b) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this section, or any conspiracy to violate such section, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this subsection, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this subsection from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this subsection.]

* * * * *

TITLE 18.—UNITED STATES CODE—CRIMES AND
CRIMINAL PROCEDURE

Chapter 117.—WHITE SLAVE TRAFFIC

* * * * *

§ 2424. Filing factual statement about alien female

* * * * *

(b) In any prosecution brought under this section, if it appears that any such statement required is not on file in the office of the Commissioner of Immigration and Naturalization, the person whose duty it is to file such statement shall be presumed to have failed to file said statement, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, [but no person shall be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement.] *but no information contained in the statement or any evidence which is obtained by the exploitation of such information may be used against any person making such statement in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this section.*

* * * * *

Chapter 119.—WIRE INTERCEPTION AND INTERCEPTION OF ORAL
COMMUNICATIONS

Sec.

* * * * *

*[2514. Immunity of witnesses.]

* * * * *

*[§ 2514. Immunity of witnesses

*[Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify

*Repealed effective 4 years after effective date of Organized Crime Control Act of 1969.

or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.】

* * * * *

Chapter 223.—WITNESSES AND EVIDENCE

Sec.

【3486. Compelled testimony tending to incriminate witness; immunity.】

* * * * *

【§ 3486. Compelled testimony tending to incriminate witnesses; immunity

【(a) In the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that—

【(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

【(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and

that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecutions described in subsection (d) hereof) against him in any court.

【(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to the United States district court and shall be given the opportunity to be heard

with respect thereto prior to the entrance into the record of the order of the district court.

[(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of section 1751 of title 18 of the United States Code, or involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 212(a) (27, (28), (29 or 241(a) (6), (7), or 313(a) of the Immigration and Nationality Act (66 Stat. 182-186; 204-206; 240-241), and conspiracies involving any of the foregoing, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

[(d) No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.]

*	*	*	*	*	*	*
Tariff Act of 1930, 46 Stat. 699 (19 U.S.C. 1333(e))						
*	*	*	*	*	*	*

SEC. 333. Testimony and production of papers.

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(e) Fees and mileage of witnesses.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same, except employees of the commission, shall severally be entitled to the same fees and mileage as are paid for like services in the courts of the United States: *Provided*, That no person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpoena of the commission; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence, except that

no person shall be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *
 Federal Food, Drug and Cosmetic Act, 52 Stat. 1057 (21 U.S.C. 373)
 * * * * *

SEC. 703. Records of interstate shipment.

For the purpose of enforcing the provisions of this chapter, * * *
Provided, That evidence obtained under this section, or any evidence which is obtained by the exploitation of such evidence, shall not be used in a criminal prosecution of the person from whom obtained: * * *

* * * * *

TITLE 26.—UNITED STATES CODE—INTERNAL REVENUE CODE

* * * * *

Chapter 39.—REGULATORY TAXES

* * * * *

Subchapter D

* * * * *

PART III.—ADMINISTRATIVE PROVISIONS

Sec.

* * * * *

【4874. Immunity of witnesses.】

* * * * *

【§ 4874. Immunity of witnesses.

【No person whose evidence is deemed material by the officer prosecuting on behalf of the United States in any case brought under any provision of this subchapter shall withhold his testimony because of complicity by him in any violation of this subchapter or of any regulation made pursuant to this subchapter, but any such person called by such officer who testifies in such case shall be exempt from prosecution for any offense to which his testimony relates.】

* * * * *

Chapter 76.—JUDICIAL PROCEEDINGS

* * * * *

Subchapter E

* * * * *

【7493. Immunity of witnesses in cases relating to cotton futures.】

* * * 【§7493. Immunity of witnesses in cases relating to cotton futures.

【No person whose evidence is deemed material by the officer prosecuting on behalf of the United States in any case brought under any provision of subchapter D of chapter 39 (relating to cotton futures) shall withhold his testimony because of complicity by him in any

violation of subchapter D of chapter 39, or of any regulation made pursuant to such chapter, but any such person called by such officer who testifies in such case shall be exempt from prosecution for any offense to which his testimony relates.】

* * * * *

Labor Management Relations Act of 1947, 49 Stat. 455 (29 U.S.C. 161(3))

* * * * *

SEC. 11. Investigatory powers of Board.

* * * * *

【(3) Privilege of witnesses; immunity from prosecution.

【No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *

Act to provide that tolls on certain bridges over navigable waters of the United States shall be just and reasonable, and for other purposes, 1935, 49 Stat. 671 (33 U.S.C. 506)

* * * * *

SEC. 4. . . . 【No person shall be excused from attending and testifying or from producing books, papers, and documents in any inquiry under this section and section 504 of this title, or in obedience to any such subpoena, or in any cause or proceeding, criminal or otherwise, based upon or arising under said sections, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】 * * *

* * * * *

Social Security Act (42 U.S.C. 405(f))

* * * * *

SEC. 205.

* * * * *

【(f) Self-incrimination.

【No person so subpoenaed or ordered shall be excused from attending and testifying or from producing books, records, correspondence, docu-

ments, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】

* * * * *
 Atomic Energy Act, 68 Stat. 948 (42 U.S.C. 2201(c))

SEC. 161. General Provisions.

(c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. 【No person shall be excused from complying with any requirements under this paragraph because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege.】 * * *

* * * * *
 Railway Labor Act, 44 Stat. 582 (45 U.S.C. 157).

Sec. 7.

Third.

(h) All testimony before said board shall * * * 【In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Interstate Commerce Act as amended.】

* * * * *
 Railroad Unemployment Insurance Act, 52 Stat. 1107 (45 U.S.C. 362(c))

SEC. 12. Duties and powers of Board.

[(c) Self-incrimination.

[No person shall be excused from attending or testifying in obedience to a subpoena issued under this act or from complying with any subpoena duces tecum issued under this Act, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, but such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.]

* * * * *

Shipping Act, 1916, 39 Stat. 737 (46 U.S.C. 827)

* * * * *

[SEC. 28. Immunity of witnesses.

[No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpoena of the Federal Maritime Board or of any court in any proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence, except that no person shall be exempt from prosecution and punishment for perjury committed in so testifying.]

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Merchant Marine Act, 1936, 49 Stat. 1991 (46 U.S.C. 1124(c))

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SEC. 214.

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[(c) No person shall be excused from attending and testifying or from producing books, papers, or other documents before the Commission, or any member or officer or employee thereof, in any investigation instituted by the Commission under this Act, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted or subject to any penalty or forfeiture for or an account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.]

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Communications Act of 1934, 48 Stat. 1096 (47 U.S.C. 409(1))

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SEC. 409.

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[(i) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpoenas of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.]

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Interstate Commerce Act, 24 Stat. 382, 54 Stat. 946, 56 Stat. 297 (49 U.S.C. 9, 916(a), 1017(a))

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SEC. 9. * * * In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceedings.

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SEC. 316. (a) The provisions of section 12 and section 17 of part I [], and the Immunity of Witnesses Act (34 Stat. 798; 32 Stat. 904, ch. 755, sec. 1), [] shall apply with full force and effect in the administration and enforcement of this part.

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SEC. 417. (a) The provisions of sections 12 and 17 of part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions [], and of the Compulsory Testimony Act (27 Stat. 443) [], and of the Immunity of Witnesses Act (34 Stat. 798; 32 Stat. 904, ch. 755 sec. 1), []

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An Act to further regulate Commerce with foreign nations and among the States, 1903, 32 Stat. 848 (49 U.S.C. 43)

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SEC. 3. * * * And in proceedings under this Act and Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper,

which relate directly or indirectly to such transaction【; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions】. *The provisions* of an Act * * *

* * * * *

Act of February 11, 1893, 27 Stat. 443 (49 U.S.C. 46)

【That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to the subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.】

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Federal Aviation Act of 1958, 72 Stat. 792 (49 U.S.C. 1484(i))

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SEC. 1004.

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【Compelling Testimony

【(i) No person shall be excused from attending and testifying, or from producing books, papers, or documents before the Board, or in obedience to the subpoena of the Board, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】

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Internal Security Act of 1950, 64 Stat. 998, 81 Stat. 768 (50 U.S.C. 792(c))

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SEC. 13. Proceedings Before Board.

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(c) * * * **【**No person, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture, shall be excused from testifying or producing documentary evidence before the Board in obedience to a subpoena of the Board issued on request of the Attorney General when the Attorney General represents that such testimony or evidence is necessary to accomplish the purposes of this title; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he, under compulsion as provided in this subsection, may testify, or produce evidence, documentary or otherwise, before the Board in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.**】**

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Second War Powers Act, 1942, 56 Stat. 185

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SEC. 1302. * * * **【**No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpoena, or in any action or proceeding which may be instituted under this section, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be subject to prosecution and punishment or to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that any such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.**】**

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An act to expedite national defense, and for other purposes, 1940, 54 Stat. 676 (50 U.S.C. App. 1152(a)(4))

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SEC. 2.

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(4)

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(a). * * * **【**No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpoena, or in any action or proceeding which may be

instituted under this subsection, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be subject to prosecution and punishment or to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that any such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.】

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Export Control Act of 1949, 63 Stat. 8 (50 U.S.C. App. 2026(b))
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SEC. 6.
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【(d) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (27 Stat. 443) shall apply with respect to any individual who specifically claims such privilege.】

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Act of September 8, 1950, to amend the Tariff Act of 1930, 64 Stat. 816 (50 U.S.C. 2155(b))
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SEC. 705.
* * * * *

【(b) No person shall be excused from complying with any requirement under this section or from attending and testifying or from producing books, papers, documents, and other evidence in obedience to a subpoena before any grand jury or in any court or administrative proceeding based upon or growing out of any alleged violation of this Act on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; but no natural person shall be prosecuted or subjected to any penalty or forfeiture in any court, for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such natural person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying: *Provided*, That the immunity granted herein from prosecution and punishment and from any penalty or forfeiture shall not be construed to vest in any individual any right to priorities assistance, to the allocation of materials, or to any other benefit which is within the power of the President to grant under any provision of this Act.】

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TITLE 28.—UNITED STATES CODE

Chapter 119.—EVIDENCE; WITNESSES

Sec.

* * * * *

1826. *Recalcitrant witnesses.*

* * * * *

§ 1826. *Recalcitrant witnesses.*

(a) *Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of the court proceeding or of the term, including extensions, of the grand jury before which such refusal to comply with the court order occurred.*

(b) *No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement, unless there is substantial possibility of reversal. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than 30 days from the filing of such appeal.*

* * * * *

TITLE 18.—UNITED STATES CODE

Chapter 49.—FUGITIVES FROM JUSTICE

§ 1073. **Flight to avoid prosecution or giving testimony**

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey, is a high misdemeanor under the laws of said State, is charged, or (3) to avoid contempt proceedings for alleged disobedience of any lawful process requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a State empowered by the law of such State to conduct investigations of alleged criminal activities, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement, or in which a contempt referred to in clause (3) of the first paragraph

of this section is alleged to have been committed, and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

TITLE 18.—UNITED STATES CODE

Chapter 79.—PERJURY

Sec.

1621. Perjury generally.
 1622. Subornation of perjury.
 1623. False declarations before grand jury or court.

* * * * *

§ 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any materially false declaration or makes or uses any other information, including any book, paper, document, record, recording or other material, knowing the same to contain any materially false declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that the defendant under oath has made contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury of the United States, need not specify which declaration is false. In any prosecution under this section, the falsity of the declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made manifestly contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. Where the contradictory declarations are made in the same continuous court or grand jury proceeding, an admission by a person in that same continuous court or grand jury proceeding of the falsity of his contradictory declarations shall bar prosecution under this section if, at the time the admission is made, the false declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(d) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

PROTECTED FACILITIES FOR HOUSING GOVERNMENT WITNESSES

[See Title V of amendment in the nature of a substitute bill, p. 13 of this report.]

TITLE 18.—UNITED STATES CODE

Chapter 223.—WITNESSES AND EVIDENCE

Sec.

* * * * *

3503. Depositions to preserve testimony.
 3504. Litigation concerning sources of evidence.

§ 3503. Depositions to preserve testimony

(a) Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and

preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination, but his failure, absence good cause shown, to appear after notice and tender of expenses shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) If a defendant is without counsel, the court shall advise him of his rights and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel of his own choice. If it appears that a defendant cannot bear the expense of the taking of the deposition, the court may direct that the expenses of travel and subsistence of the defendant and his attorney for attendance at the examination shall be paid by the government. In such event the marshal shall make payment accordingly.

(d) A deposition shall be taken and filed in the manner provided in civil actions. On request or waiver by the defendant the court may direct that a deposition be taken on written interrogatories in the manner provided in civil actions. Such request shall constitute a waiver of any objection to the taking and use of the deposition based upon its being so taken.

(e) The government shall make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and which the government would be required to make available to the defendant if the witness were testifying at the trial.

(f) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

§ 3504. Litigation concerning sources of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof—

(1) upon a claim, by a party aggrieved, that evidence is inadmissible because it is the primary product of an unlawful act or of lawful compulsion and grant of immunity, or because it was obtained by the exploitation of an unlawful act or of evidence given under lawful compulsion and grant of immunity, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act or compulsion; and

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act or of lawful compulsion and grant of immunity, or because it was obtained by the exploitation of an unlawful act or of evidence given under lawful compulsion and grant of immunity, shall not be required unless such information may be relevant to a pending claim of such inadmissibility, and such disclosure is in the interest of justice; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act or of evidence given under lawful compulsion and grant of immunity, if such event occurred more than five years after such allegedly unlawful act or compulsion.

(b) As used in this section—

(1) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States, and

(2) "unlawful act" means any act in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

This title shall apply to all proceedings, regardless of when commenced, occurring after the date of its enactment. Paragraph (3) of subsection (a) of section 3504, Chapter 223, title 18, U.S.C. shall not apply to any proceeding in which all information to be relied upon to establish inadmissibility was possessed by the party making such claim and adduced in such proceedings prior to such enactment.

TITLE 18.—UNITED STATES CODE

Chapter 73.—OBSTRUCTION OF JUSTICE

Sec.

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

* * * * *
 Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act or section 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

* * * * *
 1511. Obstruction of State or local law enforcement.

* * * * *
 § 1511. Obstruction of State or local law enforcement

(a) It shall be unlawful for two or more persons to participate in a scheme to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business, if—

(1) one or more of such persons does any act to effect the object of such a scheme;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, who is responsible for the enforcement of criminal laws of such State or political subdivision; and

(3) one or more of such persons participates in an illegal gambling business.

(b) As used in this section—

(1) “illegal gambling business” means a gambling business which—

(i) is a violation of the law of a State or political subdivision thereof;

(ii) involves five or more persons who participate in the gambling activity; and

(iii) has been or remains in operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) “gambling” includes pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, bolita or numbers games, or selling chances therein.

(3) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization, except as compensation for actual expenses incurred by him in the conduct of such activity.

(d) Whoever violates this section shall be punished by a fine of no more than \$20,000 or imprisonment for not more than five years, or both

TITLE 18.—UNITED STATES CODE

Chapter 95.—RACKETEERING

Sec.

* * * * *

1955. Prohibition of illegal gambling businesses.

* * * * *

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever participates in an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) “illegal gambling business” means a gambling, business which—

(i) is a violation of the law of a State or political subdivision thereof;

(ii) involves five or more persons who participate in the gambling activity; and

(iii) has been or remains in operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) “gambling” includes pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) For the purposes of this section, if it is found that a gambling business has five or more persons who participate in such business and such business operates for two or more successive days, the probability shall have been established that such business receives gross revenue in excess of \$2,000 in any single day.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

* * * * *

Commission to review national policy toward gambling

[See Title VIII, Part D, of amendment in the nature of a substitute bill, p. 19, this report.]

TITLE 18.—UNITED STATES CODE

CHAPTER 119.—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

* * * * *

§ 2516. Authorization for interception of wire or oral communications

(1) * * *

* * * * *

(c) any offense which is punishable under the following sections of this title: . . . section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), . . . , section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), . . . or sections 2314 and 2315 (interstate trans-

portation of stolen property), *section 1963 (violations with respect to racketeer influenced and corrupt organizations)*;

§ 2517

. . . (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any [criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.] *proceeding held under the authority of the United States or of any State or political subdivisions thereof.*

* * * * *

TITLE 18.—UNITED STATES CODE

Chapter 95.—RACKETEERING

* * * * *

Chapter 96.—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.

- 1961. *Definitions.*
- 1962. *Prohibited racketeering activities.*
- 1963. *Criminal penalties.*
- 1964. *Civil remedies.*
- 1965. *Venue and process.*
- 1966. *Expedition of actions.*
- 1967. *Evidence.*
- 1968. *Civil investigative demand.*

[For language of new chapter, see Title IX of amendment in the nature of a substitute bill, p. 22, this report.]

* * * * *

TITLE 18.—UNITED STATES CODE

Chapter 73.—OBSTRUCTION OF JUSTICE

* * * * *

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

* * * * *

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, or *section 1968 of this title*, willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

* * * * *

TITLE 18.—UNITED STATES CODE

Chapter 227.—SENTENCE, JUDGMENT, AND EXECUTION

Sec.

* * * * *

3575. Increased sentence for dangerous special offenders.

3576. Review of sentence.

3577. Use of information for sentencing.

3578. Conviction records.

* * * * *

§ 3575. Increased sentence for dangerous special offenders

(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender, such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or *nolo contendere*, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony or in any manner be disclosed to the jury.

(b) Upon any plea of guilty or *nolo contendere* or verdict or finding of guilty of the defendant of such felony, the court shall, before sentence is imposed, hold a hearing before the court alone. The court shall fix a time for the hearing and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. In connection with the hearing, the defendant and the United States shall be informed of the substance of such parts of the presentence report as the court intends to rely upon, except where there are placed in the record compelling reasons for withholding particular information, and shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be *prima facie* evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for a term not to exceed thirty years. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding thirty years upon any person convicted of an offense so punishable.

(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony.

(e) A defendant is a special offender for purposes of this section if—

(1) on two or more previous occasions the defendant has been convicted in a court of the United States, a State, the District of

Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof for an offense punishable in such court by death or imprisonment in excess of one year, and for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony; or

(2) *the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or*

(3) *such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.*

A conviction shown to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In determining under paragraph (1) of this subsection whether the defendant has been convicted on two or more previous occasions, conviction for offenses charged in separate counts of a single charge or pleading, or in separate charges or pleadings tried in a single trial, shall be deemed to be conviction on a single occasion. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct.

(f) *A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.*

(g) *The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.*

§ 3576. Review of sentence

With respect to any sentence imposed on the defendant after proceedings under section 3575, a review may be taken by the defendant or the United States or both to a court of appeals. Any review by the United States shall be taken at least five days before expiration of the time for taking a review or appeal by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review by the United States after the time has expired. A court extending the time for taking a review by the United States shall extend the time for taking a review or appeal by the defendant for the same period. The court of appeals may, after considering the record, including the presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be increased or otherwise changed to the disadvantage of the defendant only on review taken by the United States and after hearing. Any withdrawal of review taken by the United States shall

foreclose change to the disadvantage but not change to the advantage of the defendant. Any review taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

§ 3577. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

§ 3578. Conviction records

(a) There is established within the Federal Bureau of Investigation of the Department of Justice a central repository for written judgments of conviction.

(b) Upon the conviction of a defendant in a court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof, for an offense punishable in such court by death or imprisonment in excess of one year, the court shall cause to be affixed to a copy of the written judgment of conviction the fingerprints of the defendant together with certification by the court that the copy is a true copy of the written judgment of conviction and that the fingerprints are those of the defendant, and shall cause the copy to be forwarded to the central repository.

(c) Copies maintained in the central repository shall not be public records. Attested copies thereof—

(1) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof;

(2) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of a State, any political subdivision, or any department, agency or instrumentality thereof, if a statute of such State requires that, upon the conviction of a defendant in a court of the State or any political subdivision thereof for an offense punishable in the court by death or imprisonment in excess of one year, the court cause to be affixed to a copy of the written judgment of conviction the fingerprints of the defendant together with certification by the court that the copy is a true copy of the written judgment of conviction and that the fingerprints are those of the defendant, and cause the copy to be forwarded to the central repository; and

(3) shall be admissible in any court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof.

TITLE 18.—UNITED STATES CODE

Chapter 207.—BAIL

* * * * *

§ 3148. Release in capital cases or after conviction

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or *sentence review under section 3576 of this title* of has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: Provided, That other rights to judicial review of conditions of release or orders of detention shall not be affected.

INDIVIDUAL VIEWS OF MR. TYDINGS

I wish to register my support for the general thrust of S. 30 since it is designed to advance our Federal law enforcement efforts against organized crime. At the same time, however, I want to reiterate my firm belief that an additional measure is required both in order to give direction to present antiracketeering activities and to assure the proper and effective utilization of the new weapons conferred by S. 30 on the Department of Justice. In the interest of expediting S. 30 through the Judiciary Committee, I did not pursue this proposal in committee. However, I reserve the right to introduce it in the form of an amendment to S. 30 on the floor.

My proposal is for the creation of a new Assistant Attorney General, who shall be appointed by the President pursuant to section 506 of title 28, and who shall head an Organized Crime Division in the Justice Department. My proposal is based on legislation, S. 974, which I introduced earlier this year and which was discussed at some length by a number of witnesses during the hearings of the Subcommittee on Criminal Laws and Procedures. In order to adequately deal with the pervasive ongoing problem of organized crime, it is essential that the Federal Government mount a serious, full-scale, institutionalized effort under the direction of one prestigious law enforcement officer who may command the manpower and resources which are equal to the complexity and importance of his task and which are not diluted by other responsibilities. That, in brief, is the case for an Assistant Attorney General for Organized Crime Control.

Organized crime is a unique and particularly devastating kind of crime. The President's Crime Commission has described organized crime in the following manner: ¹

Organized crime is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits.

The core of organized crime activity is the supplying of illegal goods and services—gambling, loan sharking, narcotics, and other forms of vice—to countless numbers of citizen customers. But organized crime is also extensively and deeply involved in legitimate business and in labor unions. Here it employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out or control lawful ownership and leadership and to exact illegal

¹ "The Challenge of Crime in a Free Society" pp. 187, 209 (1967).

profits from the public. And to carry on its many activities secure from governmental interference, organized crime corrupts public officials.

* * * * *

In many ways organized crime is the most sinister kind of crime in America. The men who control it have become rich and powerful by encouraging the needy to gamble, by luring the troubled to destroy themselves with drugs, by extorting the profits of honest and hard-working businessmen, by collecting usury from those in financial plight, by maiming or murdering those who oppose them, by bribing those who are sworn to destroy them. Organized crime is not merely a few preying upon a few. In a very real sense it is dedicated to subverting not only American institutions, but the very decency and integrity that are the most cherished attributes of a free society. As the leaders of Cosa Nostra and their racketeering allies pursue their conspiracy unmolested, in open and continuous defiance of the law, they preach a sermon that all too many Americans heed: The Government is for sale; lawlessness is the road to wealth; honesty is a pitfall and morality a trap for suckers.

To effectively combat this challenge of organized crime, the President's Crime Commission has suggested that the Justice Department's efforts be made a division-level operation directed by an Assistant Attorney General. That recommendation was made 2 years ago, but no heed has been paid to it. As Congress launches a new effort against organized crime with S. 30, it is time to implement the Crime Commission's recommendation.

Implementation is necessary for a number of reasons. First, an Assistant Attorney General in charge of an Organized Crime Division will have the clear responsibility of directing an intensive and comprehensive effort, undiluted by other responsibilities, to control organized crime. Presently, the Justice Department's organized crime activities are charted in the Organized Crime Section of the Criminal Division. Administratively the Section stands on the same level as a number of other sections in the Criminal Division, such as Administrative Regulations, Fraud, Appellate, General Crime, Legislation and Special Projects, and Administrative. As a result, the Assistant Attorney General for the Criminal Division is placed in a situation where he is forced either to concentrate his efforts on organized crime or the general crime fighting activities or to dilute his efforts by trying to concentrate on both. The two are simply not coterminous and are too extensive for any single man to handle adequately.

Second, the creation of a new Assistant Attorney General and an Organized Crime Section can assure an ongoing, institutionalized commitment to a war on organized crime. Without such a commitment, history has shown that the Department's effort against organized crime remains dependent upon the personal interests of the Attorney General and the Assistant Attorney General for the Criminal Division. It is noteworthy, that the interest and intensity of effort in combating organized crime has not remained constant

through the changes in top echelon personnel. Indeed, at times the effort has waned. Since 1966 and the Presidential directive of that year, the Organized Crime Section has again been spurred into action. However, the recent momentum does not detract from the history of ebb and flow of the section's activities. (See hearings, *Measures Relating to Organized Crime*, pp. 163-171.) Another decline in interest and activity should not be risked. The legislative creation of a permanent Assistant Attorney General whose paramount responsibility will be to fight organized crime would obviate this risk.

Third, the Organized Crime Section has already taken on the appearance of a division. The section, at present time, is larger in manpower than the Internal Security Division of the Department of Justice, and comparable to the Civil Rights Division and the Lands Division. In addition, the present section, like a division, is divided into a number of units. Yet, without an Assistant Attorney General as director, the section lacks prestige and administrative clout so important in the necessary cross contact with various law enforcement agencies (see hearings, p. 169).

Fourth, the important new weapons given by S. 30 to the Department of Justice to fight organized crime make it more important than ever to coordinate the antiorganized-crime effort at a division level under the direction of an Assistant Attorney General.

Some of the weapons given the Department of Justice include: (a) title I—special grand juries in a judicial district with more than 4 million inhabitants; (b) title II—authority for a testimonial immunity order; (c) title V—protective housing facilities; (d) title IX—civil investigative demands almost identical to those used in anti-trust matters under the supervision of the Assistant Attorney General for Anti-trust; (e) title IX—forfeiture proceedings against one convicted of a designated racketeering offense; (f) title IX—civil divestiture proceedings against racketeering; and (g) title X—procedures to seek an increased sentence for dangerous offenders. If these newest weapons are to be properly utilized against organized crime, the Department must provide high-level impetus, direction, and control, the kind that can only be given by an Assistant Attorney General charged solely with fighting organized crime.

Finally, and perhaps most importantly, an Assistant Attorney General in charge of an Organized Crime Division will appreciably enhance the *accountability and visibility* of the organized crime effort. The Assistant Attorney General for Organized Crime would be a Presidential appointee subject to Senate confirmation. In addition, the Organized Crime Division would have a separate, definable budget.

In brief, I do not believe that the Federal Government's anti-organized-crime machinery will be equal to the tremendous task set for it without top-echelon leadership, divisional status in the Justice Department, and a clear statutory mandate of authority and responsibility.

There is widespread support for the statutory creation of an additional Assistant Attorney General who shall be responsible for the antiorganized-crime effort. In addition to the support for this proposal which has been given by the President's Crime Commission, the idea has been endorsed by the American Bar Association (hearings, p. 267—“ . . . a good change in structure within the Department of Justice.”);

Prof. Henry Ruth, University of Pennsylvania School of Law (hearings, p. 347); John P. Diuguid, general counsel, Association of Federal Investigators (hearings, p. 277); Edwyn Siberling (hearings, at 531-532); Milton R. Wessel (hearings, p. 533); and William G. Hundley, former Chief of Organized Crime Section (hearings, pp. 425-427).

Mr. Hundley's comments at the hearings on S. 30 before the Subcommittee on Criminal Laws and Procedures are particularly relevant to a discussion of the need to elevate the Organized Crime Section to divisional status (hearings, pp. 425-426):

Mr. HUNDLEY. . . . I, of course, favor elevating the Section to division status. I favored it when I was down there. When I left as Chief of the Section we had about 60 attorneys in the Section and it was becoming unmanageable as a Section then. I understand they have over 70 now, and that, if they receive supplemental appropriation they will have 89 and if they receive the requested appropriation for next year, they will have 140 attorneys.

Now, it just doesn't make any sense to me to ask for \$65 million for an organized crime drive, which I agree with, by the way—ask for 140 attorneys, and then seem to quibble on whether or not it ought to be a division. It just seems to me that it just flows naturally that it ought to be a division. I agree with Senator Tydings' bill on that.

I am aware that the Attorney General has asked that no legislative action be taken to create an Assistant Attorney General for Organized Crime Control until the completion of a report of the President's Advisory Council on Effective Organization. Such review has been underway for more than 7 months and no resolution of the bureaucratic infighting has appeared. Furthermore, no delay in the passage of S. 30 is requested, and this legislation, as noted above, will give the Department new weapons to use against organized crime which surely will place new burdens on the already strained organization.

A chief fear expressed by opponents of this legislation is that "there would be complex problems of determining which Division, either the Criminal Division or the Organized Crime Division, should have jurisdiction [over a particular Federal criminal prosecution.]" (hearings, pp. 391, 530, 531, 532). Such problems may occur; indeed, they occur today as the various sections within the Criminal Division vie for control of a particular prosecution. Yet, those problems are worked out regularly and without undue difficulty (hearings, pp. 426, 167).

A second expressed concern is that, without the organized crime function as a part of the Criminal Division, that Division would have little left to do and it would be difficult to attract a "high-quality person to head the Criminal Division" (hearings, p. 530; see also pp. 426, 532). Almost two-thirds of the attorneys in the Criminal Division are assigned to sections other than the Organized Crime Section. Consequently, elevating the Section to Division status will hardly gut the Criminal Division. As for recruiting a highly qualified individual to head a Criminal Division which does not control organized crime prosecutions, it must be noted that interest in criminal justice has expanded immensely in recent years and surely there will still be well qualified men interested in that field in the future as there are today.

The real objection, I feel certain, to creating a division with an Assistant Attorney General for Organized Crime Control is bureaucratic inertia and prerogatives.

As Congress confers new powers on the Department and sanctions a new impetus against organized crime, there should be a clear congressional mandate for a permanent commitment to a war on organized crime. The surest way of stating that commitment is through legislative action to create an Assistant Attorney General and a Division for Organized Crime Control.

JOSEPH D. TYDINGS.

ADDITIONAL VIEWS OF MR. SCOTT

The Judiciary Committee has voted to report S. 30, the "Organized Crime Control Act of 1969." I concur with the committee's report and their action in favorably reporting the bill. S. 30 consists of ten substantive titles derived from some eight separate bills introduced by Senators on both sides of the aisle. Its provisions are designed to correct several defects in the evidence-gathering process which are especially troublesome in organized crime cases, to limit defense abuse of pretrial proceeding to extend Federal jurisdiction over major cases of gambling and corruption, to curb organized crime infiltration of legitimate organizations, and to authorize extended sentences for special offenders. The bill incorporates the best recommendations of the President's Crime Commission, the National Commission on Reform of Federal Criminal Laws, the American Bar Association Project on Minimum Standards of Criminal Justice, the Model Penal Code, the Model Sentencing Act, and witnesses who represented the National Council on Crime and Delinquency, the Association of Federal Investigators, the New York County Lawyers Association, the American Civil Liberties Union, the New York State Commission of Investigations, the National Association of Counties, the National Chamber of Commerce, and the New York State Bar Association in hearings held by the subcommittee. The Justice Department supports every title of the bill with amendments made by the subcommittee. I would like briefly to discuss certain implications of the organized crime problem and of the measures which S.30 proposes for dealing with that problem.

One of the most disturbing aspects of organized crime today is the fact that its preponderant impact is upon those least able to pay the price that organized crime exacts: the urban poor. As President Nixon stated in his organized crime message to the Congress of April 23, 1969: "The most tragic victims [of organized crime], of course, are the poor whose lack of financial resources, education and acceptable living standards frequently breed the kind of resentment and hopelessness that make illegal gambling and drugs an attractive escape from the bleakness of ghetto life." (Message from the President of the United States relative to the fight against organized crime, H. Doc. 91-105, 91st Cong., first session, 2 (Apr. 23, 1969).)

Organized crime bleeds those citizens in an insidious variety of ways. Its most obviously predatory method is the promotion of the use of "hard" narcotics, which, as the President's Crime Commission has documented, are imported and distributed wholesale by national crime syndicates. (President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society," 218 (1967).) The end points of that system of drug distribution are found primarily in the low-income neighborhoods of our major cities. The addicts themselves, of course, suffer untold agonies of body and mind. The New York Times has reported evidence that, in New York

City, heroin use killed 700 persons, including 170 teenagers in the first 10 months of this year. (New York Times, Oct. 23, 1969, p. 51, col. 2.) Heroin now is the leading single cause of death among persons 15 to 35 in New York City.

The harm done in the ghettos by the promotion of hard-drug use reaches beyond the addicts to the vast majority, the honest, decent citizens. One of the causes of violence in our major cities is the failure of the authorities to crack down on those who traffic in narcotics. Addicts, desperate for money to support their habits, commit a large proportion of all crime against person and property and, as the President's Crime Commission stated, "(o)ne of the most fully documented facts about crime is that the common serious crimes that worry people most—murder, forcible rape, robbery, aggravated assault, and burglary—happen most often in the slums of large cities." (President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (1967).) Society as a whole cannot, in justice, close its eyes to that ghetto crime. We must recall the words of the National Advisory Commission on Civil Disorders:

Two facts are crucial to an understanding of the effects of high crime in racial ghettos; most of these crimes are committed by a small minority of the residents, and the principal victims are the residents themselves. . . .

As a result, the majority of law-abiding citizens who live in disadvantaged Negro areas face much higher probabilities of being victimized than residents of most higher income areas, including almost all suburbs. . . . (Report at 134-135 (1968).)

While the exploitation of disadvantaged groups may be most obvious where addiction and resulting street crime are involved, that exploitation takes other forms, equally subversive of the struggle of minorities for dignity and fulfillment. Ubiquitous numbers and book-ing offices, often operated directly by syndicates, drain the meager assets of the urban poor by cultivating the illusion of a chance for wealth. Furthermore, organized crime, as President Nixon has stressed, ". . . is increasing its enormous holdings and influence in the world of legitimate business." (Message from the President of the United States relative to the fight against organized crime, H. Doc. 91-105, 91st Cong., first session 1 (Apr. 23, 1969).) One of the principal means of that expansion is foreclosure on debts to loan sharks, and the small marginal, local businessman in the concentrated areas of the urban poor is a primary victim of organized crime loan sharking. These and other organized criminal enterprises yearly take large sums from their direct victims and, by raising prices on necessary commodities and services, plunder the funds of all slum residents.

Organized crime views corruption of police and other officials, which the President's Crime Commission found to be common in areas marked by organized crime, as a means of protecting its profitable operations. The Congress, however, must recognize that corruption represents a distinct evil, one which is especially abhorrent to our national values. Police officials whose dedication to our laws has been sold out are ineffective not only in curbing organized crime; they have forfeited their initiative and opportunity to fairly and fully enforce

laws involving all segments of society. Dr. Martin Luther King wrote in 1965:

The most grievous charge against municipal police is not brutality, although it exists. Permissive crime in ghettos is the nightmare of the slum family. Permissive crime is the name for the organized crime that flourishes in the ghetto—designed, directed, and cultivated by the white national crime syndicates operating numbers, narcotics, and prostitution rackets freely in the protected sanctuaries of the ghettos. Because no one, including the police, cares particularly about ghetto crime, it pervades every area of life.

(King, "Beyond the Los Angeles Riots: Next Stop the North," *Saturday Review*, vol. 48, p. 34 (Nov. 13, 1965).)

A society in which organized crime and corruption openly flourish cannot foster morality or order among its members. A pattern of "successful" organized rackets, with the lesson it teaches slum children who see hard-working and honest adults fail economically in the face of racial and educational barriers, is not uncommon in urban areas, according to the National Advisory Commission on Civil Disorders:

With the father absent and the mother working, many ghetto children spend the bulk of their time on the streets—the streets of a crime-ridden, violence-prone, and poverty-stricken world. The image of success in this world is not that of the "solid citizen," the responsible husband and father, but rather that of the "hustler" who promotes his own interests by exploiting others. The dope sellers and the numbers runners are the "successful" men because their earnings far outstrip those men who try to climb the economic ladder in honest ways.

Young people in the ghetto are acutely conscious of a system which appears to offer rewards to those who illegally exploit others, and failure to those who struggle under traditional responsibilities. Under these circumstances, many adopt exploitation and the "hustle" as a way of life. This pattern reinforces itself from one generation to the next, creating a "culture of poverty" and an ingrained cynicism about society and its institutions. (Report at 129-130 (1968).)

Among the most threatening implications of the failure of our actions to rebut that cynicism is the suggestion of the riot commission that the high ghetto crime rate ". . . not only creates an atmosphere of insecurity and fear throughout Negro neighborhoods but also causes continuing attrition of the relationship between the Negro residents and police. This bears a direct relationship to civil disorder." (Report of the National Advisory Commission on Civil Disorders 135 (1968).) We must hear that warning. We must try to relieve the unfair burden upon slum residents, and the intolerable strain upon the fabric of our society, imposed by organized crime and corruption.

Of course, to agree upon that goal is not the same as to reach it. In view of our imperfect knowledge of the factors in causation and prevention of crime and our complex procedures for identifying and

dealing with criminals, it is difficult to formulate laws which will be effective against organized crime. Furthermore, the subject of criminal law is circumscribed by constitutional rules depending upon fine distinctions and subtle analysis. We have set no easy task for ourselves.

Nevertheless, the nature and urgency of this problem demand prompt action, whenever constructive proposals can be made. President Nixon sounded the call:

As a matter of national "public policy," I must warn our citizens that the threat of organized crime cannot be ignored or tolerated any longer. It will not be eliminated by loud voices and good intentions. It will be eliminated by carefully conceived, well-funded and well-executed action plans. . . . Success also will require the help of Congress. . . . (Message from the President of the United States relative to the fight against organized crime, H. Doc. 91-105, 91st Cong., first session 2 (Apr. 23, 1969).)

An example of such a constructive measure may be title IX of S. 30, on Racketeer Influenced and Corrupt Organizations. That title adapts the remedy of forfeiture, and the equitable remedies long used for economic ends in the antitrust laws, to the problem of organized crime infiltration of legitimate organizations. In urban ghettos where "black capitalism" offers hope for local self-advancement, title IX may be a means to excise syndicate-infiltrated businesses which use force to eliminate local competition and then charge extortionate prices for staple commodities and services.

While the other titles of S. 30 approach the organized crime problem in a variety of ways, each of them is the product of a long, painstaking process of bipartisan development by the subcommittee and committee, with the help and support of the Justice Department. I sincerely believe that the entire bill demands and deserves thoughtful consideration by the Senate. Areas for improvement may exist; but the bill as a whole is a careful attempt to accommodate the public interest in effective law enforcement with individual rights in a specific and complex area of criminal law. As we consider the bill, broad calls for "law and order," like bare invocations of "preferred rights" of individuals, would be inadequate guides for action. We must consider the bill with open minds as to possible improvements, while not losing sight of our broader mandate, challenge, and opportunity to enact effective legislation in this area.

In view of the tragic and growing influences of organized and other crime upon our society, the welfare of all Americans—especially those most disadvantaged—requires that we seize every opportunity to improve the efficiency and fairness of our criminal laws. I believe that S. 30 is a thoughtful and sound vehicle for such action and urge that it be given prompt, sophisticated, and constructive consideration. The people of our Nation deserve no less.

HUGH SCOTT.

INDIVIDUAL VIEWS OF MESSRS. HART AND KENNEDY

To combat organized crime, as distinguished from other forms of criminal activity, requires procedures specifically designed for that purpose.

S. 30, the Organized Crime Control Act of 1969, is billed as a means of providing the procedures necessary to eradicate the disease of organized crime and its serious threat to our national security.

But the reach of this bill goes beyond organized criminal activity. Most of its features propose substantial changes in the general body of criminal procedures.

New rules of evidence and procedure applicable to all criminal jurisprudence are established.

Amended to restrict its scope solely to organized criminal activity and to assure the protection of individual rights, the bill could contribute important and useful means of eradicating organized crime.

PHILIP A. HART,
EDWARD M. KENNEDY.

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