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Senate

SHOULD S. 1 BE JUNKED?

Mr. CRANSTON. Mr. President, it is expected that the Committee on the Judiciary will take up S. 1, the Criminal Justice Reform Act of 1975, for consideration sometime this fall. As many know, S. 1 recodifies and systematizes the present hodgepodge of Federal criminal statutes.

I have been very much concerned with those provisions of S. 1 which I believe threaten first amendment rights and give to the Federal Government too much power over what information will be made known to the American people. I have outlined the case against these provisions in appearances before the American Society of Newspaper Editors, the Newspaper Guild, and other press organizations. I have urged that these provisions be eliminated or totally revised.

The threats to freedom of information are not the only problems with S. 1, but these have been the subject of my direct concern with the bill.

Other critics of S. 1 argue that the bill should not pass even with amendments. They say that it is incapable of being improved by amendment and should be junked in toto.

The Los Angeles Times, in its lead editorial for September 15, has urged that S. 1 be thrown out. I ask unanimous consent that this editorial be printed in full at this point in my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

PUTTING FREEDOM AGAINST THE WALL

Legislation now pending in Congress to revise the federal criminal code should be junked.

Senate Bill 1, a massive and complicated measure 753 pages long, is so pervasively and fatally flawed that it lies beyond the scope of any rational amending process.

Known as the Criminal Justice Reform Act of 1975, the bill, and companion legislation in the House, purports to standardize federal criminal law. It does that to an extent—but far more. It proposes revolutionary change that would vastly enhance the power of government and sharply decrease the freedom of the American people.

Federal law is a hodgepodge of discrepancies that need revision and codification. That was the purpose of the National Commission on Reform of Criminal Laws appointed in 1966, with former Gov. Edmund G. Brown as chairman. After five years of study, the commission presented its report to President Nixon and Congress in 1971.

In the next two years, the bipartisan commission's effort was undercut. The three Senate members of the commission, often dissenting from its recommendations, embodied their views in a bill (S 1) introduced in 1973. They were John L. McClellan (D-Ark.), Roman L. Hruska (R-Neb.) and Sam J. Ervin Jr. (D-N.C.) Even this did not satisfy Nixon, who had the Brown commission report thoroughly revised and presented as the administration-backed Criminal Code Reform Act of 1973 (S 1400). McClellan and Hruska held hearings to consolidate both bills, and what emerged was the present legislation, which far exceeds the goal of the Brown commission.

The American Bar Assn. house of delegates recognized this last month by voting nearly unanimously that codification should not go beyond present law. And the board of governors of the Society of American Law Teachers concluded recently that 'the bill is so riddled with defects" that it is doubtful whether it is "amenable to piecemeal improvements."

Its most drastic provisions would virtually give ownership to the government of all public information. The legislation would accomplish this by creating a new felony: unauthorized disclosure of "classified" official data. With some 15,000 government employes authorized to classify documents, this provision, with its severe penalties, would permit the government to engage in unprecedented suppression of information.

The sections dealing with "national defense information" would make government employes and news reporters vulnerable to prosecution that would be limited only by the imagination of the prosecutor.

One section would make it a crime to collect or communicate "national defense information" with the "knowledge that it may be used to the advantage of a foreign power . . ." Is there any information, defined as a prosecutor may want to define it, that could not be "used" by a foreign power or would not be related in some way to national defense?

Government employes who revealed information and reporters who received and published it would be liable under the law. Only the official version of events would be available to the public. The government would be able to operate behind a screen of secrecy.

This attempt to scuttle the First Amendment is the most dangerous aspect of S 1, and naturally has drawn the most fire from the press. As a result, some modifications of sections relating to control of government information may be accepted by the bill's sponsors. Even so, the legislation should be rejected, because freedom is not a commodity to be parceled out in varying degrees to the American people, and S 1 contains a long array of hazards to a free society. The bill would:

Protect federal officials from criminal prosecution for illegal acts as long as they believed "the conduct charged was required or authorized by law"; this clause, dubbed the "Watergate defense," would provide a rationale for almost any kind of abuse of authority.

Reaffirm authorization of domestic wiretapping for 48 hours without court order and require landlords and companies to cooperate "forthwith" and "unobtrusively" with government agents.

Impose restrictions on demonstrations by making the picketing of government buildings illegal; also illegal would be interstate travel to assemble 10 or more persons who "create a grave danger of imminently causing" damage to property.

Outlaw demonstrations that would take place adjacent to wherever authorities say is the "temporary residence" of a President.

Receive in part the Smith Act by making it a crime to incite others to engage in conduct that then or at some future time would facilitate the destruction of the government.

Define sabotage broadly as activity that "damages" or "tampers with" almost any property, facility or service "that is or might be used" in the national defense of this country or "an associate nation."

Permit entrapment by government agents, and place the burden on a defendant to prove he was "not predisposed" to commit the crime.

Broaden the conspiracy law by eliminating the requirement of proof of an "overt act"; substituted is "any conduct" that shows intent to effect a criminal agreement.

Reaffirm limited "use" immunity in criminal proceedings and congressional hearings—a procedure that weakens the Fifth Amendment protections against self-incrimination.

These provisions do not by any means exhaust the list; worse, the legislation is marked throughout by a chronic vagueness of definition that would insure decades of battles in the courts.

Whatever this bill is, it is not simply an effort to pull together and rationalize existing federal law. It is, rather, a reflection of an authoritarian view of the way government should function, and a radical departure from the letter and spirit of the Constitution.

In this bicentennial year, Congress could honor the founding fathers in no more effective way than by throwing out this legislation in its entirety.

Mr. CRANSTON. Mr. President, the American Civil Liberties Union of southern California states that S. 1 "is so riddled with defects" as to be "unamenable to piecemeal improvements; many provisions must be redrawn from scratch."

Prof. Louis B. Schwartz, however, who was the draftsman for the Brown Commission report, on which S. 1 is based, has said that S. 1 can be amended to

cure the defects spelled out by the ACLU. I ask unanimous consent that the ACLU memorandum furnished me be printed in full at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. CRANSTON. Mr. President, certainly we should not pass S. 1 in its present form. As to whether it should be approved in any form at this time, I suggest we wait to see if the Judiciary Committee accepts much-needed improvements to the bill and succeeds in reporting to the Senate, with solid committee support, a bill which mitigates the unnecessary harshness of our present Federal criminal statutes and reduces, rather than enhances, the power of government over our lives. If it turns out that the bill is not improved substantially in committee and if there are only slim prospects for improving the bill on the floor, then I will oppose S. 1 outright.

EXHIBIT 2

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA—POSITION PAPER ON S. 1

S. 1 purports to provide a more rational, uniform, and precisely stated federal criminal law. The ACLU believes that the federal criminal code requires such revision. Criminal legislation has proliferated in an unsystematic fashion over the past several decades. Court decisions necessary to fill in substantive gaps have not been standardized by the Supreme Court. Nevertheless, the ACLU finds serious fault with the codification offered in S.1. The bill disregards many of the sound recommendations of legal experts embodied in the Report of the National Commission of Reform of Criminal Laws (Brown Commission), particularly those relating to the structure of criminal sentences, the availability of defenses, and the crime of conspiracy. Moreover, since S. 1 was drafted by high-placed members of the Nixon Administration, it reflects that Administration's now-discredited philosophy of mistrust for expressions by the American press and people, particularly in those sections concerned with national security, classified information, rioting, and wire-tapping. The bill is so riddled with defects, that the ACLU of Southern California finds it unamenable to piecemeal improvements; many of the provisions must be redrawn from scratch. Some of the worst problems concern:

SENTENCING STRUCTURE

(a) Length of sentences: According to the Brown Commission, existing maximum sentences are much too high for the ordinary offender, and produce unnecessarily long sentences that destroy any hope of rehabilitation. The Commission therefore recommended lower maxima, accompanied by a "mandatory parole component" within the maximum, and reservation of the upper ranges within the ordinary maximum for "dangerous special offenders." By contrast, S. 1 provides for maxima higher than current penalties in some cases and higher than the Brown Commission's in all, a parole component in addition to the prison maxima, and extended terms that add to the regular maxima. In addition, for minor offenses S. 1 ignores the Brown Commission's preference for jail terms just long enough to accomplish deterrence (since rehabilitation is impossible), and for categorization of the most minor offenses (including possession of small quantities of marijuana) as "nonjailable infractions". Misdemeanor sentences can be for as long as one year under § 2301 of S. 1, and "infractions" are punishable by five days in jail.

(b) Consecutive sentences: The Brown Commission attempted to confine imposition of consecutive sentences for the same transaction to a few exceptional situations and to limit the length of such sentences even in those cases. Nevertheless, S. 1 permits cumulation wherever the criteria for imposing a sentence rather than granting probation are satisfied, and imposes a high ceiling on such sentences (as high as the maximum for offenses one grade higher than the most serious offense of which the defendant is found guilty).

(c) Death penalty: In an attempt to satisfy the requirements for imposition of capital punishment set forth in *Furman v. Georgia*, 408 U.S. 238 (1972), S. 1 mandates the death penalty for certain classes of treason, sabotage, espionage, and murder. Apart from moral and political objections to imposition of this form of punishment, it is vulnerable as authorized in S. 1 on grounds of vagueness and irrationality in the delineation of suitable offenses. Murder, for example, is a capital offense if committed in the course of espionage, kidnapping or arson, but not in the course of robbery, burglary, or rape. It is also capital if committed in a "specially heinous, cruel, or depraved manner," a category which allows unfettered exercise of discretion. Finally, like all mandatory sentences, a mandatory death sentence vests prosecutors with excessive behind-the-scenes control in the course of drawing up and bargaining over charges.

(d) Mandatory Minima and Probation Discretion: Whereas the Brown Commission advocated availability of probation for all offenders unless the judge specifically found there were sound reasons for choosing incarceration, S. 1 excludes all Class A felonies and certain other offenses from probation (including any offense in which a gun or simulated gun is possessed), and makes it much less clear that probation ought to be granted unless prison is the better alternative. The exclusion of probation contradicts expert opinion that mandatory minima interfere with judicial discretion vital to fairness in our criminal justice system, and inordinately disadvantage the defendant in the plea-bargaining process.

(e) Discretion to Grant Parole: Just as the Brown Commission recommended probation rather than incarceration unless the judge finds that some specific purpose (e.g. deterrence, rehabilitation, protection of society) will be served by sending the offender to prison, so it also recommended mandatory grant of parole for almost all offenders after a year has passed unless the judge finds that specific risks are involved or release would unduly depreciate the seriousness of his crime. Although S. 1 establishes parole eligibility for almost all offenders after six months, the parole may only be granted if the judge finds that certain risks do *not* exist (much more difficult to demonstrate). By making parole much harder to obtain and more discretionary that the Brown Commission would authorize, S. 1 exacerbates the problems resulting from its high maximum sentences.

(f) Appellate Review of Sentences: This innovation has substantial support among judges and legal scholars, and the Brown Commission favored its institutions. S. 1 does provide for appellate review of sentences, but the procedure would be greatly improved if it 1) included the guidance of judicial discretion in a general policy statement that actual sentences be related to specific goals (e.g. deterrence, rehabilitation, incapacitation); 2) required judges to state findings and reasons for the record; 3) allowed such review of *all* sentences longer than a minimal length, without S. 1's exclusion of all drug and gun cases, all misdemeanors, and all sentences where the sentence is less than one-fifth of the authorized maximum (making some sentences of six or more years unreviewable); 4) eliminated the provision for appeal of certain sentences and all probation awards by the government, with the possibility of a higher sentence if the government succeeds. The provision for higher sentences upon a successful appeal by the government may well violate the constitutional guaranty against double jeopardy.

DEFENSES

(a) Insanity: S. 1 would allow a defense of insanity only where insanity caused by an absence of "the state of mind required as an element of the offense charged." This standard is more restrictive than existing law, the Brown Commission's recommendations, and the ALI model code's insanity provision, in that it denies the defense to individuals who "lacked substantial capacity to appreciate the character of his conduct or to control his conduct." Given the purposes and moral underpinnings of the criminal law, S. 1's refusal to afford such individuals the insanity defense makes no sense at all.

(b) Entrapment: S. 1 reaffirms existing law on this subject, but rejects the thinking of the Brown Commission, by allowing this defense only where the defendant was not "predisposed" to commit the offense charged. This standard improperly focuses on the character and past misconduct of the defendant rather than on the propriety of the police behavior. An objective test, focusing on whether the police activity would be likely to cause normally law-abiding persons to commit the offense, "would permit law enforcement officers to set up the opportunity to commit the offense, without making the propriety of police behavior vary according to the past criminality of the suspect."

(c) Public Duty: S. 1 allows a new defense for illegal acts by a federal official if he or she "believed . . . that the conduct charged was required or authorized," unless his or her belief was reckless or negligent. § 544(b) This provision will dilute individual responsibility for public actions, and encourage federal officials to perceive themselves as accountable first to their superiors, and only second to the American public. It is startling, so soon after the rejection of such defenses in Watergate-related prosecutions, that Congress might introduce such a justification for otherwise patently illegal acts.

CRIME OF CONSPIRACY

The Brown Commission proposed to alter current laws of conspiracy by making it more difficult to establish the commission or an "overt act," tailoring the penalty to the target offense, and barring consecutive sentences for conspiracy and the target offense. These alterations were responses to severe and widespread scholarly criticism of conspiracy laws on first amendment grounds and on grounds of susceptibility to abuse. Nevertheless, under § 1002 of S. 1 an "omission" or "possession" suffices to establish that the plotting has gone beyond the talking stage, even if it does not satisfy the Brown Commission's requirement of being "a substantial step . . . strongly corroborative of the actor's intent to complete commission of the crime." Furthermore, the sentence for conspiracy can run as high as 30 years (compared with a maximum under Brown Commission recommendations of 15 years in some cases, and five years under existing law); and the sentence under S. 1 can be consecutive with the target offense sentence.

OFFENSES DIRECTED AT NATIONAL SECURITY AND GOVERNMENTAL EFFICIENCY WHICH JEOPARDIZE FREE SPEECH AND PRESS

S. 1 contains a collection of laws that threaten beneficial dissemination of information to the American public, all in the name of an inflated view of the requirements of national security and governmental efficiency. While not all of these provisions are innovations, they all step boldly into realms of speech and publication clearly protected by the first amendment. They must be completely rewritten with greater sensitivity to

the need—so painfully reaffirmed in recent years—for vigorous public scrutiny of governmental activity. The most objectionable of these provisions in S. 1 relate to:

(a) Espionage: Section 1121 penalizes the knowing collection or communication of "national defense information" with the "knowledge that it may be used, to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power. . . ." The absence of any requirement of specific intent to injure the interests of the United States or any likelihood of such injury, coupled with the extremely broad definition of "national defense information" and the vague reference to the "safety or interest of the United States", takes this section far into protected first amendment territory. "National defense information", for example, includes "any . . . matter involving the security of the United States that *might* be useful to the enemy." An effective espionage law can be drafted which reaches only the narrow class of conduct which genuinely endangers the public welfare, such as communication to hostile governments of information about weapons development or military contingency plans. Similar objections are appropriate to the sections of the act forbidding disclosure of "national defense information" to anyone who is known not to be authorized to receive it by Act of Congress or Executive Order, and requiring any unauthorized person who receives it to deliver it promptly to a federal public servant who is entitled to receive it (§ § 1122–23).

(b) Disclosing Classified Information: Section 1124 makes communication of classified information to "unauthorized" persons a felony, even if the individual has neither the purpose nor the capacity to harm real national defense interests. Under the original version of the bill, it was no defense that the information was improperly classified unless the individual had exhausted elaborate, potentially time-consuming administrative proceedings seeking declassification.

Recently agreed upon amendments improve the section somewhat by barring prosecution where the information was not lawfully subject to declassification or no administrative procedures for securing declassification or no administrative procedures for securing declassification exist. Especially if the words "lawfully subject to classification" are interpreted broadly, enactment of this provision will put Congress in the position of sanctioning an unfortunate bureaucratic tendency to excessive secrecy, as well as restricting the ability of news reporters to provide the American public with anything other than what the government decides they should know. Since official and unofficial "leaks" are a news-gathering fact of life, it is likely that this provision will be used selectively to harass independent-minded, public-spirited officials. Certainly there are other actions the government could take (e.g. dismissal) if an official disclosed properly classified information recklessly, with culpable intent, or for personal gain.

(c) Sedition: Recent United States Supreme Court precedent permits the government to proscribe advocacy of force or of law violation only when such advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). By contrast, § 1103 of S. 1 (as amended in Committee) punishes one who "with intent to bring about the forcible overthrow or destriction of the government of the United States or of any state," "incites other persons to engage in imminent lawless conduct that would facilitate the forcible overthrow or destruction of such government." By penalizing words that incite conduct which merely "facilitates" forcible overthrow of the government and by failing to require a substantial likelihood that the incitement will result in such conduct, this section flouts the protection granted by the First Amendment. This disregard for rights of free speech is even more glaring when the sections prohibiting conspiracy and solicitation are linked with the anti-sedition law itself: for agreeing with or persuading another to engage in seditious incitement at some time in the indefinite future would be a crime. The substantive offense should be rewritten to conform with Supreme Court doctrine, and a bar on cumulative inchoate offense should be imposed.

(d) Obstruction Government Functions and Impairing Military Effectiveness: Sections 1301 and 1302, prohibiting obstruction of government functions through fraud or physical interference, and §§ 1112 and 1114, penalizing impairment of military effectiveness through false statements and otherwise, all provide heavy penalties for broadly and vaguely defined categories of conduct. They could be used against public officials and media organizations whose aim is to inform the American people about unlawful actions such as the My Lai massacre, as well as against large but peaceful demonstrations that interfere with the free flow of traffic to and from government buildings. As such, they obstruct and impair vigorous debate in the press and on the streets. Unless such sections are amended to require specific intent to interfere with governmental or military effectiveness and to single out the most serious functions and military activities that might be impaired, these sections should be dropped, and reliance placed in other crimes such as sabotage, rioting and espionage.

(e) Rioting: While S. 1's anti-rioting provisions are more precise than current law in defining a riot, they are deficient in several respects. First, they penalize urging participation in a riot during the riot (§ 1831(a)(2)). Given that a riot is defined as "a public disturbance . . . that involves violent and tumultuous conduct . . . and . . . creates a grave danger of imminently causing injury or damage to person and property" (§ 1934), and given that there is no requirement that the defendant's "urging" be likely to produce activity in furtherance of the riot, the sections do not satisfy the Supreme Court's criteria for appropriate punishment of "mere speech" (see discussion of "Sedition"). Second, when the definition of a riot to include any disturbance of ten (recently amended from five) or more persons is considered in conjunction with jurisdictional provisions encompassing situations where any government function is obstructed, it becomes apparent that the federal government is intruding into areas more properly of local concern. The Brown Commission strenuously endeavored to avoid just such over-extensions of federal power.

(f) Wire-tapping: S. 1 largely restates the controversial and much abused wire-tapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968. In view of the most recent Supreme Court and Circuit Court of Appeals decisions restricting Congress's power to authorize warrantless searches in domestic national security matters (*United States* v. *United States District Court*, 407 U.S. 297 (1972); *Zweibon* v. *Mitchell* (No. 73–1847, D.C. Cir., June 23, 1975)), the provisions in S. 1 authorizing taps without a court order whenever a law enforcement officer "reasonably determines that an emergency situation exists with respect to conspiratorial activities threatening the national security" (§ 3104(b)(2)) and exempting the President from all liability for wiretapping instituted, *inter alia*, "to protect the United States against the overthrow of the govenment by force or other unlawful means," (§ 3108) are wholly inappropriate. Inherent in these sections is a potential for abusive surveillance of political dissidents or other disfavored groups.