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New Criminal Code

799-Page Bill Stirs Controversy

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A 799-page bill called the Criminal Justice Reform Act is rolling through Congress, picking up mass and speed and attracting controversy and comment from almost everyone concerned with the future of criminal justice in America.

Nothing like S. 1, as the bill is called, has appeared on the legal scene for more than 60 years and nothing even remotely on the scale of S. 1—the total revision and modernization of the entire body of federal criminal law—has ever been attempted.

The controversy is not over the need for revision, which is conceded by legislators, judges, lawyers and legal technicians on all sides. It is over what shape the law shall take and who shall shape it—those favoring more powerful tools for law enforcement or those favoring removing criminal penalties for certain conduct and strengthening rights of the individual against the state.

To many who have waded through the bill and 16,000 pages of hearings that amplify or confuse its meaning, the nation is threatened with enactment of a tool for government repression—a set of laws that would create new powers to intimidate the press and whistleblowing government employees, to suppress criticism, and to punish the unpopular in a legacy from the Nixon administration. To many others, the nation is on the threshold of achiev-

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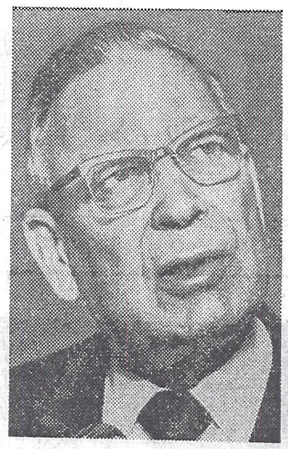

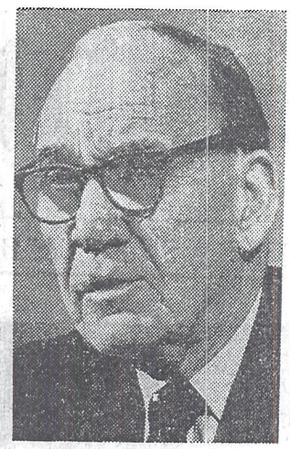

ROMAN L. HRUSKA JOHN L. McCLELLAN
. . . senators who directed criminal-code hearings

CODE, From A1

ing the first rational, organized federal criminal code in history.

Still others say that both the condemnation and the praise are accurate—that S. 1 offers the threat of repression and the promise of reform. For those with mixed emotions, the queston is whether any bill so massive and so technical can be amended to capture the reforms and discard the repressive features.

Meanwhile, those familiar with S. 1 realize that the bill is on a collision course with politics. They sense the approach of an election season in which crime is a big issue and Congress is feeling pressure to do something—anything—about it.

By next spring, when the Senate may have passed one version of the bill and the House may be working on another version, the chances for carefully drawn legislation may have disappeared, some observers fear.

Until recently the public knew little about S. 1, and its bulk and complexity deterred serious study by preoccupied legislators. It began to hit the news a few months ago when the press, sensing that the bill's sharpest threat was to First Amendment rights, began to study the bill.

Most of the controversy has centered on what has been called an American version of the British Official Secrets Act, creating new crimes in the area of disclosing and publishing government secrets and making it easier—and more tempting—for the government to prosecute the press for such things as publishing the Pentagon Papers, a top-secret history of U.S. involvement in Vietnam.

Press organizations, some representing political power of persuasion, are expected to beat back attempts to expand on existing law in hard negotiations next month within the Senate Judiciary Committee.

That prospect does not ease the concern of such opponents as the American Civil Liberties Union and Americans for Democratic Action. Their leaders fear that press victories will divert attention from other controversial features of the bill and dull the vigilance of the press for other threats to civil liberties.

A sampling of controversial features:

• Abolition of the insanity defense in federal criminal trials.

• Expansion of the death penalty to most of the federal crimes to which it applied before the Supreme Court's 1972 ruling striking down existing capital punishment laws as unconstitutional.

• A system of sentencing and schedule of penalties so severe that the usually conservative American Bar Association has disapproved it.

• A rule making it easier than ever to convict on conspiracy charges by providing that even an act of omission could be the kind of "overt act" in furtherance of conspiracy that the law has long required the government to prove.

• Establishment of defenses, including what has been dubbed the "Ehrlichman defense," which critics say (and defenders deny) would excuse top Watergate offenders on grounds they thought they were obeying orders or following the law.

Equally long is the list of features admired by both liberals and conservatives. The principal virtue is technical: a decade of work on the immense task of organizing and arranging thousands of criminal laws in a rational scheme in one document has been done with skill. Tricky problems of jurisdiction—the wavy line where federal power ends and state power begins—have been faced and solved, sometimes ingeniously. Problems that have plagued lawyers and judges in criminal trials for decades will disappear if the bill passes.

According to the bill's defenders on Capitol Hill and in the Justice Department, there are other praiseworthy features. They include:

• The first federal system of appelate review of sentencing, an attempt to iron out wide disparities in pun-

ishment meted out to similar offenders for similar offenses.

- For the first time, a federal system of compensating innocent victims of violent crime.
- Revised civil rights laws that would get rid of technicalities that have plagued prosecutions against Ku Klux Klansmen and local sheriffs for racial terrorism.
- New jurisdictional authority that would simplify extradition of elusive suspects who flee the country and would make clear that if any future massacre such as that at Myliai in South Vietnam in 1968 should occur, both present and former service personnel will be subject to prosecution.
- A section making it a crime, for the first time, to plot or plan within the United States the assassination of a foreign leader.

Leadership on the federal law revision has changed hands since 1966, when President Johnson recommended and Congress authorized a 12-member commission to take first crack at the rewriting job. The commission, which was considered "liberal-dominated," included three members from the Senate, three from the House, three appointed by the President and three appointed by the late Chief Justice, Earl Warren.

Four years later the so-called Brown Commission, chaired by former California Gov. Edmund G. Brown, produced a 364-page set of recommendations. It included the basic structure of an expanded federal crimes jurisdiction, a sentencing schedule reducing from about 30 to 6 the degrees of severity in punishment, and numerous policy proposals. A majority of the commission came out for abolition of the death penalty, decriminalization of marijuana and a ban on private ownership of handguns.

Outvoted on many issues within the commssion, Sens. John L. McClellan (D-Ark.) and Roman L. Hruska (R-Neb.) gained control of the code's development once it reached Congress and began to share the control with the Nixon administration.

McClellan, chairman of the Senate Judiciary Subcommittee on Criminal Laws and Procedures, and Hruska, the committee's ranking Republican, directed the hearings. Their first action was to announce that they would politely wait while the Justice Department, which considered the Brown commission's report merely a useful point of departure for a new code, worked on its own draft.

Two years passed before the Nixon administration, with a presidential speech vowing to attack crime "without pity," unveiled its version. Rejected outright were death-penalty abolition, decriminalization of marijuana and stiffer gun controls. Added were provisions increasing the government's secrecy powers and attempting to clarify the power to prosecute publishers and the sources of their information in the national security area.

The new provisions covering espionage, disclosure or "mishandling" of national defense information and a new crime of disclosure of classified information triggered strong opposition from press organizations.

Some critics charged that the bill had strong overtones of the administration's legal theories in the then-pending Pentagon Papers prosecuiton of Daniel Ellsberg, who leaked the secret history of the origins of the Vietnam war.

Administration lawyers contended, and still contend, that the bill basically embodied current law and made few, if any, drastic departures. The ACLU and other critics have hotly disputed this point, charging that the Justice Department especially in recent years, has interpreted the law too broadly.

This clash of views was seen in the prosecution of Ellsberg in 1971 on charges that applied the espionage law to government employee leaks.

But the case reached no conclusive result because disclosure of illegal evidence-gathering by White House "plumbers" resulted in the dismissal of Ellsberg's indictment in 1973.

The administration, McClellan and Hruska, while expressing willingness to study changes in the proposaled code, defend the bill as necessary to safeguard government secrets. They contend it is necessary to make mishandling classified documents a crime, without which there would continue to be a big gap in the law.

Opponents have claimed that the new crime would put more power in the hands of thousands of bureaucrats who wield classification stamps and would intimidate anyone who wanted to expose cost overruns and other government embarrassments.

Critics also charged that there is no limit to what could be considered "national defense information," whether classified or not, that the proposed law would make it a crime to discuss or write about.

Some of the criticisms are answered by statements by McClellan, Hruska, Senate Minority Leader Hugh Scott (R-Pa.) and others that the bill has been tightened and can be amended further to take care of any objections. "I'd like to see the language," said Harvard law professor Vern Countryman last week. He called the bill "unamendable."

Nonsense, said University of Pennsylvania law professor Louis B. Schwartz. "Give me a week and I can make the entire bill perfectly acceptable." Schwartz, who directed the staff of the Brown commission, acknowledged however, that the bill could not be amended without the votes and the votes were not his department.

The crunch in the Senate will begin soon when the subcommittee takes the formal step of reporting the bill favorably to the full Judiciary Committee.

Whether the bill can reach the Senate floor this year is a major question mark. Hearings cannot begin in the House until the Senate acts. Thus, the outlook is for a final showdown so late in 1976 that elections, and little else, will be on the minds of the legislators.

Additional articles will appear from time to time detailing specific sections of S. 1.