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THE PROPOSED FEDERAL CRIMINAL CODE: CONSPIRACY PROVISIONS†

*Paul Marcus**

I. INTRODUCTION

In 1966 Congress created the National Commission on Reform of Federal Criminal Laws. The authorizing statute directed the commission to study the criminal laws of the federal government and to recommend revisions to improve the federal system of criminal justice.¹ The commission, chaired by the former governor of California, Edmund G. Brown Sr., consisted of a group of elected officials and appointed members with unusually varied interests and had the assistance of an extremely able staff. The Brown Commission submitted its final report to the Congress in January 1971.² The report and the commission's proposal for a new federal criminal code underwent extensive changes before its consideration in the Senate as the controversial S. 1. This bill ultimately died in the Senate, however, and in May 1977, a modified version of the proposed code was introduced simultaneously as S. 1437 in the Senate and H.R. 6869 in the House. After a lengthy report by the Committee on the Judiciary³ and some fairly extensive floor amendments, the Senate passed S. 1437 in early 1978.⁴ H.R. 6869 is currently before the House Committee on the Judiciary, Subcommittee on Criminal Justice. Thus, four different federal criminal code reforms have been suggested within the past seven years: the Brown Commission recommendations, S. 1, the original S. 1437, which was identical to the present H.R. 6869, and the amended version of S. 1437 that the Senate passed.

Although some have questioned the need for any law punishing

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1. An Act to establish a National Commission on Reform of Federal Criminal Laws, Pub. L. No. 89-801, § 3, 80 Stat. 1516 (1966).

2. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971).

3. S. REP. NO. 95-605, 95th Cong., 1st Sess. (1977) [hereinafter cited as SENATE REPORT].

4. 124 CONG. REC. S. 860 (1978).

conspiracies,⁵ neither the Brown Commission nor Congress has questioned the necessity of such a statutory offense.⁶ The crime of conspiracy, however, creates difficult procedural and substantive problems at trial, and these problems have become more acute as federal prosecutors have increasingly relied on conspiracy theories in the courts. Consequently, a careful analysis of the current congressional proposals is essential. This article, although focusing on H.R. 6869 and the changes the bill would introduce in the law of conspiracy, will discuss the similarities and differences between the House bill and the other three proposals. Furthermore, changes in the bill which would improve the administration of justice in the federal courts will be recommended.

II. INSTITUTING PROSECUTION FOR CONSPIRACY AND RELATED OFFENSES

A. Venue

One of the tactical advantages afforded to prosecutors in conspiracy prosecutions is that prosecution may be instituted not only in the district where the agreement was made,⁷ but also where any overt act by any conspirator was committed in furtherance of the conspiracy.⁸ The venue provision in H.R. 6869 codifies this practice.⁹ Although Justice Holmes, arguing that the overt act was not an element of the crime of conspiracy, protested such a rule,¹⁰ his view has not prevailed. Because the bill makes an overt act an element of the criminal offense and not simply proof of the crime,¹¹ the venue rule contained in the House bill is sound.

In the past, however, prosecutors have abused this broad rule in certain areas. The venue provision of the final Senate version contains a significant improvement that does not appear in the House version. The Senate bill provides that charges of conspiracy to distribute obscene materials may be brought only where the conspiracy was formed or where "a substantial portion of the conspiracy occurred."¹² Presumably, this provision would avoid the problem created by the so-called "Deep Throat" prosecution,¹³ in which defendants were forced to stand trial in a district they had never visited solely on the ground that one copy of a film was shown there. Considering the broad sweep

5. See Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137 (1973); Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977).

6. See SENATE REPORT, *supra* note 3, at 161.

7. Hyde v. Shine, 199 U.S. 62 (1905).

8. Hyde v. United States, 225 U.S. 347 (1912).

9. H.R. 6869 § 3311(b). For the text of the sections of the House and Senate bills relating to conspiracy, see the appendix to this article.

10. Hyde v. United States, 225 U.S. 347, 384 (1912) (Holmes, J., dissenting).

11. See text accompanying notes 37-41 *infra*.

12. S. 1437 § 3311(b).

13. United States v. Peraino, Cr. No. 75-91 (W.D. Tenn. 1977).

of conspiracy law in general, this venue limitation is especially significant when the conspiracy prosecution is combined with the vague and confusing elements inherent in any obscenity charge.

B. Co-Conspirator Liability

Not only may a defendant in a conspiracy prosecution find himself prosecuted, because of the actions of his alleged co-conspirators, in a district he has never visited, he may also find himself defending against any number of crimes allegedly committed by a co-conspirator. Mr. Justice Douglas established the broad accomplice liability rule of co-conspirators in his celebrated opinion in *Pinkerton v. United States*:¹⁴ A conspirator is liable for all criminal acts of his co-conspirators as long as those acts were reasonably foreseeable. Accepting the argument that the criminal acts are "sufficiently dependent upon the encouragement and material support of the group as a whole to warrant treating each member as a causal agent,"¹⁵ both the House and the Senate bills contain provisions that perpetuate the *Pinkerton* rule. Section 401(b) provides that a conspirator is liable for a principal offense if "the other person engages in the conduct in furtherance of the conspiracy; and the conduct is authorized by the agreement or it is reasonably foreseeable that the conduct would be performed in furtherance of the conspiracy."

There are two reasons why the Brown Commission rejected the *Pinkerton* complicity rule and why the House should also do so. First, as Mr. Justice Rutledge noted in his dissent in *Pinkerton*, the rule confuses two distinct bases of criminal liability.¹⁶ One is the criminal agreement, punishable under the law of conspiracy. The other is accountability for the acts of others, punishable under the law of accomplice liability. A defendant should be accountable for the commission of the substantive offense only if he in fact aided the commission of the crime, not if he merely assented to it. Otherwise, the defendant is convicted twice for the single act of agreement. In accord with this rationale, many states do not allow convictions for both conspiracy and the substantive offense. In Illinois, for example, conspiracy is treated as an inchoate offense, and a statute expressly prohibits conviction for both the conspiracy and the object of the conspiracy.¹⁷ Similarly, the Supreme Judicial Court of Massachusetts rejected the *Pinkerton* rule as a matter of state law:

If the rule were otherwise, the fundamental distinction between a substantive offence and a conspiracy to commit that of-

14. 328 U.S. 640 (1946).

15. SENATE REPORT, *supra* note 3, at 69 (quoting *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 998-99 (1959)).

16. 328 U.S. at 648 (Rutledge, J., dissenting).

17. ILL. REV. STAT. ch. 38, § 8-5 (1977).

fence would be ignored. Each is a separate and distinct offence and each may be separately punished. . . . Punishment is imposed for entering into the combination. This is not the same thing as participating in the substantive offence which was the object of the conspiracy. While it has been said that a conspiracy is a "partnership in crime", . . . that metaphor should not be pressed too far. It does not follow that such a partnership is governed by the same principles of vicarious liability as would apply in civil cases. Our criminal law is founded on the principle that guilt, for the more serious offences, is personal, not vicarious. One is punished for his own blameworthy conduct, not that of others. . . . To ignore the distinction between the crime of conspiracy and the substantive offence would enable "the government through the use of the conspiracy dragnet to convict a conspirator of every substantive offense committed by any other member of the group even though he had no part in it or even knowledge of it."¹⁸

The second argument against the *Pinkerton* rule rests less on the distinct bases of criminal liability than on the mental state required for conviction. If a conspirator agrees to commit one crime, under the *Pinkerton* rule and the House and Senate bills, he is liable for any other reasonably foreseeable crime committed in furtherance of the conspiracy by any co-conspirator, even if the conspirators never discussed or considered the other crime. The Criminal Justice Section of the American Bar Association has stated the objection to this result with great clarity:

The *Pinkerton* rule represents a form of vicarious criminal liability that, in essence, imposes liability for negligence. In the form of the rule adopted . . . a person is liable for a co-conspirator's crime which was "reasonably foreseeable"; or, stated another way, the person is criminally liable if he should have known, when he agreed to become a part of the conspiracy, that there was a risk that the collateral offense would be committed. This is clearly negligence liability, and should be imposed only if there is strong justification.¹⁹

The Criminal Justice Section properly could not perceive any convincing justification for imposing criminal liability for negligence on a party to a conspiracy. As the Brown Commission remarked, "the argument [supporting *Pinkerton*] seems to go no further than to support the provision which makes mere membership in a conspiracy a crime even though there is no complicity relationship to the crimes which may be committed."²⁰ Moreover, the *Pinkerton* rule is unnecessary

18. *Commonwealth v. Stasiun*, 349 Mass. 38, 48, 206 N.E.2d 672, 679 (1965).

19. Criminal Justice Section, American Bar Association Policy regarding S-1, The Proposed Federal Criminal Code (94th Congress) at 5 (adopted Aug. 1975).

20. 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 157 (1970).

because of the broad sweep of the aiding and abetting provisions in the proposed bills.²¹ Consequently, the House should delete subsection 401(b) from the bill. Subsection (a) is sufficient to establish accountability for the conspirator who genuinely aided the principal in the offense.²²

III. THE ELEMENTS OF AND DEFENSES TO CONSPIRACY

A. *The Definition of Conspiracy*

The definition of the offense of conspiracy has undergone little change from the Brown Commission proposal to the House version. Section 1002(a) of the House bill provides that a person is guilty of criminal conspiracy "if he agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes, and he or one of such persons in fact engages in any conduct with intent to effect any objective of the agreement." This is the same definition contained in the amended version of S. 1437 and is quite similar to that recommended by the Brown Commission.²³ The proposed section eliminates the confusion created by the numerous conspiracy provisions in the United States Code, which contain different language and different overt act requirements.²⁴ The improvement would no doubt be welcomed by prosecutors and defense attorneys who must often grapple with two different conspiracy statutes in the same trial. The proposed section also eliminates language in the current general conspiracy statute that has confused the courts for a good many years.²⁵ The current statute proscribes an agreement to commit an offense against the federal government "or to defraud the United States."²⁶ The fraud provision has occasioned inconsistent decisions by the federal courts and anomalous limitations by the Supreme Court.

Although the crime of conspiracy is defined in terms of a person who agrees to commit an unlawful act, the proposed section contains no definition of agreement. This omission, however, was both intentional and necessary. The perimeter of the federal conspiracy offense has been demarcated by literally thousands of reported decisions. This

21. See H.B. 6869 § 401(a)(1).

22. Alternatively, the House could limit the scope of the *Pinkerton* rule without abandoning it by requiring that the crime committed by the co-conspirator in fact be contemplated by the parties. Such a provision would eliminate liability for negligence, but still hold a conspirator responsible for the actions of co-conspirators.

23. The most significant difference between the present proposals and the Brown Commission proposal is that the latter provided in § 1004(1) that "the agreement need not be explicit but may be implicit in the fact of collaboration or existence of other circumstances." Because a large body of case law supports permitting the finder of fact to draw such an inference, see, e.g., *Direct Sales Co v. United States*, 319 U.S. 703, 714 (1943); *Glasser v. United States*, 315 U.S. 60, 80 (1942), this language is unnecessary and its omission was probably not intended to change the current law.

24. See SENATE REPORT, *supra* note 3, at 161-62.

25. See Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

26. 18 U.S.C. § 371 (1970).

body of case law includes many opinions interpreting the meaning of "agreement," discussing the mental state required for an agreement, and prescribing the evidence necessary to prove an agreement.²⁷ In light of this highly developed body of law, an attempt to encapsulate the implications of the term "agrees" in a sentence or two would have been unfortunate.

B. The "Unilateral" Agreement

Although the proposed bill adopts by implication a considerable body of case law on the nature of a criminal agreement, the bill has expanded the judicial definition in one troublesome respect. At common law and in the current general conspiracy statute, a criminal conspiracy occurs when "two or more persons conspire." All four versions of the proposed federal code impose criminal liability on a person who "agrees with one or more persons."

The change is more than stylistic; it represents an intentional change in the substantive law. The proposed bill focuses on whether the defendant has agreed, not on whether several persons have agreed. The proposed bill thus adopts the Model Penal Code's "unilateral approach" to conspiracy and rejects the current requirement of a true agreement.²⁸ The bill, if enacted, will therefore permit a prosecutor to charge a single defendant with conspiracy if he agreed with another party, even though the other party did not genuinely agree with him. In *State v. St. Christopher*,²⁹ for example, the defendant told his cousin that he planned to murder his mother, and he sought the cousin's aid. The cousin, under specific directions from the police, feigned agreement, and the defendant was tried and convicted of conspiracy to commit murder. Although no true agreement had been reached, the Minnesota Supreme Court upheld the conviction. The court noted that the defendant's action was sufficient to constitute a crime under the Minnesota conspiracy statute, which is virtually identical to the proposed federal law.³⁰

The *St. Christopher* decision is a thoroughly defensible interpretation of the Minnesota statute, and also of the proposed federal law, and reaches the result that the drafters of the Model Penal Code intended.³¹ A person charged with making a unilateral agreement should be punished, the drafters argued, because of "the unequivocal evidence of a

27. See generally Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-Federal Intent*, 1976 U. ILL. L.F. 627.

28. See MODEL PENAL CODE § 5.03, Comment 2 (Tent. Draft No. 10, 1960).

29. 305 Minn. 226, 232 N.W.2d 798 (1975).

30. See MINN. STAT. § 609.175(2) (1974) ("Whoever conspires with another to commit a crime").

31. See Wechsler, Jones, & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy* (pt. 2), 61 COLUM. L. REV. 957, 966 (1961).

firm purpose to commit a crime.”³² In my judgment, however, the unilateral approach is an unwarranted expansion of the scope of conspiracy law. Presently, a federal prosecutor must establish a true agreement between two or more persons; without such an agreement, no criminal conspiracy exists. The rationale for this requirement is that a conspiracy is particularly dangerous because of the concerted criminal action that it makes possible. The Supreme Court has said that

collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.³³

Although the unilateral approach is unlikely to have broad impact on the number of conspiracy prosecutions, the approach unjustifiably distorts the purpose of the separate crime of conspiracy. The “unilateral conspirator” may be guilty of the crimes of attempt or solicitation, but he should not have to defend against a charge of conspiracy, particularly because the charge entails significant tactical disadvantages at trial.

Both the current bill and the Brown Commission report contain a corollary of the unilateral approach. Under the provisions of both, it is no defense that the other conspirators were not convicted or were not even charged.³⁴ The unilateral approach requires this result because it assumes that the genuine agreement, and hence the guilt, of co-conspirators is irrelevant to the defendant’s guilt. The only concern of the statute is with the state of mind and actions of the defendant. The provision necessarily rejects the so-called Rule of Consistency. This rule provides that if only one conspirator is convicted, the conviction must be overturned because “[i]t is impossible in the nature of things for a man to conspire with himself [C]onspiracy imports a corrupt agreement between not less than two with guilty knowledge on the

32. MODEL PENAL CODE § 5.03, Comment 2 (Tent. Draft No. 10, 1960).

33. *Callanan v. United States*, 364 U.S. 587, 593-94 (1961).

34. H.R. 6869 § 1002(c). The bill that the Senate passed contains the same provision in § 1002(d).

part of each."³⁵

The Senate, presumably to mitigate the harsh consequences of the unilateral approach, made an eleventh hour change in the Senate bill. The new subsection 1002(c) of S. 1437 provides: "It is a defense to a prosecution under this section that all of the persons with whom the defendant is alleged to have conspired have been acquitted because of insufficient evidence, not occasioned by a suppression order, that a conspiracy existed." This defense appears to be a half-way measure between the Rule of Consistency and the unilateral approach. On one hand, it would bar a conspiracy conviction if all other conspirators were acquitted of the conspiracy offense.³⁶ On the other hand, S. 1437 retains the original subsection precluding a defense when only some of the other conspirators have been acquitted or when they have not been charged. The disparity between the two subsections results in a confusion that could be avoided by adhering to the traditional notion of a genuine agreement. Thus, the House bill should retain the present requirement that "two or more persons conspire" and should also continue the Rule of Consistency. If a defendant cannot be convicted of conspiracy under these provisions, it is because he has not engaged in dangerous group planning activity. Such a defendant, however, will not necessarily escape criminal liability, because in many cases he can be convicted of either attempt or solicitation.

C. *The Overt Act*

The current general federal conspiracy statute requires the prosecution to prove that an overt act was committed in furtherance of the conspiracy. The federal courts, however, have disagreed on whether other federal conspiracy statutes that do not expressly contain an overt act requirement should be construed to require proof of an overt act.³⁷ The requirement can have immense practical significance. The overt act often establishes venue, as well as the duration of the conspiracy, which in turn is important in determining the applicability of the statute of limitations, hearsay exceptions, and liability for substantive offenses committed by co-conspirators.

The proposal before the House, like each of the other three proposals, explicitly requires proof of an overt act. The proposed definition of conspiracy requires that the defendant, or one of the parties to the agreement, engage "in any conduct with intent to effect any objective of the agreement." The key language here is "any conduct," the

35. *Morrison v. California*, 291 U.S. 82, 92 (1934) (Cardozo, J.). See generally Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 957-58 (1977).

36. S. 1437 § 1002(c). The amendment apparently provides a defense only when all the co-conspirators have been acquitted at the same trial. It is extremely unlikely that the Senate intended to broaden the scope of the Rule of Consistency.

37. Compare *United States v. Cortwright*, 528 F.2d 168, 172 & n.1 (7th Cir. 1975) with *United States v. King*, 521 F.2d 61 (10th Cir. 1975).

same language found in the present general conspiracy statute.³⁸ The courts have interpreted these two words literally. Proof of any conduct, no matter how insignificant, will usually satisfy this requirement.³⁹ This broad interpretation of the overt act requirement is troubling because it betrays the rationale for the requirement. The reason for requiring proof of an overt act is to show that the conspiracy is in force and is "neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence."⁴⁰ Consequently, the better requirement is the one suggested by the former Director of the National Commission on Reform of Federal Criminal Laws for restricting "the scope of conspiracy by requiring proof of an overt act that is 'strongly corroborative of the firmness of the actor's intent to complete the commission of the crime,' as in the proposed law of attempt."⁴¹ This formulation would require that the government carry a heavier burden with respect to both the nature of the act and the actor's state of mind.

D. *The Withdrawal Defense*

Under the present federal conspiracy statute, a defendant's withdrawal from the conspiracy prior to the completion of the crime that was the object of the agreement does not constitute a defense to a charge of conspiracy. Withdrawal will, of course, eliminate responsibility for the completed offense, but criminal responsibility for the conspiracy will remain unaltered.⁴² Adopting a position taken by the drafters of the Model Penal Code,⁴³ all four proposals to revise the criminal code permit a defense to the conspiracy charge if the defendant voluntarily "prevented the commission of every crime that was an objective of the conspiracy." Arguably, the mere attempt to prevent the achievement of the conspiracy's objects manifests a sufficient renunciation of criminal intent to warrant permitting a defendant to escape criminal sanctions.⁴⁴ Nevertheless, the proposed defense is a

38. See 18 U.S.C. § 371 (1970).

39. See, e.g., *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975) (boarding vessel to be used for importing marijuana several months before the planned crime is sufficient to establish overt act); *Smith v. United States*, 92 F.2d 460 (9th Cir. 1937) (telephone call from Hawaii to California establishes venue in California).

40. *Yates v. United States*, 354 U.S. 298, 334 (1957).

41. *Reform of the Federal Criminal Laws: Hearings before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 108 (1971) (statement of Professor Louis B. Schwartz).

42. See SENATE REPORT, *supra* note 3, at 166 n.74.

43. See MODEL PENAL CODE § 5.03(6) (Official Draft 1962).

44. One review of those states that have enacted or considered enacting criminal codes since the promulgation of the Model Penal Code, for example, notes that eight states allow a defendant charged with conspiracy to defend on the basis that he "gave timely warning to law enforcement authorities or made a substantial effort to prevent the performance of the criminal conduct contemplated." Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1170 (1975). The same review also notes, however, that 15 of the states surveyed have adhered to the common law rule that provides no withdrawal defense to conspiracy. *Id.* at 1172.

distinct improvement over the current law and eliminates the difficult problems of proof that the more lenient defense would create. Consequently, the House should approve the proposed defense.

E. The Statute of Limitations

Section 511(d)(2)(a), included in both the Senate and House versions of the bill, provides that, for the purpose of determining when the statute of limitations begins to run, a conspiracy occurs

on the day of the occurrence of the most recent conduct to effect any objective of the conspiracy for which the defendant is responsible, or on the day of the frustration of the last remaining objective of the conspiracy, or on the day the conspiracy is terminated or finally abandoned.

Both provisions thus provide that the statute of limitations will commence to run when the last overt act was committed by the defendant or a co-conspirator, when the last planned objective was frustrated, or when the conspiracy was abandoned. This provision conforms to existing law and is soundly based; it should be adopted in its current form.

IV. PUNISHMENT OF CONSPIRACY

A. Penalties

The proposed codes all depart from current statutory provisions for the penalty of the convicted conspirator. Under the present conspiracy statute, conspiracy is punished with a fine of not more than \$10,000 or imprisonment for not more than five years, or both.⁴⁵ The statute makes no differentiation between conspiracies with different criminal objectives. Thus, a conspiracy to commit a crime is often punished less severely than the crime that is its object, but occasionally a conspiracy may be punished much more severely than would be the completed offense.⁴⁶ This arbitrary penalty structure is difficult to justify and contrary to the purpose of the conspiracy offense to prevent the commission of the substantive crime. Relying on this purpose, the Brown Commission and the drafters of the House and Senate bills, in section 1002(d), have linked the conspiracy penalty to the penalty for the substantive crime that is the object of the conspiracy:

An offense described in this section is an offense of the same class as the most serious crime that was an objective of the conspiracy, except that if the most serious crime that was an objective of the conspiracy is a Class A felony, an offense described in this section is a Class B felony.

45. 18 U.S.C. § 371 (1970). If the object of the conspiracy is a misdemeanor, punishment cannot exceed the maximum punishment provided for commission of the misdemeanor. *Id.*

46. 1 NATIONAL COMMISSION FOR REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 402 (1970).

B. Sentencing

One of the major improvements on current law contained in the proposed law is the provision for the sentencing of the convicted conspirator. Here, as in the area of accomplice liability, the *Pinkerton* decision establishes the current rule: A conspirator may receive consecutive sentences for the conspiracy and the principal offense.⁴⁷ The rationale for this rule is that the conspiracy and the completed crime are separate offenses and should be punished separately.⁴⁸ Although in practice most convicted conspirators do not actually receive consecutive sentences,⁴⁹ the principle has been subject to persistent criticism. Most commentators, like the dissenters in *Pinkerton*, have argued that the purpose of the crime of conspiracy is to prevent the commission of the objective of the conspiracy. Consequently, when the conspiracy achieves its objective, the underlying crime alone should be punished. There should not be double prosecution and punishment.⁵⁰

Responding to this criticism, the Brown Commission recommended that consecutive sentencing generally not be allowed for the conspiracy and the completed offense. The recommendation has been followed in section 2304 of the proposed bill, which provides that "the terms may not run consecutively . . . for [criminal conspiracy] . . . and for another offense that was the sole objective of the . . . conspiracy." Consecutive sentences, however, could be imposed for a conspiracy with numerous criminal objectives in a complex pattern of criminal activity.⁵¹ Because the proposed bill would have little impact on prosecutorial effectiveness and because it would abandon the overly harsh *Pinkerton* rule, the change in the law should be enacted.

V. CONCLUSION

On the whole, the conspiracy provisions in the House bill for a new federal criminal code would greatly improve the administration of justice for conspiracy cases in the federal courts. Inconsistencies in the present statutory scheme would be eliminated, existing practices would be codified and thereby clarified, and the discretion of government prosecutors would, at least, not be broadened. Moreover, the elimination of consecutive sentencing, the adoption of a withdrawal defense, and the rationalization of the penalty structure would be substantial

47. See *United States v. Marchese*, 438 F.2d 452 (2d Cir.), *cert. denied*, 402 U.S. 1012 (1971); *Johnstone v. United States*, 418 F.2d 1094 (5th Cir. 1969).

48. Indeed, the Supreme Court has sanctioned the imposition of a harsher penalty for the conspiracy than for the offense which was the object of the conspiracy. See *Clune v. United States*, 159 U.S. 590 (1895).

49. Marcus, *The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 938 (1977).

50. Cf. *United States v. Miranti*, 253 F.2d 135, 138-39 (2d Cir. 1958) (expressing in dictum the court's disapproval of consecutive sentencing for convictions of the conspiracy and the completed crime).

51. SENATE REPORT, *supra* note 3, at 934.

improvements over the existing criminal code. Improvements in the current proposal, however, should be made. The adoption of the unilateral approach to conspiracy, the retention of the minimal overt act requirement, and the codification of the *Pinkerton* complicity doctrine would provide the government with an undue and unnecessary advantage in conspiracy prosecutions. Consequently, the House should consider amending these portions of the bill before its final passage. Nevertheless, the bill, even in its present form, would represent such an improvement over the current confused state of the law of conspiracy that it should be passed.⁵²

52. On August 17, 1978, the House Subcommittee introduced its own revision bill drastically limiting the impact of the Senate version and the original House version of the revised criminal code. This subcommittee bill, H.R. 13959, would keep the current federal conspiracy section, 18 U.S.C. § 371, intact. See text accompanying notes 26-28, *supra*. Both versions are currently before the full House Judiciary Committee.

APPENDIX

The Proposed Federal Criminal Code Conspiracy
Provisions of S. 1437 and H.R. 6869

(Changes made in the Senate bill are indicated by italics and line-outs)

“§ 1002. Criminal Conspiracy

“(a) OFFENSE.—A person is guilty of an offense if he agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes, and he, or one of such persons in fact, engages in any conduct with intent to effect any objective of the agreement.

“(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of every crime that was an objective of the conspiracy.

~~“(c) DEFENSE.—It is a defense to a prosecution under this section that all of the persons with whom the defendant is alleged to have conspired have been acquitted because of insufficient evidence, not occasioned by suppression order, that a conspiracy existed.~~

“(e)(d) DEFENSES PRECLUDED.—~~It~~ *Except as provided in subsection (c),* it is not a defense to a prosecution under this section that one or more of the persons with whom the defendant is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution.

“(d)(e) GRADING.—An offense described in this section is an offense of the same class as the most serious crime that was an objective of the conspiracy, except that if the most serious crime that was an objective of the conspiracy is a Class A felony, an offense described in this section is a Class B felony.

“(e)(f) JURISDICTION. —There is federal jurisdiction over an offense described in this section if any objective of the conspiracy is a federal crime with regard to which federal jurisdiction:

“(1) is not limited to certain specified circumstances; or

“(2) is limited to certain specified circumstances and any such circumstance exists or has occurred, or would exist or occur if any crime that is an objective of the conspiracy were committed.

“§ 1004. General Provisions for Chapter 10

“(a) DEFINITION.—As used in this chapter, a renunciation is not ‘voluntary and complete’ if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective.

~~“(1) a belief that a circumstance exists that increases the probability of detection or apprehension of the defendant or another participant in the crime, or that makes more difficult the consummation of the crime; or~~

~~“(2)~~

“(b) **INAPPLICABILITY TO CERTAIN OFFENSES.**—It is not an offense under this chapter:

“(1) to attempt to commit, to conspire to commit, or to solicit the commission of:

“(A) an offense described in section 1001 (Criminal Attempt), 1002 (Criminal Conspiracy), or 1003 (Criminal Solicitation);

“(B) an offense described in section 1202 (Conspiracy against a Foreign Power) or 1764 (Antitrust Offenses); or

“(C) an offense described outside this title that consists of an attempt, a conspiracy, or a solicitation; or

“(2) to attempt to commit, to conspire to commit unless it was in fact completed, or to solicit the commission of, an offense described in section 1115(a)(3) (Obstructing Military Recruitment or Induction), 1116(a)(1) (Inciting or Aiding Mutiny, Insubordination, or Desertion), or 1831(a)(1) (Leading a Riot).

“§ 401. Liability of an Accomplice

“(a) **LIABILITY IN GENERAL.**—A person is criminally liable for an offense based upon the conduct of another person if:

“(1) he knowingly aids or abets the commission of the offense by the other person; or

“(2) acting with the state of mind required for the commission of the offense, he causes the other person to engage in conduct that would constitute an offense if engaged in personally by the defendant or any other person.

“(b) **LIABILITY AS COCONSPIRATOR.**—A person is criminally liable for an offense based upon the conduct of another person if:

“(1) he and the other person engaged in an offense under section 1002 (Criminal Conspiracy):

“(2) the other person engages in the conduct in furtherance of the conspiracy; and

“(3) the conduct is authorized by the agreement or it is reasonably foreseeable that the conduct would be performed in furtherance of the conspiracy.

“§ 511. Time Limitations

“(d) **TIME WHEN OFFENSE COMMITTED.** —Except as otherwise provided by statute, for purposes of this section the commission of an offense occurs

“(1) if the offense is other than a continuing offense, on the occurrence of the last remaining element of the offense; or

“(2) if the offense is a continuing offense involving:

“(A) criminal conspiracy, on the day of the occurrence of the most recent conduct to effect any objective of the conspiracy for which the defendant is responsible, or on the day of the frustration of the last remaining objective of the conspiracy, or on the day the conspiracy is terminated or finally abandoned;

“§ 2304. Multiple Sentences of Imprisonment

“(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively: ~~“(1)~~ for an offense described in section 1001 (Criminal Attempt), 1002 (Criminal Conspiracy), or 1003 (Criminal Solicitation), and for another offense that was the sole objective of the attempt, conspiracy, or solicitation.

“§ 3311. Venue for an Offense Committed in more than one District

“(a) IN GENERAL.—Except as otherwise provided, an offense begun in one judicial district and completed in another, or committed in more than one district, may be prosecuted in any district in which the offense was begun, continued, or completed.

“(b) CONSPIRACY OFFENSES.—A conspiracy offense, for purposes of subsection (a), is a continuing offense, and may be prosecuted in any district in which the conspiracy was entered into or in which any person engaged in any conduct to effect an objective of the conspiracy. *A conspiracy to commit an offense under section 1842 (Disseminating Obscene Material) may be prosecuted only in a district in which the conspiracy was entered into or in which a substantial portion of the conspiracy occurred.* A substantive offense that is committed pursuant to a conspiracy may be prosecuted with the conspiracy offense in any district in which the conspiracy offense may be prosecuted.