

See: Minutes of Subcommittee No. 2  
6/10/69, p. 1, Vol. XI  
Tapes #74 & 75

CRIMINAL LAW REVISION COMMISSION  
208 Agriculture Building  
Salem, Oregon

ARTICLE 21

BRIBERY AND CORRUPT INFLUENCES

Preliminary Draft No. 1; April 1969

Reporter: Roger D. Wallingford

Subcommittee No. 2

## BRIBERY AND CORRUPT INFLUENCES

Preliminary Draft No. 1; April 1969

Section 1. Bribery and corrupt influences; definitions. As used in \_\_\_\_\_, except as the context may require otherwise:

(1) "Benefit" means any gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "Pecuniary benefit" is benefit in the form of money, property, commercial interests or anything else of which the primary significance is economic gain.

(3) "Public servant" means any public officer or employee of government, including legislators and judges, and any other person participating as an advisor, juror, consultant or otherwise in performing governmental functions and includes a person who has been elected or designated to become a public servant although not yet occupying that position; but the term does not include witnesses.

(4) "Government" includes any branch, subdivision or agency of this state or any locality within it.

(5) "Governmental function" includes any legally authorized activity which a public servant may undertake on behalf of a government.

(6) "Party official" means a person holding any position or office in a political party, whether elective, appointive or otherwise.

(7) "Harm" means loss, disadvantage or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to a third person.

### COMMENTARY - BRIBERY: DEFINITIONS

This section adapted from New York Penal Law section 10.00, Michigan Revised Penal Code 4701 and the Model Penal Code section 240.0.

The terms "benefit" and "pecuniary benefit" are distinguished. "Pecuniary benefit" applies to any consideration with a primary significance of economic gain. "Benefit" applies to any gain or advantage to the beneficiary. This distinction has considerable relevance when the terms are used to designate the form of consideration constituting an element of the offense.

The term "Public servant" includes all public officers and employees engaged in a governmental function and extends to those persons acting in an advisory or consultative capacity. This definition would include jurors while serving their term as part of the judicial process. The definition does not include witnesses who are covered in section \_\_\_\_\_ relating to Tampering with Witnesses and Informants.

The definition of "Government" restricts the application of the Bribery Section to state, county and municipal governmental bodies. Federal law 18 U.S.C.A. 201 covers those offenses involving a public servant or employee of the United States government.

The definition of "governmental function" was included to avoid any possible suggestion that the term was limited by the "governmental" vs. "proprietary" function distinction found in certain areas of local government law.

The definition of "party official" is intended to include those political functionaries whose elective or appointive position enable them to influence the course of judicial, administrative and legislative decision-making.

The term "Harm" is broadly defined to include all threatened action which has as its purpose the unlawful intimidation of a public servant.

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TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 240.0. Definitions.

In Articles 240-243, unless a different meaning plainly is required:

- (1) "benefit" means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose;
- (2) "government" includes any branch, subdivision or agency of the government of the State or any locality within it;
- (3) "harm" means loss, disadvantage or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested;
- (4) "official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding;
- (5) "party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts, or participates in directing or conducting party affairs at any level of responsibility;
- (6) "pecuniary benefit" is benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain;
- (7) "public servant" means any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function; but the term does not include witnesses;
- (8) "administrative proceeding" means any proceeding other than a judicial proceeding the outcome of which is required to be based on a record or documentation prescribed by law, or in which law or regulation is particularized in application to individuals.

Text of Michigan Revised Penal Code

[Definition of Terms]

Sec. 4701. (1) The definitions contained in section 4501 are applicable in this chapter unless the context otherwise requires.

(2) "Benefit" means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

(3) "Pecuniary benefit" is benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain.

(4) "Public servant," as used in this chapter, includes persons who presently occupy the position of a public servant as defined in section 4501 (3) or have been elected, appointed or designated to become a public servant although not yet occupying that position.

(5) "Party officer" means a person who holds any position or office in a political party, whether by election, appointment or otherwise.

[Definition of Terms]

Sec. 4501. The following definitions apply in this chapter unless the context otherwise requires:

(a) "Government" includes any branch, subdivision or agency of the government of this state or any locality within it.

(b) "Governmental function" includes any activity which a public servant is legally authorized to undertake on behalf of a governmental

(c) "Public servant" means any officer or employee of government, including legislators and judges, and any person participating as an adviser, consultant or otherwise in performing a government function; but the term does not include witnesses

Text of New York Revised Penal Law

Section 10.00. Definition.

15. "Public servant" means (a) any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.

17. "Benefit" means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

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Section 2. Bribery. (1) A person commits the crime of bribery if:

(a) He offers, confers or agrees to confer any pecuniary benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion in his official capacity be thereby influence; or

(b) While a public servant he solicits, accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

(c) In any prosecution for bribery, it is a defense that the defendant conferred or agreed to confer the pecuniary benefit upon the public servant as a result of conduct of the public servant constituting extortion or coercion.

(d) It is no defense to a prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because he had not assumed office, lacked jurisdiction, or for any other reason.

Existing Law
ORS
162.210
162.220
162.230
162.240
561.210
619.830
619.240
279.032
162.670
162.510
162.655
260.680
260.690
260.700
241.525
167.720
167.725
167.730
167.735

COMMENTARY - BRIBERY AND CORRUPT INFLUENCES

A. Summary

The gist of the crime of bribery is an effort to secure an improper advantage in the judicial, administrative and legislative decision-making process.

Although the term "corruptly" is often used in extant legislation and judicial decisions it is ambiguous when applied to two important categories of cases: (1) where the alleged briber seeks to justify his conduct on the ground that he sought only to counter opposing corrupt offers, or to influence an official to make the decision which he should in any event make; and (2) where the alleged bribe is an offer of appointment or promotion in the public service, or of political support, in exchange for like commitments by the offeree.

Bribery and Corrupt Influences  
Preliminary Draft No. 1; April 1969

The proposed draft eliminates use of the word "corruptly" and prohibits without qualification the giving or receiving of any pecuniary benefit to influence official or political decision-making.

A basic policy decision is inherent in the use of the term "pecuniary benefit" in section 2.

The MPC, section 240.1, makes a distinction between the form of consideration applicable to its bribery section by using the term "pecuniary benefit" in regard to public servants, party officials and voters, while using the term "any benefit" in regard to judicial or administrative proceedings. The MPC thereby establishes a higher standard of official conduct for those involved in judicial or administrative proceedings.

The Michigan Revised Penal Code uses the term "pecuniary benefit" throughout its basic bribery sections. The Michigan revisors recognized this deviation from existing law in limiting bribery to the giving of "pecuniary benefit" to public servants, supporting their position in the following:

"Section 118 C.L. 1948, includes as an element of bribery statute the offer of any gift or 'any act beneficial' to the public servant. Although the Michigan Supreme Court has not had occasion to determine the applicability of these terms to non-pecuniary benefits, statutes in other states using similar language have been applied to such benefits. This result seems entirely consistent with the basic function of the bribery statutes.

"On the other hand, a broad interpretation of the benefits described in Section 118 could also be used to prohibit 'log rolling', i.e., the offer by a legislator or other official to vote in a particular way in exchange for some 'beneficial act' such as political assistance at the polls, etc. Obviously, bargaining of this nature should not be covered by the bribery statute.

"The Committee believed that the potential for pernicious application of a broad definition of the proscribed benefits outweighs the advantage in insuring coverage of appropriate cases. It was particularly concerned that a public servant should not become suspect everytime he received a non-pecuniary favor from a member of the public. It should be noted that as defined such benefits are not limited to the distribution of cash, but include all items "the primary significance of which is economic gain'."



It might also be noted that the MPC anticipated this problem by drafting a specific exception to cover it (Tent. Draft No. 8, Art. 208, p.105), which was not incorporated into the official proposed draft.

Your reporter felt that the necessary breadth of the definition of "benefit" would create difficulties when applied to situations arising in the process of political compromise. It is submitted that the qualifying language "the primary significance of which is economic gain" in the definition of benefit should cover those bargains with public servants most inimical to public welfare.

Section 2 (c) recognizes the tendency of the individual citizen to capitulate to threats by a public servant rather than resist them. Courts have emphasized that bribery extends only to "voluntary" conferral of benefits, not the product of threats. (See People v. Ritholz, 359 Mich 539, 103 NW 2d 481 (1960). The language in this section was derived from New York Revised Penal Law 200.05 and Michigan Revised Penal Code 4705 (2).

Section 2 (d) is derived from MPC 240.1, which is based upon a general proposition rejecting "impossibility" as a defense to attempts to interfere with government administration. The New York Penal Code commentators (section 200.00, p.649) point out that it is immaterial and no defense to a prosecution for bribery of a public servant that the public servant sought to be influenced was not qualified to act in the particular way desired. They emphasize that the gist of the crime of bribery is the effort to secure an impermissible advantage in the decision-making process of government.

#### B. Derivation

The basic bribery statute is derived from section 240.1 MPC, section 4705, Michigan Revised Criminal Code, and sections 200.0 through 200.15, New York Revised Penal Law.

#### C. Relationship to existing law.

Common law definition of bribery: "Bribery, under the common law, is usually defined to be the giving or receiving anything of value, or any valuable service intended to influence one in the discharge of a legal duty." (See People v. Peters, 265 Ill. 122, 128, 106 NE 513, 515 (1914).)

Oregon case law in the field of bribery is virtually non-existent. State v. Coffey, 157 Or 457, 72 P2d, (1937) involved the conviction of a municipal police officer for accepting money in consideration for allowing an illegal slot machine to operate unabated. A municipal police officer was held to be an "executive officer" within the statute prohibiting executive officers from accepting bribes.

State v. Packard, 4 Or 157, (1871), involved the conviction of a county clerk for knowingly receiving compensation for official duty other than that authorized by law. The indictment was held insufficient for failure to designate the service for which compensation was received.

Bradshaw v. U.S., 15 F 2d 970, (1927) held that an indictment for attempting to bribe a juror was sufficient to put into issue the defendant's knowledge that such person was a juror.

There is no statutory definition of bribery in the present Oregon Revised Code. The various statutes dealing with bribery of public officials embody the essential elements of the substantive offense.

ORS 162.210 defines the judicial, legislative and executive officers covered by the bribery statutes. Subsection (1)(c) includes referees, umpires and arbitrators. Insofar as this subsection applies to persons not defined as public servants they will not be covered by this section. Section \_\_\_\_\_ on Rigging Publicly Exhibited Contests will cover these officials.

ORS 162.220 and ORS 162.230 deal with the bribery and intimidation of public officials. The sections relating to bribery would be repealed by the proposed draft. The sections dealing with intimidation of public officials will be covered in Section \_\_\_\_\_ relating to Intimidation in Official and Political Matters.

ORS 162.240 deals with gratuities to public officials for services rendered. This section will be repealed by Section \_\_\_\_\_ relating to Giving and Receiving Unlawful Gratuities. It might be noted that the present ORS provides a harsher penalty for the public servant who receives or solicits a bribe than it does for the individual citizen who gives or offers a bribe.

ORS 162.670 prohibits any person from inducing the deposit of funds by offering or giving any gift, compensation or reward to the Multnomah County Treasurer. The proposed draft would repeal this statute as the Multnomah County Treasurer comes within the definition of "public servant". Acceptance of Gifts would be covered under Section \_\_\_\_\_ (2) relating to Giving and Receiving Unlawful Gratuities.

ORS 162.510 prohibits the taking of any fee or compensation not authorized by law by any state officer, excepting the Governor, judges of the Supreme Court and members of the Legislative Assembly. The proposed draft would repeal this statute as it presents a duplication of coverage.

ORS 162.655 prohibits any offer of gift, compensation, reward or inducement by any persons to the State Treasurer to induce him to deposit funds in any bank, contrary to state law. This statute would be repealed by the proposed draft and by Section \_\_\_\_ relating to Giving and Receiving Unlawful Gratuities.

ORS 279.032 prohibits paying or agreeing to pay a public officer anything of value in order to obtain a public contract. This statute would be repealed by the proposed draft and Section \_\_\_\_ relating to Giving and Receiving Unlawful Gratuities.

ORS 561.210 prohibits the offering or accepting a bribe to improperly perform duties imposed by law relating to Agriculture, including ORS 616.405 through ORS 616.475 relating to grades and standards. This statute would be repealed by the proposed draft as the officials covered are within the definition of public servants.

ORS 619.830 prohibits offering or giving anything of value to Department of Meat Food officers, agents or employees to influence the discharge of their functions. ORS 619.240 prohibits the same conduct but makes special reference to special meat hygiene agents. Both these statutes would be repealed by the proposed draft as they are directed at public servants as defined in the draft.

ORS 260.680, Corrupt Practices and Other Election Offenses, prohibits giving, offering or promising to give any gift, gratuity or valuable consideration to a voter to influence his vote.

ORS 260.690, prohibits the acceptance of any such consideration by a voter upon an understanding that he will vote a particular way.

ORS 260.700, extends coverage of the two preceding statutes to persons who vote or offer to vote even though they are not legally qualified to do so. Subsection (2) provides that if a person is convicted a second time for an offense under the preceding statutes a penitentiary term is mandatory.

The definition of "Public Servant" as used in this section does not include voters. It is submitted that the Oregon Corrupt Practices in Election Act provides a comprehensive statutory scheme for regulation in this important area and should be left intact by the Criminal Code revision.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 240.1. Bribery in Official and Political Matters.

A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(2) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or

(3) any benefit as consideration for a violation of a known legal duty as public servant or party official.

It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

Text of Michigan Revised Penal Code.

[Bribery]

Section 4705. (1) A person commits the crime of bribery if:

(a) He offers, confers or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion or other action in his official capacity; or

(b) While a public servant, he solicits, accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that his vote, opinion, judgment, exercise or discretion or other action as a public servant will thereby be influenced.

(2) A person does not commit a crime under this section if he confers or agrees to confer any pecuniary benefit upon a public servant as a result of conduct of the public servant constituting extortion or coercion. The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.

Text of Michigan Revised Penal Code, Cont'd

(3) It is no defense to a prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because he had not yet assumed office, lacked jurisdiction, or for any other reason.

(4) Bribery in the first degree is a Class C felony.

New York Revised Penal Law

Section 200.00 Bribery

A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribery is a class D felony.

Section 200.05 Bribery; defense

In any prosecution for bribery, it is a defense that the defendant conferred or agreed to confer the benefit involved upon the public servant involved as a result of conduct of the latter constituting larceny committed by means of extortion, or an attempt to commit the same, or coercion, or an attempt to commit coercion.

Section 200.10 Bribe receiving

A public servant is guilty of bribe receiving when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribe receiving is a class D felony.

Section 200.15 Bribe receiving; no defense

The crimes of (a) bribe receiving, and (b) larceny committed by means of extortion, attempt to commit the same, coercion and attempt to commit coercion, are not mutually exclusive, and it is no defense to a prosecution for bribe receiving that, by reason of the same conduct, the defendant also committed one of such other specified crimes.

Text of California Penal Code

Section 67 Bribes; Giving or offering to executive officers; punishment.

Giving or offering bribes to executive officers. Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion or other proceeding as such officer, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years, and is disqualified from holding any office in this state.

Section 68 Bribes; Executive or ministerial officers, or appointees, asking or receiving; punishment. Every executive or ministerial officer, employee or appointee of the State of California, county or city therein or political subdivision thereof, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years; and in addition thereto, forfeits his office, and is forever disqualified from holding any office in this state.

Section 3. Giving and Receiving Unlawful Gratuities

A person commits the crime of giving or receiving unlawful gratuities if:

(a) He offers, confers or agrees to confer, pecuniary benefit upon a public servant as consideration for performance of an official action knowing that the public servant is required to perform without compensation or for which he is not entitled to any special or additional compensation; or

(b) While a public servant he knowingly solicits, accepts or agrees to accept any pecuniary benefit as consideration for the performance of official action that he is required to perform without compensation or for which he is not entitled to any special or additional compensation.

Existing Law
ORS
162.310
162.320
162.510
561.210
619.830
619.240
162.240
162.670
279.032
162.655

COMMENTARY - GIVING AND RECEIVING UNLAWFUL GRATUITIES

A. Summary

The Model Penal Code notes that this section may go beyond the proper limits of a criminal code revision project. The commentary suggests that non-criminal sanctions against the offending public servant might be the preferred remedy. (Comments, T.D. No. 8, p. 114 (1958) ).

Michigan Revised Criminal Code Section 4710 is directed at the solicitation of unlawful compensation by a public servant, requiring that (1) the public servant demand the unlawful compensation, and (2) act knowing that he is not entitled to the compensation.

The Michigan Revised Criminal Code commentators note that a demand by a public servant for unlawful compensation will ordinarily constitute the crime of extortion. The prosecutor in that instance is provided an alternative route where it is shown that the demand was (1) not clearly presented as a threat, or (2) was too petty to warrant an extortion charge. (Sec. 4710, pp.375-376.)

The Michigan Code section 4710 does not prohibit the offering of an unlawful gratuity to a public servant. This conduct would apparently not be covered by the Michigan Code section 1010 on Criminal Solicitation, even if accepted, since section 4710 requires a demand by the public servant.

New York Revised Penal Law sections 200.30 and 200.35 prohibit both the giving and receiving of unlawful gratuities. The Commentary (NY Revised Penal Law, p. 660) noted that the provision for the giver of an unlawful gratuity had no counterpart in the former penal code. In support of such a provision they cited U.S. v. Irwin, C.A.N.Y. 1965, 354 F 2d 192, Cert denied 86 S.Ct. 1272, 383 US.S 967, 16 L.Ed. 2d, 308, as follows:

"It is apparent from the language of the subsection that what Congress had in mind was to prohibit an individual, dealing with a Government employee in the course of his official duties, from giving the employee additional compensation or a tip or gratuity for or because of an official act already done or about to be done. The awarding of gifts thus related to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees, consciously or unconsciously, for those who give gifts as distinguished from those who do not. The preference may concern nothing more than fixing the time for a hearing or giving unusually prompt consideration to the application of a donor while earlier applications of non-donors are made to wait, even though there is no evidence that the donor sought the particular preference. Moreover, the behavior prohibited by Section 201 (f) embraces those cases in



which all of the essential elements of the bribery offense (corrupt giving) stated in Section 201 (b) are present except for the element of specific intent to influence an official act or induce a public official to do or omit to do an act in violation of his lawful duty. The iniquity of the procuring of public officials, be it intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another, by prohibiting all gifts 'for or because of any official act,' is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of the law."

Section 1 (b) and its relation to the crime of extortion demands reference to the Pirkey case.

The Pirkey case does not expressly or impliedly prohibit a district attorney or grand jury from exercising discretion in charging a defendant with either of two crimes, so long as there is a rational basis for distinguishing between the statutes.

It is probable that the crime of Giving and Receiving Unlawful Gratuities will be graded a misdemeanor while Extortion will be graded a felony. The dividing line between the solicitation of unlawful gratuities and extortion may in some cases be very narrow.

The Michigan Revised Criminal Code, Section 3245, classes extortion as a crime against property, defining extortion as "knowingly to obtain by threat control over property of the owner." Threat is defined in Section 3201 (1) to include any conduct constituting a violation of a legal duty or other specified non-criminal conduct in public office.

The gist of the distinction would therefore appear to be the quality of the inducement exerted by the public servant to extract the pecuniary benefit. If the proscribed conduct involved the use of threat, menace or intimidation elements of the crime of extortion would be present. If the unlawful gratuity was obtained by verbal or written entreaty lacking in express or implied threat the crime of Receiving Unlawful Gratuities could be supported.

This distinction would seem to provide reasonable guidelines for a prosecutor in differentiating between the two crimes, particularly since Section \_\_\_\_ does not refer to threats or intimidation.

#### B. Derivation

Reference was made to Model Penal Code Section 240.5 and Michigan Revised Criminal Code Section 4710. The main source of the statutory construction was New York Revised Penal Law Sections 200.30 and 200.35.

C. Relationship to existing law

ORS 162.310 prohibits compounding or concealing a crime for a gratuity or other consideration. This statute is not restricted in its coverage to public servants. It applies to conduct giving rise to a violation of legal duty and would not seem to reach acceptance of a gratuity for performance of a legal duty.

ORS 162.320 prohibits the taking of a gratuity upon an agreement to compound or conceal a crime, even though the person guilty of the original crime has not been indicted or tried.

ORS 162.510 is a broadly drawn statute prohibiting unlawful acts and omissions by public officers, excepting the Governor, Judges of the Supreme Court, and members of the Legislative Assembly. It includes the receipt of any fee or compensation not permitted by law. This statute would be repealed by the various proposed draft sections dealing with bribery and unlawful gratuities.

ORS 561.210, ORS 619.830 and ORS 619.240 all relate to the offering to or receiving of bribes, gifts or any other consideration, by State Agriculture Department employees. These statutes were discussed in the Relationship to Existing Law Section under Bribery. They would be repealed by the various proposed draft sections relating to bribery and unlawful gratuities.

ORS 162.240 prohibits the acceptance of gratuities by public servants for official services rendered. This statute would be repealed.

ORS 162.670 prohibits any person from inducing the Multnomah County Treasurer by gratuity to deposit public funds in a particular depository. This statute would be repealed.

ORS 279.032 prohibits paying or agreeing to pay a public officer any compensation in order to obtain a public contract. This statute would be repealed.

ORS 162.655 prohibits the offer of a gratuity or other consideration to the State Treasurer as inducement for him to deposit state funds contrary to law. This statute would be repealed.

Jackson v. Siglin, 10 Or 93 (1882), affirmed the common law doctrine that a public officer shall be confined to the compensation or fee prescribed by law. The case held that in an indictment for taking illegal fees it must be shown that the illegal charge was made wilfully and knowingly.

The rule in the Jackson v. Siglin case was reiterated in Pugh v. Good, 19 Or 92, 23 P. 830 (1890), where the court stated, "The rule is inflexible that an officer can demand only such fees as the law has fixed and authorized for the performance of official duties."

MacKenzie v. Douglas County, 81 Or 442, 159 P. 625, 159 P. 1033, (1916), cites the Pugh case, stating, "It is an inflexible rule that the right even of an officer to demand expenses incurred by him in the performance of official duty must be found in the Constitution of the statute conferring it, either directly or by necessary implication."

The proposed draft section therefore codifies existing Oregon law on the subject of giving and receiving unlawful gratuities.

The Michigan Revised Criminal Code, Section 4715, covers Receiving or Granting Unlawful Compensation for Assistance in Public Matters. This section is derived from Model Penal Code Section 240.6, Compensating Public Servant for Assisting Private Interests in Relation to Matters Before Him. The New York Revised Penal Law and California Tentative Draft No. 8 do not include this provision.

The section is designed to cover those evasions of the bribery law where the parties characterize the compensation as pay for "services" performed in official matters.

Your reporter did not feel that such a provision was necessary in the proposed draft as Section \_\_\_\_\_, Giving and Receiving Unlawful Gratuities, would appear to provide coverage for most problems in this area. Problems beyond the reach of Section \_\_\_\_\_ involve the field of conflict of interest law and should be left to regulatory authority outside the Criminal Code.

The Michigan Revised Criminal Code, Section 4715, reads:

" [Receiving or Granting Unlawful Compensation for Assistance in Public Matters]

Sec. 4715. (1) A person commits the crime of receiving or granting unlawful compensation for assistance in public matters if:

(a) While a public servant, he solicits, accepts or agrees to accept compensation for advice or other assistance in preparing a bill, contract, claim or other transaction or proposal as to which he knows that he is likely to have an official discretion to exercise; or

(b) He knowingly offers, pays or agrees to pay compensation to a public servant for advice or other assistance in preparing or promoting a bill, contract, claim or other transactions as to which the public servant is likely to have an official discretion to exercise.

(2) A person does not commit a crime under subparagraph (1)(b) unless he knows that the acceptance of such compensation by the public servant is unlawful. The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.

(3) Receiving or granting unlawful compensation for assistance in

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 240.5. Gifts to Public Servants by Persons Subject to Their Jurisdiction.

(1) Regulatory and Law Enforcement Officials. No public servant in any department or agency exercising regulatory functions, or conducting inspections or investigations, or carrying on civil or criminal litigation on behalf of the government, or having custody of prisoners, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated.

(2) Officials Concerned with Government Contracts and Pecuniary Transactions. No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(3) Judicial and Administrative Officials. No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority, or participating in the enforcement of its decisions, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant or a tribunal with which he is associated.

(4) Legislative Officials. No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in a bill, transaction or proceeding, pending or contemplated, before the legislature or any committee or agency thereof.

(5) Exceptions. This Section shall not apply to:

(a) fees prescribed by law to be received by a public servant, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled; or

(b) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or

(c) trivial benefits incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

Text of Model Penal Code, Cont'd.

(6) Offering Benefits Prohibited. No person shall knowingly confer, or offer or agree to confer, any benefit prohibited by the foregoing Subsections.

(7) Grade of Offense. An offense under this Section is a misdemeanor.

Text of Michigan Revised Criminal Code

[Soliciting Unlawful Compensation ]

Sec. 4710. (1) A public servant commits the crime of soliciting unlawful compensation if he requests a pecuniary benefit for the performance of an official action knowing that he was required to perform that action without compensation or at a level of compensation lower than that requested.

(2) The provisions of section 130 (3) (b) do not apply to prosecutions under this section.

(3) Solicitation of unlawful compensation is a Class B misdemeanor.

Text of New York Revised Penal Law

Section 200.30 Giving unlawful gratuities

A person is guilty of giving unlawful gratuities when he knowingly confers, or offers or agrees to confer, any benefit upon a public servant for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation.

Giving unlawful gratuities is a class A misdemeanor.

Text of California Proposed Tentative Draft

Section 1004. Giving Unlawful Gratuities.

(1) A person is guilty of giving unlawful gratuities if he offers, confers or agrees to confer any pecuniary benefit upon a public official for having performed an official function in a particular manner.

(2) Giving unlawful gratuities is a misdemeanor.

Section 1005. Receiving Unlawful Gratuities.

(1) A public servant is guilty of receiving unlawful gratuities if he solicits, accepts or agrees to accept any pecuniary benefit for having performed an official function in a particular manner.

(2) Receiving unlawful gratuities is a misdemeanor.

( Existing
( Law
( ORS
( 162,240

Section 4. Rewarding Past Official Misconduct

A person commits the crime of rewarding past official misconduct if:

(a) He knowingly offers, confers or agrees to confer any pecuniary benefit upon a public servant as consideration for the public servant's past violation of his duty; or

(b) While a public servant he solicits, accepts or agrees to accept any pecuniary benefit from another person as consideration for having violated his duty as a public servant.

COMMENTARY - REWARDING PAST OFFICIAL MISCONDUCT

A. Summary

This section is intended to obviate the difficulty present in bribery prosecutions where the defendant contends that he did not solicit or receive the pecuniary benefit until after completion of the official action.

It is submitted that compensation for past official favor should be discouraged as detrimental to the integrity of public administration. Compensation for past official action implies a precedent for similar future compensation. Such compensation also puts pressure upon others dealing with the public servant to engage in similar activity or risk subtle disfavor.

The section is drawn to limit the proscribed conduct in three respects:

- (1) The compensation must be a "pecuniary benefit".
- (2) It must be in consideration of the past official action, and
- (3) The past official action compensated must have been a violation of the public servant's legal duty.

An example of the conduct prohibited would be the accepting of money by fire department inspectors for failing to report past violations or payment to an official process server for his negligent delay in serving judicial papers.

B. Derivation

The proposed draft is derived from the New York Penal Law Sections 200.20 and 200.25.

The Michigan revisors did not adopt such a provision stating that the Committee felt that the underlying policy should not be made applicable to public servants generally. The Michigan Code did retain sections applicable to receipt of gratuities by specific officials, e.g., probate judges and labor department inspectors.

Model Penal Code Section 240.3 relates to Compensation of Past Official Behavior.

C. Relationship to existing law

ORS 162.240 prohibits acceptance of any fee, commission, compensation, gift, reward or other consideration by public officials for services rendered to persons dealing with public administration. "Services rendered" includes past official action and as such would be repealed by the proposed draft.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 200.20 Rewarding official misconduct

A person is guilty of rewarding official misconduct when he knowingly confers, or offers or agrees to confer, any benefit upon a public servant for having violated his duty as a public servant.

Rewarding official misconduct is a class E felony.

Section 200.25 Receiving reward for official misconduct

A public servant is guilty of receiving reward for official misconduct when he solicits, accepts or agrees to accept any benefit from another person for having violated his duty as a public servant.

Receiving reward for official misconduct is a class E felony.

Text of Model Penal Code

Section 240.3. Compensation for Past Official Behavior.

A person commits a misdemeanor if he solicits, accepts or agrees to accept any pecuniary benefit as compensation for having, as public servant, given a decision, opinion, recommendation or vote favorable to another, or for having otherwise exercised a discretion in his favor, or for having violated his duty. A person commits a misdemeanor if he offers, confers or agrees to confer compensation acceptance of which is prohibited by this Section.



Section 5. Intimidation in Public and Political Matters

A person commits the crime of Intimidation in Public and Political Matters if:

(a) He threatens unlawful harm to any public servant, party official or voter with intent to influence his vote, opinion, judgment, action, decision or exercise of discretion in his official capacity.

(b) It is no defense to a prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because he had not assumed office, lacked jurisdiction, or for any other reason.

(	Existing
(	Law
(	ORS
(	162.220
(	163.480
(	163.490
(	163.500

COMMENTARY - INTIMIDATION IN PUBLIC AND POLITICAL MATTERS

A. Summary

This section is derived from Model Penal Code Section 240.2. It is intended to cover those situations where the motivating factor influencing a violation of public duty is threats and intimidation rather than the payment of a pecuniary benefit.

There is some difficulty in drawing a clear line between permissible and prohibited threats. For example, threats of political opposition are legitimate means of influencing political decisions. One solution is to restrict the section to threats to do "unlawful" acts. This would include threats of injury to the person or his property and threats to discharge or demote a public servant in violation of applicable civil service law.

The use of the term "unlawful" would fail to reach some areas of improper influence; e.g., intimidation of a public servant by threats to foreclose a mortgage, or to expose a scandal in a public servant's private life.

The Michigan Revised Criminal Code and the New York Revised Penal Law avoided this problem by deleting this section as a Crime Against Public Administration. Coverage was provided by the NY Revised Penal Law under Coercion Statute 135.60 in the Kidnapping Section.

Michigan has the same basic coverage under Section 2125, Coercion, contained in the Assault Section.

Michigan Revised Criminal Code Section 2125 reads as follows:

[Coercion]

Section 2125. (1) A person commits the crime of coercion if he compels or induces a person to engage in conduct that the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by instilling in him through use of a threat a fear that, if the demand is not complied with, the actor or another will bring about the harm threatened.

(2) "Threat" as used in this section includes:

(a) threatening the imminent use of force against any person who is present at the time; and

(b) threats as defined in section 3201 (1).

(3) The actor does not commit coercion by instilling in a person a fear that he or another person will be charged with a crime, if the actor honestly believes the threatened charge to be true and his sole purpose is to compel or induce the person to take reasonable action to correct the wrong which is the subject of the threatened charge. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(4) Coercion is a Class A misdemeanor.

Under Section 3201 of the Michigan Revised Criminal Code "Threat" is broadly defined to cover both lawful and unlawful conduct intended to influence the decision-making process.

Section 3201 reads as follows:

(1) "Threat" means a menace, however communicated, to:

(i) Cause physical harm in the future to the person threatened or to any other person; or

(ii) Cause damage to property; or

(iii) Subject the person threatened or any other person to physical confinement or restraint; or

(iv) Engage in other conduct constituting a crime; or

(v) Accuse any person of a crime or cause criminal charges to be instituted against any person; or

(vi) Expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule; or

(vii) Reveal any information sought to be concealed by the person threatened; or

(viii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(ix) Take action as an official against anyone or anything, or withhold official action, or cause such action or withholding; or

(x) Bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(xi) Do any other act which would not in itself substantially benefit the actor but which is calculated to harm substantially another person with respect to his health, safety, business, calling, career, financial condition, reputation, or personal relationships.

New York Penal Law Section 135.60 requires successful intimidation. A mere threat or unsuccessful attempt to coerce would be covered under this section. Such conduct would constitute attempted coercion under the Law. New York raises the offense from Coercion in the second degree to Coercion in the first degree if the threat or intimidation compels or induces the victim to violate his duty as a public servant. The aggravating factor which raises the crime to first degree relates not to the kind of threat made by the defendant but to the kind of conduct which he compels the victim to perform. If a comprehensive Coercion statute is incorporated into the proposed Oregon draft it would be possible to delete this section.

One alternative would be to retain this section directed at intimidation of public officials with a view towards distinguishing the gravity of the offense from coercion generally. It is felt, however, that the proscribed conduct could be adequately covered under a coercion statute similar to New York's Section 135.60.

Your reporter feels that the aggravating factor of intimidation directed at public officials should be retained in the appropriate code section.

Subsection (1)(b) is intended to eliminate impossibility as a defense in conformance with other code sections. It conforms also to the basic policy of the Code in putting emphasis on the intent of the actor instead of the result sought to be achieved.

B. Derivation

Model Penal Code Section 240.2. Substantial changes were made in an effort to cover all public officials and voters exercising a legal or discretionary duty. Voters were included as they are not protected from threats and intimidation under the Oregon Corrupt Practices in Elections Act, ORS c. 260.0.

C. Relationship to existing law

ORS 162.220 prohibits influencing public officials by intimidation or threats to injure the person or property of the official.

ORS 163.480 prohibits threatening injury to the person or property of another with the intent to secure a pecuniary or property advantage or to compel him to do any act against his will.

ORS 163.490 prohibits compelling a person by threat, intimidation or coercion from joining or refraining to join any labor or other lawful organization.

ORS 163.500 prohibits any person or corporation from using threats or intimidation to compel an employee to board or buy at a particular place.

The proposed draft on Intimidation of Public Officials would repeal ORS 162.220. A general Coercion statute would repeal ORS 163.480-500.

There are no Oregon cases dealing directly with threats or intimidation of public officials.

New York Revised Penal Law Sections 200.45 and 200.50 deal with Bribe Giving and Receiving for Public Office. The Michigan Revised Criminal Code has a similar provision under Section 4725 relating to Trading in Public Office. Both these statutes are derived from Model Penal Code Section 240.7, Selling Political Endorsement: Special Influence.

The Oregon Corrupt Practices Act deals in some measure with this conduct. ORS 241.525 prohibits public officers and those seeking public office from using official authority to influence as an aid in securing any public office or appointment, or to secure confirmation, promotion or increase in salary. ORS 241.990 (4) provides a criminal penalty for violation of ORS 241.525.

Page 27

Bribery and Corrupt Influences

Preliminary Draft No. 1; April 1969

ORS 241.525 does not deal directly with the problem of payment of money or other valuable consideration to secure an advantage in obtaining public office.

It is your reporter's understanding that legislation is presently pending in the Legislative Assembly that may be applicable to this problem. It was felt that a provision involving Trading in Public Office should not be submitted to the Commission until the Legislative Assembly has had an opportunity to take a position on the matter.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 240.2. Threats and Other Improper Influence in Official and Political Matters.

(1) Offenses Defined. A person commits an offense if he:

(a) threatens unlawful harm to any person with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(b) threatens harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding; or

(c) threatens harm to any public servant or party official with purpose to influence him to violate his duty; or

(d) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication designed to influence the outcome on the basis of considerations other than those authorized by law.

It is no defense to prosecution under this Section that a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

(2) Grading. An offense under this Section is a misdemeanor unless the actor threatened to commit a crime or made a threat with purpose to influence a judicial or administrative proceeding, in which cases the offense is a felony of the third degree.

Text of California Tentative Draft

Section 1003. Threats Against Public Servants.

(1) A person is guilty of threats against public servants if he influences or attempts to influence the performance of an official function by a public servant by any means which would constitute the offense of theft by extortion under this code if those means were employed upon a private person.

(2) Threats against public servants is a felony of the third degree.

Section 6. Official Misconduct. A public servant commits the crime of official misconduct if with intent to obtain a benefit for himself or to harm another:

(1) He knowingly fails to perform a duty imposed upon him by law or one clearly inherent in the nature of his office; or

(2) He knowingly performs an act constituting an unauthorized exercise of his official function.

Existing  
Law

ORS  
162.510  
162.430  
162.440  
162.620  
162.630  
162.640  
162.650  
162.680  
162.690  
165.015  
167.515  
167.555  
169.350  
141.730  
141.090  
141.740

COMMENTARY - OFFICIAL MISCONDUCT

A. Summary

Perkins defines Misconduct in Office as "corrupt misbehavior by an officer in the exercise of the duties of his office or while acting under color of his office". (Perkins on Criminal Law, Foundation Press, Inc., 1957, p.413)

Official misconduct may take any one of three different forms:

(1) Malfeasance, the doing of that which should not be done at all.

(2) Misfeasance, doing in an improper manner that which would otherwise be acceptable.

(3) Nonfeasance, failing to do that which should be done.

Subsection 1 (a) deals with official misconduct involving nonfeasance. Subsection 1 (b) incorporates the common law crimes of misfeasance and malfeasance.

The common law punishment for misconduct in office is by imprisonment or fine, to which may be added removal from office and disqualification to hold office (See 4 Bl. Comm., 121).

The culpability element in Section 1, "with intent to obtain a benefit for himself or to harm another", is based upon the theory that the inadequate performance of official functions should ordinarily be regulated by civil remedies. Criminal liability should be justified only where the public officer acts with, (1) an intent to benefit himself or harm another, and (2) with knowledge that his conduct violates an applicable regulation or statute.

The proposed section requires that the public servant be aware of the fact that his action constitutes a violation of legal duty or regulation relating to the performance of his office. This limitation prevents coverage for ordinary neglect of duty and negligence in performing official functions.

A public servant who neglects his official duty usually does so knowingly, but not with the intent to benefit himself or harm another. If the act of omission was coupled with either of these two elements the conduct would be subject to this section. Negligence in the performance of official functions does not imply an intent to violate a known duty. This type of misconduct is best regulated by civil service procedures and election law.

Subsection 1 (a), the "omission to act" offense, refers to the failure to perform an official non-discretionary duty. It requires knowledge of such non-discretionary duty to act. The duty must be one that is imposed by law, or one that is clearly inherent in the nature of the office. In other words, the failure to act must be more than a mere breach of good judgment.

A significant element of the proposed section is that it requires a specific mens rea not found in many of the present Oregon criminal provisions relating to official misconduct. The culpability requirements of these sections are vague in that, for the most part, they are designated by the nebulous word "wilfully".

As applied to an act of omission the only mens rea required would be that the failure to act was intentional, regardless of the purpose or motive. This raises the implication that virtual absolute liability attaches to any conscious omission whether or not a culpable motive is present. Such conduct may be deserving of removal from office or disciplinary action but does not justify the imposition of criminal liability.

New York Revised Penal Code, Section 195.00, makes official misconduct criminal only when the public servant's "act" or "omission" is coupled with an intent to obtain a benefit or injure some person.



Michigan Revised Penal Code, Sections 4805 and 4806, makes a distinction between official misconduct in the first and second degree. Section 4805 raises the offense to first degree official misconduct if the public servant is motivated by obtaining a benefit for himself or causing injury to another. Second degree official misconduct does not require this specific intent.

The Model Penal Code does not have a proposed section dealing generally with Official Misconduct.

Your reporter felt that the New York approach was preferable. The underlying policy of the proposed Oregon Revised Criminal Code is to reach the subjective wrongful intent of the actor. The evil sought to be reached by this section is the conscious intent to violate official duty for personal gain or advantage. Violations of official duty lacking the element of personal interest can be discouraged by appropriate civil remedies.

#### B. Derivation

Principal reference was New York Revised Penal Code Section 195.00 and Michigan Revised Penal Code Sections 4805 and 4806.

#### C. Relationship to Existing Law.

There are presently sixteen Oregon statutes that deal directly or indirectly with misconduct in public office.

ORS 162.510 is a general statute prohibiting unlawful acts and omission by public officers. It reads:

"Any officer of this state, or of any county, town, or other municipal or public corporation therein, other than the Governor, judges of the Supreme Court or members of the Legislative Assembly, who wilfully and knowingly charges, takes or receives any fee or compensation other than that authorized or permitted by law, for any official service or duty performed by such officer, or who wilfully neglects or refuses to perform any duty or service pertaining to his office, with intent to injure or defraud anyone, to the injury of anyone, or the manifest hindrance or obstruction of public justice or business, whether such injury, hindrance, or obstruction was particularly intended or not, shall be punished upon conviction by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not less than three months nor more than one year, or by fine of not less than \$50 nor more than \$500, or by dismissal from office with or without either of any of such punishments."

This statute includes the offenses of Receiving Unlawful Gratuities and Official Misconduct.

ORS 162.430 provides that any sheriff, jailer or other officer who wilfully refuses to take into custody a lawfully committed person or prisoner is guilty of a misdemeanor.

ORS 162.440 prohibits any officer authorized to serve process from wilfully and wrongfully refusing, omitting or delaying execution of any lawful process. Punishable as a misdemeanor.

ORS 162.620 prohibits any person having legal custody of public records from wilfully destroying, secreting or mutilating same. This statute does not refer specifically to public officials. This offense, as it relates to private parties, will be covered under Section \_\_\_\_\_, Tampering with Public Records.

ORS 162.630 requires that all public officers, excepting school district clerks, having custody of public funds as "soon as practicable" pay the same to the county or State Treasurer. This statute is designated a felony offense, with a maximum penalty of 20 years imprisonment.

ORS 162.640 prohibits any public officer from making a profit by loaning or otherwise using public funds in his custody. Violation of the statute is a felony, punishable by imprisonment for not more than 20 years.

ORS 162.650 prohibits the State Treasurer from making a profit out of public funds and from removing money out of the treasury depository except as authorized by law. This is a felony offense.

ORS 162.680 prohibits Port Commissioners or public officers from making a profit by loaning or otherwise using any money in the hands of the Port Commissioners. This is a felony offense.

ORS 162.690 prohibits school clerks, school directors, or any public officer from making a profit by loaning or using money in the hands of school clerks. This is a felony punishable by a prison term not to exceed 20 years or a \$50,000.00 fine, or both.

ORS 165.015 is a larceny statute that prohibits any person from converting public funds to his own use.

ORS 167.515 provides a misdemeanor penalty for any District Attorney, sheriff, constable, city or town marshall or public

officer who refuses or "wilfully" neglects to diligently prosecute gambling violations.

ORS 167.555 (3) directs peace officers to confiscate and destroy prohibited gambling devices. No criminal penalty is provided for failure to discharge this duty.

ORS 169.350 provides that a sheriff or his officer is guilty of a misdemeanor if served with a judicial paper and "wilfully" fails to act as directed.

ORS 141.730 prohibits any officer from knowingly proceeding under an expired judicial order for interception of telecommunications, radio communications or conversations. Violation is punishable by imprisonment in the penitentiary not to exceed 3 years, a \$3,000.00 fine, or both.

ORS 141.090, provides a misdemeanor penalty for any person who maliciously and without probable cause procures a search warrant to be executed and issued.

ORS 141.740 prohibits confidential records relating to an application for an order for interception of telecommunications, radio communications or conversations from being released or the material therein disclosed, except by written order of the court. The penalty is identical with that provided for in ORS 141.730.

There are many additional statutes imposing criminal liability for official misconduct in the various ORS Chapters relating to Government Structure and Finances, Public Services and General Welfare, etc. An example is ORS 305.990 (4), relating to the administration of the Tax Court, which reads, "Any public officer who neglects or refuses to perform any of the duties imposed on him by law as to the assessment, levying or collection of taxes shall be punished, upon conviction, by a fine not exceeding \$500 or by imprisonment in the county jail not exceeding one year."

All of these statutes dealing directly with official misconduct would be repealed by the proposed section. Some of the sections are applicable to persons other than public officials. These offenses will be included in other sections, e.g., Tampering with Public Records, Unsworn Falsification to Authorities, Obstructing Administration of Law or Other Government Function.

Those felony offenses relating to the mismanagement or diversion of public funds for personal gain will be covered by the Theft and Embezzlement sections.

The only departure from present Oregon law would be in certain areas of official misconduct that do not now require the culpability element of intent to benefit the actor or cause harm to another. If the Commission felt that retention of this coverage is in the best interest of public welfare an alternative section is proposed, as follows:

[Section 7. Official Misconduct in the first degree. A public servant commits the crime of official misconduct in the first degree, if:

(1) With intent to obtain a benefit for himself or to harm another he knowingly fails to perform a duty imposed upon him by law or one clearly inherent in the nature of his office; or

(2) With intent to obtain a benefit for himself or to harm another he knowingly performs an act constituting an unauthorized exercise of his official duties.

Section 8. Official Misconduct in the second degree. A public servant commits the crime of official misconduct in the second degree if he knowingly violates any statute or lawfully adopted rule or regulation relating to his office.]

Note: Section 8 would be graded the lesser offense.

No Oregon cases were found dealing directly with the scope of criminal liability for official misconduct.

In Svenson v. Brix, 156 Or 236, 64 P.2d 830 (1937), the Court quoted, with approval, 2 Cooley on Torts (4th Ed), 300, as follows:

"The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecutions."  
(p. 242)

Model Penal Code Article 243 relates to Abuse of Office. Section 243.1 covers Official Oppression by one acting or

purporting to act in an official capacity. Criminal liability is imposed for the infringement of personal or property rights and the denial of any privilege, power or immunity. The section on Official Misconduct would cover the prohibited conduct when committed by a public servant. Model Penal Code Section 243.2 prohibits speculating or wagering on the basis of information obtained by a public servant in his official capacity. Michigan Revised Penal Code Section 4720 imposes criminal liability on the public servant who fails to disclose a conflict of interest in governmental pecuniary transactions.

These sections involve the field of conflict of interest law. There is presently no comparable criminal statute in Oregon law. Due to the complexity of the issues involved in this area it is felt that the regulatory force of appropriate civil service law and administrative procedures can most effectively curb this form of abuse. Elective officials are also subject to recall and judgment at the polls.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Official Misconduct in the First Degree]

Sec. 4805. (1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit for himself or to cause harm to another;

(a) He knowingly commits an act relating to his office but constituting an unauthorized exercise of his official functions;

(b) He knowingly refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or

(c) He knowingly violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct in the first degree is a Class A misdemeanor.

[Official Misconduct in the Second Degree]

Sec. 4806. (1) A public servant commits the crime of official misconduct in the second degree if:

(a) He knowingly refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or

(b) He knowingly violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct in the second degree is a Class C misdemeanor.

[Failing to Disclose a Conflict of Interest]

Sec. 4720. (1) A public servant commits the crime of failing to disclose a conflict of interest if he exercises any substantial discretionary function in connection with a government contract, purchase, payment or other pecuniary transaction without advance public disclosure of a known potential conflicting interest in the transaction.

Text of Michigan Revised Criminal Code (Cont'd.)

(2) A "potential conflicting interest" exists when the public servant is a director, president, general manager or similar executive officer, or owns directly or indirectly a substantial portion of any non-governmental entity participating in the transaction.

(3) Public disclosure includes public announcement or notification to a superior officer or the attorney general.

(4) Failing to disclose a conflict of interest is a Class A misdemeanor.

Text of New York Revised Penal Law

§195.00 Official misconduct

A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor.

Text of Illinois Criminal Code

§ 33-3. Official Misconduct

A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

(a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or

(b) Knowingly performs an act which he knows he is forbidden by law to perform; or

(c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or

Text of Illinois Criminal Code (Cont'd.)

(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

A public officer or employee convicted of violating any provision of this Section forfeits his office or employment. In addition, he shall be fined not to exceed \$1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years, or both fined and imprisoned.

Text of Model Penal Code

Section 243.0. Definitions.

In this Article, unless a different meaning plainly is required, the definitions given in Section 240.0 apply.

Section 243.1. Official Oppression.

A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his conduct is illegal, he:

(a) subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights; or

(b) denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.

Section 243.2. Speculating or Wagering on Official Action or Information.

A public servant commits a misdemeanor if, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he:

(1) acquires a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action; or

(2) speculates or wagers on the basis of such information or official action; or

(3) aids another to do any of the foregoing.