Tapes #74 and 75
#74 - 475 to end of Side 2
#75 - Side 1 only

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

Sixth Meeting, June 10, 1969

Minutes

Members Present: Representative Wallace P. Carson, Jr., Chairman
Representative Harl H. Haas
Attorney General Lee Johnson

Absent: Senator Berkeley Lent

Staff: Mr. Donald L. Paillette, Project Director
Mr. Roger D. Wallingford, Research Counsel

The meeting was called to order at 1:30 p.m. by Chairman Carson in Room 315 Capitol Building, Salem.

Bribery and Corrupt Influences; P. D. No. 1; April 1969 (Article 21)

Chairman Carson asked Mr. Wallingford, the reporter for the draft to explain the draft provisions.

Section 1. Bribery and corrupt influences; definitions.

Mr. Wallingford explained that section 1 contained seven definitions of terms used in the Article. He added that since the draft had been reproduced, it had been given additional study beginning with the second definition contained in section 1 and he would suggest some changes. Subsection (2) of section 1 now reads "'Pecuniary benefit' is benefit . . . " and it is felt it would be better to have it read "'Pecuniary benefit' means . . . ".

Mr. Paillette noted the change was mainly of style and he felt the word "means" limited the definition and also was more precise. He added that the Drafting Manual prescribes the use of "means" ordinarily.

Mr. Wallingford advised there would be other changes as the draft is considered in connection with the words "means" and "includes". Three of the definitions in section 1 use the word "includes" and it was felt that this term tends to expand the meaning and the use of the word "means" tends to restrict it. Mr. Wallingford referred to the definition of "public servant" and read the proposed change in the language: "'Public servant' includes any public officer or employee o government, legislator, judge, any person, excepting witnesses, participating as an advisor, juror, consultant or otherwise in performing

governmental functions, and a person who has been elected or appointed to become a public servant although not yet occupying that position." He noted that the word "designated" appearing in the draft had been deleted and the term "appointed" used because it was felt it was more commonly used.

Mr. Johnson asked what would happen with respect to a member of the bar in that he is an officer of the court.

Mr. Wallingford thought he would come within the scope of the definition of "public servant".

Mr. Johnson wondered if this would create a problem -- would a lawyer be taking a bribe every time he took a fee? This would be economic gain. He thought perhaps the definition should be a little more precise.

Mr. Paillette noted that the definition would be used in context with the bribery section.

Chairman Carson noted that the definition excluded "witnesses" and asked if this was because this would be picked up in suborning, perjuring and tampering with witnesses.

Mr. Wallingford replied that there will be specific bribing of witnesses statutes under obstruction of justice which will be in a separate Article. He added that it is very difficult to consider witnesses as public servants and ordinarily witnesses would be bribed before they are sworn in to testify and at this time their legal position would be nothing more than that of an ordinary citizen.

Mr. Johnson posed an example where the governor relies on a private citizen as an unpaid advisor and someone bribed the advisor. He asked how this situation would be handled under the draft provisions.

Mr. Wallingford thought that under the draft definition if the advisor were acting as a consultant in the performance of governmental functions, he would be covered even though he was not on the payroll.

Mr. Paillette did not think that the definition envisioned that the individual must be on the payroll to be a public servant.

Mr. Johnson thought the question was whether it was desired to cover this individual by the statute.

Representative Haas did not feel that pay was really a factor since there are so many unpaid boards in Oregon. He did not think they should be excluded.

Chairman Carson commented that cities, such as Salem, have a number of advisory committees, i.e., traffic committees, city beautification committees, etc. He wondered about the situation where a member of one of them accepted a gift.

Mr. Johnson added that the type of consultants he was talking about (and he thought every chief executive probably had a group of people he relied upon) were private citizens who probably all had special interests for which they are being paid, which fact is recognized by the chief executive. He asked about the status of lobbyists, noting that the legislature often relies on these people for advice. He pointed out that sometimes civic committees are made up of people who it is recognized have vested interests.

Mr. Wallingford suggested that one way that would tend to clarify and restrict would be by the expansion of the definition of what a "governmental function" is. Presently the definition of "public servant" and "governmental function" are tied together in that "governmental function" refers back to what a "public servant" is.

Chairman Carson suggested going ahead with consideration of the draft to see how the definitions are applied in the sections, noting that further work may necessarily be done on the definition section.

Mr. Johnson tended to feel the draft provisions should be limited to people who are actually being compensated for their services.

Representative Haas disagreed, pointing out the large number of public boards there are. He specifically cited the Highway Commission as an example and the problem arising if someone in a community attempted to bribe a Commission member. He also cited the Governor's Committee on Workmen's Compensation as a committee which specifically recognizes people with "labor" and "management" interests.

Mr. Wallingford referred to subsection (4) of section 1, the definition of "Government", suggesting that the word "includes" be deleted and replaced by the word "means" since "includes" was ambiguous. It was felt the present language, "'Government' includes any branch . . . ", might suggest it was just part of something larger and the draft intended to exclude the federal government.

Mr. Johnson understood this but did not feel that all of local government was included in the definition. He did not think a home-rule city was a subdivision of the state government and he was not sure about the adequacy of the language, "or any locality within it".

Chairman Carson asked the reason for the draft definition rather than using the language "municipal or quasi-municipal government", such as school districts, sewer districts, water districts, etc.

Mr. Wallingford replied that the definition was intended to cover all of these. "Government" is meant to mean any branch, subdivision or agency of any locality within the state. He agreed to reexamine the language to make the intent more clear.

Chairman Carson read from the definition of "Public Servant" set out in section 10.00, New York Revised Penal Law: " . . . means (a) any public officer or employee of the state or of any political subdivision thereof" (which he felt was the way it was normally stated in Oregon statutes) "or any governmental instrumentality within the state . . . " Chairman Carson felt that the language " . . . or of any political subdivision thereof" would pick up the water districts, sewer districts, etc., and by adding the phrase "any governmental instrumentality . . . " it would catch the home-rule cities.

Mr. Johnson commented that Legislative Counsel has drafted this type of thing a number of times and have language that has been used by the courts of Oregon so that there would be no question about what was or was not included by its use.

Mr. Wallingford explained that the definition of "governmental function" contained in subsection (5) is somewhat tied to the definition of "public servant" contained in subsection (3); therefore, if some changes were made in subsection (3), it would probably necessitate some changes in the definition of "governmental functions".

Chairman Carson asked if "political party" was defined anywhere in the Oregon code.

Mr. Johnson replied that it was and then went on to say that he questioned whether the conduct being discussed, certainly part of it if not all of it, was applicable to criminal sanction or whether it was something that should be in the Corrupt Practices Act, separate and apart from the criminal code.

Mr. Wallingford advised that the term "party official" is used in section 5, Intimidation in public and political matters.

Mr. Paillette said that when the draft was written, an attempt was made to stay away from the Corrupt Practices Act, as such, and Mr. Wallingford agreed that this was correct.

Mr. Johnson stated that the Corrupt Practices Act covers some of the conduct described in the draft and he thought possibly it properly should be covered by the draft and not in the Corrupt Practices Act.

Chairman Carson asked if section 5 was the only place where there was reference to political parties and Mr. Wallingford replied that it

was. Chairman Carson referred the attention of the members to section 5 and commented that it was purely for the protection of party officials. It did not refer to his influence upon someone else and referred to "harm" not "bribery" which is more like threatening an assault.

Mr. Paillette added that it was more like coercion, as it had been defined in the Kidnapping Article.

Mr. Johnson stated that the conduct set out in section 5 of the draft is clearly contained in the Corrupt Practices Act today in several places.

Representative Haas observed that the section also encompassed economic harm done.

Mr. Johnson said that he frankly thought that the kind of conduct being discussed should be placed in the draft and taken out of the Corrupt Practices Act because the conduct is felonious, or at least approaching a felony.

Mr. Paillette pointed out that this was mentioned in the draft commentary appearing on page 26.

Mr. Wallingford called attention to subsection (6) of section 1 and asked if there was any problem with this definition of what a "party official" is.

Representative Haas asked what the language "or otherwise" contained in the definition was meant to encompass.

Mr. Wallingford replied that it would cover anyone operating in a political apparatus who was not appointed or elected, although he admitted he could not, offhand, think of who this would be.

Chairman Carson commented that the SDS is a non-leadership organization; they have no leaders elected because it is totally democratic.

Mr. Johnson did not think the SDS would be regarded as a party. He advised that a "political party" is defined for the purposes of the election law and he was of the opinion that this definition was the one which should be followed. He thought perhaps the term "party official" was also defined in the Election Code.

Chairman Carson read from ORS 248.010: "'Major political party' means an affiliation of electors representing a political party or organization which polled for its candidates for presidential electors, at the last general election, at least 20 percent of the entire vote cast for that office."

Mr. Johnson stated that this statute has a "minor political party" in it too. There is statutory recognition in it as there are steps to go through to form a party and asked if what was being discussed was an informal party.

Mr. Wallingford pointed out that the definition of "party official" contained in section 1 (6) would only apply to section 5 which covers intimidation of a party official; it does not come up in the bribery section. Only the definition of "public servant" would apply in bribery.

Mr. Johnson suggested that in view of the open primary system in Oregon, that the definition of "party official" be eliminated.

Mr. Wallingford was of the opinion that it would be very difficult to draft a comprehensive definition of "political party" without some authority to tie it to.

Mr. Johnson thought that if the definition were too broad it would run into a free speech problem. People, he said, have a right to pay someone to go out and advocate a cause.

Mr. Wallingford pointed out that under the draft the bribery sections will not apply to party officials; section 5, intimidation, is the only section that will apply to a party official.

Representative Haas posed a situation where a lawyer is a member of a central committee which is to appoint someone to fill out a term of an office. A client of his calls and expresses the hope that a certain individual will be appointed and if he is not, that business will be withdrawn from the lawyer. He asked if this conduct was covered by the draft provisions.

Mr. Johnson asked if the type of conduct being discussed would be felonious. He asked if the statutes were not designed to protect against corrupt behavior and to protect against corruption in the operation of government.

Mr. Wallingford said that most of the bribery statutes would probably be felonies but the other crimes would be misdemeanors.

Chairman Carson asked if an individual who is threatened with harm would not have recourse, other than that provided in the draft, where he would have to rely on his being a party official. He observed, again, that a "major political party" is defined in ORS 248.010 and that a "minor political party" as defined in ORS 249.710 (2): " . . . means an affiliation of electors representing a political party or organization which: (a) Polled for any one of its candidates for any public office in the state, county, precinct or

other electoral district for which the nomination is made, at the last general election, at least five percent of the entire vote cast for Representative in Congress in such electoral district . . . ".

Mr. Wallingford referred to the commentary on section 5 which points out that perhaps the statute is not needed at all; that a broad criminal coercion statute might cover exactly the same type of offense. He observed that the same type of coverage is provided in the New York statute under their coercion statute.

Mr. Johnson moved to delete subsection (6) of section 1.

Representative Haas favored the deletion of the subsection also and Chairman Carson stated that it would be taken out and the reasons explained to the Commission when the draft is considered by them.

Mr. Wallingford thought that since subsection (6) of section 1 was deleted, the subcommittee might also want to delete subsection (7), depending upon whether or not section 5 was retained.

Mr. Johnson referred to the language "'Harm' means loss, disadvantage or injury, or anything so regarded by the person affected" appearing in subsection (7) and said he could understand the language "regarded by the person affected" from the standpoint of the intent of the person intimidating but added that it put the person accused in a difficult position because it is purely subjective on the part of the victim.

Mr. Wallingford agreed that under the definition the test would be subjective.

Chairman Carson thought perhaps the wording should be changed to "reasonably regarded by the person affected . . .".

Mr. Paillette asked where this definition would be important and Mr. Wallingford replied that it would be in section 5.

Representative Haas suggested the members go ahead to consider the other draft sections and that they could then return to section 1, definitions.

Section 2. Bribery.

Mr. Wallingford explained that subsection (a) covers the giving of a bribe and subsection (b) covers the taking of a bribe. He read subsection (a) and noted a typographical error -- the word "will" should be inserted in the subsection so that it will read: " . . . his official capacity will be thereby influenced . . .". A change was also made in subsection (b) to make the language conform to that of

subsection (a). Subsection (b) will read: " . . . as a public servant will be thereby influenced."

Mr. Wallingford advised that subsection (c) of section 2 establishes a defense where "the defendant conferred or agreed to confer the pecuniary benefit upon the public servant . . . ". Subsection (d), in effect, takes away a defense in that it is no defense "that the person sought to be influenced was not qualified to act in the desired way . . . because he had not assumed office, lacked jurisdiction, . . . ".

Chairman Carson understood that subsection (c) covered the situation where a public official, in effect, commits extortion by demanding something for an act on his part and the person charged with bribery would have a defense if he could show the public official demanded this.

Representative Haas asked if this were a standard defense.

Mr. Wallingford explained that the reason for it was that the courts have generally construed the act of bribery to be a voluntary conferral or inducement.

Representative Haas could envision this defense coming up quite frequently.

Chairman Carson thought that the prosecutor would have to prove "an agreement or understanding"; he thought there would have to be some voiced or understood deal. He noted that the question of "understanding" was quite significant.

Mr. Paillette agreed that this would be an element to be pleaded and proved by the prosecution.

Chairman Carson, while admitting that as a legislator he might be supersensitive, was concerned that one might be charged with bribery for having dinner with a lobbyist, though perhaps it could never be proven.

Representative Haas added that conduct must be influenced by the bribe.

Mr. Wallingford commented that if the passage of the consideratic and the agreement could be proven, it would not be necessary to prove that any action was taken on it.

Mr. Johnson felt that what the subcommittee was really a little worried about was the pecuniary benefit. He referred to section 4, Rewarding past official misconduct, and posed the situation where a

legislator receives a gift at Christmas along with a note thanking him for voting for the sender's bill. He wondered if there was not some way of putting in some element such as "substantial" in describing the pecuniary benefit.

Mr. Wallingford replied that the section on Rewarding past official misconduct would only apply to consideration given for a violation of duty.

Chairman Carson stated that while the word "substantial" has been used other places in the code, he hesitated getting into the position of defining "how much is too much". He remarked, also, that perhaps all being legislators, the committee members were tending to look at the draft from that viewpoint while it should also be viewed from the position of others, i.e., that of the attorney general or that of circuit judges. It was his opinion that a judge should not receive a pecuniary benefit of any kind.

Mr. Johnson agreed with this view but thought it was somewhat implicit in the Judicial Code of Ethics. He did feel, however, that the operating politician has a little more difficult time.

Mr. Paillette said that these kind of problems were the ones the draft approach was trying to get at by the use of the words "pecuniary benefit" rather than just "benefit". He pointed out that the bribery section was written in terms of "pecuniary benefit" which would get away from "log rolling", "vote trading" and this type of thing.

Chairman Carson read the dictionary definition of "pecuniary": "Consisting of money; exacted or given in money; entailing a money penalty; relating to money; monetary". He stated that if this definition were used, the gift of a trip or some item would not be considered. He wondered, however, if it was the intent of the members to really limit the benefit to a "pecuniary benefit".

Mr. Paillette recalled that the draft definition of a "pecuniary benefit" is "benefit in the form of money, property, commercial interests or anything else . . . "

Representative Haas suggested that rather than using the word "substantial" perhaps the word "significant" would be more acceptable.

Chairman Carson brought out the point that a pecuniary benefit could be obtained through vote trading, also. An individual could trade his vote on a measure for a favorable vote on another measure which would favorably affect a business or industry in which he had a vested interest. He thought the problem was in knowing how broad a meaning the term "pecuniary benefit" had.

Mr. Wallingford replied that the key phrase in the definition is "primary significance is economic gain". He admitted that the definition was meant to cover more than just money as he felt this would be unduly restrictive.

Mr. Johnson asked what would be done in respect to campaign contributions. He noted there is a provision in the Corrupt Practices Act but he wondered if the draft statute would also cover this.

Chairman Carson thought there would be a problem arising with the receipt of birthday gifts, Christmas gifts, etc., unless heavy reliance was made on the language "upon an agreement or understanding" appearing in section 2. He felt this language would require an action on the part of the donee as well as the donor. He felt this language to be the key rather than the benefit conferred or received.

Mr. Paillette agreed with this, adding that the definition was certainly preferable to the present statutes: ORS 162.220, which uses the language, " . . . any gift, gratuity, valuable consideration or thing whatever . . . " and ORS 162.230, which uses the language, " . . . corruptly accepts or receives any gift, gratuity, valuable consideration, or thing whatever . . . " He advised that the ALI thought this kind of language too broad.

Mr. Johnson thought one of the questions involved was whether or not some of the conduct covered by the draft provisions would be better handled some other way. He thought perhaps political contributions could be taken out because they were handled in another statute which requires disclosure.

Mr. Wallingford observed that the bribery statute was not intended to cover the political contribution unless it were given upon an agreement to influence.

Mr. Johnson was of the opinion that political contributions should be exempt from the draft provisions and the way he read it now, the provisions would apply. He felt there were presently laws to handle the problem through disclosure.

Chairman Carson was reluctant to write in such an exemption in that he felt the exemption of campaign contributions would, in effect, be saying that that type of agreement or understanding, which would otherwise be bribery, will be handled elsewhere.

Mr. Wallingford added that it would also be very easy to bribe under the guise of a contribution.

Representative Haas asked if there was anything wrong with a large corporation advising a legislator of its stand on an issue and telling him that if his vote would favor this stand, that they will contribute to his campaign.

Mr. Johnson felt it was standard practice for business and other organization representatives to ask a candidate his position on various issues.

Mr. Wallingford thought the question here would be whether or not the candidate's judgment was influenced by the contribution or whether he was given the contribution because his judgment was already favorable.

Chairman Carson observed that as a rule a contribution is made during the campaign, prior to a vote on an issue, so that unless the interview were discussed in detail, as a practical matter, it would appear that the vote followed the contribution.

Mr. Johnson felt that until citizens are willing to subsidize campaigns and there are countervailing reasons for campaign contributions, that without them politicians will be unable to communicate.

Mr. Wallingford understood, then, that it was desired under the bribery section, for example, that it be made clear it was not intended that campaign contributions be covered.

Mr. Johnson agreed because he thought there would be a real problem whenever a substantial contribution was made.

Mr. Wallingford commented that there might be a problem then in defining what a "political contribution" is.

Mr. Johnson advised that it was defined in the Corrupt Practices Act, although it was quite broad.

Mr. Paillette recalled that there were just a handful of Oregon bribery cases, none of which involved political bribes or political candidates. He noted that the problems being discussed by the subcommittee were the same as those wrestled with by the compilers of the Model Penal Code. He read from the MPC Commentary on section 208.10, Bribery in Official and Political Matters, T.D. No. 8: "Nature of the Benefit; Political Inducements. Bribery laws commonly speak of offer of 'anything of value,' with various elaborations intended to make it clear that the value may be 'present or prospective,' . . . The term has been interpreted broadly enough to include sexual relations solicited of a girl by a law enforcement officer, as consideration for his overlooking illegal behavior of her father. Other statutory formulations explicitly encompass 'advantage' or 'beneficial' act, as well as 'anything of value.' Some employ language which would appear to be restricted to pecuniary bribes. Log-rolling, i.e., the offer by a legislator or other official to vote or act in a particular way on a public issue in exchange for a reciprocal commitment by another public servant as to his official action or decision, has been treated as bribery." Mr. Paillette noted that this was the California statute.

The MPC "defines the offense in terms of 'any benefit'; and benefit is defined very broadly in Section 208.50 to include 'any gain or advantage, pecuniary or otherwise, or anything regarded by the beneficiary as gain or advantage.' The purpose is to reach every kind of offer designed to influence official or political action by extraneous incentives. There would be no doubt, for example, that it would be bribery to offer a public servant a job in private industry as an inducement to make an official decision favorable to the prospective employer. So also, where an employee of a private corporation is a member of a state legislature, it would be bribery for his employer to give him a promotion or a raise in pay as part of a bargain by which the employee legislator casts his vote for or against a particular bill.

"The necessary breadth of the definition of 'benefit' does, however, create difficulties when applied to bargains made in the process of political compromise. The Council of the Institute and the Advisory Committee were in agreement with the Reporters that it would be unrealistic and improper to make all such compromises criminal even though they may involve offers of appointment or promotion in the public service, or promises to vote for a particular measure given in exchange for a like 'benefit' proferred by another. Logrolling is often offensive and sometimes subversive of good government; but it is most frequently an unavoidable technique for bringing persons of differing views together on some program of action.

"One way of meeting this problem would be to draft a specific exception to cover it . . .

"Exceptions. This section shall not apply to:

"(a) representations of a candidate's position on public issues, made to influence electors; or

"(b) arrangements with or among public servants, party officials, or candidates, for reciprocal support or commitments in relation to elections, appointments, legislation, or other resolution of matters of public policy or administration, where such arrangements do not involve pecuniary benefit to any participant or violation of any other law.

"This was rejected because such an explicit exception might be interpreted as affirmative approval of log-rolling and similar practices, and because of the difficulty of drafting a proper line of separation between criminal and exempt activities . . .

"Giving up, therefore, the attempt to narrow the scope of 'benefit,' by definition or exception, to take account of the foregoing problems, it was decided instead to rely on the word 'corrupt' to characterize the sort of influence to be prohibited."

Mr. Paillette advised that though this was stated in the MPC T.D. No. 8, the word "corrupt" was taken out of their official, approved draft because it was thought ambiguous.

Mr. Johnson felt the use of the word "corrupt" helped the draft and Chairman Carson agreed.

Mr. Wallingford observed that subsections (2) and (3) of the final MPC section 240.1 are more restricted because they use the term "any benefit" in respect to judicial or administrative proceedings and in respect to a violation of a known legal duty.

Mr. Johnson advised that he has read a good deal of what has been written on this subject and that most writers on the matter conclude that the only sanction feasible is exposure through disclosure laws because it is really a case of trying to legislate morality.

Mr. Wallingford pointed out that the bribery law by including public servants, legislators and politicans would probably be in the minority. The class discussed covers the entire judicial system and the entire administrative and executive system of government also.

Mr. Johnson noted, however, that those in the judicial system are in a different situation in that they are more removed and do not have to compromise whereas the very essence of our system requires the legislator to compromise.

Mr. Paillette was of the opinion that the MPC approach of just covering the problem in their commentary begged the question a little because they say: "Offers of non-pecuniary benefits, e.g. political support, honorific appointments, are penalized . . . only in connectio with attempts to influence judicial and administrative proceedings." (See MPC Commentary, section 240.1, p. 196). Mr. Paillette was not convinced that saying political support is a non-pecuniary benefit really gets to the problem.

Mr. Wallingford asked if it was the feeling that a special provision relating to the legislative process should be drafted.

Chairman Carson was concerned that writing in an exemption for the legislature would appear to condone log-rolling and other such practices. He thought the question was simply whether or not to rest hope on the fact that the average juror would not be vindictive in this sense. Replying to a comment made by Mr. Wallingford, he stated that to be able to rely upon the discretion of prosecutors in bringing this type of charge would require the changing of other statutes because the prosecutors feel they have no discretion. If they do not prosecute any violation of the Corrupt Practices Act, they can lose their job.

Mr. Johnson commented that it is the age old problem of trying to legislate a higher morality than society abides by. He felt it might help the problem if the word "corrupt" were employed.

Chairman Carson asked if the term was defined anywhere and Mr. Paillette read from ORS 161.010: "'Corruptly' imports a wrongful design to acquire some pecuniary or other advantage to the person guilty of the act or omission referred to." He noted that the definition of "corruptly" could be changed for the purposes of the revised code.

Mr. Johnson felt that part of the problem could be eliminated if the definition of "public servant" were limited.

Chairman Carson advised that the dictionary definition of "corrupt" was a lot stronger than just accepting a benefit. He quoted "To become putrid or tainted. To become debased; to lose virtue."

Mr. Paillette suggested that perhaps it would be necessary to take the approach used by the MPC and rely on the commentary to explain the intent of the revisers.

Chairman Carson stated that he was not heartened by the Oregon Supreme Court's allegiance to legislative history. The Court retains the question of the "plain meaning rule"; they do not have to look to legislative intent behind a statute if it is obvious on the face of it.

Mr. Johnson asked if there was any possibility of requiring corroborating testimony in the statute.

Mr. Paillette replied that the question of "corroboration" and "accomplices" would be dealt with under the Article on "Parties to Crime". There is one section in that draft which provides that a person is not considered an accomplice under the statute if his conduct is necessarily incidental to the act which is prohibited. For example, if someone were being prosecuted for bribery, the bribe giver would be an individual whose conduct would be considered incidental.

Mr. Wallingford advised that under existing Oregon statute a defendant cannot now be convicted on the uncorroborated testimony of an accomplice.

Chairman Carson was of the opinion that there were really only two choices left -- to exempt legislators (and to be fair he thought it would have to cover all the legislative branches, city, county, etc.) or to use the MPC approach and put in the commentary the fact that the revisers clearly did not intend to prohibit "log-rolling".

Representative Haas said that the state of mind of the person offering the bribe and that of the person taking it were the important factors and that what was really being discussed was "malice". He

read its dictionary definition: "The state of mind manifested by an intent to commit an unlawful act; a deliberate intention to commit the act."

Mr. Johnson felt the addition of the word "corrupt" would at least characterize the conduct and it would then not be just a matter of the benefit.

Mr. Wallingford referred to the commentary on page 6, Bribery and Corrupt Influences, and advised that it set out the reason the term "corruptly" had not been used.

Mr. Johnson wondered if the problem was not with the words "or understanding" contained in section 2. He felt this to be a rather vague term.

Mr. Paillette suggested that perhaps the problem could be solved by deleting the words "an understanding" in subsection (a) of section because here it is discussing the intent of the offeror. There could certainly be an evil intent on the part of the bribe giver and no understanding or agreement on the part of the receiver. He felt that the bribe giver, then, would be just as guilty as he would have been had there been an understanding.

Mr. Wallingford felt the term "agreement" implied a meeting of the minds.

Representative Haas referred to subsection (a) of section 2, to the word "upon" and asked if this were not potentially perspective -- the offeror could be turned down and it would still be bribery.

Mr. Johnson favored deletion of the language "or understanding" contained in subsection (a) of section 2.

Mr. Paillette suggested that both terms ("agreement" and "understanding") could be deleted in subsection (a) and handled the way Michigan did. He referred to the text of Michigan Revised Penal Code, page 11 of the draft, which talks only of the intent of the bribe offeror.

Chairman Carson thought that leaving the term "agreement" in would seem to require some proof on the part of the prosecutor that there was some true meeting of the mind or an offer to have a meeting of the minds.

Representative Haas moved to delete the words "or understanding" contained in section 2 (a).

Mr. Paillette posed a situation where an individual offers $1,00 to a legislator advising him that he is very much interested in the

passage of a certain bill. The offer is rejected so there is no agreement. He asked if the offeror would nevertheless be guilty of bribery. He felt that to prove bribery between two persons it would be necessary under the draft for the prosecutor to prove there was agreement; however, where there was no agreement, should the bribe offeror go unpunished because the agreement was not made? It seemed to him that the mens rea of the actor was just as bad as it would be had an agreement been completed.

Representative Haas agreed and then suggested that perhaps the language "upon an agreement or understanding" should be deleted and the words "with the intent" inserted.

Chairman Carson agreed and felt the language could be deleted in both subsections (a) and (b) since he felt it was redundant. He noted that in subsection (a) the actor would offer, confer or agree (which would involve two persons) and under subsection (b) the public servant would solicit (or offer), accept or agree and he felt this would cover all conduct.

Mr. Johnson thought the exclusion of campaign contributions ought to at least be suggested to the full Commission. He felt this was the most sensitive area and might possibly run into a free speech problem. He stated that the legitimate area of public concern is that the publi know that the candidate comes in with certain obligations. He contended that the Corrupt Practices Act takes care of this.

Chairman Carson did not agree that the Corrupt Practices Act, in fact, does handle the problem.

Mr. Johnson was of the opinion that it does cover the problem; the only problem with the Act today is that it does not require prior disclosure.

Representative Haas observed that the present bribery statute employs the term "corruptly".

Mr. Paillette commented, however, that the existing definition of "corruptly" was not too helpful.

Mr. Wallingford questioned that anyone would report a bribe as a contribution under the Corrupt Practices Act or that the Corrupt Practices Act procedures would ever disclose a bribe.

Mr. Johnson replied that it would disclose contributions made and by whom so that the public would be aware that a candidate had obligations and then through public debate this issue would be raised.

Representative Haas pointed out that there was a difference between a campaign contribution and a personal gift.

Mr. Wallingford stated that an exception could be drafted making it clear that this area does not apply to political contributions, political parties or people running for political office.

Representative Haas suggested trying this approach on the full Commission. He asked Mr. Paillette if he agreed that to take out the words "upon an agreement or understanding" contained in section 2 (a) would make the person who makes, pure and simple, a campaign contribution with the hope of influencing the vote of the recipient guilty of a crime.

Mr. Paillette replied that he thought the language could be deleted in the first paragraph of section 2 but he thought some language relating to the intent should be inserted.

Representative Haas understood then that a contribution made with the intent of influencing the recipient's vote would be a criminal act

Mr. Paillette did not think it would be any more criminal conduct under the draft provision than it is under present statute.

Chairman Carson did not think the present statute was good and thought the reason conduct had not been prosecuted under the statute was that it was so obviously in error.

Mr. Wallingford observed that political contributions are generally made with the intent to influence so it would be better if it were necessary to show an actual agreement existed.

Mr. Paillette voiced the concern that when exceptions are written into the statute (such as one covering campaign contributions), every time a case comes along that might be a legitimate case of bribery, the defense will be that it was not bribery, but a campaign contribution.

Chairman Carson replied that there would be a timing element -- why was the receipt not reported as a campaign contribution?

Mr. Wallingford advised that Michigan has a statute which makes it a crime not to report a bribe offer.

Mr. Johnson stated that the whole justification for drafting exceptions is that there are now criminal sanctions that will take care of this conduct. They involve, essentially, two elements, disclosure and the wrath of public opinion. He felt this was the only effective way to take care of this conduct.

Chairman Carson felt all were agreed that the campaign contribution whether it be work or vote or dollars is not what is being discussed as bribery under section 2. The question is whether to

exempt it specifically or resolve it by commentary. He reiterated his concern about relying too heavily upon the commentary and asked Mr. Paillette his opinion about this.

Mr. Paillette admitted that he too had this concern and that it had been his position with the Commission right from the beginning that if there was any doubt about legislative intent, clarifying language should be written into the statute. Because of the nature of the problem, however, he thought perhaps this instance might be the exception which should go into the commentary.

Chairman Carson stated that, at least for discussion purposes, an exception will be added to the application of subsections (1) and (2) of section 2 to campaign contributions. The alternative will be couched in such phrases that if a disclosure is made under the Corrupt Practices Act, in effect, it will not be a bribe.

Representative Haas noted, also, that if funds are reported as campaign contributions, the recipient has to continue reporting and cannot spend the funds for anything other than campaign expenses. If he does so, he runs into difficulty with the IRS.

Mr. Johnson thought the exception would be very simple to write: "Notwithstanding, this does not apply to political contributions reported in accordance with ORS _____."

Chairman Carson asked if it was the desire to leave such things as log-rolling, etc., to the commentary.

Mr. Paillette drew attention to the draft commentary on page 7 which cites Michigan Commentary: "On the other hand, a broad interpretation of the benefits described in Section 118 could also be used to prohibit 'log rolling', . . . Obviously, bargaining of this nature should not be covered by the bribery statute."

Mr. Johnson said that in this area he would be a little more willing to rely upon the good sense of the courts and Chairman Carson agreed.

Representative Haas asked what the decision was in regard to the language "agreement or understanding" contained in subsection (1) of section 2.

Mr. Johnson suggested the language: "He offers, confers or agrees to confer any pecuniary benefit upon a public servant with the intent that such public servant's vote . . . thereby influenced . . . ".

Representative Haas understood that the gift of a case of whiskey on Christmas day given with the intent to influence the recipient's vote would be subject to the statute provisions.

Chairman Carson agreed this was correct.

Chairman Carson summarized the action desired by the subcommittee in respect to section 2 by stating that the present designation of "(1)" will be deleted and the subsections will be numbered instead of being designated by letters; the language "upon an agreement or understanding" will be deleted and the language "with the intent" inserted in subsection (1). Subsection (2) will be amended in the same manner and the problem will be discussed further when the draft is considered by the full Commission.

Representative Haas was somewhat concerned about the amendments, not in respect to the solicitation aspect but in relation to the acceptance of the offer.

Mr. Wallingford observed that in the case of non-acceptance of an offer, he thought the statute covering "attempts" would apply, as an inchoate crime.

Chairman Carson did not think it would in that the inchoate crime was being picked up in the proposed draft; "solicit" and "offer" are both inchoate.

Mr. Paillette replied that the definition of "attempt" would be broad enough to get into this type of conduct if the draft did not contain it.

Representative Haas was still reluctant to accept the proposed amendment to section 2 and Mr. Johnson observed there would always be somewhat of a problem in respect to a gratuity and he did not see how it could be avoided unless "pecuniary benefit" is defined to be of a "substantial" nature or a "dollar" figure put on it.

Mr. Paillette suggested that the subsection be broken down, splitting off bribe offering or bribery from bribe receiving, then further breaking down bribe receiving into separate subsections to cover solicitation and acceptance upon an understanding or an agreement.

It was agreed that this method would make the draft much clearer.

Chairman Carson stated, then, that it was agreed that subsection (1) of section 2 would stand by taking out the language "upon an agreement or understanding" and subsection (2) will be broken into two paragraphs, one covering "solicitation with intent" and one covering "accepting or agreeing to accept any pecuniary benefit upon the agreement or understanding".

Mr. Paillette suggested that subsections (3) and (4) of section 2 be placed under a separate section called "bribery defenses", with subsections (1) and (2).

Chairman Carson observed that in subsection (3) the briber had an entrapment defense and asked if this defense was pretty standard.

Mr. Wallingford replied that it was; the same provision was adopted by New York and Michigan.

Chairman Carson understood that under subsection (4) it would be no defense that the candidate had not assumed office or had no jurisdiction, etc.

Mr. Paillette agreed with this statement; the impossibility defense would not apply.

Chairman Carson announced that with the agreed upon amendments, section 2 would stand approved.

The subcommittee recessed for ten minutes.

Section 3. Giving and receiving unlawful gratuities

Mr. Paillette noted a style change to be made in the section -- subsections "(a)" and "(b)" will be numbered "(1)" and "(2)".

Mr. Wallingford advised that the conduct described in section 3 does not require an agreement or understanding.

Representative Haas understood that under this section a public servant would be given money for doing something he has to do anyway, for an official action he is required to perform.

Mr. Wallingford added that the draft provision covers both the giving and receiving of an unlawful gratuity.

Chairman Carson referred to the popularity of honorariums as a method of obtaining special or additional compensation and asked if a public servant would be entitled to this compensation.

Mr. Wallingford thought it would depend upon whether it required an additional or special action that the public servant is required t perform without special compensation.

Mr. Johnson referred to section 2, subsection (1), to the language, "He offers, confers or agrees to confer any pecuniary benefit upon a public servant with the intent that such public servan . . . exercise of discretion in his official capacity will be thereby influenced . . . ", and said he thought this would cover what is covered in section 3.

Chairman Carson thought perhaps this would cover the provisions in section 3 (1) but he was not sure it would cover section 3 (2).

This would be the case where a public official solicits to hold court, for example, and demands payment to render a decision or to do some other official duty. The payment may or may not influence the decision. He felt that section 2 would cover the influencing of an opinion, decision or action by a public servant while section 3 would cover the performance or non-performance of a duty whether or not the decision resulting from the performance of the duty was influenced.

Mr. Johnson still contended that the language " . . . judgment, action, decision or exercise of discretion as a public servant will be thereby influenced" contained in section 2 (2) would cover this type of situation.

Mr. Wallingford stated that under the bribery statute it must be shown that there was an intent to influence while under the provisions of section 3 this is not necessary. It is necessary only to show that consideration passed when it was not supposed to, i.e., paying a district attorney for advice. He added that while the provisions contained in subsection (2) of section 3 were fairly common, the provisions contained in subsection (1) are not. Michigan, in fact, does not prohibit the offering of such benefit.

Mr. Johnson felt that subsection (2) of section 3 necessitated the proving of an agreement; the proof must show the "pecuniary benefit as consideration for the performance . . . ". He felt this would be proving a contract. He suggested that if the words "or inaction" were added to the subsections in section 2, the section would cover everything now covered in section 3. He felt that the intent of section 3 was to cover something less than a bribe, a gratuity, but that it is impossible to draw up a bribe statute (section 2) without covering a gratuity within it.

Mr. Wallingford replied that section 2 and section 3 are not really designed to attack the same problem. The bribe, he said, is aimed at a concrete understanding of some sort, a corrupt intent to influence a decision whereas receiving an unlawful gratuity, under the draft, does not require this at all.

Representative Haas cited an instance where in order to get a case assigned, the attorney offers payment and the case is placed on the calendar.

Mr. Johnson thought this act would come under "bribery", especially if the language "or inaction" were added to the subsections in section 2. He thought the solution would be to allow a fair amount of discretion in sentencing under the bribery statute.

Mr. Wallingford read from the Supreme Court opinion in U. S. v. Irwin (see draft commentary, p. 15): "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, . . . " and noted this is how a gratuity is distinguished from bribery.

Mr. Johnson agreed with this approach but did not think the draft said this. He wondered if perhaps it was the desire of the subcommittee to draft a statute stating that "any kind of a gift to a public employee is illegal". He was not sure he wanted to go this far.

Chairman Carson referred to the draft commentary and noted that the MPC almost seemed apologetic about the inclusion of the section. He quoted: " . . . this section may go beyond the proper limits of a criminal code revision project."

Mr. Johnson moved to delete section 3 from the draft and the motion carried unanimously.

Section 4. Rewarding past official misconduct.

Mr. Johnson wondered if section 4 should not be made a part of section 2 and be made a part of bribery itself.

Mr. Wallingford thought the only problem there is that in section 4 no attempt is being made to influence anyone to do anything. The reward is made for something that has already been done.

Mr. Paillette referred to the draft commentary on section 4, to the statement: "Compensation for past official action implies a precedent for similar future compensation."

Mr. Johnson said he would certainly put in the "political contribution exception" to this section.

Chairman Carson did not agree, pointing out it would be in relation to past violations of conduct.

Mr. Johnson agreed, noting it would have to be proved that the public servant violated his duty. He wondered, then, if the section covered very much.

Mr. Paillette referred to ORS 162.240 and noted that it touches upon this now because it covers taking, demanding or accepting "any fee, commission, . . . or other consideration for services rendered or promised in connection . . . "

Chairman Carson asked if it was the desire to keep section 4 as drafted, renumbering the subsections "(1)" and "(2)" instead of lettering them "(a)" and "(b)".

Mr. Paillette advised that section 4 was based on the New York and the MPC approach.

Mr. Johnson agreed that section 4 covered a separate crime involving a violation of duty and past conduct and so should be in a separate section.

Section 5. Intimidation in public and political matters

Mr. Wallingford called attention to a style change necessary in section 5, also -- changing the subsections lettered "(a)" and "(b)" to numbers "(1)" and "(2)".

Mr. Paillette suggested this might be a good time to look at the matter of coercion. He recalled this had been discussed by the subcommittee in connection with Assault. The section on coercion had been taken out of the Assault Draft and the matter had again been discussed when the Kidnapping Draft was considered. The section on coercion is being sent to the Commission as a section of the draft on Kidnapping and Related Offenses because it was felt there should be a broad coercion statute. It seemed to Mr. Paillette that coercion would pretty well cover the conduct covered in section 5 of the draft on Bribery and Corrupt Influences. He suggested the subcommittee might want to reserve any action on this section since the Commission would be considering the Kidnapping Draft on June 17th. He referred the attention of the subcommittee members to the draft on Assault and Related Offenses, P. D. No. 1, p. 22, section 6, Coercion, noting the section referred to "compels or induces another person to engage in conduct which 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...

Mr. Wallingford pointed out that subsection (8) of this section on Coercion referred to "Use or abuse his position as a public servant by . . . " and advised that the only reason the MPC suggested a separate statute was that they thought some states might want to establish a more severe penalty for intimidation of a public servant as opposed to others in general.

Chairman Carson suggested section 5 of Bribery and Corrupt Influences be tentatively eliminated (along the lines suggested by Mr. Paillette) with the understanding the Coercion may be adopted along the lines set out in the Assault Draft, P. D. No. 1, when the Commission considers the Kidnapping Draft. He also suggested the elimination of subsections (6) and (7) of section 1, Bribery and corrupt influences; definitions.

Mr. Johnson so moved the above and the motion carried unanimously

Section 6. Official misconduct.

Mr. Paillette advised that the intent of this section is to gather up a number of statutes now on the books and combine them under one broad provision.

Mr. Wallingford agreed with this statement, adding it brought together about fifteen statutes. He noted, also, that there was a great variation in the penalties contained in these statutes, ranging from a misdemeanor to twenty years imprisonment and a $50,000 fine.

Mr. Paillette referred to pages 31 - 33 of the draft commentary which set out a number of the present statutes.

Chairman Carson felt that a good number of these were probably enacted at the urging of some disgruntled constituent as retaliation for some wrong he felt he had suffered.

Mr. Johnson questioned that all of the conduct which would be covered by the section would be criminal conduct.

Chairman Carson agreed and wondered if it should come under embezzlement or misappropriation of funds, etc.

Mr. Paillette pointed out that to come under the section's provisions there would have to be an "intent to obtain a benefit for himself or to harm another . . . ".

Chairman Carson noted the language "to obtain a benefit" was quite broad.

Mr. Paillette added that one thing that may not be commented upon in some of the revisions of other states is the question of negotiated pleas. He felt this would explain some of the sections contained in the codes, particularly in that of Michigan.

Mr. Johnson voiced the thought that this was the age-old problem of trying to outlaw everything we are against in society and he thought some things were simply not fit for criminal sanction. He did not feel the problem of the negotiated plea was going to be solved by this statute.

Mr. Paillette answered that he thought it would provide a "cop-out" for bribery and Chairman Carson agreed, adding it would provide a "cop-out" for embezzlement but that the question was whether it was desired to have a "cop-out" for embezzlement.

Mr. Johnson repeated his earlier statement that it would be necessary under bribery to provide a good deal of discretion as to sentencing.

Mr. Wallingford advised that section 6 was based on New York and that the MPC did not contain a section on official misconduct.

Mr. Paillette brought out the point that in order to set out the existing law and show how it relates to the proposed code, it is necessary to draw up the early drafts in a manner so as to provide a springboard for discussion. All sections drafted may not be desired

but if the early drafts do not provide some section to cover the present statute provisions, there will be a number of statutes now on the books that will never be discussed, resulting in a number of dangling sections in the present code when the new provisions are presented to the legislature for adoption.

Chairman Carson agreed that this continuity was vital for the benefit of the Commission members.

Chairman Carson drew the attention of the committee members to page 34 of the draft, to alternative sections 7 and 8. The sections were drafted to point out the differences in the culpability element of intent and to divide Official Misconduct into two degrees. In that he felt it was the opinion of the subcommittee that section 6 of the draft be deleted, he did not see much value in discussing the alternative sections.

Mr. Paillette agreed, noting, for instance, that there are some fifteen separate embezzlement statutes which will be consolidated under the proposed Theft statute.

Chairman Carson was given unanimous consent to direct that section 6 be removed from the draft.

The meeting was adjourned at 4:20 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission