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FINAL REPORT

AMERICAN BAR ASSOCIATION

SECTION OF CRIMINAL JUSTICE

COMMITTEE ON ECONOMIC OFFENSES

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NCJRS

MAR 7 1977

ACQUISITION

MICROFICHE

Paul K. Rooney, Chairman
David T. Austern, Reporter
H. Lynn Edwards, Staff Director

December 30, 1976

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.	4
II. Findings and Recommendations	10
III. Definition.	28
IV. The Federal and Local Effort Against Economic Crime	32
1. Securities and Exchange Commission	32
2. Federal Bureau of Investigation.	36
3. Postal Inspection Service.	39
4. Department of Health, Education and Welfare.	42
5. Internal Revenue Service	45
6. Department of Justice - Antitrust Division.	49
7. Banking Enforcement Agencies	52
8. State and Local Effort.	57
9. The Private Sector.	67
V. Appendix A.	69
Appendix B.	75

I.

INTRODUCTION

The primary emphasis of law enforcement has traditionally been on crimes of violence, which unlike economic offenses, seem to have a much more immediate and frightening impact. However, events over the past several years, including the disclosure of political corruption at our highest level of government and widespread bribery and manipulations by various business entities, have focused attention on what appears to be a pervasiveness of "white collar" crime. Prosecution of this type of crime has so far been inadequate, largely because of inadequate resources but also because of law enforcement's historical inattention to economic crime.*

At the 1975 annual convention of the American Bar Association, representatives of the Law Enforcement Assistance Administration (LEAA) and various Justice Department officials asked the Criminal Justice Section to create a committee to establish a dialogue and mount an effective national front to combat economic crime offenses. The Criminal Justice Section was selected because it was in the unique position of being able to bring together all of the elements of the criminal justice system, including judges, prosecutors, defense attorneys,

* See Address by the Hon. Harold R. Tyler, Jr., Deputy Attorney General of the United States, before the American Society of Criminology (October 31, 1975). See also Testimony of Judge Tyler before Subcom. on Oversight of the House Ways and Means Committee (September 22, 1975).

academicians and others with expertise in this area. The Criminal Justice Section agreed to undertake this study and established an Economic Crime Committee composed of representatives of all of the above elements.

The members are as follows:

Paul K. Rooney, Chairman
Attorney in Private Practice
New York, New York

Gordon F. Bowley, Vice-Chairman
Supervising Deputy District
Attorney
Fraud Division
Sacramento, California

Honorable James G. Exum, Jr.
Associate Justice
Supreme Court, State of
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Raleigh, North Carolina

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Attorney in Private Practice
Washington, D. C.

Honorable William L. Hungate (D-Mo.)
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Representatives
Washington, D. C.

Honorable Charles W. Joiner
Judge, United States District Court
Eastern District of Michigan
Detroit, Michigan

George R. Fusner, Jr.
Law Student
Nashville, Tennessee

Alan Y. Cole*
Attorney in Private Practice
Washington, D. C.

John C. Keeney
Deputy Assistant Attorney General
United States Department of Justice
Washington, D. C.

*Mr. Cole was the first Committee chairman when the Committee was formed, but relinquished this position in August, 1976, when he assumed the Chairmanship of the ABA Section of Criminal Justice.

Professor Herbert S. Miller
Georgetown University Law Center
Washington, D. C.

George C. Smith
Prosecuting Attorney
Columbus, Ohio
(former Chairman of the National
District Attorneys Association
Economic Crime Project)

Honorable Richard C. Turner
Attorney General of Iowa
Des Moines, Iowa

John Wing
Assistant United States Attorney
New York, New York

In addition, seven persons were named ex-officio members of the Committee based on their responsibilities in the organizations they represent or based on specific expertise in selected areas. Those ex-officio members of the Committee are:

Robert M. Ervin
Chairman, Criminal Justice Section, 1975-76
Attorney in Private Practice
Tallahassee, Florida

Richard P. Lynch, Director
National District Attorneys Association
Washington, D. C. Offices

James C. Swain, Director
Judication Division, LEAA
Government Project Monitor
Washington, D. C.

H. Lynn Edwards
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Laurie Robinson
Assistant Staff Director, Criminal Justice Section
American Bar Association
Washington, D.C.

Frank A. Ray, Chief Counsel
Civil Division
Prosecuting Attorney's Office
Columbus, Ohio
(former Project Director National
District Attorneys Association
Economic Crime Project)

Mark M. Richard, Chief
Fraud Section, Criminal Division
U. S. Department of Justice
Washington, D. C.

David T. Austern, an attorney in private practice in Washington, D.C., was selected as Reporter for the Committee.

The Law Enforcement Assistance Administration grant specifically described the Committee's responsibilities:

"To review the area of political, business, white collar and/or economic offenses; to define the problem; to consider means of combatting such conduct; to consider methods of protecting or compensating victims of such offenses; to consider the special problems such offenses create for law enforcement agencies, prosecutors, defense lawyers, courts and correctional officials, both state and federal; and to make recommendations with respect to the foregoing."

An LEAA grant of \$10,000 was provided to defray the expenses of four meetings. The Committee's work at these meetings was devoted to the formulation of a working definition, a study of the overall federal and state prosecutorial effort, a review of attendant problems involving such areas as sentencing and victimization, and recommendation of steps to be taken to confront what has been described as a "cancer on our society." Time and budgetary constraints made it impossible for the Committee to do more.

In general, the methodology employed by the Committee in identifying problem areas was to invite individuals with experience in the economic crime area to present to the Committee statements concerning specific problems. In addition, Committee Members were assigned problem areas to investigate and report to the Committee as a whole. The members were instrumental in identifying experts in the economic crime area to appear before the Committee. In the interest of time and because the over-all Committee membership was intentionally kept small, division into sub-committees was rejected.

The Committee was fortunate to receive cooperation from federal and state officials, as well as from individuals in the private sector, in both testifying before the Committee and in providing the Committee with information. Federal and State officials who appeared before the Committee included Theodore Sonde, Association Director, Division of Enforcement, Securities and Exchange Commission; Richard J. Gallagher, Assistant Director, Federal Bureau of Investigation; C. W. Wilson, Postal Inspector, United States Postal Service; John Walsh, Director, Office of Investigations, Department of Health, Education and Welfare; Robert J. Potrykus, Acting Assistant Director, Intelligence Division, Internal Revenue Service; John McCavley, Chief, Operations Branch, Intelligence Division, Internal Revenue Service; Meade Emery, Assistant to the Commissioner of Internal Revenue; Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division, United States

Department of Justice, Robert Serino, Office of the Comptroller of the Currency; Robert Levinson, Federal Bureau of Prisons; and Peter Andreoli, Chief, Fraud Division, New York County District Attorney's Office. Private sector individuals who appeared before the Committee included James V. Bennett, former Director, Federal Bureau of Prisons; Ralph Nader and Mark Green, Center for Study of Responsive Law; Robert D. Carnaghan, Vice President, Fidelity and Deposit Company; Frank Le Munyon, Security Associates of America; and Otto Obermaier, an attorney in private practice in New York City.

An extensive bibliography of the literature in the Economic Crime area was assembled to guide the Committee's discussions. All of the materials contained in the bibliography were read by Committee members or the Reporter. Appendix A of this Report lists the bibliography.

II

FINDINGS AND RECOMMENDATIONS

1. The Committee recommends that the federal government collect data from all federal agencies with jurisdiction in the detection, investigation, or prosecution of economic crime offenses, and that following the establishment of such data collection system appropriate consideration be given to the establishment of a case-weighting system in which predetermined factors as to the importance of cases can be counted.

Based on the material and information received from all sources (as well as the Committee members' own experiences and knowledge), the Committee concluded that the federal government does not possess the mechanisms to measure accurately its own efforts against economic crime, nor the mechanisms to assess the impact of economic crime on the country as a whole.

Little data in the area of economic crime have been collected by the federal government; the data which have been gathered are of questionable validity in that there are no uniform standards for collecting economic crime data as among the relevant agencies. Accurately evaluating the efforts and effectiveness of the enforcement agencies is virtually impossible because comparisons simply cannot be made; without uniform data, comparisons are futile. Effective data collection should, in the first instance, provide the government with the cost of law enforcement activities in the economic area.*

* The federal government does not have a uniform codification of economic crime offenses. Not all federal agencies consider the same violations to be economic crime offenses.

The Department of Justice is planning the implementation of a first step in the collection of data. When referring cases to the Department, federal agencies will complete a form which includes information as to amount of provable loss, amount of suspected loss, number of identified and suspected victims, number of defendants, etc.

Collecting statistics not infrequently leads to an attempt to have a higher number of cases, investigations, known losses, manpower assigned, etc., as between agencies. In order to minimize competition among enforcement agencies based solely on numbers of cases, the Committee is in favor of a case weighing system designed to favor more important cases. The Committee concluded that the number of investigators or prosecutors is far less important in collecting data than a measure of the impact of cases which are investigated or brought against a party.

2. The Committee recommends that the Congress undertake an evaluation of the federal effort against economic crime, and that the Congress review the enforcement priorities for the detection, investigation and prosecution of economic crime offenses.

A summary of the efforts in the economic crime area of nine federal agencies appears, ante. The agencies report to a number of different Congressional committees. Other federal agencies with economic crime responsibilities not described below report to other Congressional committees. There is no

centralized Congressional oversight responsibility for the federal effort against economic crime.

The Committee concludes that the total federal effort against economic crime is underfunded, undirected, and uncoordinated, and is in need of the development of priorities.

The Committee discussed at some length the question of whether the Congress should make this evaluation. Some Committee members suggested that the Department of Justice undertake this responsibility, or that the task be assigned to some other agency. It was the consensus of the Committee, however, that no federal agency could be completely impartial in this effort. The Committee also discussed the possibility of private consulting firms undertaking this project; this idea was unanimously rejected. The Committee concluded that the task be assigned to the place where the Constitution mandates it to be assigned -- to the Congress.

The Committee concluded that for the most part, within the federal agencies with direct responsibility in the economic crime offenses area, available resources are unequal to the task of combatting economic crime. Examples are abundant. The Department of Health, Education and Welfare has inadequate manpower to audit and monitor the enormous number of agency programs, and practically no manpower for the detection and investigation of economic crime offenses within these programs. Even today, with a vastly expanded audit and investigation capability within HEW, the manpower assigned is inadequate.

The Committee has learned of some instances in which seemingly adequate resources to combat economic crime exist, but are poorly deployed, underutilized, or frustrated by jurisdictional considerations. Among the federal banking agencies, there is multiple jurisdiction, with three separate auditing and investigatory agencies with responsibility as a function of the bank charter, rather than location, type of depositor, or type of bank business. Although the Committee has been told that competition among the agencies in terms of their investigatory responsibilities leads to healthy competition, the Committee is forced to speculate that the trichotomous investigatory responsibilities of the federal banking agencies result in ineffective, inefficient and improvident investigations of bank fraud. In addition, the Committee notes that one of the federal banking agencies is resorting to computer model audits in order to detect bank irregularities, while another agency has resigned from auditing of banks altogether in favor of auditing, at least in selected locations, by state banking agencies.

3. The Committee recommends that all federal agencies with either a law enforcement or law inspection function be required to issue annual compliance reports. The Committee recommends that all state agencies with either a law enforcement or law inspection function be required to issue annual compliance reports.

The compliance report would include the nature of the compliance population (how many individuals, corporations,

dealers); an estimate of the level of violations; the cost of such violations; the extent of the resources to prevent, detect, or prosecute such violations; the conviction rate for such violations; the remedies that are available, including an evaluation of how well the available remedies were working; and a list of those violations established. A compliance report should also include suggestions for legislative changes which would enhance the law enforcement or law inspection function of the agency concerned.

As one witness who appeared before the Committee noted, if an agency does not have a compliance reporting function, it is not serious about enforcing the law, nor is it serious about developing a constituency for greater resources that may be needed.

4. The Committee recommends that in the future, all federal social programs (excluding revenue-sharing funds) be designed so as to diminish the likelihood of abuse, and that the design of any social program specifically recognize the potential for fraud.

The Committee has been presented with evidence to indicate that certain government programs have been inadvertently designed and operated so as to contribute to their own victimization. Indeed, many of the problems associated with economic crime appear to be the result of improvident design and/or inadequate auditing procedures in a number of social programs.

In addition, executive agencies should promulgate rules

and regulations designed to protect the funds given to the agency for ultimate distribution to others. In such rules and regulations there must be a clear delineation as to whether the state agency, the federal agency, or both have jurisdiction to investigate abuses; it is the responsibility of Congress to determine which agency has primary jurisdiction in this area.

The Congressional responsibility is not limited to a determination of such jurisdictional priorities however. Congressional oversight responsibilities in this area are broader and should be seriously pursued. Accountability to the Congress from both the federal enforcement agencies and the program agencies is exceedingly weak. There is some reason to believe that if the public were aware of the extent of economic crime violations in the program agencies which remain unaffected by the enforcement agencies, it would reflect badly on the agencies and on the officials charged with the responsibilities within those agencies to prevent or detect violations of law.

5. The Committee recommends that both recruitment and manpower training become priority items for every agency with economic crime enforcement responsibilities.

The lack of resources in the economic crime area at the federal and local level is, to a great extent, a function of insufficient manpower and inadequately trained personnel.

Included in this recommendation are: (1) the establishment of experienced economic crime prosecution specialists in every United States Attorney's office and every local district attorney's office; (2) a direct exchange between personnel in the Department of Justice and other federal agencies in order that the personnel exchanged will acquire knowledge in a particular program area; (3) an increase in the salaries of experienced prosecutors in the economic crime area in order to retain them in continued public service; and (4) the recruitment of trained auditors* in all agencies with program responsibilities.

6. The Committee recommends that such projects as the Economic Crime Project receive continued and substantial funding. In addition, the Committee recommends to the Law Enforcement Assistance Administration that it consider economic crime as a major factor in overall crime in this country, and that this consideration be a factor in the Administration's discretionary grant fund priorities.

To no small extent, deployment of resources at the local level in the economic crime area is a function of the Economic Crime Project of the National District Attorneys Association.

Although there was a measurable effort of economic crime prosecution at the local level prior to establishment of the Project, unquestionably the Project has materially benefitted even those jurisdictions in which economic crime prosecution predated its existence.

* By trained auditors, the Committee intends the recruitment and training of auditors who can detect criminal offenses.

The Committee commends LEAA for having funded the Economic Crime Project.

It is nonetheless disappointing to report that funding for the Economic Crime Project is being dramatically reduced. Although the funding cycle from LEAA is typically three years, and although the project has now operated more than three years, the Project is clearly an undertaking that should continue.

Under no circumstances should the states and other units of local government rely on the federal government to fund forever economic crime prosecution projects. It is the responsibility of local government to assume the financial responsibility for such offices.

Those who have studied anti-trust violations in this country generally believe that the great majority of anti-trust conspiracies occur locally, within commerce which operates at the county or state level. Despite this fact, most states and smaller units of local government have failed to enforce the anti-trust laws either through criminal complaints or civil complaints. With the limited resources of the Anti-trust Division of the Justice Department, and with the prevalence of anti-trust violations at the local level, it is particularly important that units of local government devote greater resources to anti-trust enforcement.

The Committee understands that if the NDAA Economic Crime Project continues, there are plans to increase the capabilities of local prosecutors to prosecute anti-trust violations.

7. The Committee recommends the expansion to other jurisdictions of the extant pilot project underway in San Diego, California, whereby an assistant United States Attorney is also an assistant district attorney, and an assistant district attorney has been designated as an assistant United States attorney.

Joint investigations similar to the Strike Force concept may be needed between the Fraud Division of the Department of Justice and the Securities and Exchange Commission; in addition, joint investigation and prosecution efforts between federal agencies and local agencies are needed.

The Committee concludes that effective economic crime prosecution requires a national policy of enforcement, as well as stronger federal-state cooperation. Local District Attorneys, Attorneys General, and the Department of Justice should actively encourage the establishment of Federal-State Law Enforcement Committees in every state.* In addition to other responsibilities in the area of coordinating economic prosecution, the sharing of intelligence among the enforcement and prosecuting agencies should be a function of these committees.

The lack of resources in economic crime enforcement at the federal level as well as the ubiquitous nature of economic crime have resulted in federal enforcement agencies becoming extremely selective in the types of cases that are investigated. The case selection priorities in the federal agencies do not

*Eighteen such Committees now exist.

necessarily reflect the case prosecution priorities in the Department of Justice, which is charged with the prosecution of cases referred to it by other agencies. Although there is increasing coordination as to case priority between the Justice Department and other federal agencies, such coordination should be expanded.

Although selective enforcement of the law is generally recognized as a legitimate law enforcement procedure, in the absence of coordination among the federal agencies, the legitimacy of the procedure gives way to undirected and unguided enforcement. The Department of Justice has limited manpower assigned to the prosecution of economic crime offenses, and the limitations of the Department must be fully understood by those agencies which refer criminal prosecutions to the Department.

8. The Committee recommends that pretrial, reciprocal discovery in economic crime cases should be increased. The Committee notes that enhanced discovery procedure would probably result in the obtaining of pleas in many more economic crime cases, as well as many more stipulations in those cases which do go to trial.

Although not all economic crime cases require many weeks or even months of trial, many do require extensive commitments of time and resources on the part of the defense, the prosecution, and the courts. Some criminal and civil cases in the economic crime area are interminable and end up as a test of the perseverance and stamina of the parties. The Committee heard from one witness

concerning a case which resulted in a nine-month trial, and a number of cases in which defense expenses exceeded \$1 million.

The prime factor in the length of a trial in an economic crime case is not necessarily the complexity of the subject matter. The prime factor is sometimes the combination of (1) the number of counts in the indictment, (2) the extent of the proof the prosecutor presents, particularly as to similar transactions, and (3) deliberate or inadvertent delaying tactics during trial on the part of the defense.

From the prosecution point of view, even the most simple charge of an intent to defraud requires an exceedingly complex and time-consuming presentation of the fraudulent scheme, even in those cases in which the only count is a definitive one as to intent. A scheme or pattern of a fraud with one or more defendants is not quickly demonstrated to a trial jury.

From both the defense and prosecution point of view there is an immediate impact on the projected length of the trial in terms of the type of jury that will ultimately be selected. It is unlikely that a cross-section of the community will be selected when the presiding judge instructs the venireman that the trial may last several months. Under such circumstances, many people are justified in asking to be excused.

The lengthy trial also diminishes the ability of many defendants to defend themselves, frequently because of the expenses involved. One witness who appeared before the

Committee suggested that a successful defendant be permitted to recover the costs of his defense from the prosecution.

The Committee discussed the number of counts that should be contained in indictments returned in economic crime cases. The Committee found it difficult to reach a consensus as to the number of counts, but agreed that, at least in the typical case, the number of counts in the indictment should not exceed fifteen.

In addition, the Committee notes that trial judges have the major responsibility of insuring broader discovery by both sides, as well as the responsibility to expedite longer trials. This is not a recommendation to the effect that trial judges should necessarily participate in the examination of witnesses or the presentation of evidence, nor is it a recommendation that judges interfere with the presentation by the respective attorneys. It is, however, a recommendation that trial judges be far more conscious of their role as an expeditor of issues in a lengthy trial.

There is no consensus within the Committee as to the advantages of Omnibus Hearings, which are employed in a number of United States District Courts, or the advantages that might be achieved by the elimination or curtailment of the Jencks Act (18 U.S.C. 3500) in economic crime cases as a means of pretrial discovery.

The Committee notes that the advent of the final stages of the Speedy Trial Act may have a severe impact on economic crime cases, particularly if courts do not grant extensions to either side for complex litigation.

9. The Committee recommends that a greater emphasis be placed on punishing economic crime offenders following their conviction.

It is the consensus of the Committee that the most effective punishment for the economic crime offender is incarceration. Whereas the Committee does not recommend the elimination of fines or restitution to victims where possible and appropriate, the Committee finds that incarceration of economic crime offenders results in equal justice, as well as both special and general deterrence. The Committee recognizes the value of social sentences for economic crime offenders, as well as the value of permitting victims to address the Court at the time of sentence. "Social sentences" refer to sentences that require the offender to contribute to society through community or rehabilitative employment.

Some Committee members believe that where presumptive sentences are employed, there are some economic crime offenses for which the presumption should include some period of incarceration. As a factor for either increasing or decreasing the presumptive sentence, a sentencing judge should consider the extent of the harm to the victim or victims.*

* This Report does not address, although the Committee did consider, the question of whether sentences should be in writing and whether there should be a right of appeal by either the prosecution or defense.

There is significant evidence that individuals convicted of economic crime offenses are not incarcerated to the same extent as individuals convicted of other offenses. For instance, in the federal courts, statistics are available which underscore the disparity of sentencing policies.*

In fiscal year 1976, 40,112 defendants were sentenced, of which 46% were sentenced to imprisonment for an average term per sentenced defendant of 47.2 months. Eighty-nine percent of those defendants sentenced for robbery, were sentenced to prison, while 91% of those convicted of bank robbery were sentenced to prison. The average monthly term for total robbery and bank robbery sentences were 134.3 and 136.7 months respectively. Seventy percent of robbery defendants imprisoned received sentences of five years or more.

By contrast, only 17% of those defendants sentenced for embezzlement of bank funds received a prison term (for an average of 22.6 months). Thirty-one percent of those defendants who were convicted of fraud committed against lending institutions received prison terms (for an average of 18.4 months). Only one of the 175 defendants convicted of antitrust violations received a prison term.

In summary, nearly three times as many defendants received a prison term for a crime of violence committed in a lending

* The statistics cited are taken from the 1976 Annual Report of the Director of the Administrative Office of the United States Courts. Percentages are rounded off to two decimal places.

institution as those defendants who committed an economic crime in such institutions. In addition, the length of the incarceration imposed was nearly eight times longer following conviction for the crimes of violence. It is interesting to note that even for a non-violent criminal offense, violation of the federal narcotic laws, the sentences imposed resulted in twice as many (63%) prison terms as fraud committed in lending institutions (31%).

The Committee was informed by a representative of the Federal Bureau of Prisons that the impact of lighter sentences for economic crime offenders on the rest of the prison population is invidious. This problem is exacerbated, at least in state prison systems, by the fact that frequently persons sentenced following a conviction for a crime of violence are members of low income and racial minorities, while those sentenced following conviction for economic crime offenses are generally not members of a racial minority or from an economically disadvantaged background.

There are conflicting views of the extent of recidivism in economic crime cases. While a representative of the Federal Bureau of Prisons informed the Committee that economic crime offenders are unlikely to repeat their criminal conduct, a yet-to-be published study by the Economic Crime Project will present data to the effect that there is a very significant recidivism rate among economic crime offenders.

Any comparison of sentences between economic crime offenders and persons convicted of violent crimes must start with a consideration of whether persons convicted of crimes of violence should be sentenced to prison. This consideration exceeds the mandate of the Committee. We note that two other Committees of the American Bar Association are reviewing sentencing standards, while the National Conference of Commissioners on Uniform State Laws will soon propose a Uniform Corrections Act, advocating a major sentencing philosophy.

Finally, as to the issue of incarceration, assuming that some incarceration acts as a deterrent for some people, to what extent does the length of a prison term maximize the deterrent effect? Specifically, if some economic crime offenders should be given prison terms, for what period of time should the terms run?

10. The Committee recommends that the American Bar Association have a continuing committee on economic crime within the Criminal Justice Section.

Among other responsibilities, the Committee could examine pending legislation in the economic crime area, review the ABA Standards for Criminal Justice with a view to determining their impact on economic crime prosecutions, and make recommendations for further action by the ABA House of Delegates. The Committee could serve as the constituency for federal enforcement agencies before the Congress, following requests by the agencies for additional resources with which to combat economic crime. Because

it would be representative of all facets of the Bar, the Committee would be in a uniquely unbiased position to comment on funding requests from enforcement agencies.

The Committee could also serve as a planning and research group in order to determine resources which are necessary to combat newly emerging types of economic crimes. All too frequently enforcement agencies at both the federal and state level are in a reactive posture to new kinds of economic crime, rather than planning appropriate responses to kinds of economic crime that can be anticipated. The stealing of information from computers is an example of an economic offense that might have been anticipated, but was not.

Law enforcement agencies have a duty to prevent the commission of crimes. In the economic crime area, the most effective crime-prevention tool is public education. Frequently, victims of economic crime are unaware of the fact that they are victims or that they can receive assistance at the local prosecutor's office.

The Committee concludes that it would be useful for a study to be undertaken whereby the mechanisms available to assist the victims of economic crimes would be evaluated.

By way of example, courts are frequently insensitive to the fact that the acceptance of a nolo contendere plea in an economic crime case is potentially of great harm to the victim(s), as such plea is not admissible in a civil proceeding brought by the victim(s).

Local prosecutor's offices should not, however, become collection agencies to assist individual victims. There should be at least a "class" of victims before a prosecutor invokes whatever civil remedies are available to assist victims.

III

DEFINITION

At the first meeting the Committee decided that an agreed-upon definition of economic crime would have to form the basis for all future Committee work; members concluded that without a working definition there was great risk that individuals would talk past each other about problems and concepts.

In addition to more traditional economic crimes, the Committee decided that any definition must include corruption, tax fraud, and anti-trust violations. Members discussed whether the definition of economic crime decided upon should be the broadest one possible or should focus more narrowly on crimes with a nexus to the economics of society. It was the consensus of the Committee that the broadest definition should be employed.

A study group of the U.S. Department of Justice had employed a working definition of economic crime as follows:

"Economic crime constitutes any non-violent criminal activity which principally involves traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge or illegal circumvention."

Concern was expressed that the Justice Department definition does not include consumer fraud. Although it was agreed that it was the intent of the study group to include consumer fraud, it was suggested that the word "misrepresentaion" should be added in the Justice Department definition after the word, "deceit." The Committee intended that consumer fraud would

include misrepresentations negligent in character, as distinguished from deceit, which suggests an intentional misrepresentation. The Justice Department definition, it was agreed, envisioned only intentional acts. It was noted that many states have adopted legislation which makes it unlawful to make a misrepresentation concerning goods or services where the declarant knows or should have known the statement was false or misleading. Although some members expressed concern about imposing criminal sanctions on unintentional conduct, it was agreed that the word "misrepresentation" was a necessary addition to the definition.

The Committee agreed that criminal conduct in the environmental pollution and product safety areas was encompassed by the definition.

Finally, the Committee agreed that the word "criminal" in the Justice Department definition should be stricken in favor of the word "illegal," in order to include conduct and behavior in which civil remedies might prove to be a more appropriate -- as well as effective -- remedy. The Committee adopted this change, noting that in order to construe a meaningful definition of economic crime it is useful to look at the conduct which should be prohibited, as well as at the mechanisms required to uncover such conduct.

There was extensive discussion as to whether the definition of economic crime was intended to include conduct which is not

based on a desire for economic gain; it was agreed that economic gain is not a necessary element for conduct that is included in the definition.

The Committee also decided at the first meeting that a review of the working definition should be the last item on the agenda for the Committee's last meeting, in order to reevaluate the definition in light of what the Committee had heard from witnesses and had concluded from its discussions. At the last meeting, this reevaluation was undertaken. The Committee concluded that certain changes in the definition were necessary.

Definitions prepared by earlier authors who considered the problems of economic crime tended to focus on a description of the offender, rather than the elements of the offense, which forms the basis for this Committee's definition. The Committee concluded that such focus was the proper one in that, while the Committee's definition is a broader one than others have proffered, it has far greater validity for law enforcement. See, Edelhertz, The Nature, Impact and Prosecution of White-Collar Crime (as cited in Appendix A); D.C. Gibbons, Society, Crime, and Criminal Careers: An Introduction to Criminology, (as cited in Appendix A).

The final definition of economic crime by the Committee is as follows:

"An economic offense is any non-violent,* illegal activity which principally involves deceit, misrepresentation, concealment, manipulation, breach of trust, subterfuge, or illegal circumvention."**

This definition of economic crime is subject to change as the nature of the offense changes. The Committee's definition is almost certain to change, as different types of economic crimes emerge in future years.

* "Non-violent" refers to the means by which the crime is committed. It is not intended to describe the harm that is caused to the victim, which is frequently excessively violent in that it may involve the loss of one's home, life savings, or quite literally all of one's property. In addition, particularly in those many instances of economic crime in which hundreds or thousands of people are affected, the harm to society can frequently be described as violent.

**Among the offenses included in "illegal circumvention" are auto repair fraud, bait and switch schemes, land fraud, home improvement fraud, and job opportunity schemes.

IV

THE FEDERAL AND LOCAL EFFORT AGAINST
ECONOMIC CRIME

1. Securities and Exchange Commission

The Securities and Exchange Commission, according to information provided to the Committee by an SEC official, takes the position that it can neither detect nor prosecute every violation of the federal securities laws. Therefore, the Commission controls access points to the marketplace and imposes on the accounting, legal, and brokerage professions strict codes of conduct and the knowledge that when individuals from such professions are found to be engaged in illegal activities, they will be vigorously prosecuted. The Commission does not have authority to proceed criminally, but can bring civil proceedings against individuals and organizations and can refer cases to the Department of Justice for criminal prosecution. Both civil and criminal actions have been brought against professionals who through negligence and lack of professional care have unwittingly aided criminal activity.*

There is some concern in the Commission that the Code of Professional Responsibility and the disciplinary process

* The courts have generally sustained the Commission in imposing high standards (and in the case of the legal community, standards which may exceed the Code of Professional Responsibility) on professionals, and have applauded the Commission's policy of policing professionals at the access points to the marketplace in order to deter economic crime. The Commission takes the position that particularly in the securities field, it is almost impossible to commit an economic crime without the assistance of an attorney.

established by and administered by the organized bar in each state has not responded as effectively as it might to attorney misconduct -- particularly in the securities fraud area. This is particularly true in cases (and standards of conduct) in which attorney misconduct is based on negligence, rather than an intent to defraud. The Commission staff finds particularly onerous those jurisdictions in which injunctions have been issued, following a Commission petition, against attorneys who were later successfully criminally prosecuted for a violation of the securities law, without even an attempt to bring the attorney before the local disciplinary process.

Commission staff provided the Committee with statistics describing injunctive actions and criminal referrals for the past five fiscal years.*

* I. Injunctive Actions

<u>Fiscal Year</u>	<u>Cases Instituted</u>	<u>Injunctions Ordered</u>	<u>Defendants Enjoined</u>
1972	119	113	511
1973	178	145	654
1974	148	289	613
1975	174	453	749
1976	158	435	722

II. Criminal referrals

<u>Fiscal Year</u>	<u>Number of Cases Referred to Justice Dept.</u>	<u>Number of Indictments</u>	<u>Defendants Indicted</u>	<u>Convictions</u>
1972	38	28	67	75
1973	49	40	178	83
1974	67	40	169	81
1975	88	53	199	116
1976	114	23	118	97

(footnote continued)

Generally, the Commission finds its authority and legislative purpose adequate. Staffing problems at the Commission appear to be in a less satisfactory condition. Until early 1975, the Commission had operated for thirty years with a smaller staff than it had employed immediately following World War II. Even today, with 2,000 employees in Washington, D.C. and in regional offices throughout the country, the Commission's staff is inadequate for the task that is legislatively mandated. Civil complaints brought by the Commission require an enormous commitment of economic and manpower resources; in the National Student Marketing case, over 40,000 pages of depositions have been taken and over 4,000 exhibits marked during pretrial discovery.

(footnote continued)

In order to fully understand the statistics provided in Chart II, entitled "Criminal Referrals," certain additional factors should be taken into consideration. In recent years, the Commission reports, the majority of the cases that comprise the figures in the column captioned "Number of Cases Referred to Justice Department" have been referrals which are made pursuant to a request for the case from a United States Attorney's Office, Strike Force, or from the Department of Justice itself, rather than a referral initiated by the Commission. With these request-type referrals, the Commission generally makes no specific recommendation for criminal prosecution. For example, in 1975, 73 of the 88 referrals were made pursuant to requests from one of the aforementioned parties and in 1976, 107 of the 114 referrals were made pursuant to such requests.

In the past, principally because of the complexity of Commission cases, statute of limitations problems would often arise. In an effort to deal with this problem, the Commission and the Department of Justice within the last few years have worked out a program designed to apprise the Department at a very early stage of the Commission's enforcement actions. The agencies have found that this early warning system has for the most part resulted in earlier consideration of Commission cases

(footnote continued)

There is a jurisdictional aspect of SEC authority that presents problems. The Commission does not have the authority to impose civil fines or penalties as do other administrative agencies. The most common procedure for the Commission to employ in the economic crime area is to seek an injunction;

(footnote continued)

from a criminal prosecutorial standpoint and has reduced the number of problems caused by the running of the statute of limitations.

For all the above reasons, as well as for other reasons to be discussed below, the reader cannot subtract the column "Number of Indictments" from "Number of Cases Referred to Justice Department" and expect the difference to be the number of cases where the Department of Justice has declined to follow the Commission's recommendations. One reason, referred to above, is that the Commission does not in the request-type referrals make specific recommendations for criminal prosecution. Another reason is that the figures listed in "Number of Indictments" refers to the indictments returned in that particular fiscal year. In fact, the indictments that will be returned from the referrals made in 1976 will probably be reflected in upcoming fiscal years.

Another variable that must be taken into account in interpreting Chart II is that the number of cases referred does not necessarily bear a statistical relationship to the number of indictments. For instance, one case referred several years ago by the Commission to the Department of Justice resulted in the return of more than ten indictments. Conversely, it may take the referral of more than one case to result in one indictment. This situation arises, for example, where a broker, illegally manipulates the price, in four separate issues of securities. Each one of these four stock manipulations may be carried as separate cases on the Commission's records, and when they are referred to the Department of Justice, will result in four referrals (for purposes of the figures in Chart II). When the Department of Justice presents the case to the grand jury in some instances, one indictment will be returned.

The Department of Justice does, in a small number of cases, decline to follow the Commission's recommendations where specific recommendations have been made in a criminal reference report. The reasons vary. For example, in the case cited above where one defendant manipulates four issues, the Department of Justice may determine that proceeding for more than one of these manipulations might be unnecessary and, therefore, may decline prosecution on the remaining cases.

this is a frequently cumbersome procedure to use in the pursuit of economic crime offenses.

According to information provided to the Committee, it would seem that the civil sanctions which can be imposed in response to a Commission complaint are adequate, for deterrent purposes, to cover most conduct investigated by the Commission.

Prevention and public education in the economic crime area occupy a substantial amount of the SEC's annual \$40 million budget. Activities of the Commission's Market Surveillance Unit and the Market Regulation Division are almost exclusively preventive. Over the years the Commission has attempted to insure that the industries directly regulated have guidelines and internal procedures to prevent attempts by individuals to commit illegal acts.

In the public education area, the Commission has published a number of brochures which describe types of stock fraud. Press releases highlighting Commission activity against illegal activities are regularly issued. The Commission has recently established an Office of Consumer Affairs to expand its public education program.

On a regular and continuing basis, the Commission has assigned staff accountants and attorneys to local district attorneys who request assistance.

2. Federal Bureau of Investigation.

In the past five years, the FBI, in both resources and training of personnel, has increased its efforts in the economic

crime area. Statistics are not available which reflect the number of cases referred to United States Attorney's offices, but almost every Bureau investigation results in either an acceptance or declination for prosecution by the local U.S. Attorney. Some cases investigated by Bureau personnel involve relatively small sums of money and in these cases the victims are referred to the civil courts, or restitution is made. Since the Bureau has a "quality-versus-quantity" policy, in cases involving small amounts of money or in which criminal intent cannot be proven, the matter is resolved as rapidly as possible in order that major cases may be more completely staffed.

An important indication of the economic crime effort from the FBI's view is the actual number of convictions in the economic crime area based on FBI investigations. The Bureau reports the number of convictions are as follows:

<u>Fiscal Year</u>	<u>Number</u>
1972	2,380
1973	2,711
1974	3,201
1975	3,753
1976	4,610

The Bureau believes that for many reasons statistics in the economic crime area are misleading. For instance, because the Bureau has commenced many investigations wherein the "victim" of an economic crime did not even realize a crime had been committed, the Bureau believes that reported economic offenses are not an accurate barometer of the incidents of economic crime.

The FBI has found that many economic crime offenses do not come to the attention of law enforcement authorities.* In addition, the Bureau believes that there are no accurate statistics to measure losses from economic crime.** Finally, long-range consequences of an economic crime offense, particularly in the bank fraud and anti-trust areas, cannot be accurately measured at all.***

Approximately 10% of the FBI's annual budget of \$500 million is devoted to the detection and investigation of economic crime offenses. The Bureau employs 8,500 agents and approximately 12,500 non-agent personnel. In recent years, partly as a response to the increase in economic crime cases, the Bureau has recruited as agents far more accountants than attorneys. During fiscal year 1977, 1,225 agents and 700 support personnel will be assigned to economic crime offenses.

Particularly in the economic crime area, the FBI's quality-versus-quantity case policy is important. As an example, scores of accountants had to be temporarily assigned to New Orleans, Louisiana in order to investigate the grain fraud cases in that jurisdiction. Generally, in complex fraud cases, the Bureau finds that manpower demands are enormous.

* A view which is unanimously shared by the Economic Crime Committee.

** See, Committee recommendation on page 10 of this report.

*** Ibid.

The Bureau has dramatically increased its public education and prevention efforts in the economic crime area. For instance, in cooperation with the U.S. Department of Commerce and the Chamber of Commerce, the Bureau has been holding business crime seminars throughout the country. The Bureau has also met with representatives of major industries in order to ascertain what the industry concerns are in the economic crime area.

The Bureau is undergoing a review of its jurisdiction in the economic crime area. By way of example, the Department of Justice has established guidelines whereby agents can be assigned to the Departments of Housing and Urban Development and Health, Education and Welfare on an ongoing basis in housing and medicaid fraud investigations.

3. Postal Inspection Service.

The area of investigation within the Inspectional Services jurisdiction having the greatest financial impact on the public is mail fraud, an ever-increasing component of economic crime. The mail fraud and false representation statutes have proven to be flexible and effective vehicles for the prosecution of many schemes to defraud the public.

The prevalence of economic crime by mail can be ascertained from the fact that the Inspection Service received over 127,000 complaints in fiscal year 1975 from postal customers alleging mail fraud. In the first nine months of fiscal 1976, 106,000 complaints of all types were received. Over 7,000 investigations

of mail fraud were concluded in 1976. The Service devotes approximately 15% of its investigative hours to economic crime complaints and investigations.*

Criminal prosecution is not the only enforcement tool used by the Service. The administrative provisions of 39 U.S.C. 3005 and 3007 to withhold delivery of mail operators who attempt to obtain money or property by means of false representations can be employed. In fiscal year 1975 the administrative remedies were employed on over 100 occasions. In many instances, the use of these administrative remedies was frustrated -- in that when a court issued a mail stop order against a company, it would go out of business immediately, only to reopen under a different name at a different address.

According to information provided to the Committee, the Service takes the position that in all of its investigations -- but particularly in complex cases in the economic crime area -- close cooperation between its field investigators and the local U. S. Attorney or Justice Department officials is essential. The Service can cite many cases in which this close cooperation

* This is a growing area for the Service, as a comparison between fiscal years 1970 and 1975 shows an increase of approximately 40% in arrests and 49% in investigative manhours devoted to economic crime cases. During 1975 the mail fraud statute was used increasingly as a means of prosecuting insurance fraud cases, many of which victimized doctors and lawyers. Other types of mail fraud investigations in the economic crime area investigated in 1975 included advance-fee correspondence schools, franchises, work-at-home promotions, and land fraud offerings. According to the Service, the known loss from fraudulent mail promotions in fiscal 1974 was \$194 million, while the loss in fiscal 1975 from the same operations was over \$395 million.

was directly responsible for an ultimately successful prosecution.

The total operating budget for the Inspection Service for fiscal year 1976 is \$126,994,000, of which approximately \$52,802,000 is earmarked for criminal investigations of all types. (The remaining funds are used to fulfill the Inspection Service's internal audit and security functions.) Although no specific portion of the Service's budget has been allocated to prevention and public education, in the course of their regular duties inspectors make presentations concerning mail fraud to civic groups, business organizations, and members of the law enforcement community. In addition, a portion of the operating budgets of such Postal Service elements as the Law Department, Customer Services, and Communications Departments are used for consumer protection.

The Economic Crime Committee was particularly impressed with the statistical gathering capabilities of the Inspection Service. The Service not only has an unusual breadth of statistics in the economic crime area, but it has up-to-date statistics; the Committee was provided with statistics of investigations less than one month old. The Committee received information from the Service regarding the basis for these statistics.*

* Each Inspector is required to complete data processing source forms which concern all phases of his activities on either a monthly or case basis. At the close of each month, Inspectors report their current case load, the number of cases closed during that month, the number of arrests, convictions or discontinued promotions attained in all their cases

(footnote continued.)

The Service believes the statutory authority under which it operates is sufficient. The present manpower -- some 1,600 agents throughout the country -- is not sufficient.

4. Department of Health, Education and Welfare.

The Department of Health, Education and Welfare employs some 135,000 people, with an annual budget of nearly \$140 billion. The agency has some difficulty in determining exactly how many programs it has (definition of "program" is at least partly responsible for the difficulty), but the number is around 300.

Many of the programs which HEW has been given responsibility to manage were authorized under tense or emergency conditions, with pressure from Congress and the public to get the programs started immediately. The implementation of controls and audit procedures was to be accomplished later. It is now "later,"

(footnote continued)
during that month, and a specific accounting for their time. When a case is closed, Inspectors submit a report concerning sentencing, restitutions, recoveries and the estimated public loss and/or savings related to that case. When a case is open, arrests and prosecutive information are reported on a separate form as these developments occur. The data contained on the various forms are entered into a computer and reconstituted in the form of printouts used for management purposes. These printouts are compiled for the 20 field Divisions or on the basis of numerical codes which relate to specific types of investigations. For instance, within the general category of fraud investigations, there are 66 three-digit subject codes to facilitate the retrieval of data relative to specific schemes to defraud.

In the area of mail fraud investigations, additional statistical reports are required of Inspectors. On a monthly basis, each Inspector must submit a report, broken down according to subject codes, concerning precisely the number of complaints received and their dollar value, the time devoted to fraud investigations and the results of those investigations and the estimated public losses, savings, or restitutions occasioned.

and attempts are being made to implement the controls in the middle of the program. The Department reports it is proving to be a difficult task.

Before 1973, HEW had no formal investigation department. In 1973, an Office of Investigations and Security was established. The Committee was told by an HEW representative that partly as a result of Congressional apprehension that the office's jurisdiction was too broad, adequate staff was never provided. By June of 1975, the Committee was told, the number of investigators assigned to handle complaints of fraud in the various programs throughout the country was seven.

The Committee was told that in the past year, under new leadership, the Office of Investigations and Security has been dramatically changed in a number of ways. First, authorization for 60 investigators and additional support personnel has been approved. Second, a close working relationship between this office and the HEW audit staff has been developed. HEW employs 800 auditors, 10% of whom are now working under the direction of the Office of Investigations and Security. Finally, the director of the office was placed directly under an Assistant Secretary with direct access to the agency Secretary.

In addition to audit and investigations, an HEW representative reported to the Committee that the agency has a large staff in the program area whose function it is to examine programs, establish controls, screen payments, and determine eligibility under the different programs. On occasion, these personnel will detect fraudulent activity, a report of which is forwarded to investigations.

An HEW representative has told the Committee that there is a free exchange of information between the Office of Investigations and Security and other federal enforcement agencies. The office works closely with the U.S. Attorney's offices throughout the country.

Although the increased staff and operational capabilities of the office are relatively new, Investigations and Security has begun to investigate cases in three primary areas. The first is the Guaranteed Student Loan Program within the Office of Education. In this program a student can secure a loan from a lending institution to pay for school expenses, with the government acting as an insurer on the loan in the event of a default on the part of the student. Widespread abuse has been detected in this program, including loans to individuals who were not students. The default rate in the program is close to 50%.

A second area of concentration is in the Medicaid program, through which disadvantaged persons are able to obtain medical benefits. Although the primary responsibility for the prevention and detection of fraud in this program lies with the states (through which payments are made), HEW will now directly enter and initiate the investigations.

The third major program of concern is Medicare, a program which provides medical benefits to elderly persons.

According to an HEW official, the Office of Investigations and Security plans to provide suggestions to alter programs in order to prevent economic crime. In each investigation in which

some form of economic crime has been discovered, the method used to commit the offense is detailed; a report on this activity is forwarded to the program officers, with a recommendation that the program be changed or altered so as to eliminate the opportunity for crime.

In many cases, through the efforts of the Civil Division of the Justice Department, civil actions are filed against individuals who have received funds from HEW in violation of the law. Civil sanctions are also employed in those cases in which violations are discovered in the performance of HEW contracts and grants.

Some HEW officials support legislation to fix primary responsibility on the ultimate recipient of HEW funds -- the school, the hospital, the doctor -- to insure that the recipient of services for which the government will pay is in fact eligible for the program and not otherwise in violation of the law. It is possible that such responsibility could be arranged through regulations; however, regulations could not provide for civil or criminal penalties in the event of violation.

5. Internal Revenue Service.

The Internal Revenue Service Intelligence Division is the criminal investigation arm of the Service, and the division most directly involved in the detection of economic crime offenses. The primary responsibility of the Division is to enforce the revenue laws and to prosecute tax evaders. Clearly, of economic crimes, tax evasion is among the most prevalent.

The Intelligence Division currently has approximately 2,500 investigators, including supervisory personnel, organized in seven regional and 58 district offices. In 1975 the Service received over 125 million tax returns; the Intelligence Division thus ordinarily cannot detect every person who has illegally avoided taxes in any year. The Division's approach to detecting tax evasion is based on the assumption that prosecution of a representative number of tax evaders will have the maximum impact on voluntary compliance with the tax laws. As a result, the Division looks to certain factors in selecting cases for prosecution.

Although the national office of the Intelligence Division gives guidance on certain types of cases, most of the factors which lead to prosecution are localized and are most easily made at the local level. In that regard, the Division is the only completely decentralized government enforcement agency. By way of example, the Chief of the Intelligence Division in Los Angeles reports to the District Director of the Service in Los Angeles -- not to the Chief of Intelligence in Washington, D.C.

All of the investigations are, of course, financial in nature. These range from simple investigations of a sole proprietorship's books, to the books and records of a multi-national corporation in which millions of transactions are computerized in a maze of journals and ledgers. Notwithstanding the decentralized enforcement functions, once a case is recommended for prosecution the normal journey to prosecution begins with the investigating agent's Division Chief, moves from

there to IRS Regional Counsel for an in-depth legal review, then to the Department of Justice Tax Division for further review, and finally to the local U. S. Attorney for a final review and prosecution. This process can take anywhere up to eighteen months.*

The Service attempts to investigate and prosecute those cases which will have the greatest impact -- geographically, by profession, and by industry. The Intelligence Division's efforts are on the criminal side of enforcement, and are separate from civil actions commenced on behalf of the government by the Department of Justice against taxpayers in which the government seeks to recover tax due, but not paid.

The caseload of the Intelligence Division has increased

* Prosecution standards generally are based on the following, according to a statement made to the Committee by an Intelligence Division official.

"Criminal prosecution will be recommended in every case developed by the Intelligence activities involving an offense against the Internal Revenue laws where: (1) The evidence is sufficient to indicate guilt beyond a reasonable doubt, and (2) a reasonable probability of conviction exists. All the factors and circumstances of each case will be considered in an administrative determination of whether the case is properly one for disposition on the basis of civil liability, or warrant a recommendation of criminal prosecution. The following factors may be significant in this determination: (1) a nominal tax deficiency; (2) voluntary disclosure of the violation by the proposed defendant; or (3) serious state of ill health of the proposed defendant. Judgment will be exercised in the determination to insure that such a factor will not likely imperil successful prosecution. The Service policy does

(footnote continued)

in recent years, and is continuing to rise.*

A representative of the Intelligence Division told the Committee that there is a trend throughout the courts to impose lighter penalties on individuals convicted of tax evasion. Convictions have also declined slightly -- 1,253 in fiscal year 1974 to 1,219 in fiscal year 1975. In fiscal year 1975, 40% of the convictions were followed by sentences which included a prison term, down from 42% the year before. However, the average prison term of 14 months in fiscal year 1975 was down substantially from an 18-month average in fiscal year 1973.

Although the Intelligence Division and the Service generally cooperate with other enforcement agencies, except under

(footnote continued)

not necessarily preclude prosecution when one of the above factors is present in the case."

"Unless compelling reasons exist, prosecution will not be recommended in any tax cases wherein the proposed defendant has been convicted and has received a sentence by federal or state court on substantially the same facts that would be used for the federal tax charge."

In addition, it is Service policy not to prosecute in those cases in which the putative defendant is serving a long prison sentence.

* In fiscal year 1974 there were 8,078 new investigations and in 1975, 9,268 new investigations. In the first three-quarters of fiscal year 1976, there were 6,715 new investigations. The number of prosecutions recommended by the Division has also increased in the past fiscal years. This has resulted in a substantial increase in the number of cases pending in the Tax Division of the Department of Justice. In 1974, at the end of the fiscal year, there were 741 cases pending, and at the same time in 1975, 972 cases were pending.

specific and restricted guidelines, the Service is unwilling to disclose the information contained in taxpayer's returns. The Service takes the position that its primary responsibility is to encourage voluntary compliance with the tax laws, and almost any disclosure would interfere with such compliance for the reason that taxpayers could be reluctant to file returns knowing that the information contained therein might be turned over to others.

6. Department of Justice - Antitrust Division.

Although the Antitrust Division concerns itself with non-criminal activities -- including anti-merger statutes, interventions before regulatory agencies, and enforcement of the Clayton Act -- its principal focus is enforcement of the criminal provisions of the Sherman Act. The Sherman Act contains two criminal sections, one of which prohibits every contract, combination or conspiracy in restraint of trade, and the other of which prohibits monopolies or attempts to monopolize or conspiracy to monopolize any part of a trade or commerce.*

The extent of economic crime in this area is incalculable. The Justice Department is unable to determine how much trade and commerce is affected by anti-competitive practices, nor how much the public pays yearly in illegal overcharges. In 1968 the Division estimated that between 35 and \$40 billion was affected annually by illegal practices under the Sherman Act. However, these figures represent no more than an educated guess.

* The two criminal sections of the Sherman Act have engendered countless books, articles, and judicial opinions to the extent that they compose one of the larger bodies of specialized law in the country.

The difficulty in determining the economic crime loss in the anti-trust area is exacerbated, at least in part, by the very large dollar figure alleged in the complaints. For example, recent price fixing indictments filed by the Division in the gypsum industry resulted in the defendant companies paying some \$71 million in damage settlements. Early this year, an indictment was filed which alleged gasoline price fixing in a six-state, east coast area over a six-year period. In the area, during the period of time noted in the indictment, gross sales of gasoline amounted to \$4 billion. Complaints filed in the test cycling industry have resulted in over \$280 million paid in settlements.

At any given time, the Division has between 650 and 800 investigations pending.* Criminal complaints filed average between 60 and 70 a year. The manpower of the Division has risen substantially in the past few years, due in part to certain cases which require huge commitments of professional personnel. In the past seven years the Division has grown from 270 to 500 attorneys.

* The statistics (as provided by the Division) for the past nine years are as follows:

<u>Year</u>	<u>Investigations</u>
1967	644
1968	692
1969	710
1970	678
1971	758
1972	773
1973	776
1974	715
1975	701

The Division has found that the best technique for uncovering hard core antitrust violations is the grand jury. As a result, the Division has expressed concern at the legislative attempts in the last Congress to limit the use of the grand jury as an investigative tool.

According to a Department of Justice official who appeared before the Committee, among the most difficult problems facing the Division is retaining good attorneys to try the cases that are brought. The salary structure in the government, particularly when compared to the fees paid in the private sector to an experienced antitrust litigator, results in a very heavy turnover in the Division. This problem is particularly serious because the government antitrust prosecutor is frequently trying the case against a highly skilled defense attorney.

The Division has also been perplexed by the growing and seemingly insoluble problem of how to try the complex case. The Division has cases pending in which there are literally millions of exhibits. Years -- rather than days or weeks -- is the projected length of the trials. The Division has been forced to employ computerized litigation support systems merely to keep track of exhibits and witnesses.

Private enforcement in the antitrust area has sometimes been an effective remedy. The Division reports that plaintiffs' attorneys complain that the Division does not provide them with enough support in their cases, while defendants' attorneys complain that too much support is provided.

The Division would like to see a greater effort by state

enforcement agencies in antitrust. Cooperation between the states and the Division is good.

7. Banking Enforcement Agencies.

Three separate government agencies investigate violations of the banking laws. The Comptroller of the Currency audits and investigates the activities of approximately 4,500 national banks throughout the United States. The Federal Deposit Insurance Corporation insures almost all banks, and audits and investigates the activities of state banks which are not members of the Federal Reserve System; there are approximately 9,000 such banks. The Federal Reserve audits and investigates the activities of approximately 1,000 banks, all of which are part of the Federal Reserve System.*

The FDIC has a policy of listing "problem banks" based on the results of audits. Two-and-a-half percent of all of the banks in the United States were listed during 1975 as "problem banks;" however, two-thirds of them were from the FDIC's least serious problem bank category.

* The number of banks regulated is not necessarily the only way of describing the jurisdiction of these three agencies. For instance, those banks regulated by the Federal Deposit Insurance Corporation represent only about thirty-two percent of the total deposits of all banks insured by the FDIC. Most insured banks are relatively small, and many of the banks regulated by the FDIC have substantially smaller deposits than those banks regulated by the Federal Reserve Board of the Comptroller of the Currency. Only eleven of the commercial banks regulated by the FDIC have deposits of greater than one billion dollars as compared with 73 national banks and 26 Federal Reserve Member banks with assets of greater than one billion dollars.

Thirteen insured banks, with aggregate deposits of \$342.4 millions, failed in 1975, the largest number of bank failures since 1942. In the two previous years, 1974 and 1973, the two largest bank failures in the history of this country took place, the Franklin National Bank failure in New York and the United States National Bank failure in San Diego. In each case there were violations of the criminal laws of the United States that were directly responsible for the failures of the banks.

All three federal banking agencies conduct audit examinations of the banks under their jurisdiction. However, in no case are the audits complete examinations of the bank records except when the audits or other information suggest bank irregularities. Examinations of the bank records are intended "to determine the bank's current condition, to evaluate bank management and to discover and to obtain correction of unsafe and unsound practices for violations of laws and regulations."*

As far as national banks are concerned, the examinations are made by the Comptroller of the Currency two times a year. The examinations are on-site and on a surprise basis. The Comptroller of the Currency "examinations" are intended to evaluate the assets of the national banks and the credit-worthiness

* "Highlights of Operations - 1975," Federal Deposit Insurance Corporation, March 15, 1976.

of the assets.*

The Comptroller of the Currency finds that on-site audits are extremely time-consuming, especially in larger banks. In addition, the Comptroller's Office finds that examinations are essentially after-the-fact matters: what the agency seeks in the books and records of the bank concern matters which affect the credit rating of the bank months or even years ago. The agency instead will, within the next year, rely on a "National Bank Surveillance System," whereby every quarter it will receive statements from the banks which in turn will be given to the computer. The theory of the surveillance is that by reviewing certain variables, the Comptroller's office will be able to ascertain the soundness of the bank and its practices.

In a recent test of the National Bank Surveillance System, quarterly statements from the Franklin National Bank were fed into the computer, and based on statements from the Franklin which reflected bank conditions as of six months before the bank failure, the computer accurately predicted the failure. The Comptroller's office candidly acknowledges that the problem with a computer surveillance system is that it does not give auditors the opportunity to "dig around" in a bank, as auditors have done in the past.

* Both the Comptroller of the Currency and the Federal Deposit Insurance Corporation are moving away from on-site examinations and audits. In 1975, the FDIC withdrew from its usual examination schedule of each insured state non-member bank in the states of Georgia, Iowa and Washington, and for a specified number of banks in each state, agreed to rely primarily upon examinations by the local state banking department. By the end of 1975, approximately 525 banks were affected by the selected withdrawal program. The FDIC reserves the right to examine any state non-member bank in the three states whether or not it is examined by the state banking department.

All three banking agencies have the statutory power to place a bank into conservatorship or receivership. This is a drastic remedy and one which is rarely utilized. The agencies also have the power to commence administrative cease-and-desist proceedings pursuant to the Financial Institution Supervisory Act of 1966. This Act has essentially two aspects, one of which is the power to commence cease-and-desist proceedings, and the other which is to remove bank officials. Generally speaking, pursuant to the Act, it is more difficult to remove a bank official than it is to convict him of a criminal offense. The Act also gives the agency the power summarily to remove an individual from a bank if he has been indicted for a felony involving a breach of trust or a dishonest act.

All three federal agencies devote a great deal of time to educating bankers, particularly as to how to avoid or prevent unsound bank practices. In order to be a banker, training is not required. There is no licensing test or special training required. Although the chartering of a bank is carefully controlled, including close inspection of the individuals who will be responsible for the bank's management, there are very few controls over the sale of a bank once it has been chartered. The Comptroller of the Currency has publicly stated that although there are 4,700 national banks, there are not 4,700 bankers.

The banking agencies recognize that the vast majority of bank cases involve teller-embezzling from the bank. Some Department of Justice officials have stated that these cases should not be prosecuted by the Department in the federal courts, but should be prosecuted on a local level in the state courts. However, economic crime cases involving large sums of money should be brought in the federal courts. By way of example, in the United States National Bank in San Diego, California, Comptroller of the Currency auditors discovered that C. Arnholdt Smith, who was the principal stockholder of a billion dollar bank, had directed \$400 million in loans to himself through some 300 corporations which he also controlled. The Comptroller of the Currency believes that only a federal effort, with its massive infusion of hundreds of auditors and investigators working throughout the country, could have uncovered a larceny of this dimension.

The Federal Deposit Insurance Corporation employs nearly 2,500 auditors, while the Comptroller of the Currency employs nearly 2,000 individuals.*

* In addition to the three federal agencies mentioned in this section, and the state banking agencies, there are other regulatory agencies within the banking field, including the Home Loan Bank Board, the credit union regulatory agencies, and the farm bank regulatory agencies. The proliferation of these banking agencies has been justified to Congress on numerous occasions. As to their enforcement responsibilities, it has been argued that the competition among them is good. As for investigations of bank practices, a representative of the Comptroller of the Currency who appeared before the Committee stated that a consolidation of investigations might be in order.

A banking agency official told the Committee he was appalled at some of the lenient sentences imposed on individuals directly responsible for bank failures. A 1971 bank failure of \$60 million resulted in a three-year probation and \$5,000 fine to the official directly responsible, following his plea of guilty to two felony counts in the indictment. And C. Arnholdt Smith, directly responsible for the failure of a \$1 billion bank due to the misappropriation of \$400 million was permitted to enter a plea of nolo contendere over Justice Department objections to four counts of the indictment; he received a five-year probation sentence and a \$30,000 fine, to be paid over the next 30 years at the rate of \$1,000 per year.

STATE AND LOCAL EFFORT

Two local prosecutors' offices were represented on the Economic Crime Committee, as was the office of a state Attorney General. In addition, the Economic Crime Project of the National District Attorneys Association was represented through an ex-officio member of the Committee. A number of witnesses told the Committee about local enforcement efforts against economic crime, and the Committee Reporter interviewed representatives from six local prosecutors' offices which are members of the Economic Crime Project.

A discussion of the state and local effort against economic crime must begin with a discussion of the Economic Crime Project of the National District Attorneys Association (NDAA). During

the past three years, 53 separate prosecution offices from coast-to-coast in practically every state have participated in the Project. Funded by LEAA, 15 District Attorneys offices initially participated in the Project.

The Project is run by the NDAA office in Washington, D.C. The office functions as national coordinator for the Project, and presently includes a legal staff of three attorneys. In addition the Washington, D.C. office provides technical assistance to the field offices, arranges quarterly conferences for field unit chiefs, coordinates nationwide investigations, publishes written materials, arranges liaison with federal enforcement agencies, assists in public education programs, and assists in the establishment and maintenance of economic crime units in local district attorneys offices. Appendix B of this report contains a list of those offices which are members of the Economic Crime Project.

The scope of the activities in the District Attorneys offices that participate in the Economic Crime Project can be at least partially measured by the cumulative statistics which appear on the next page.

As of August 31, 1976, the LEAA-funded NDAA Economic Crime Project had compiled the following statistical evidence of its national scope impact:

• Inquiries to Project Offices	362,871
• Complaints Processed.....	104,262
• Special Investigations Conducted.....	8,985
• Civil Actions Against Economic Offenders:*....	
• Cases Filed.....	386
• Cases Pending.....	193
• Cases Settled.....	45
• Judgment for Defendant.....	2**
• Judgment for State.....	191
• Misdemeanor Actions Against Economic Offenders:	
• Cases Filed.....	1,206
• Cases Pending.....	179
• Acquittals.....	33
• Convictions.....	781
• Felony Actions Against Economic Offenders:	
• Cases Filed.....	2,135
• Cases Pending.....	695
• Acquittals.....	39
• Convictions.....	1,177
• Restitution and Fines Ordered	\$24,389,529
• Total Convictions of Economic Offenders.....	2,149

* It should be noted that a substantial number of district attorney's offices participating in the Project do not have statutory authority to proceed civilly. This explains why fewer offices reported statistics as to civil actions.

** While the Project figures reflect only two Judgments for defendant in a civil case, civil judgments, unlike criminal judgments, are often compromising in their final determination, making wins and losses more difficult to clearly assess.

A more significant measure of the activities of the Economic Crime Project and its participating local prosecutors are the types of economic crime cases which were investigated and successfully prosecuted, either criminally or civilly. The following information, which was extrapolated from the Project's annual report to LEAA, notes only major coordinated investigations, and does not, of course, make mention of more routine economic crime investigations in the participating offices.

Beginning in the winter of 1973, and continuing to the present (and most likely, beyond), devices and gadgets guaranteed to improve gasoline mileage appeared in almost every jurisdiction in this country. In addition to the usual problems associated with proving the misleading nature of an advertising statement, proving the illegality in the advertising of the gas-saving devices was exacerbated by the national nature of the marketing schemes, as well as the problems of testing the devices and proving the falsity of the crimes. A district attorney's office in California which was a participant in the Project had tested several devices and was preparing to proceed against several companies. Three other district attorneys' offices in the Project found similar devices in their jurisdictions. These four district attorneys offices -- located in California, Colorado, Washington and Vermont -- formed a coordinated investigation team that shared information, results of testing and expertise. They not only planned the joint strategies to be

used in their respective jurisdictions, but they shared their strategies with other participants in the Project to prevent distributors from starting new sales programs. In short, the Economic Crime Project provided coordination and resources which turned isolated local district attorneys' efforts into a national campaign.

Because the perpetrators of charitable frauds are often peripatetic, a coordinated investigation into the prevalence of charitable solicitation frauds is important. The Project coordinated an investigation into such frauds in all participating offices, and solicitations were in fact frustrated in certain jurisdictions because of information received from other offices.

A substantial number of individuals and companies travel from jurisdiction to jurisdiction offering opportunities to invest in businesses and franchises. Exorbitant profits are frequently promised. Some investment opportunities are legitimate, and some are not. Because individuals are frequently asked to invest funds immediately, it is usually very difficult either to detect criminal conduct or to prosecute the economic crime offenses after the fact; by the time the crime is discovered or reported, the perpetrator is in another jurisdiction, many miles away. The Economic Crime Project has coordinated intelligence on business opportunity schemes so that participating offices now have extensive data on companies and individuals against whom such complaints have been filed.

In addition, in those cases in which the business opportunity is not fraudulent -- at least not in the criminal sense -- but nonetheless fails in its advertising to note substantial risks that the investor may face, some jurisdictions have successfully sought court orders to require advertisers of business opportunities and franchises to alter their claims.

In several other areas, including economic crime offenses in the sale of gold and silver, rental locators, auto rebates and nursing homes, the Economic Crime Project has coordinated national efforts in which most or all of the participating offices have been active.

The Economic Crime Project staff, in addition to other activities noted above, provides four other services to the participants in the Project which probably could not be duplicated by any local prosecutor's office.

When the Project first commenced, a publication called Economic Crime Digest was started with a limited circulation of unreported cases and activities of general interest in the economic crime area. During the first year of the Project, six issues were distributed bi-monthly. Because the criminal justice community, both state and federal, expressed great interest in receiving the Digest, the circulation has increased, as has the scope and depth of the publication.

The Digest now prints over 1,700 copies of each edition.*

Among the original aims of the Project was to develop methods to overcome the insular nature of local prosecutors. Economic crime offenses do not honor state and local political boundaries. In addition to the coordinated investigations noted above, the Project developed a multi-jurisdictional telephone network which was supplemented by confidential bulletins. As the Project offices received intelligence from its participating members about on-going economic crime schemes and investigations, it disseminated the information in confidential bulletins to

* Circulation of the Digest includes:

District Attorneys Offices unaffiliated with the project	520
Affiliated offices	80
Law Libraries and Law Schools	250
Armed Forces	30
State Attorney Generals Offices	66
Federal Bureau of Investigation	5
United States Attorney Offices	19
United States Department of Justice	6
United States Department of Commerce	4
Federal Trade Commission	5
Securities and Exchange Commission	5
Postal Inspection Service	8
Foreign Law Enforcement Agencies	8
Congress	5
Private Associations	20

other offices. Disclosure was limited to the Project participants. During 1975, approximately 30 such bulletins were issued on subjects ranging from municipal bonds to assistance in locating fugitives.

The Project has always taken the position that citizen awareness, particularly in recognition of economic crime schemes, is critical. Many of the Project offices have developed manuals and handbooks for the general public on economic crime. In addition, the Project prepared a draft of a model citizens handbook on economic crime that can be distributed to all district attorneys offices throughout the country.

Other Project publications include a book entitled Economic Crime: a Prosecutors Handbook. This book presents relevant criminal statutes and how they apply to economic crime schemes. Requests for the handbook required the Project to order three additional printings to fill the requests.

In the development of new economic crime units throughout the country, a task which requires a measurable percentage of the efforts of the Project staff, the Project has developed criteria for the organization of economic crime units within units of local government. Although described in Project publications as "general observations" in summary form of the organization of an economic crime unit at the local level, the Committee believes that these observations are applicable

to all prosecutors' offices.*

Over 28% of the U. S. population lives in the 50-plus District Attorneys offices which participate in the Economic Crime Project. Although the Project newsletter reaches many more local enforcement agencies than that, the Project has continued to coordinate instructional sessions for prosecutors on the problems of economic crime prosecution at seminars

* The general observations are as follows:

- "(1) Economic crime prosecutions cannot operate on an ad hoc basis. The prosecutor must first assess his capabilities and adopt an approach to economic crime that can be successful in his particular office. He should initially prioritize the service that his office will allocate to complaining consumers and the effort that his staff will expend on investigating major frauds. Some offices have concentrated on consumer complaints; others have emphasized investigation of major frauds; and others have combined their emphasis in varying proportions. The prosecutor must assess the role of his fraud unit in light of the needs of the community and resolve to make a policy determination as to the kind of efforts that his office will put forth.
- (2) Whatever course is adopted by the office in weighing priorities between consumer complaints or major economic frauds, the prosecutor must have one or more economic crime specialists. In medium size and larger prosecutor unit offices, the prosecutor would no doubt need to establish an economic unit that devotes full-time to economic crime cases. In smaller offices (the prosecutor should probably designate) at least one person to handle economic crime cases in addition to other duties.
- (3) Investigators and paralegals can be more efficiently used than lawyers in performing many standardized jobs required in economic crime prosecutions.

(footnote continued)

throughout the country. Participating district attorneys have also travelled to other jurisdictions to provide technical assistance in the economic crime area.

(footnote continued)

- (4) Every community contains a large reservoir of often ignored resources that can be tapped in developing economic crime cases. In every jurisdiction state and local regulatory agencies with trained investigators have the capability to investigate areas that directly or indirectly bear on economic crime. Unfortunately, many prosecutors unconnected with the project have not been greatly interested in cases developed by investigators from these agencies. Economic crime units within the Project who have extended an open hand to these agencies and have worked with them in assembling prosecutable cases have found a wealth of investigative talent at their disposal. In addition to governmental agencies, a number of private organizations and associations are willing to assist prosecutors. A number of offices in the Project enlisted volunteer students and citizens to process consumer complaints.
- (5) Keeping records and statistics is crucial. Basic records of investigations essentially differentiate the careless businessman from the criminal offender. In larger and medium size offices, case records and statistics are vital to setting prosecutor priorities. Records of results have been instrumental in obtaining funds for economic crime units. Upon review of the prosecutor's budget, many units within the Project have been able to demonstrate that restitution recovered for citizens and the amount of fines recovered for the local government exceeds the total operational budget of the fraud section. Such data has been of unquestionable value in obtaining necessary funding.
- (6) Prosecutors must establish priorities as to types of cases upon which their unit will concentrate. Attempts to prosecute cases without overall direction have usually resulted in a lack of significant impact on their communities. The most successful offices have been those than have fixed priorities and have concentrated their efforts in those areas."

THE PRIVATE SECTOR

A number of organizations in the private sector are in a position to contribute to the federal and local effort against economic crime. The representatives of one such group, the fidelity and bonding companies, appeared before the Committee. In addition, the reporter spoke to representatives of a national society of certified public accountants.

Although many individuals and institutions in the private sector cooperate with enforcement agencies in the economic crime area, some private sector institutions prefer not to cooperate, and are unwilling even to report the commission of an economic offense for fear that it will adversely reflect on the institution-victim, or the industry it represents. In those cases in which the victim of the offense is insured for the loss, the victim may assume the loss without reporting it to the insurance carrier or an enforcement agency; adverse publicity and increased insurance premiums may, in the mind of the victim, be a more serious business consequence than a 100% reimbursement by the insurance carrier.

Some Committee members who are representatives of enforcement agencies have reported on a number of economic crime offenses involving employee dishonesty. In many of these cases it was subsequently discovered that other employers had been defrauded, but had failed to report the loss. As a result, the dishonest employee's record remained unblemished.

Although the Committee is sensitive to private sector concerns that reporting the commission of an economic crime may bring opprobrium to the victim, particularly when the victim is a business enterprise, the business community must be equally sensitive to the problem of economic crime's effect on society, and that the failure to report a crime frequently results in further criminal behavior by the perpetrator.

APPENDIX A

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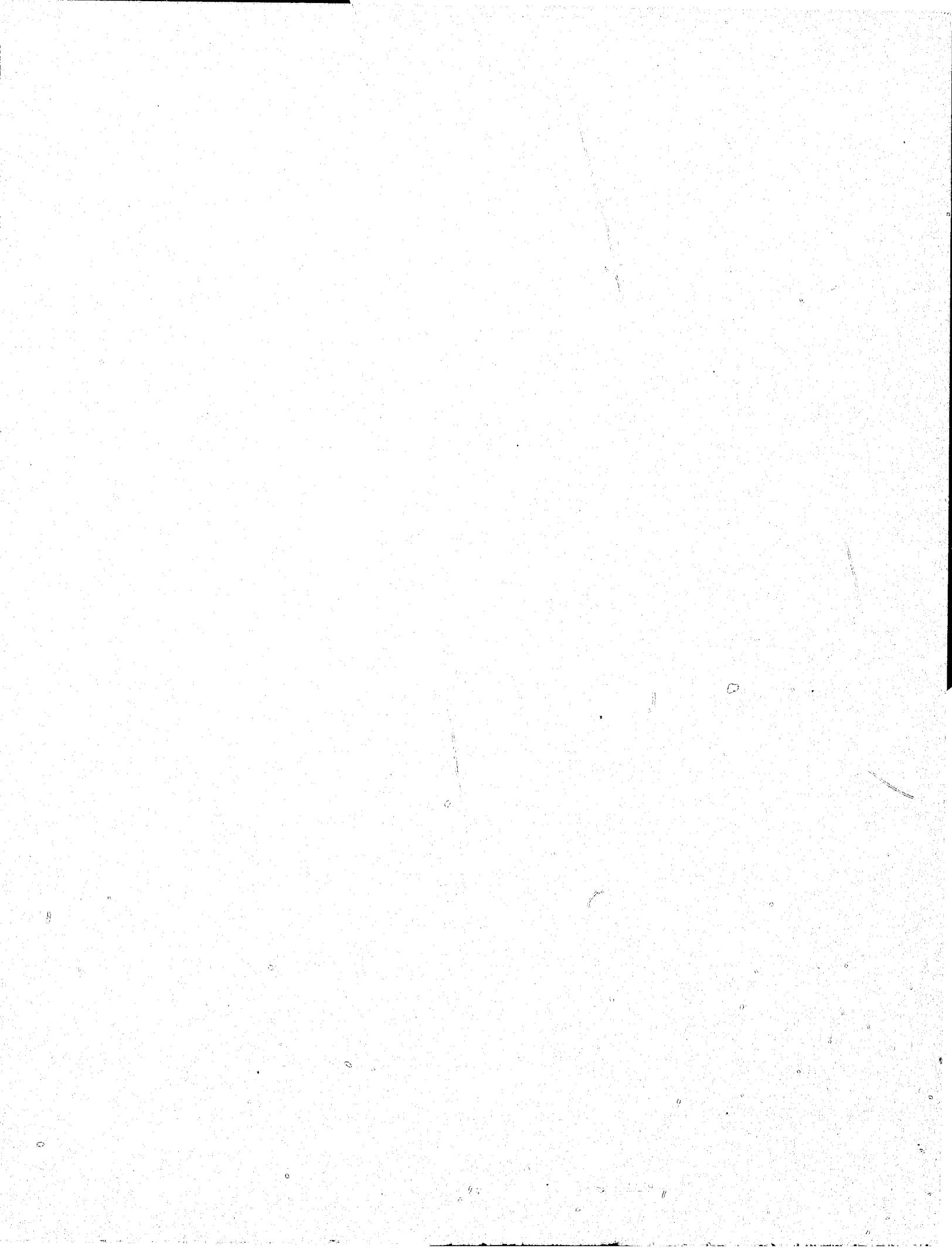
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