

"Whoever sells, or offers to sell, or give away, in the District, or has in his possession with intent to sell or give away or to exhibit to another, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, or article of indecent or immoral use, or advertises the same for sale, or writes or prints any letter, circular, handbill, book, pamphlet, or notice of any kind stating by what means any of such articles may be obtained, or advertises any drug, nostrum, or instrument intended to produce abortion, or gives or participates in, or by bill, poster, or otherwise advertises, any public exhibition, show, performance, or play containing obscene, indecent, or lascivious language, postures, or suggestions, or otherwise offending public decency, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned not more than one year, or both."

The foregoing provision of law does not, however, take into account certain relatively modern means of publication or communication, nor does it affect persons engaged in the production of indecent publications.

Section 506 has for its purpose the expansion of existing law relating to indecent publications so as to make it applicable to publishing and communicating techniques developed since the enactment of the 1901 act; to extend its provisions to persons engaged in the production or dissemination of obscene materials; to authorize temporary restraining orders, preliminary injunctions, and permanent injunctions affecting the production, distribution and sale of obscene materials; and to provide for the forfeiture to the District of Columbia of personal property made subject to any such permanent injunction. The Commissioners note, incidentally, that the language of section 506 departs from the language of H.R. 5989 by providing, in subsections (a) and (b) of the proposed new section 872, for certain mandatory minimum sentences, involving fines of not less than \$200 or imprisonment for not less than 3 months for violations of section 872, as amended by the bill. For the reasons they have set forth at greater length below, the Commissioners have some doubt as to the effectiveness of a mandatory minimum penalty.

The Commissioners also object to that provision contained in subsection (c) of the amended section 872 which requires the U.S. attorney for the District of Columbia and the Corporation Counsel of the District of Columbia to join in an action to petition the U.S. district court for the temporary restraining order authorized by such subsection. At the very least, the language of the subsection should be couched in the disjunctive so as to authorize either the U.S. attorney or the Corporation Counsel, but not both, acting in concert, to file a petition for such a temporary restraining order. In point of fact, the Commissioners fail to see the need for including the Corporation Counsel in the language of the revised section 872. Prosecutions for the violation of this provision of law would be the function of the U.S. attorney for the District of Columbia. The Commissioners strongly believe that every aspect of the problem, including not only prosecution but also the securing of a temporary restraining order, a preliminary injunction, and a permanent injunction, all as authorized by the proposed new section 872, should be solely the responsibility of the U.S. attorney, without participation by the Corporation Counsel at any point in the process.

The Commissioners are aware that the proposed legislation is concerned with an area in which one must be mindful of the protections guaranteed by the first amendment. The Commissioners accordingly requested the Office of the Corporation Counsel to review the proposed legislation in this light, in cooperation with the Department of Justice and other interested agencies. As a result of that further study the Commissioners believe that there may be constitutional objections to those provisions of section 506 which relate to an ex parte proceeding in connection with the issuance of a temporary restraining order, and which provide for the forfeiture of property other than the obscene and indecent material itself. Accordingly, the Commissioners recommend that subsections (b) through (h) of the amended section 872, as set forth in section 506, be changed to read as follows:

"(b) Whoever in the District produces, or participates in the production of, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, magazine, story, paper, writing, card, print, motion picture film, image, cast, slide, figure, statue, phonograph record, wire, tape, or other sound recording, or other presentation or article of indecent or immoral use, with knowledge that the same is to be sold, given away, or exhibited to another, shall be fined not more than \$5,000, or imprisoned not more than two years, or both.

"(C) The U.S. attorney for the District of Columbia is authorized to apply