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*ATTEMPT TO COMMIT A FEDERAL CRIME: S. 171, A
PROPOSED GENERAL STATUTE*

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Abstract. There is no general federal statute proscribing criminal attempts; the federal criminal statutes are written in such a manner so as to include only the attempt to commit a specific substantive crime or substantive offense. As introduced, S. 171 would address this perceived problem in the current law by adding a general attempt provision to title 18 of the United States Code which would define what constitutes an attempt in all circumstances. It is also the intent of the legislation to fill in the gaps found in the current attempt statutes.

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Attempt To Commit A Federal Crime: S. 171, A Proposed General Statute

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Summary

There is no general federal statute proscribing criminal attempts; the federal criminal statutes are written in such a manner so as to include only the attempt to commit a specific substantive crime or substantive offense. Therefore, a specific intent crime would require that the offender specifically intended to devise a scheme to commit the crime. The government, on the other hand, must present proof by inferences from the circumstances that the offender possessed the specific intent to commit the crime. This approach to the law has led to a patchwork of attempt statutes—leaving gaps in coverage, and failing to satisfactorily define exactly what constitutes an attempt in all circumstances. As introduced, S. 171 would address these problems in the current law by adding a general attempt provision to title 18 of the United States Code which would define what constitutes an attempt in all circumstances. It is also the intent of the legislation to fill in the gaps found in the current attempt statutes. This report will be updated if legislative activity warrants

The law surrounding criminal attempts has produced considerable commentary relating to the vagueness of its elements; there does not appear to have been a solution which “successfully addressed the complete range of attempt cases.”¹ There is broad acknowledgment that the elements are vague, probably because attempts to commit crimes cover a broad range of different criminal offenses. Each criminal offense contains different elements. Hence, the type of facts necessary to prove an attempt to commit murder will not be the same as those required to prove an attempt to commit embezzlement or arson. The classical elements of an attempt are intent to commit a crime, the execution of an overt act in furtherance of the intention, and a failure to consummate the crime.² Initially, the defendant must have been acting with the kind of

¹ Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 Stan. L. Rev. 201, 207 (1981).

² *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976). See also *United States* (continued...)

knowing culpability otherwise required for the commission of the crime he is charged with attempting.³ Then, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime, conduct strongly corroborative of the firmness of the defendant's criminal intent.⁴ Otherwise, when one is attempting to commit a crime where the attempt is not an offense, the law enforcement officials must wait until the crime is completed, or find some other charge to fit the criminal's actions.

With regard to a general definition for the crime of attempt, two requirements must be met: (1) intent to commit the underlying offense; and (2) a "substantial step" was taken beyond mere preparation, toward committing the crime.⁵ The proposed legislation appears to embrace these elements and would seemingly provide direction in defining what constitutes an attempt in most, if not all, circumstances.⁶

Selected Statutes

In order to violate a mail fraud statute, one must (1) devise or intend to devise a scheme to defraud, obtain money or property by false pretenses, or sell or otherwise deal in counterfeit currency; and (2) mail, receive via mail, or cause to be delivered by mail a document for the purpose of executing or attempting such a scheme.⁷ Hence, the statute

²(...continued)

v. Williams, 136 F.3d 547, 553 (8th Cir. 1998); *United States v. Burks*, 135 F.3d 582, 583-84 (8th Cir. 1998); *United States v. Price*, 134 F.3d 340, 350-51 (6th Cir. 1998).

³ *Stallworth*, 543 F.2d at 1040.

⁴ *Id.*

⁵ See *United States v. Thompson*, 130 F.3d 676, 688 (5th Cir. 1997); *United States v. Carothers*, 121 F.3d 659, 661 (11th Cir. 1997).

⁶ It appears as if there are two types of statutes under which attempts to commit federal crimes are determined: (1) those with free standing attempt offenses which have sentences distinct and related to the sentence for the completed offense and (2) those which define a crime where there is the intent to do certain proscribed acts or to bring about a certain proscribed result and though unsuccessful, there is an act of preparation which must occur but the statute is silent on what act must be accomplished in order to constitute the offense of attempt.

The Model Penal Code requires "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime." Model Penal Code § 5.01(1)(c).

⁷ The mail fraud statute provides: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which

(continued...)

has only two elements: an intent to devise a scheme to defraud and a mailing for the purpose of executing the scheme.⁸

Mail fraud is an inchoate⁹ crime; the offender does not have to cause actual harm in achieving a fraudulent scheme to violate the statute.¹⁰ Because it emphasizes guilt rather than consequences, the law has, in the interest of crime prevention, prohibited inchoate crimes and attached criminal culpability at an earlier point in time.¹¹

In contrast to attempt, which assigns culpability for a substantive offense—the substantive offense itself requires only that the offender intended the scheme to defraud—the offender may also be charged upon an intention to devise a scheme, which is planning to plan or devise.¹²

The mental state required for the crime of attempt, as generally stated in the cases, is an intent to commit some other crime.¹³ Some of the attempt statutes do not specify

⁷(...continued)

it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.” 18 U.S.C. § 1341 (1994).

⁸ See *Pereira v. United States*, 347 U.S. 1 (1954).

⁹ Unfinished; something begun but not finished.

¹⁰ See *United States v. Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989) (unsuccessful scheme to defraud remains within the purview of § 1341); *United States v. Frost*, 125 F.3d 346, 360 (6th Cir. 1997).

¹¹ See Robbins, Double Inchoate Crimes, 26 Harv. J. on Legis. 1, 5-13 (1989). The crime of attempt punishes behavior when the harm intended by the offender and criminalized in a substantive criminal statute did not occur because law enforcement agents intervened, because the actor failed to complete the act, or because it was impossible to achieve the goal. Conspiracy and solicitation are also inchoate in that each criminalizes an agreement to commit a subsequent, substantive crime. Reckless endangerment statutes, enacted to punish those who put others at risk of harm, are inchoate in that they do not require tangible harm, or even an intent to inflict harm.

¹² See Morano, The Mail-Fraud Statute: A Procrustean Bed, 14 J. Marshall L. Rev. 45, 57 n. 36 (noting that those who plan a scheme may be punished).

¹³ See *United States v. Farber*, 336 F.2d 586 (6th Cir. 1964) (intent required to be proved under 18 U.S.C. § 2421 is intent that female transported by accused in interstate commerce shall, after such transportation, engage in charged immoral conduct and that intent may be shown by circumstantial evidence).

the requisite mental state,¹⁴ although in modern recodifications an intent to commit some offense is usually set forth as an element of the crime of attempt.¹⁵

However, under § 1113 of title 18, the attempt offense is free standing, *i.e.*, it is not based upon the elements of the murder itself, and has a sentence that is distinct and related to the sentence for the completed offense.¹⁶

Analysis

S. 171 would make criminal the intent to commit any offense if the person engages in conduct that, if successful, would constitute or result in the offense. In this type of situation, the attempt would be complete if the offender has completed the conduct that he/she expects to cause a proscribed result. It would also appear as if the offense would be completed even if the offender had not completed the preparation for the criminal attempt. In this instance liability would depend upon the offender having taken a significant step in a course of conduct which was planned to culminate in the commission of a crime.

The bill would create an affirmative defense which could be claimed if the offender abandoned or otherwise prevented the commission of the offense, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

¹⁴ See 18 U.S.C. § 2421 (1994) “Transportation generally: Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned no more than five years, or both.”

¹⁵ See 18 U.S.C. § 1991 (1994) “Entering train to commit crime: Whoever, in any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States, willfully and maliciously trespasses upon or enters upon any railroad train, railroad car, or railroad locomotive, with the intent to commit murder or robbery, shall be fined under this title or imprisoned not more than twenty years, or both.

Whoever, within such jurisdiction, willfully and maliciously trespasses upon or enters upon any railroad train, railroad car, or railroad locomotive, with intent to commit any unlawful violence upon or against any passenger on said train, or car, or upon or against any engineer, conductor, fireman, brakeman, or any officer or employee connected with said locomotive, train, or car, or upon or against any express messenger or mail agent on said train or in any car thereof, or to commit any crime or offense against any person or property thereon, shall be fined under this title or imprisoned not more than one year, or both.

Upon the trial of any person charged with any offense set forth in this section, it shall not be necessary to set forth or prove the particular person against whom it was intended to commit the offense, or that it was intended to commit such offense against any particular person.”

¹⁶ 18 U.S.C. § 1113 (1994). “Attempt to commit murder or manslaughter: Except as provided in section 113 of this title, whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, shall, for an attempt to commit murder be imprisoned not more than twenty years or fined under this title, or both, and for an attempt to commit manslaughter be imprisoned not more than seven years or fined under this title, or both.”

It will suffice to preclude the impossibility defense where causing a result is an element and there is a belief that the result will occur without further conduct on the offender's part. The defense would be rejected since liability is focused upon the circumstances as the offender believes them to be rather than as they actually exist.

A major difference between S. 171 and the current statutes is that the bill would proscribe attempts to commit all or a broad class of crimes whereas the latter deal with attempts to commit particular crimes. The most common of the latter class are those statutes which provide for liability if a person attempts to commit a crime and in such attempt does any act toward the commission of the offense, but fails in the preparation, or is intercepted or prevented in the execution of the crime.¹⁷

The question which might be asked, however, is whether S.171 will have any effect on existing federal attempt provisions, *e.g.*, is it going to be a crime under the bill to attempt to violate 18 U.S.C. § 1113 (*i.e.*, attempted, attempted murder)?

It is also unclear as to whether the general attempt crime will be merged into the completed offense, *e.g.*, would every individual who is guilty of murder of a federal employee¹⁸ be subject to an added penalty for attempted murder as well; or in the case of a single act resulting in murder, could the individual only be convicted and punished for either the attempted crime or the completed crime, but not both?

Critics may suggest that S. 171, as introduced, simply compounds the inconsistent approach set out in the federal attempt law. It does not replace the existing federal attempt statutes, and its sentencing approach seems at odds with that which Congress has chosen in the case of the other general inchoate offense statute (sentencing for conspiracy at the next lesser degree than the offense attempted versus the current five year imprisonment regardless of the seriousness of the underlying felony has the potential of being inconsistent).

Lastly, it is unclear as to whether the bill will expand the federal criminal jurisdiction to include offenses where the incomplete element is the federal jurisdictional element itself, *e.g.*, kidnaping under circumstances which otherwise is not a federal crime inasmuch as the offender has yet to transport the victim across state lines.

¹⁷ See 18 U.S.C. § 2421(1994) ; 18 U.S.C. § 1991 (1994).

¹⁸ See 18 U.S.C. § 1114 (1994).