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Report to the Congress

September 1987

SENTENCING GUIDELINES

Potential Impact on the Federal Criminal Justice System



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United States
General Accounting Office
Washington, D.C. 20548

Comptroller General
of the United States

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September 10, 1987

President of the Senate and Speaker
of the House of Representatives

The Comprehensive Crime Control Act of 1984 (Public Law 98-473, dated October 12, 1984) made several significant changes to the federal criminal justice system. One of the most significant changes required by the law was the establishment of the United States Sentencing Commission. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system, including detailed guidelines for federal judges to use to sentence offenders convicted of federal crimes. The guidelines are intended to reduce unwarranted sentencing disparities among offenders with similar criminal records who commit similar crimes.

On April 13, 1987, the Sentencing Commission submitted its proposed guidelines to Congress, and they are scheduled to go into effect on November 1, 1987. Section 235 of the law requires that within 150 days after the Sentencing Commission submits its proposed guidelines to Congress, we report to Congress on the potential impact of the guidelines on the federal criminal justice system. Also, the House and Senate Committees on the Judiciary requested that we examine the Sentencing Commission's basis for requesting a 9-month delay in implementation of the guidelines.

To satisfy our objectives, we interviewed various officials from the judiciary, Department of Justice, and other groups concerned with the federal criminal justice system and reviewed the Sentencing Commission's analyses of increases in future prison populations and how much the guidelines will contribute to those increases. The results of our review are summarized in this letter and discussed in detail in the appendix as are the details of our objectives, scope, and methodology.

Although the Sentencing Commission believes that the population of federal prisons will increase significantly over the next 10 to 15 years, it believes the sentencing guidelines will contribute a relatively small amount to the overall population growth. The Commission's prison population analyses appear to be reasonable. But, how much future federal prison populations will actually grow, and how much the guidelines will contribute to that growth cannot be determined. Factors, such as changes in future prosecution and enforcement policies and practices, the extent of the use and nature of plea agreements, and the extent that

judges depart from the guidelines in sentencing offenders will affect the growth in prison populations and the workload of the courts.

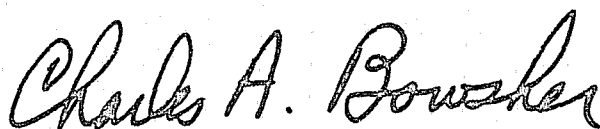
From our interviews, it seems widely accepted that the guidelines will result in increased workloads for virtually all components of the criminal justice system. However, the full impact of the guidelines will become clear only when there is empirical evidence on how they are implemented.

The Commission requested that implementation of the guidelines be delayed to allow time for field testing them and training personnel. The Commission is proceeding as if the guidelines will be implemented as scheduled on November 1, 1987. Although there are pros and cons on the delay issue, there are no clear cut answers to the question of whether or not to delay implementation.

The Subcommittee on Criminal Justice, House Committee on the Judiciary, recently held hearings on the constitutionality of the Sentencing Commission and its sentencing guidelines. The witnesses believed the constitutionality of the guidelines would probably be challenged.

We did not obtain official agency comments on this report due to the tight reporting deadline specified in Public Law 98-473. However, we discussed the results of our work with officials from the Sentencing Commission, the judiciary, and the Department of Justice who generally agreed that our information was accurate. Their comments were considered in preparing the final report.

We are sending copies of this report to the Chairman, United States Sentencing Commission; the Chief Justice of the United States; the Chairmen of the Judicial Conference's Committee on the Administration of the Probation System and Ad Hoc Committee on Sentencing Guidelines; the Director, Administrative Office of the United States Courts; the Director, Federal Judicial Center; the Attorney General; and other interested parties.



Charles A. Bowsher
Comptroller General
of the United States

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Abbreviation

FPS Federal Prison System

Sentencing Guidelines: Potential Impact on the Federal Criminal Justice System

Background

Public Law 98-473 established the Sentencing Commission as an independent agency within the judicial branch. The Commission is composed of seven voting and two nonvoting members. As required by law, the Commission submitted its proposed guidelines to Congress on April 13, 1987. The guidelines were approved by six of the commissioners, with one commissioner dissenting. The one commissioner dissented generally because he did not believe the guidelines would reduce unwarranted sentencing disparities. The guidelines go into effect on November 1, 1987, unless legislation is enacted to delay or stop their implementation. In submitting the guidelines, the Commission recommended that Congress delay their implementation for 9 months—from November 1, 1987, to August 1, 1988. The Commission wants the additional time to field test the guidelines, train personnel, and propose any necessary amendments to the guidelines before they go into effect.

In accordance with the law, the guidelines limit the sentencing ranges for offenders with similar criminal records who commit similar crimes. However, the law and the guidelines allow judges to depart from those ranges if they believe that aggravating or mitigating circumstances justify departures. In such cases, judges must state their reasons for departure.

The law also expands the authority of the United States Courts of Appeals (circuit courts) to review sentences. Both the defendant and the government can appeal a sentence that is imposed in violation of law or that is a result of an incorrect application of the guidelines. In addition, the law permits the defendant to appeal an above-guidelines sentence, and the government to appeal a below-guidelines sentence. Under the guidelines system, parole (conditional release of offenders before completion of their original prison sentences) will not exist.

Five years after implementation of the guidelines, the United States Parole Commission is scheduled to be abolished. In the interim, it will continue to make parole release decisions for offenders sentenced under the present system. Section 236 of the law requires us to submit another report to Congress 6 months before the scheduled abolishment of the Parole Commission. The report is to address the actual impact of the guidelines system compared to the operations of the previous sentencing and parole release system and is to be used by Congress to determine whether the guidelines system has been effective, whether changes are needed, and whether parole should be retained in some form.

Section 994(g) of Public Law 98-473 directs the Sentencing Commission to estimate the impact of its sentencing guidelines on the population of federal prisons. Also, this section of the law requires that the Commission make recommendations to Congress concerning any change or expansion in the nature or capacity of federal correctional facilities and services as a result of the guidelines. In a June 18, 1987, report to Congress entitled Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, the Commission estimated dramatic increases in future federal prison populations. However, the Commission has not determined the number and types of facilities and services needed to house the increased prison populations, although it has begun work in this area.

Objectives, Scope, and Methodology

Section 235 of Public Law 98-473 requires us to report to Congress on the potential impact of the sentencing guidelines compared to the operation of the current sentencing and parole release system. The report is due within 150 days after the Commission submits its guidelines (by September 10, 1987). Also, the House and Senate Judiciary Committees requested that we examine the rationale for the Commission's request for a 9-month delay in the implementation of the guidelines.

We assembled a panel of five experts to advise us on our audit approach. The panel consisted of two circuit court judges, a clerk of court for a federal court of appeals, a state sentencing guidelines agency director, and an expert on prison population forecasting.

We conducted our audit work from January 1986 to August 1987. We attended the regional public hearings conducted by the Commission, examined testimony and written comments from groups and individuals, and reviewed early drafts of the guidelines as well as the version submitted to Congress on April 13, 1987. In addition, to determine the potential impact of the guidelines on the workload of federal court personnel, we reviewed the Report of the Proceedings of the Judicial Conference of the United States held in Washington, D.C., March 12-13, 1986, Special Session June 30, 1986, and September 18-19, 1986; and the Annual Report of the Director of the Administrative Office of the United States Courts, 1986. We also reviewed statements submitted by witnesses at congressional hearings that were held during 1987 on the sentencing guidelines. It was not within the scope of our review to consider the overall advisability of the guidelines and therefore, we are taking no position on them.

Our review was performed in accordance with generally accepted government auditing standards. However, because of time constraints, we did not make a complete verification of the computer model and data used by the Commission to estimate the impact of the guidelines on future prison populations.

Prison Impact

To address the potential impact of the guidelines on the population of federal prisons we reviewed (1) the Commission's June 18, 1987, report to Congress which contains a summary of the Commission's prison impact study; (2) a draft of its technical report being prepared to further explain the methodology for its study; and (3) related documentation.

To estimate the impact of its guidelines on future federal prison populations, the Commission developed a computer simulation model and applied the model to a sample of about 10,500 offenders who were convicted during fiscal year 1985. In order to meet the congressionally mandated reporting requirement, we did not have time to perform a complete reliability assessment of the Commission's model and data. However, we did perform some limited tests of the model and sample data, and had two of our advisory panel members who are experts in sentencing guidelines and prison population forecasting provide us with an assessment of the Commission's study. These experts reviewed the methods utilized by the Commission staff in their impact study.

We reviewed the computer programs used in the Commission's model on a test basis to check for logic or computation deficiencies and to verify the assumptions built into the model. We also verified the sentence computations of the impact model using a sample of drug cases drawn from the data used by the Commission in developing its projections. On a judgmentally selected basis, we recomputed the Commission's prison population projections using its data and model.

The Commission's development of guidelines and prison population estimates relied heavily on data supplied by other agencies. In addition, the Commission conducted an extensive data collection effort to augment existing data on federal sentencing and release practices. We interviewed the Commission members, their staff, and outside agency officials assisting the Commission, regarding the controls used to verify the model and the accuracy of the data used in the model. We then analyzed these controls to assist us in our review. The Commission could not provide written documentation of the application of these controls to its

model; therefore, we could not assess their quality. However, we interviewed Commission officials for details on their quality controls. In addition, we reviewed the Commission's documentation of its sample data selection and analyses.

We interviewed Commission officials responsible for preparing the impact study and Federal Prison System (FPS) officials responsible for estimating future federal prison populations and preparing building plans for federal prisons.

Other Impacts and the Delay Issue

To address the potential impact of the guidelines on other components of the federal criminal justice system and the Commission's rationale for the 9-month delay in implementation, we interviewed 26 knowledgeable persons associated with groups or agencies who will be most affected by the guidelines, such as court officials, defense attorneys, and prosecutors. These persons were not selected using procedures that would ensure against bias. We selected these individuals because we believed they were part of a limited number of people who had detailed knowledge of the guidelines at the time of our review and based on our advisory panel's observation that they were likely to be knowledgeable and have differing perspectives.

We interviewed all seven voting and two nonvoting members of the Sentencing Commission and key staff. We also interviewed officials representing sentencing guidelines agencies from four states (Florida, Minnesota, Pennsylvania, and Washington) concerning their experiences in implementing sentencing guidelines. Further, we examined testimony and written comments of groups and individuals who commented on various versions of the guidelines.

Finally, we reviewed the Sentencing Commission's plans for field testing the guidelines and the Federal Judicial Center's plans for training court personnel in the use of sentencing guidelines. We also observed the Commission's 2-day testing session of the guidelines by probation officers held in Washington, D.C., on July 13 and 14, 1987.

Impact of the Guidelines on the Population of the Federal Prison System

The Commission believes that its sentencing guidelines will have a minimal effect on future prison populations. However, the Commission expects there will be significant growth in the population of federal prisons over the next 10 to 15 years primarily because of the mandatory minimum penalties required by the Anti-Drug Abuse Act of 1986, increases in federal prosecutions and convictions, and increased sentences required by the career offender provisions of the Comprehensive Crime Control Act of 1984.

Between 1970 and 1986, the federal prison population increased about 85.7 percent, with periods of sharp increases occurring from 1975 to 1978 and 1980 to 1986. From 1978 to 1980, a decrease in prosecutions/convictions contributed to a sharp decline in the federal prison population. The changes in the prison population are highlighted below.

- In fiscal year 1970 the average daily population was about 21,000.
- In 1975 the population was about 23,000 and grew to about 30,000 in 1978, a 30.4 percent increase over 3 years.
- The population dropped from 30,000 in 1978 to about 24,000 in 1980, a 20.0 percent drop in 2 years.
- The population grew from about 24,000 in 1980 to about 39,000 in 1986, a 62.5 percent increase over 6 years.
- FPS estimates that the average daily population for 1987 will be 42,000, a 7.7 percent increase in 1 year.

As of July 2, 1987, FPS reported that 43,507 inmates were in federal prisons. This was 15,581 (about 56 percent) more than the system's design capacity of 27,926. An additional 5,031 prisoners were housed in contract facilities.

FPS officials said that overcrowding is the principal issue facing federal prisons. Prison overcrowding increases the likelihood of violence and puts the staff in greater danger. It also results in inmates being housed in less than generally acceptable conditions and makes providing efficient and effective operations and programs more difficult. To address the overcrowding problem, FPS plans to build more prisons and expand the capacities of some existing facilities.

Section 994(g) of Public Law 98-473 directs the Sentencing Commission to estimate the impact of its sentencing guidelines on the federal prison population. This section of the law also requires that the Commission make recommendations to Congress concerning any change or expansion in the nature or capacity of federal correctional facilities and services as

a result of the guidelines. On June 18, 1987, the Commission provided a supplementary report to Congress that contained a summary of its prison impact study estimating dramatic increases in the future federal prison population. However, the Commission has not determined the number or types of facilities that would be needed to house the increased prison population, although it has begun work in this area.

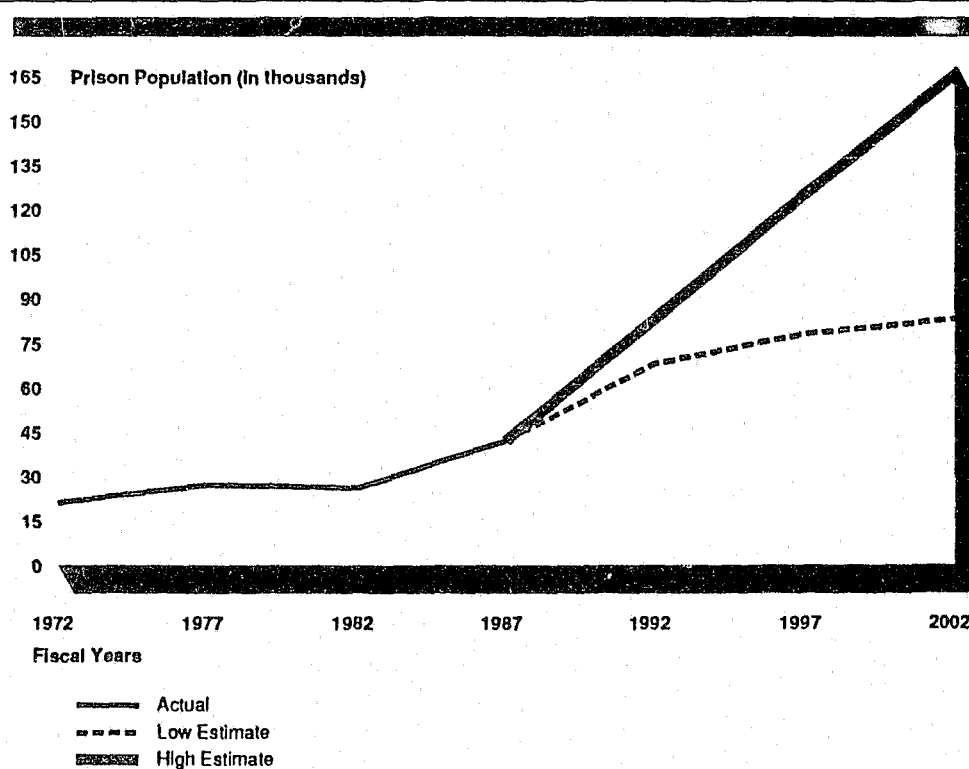
The Commission's study pointed out the problems inherent in forecasting prison populations, including the absence of reliable methods for predicting future crime rates and changes in federal prosecution and enforcement priorities. The study also noted that uncertainties about sentencing under the guidelines made forecasting the effects of the guidelines on prison populations especially difficult. For example, the study pointed out that the proportion of convicted defendants who plead guilty (about 86 percent during the 12-month period ending June 30, 1986) could change under the guidelines, which could affect the sentences they receive. For example, the longer sentences under the guidelines may provide more or less incentive for guilty pleas. Similarly, the authority of judges to depart from the guidelines (even though they must provide a written explanation) creates uncertainty about the ultimate impact of the guidelines.

After pointing out the unknowns concerning the effect of the guidelines on future prison populations, the study explains how the Commission estimated this impact. Generally, the Commission analyzed sentencing practices for a sample of about 10,500 offenders who were convicted during fiscal year 1985. Then, working with FPS, the Commission developed a computer simulation model to project future prison populations on the basis of a variety of factors, including: (1) current practice; (2) anticipated prosecution trends; (3) the Anti-Drug Abuse Act of 1986 (which requires, among other things, mandatory minimum sentences for certain drug offenders); (4) the career offender provisions of the Comprehensive Crime Control Act of 1984 (which require, among other things, prison terms at or near the maximum prescribed by law for certain repeat offenders); and (5) the guidelines.

Because future prosecution policy cannot be anticipated, the Commission projected prison populations for 1992, 1997, and 2002 using various assumptions concerning prosecution/conviction rates, plea negotiation practices, and the extent that judges would depart from sentences recommended in the guidelines. The Commission believes that the federal prison population will continue to grow. The Commission's prison population estimates range from 67,000 to 83,000 for 1992;

78,000 to 125,000 for 1997; and 83,000 to 165,000 for 2002.¹ Compared to the 42,000 inmates estimated for 1987, these estimates translate into increases that range from about 60 to 98 percent for 1992, 86 to 198 percent for 1997, and 98 to 293 percent for 2002. Figure I.1 illustrates the Commission's estimated prison population growth.²

Figure I.1: Growth in Prison Population
From 1972 to 2002



Source: Federal Prison System and U.S. Sentencing Commission.

All figures for 1987 and beyond are estimates based on the U.S. Sentencing Commission prison population projections.

¹The Commission believes its 1992 estimates are the most accurate, its 1997 estimates are somewhat less accurate, and its 2002 estimates are very speculative.

²In testimony before the House Judiciary's Subcommittee on Criminal Justice on July 29, 1987, one of the Commissioners testified that the Commission's prison population increases are likely to occur less rapidly than projected. This is generally because the Commission's projections were based on the guidelines being applied to all offenders sentenced after November 1, 1987, regardless of when the crime was committed. However, it is likely that the guidelines will apply only to offenders who commit offenses after November 1, 1987.

Appendix I
Sentencing Guidelines: Potential Impact on
the Federal Criminal Justice System

The Commission's estimates indicate that the population of federal prisons will increase dramatically because convictions will increase; sentences that do not include confinement (probationary sentences) will be reduced significantly; and the average time served for drug related, violent, and repeat offenses will increase substantially. According to the Commission's study, the use of probation without any confinement will decrease under the guidelines for all nine offense types that it analyzed. Table I.1 shows the Commission's estimates of changes in probation under the guidelines.

Table I.1: Comparison of the Percentage of Defendants Receiving Probation Without Confinement by Offense Type

Offense type	Under current practice	Under guidelines	Difference
Person offenses ^a	31.4	14.6	-16.8
Robbery	18.0	3.0	-15.0
Burglary and trespass	64.0	43.0	-21.0
Property offenses ^b	60.1	33.1	-27.0
Drugs	20.8	5.1	-15.7
Fraud	59.0	24.0	-35.0
Income tax	57.0	3.0	-54.0
Firearms	37.0	9.0	-28.0
Immigration	41.0	30.0	-11.0

^aPerson offenses include homicide, assault, rape, and kidnapping.

^bProperty offenses include embezzlement, forgery, larceny, property destruction, counterfeiting, and auto theft.

Source: U.S. Sentencing Commission.

In addition, the Commission estimates that the use of probation with some form of confinement will increase under the guidelines for six of the nine offense types analyzed. Table I.2 shows this information.

Appendix I
Sentencing Guidelines: Potential Impact on
the Federal Criminal Justice System

Table I.2: Comparison of the Percentage of Defendants Receiving Probation With Confinement by Offense Type

Offense type	Under current practice	Under guidelines	Difference
Person offenses ^a	10.0	10.8	+ 0.8
Robbery	8.0	2.0	- 6.0
Burglary and trespass	10.0	2.0	- 8.0
Property offenses ^b	15.2	35.6	+ 20.4
Drugs	13.0	8.2	- 4.8
Fraud	18.0	41.0	+ 23.0
Income tax	25.0	56.0	+ 31.0
Firearms	15.0	33.0	+ 18.0
Immigration	27.0	36.0	+ 9.0

^aPerson offenses include homicide, assault, rape, and kidnapping.

^bProperty offenses include embezzlement, forgery, larceny, property destruction, counterfeiting, and auto theft.

Source: U.S. Sentencing Commission.

Further, the Commission estimates that the average time served for seven of the nine offense types will increase under the guidelines. Table I.3 compares the time served under current practice and projected time served under the new drug law, the career offender provisions, and the guidelines.

Appendix I
Sentencing Guidelines: Potential Impact on
the Federal Criminal Justice System

Table I.3: Comparison of Time Served (in Months) Under Current Practice With Projected Time to Be Served by Offense Type

Offense type	Current practice	Average Imprisonment Time ^a		
		Future practice		
		Drug law	Career offender	Guidelines
Robbery	44.8	•	74.1	75.4
Person offenses ^b	37.7	•	53.3	75.2
Drugs	23.1	48.1	56.8	57.7
Firearms	14.1	•	•	15.2
Burglary and trespass	7.7	•	9.1	16.5
Fraud	7.0	•	•	8.0
Property offenses ^c	6.8	•	•	6.5
Immigration	5.7	•	•	5.2
Income tax	5.5	•	•	11.9

^aAverage time served is based on sentences for all offenders. Offenders not sentenced to imprisonment are treated as having zero months imprisonment. The average time served reported in the drug law and career offender columns is for all offenders, not only offenders subject to the new drug law and the career offender provisions.

^bPerson offenses include homicide, assault, rape, and kidnapping.

^cProperty offenses include embezzlement, forgery, larceny, property destruction, counterfeiting, and auto theft.

Source: U.S. Sentencing Commission.

The Commission believes that the most significant factors contributing to future prison population increases will be growth in the number of prosecutions and the mandatory minimum sentences required by the new anti-drug law. The Commission attributes some of the growth to the longer sentences required under the career offender provisions of the Comprehensive Crime Control Act. It attributes a relatively modest amount of the increased prison population to the guidelines themselves. Under the Commission's various prison population estimates for 1992, 1997, and 2002, the most the sentencing guidelines will contribute to the overall growth in prison populations from 1987 is about 18.5 percent for 1992, 9.8 percent for 1997, and 7.6 percent for 2002.

Table I.4 shows the extent that the Commission believes each of these factors will contribute to the overall growth in the federal prison population from 1987 to 1997 under two of its scenarios.³

³These two scenarios contain estimates that fall between the Commission's lowest and highest estimates for 1997. Also, these are the two basic scenarios that the Commission discusses extensively in its study.

Appendix I
Sentencing Guidelines: Potential Impact on
the Federal Criminal Justice System

Table I.4: Factors Contributing to Overall
Growth in Prison Populations 1987 to
1997

Factor	Scenario # 1		Scenario # 2	
	Estimated number	(Percent)	Estimated Number	(Percent)
Growth due to increased prosecutions	+ 19,000	(38.0)	+ 36,000	(47.4)
Growth due to anti-drug law	+ 24,000	(48.0)	+ 30,000	(39.5)
Growth due to career offender law	+ 4,000	(8.0)	+ 6,000	(7.9)
Growth due to guidelines	+ 3,000	(6.0)	+ 4,000	(5.3)
Total growth	+ 50,000	(100.0)	+ 76,000	(100.0)^a
Plus 1987 population	+ 42,000		+ 42,000	
Total 1997 population	92,000		118,000	

^aDoes not add to 100 due to rounding.

While the Commission estimates that only a relatively small part of the overall growth in prison populations will be attributable to its guidelines, the Commission's estimates indicate that the guidelines will contribute more to the increased prison populations of certain nondrug offenders (primarily burglary, fraud, and income tax offenders). Table I.5 illustrates this for the Commission's two basic scenarios.

Table I.5: Factors Contributing to Growth
in Nondrug Prison Populations 1987 to
1997

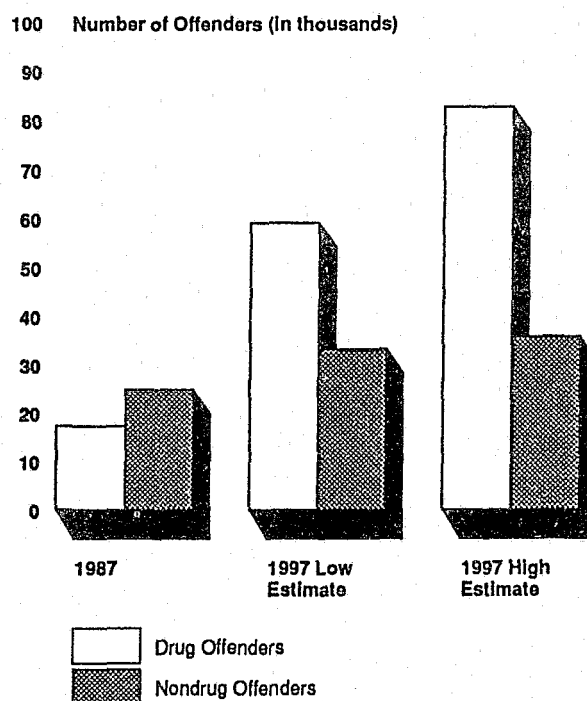
Factor	Scenario # 1		Scenario # 2	
	Estimated number	(Percent)	Estimated number	(Percent)
Growth due to increased prosecutions	+ 4,000	(50.0)	+ 6,000	(54.5)
Growth due to antidrug law	0	(0)	0	(0)
Growth due to career offender law	+ 2,000	(25.0)	+ 2,000	(18.2)
Growth due to guidelines	+ 2,000	(25.0)	+ 3,000	(27.3)
Total growth in nondrug offenders	+ 8,000	(100.0)	+ 11,000	(100.0)
Plus growth in drug offenders	+ 42,000		+ 66,000	
Plus 1987 population	+ 42,000		+ 42,000	
Total 1997 population	92,000		119,000^a	

^aTotal does not agree with table I.4 due to rounding.

The Commission's increased sentences for certain nondrug offenses do not significantly affect its overall prison population estimates. This is because the Commission estimates that the proportion of drug offenders, who are currently the largest offender group in federal prisons (about 41 percent according to the Commission's 1987 estimates), will

continue to grow. For example, under its two basic scenarios, the Commission estimates that by 1997, drug offenders will constitute about 64.0 to 69.7 percent of all prisoners, an increase of about 56.1 to 70.0 percent. Figure I.2 illustrates the change in the proportion of drug and nondrug offenders in the federal prison population from 1987 to 1997 under the Commission's two basic scenarios. If the actual increase in the drug offender population is not as large as the Commission's estimates, the guidelines will contribute proportionately more to the overall increase in the federal prison population.

Figure I.2: Comparison Between 1987 and 1997 Prison Populations—Drug Versus Nondrug Offenders



Source: U.S. Sentencing Commission

A FPS official told us that FPS staff worked closely with the Sentencing Commission in developing the Commission's prison population projection model. While recognizing the inherent difficulties of all prison population projection methodologies, this official said the Commission's range of estimates and their underlying assumptions are reasonable. He

added that it is highly probable that FPS will eventually use the Commission's model, with possible modifications, to estimate future prison populations.

Our review of the Commission's prison impact study methodology, assumptions, and results included sufficient tests to allow us to form an opinion that the Commission's projections were reasonable. However, even a more in-depth analysis would not change the uncertainty of projecting future prison populations.

Estimated Cost of Increased Prison Space

Before the Commission submitted its proposed guidelines and prison impact estimates to Congress, FPS had planned to add 16 new prisons and expand the capacity of 38 (about 81 percent) of the existing 47 correctional facilities at a cost of about \$900 million. FPS estimated that its prison population would be 55,200 by fiscal year 1993, and that it would have an overcrowding rate of about 20 percent (which calculates to a base capacity of 46,000). However, that estimate did not include the additional prison space that will be needed because of the Anti-Drug Abuse Act of 1986, the career offender provisions of the Comprehensive Crime Control Act of 1984, or the sentencing guidelines. As part of the Department of Justice's fiscal year 1989 budget submission, FPS is updating its prison population estimates and prison construction plans. These estimates and plans, however, will not be available for review until the President's 1989 budget is submitted to Congress.

In an effort to estimate the potential cost of new prisons, we used FPS' April 1987 cost estimates for new minimum/medium security correctional facilities. These estimates show an average cost per bed of about \$66,000. We applied that cost figure to the difference between the Sentencing Commission's estimated population and the approximate 34,500 bed capacity that has been funded by Congress (current capacity of about 28,000 beds plus about 6,500 beds in process) to obtain a rough estimate of the cost to build new facilities for the additional prisoners.

Using the Commission's previously discussed 1997 estimates of 92,000 and 118,000, FPS would need space for 57,500 to 83,500 additional prisoners at a cost of about \$3.8 to \$5.5 billion to totally eliminate overcrowding. To achieve a 20-percent overcrowding rate, which is FPS' goal, FPS would need 42,200 to 63,800 more spaces at a cost of about \$2.8 to

\$4.2 billion. Using the Commission's lowest and highest population estimates for 1997 of 78,000 and 125,000 to achieve a 20-percent overcrowding rate, FPS would need 30,500 to 69,700 more spaces at a cost of about \$2.0 to \$4.6 billion.

These estimates do not include factors for future inflation. Also, the costs could be higher if FPS has to build proportionately more maximum security facilities, which are more expensive than medium or minimum security facilities. Similarly, costs would be lower if proportionately more minimum security facilities were built. Further, the costs could be reduced to the extent that FPS can avoid constructing new prisons by using lesser cost alternatives, such as (1) expanding the capacity of existing federal prisons, (2) placing more offenders in state and local correctional facilities, (3) making greater use of halfway houses, or (4) acquiring facilities no longer needed for their original purpose. FPS officials believe the first two alternatives will not provide much relief because they are already expanding existing facilities to the maximum extent possible and because state and local facilities are currently overcrowded. The extent that alternatives (3) and (4) can be used is unknown. Any need not met by these four alternatives would most likely have to be satisfied by new construction.

Besides the money needed to provide additional prison space, a greatly expanded prison population would substantially increase the funds needed by FPS to operate and maintain its prisons and to provide for inmate custody, care, and rehabilitation programs. For fiscal year 1986, FPS' operating costs averaged about \$13,100 per inmate. Using that figure and ignoring any inflation or productivity improvements, FPS could need additional operating funds of as much as \$650 million to \$1 billion annually to house the additional 50,000 to 76,000 prisoners that the Sentencing Commission estimates for 1997 under its two basic scenarios. For the Commission's lowest and highest population estimates, FPS' additional operating funds needed for 1997 would range from about \$470 million to \$1.1 billion.

Potential Impact of Sentencing Guidelines on Court and Court- Related Personnel

The Sentencing Commission was not required to estimate the potential impact of its sentencing guidelines on the workload of the federal courts and court-related personnel including district and circuit court judges, probation officers, defense attorneys, prosecutors, magistrates, court reporters, and U.S. Marshals. In addition, neither the judicial branch nor the Department of Justice have developed estimates of the budgetary impact of the sentencing guidelines. However, the Judicial Conference of

the United States (the policy-making body of the judiciary), members of the judiciary that have testified at congressional hearings, and most of the people we interviewed believe the guidelines will increase the workload of court and court-related personnel.

Views of the Judiciary

In its Report of the Proceedings of the Judicial Conference of the United States held on September 18-19, 1986, the Judicial Conference noted that although the details of the sentencing guidelines had not been finalized, there is no doubt that the guidelines will significantly increase the work of probation officers and district and circuit court judges. It pointed out its intention to request additional judicial branch resources to implement the guidelines properly.

In his July 23, 1987, testimony before the House Judiciary Committee's Subcommittee on Criminal Justice, the Chairman of the Federal Judicial Center's (the research, development, and training arm of the federal judicial branch) Committee on Sentencing Guidelines Education said,

"The guidelines will greatly increase the length of sentencing hearings which will increase the workload of district judges, magistrates, federal public defenders and probation officers....appellate judges and their personnel will experience a vast increase in their workloads. Any increase in federal judicial workloads can only be accommodated with difficulty. At the present, the delays in the availability of new judgeships and the availability of appropriations to fund needed supporting personnel have continually kept the Judiciary in the posture of 'racing to catch up' with demands for services."

On June 18, 1987, in testimony before the Subcommittee on Crime of the House Committee on the Judiciary, the Chairman of the Judicial Conference's Committee on the Administration of the Probation System said,

"...when guideline sentencing takes effect, the probation workload in every court will experience an increase overnight of approximately 20 percent."

In addition, one of the members of the Sentencing Commission, who is also a circuit court judge, believes that the workload of court officials will increase under the guidelines. In a June 18, 1987, letter to a judge from the Sixth Circuit Court of Appeals, he said the guidelines could significantly increase the workload of circuit court judges, and possibly increase the workload of district court judges and magistrates.

Views of Persons Interviewed

To obtain their views on the potential impact of the sentencing guidelines on the workload of federal criminal justice system personnel, we interviewed 26 knowledgeable persons, including 7 district and circuit court judges, 5 probation officers, 5 defense and prosecuting attorneys, an official from both the Administrative Office of the United States Courts' Magistrates Division and Office of General Counsel, an official from the U.S. Marshals Service, an official from the FPS, 3 officials from the Federal Judicial Center, an official from the American Bar Association, and a law professor from Yale University. Most of the persons interviewed believe sentencing guidelines will increase the workload of all court and court-related personnel except magistrates.

District Court Judges' Workload

Twenty-four of the persons interviewed told us that the workload of district court judges would increase under sentencing guidelines and no one said that a decrease would occur. They provided various reasons for the potential increased workload, including their beliefs that there would be

- an increase in the number, duration, and complexity of hearings to resolve factual disputes and determine the sentence;
- an increase in the number of trials because more people will elect to go to trial rather than plead guilty under guidelines;
- a need to take greater care in explaining reasons for sentences in order to comply with reporting requirements and possible appellate review; and
- an increase in the time to review plea agreements to assure that the guidelines are not being circumvented.

One person told us that no change would occur in the district court judges' workload and one person did not express an opinion.

Circuit Court Judges' Workload

All of the persons interviewed said that circuit (appeals) court judges will have an increased workload under sentencing guidelines. The primary basis for this unanimous view is that Public Law 98-473 significantly expands the basis for appealing sentences. Under the current system, sentences can only be appealed if they violate the law (e.g., exceed the maximum sentence authorized by law). Under section 213(a) of Public Law 98-473, both the defendant and the government can appeal sentences. Both can appeal based on the sentences violating the law or the incorrect application of the sentencing guidelines. In addition, the defendant can generally appeal any sentence greater than the

sentences specified in the guidelines and the government can generally appeal any sentence that is less than the guidelines.

On May 9, 1984, we testified on various sentencing reform proposals before the House Judiciary Committee's Subcommittee on Criminal Justice. We said most circuit court judges (93 percent) who responded to our questionnaires indicated that sentencing reform measures involving single appellate review of sentences could increase the workload of circuit courts. In addition, most of the responses from district court judges (98 percent) and U.S. attorneys (89-97 percent) indicated that the workload of the circuit courts could increase as a result of sentences being appealed.

Probation Officers' Workload

Twenty-four of the persons interviewed told us that the probation officers' workload would increase under sentencing guidelines. The reasons included the following:

- Probation officers will need to assume new responsibilities in fact-finding and preparation of the presentence investigation reports.
- Probation officers will be the focal point for calculating sentences under the guidelines.

One person told us that no change would occur in the probation officers' workload and one person did not express an opinion.

Defense Attorneys' Workload

Twenty-three of the persons interviewed told us that the defense attorneys' workload would increase under sentencing guidelines and no one said that a decrease would occur. They provided various reasons for the potential increased workload, including the following:

- There will be more trials, more complex sentencing procedures, and more appeals.
- There will be more sentencing hearings, more in-depth analysis of what the real facts of the case are, and more time in developing complex plea agreements with prosecutors.

Two of the persons interviewed said that the defense attorneys' workload would not change and one did not express an opinion.

Prosecutors' Workload

Twenty of the persons we interviewed told us that sentencing guidelines would increase the prosecutors' workload. The reasons cited for the potential increases were similar to those cited for defense attorneys. Four interviewees said there will be no change in the prosecutors' workload and two did not express an opinion.

Court Reporters' Workload

Citing similar reasons for potential workload increases for other court personnel, 21 of the persons we interviewed told us that court reporters' workload would increase. One interviewee believed court reporters' workload would decrease because of an expected decrease in the number of cases going to trial. Two interviewees said that there would be no change in court reporters' workload and two did not express an opinion.

U.S. Marshals' Workload

Sixteen of the interviewees said that U.S. Marshals will experience an increased workload as a result of the sentencing guidelines primarily because more prisoners will need to be transported by marshals, and more court hearings will occur. Four interviewees expressed the view that no change would occur in the marshals' workload and six did not express an opinion.

Magistrates' Workload

Unlike the other court personnel, half of the interviewees believed that there would be no change in magistrates' workload primarily because they did not believe that magistrates would normally be involved with felony cases. The nine persons who told us that the magistrates' workload would increase cited some of the same reasons given for increases in the district court judges' workload (e.g., the potential for more trials). Four interviewees did not express an opinion.

Advantages and Disadvantages for Delaying Implementation of the Sentencing Guidelines

In an April 13, 1987, letter transmitting the guidelines to Congress, the Commission's Chairman said the limited time for preparing the guidelines did not permit the Commission to field test them to the degree the Commission would have desired. The Chairman added that delaying implementation would provide additional time for the Commission, in conjunction with the Federal Judicial Center, the Department of Justice, and the Probation Division of the Administrative Office of the United States Courts, to conduct extensive training programs for judges, probation officers, prosecution and defense attorneys, and others.⁴

The Chairman's letter further explained that the Commission would use the information received during the field testing and educational period to prepare any necessary technical and substantive amendments to the guidelines. The Commission plans to submit any needed amendments to Congress by February 1, 1988, so they could take effect with the initial guidelines on August 1, 1988. Under section 994(p) of the law, amendments to the guidelines submitted by the Commission take effect in 180 days unless action is taken by Congress to disapprove or modify them.

On July 16, 1987, the Executive Committee of the Judicial Conference endorsed the Commission's suggestion for a delay, but concluded that an additional 3-month delay would be beneficial to allow time for a smoother transition into the new system, would allow the judiciary to proceed with implementation more effectively, and would allow time for education of all those involved in the criminal justice system. In contrast, on May 22, 1987, the Attorney General stated that he opposed delaying the implementation of the sentencing guidelines because of possible changes that could negatively affect the federal criminal justice system.

In case Congress does not approve an extension, the Commission is proceeding with its testing and training plans on the basis of a November 1, 1987, implementation date. In addition, the Commission is developing a monitoring and evaluation system for the guidelines to be implemented by November 1, 1987.

⁴When we were completing our audit work, two of the Commissioners told us that they believed that a majority of the Commission's voting members would no longer be in favor of a delay in implementing the guidelines because the testing and training efforts are proceeding very well. However, according to the Commission's General Counsel, the Commission has not changed its official position that a delay in the guidelines implementation date to August 1, 1988, is needed. He said, however, that in September 1987 the Commission's Chairman plans to discuss a number of issues with the Commissioners, one of which may be the delay issue.

The persons we interviewed identified advantages and disadvantages to delaying implementation of the guidelines. The 22 respondents who favored delaying implementation of the guidelines differed in their views on the length of the delay, with suggested delays ranging from 6 to 22 months. They said a delay is warranted in order to

- finish testing the guidelines to eliminate ambiguities and to assure consistency of application;
- educate and train district and appellate court judges, probation officers, and attorneys in the use of the guidelines; and
- design and put in place a data collection system for monitoring guidelines implementation.

The Chairman of the Federal Judicial Center's Committee on Sentencing Guidelines Education said the 9-month delay in implementation of the guidelines requested by the Sentencing Commission is warranted because the guidelines will result in a dramatic change in the federal criminal justice system. He said that the delay in implementation would enable the judiciary to better identify the type and scope of training needed by court personnel. He also said the more comprehensive the training, the more it would minimize potential problems such as errors in application of the guidelines and unnecessary appellate review of sentences to correct these errors.

The Chairman of the U.S. Parole Commission and its Director of Research and Program Development said that on the basis of the Parole Commission's experience in implementing the parole guidelines that are used in making parole release decisions, the Sentencing Commission's request for a 9-month delay to conduct field testing and training of personnel on the sentencing guidelines did not seem unreasonable. They also said that more than 9 months might be needed due to the complexity of the sentencing guidelines and the large number of personnel who would require training. For example, before the initial implementation of its parole guidelines, the United States Board of Parole⁵ began a pilot project in 1972 that included, for the first time, the use of guidelines to aid in the parole decision. On the basis of experience with the pilot project, the Board modified its guidelines and adopted them in 1974 for use in making all federal parole decisions. The parole guidelines are less complex than the sentencing guidelines and are used by a much smaller number of people.

⁵Public Law 94-233, March 15, 1976, retitled the United States Board of Parole as the U.S. Parole Commission.

States' experience in implementing sentencing guidelines provide mixed results on the importance of training. For example, in Minnesota only limited training was provided while in Pennsylvania, the training was more comprehensive. Both states experienced a 50 percent error rate during the initial implementation period. The guidelines in both states were less complex than the proposed federal guidelines.

Reasons cited by the four persons we interviewed who were not in favor of delaying implementation of the guidelines past November 1, 1987, included the following:

- The legislation required to permit delay could also change or abolish the guidelines.
- The guidelines are superior to the present system since they provide for fixed sentences with no parole and increased sentences, especially for white-collar crimes. Problems with the guidelines can be fixed over time.
- The necessary training can be provided within the current time frame. The guidelines only apply to offenses committed after November 1, 1987. Because there is a delay between when a crime is committed and when the offender is sentenced, there will be sufficient time for training practitioners.

The Sentencing Commission's Plans for Field Testing the Guidelines

The Commission is field testing its sentencing guidelines across the country with small groups of probation officers. In addition, on August 19, 1987, the Commission field tested the guidelines with prosecutors from Department of Justice headquarters and several U.S. attorney offices. It also plans to include judges and federal defenders in its field tests but has not finalized its plans. If the effective date of the guidelines is extended, Commission officials said they would conduct more extensive field tests.

The Commission has developed work sheets, instructions, and test cases for field testing the guidelines. The field testing by probation officers is being conducted in 7 to 10 locations during the period July 13 through September 29, 1987. According to the Commission, if all 10 locations are included, at least 111 probation officers presenting 44 of the 94 federal judicial districts that account for more than 50 percent of the total federal criminal caseload will have participated in the field testing. At the conclusion of each testing session, the Commission is requesting that each probation officer apply the guidelines to three recent cases with which they are involved and mail their results to the Commission. Analysis of this material is ongoing.

Plans for Training Criminal Justice System Personnel in Use of the Guidelines

The Federal Judicial Center will receive approximately \$870,000 from the Sentencing Commission to provide training on using the guidelines to about 3,600 court personnel, including district and circuit court judges, full-time magistrates, probation officers, and defense attorneys. According to a Department of Justice official, Justice plans to conduct its own training program for over 2,500 prosecutors.

On May 6, 1987, the Federal Judicial Center's Committee on Sentencing Guidelines Education approved a training plan for the guidelines. It covers basically four approaches to training: (1) between June and October 1987, the Federal Judicial Center plans to add presentations and discussions of the guidelines to regularly scheduled Center seminars and workshops; (2) from May 1987 to January 1988, the Center plans to provide special instructional materials, mainly for probation officers, on specific skills that the guidelines will require; (3) from October through November 1987, the Center plans to provide each district court with a self-contained training package that includes video materials on the application of the guidelines, discussion questions, and detailed written instructions and exercises; and (4) the Center will conduct follow-up training programs as necessary. The Sentencing Commission worked with the Center to develop a training program and approved the general training agenda.

The training plan is subject to change on the basis of new developments and needs that come to the attention of the Federal Judicial Center's Committee on Sentencing Guidelines Education. The committee plans to work closely with the Sentencing Commission and with federal judges and other judicial system personnel during the development and implementation of the educational program on sentencing guidelines.

Judiciary Is Revising Presentence Investigation Reports and Plans to Train Probation Officers in Using New Reports

Under the sentencing guidelines system, the presentence investigation report prepared by probation officers will continue to be the principal document that court officials use to determine the appropriate sentences for convicted federal offenders. The Probation Division of the Administrative Office of the United States Courts is modifying the current presentence investigation report form and its preparation instructions. The objective is to incorporate the information necessary for sentencing under the guidelines system.

Probation Division officials said current plans call for the revised form and instructions to be completed, including pretesting, by the end of

August 1987. The Judicial Center has developed a plan that incorporates a training program for probation officers on how to use the new form and instructions. The Federal Judicial Center's training coordinator told us that this training will take place by the time the first offenders are sentenced under the guidelines.

Probation Division officials responsible for modifying the presentence investigation reports told us that certain variables emphasized in the current system will not be that important under the proposed guidelines. For example, there will be less emphasis on marital and family matters in presentence investigation reports. However, the reports will require new and/or more specific information under the guidelines. The officials said that new information requirements will include the probation officer's own account of the offense committed, while in the current system the probation officer only records the versions of the offense described by the prosecutors and defense attorneys. Officials said that under the guidelines, the presentence investigation report will have to be very specific in terms of the dollar amounts stolen in theft cases. In addition, they said that in drug cases, the reports will have to be more specific in terms of the victim's age, whether the drug was sold to juveniles near a school, and whether juveniles were used to transport the drugs.

The presentence investigation reports may require additional revisions depending on the results of the Commission's field tests of the guidelines.

The Sentencing Commission Plans to Establish a Monitoring and Evaluation System

The Commission has said the guidelines will continue to evolve over time. To enable the Commission to modify the guidelines and to make sure that judicial and prosecutorial practices do not circumvent them, the Commission will need a monitoring and evaluation system. Part of this system will involve capturing information to be collected under sections 994 and 995 of Public Law 98-473. Section 994(w) directs the Commission to submit a report to Congress at least annually on the results of sentencing information received from the courts. Section 995 allows the Commission to monitor the performance of probation officers regarding sentencing recommendations and to systematically collect and disseminate information concerning sentences imposed.

The Commission has recently begun to develop a monitoring and evaluation system to capture information on judicial and prosecutorial practices under the guidelines. The Commission is currently determining

what kind of monitoring and evaluation system is needed and the degree of sophistication required. For example, it is considering whether to look at every case in detail or only a sample of cases.

A key area that the Commission will need to monitor and evaluate is the use of plea agreements. Plea agreements have become a common tool of U.S. attorneys for disposing of criminal cases. They generally consist of an agreement between the prosecutor and the defendant or defense counsel whereby in return for a defendant's guilty plea, the prosecutor agrees not to press other charges that he/she asserts could be proven in a trial. According to the Administrative Office, during the 12-month period ending June 30, 1986, about 86 percent of the convicted defendants in federal criminal cases entered guilty pleas. Because plea agreements have an impact on the ultimate sentence imposed on the defendant, the consistency of their application directly influences the treatment of defendants, and inconsistent application can result in disparate treatment. The Commission intends to study plea agreement practices under the guidelines and seek to further regulate the plea agreement process if necessary.

Constitutionality of the Guidelines May Be Questioned

On May 12, 1987, the Subcommittee on Criminal Justice, House Committee on the Judiciary, held hearings on the constitutionality of the Sentencing Commission and its sentencing guidelines. The issue discussed at the hearings was whether Public Law 98-473, which authorizes the establishment of binding sentencing guidelines by a nonelected body (the Sentencing Commission), improperly delegates the legislative authority of Congress. According to the persons who testified, the constitutionality of the sentencing guidelines will probably be challenged on this basis. The consensus among the witnesses was that the sentencing guidelines will survive any separation of powers challenge if the final guidelines are enacted into law, in essence treating the guidelines as recommendations.

The separation of powers argument was supplemented by observations of some witnesses concerning the constitutionality of permitting Article III judges⁶ to serve on a presidentially-appointed panel. Their concern was that such appointments subjected the judges to the possibility of removal from the panel by the President and also required the judges to devote time to a matter (i.e., the deliberations of the panel) which does

⁶Article III judges are appointed for life under Article III, Section 1 of the Constitution. They can only be removed for cause through impeachment proceedings.

not involve the judicial branch function of considering a specific case or controversy. In our view, these supplemental questions do not appear to raise significant constitutional issues.

One way the guidelines could be challenged and the issue of constitutionality decided by the court would be if a defendant sentenced under the final guidelines brought suit alleging that the guidelines under which he/she was sentenced do not have the force and effect of law because they were unconstitutionally promulgated. If challenged, it could take some time before the issue is resolved. The witnesses predicted that it could be as long as 3 years for a challenge to work its way through the courts and be resolved by the Supreme Court. If a law was enacted calling for accelerated judicial review (e.g., Balanced Budget and Emergency Deficit Control Act of 1985, Public Law 99-177, dated December 12, 1985), the witnesses said the issue would probably be before the Supreme Court in about 1 year. There are approximately 40,000 defendants sentenced in federal courts each year. This workload could be significantly increased if the guidelines were found to be unconstitutional and offenders sentenced under them had to be resentenced.

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