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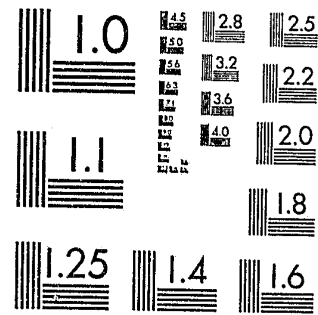

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Department of Justice

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

SENTENCING REFORM

ON

MAY 3, 1984

NCJRS
JUN 18 1984
ACQUISITIONS

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I. Introduction

I welcome this opportunity to testify concerning the need for reform of federal sentencing laws and the best means of achieving such reform.

A sentence is the culmination of the criminal trial process following a determination of the defendant's guilt. Ideally, a sentence should represent a thoughtful statement -- based on appropriate factors relating to the nature of the offense and the characteristics of the offender -- of the seriousness or lack of seriousness with which society views the defendant's criminal conduct. A sentence should also deter criminal conduct by others, by prompting public recognition that criminal sanctions will be applied to such activity with certainty, with swiftness, and with fairness.

By contrast, the federal criminal justice system has fallen far short of that ideal. Sentences imposed on convicted federal offenders lack consistency and vary widely from judge to judge, thus contributing to cynicism and fostering inequality. The widespread disparity in sentences imposed is not surprising inasmuch as federal statutes typically provide no guidance, apart from setting forth the maximum permissible sentence, to assist the judge in imposing sentence, nor is appellate review available to assure that a sentence imposed is reasonably proportionate to the defendant's conduct. Moreover, if a sentence to imprisonment is imposed, the existence of parole as determined by an executive branch agency means usually that the length of the sentence

specified by the court will be significantly reduced and may not achieve the purposes for which sentence was imposed in the first place.

Accordingly, while the current federal sentencing system at times may achieve appropriate results in individual cases, its aberrations are numerous and serious, and its successes often represent triumphs over the system itself and over years of legislative neglect.

II. Problems with Sentencing Under Current Law

Trial judges today are assigned almost unfettered discretion and responsibility for sentencing criminal offenders. In exercising this discretion and fulfilling this responsibility, the judges are left to their own devices. Each is free to adopt any philosophy he or she finds appropriate in determining what sentences to mete out and is not required to state the rationale that caused the selection of a particular sentence in an individual case. The existing federal statutes provide no guidance to sentencing judges as to the purposes sought to be achieved by the sentencing process. Other than occasional hints at rehabilitation, current statutes fail to set forth the factors pertaining to the offense and the offender that warrant consideration in the determination of an appropriate penalty, and include no instruction to govern the selection of either the kind of sentence to be imposed or the severity of the kind selected.

The present statutes do of course recognize the sentencing alternatives of probation, restitution, fines, and imprisonment. The federal system for imprisoning convicted defendants and for determining when to release them from prison, however, reflects a medical model and a rehabilitative philosophy that has proved to be faulty. The theory underlying current imprisonment statutes is that the defendant, by committing a crime, has shown himself or herself to be sick and to need society's help in being cured. The purpose of a sentence to imprisonment is therefore to rehabilitate. Since no one knows how long a defendant's rehabilitation will take, a defendant should be sentenced to an indeterminate sentence that is considerably longer than would ordinarily be necessary. This lengthy sentence will ensure that he will remain in prison long enough to be rehabilitated. Later, the parole authorities will examine the defendant's behavior in prison, and, when they find he has become rehabilitated, will release him before the expiration of his imposed term.

There are two principal problems with this theory. First, many if not most sentences to imprisonment are not intended to rehabilitate, but to deter, incapacitate, or punish. Reducing through the granting of parole the length of sentences imposed for these purposes according to the defendant's prison behavior as determined by parole authorities is clearly inappropriate. Second, the theory is unsoundly predicated even for sentences designed to rehabilitate. It has been generally concluded that there exists no satisfactory means of inducing rehabilitation in

prison on a regular basis or even telling from a person's behavior in prison whether he has become rehabilitated.[1] Consequently, the basic reason for an indeterminate sentence that may be adjusted by parole authorities has disappeared.

The federal Parole Commission today recognizes these facts. With few exceptions, it releases prisoners at times specified by guidelines that are based upon factors known at the time of sentencing. Since the Commission's release determinations are no longer based upon the prisoner's conduct in confinement, there is no reason why the Commission cannot inform a prisoner of this proposed release date at about the time his incarceration begins -- and the Commission in fact now does this. The imprisonment process today, therefore, involves two branches of government -- acting at approximately the same time and basing their determinations on essentially the same information -- solemnly announcing quite different sentences to be served by the same defendant. The result is not only indefensible in theory; it leaves the judges attempting to adjust their sentences to overcome what they may perceive to be inappropriately harsh or lenient consequences of the parole process.

1 See, e.g., Robinson and Smith, The Effectiveness of Criminal Programs, 17 Crime and Delinquency 67 (1971). D. Lipton, R. Martinson, and J. Wilks, Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (1975). See also A. Von Hirsch, Doing Justice: The Choice of Punishment 14-15 (1976).

As might be expected, numerous studies have documented considerable disparity in sentences meted out by federal judges to similarly situated defendants who have committed like offenses. A 1977 Yale study includes statistics that show dramatic geographic differences in federal sentencing practices. For example, in 1972, the average sentence for burglary in the Eastern District of New York was two months and in the Eastern District of Kentucky was 167 months. In the same year, only four percent of the defendants convicted of burglary in the Northern District of Texas were placed on probation, while fifty percent received probation in the Northern District of New York.[2] In two studies in which judges were given identical case files, one using hypothetical cases and one using actual case files, the judges agreed on whether to imprison a defendant at all in only about one-fourth of the cases, and their recommendations as to the length of prison terms in the same case varied by as much as a dozen times.[3] A recent study[4] also concluded that 21 percent of the variation in federal sentences was attributable solely to the tendency of particular judges generally to impose harsher or more lenient sentences than their colleagues, and another 22

2 Administrative Office of the United States Courts, "Federal Offenders in United States Courts" (1972).

3 Seymour, 1972 Sentencing Study for the Southern District of New York, 45 N.Y.S.B.J.163.; Partridge and Eldridge, The Second Circuit Sentencing Study, A Report to the Judges (1974).

4 INSLAW, Inc., and Yankelovich, Skelly, and White, Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions (1981).

percent was attributable to other judge-dependent factors such as the tendency of a particular judge to sentence defendants convicted of a particular offense more harshly or leniently than other judges.

Plainly, the United States needs to establish a system that sets standards for sentencing that reflect society's considered assessment of the relative punishment that an offense warrants. Equally clearly, we need a system that does not permit the confusion inherent in the current system in which a sentence imposed one day by a judge is changed the next day by the Parole Commission. It is important that our sentencing system be, and be perceived as being, credible, rational, and fair to defendants and to the public alike.

III. The Administration Proposal

Over the past decade, persons of different political views have concurred in the view that the current federal sentencing system is pervasively burdened with serious shortcomings. More recently, most of them have agreed that there is a practical approach by which the shortcomings might be remedied. The federal sentencing reform effort began more than a decade ago as part of an ongoing effort to reform federal criminal laws generally. Significant sentencing reform provisions were first added to a comprehensive federal criminal code reform bill in 1976 and have been reintroduced and refined in each succeeding Congress.

Our proposal continues that effort. In order to create a credible, rational, and fair sentencing system, the Department of Justice, in cooperation with several members of Congress, has proposed legislation that would create an entirely new system of sentencing. The principal attributes of this system are that sentences would be imposed by judges pursuant to a highly sophisticated guideline system, and sentences to imprisonment would be determinate. Moreover, the legislation would delineate for the first time the specific purposes to be served by federal sentences -- just punishment, deterrence, incapacitation, and rehabilitation. At the same time, it would recognize that the purpose of rehabilitation should not be the basis for imprisoning a defendant or for determining the length of his prison sentence.

Under the proposed system, a seven-member Sentencing Commission would be appointed by the President. It would be composed initially of full-time members with a wide variety of high-level experience and interest in the federal criminal justice system and would have a professional staff able to devote their full professional efforts to the improvement of sentencing practices. The Commission would examine offense and offender characteristics that judges now consider in imposing sentence and any other characteristics it finds may be relevant to the sentencing decision. It would determine which of those should be reflected in sentencing guidelines, which occur so rarely that it is not appropriate to incorporate them in guidelines although they might form the basis of a sentence outside the guidelines,

and which should not affect the sentence at all. It would then develop, for each federal offense, guidelines for consideration in the imposition of sentence. The guidelines would specify a variety of appropriate sentencing ranges -- from probation with minimal conditions, through probation with highly restrictive conditions and through the wide latitude of fine levels, to short and then long-term imprisonment -- depending upon the particular history and characteristics of the defendant and the particular circumstances under which the offense was committed. Each offense, therefore, might have a dozen or so sentencing ranges suggested, only one of which would fit a given case. The system would be capable of reflecting the effect that a fairly complex pattern of offense and offender characteristics should have on the sentence while still remaining relatively straightforward to use.

The guidelines would be applied in a particular case by the sentencing judge. The presentence report, which with certain exceptions would be given to the defendant and the government, would specify the offense and offender characteristics and the sentencing guideline that the probation officer believed applicable to the defendant. The sentencing hearing would be focussed on the accuracy of the probation officer's conclusions and on the question whether sentence should be imposed within or outside the guidelines. At the end of the hearing, the judge would make findings as to the applicable guideline. He would then impose sentence, ordinarily within the applicable guideline range.

However, if he thought the sentence was inappropriate because there was a factor that should affect the sentence that was not adequately considered by the Sentencing Commission in developing the guidelines, the judge could impose the sentence above or below the guideline recommendation, stating his reasons for doing so. If the judge imposed a sentence above the applicable guideline range, the sentence could be appealed by the defendant. Similarly, if the judge imposed a sentence below the guideline range, the sentence could be appealed by the government on behalf of the public if appeal was personally approved by the Attorney General or the Solicitor General.

With a rational set of guidelines and appellate review to assure their correct application, the continued existence of the Parole Commission to set release dates is unnecessary. Thus, our sentencing reform package includes the abolition of the Parole Commission and the creation of a determinate sentencing system. With one exception, all the factors relevant to determining an appropriate release date are known at the time of sentencing. Only a prisoner's level of compliance with institution rules is unknown at the time of sentencing. There is also no need to retain the Parole Commission to make this determination. Prison authorities already have substantial experience with the good time statutes in current law and are in a better position than the Parole Commission to determine whether a prisoner deserves credit toward service of sentence for complying with prison rules. Under our proposal, sentences to imprisonment would

represent the actual time a prisoner would serve, except that he could earn up to a ten percent reduction for complying with prison rules. Nor is it necessary to preserve the Parole Commission to determine whether a prisoner should receive street supervision following his prison term. The Parole Commission does not make that determination under current law -- today, a prisoner who has time remaining on his judge-imposed prison sentence when he is released is placed on parole; one who does not have time remaining is released, without supervision. Thus, the question whether a prisoner will receive post-release supervision is determined in an irrational manner -- not by whether anyone finds that he needs it but by whether he served his entire sentence in prison.

Our proposal has received overwhelming bipartisan support in the Senate, which has passed it twice in this Congress -- once as part of S. 1762, the proposed Comprehensive Crime Control Act of 1983, by a vote of 91 to 1; and once as a separate bill, S. 668, by a vote of 85 to 3. In this House, the counterparts of these measures are H.R. 2151 and H.R. 3997, respectively. We strongly recommend the passage of the sentencing provisions in those bills rather than the alternatives set forth in the four bills before this Subcommittee, H.R. 2013, H.R. 3128, H.R. 4554, and H.R. 4827. Set forth below is a more detailed description of the problems with the current federal sentencing system and our

proposed solutions for those problems, and a statement concerning what we view as the most serious shortcomings of each of the four bills before you, with an emphasis on H.R. 4554 and H.R. 4827.[5]

IV. Summary of the House Bills Before the Subcommittee and the Department's Position Thereon

This Subcommittee has requested our views on four House bills: the sentencing provisions in H.R. 2013, H.R. 3128, H.R. 4554, and H.R. 4827. In this regard, we have devoted particular attention to H.R. 4554 and H.R. 4827, introduced by the Chairman of the House Judiciary Committee and the Chairman of this Subcommittee, respectively. After careful analysis, and with deep regret, the Department of Justice has concluded that each of these bills is seriously flawed and therefore unacceptable. Not only would enactment of these bills fail, in our judgement, to correct the glaring deficiencies with present sentencing law, in contrast to the bipartisan approach taken in S. 1762 and S. 668. Their enactment would actually worsen the condition of the federal sentencing system from the standpoint of assurance of the public safety and the fairness and efficiency of the sentencing process.

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[5] These bills were introduced by the Chairman of the Judiciary Committee and of the Subcommittee, respectively, and thus we assume are likely to receive the most serious consideration. H.R. 3128 is a sentencing bill drafted by the Judicial Conference and introduced by the Chairman of the Judiciary Committee by request.

For example, focusing temporarily and by way of illustration on H.R. 4554, that bill, by comparison with current law, would have the following devastating effects:

(1) Eliminate just punishment as a valid purpose of sentencing;

(2) Permit probation for a person found guilty of a capital offense or one punishable by life imprisonment;

(3) Create a "lock step" sentencing procedure in which the court must always impose the "least severe" sentence in a rigid hierarchy of sentences -- an approach that, particularly when coupled with the elimination of just punishment as a legitimate purpose of sentencing, causes unreasonable barriers to the imposition of prison sentences;

(4) Create a skewed system of appellate review, in which a sentence may only be adjusted downward, by providing that a defendant may appeal any sentence, while permitting no appeal by the government of even the most unreasonably lenient sentence;

(5) Make maintenance of "ideal" prison capacity a goal to which all other purposes of sentencing must be subservient, and allow the Parole

Commission (renamed the "Board of Imprisonment") to order early release dates when "ideal" capacity is exceeded;

(6) Establish greatly increased defendants' rights in connection with sentencing and parole release determinations that essentially transform these hearings into full blown adversary proceedings and permit harassment of victims;

(7) Impose significant and overly broad restrictions on the imposition of civil and employment disabilities arising from criminal convictions, so as, for example, to permit a court to order that the government not reveal a defendant's prior conviction for child molestation in connection with his application as a school bus driver.[6]

Moreover, both H.R. 4554 and H.R. 4827 would perpetuate the present indeterminacy, irrationality, and inequality in sentencing through retention of parole; neither bill would create a meaningful guidelines system to promote fairness and reduce unwarranted disparity;[7] and neither bill would permit a balanced

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6 Items 1, 2, 3, 6, and 7 are also applicable to H.R. 4827.

7 H.R. 4554 provides for sentencing guidelines, but in the context of a system that in our judgment is too weak to effectively promote fairness. H.R. 4827 contains no provision for guidelines.

and effective system of appellate review of sentences around which a body of appellate case law could ultimately be developed.[8]

In sum, it appears that these bills -- whatever their guiding philosophy may be -- represent a rejection of nearly all of the core elements of sentencing reform embodied in the Senate-passed legislation and in H.R. 2151 and H.R. 3997 in this House, and which we believe are essential. Indeed, as noted from our perspective as federal law enforcement officials, they represent a serious setback from even the highly unsatisfactory nature of the present system. Accordingly, we strongly oppose the enactment of these measures and urge the Subcommittee instead to adopt the sentencing provisions of S. 1762 or S. 668.

In what follows, I will elaborate on a number of the major problems raised by the bills before you and the reasons for our opposition to the approaches taken therein.

V. Major Issues Raised by the House Bills

A. Purposes of Sentencing. H.R. 2013, H.R.4554, and H.R. 4827 inappropriately fail to include just punishment as a purpose of sentencing. As we noted at the beginning of this statement, a criminal sentence should represent society's views concerning the extent to which a convicted defendant's conduct did not comply with applicable moral standards. This view

8 H.R. 4554, as noted, allows for appellate review only at the instance of the defendant, and places no restrictions on the type of sentences that a defendant may appeal. H.R. 4827 contains no provisions for appellate review.

necessarily involves the concept of punishment that is just considering the offense and offender characteristics in the case. It is important to note the word "just" in this context -- it is essential not only that the sentence reflect the concept of punishment but that it also be a fair sentence that is appropriate to the circumstances of the case.

The elimination of this purpose of sentencing is especially important for terms of imprisonment. All the bills before the Subcommittee except H.R. 3128 eliminate rehabilitation as a reason for deciding to send a defendant to prison or for determining the length of a prison term. This has the effect of leaving as the primary purposes for imprisonment the deterrence of others and incapacitation of an offender. The unfortunate result could be that the bills might be interpreted to mean that, for a very serious offense by an offender who did not have a long criminal record and for which research showed imprisonment had little or no deterrent effect on commission of the offense by others, a term of imprisonment could not be imposed. As the members of the Subcommittee are well aware, an offense such as major drug trafficking is frequently committed by persons who do not have a long criminal record and, unfortunately, the lucrative nature of the offense usually means that another trafficker is willing to step in to take the place of any convicted trafficker -- a fact that calls into question the notion that prior sentences have the deterrent effect on this offense that one might wish. I nevertheless find it difficult to believe that

this Subcommittee wishes to suggest that public condemnation of this offense and other equally serious offenses should not be reflected through just punishment of the offenders.

We also find objectionable the fact that none of the bills except H.R. 3128 specifically recognizes deterrence of the offender from future criminal conduct, as opposed to deterrence of criminal conduct by others, and that H.R. 2013 and H.R. 4827 do not even recognize the purpose of protecting the public from criminal activity by a convicted defendant. The purpose of individual deterrence is an important one. The criminal justice system should seek to deter future criminal conduct by a convicted defendant not simply by incapacitating him in an appropriate case so he is not able to commit additional offenses but also by creating a penalty structure that will cause him to think twice before engaging in further criminal activity. Ignoring the purpose of protecting the public from further criminal activity by the offender is to ignore a major purpose of the criminal justice system as a whole. Indeed, I strongly believe the prevention of crime by any reasonable means may be more important than the question of how to punish it once it has occurred.

B. The Need For Comprehensive Sentencing Reform. Three of the bills before you today, H.R. 2013, H.R. 3128, and H.R. 4827, do not contain comprehensive sentencing packages. H.R. 2013 and H.R. 4827 are seriously deficient in that they fail to create a sentencing guidelines system or to provide for appellate review

of sentences. On the other hand, while H.R. 3128 creates a sentencing guidelines system and appellate review of sentences, it fails to make any other needed improvements in federal sentencing law.

A sentencing guidelines system with appellate review of sentences outside the guidelines is an essential part of sentencing reform. It is beyond dispute that the lack of guidance to sentencing judges concerning the most appropriate sanctions for a particular combination of offense and offender characteristics has resulted in unwarranted disparity in sentences imposed on similarly situated offenders. Both H.R. 2013 and H.R. 4827 include as purposes of sentencing assuring that the sentence is proportionate to the culpability of the offender and the harm done, and assuring that offenders convicted of similar offenses committed under similar circumstances receive similar sentences -- yet neither bill provides a mechanism for achieving those goals. H.R. 4827 does require that the Judicial Conference collect and distribute information concerning sentences actually imposed on offenders, analyzing that information according to categories of offenses and offenders. But collection and distribution of this information is only a first step toward creation of a sound sentencing system. As a recent National Academy of Sciences study[9] has shown, the most effective mechanism for reducing unwarranted sentencing disparity is a sentencing

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9 National Academy of Sciences, Panel on Sentencing Research, Research on Sentencing: The Search for Reform (A. Blumstein, J. Cohen, S. Martin and M. Tonry, eds., 1983).

guidelines system with a mechanism for reviewing sentences outside the guidelines to assure that they are being followed when appropriate. We believe that such a system is important to assuring fair and evenhanded sentences in the federal criminal justice system.

It is also important that the sentencing guidelines system be combined with comprehensive sentencing reform, which H.R. 3128 fails to do. That bill only creates a sentencing guidelines system without rationalizing the law concerning the attributes of each kind of sentence. For example, it fails to increase current fine levels or describe the factors that should be considered in determining the amount of a fine, and it fails to create probation as a sentence or describe more fully the conditions on probation that may be imposed. We believe that failure to reform the sentencing laws generally will undermine the ability of a sentencing guidelines agency to formulate the best possible sentencing recommendations. The law relating to fines and probation should be improved so that each may be a useful form of punishment in an appropriate case. Today's fine levels and limited probation statute fail to assure that these sentences are sufficiently flexible to be used for a wide variety of non-violent non-serious offenses.

C. Guidelines Drafting Agency. Both H.R. 3128 and H.R. 4554 provide that sentencing guidelines would be drafted by a part-time group appointed by the Judicial Conference of the United States and promulgated by the Judicial Conference. Members

of the drafting agency who were not full-time officers or employees of the United States would be paid at the daily rate payable for grade GS-18 of the General Schedule. Neither bill contains specific language relating to the creation of a professional staff for the guidelines drafting agency, but we understand that it is the intent of the draftsman that the Administrative Office of the United States Courts and the Federal Judicial Center provide the staff.

For several reasons, we prefer the provisions concerning the Sentencing Commission set forth in H.R. 2151 and H.R. 3997. First, we think the initial set of sentencing guidelines should be promulgated by a highly visible entity composed of full-time members. It is important that the guidelines drafting agency be in a position to assure public awareness of its efforts and public education concerning its purposes. Furthermore, until the initial set of guidelines is promulgated and goes into effect, the members of the guidelines drafting agency will need to devote their full attention to sentencing issues and should not be distracted by other duties. The members should also be paid at a level in accord with the stature of the agency and the importance of its mission; thus, we recommend that they be paid at the rate at which judges of the United States Courts of Appeals are paid. Finally, we recommend that the bill explicitly provide for a full-time professional staff for the guidelines drafting agency. As with the members of the drafting agency, the staff of the agency should be able to devote its full energies to sentencing

issues. Of course, we would expect that such a staff would draw on the expertise in sentencing matters that has already been developed by the staffs of the Federal Judicial Center and the Administrative Office of the United States Courts. However, members of those staffs have many other obligations and would not be able to devote their full professional energies to sentencing matters.

D. Sentencing Guidelines. Neither H.R. 3128 nor H.R. 4554 provides much guidance to the guidelines drafting agency concerning the contents of the guidelines. We think it is important that sentencing legislation express the views of Congress concerning several issues: the offense and offender characteristics the guidelines drafting agency should examine to determine what impact, if any, they should have on the sentence; examples of situations in which a substantial prison term or no term of imprisonment at all is generally appropriate; and an indication how Congress expects sentences for multiple offenses to be treated in the guidelines.

A major problem with the provisions of H.R. 4554 is the requirement that the sentencing guidelines "be formulated in such a manner as to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." While we are sympathetic with the goal of avoiding prison overcrowding, we think the approach represented by this provision is the least defensible means of achieving that goal. Any sentencing guidelines system should assure that the guidelines

are designed to achieve the purposes of sentencing -- usually just punishment, deterrence, and incapacitation in the case of imprisonment; the guidelines should not be developed with a view to filling available space with a compatible number of bodies. We might as well provide that the guidelines specify sentences that will not result in underutilization of prisons.

There is, of course, a better approach. The sentencing provisions incorporated in the Senate-passed bills and in H.R. 2151 and H.R. 3779 require that the Sentencing Commission, at the time it develops its guidelines, determine the impact the guidelines will have on each part of the correctional system (probation as well as prisons) and then recommend to the Congress any increases in capacity that the affected portion of the system may require. It should be the responsibility of the Sentencing Commission to recommend appropriate kinds and lengths of sentences dependent upon the relative seriousness of offenses and the criminal histories of offenders. It should not be hampered in its considerations by artificial constraints that have nothing to do with what a sentence ought to be. To make the sentencing guidelines dependent on existing prison capacity would mean that if there were a substantial increase in serious crime, there would have to be a substantial decrease in prison terms. If anything, this result is upside down. If prison terms are to mean anything at all, it is essential that they not be decreased if there is an increase in crime.

Likewise it is an exercise in false economy to argue that we should lessen the use of imprisonment because it is expensive. Imprisonment is certainly not expensive to the public, at least if something other than a one-dimensional view of costs is taken. A recent study[10] conducted by INSLAW revealed that the average federal prisoner would be committing 10 to 14 crimes a year if he were not in prison -- and that there would be federal jurisdiction over most of those crimes. Another recent study[11] revealed that the average property loss from a federal crime is approximately $30,000. If those figures are compared with the average of about $13,000 the Bureau of Prisons spends annually for each prisoner in a federal institution, it appears that there is a considerable net economic benefit to the public for many federal prisoners incarcerated, to say nothing of lives saved or not damaged in some way in many cases. I might note, almost parenthetically at this point, that providing the level of intensive probation supervision that alternatively would be required for the kind of offenders who are in prison today would itself hardly be without cost, and would be without comparable benefit. In any event, it is highly improper to base decisions about punishment for serious crimes on monetary considerations.

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10 B. Forst and C. Wellford, Punishment and Sentencing: developing sentencing guidelines empirically from principles of punishment 33 Rutgers L. Rev. 607, 829-830 (1981).

11 Id. at 799 n. 85.

E. Sentencing Procedures.

H.R. 4554 and H.R. 4827 contain several provisions that depart from present law in potentially circumscribing the information that may be brought to the attention of the sentencing judge for use in imposing sentence, and that include expanded defendant's rights that would essentially transform the presentence hearing into a full-fledged adversarial proceeding.

First, we point out that, in specifying the contents of the presentence report, both the above House bills state that the report is to include only information of the offender's "prior criminal conviction". In contrast, current law provides that the report shall include the offender's "prior criminal record". Under Rule 32(c), F.R.Crim.P., this term has consistently been interpreted to encompass not only prior convictions but other information regarding past criminal conduct, such as hearsay information and arrests and indictments. See, e.g., United States v. Needles, 472 F.2d 652 (2d Cir. 1973). While of course, as has been recognized in case law, such information should not be equated with a conviction nor given unwarranted weight in the sentencing process, at the same time it clearly blinks reality and is excessive, if such is the intention of the bills, to exclude such information altogether as irrelevant. Certainly it is important to know of a defendant's possible gang or organized crime association. On the contrary, evidence of prior misconduct, although not the subject of a conviction, is clearly relevant and should be available to the sentencing judge. We

strongly urge that the term "criminal record", as in present law and the Senate-passed legislation, be used in lieu of the phrase "criminal conviction".

Additionally, H.R. 4554 and H.R. 4827 permit non-disclosure to the defendant of a portion of the presentence report only if the court determines that such disclosure would result in physical or other harm to the defendant or another. Present law, which we favor, recognizes additional, legitimate grounds for non-disclosure where disclosure would "seriously disrupt a program of rehabilitation" or reveal "sources of information obtained upon a promise of confidentiality" (Rule 32(c), F.R.Crim.P.).

Of far greater consequence, the House bills would vastly enlarge defendants' rights in sentencing hearings and would basically make the sentencing process into a subsequent mini-trial, with an opportunity for harassment of victims. Existing law, embodied in Rule 32(c), F.R.Crim.P., sensibly permits the court, in its discretion, to give the defendant the opportunity to introduce testimony or other information relating to any alleged factual inaccuracy in the presentence report. H.R. 4554 and H.R. 4827, on the other hand, would confer upon the defendant the <u>right</u> to subpoena and cross-examine witnesses, including the probation officer who prepared the report and any persons, such as the victim, who supplied information contained in it. The court would be given only very limited bases for denying this "right", and thus it would become commonplace for defendants to

call and cross-examine the probation officer and victims during sentencing hearings. This practice in our view would allow defendants to harass their victims and would inhibit the candor of probation officers in preparing the report and the willingness of other persons to supply the officer with relevant information, thereby thwarting the purposes and usefulness of the report. Moreover, the bills contain new evidentiary requirements associated with challenging information in the presentence report that, coupled with the expanded "rights" afforded defendants to subpoena and cross-examine witnesses, would considerably complicate and lengthen the sentencing process. We agree that sentencing is a serious business. But the problems with sentencing today, in our view, do not stem from deficiencies in the quality or amount of information normally available to sentencing judges under prevailing law and practice, on which to make the sentencing decision. Rather, the problems, as discussed earlier, arise from the absence of adequate guidance or standards as to how to translate the information into an appropriate sentence. Consequently, we see no reason justifying the substantial, and financially costly, augmentation of defendant's procedural rights at the sentencing hearing as proposed in H.R. 4554 and H.R. 4827.

F. <u>Imposition of Sentence</u>.

We oppose the provisions of H.R. 4554 and 4827 directing the judge to use a lockstep approach to determining the kind of sentence to impose. Those provisions artificially require the sentencing judge to begin his consideration of an appropriate

sentence in <u>every</u> case with the question whether unsupervised probation is an appropriate sentence. This is required even where the offense is a serious violent offense and the sentencing guidelines recommend a lengthy prison term. Furthermore, the approach assumes that each listed sentence is always less severe than the next sentence contained in the list; for example, the list assumes that supervised probation is always a more severe sentence than an order to pay a fine. This strikes us as an unduly rigid view of sentencing options. These provisions are even more troubling because neither H.R. 4554 nor H.R. 4827 recognizes just punishment as an appropriate purpose of sentencing. The combination of these facets of the bills means that, in practical operation, it will be much more difficult for a judge to impose a sentence of imprisonment even when to do so is appropriate.

H.R. 3128 permits the sentencing judge to impose a sentence outside the applicable guideline if "the purposes of sentencing ... would best be served by departing from such guidelines"; similarly, H.R. 4554 would permit the imposition of a sentence outside the applicable guideline if "the court finds that departure from the guidelines is warranted ... on the basis of the circumstances of the offense or on the basis of information about the defendant." We oppose the breadth of authority these provisions would give the sentencing judge to thwart the guidelines. The sentencing guidelines deserve more respect and must have some "teeth" if they are to fulfill the goal of reducing

unwarranted sentence disparity. The guidelines will have been promulgated by a guidelines agency pursuant to a delegation of authority by the Congress. They will have received extensive public, professional, and congressional scrutiny before they are implemented. They will, therefore, represent a national consensus on federal sentencing policy. If the offense and offender characteristics in a particular case were adequately considered in the promulgation of the guidelines, there is no reason whatever to permit a single judge to set his own sentencing policy simply because he does not agree with the guidelines. This does not mean, of course, that a judge should not be able to sentence outside the guidelines in an appropriate case -- but such a situation should be reserved for the relatively unusual case in which the judge finds that there is a factor that should affect the sentence but that is not adequately reflected in the guidelines. The seriousness of the problem presented by the broad authority that would be granted by these bills to the sentencing judge is aggravated under H.R. 4554 because it would not permit the government to appeal on behalf of the public an unreasonably low sentence.

G. <u>Retention of the Parole Commission</u>.

One of the worst features of H.R. 3128 and H.R. 4554 is that they retain the Parole Commission -- albeit with somewhat modified authority -- and vestiges of indeterminate sentencing.[12]

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[12] H.R. 4827 also would retain the Parole Commission but without most of the modifications in the other bills.

Under H.R. 3128, the sentencing judge, after considering sentencing guidelines, would set both a parole eligibility date and a maximum prison term for any convicted defendant he sentenced to prison. A prisoner would then be released on the parole eligibility date unless the Parole Commission found that he had not substantially complied with prison rules. If it made such a finding, it would set a new release date based on its own guidelines. It would also be charged with setting parole conditions with revocation of parole if the conditions were violated. These provisions keep a very expensive mechanism in place to carry out a role that could readily be filled by the prison system -- the determination of the impact noncompliance with prison rules should have on a prisoner's release date. They also carry the possibility that there would be a very wide range between the parole eligibility date and the maximum prison term within which the actual release date could be set, thus retaining vestiges of the current indeterminate sentencing system except in those cases in which there was only a small difference between the parole eligibility date and the maximum sentence. And there is nothing in the bill to preclude the imposition of a sentence to a term of imprisonment for rehabilitation purposes, an invitation to perpetuate indeterminate prison sentences for rehabilitative purposes.

The parole provisions of H.R. 4554 are far more objectionable than those in H.R. 3128 and in some respects are worse than current law. H.R. 4554 provides that the Parole Commission --

renamed the Board of Imprisonment -- will, within 120 days of the beginning of service of sentence, set an initial presumptive release date for each prisoner sentenced to a term in excess of one year. Ordinarily that date would be set between 80 percent of the term specified by the lower limit of the applicable guideline and 80 percent of the sentence imposed. If the sentence imposed was at or below the lower limit of the applicable guideline, the presumptive release date would be 80 percent of the sentence actually imposed. If the Board of Imprisonment found that the prison population exceeded or was about to exceed prison capacity, the Board could set presumptive release dates up to 120 days earlier than otherwise permitted unless the prisoner was a violent career criminal. "Violent career criminal" is defined in proposed section 3523(c)(2) of title 18, United States Code, as an individual who was convicted of a felony in which he used a gun or caused death or serious bodily injury or which was a drug felony, and who had previously served all or part of the sentences for two previous such offenses under State or federal law. The initial presumptive release date could be adjusted only if the Board of Imprisonment found by a preponderance of the evidence that the prisoner had violated a "significant" institution rule or a federal or state criminal law.

The provisions of H.R. 4554 continue virtually unchecked the problems inherent in the current indeterminate sentencing system, and even add a few new problems. The renamed Parole Commission would continue to set release dates using its own notions of

sentencing philosophy. In some cases its authority would be somewhat reduced, but in those cases in which the applicable sentencing guideline recommended a relatively low sentence compared to that actually imposed by the judge, the range in which the Parole Commission could set the release date could actually increase over that in current law. Indeed, the Parole Commission would seem to be given the greatest authority with respect to sentences above the guidelines -- even though the judge must have a reason for going above the guidelines and his decision is subject to appellate review.

We see no reason for allowing the continuation of authority in an executive branch agency to set release dates when the sentence imposed by the judge is subject to appellate review. Nor do we see any reason to permit an executive branch agency to set release dates in accord with its own guidelines, which are promulgated with no public or congressional scrutiny, 120 days after the court has imposed sentence in accord with guidelines promulgated after substantial public and congressional scrutiny. Nor do we see any reason to have an executive branch agency making an independent determination of a release date at the same time that the sentence on which it is based is undergoing appellate review.

We also find objectionable the fact that there is, in effect, the possibility of 20 percent or substantially more credit toward service of sentence for complying with institution rules. We recommend that good time credit be limited to a

maximum of 10 percent of the sentence and that the good time statute be implemented by prisons authorities, as in current law, rather than by an expensive and cumbersome renamed Parole Commission. The possibility of 10 percent credit is sufficient to assure compliance with prison rules, particularly since other disciplinary measures, such as moving a prisoner to a higher security level institution if he violates the rules, are also effective against disciplinary violations. The possibility of more than a small amount of good time credit would retain vestiges of indeterminate sentencing and the rehabilitation purpose for terms of imprisonment that have proved to be outmoded.

Keeping the current release date setting function in an executive branch agency has been characterized by some as a "safety net." It seems more likely that it would prevent effective operation of the guideline sentencing system. It would perpetuate serious uncertainties inherent in the current indeterminate system. It would continue to encourage judges to attempt to anticipate, and to avoid the effects of, the eventual parole release process by adjusting their sentences. It would permit the setting of release dates, under standards different from those used for originally imposing sentences, by a body that operates out of public view. It would also seem to permit repeated adjustments in sentence length at the expense of any semblance of finality. It would, moreover, result in almost every prisoner receiving street supervision whether he needed it

or not -- with the prisoner who constantly violated prison rules receiving no post-release supervision -- in perpetuation of one of the most absurd provisions of present law. Finally, as noted earlier, it would be an extremely costly and cumbersome mechanism for encouraging compliance with prison rules -- compliance that prison authorities have pointed out can better be handled by other means. The Department firmly believes that there are better uses in our criminal justice system to which a $6 million per year budget can be put than the attempted perpetuation of an institutional anomaly with only a name change to conceal it.

H. Appellate Review of Sentences.

H.R. 4554 also falls far short of reform standards in permitting a defendant to appeal a sentence above, within, or below the guidelines for the purpose of reducing it, but in not permitting a sentence below the guidelines to be appealed by the government on behalf of the public. It is very important to recognize that sentencing disparity today runs in two directions. If there is to be any appellate review at all to rectify that disparity, we believe that review on behalf of the public of unusually low sentences is essential to achieve balance. Just as defendant appeal of sentences above the guideline range will permit the development of a body of case law concerning the circumstances under which an unusually high sentence is appropriate, so will appeal on behalf of the public with regard to sentences below the guideline range permit the development of case law concerning circumstances under which an unusually low

sentence is appropriate. The Constitution interposes no barrier to appellate review at the instance of the government.[13] A genuine reform proposal must contain both.

We also note that H.R. 4554 explicitly permits a defendant to appeal an illegal sentence but does not state that the government also has that right. This lack could be subject to the unfortunate interpretation that the government does not have this right -- a right that it clearly has under current law and which it exercises to prevent the thwarting of congressional intent in sentencing matters. For example, we have invoked a right to appeal or petition for a writ of certiorari to correct illegal sentences in cases in which the sentencing judge has failed to order criminal forfeiture or restitution in contravention of statutory mandates. We see no reason for even implying that the government might not be able to seek appellate review in such cases.

Finally, we note that H.R. 3128, introduced at the request of the Judicial Conference of the United States, provides appellate review of sentences at the instigation of either the government or the defendant in appropriate cases. We heartily concur in the recommendations of the Judicial Conference on this important issue.

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[13] See United States v. DiFrancesco, 449 U.S. 117 (1980).

I. Restrictions on the Imposition of Civil and Employment Disabilities Resulting from Conviction

Both H.R. 4554 and H.R. 4827 would add a new chapter to title 18 concerning the imposition of, and relief from, certain civil and employment restrictions resulting from criminal convictions. In general, these proposed provisions involve a variety of controversial issues which are not relevant to sentencing. In fact, these provisions concern persons convicted of offenses who are well past the sentencing stage and in some cases beyond serving the sentence imposed. In our view, the entirely separate concerns surrounding civil disabilities should not be reflected in a sentencing bill. They deserve serious consideration in a separate context. Considering this fact, and the many difficulties presented by the provisions in the bills, we strongly recommend that they be deleted from H.R. 4554 and H.R. 4827.

The most salient problems with the proposed disabilities provisions are as follows. First, the bills provide that restrictions on the eligibility of convicted persons for federally financed or administered programs, benefits, or activities, may only be effective for five years following completion of sentence. The five-year period would undermine law enforcement efforts in a variety of areas. For example, under 5 U.S.C. 8312 a federal employee convicted of certain serious offenses may not be paid an annuity. Under the provisions of the above bills, however, such annuity benefits would have to be paid after five

years following service of sentence. Likewise, the firearms and explosives disabilities resulting from conviction under current statutes, which carry no time limitation, would be limited under the bills to five years' duration -- a result which we believe is insupportable on policy grounds.

Second, another provision of H.R. 4554 and H.R. 4827 would prohibit federal, state, and local government agencies from restricting eligibility for employment on the basis of a person's conviction of a federal offense, subject to certain exceptions set forth. One major difficulty with this provisions is that it applies to employment with a state or local agency, as well as to employment with the federal government. In our view, this raises substantial constitutional questions, since the mere fact that a person seeking employment with a state or local agency was convicted of a federal felony would not seem to be a sufficient basis, under the Tenth Amendment, for a federal statute purporting to establish how state or local governments must treat the conviction for purposes of state or local government employment. See National League of Cities v. Usery, 426 U.S. 833 (1976).

Moreover, although an exception is included in the bills for employment with law enforcement agencies, no exception is provided for employment in a national security agency or for any government position requiring a security clearance. Such an exception is clearly warranted and essential, in our judgment.

Lastly, H.R. 4554 and H.R. 4827 would create a mechanism by which convicted persons who have not had any other felony convictions may obtain a court order relieving them from the disabilities arising from the conviction. The only criteria or limitations regarding the issuance of such orders are that: (1) no such order may have been issued as to another conviction of the applicant; (2) no criminal prosecution may be pending against the applicant; (3) the application must be made not sooner that three years after the service of sentence upon conviction of a felony (one year in the case of a misdemeanor); and (4) the court must determine after a hearing that the order would be "in the public interest".

The effects of such an order, which would remain operative so long as the individual is not thereafter convicted of a felony, would be to prohibit the disclosure by a government employee of any records or information reflecting the prior conviction except in limited circumstances, including disclosure to a government agency for national security purposes and to a law enforcement agency for employment screening or criminal investigation. In addition, an individual who has obtained such an order may lawfully refuse to acknowledge the relieved conviction, even under oath.

This is, to say the least, a most disturbing provision. We are concerned at the implications of conferring broad, discretionary powers upon federal judges to relieve first-time

offenders, including felony offenders, of various collateral effects of their conviction following a relatively short period after service of their sentence.

Following a court order as contemplated under the bills, a public servant could not, for example, truthfully answer an inquiry from a prospective employer (other than a law enforcement or national security agency) as to the person's criminal record. Thus, a convicted but "relieved" embezzler could apply for a position as a teller at a bank, or seek admission to the bar, or a convicted sex offender for a position as a school bus driver, without the fact of his or her prior conviction being brought to the attention of the employer. We regard the policy permitting such results to be extremely unwise.

No less disturbing is the provision that would permit a person in possession of a court order to make a statement, whether or not under oath, failing to admit the prior conviction. We no not believe it is proper to enact legislation that, in effect, permits an individual to lie about the fact of a prior conviction so as to avoid otherwise applicable penalties for perjury or false statement. In our view, the interests of encouraging rehabilitation of offenders do not warrant the enactment of such drastic provisions with the potential for causing public harm. Nor do we believe that judicial discretion in this context is a sufficient safeguard, given the bills' inexact and broad criteria upon which a relief order may be predicated.

J. Miscellaneous Provisions of H.R. 4554.

As a final matter, we point out that H.R. 4554 and H.R. 4827 differ from our proposal as reflected in S. 1762, S. 668, H.R. 2151, and H.R. 3997 in numerous respects with which we disagree. I would like to highlight a few of our objections.

First, we have a number of problems with the probation provisions. They fail to include a requirement, which we recommend, that a felon placed on probation be required to pay a fine, make restitution, or engage in community service. We see no reason why a convicted felon should ever be placed on unconditional probation. We also object to the fact that, contrary to present law (18 U.S.C. 3651) the bills would permit a person convicted of an offense subject to death or life imprisonment to be placed on probation. We fail to see how probation can be justified for such offenses even if there are mitigating circumstances; at least some prison term is warranted for any such offense if we are to promote respect for the criminal laws.

We are also troubled by the requirement that probationers must consent to conditions requiring that they undergo medical or psychiatric treatment or reside in, or participate in a program of, a community treatment facility. Although we recognize that a defendant's cooperation with some types of programs is important to their success, we see no reason to require that their consent be obtained to the imposition of any condition of probation that requires treatment.

Second, we strongly oppose the continuation of specialized facilities for young offenders. It has been the experience of the Bureau of Prisons that these specialized facilities cause substantial discipline problems because of the youth and energy of the offenders. Furthermore, the number of young offenders is sufficiently low that there are only a few youth facilities in the country -- with the result that the youngest offenders, those who most need to retain family ties, are often the furthest from home of any federal prisoners.

Third, we strongly object to the deletion from the provisions concerning appeal by the government in criminal cases, currently 18 U.S.C. 3731, of the provision calling for liberal construction of the statute to effectuate its purposes. That provision has been cited to sanction government appeal in criminal cases when it is not barred by the double jeopardy clause, including government appeal of illegal sentences. See, e.g., United States v. Wilson, 420 U.S. 352 (1975); United States v. Martin Linen Supply, 430 U.S. 564 (1977); United States v. Godoy, 678 F.2d 84 (9th Cir. 1982); United States v. Hetrick, 644 F.2d 752 (9th Cir. 1981). We strongly recommend the retention of the provision in current law calling for a broad interpretation of the provision.

Fourth, both H.R. 4554 and H.R. 4827 would curtail the ability of a probation officer, without a warrant, to arrest a person under the officer's supervision for a violation of a court-ordered condition of probation, other than in a situation

in which the officer had probable cause to believe that the person had committed a federal or state offense and the offense was committed in the officer's presence or exigent circumstances existed that made obtaining a warrant impractical. By contrast, under 18 U.S.C. 3653, a probation officer is authorized to make a warrantless arrest of a probationer for a violation of any condition of probation rather than merely issue a summons as required under H.R. 4554 and H.R. 4827. We believe current law is preferable. It is carried forward in the Senate-passed bills and in H.R. 2151 and H.R. 3997. The broad arrest authority is a recognition of the fact that prompt steps may be needed to protect the public and the probationer if it develops that the judge's belief that the probationer could be rehabilitated through probation has been misplaced. See _United States_ v. _Allen_, 349 F. Supp. 749 (N.D. Cal. 1972).

CONCLUSION

No single area of the federal criminal justice process is as much in need of reform as sentencing. As noted earlier, the present indeterminate system is based on an outmoded and disproven rehabilitative theory; includes virtually no guidelines or principles to assist judges in imposing sentence; anomalously in our system which allows appeals of almost every other significant decision, permits no appeal of even the most unreasonable sentence; allows for subsequent "second-guessing" and, in effect, reimposition of sentence, on the same facts available to the judge at the time of the initial sentence, by an executive branch

Parole Commission; and consequently produces in totality, an irrational and inequitable system in which the public is deceived because the length of the sentence imposed bears little relation to the sentence served. Gross and unwarranted disparity in sentencing exists unchecked by the operation of any legal mechanism. As the title of Judge Frankel's well known book perhaps most succinctly expresses it, the federal sentencing system today is "law without order".

Yet the means to correct this situation exist. Sentencing legislation, developed over the past on a bipartisan basis and pending in the House, would bring principle to the sentencing process and eradicate unwarranted disparity by substituting for the present hodgepodge a determinate sentencing system. This system would: establish meaningful guidelines to aid courts in imposing a rational sentence; permit appeal of sentences outside the guidelines as a further guarantee of consistency and rationality; do away with the Parole Commission's redundant and counterproductive function of granting parole and thereby effectively resentencing a defendant already once properly sentenced by a judge; and in sum restore certainty, finality, and fairness to the judicial sentencing function. Two of the bills that would accomplish these goals have, as previously noted, passed the Senate by overwhelming, bipartisan votes and are pending in this Committee (S. 1762 and S. 668). Two other bills, which are identical to the Senate-passed measures in philosophy and basic provisions and differ only in relatively minor details

(H.R. 2151 and H.R. 3997) are also pending before this Subcommittee. In contrast, none of the four bills on which this Subcommittee specifically solicited our comments would come close to achieving the kind of reform that we view as essential; and in fact, three of the bills, H.R. 2013 H.R. 4554, and H.R. 4827, in our judgment, would not only fail to institute beneficial changes through their adherence to the current unsatisfactory "indeterminate" model, but would substantially worsen the unsatisfactory state of current federal sentencing law in the respects previously described. These bills would, moreover, as a consequence of their anti-imprisonment and defendant-oriented philosophy, actually, even if not intentionally, pose a threat to the public safety. We therefore view these bills as completely unacceptable.

We see no reason why the same bipartisan consensus forged in the Senate cannot be replicated here. We pledge our utmost efforts to work with the Subcommittee to reach the goal of overhauling our nation's sentencing laws and installing a sound sentencing system predicated on principles that will both eliminate unwarranted inequalities in the imposition of sentence and at the same time fully serve the purposes of sentencing including adequate protection of the public. Toward that end, we urge the Subcommittee, as a necessary first step, to adopt as its working draft one of the four "determinate" sentencing bills pending before it.

Mr. Chairman, that concludes my prepared remarks and I would be happy to try to answer any questions from the Subcommittee at this point.

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