

SENTENCING PRACTICES AND ALTERNATIVES IN
NARCOTICS CASES

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HEARING
BEFORE THE
SELECT COMMITTEE ON
NARCOTICS ABUSE AND CONTROL
HOUSE OF REPRESENTATIVES
NINETY-SEVENTH CONGRESS

FIRST SESSION

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CONTENTS

THURSDAY, JUNE 4, 1981

	Page
Testimony of Jim Smith, attorney general for the State of Florida.....	5
Prepared statement of Attorney General Jim Smith.....	8
Testimony of J. Marshall Coleman, attorney general for the Commonwealth of Virginia.....	14
Prepared statement of Attorney General J. Marshall Coleman.....	15
Testimony of the Hon. William Hungate, U.S. District Judge, Eastern District of Missouri.....	29
Testimony of Joe Casey, chief of police, Nashville, Tenn.....	38
Prepared statement of Chief Joe Casey.....	42
Written statement of Mr. Cecil McCall, Chairman of the U.S. Parole Commission.....	51
Testimony of Cecil McCall ^(III) --- 84582	53
Statement of Cecil McCall --- 84583	86

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IN NARCOTICS CASES**

THURSDAY, JUNE 4, 1981

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL,
Washington, D.C.

The select committee met, pursuant to notice, at 9:35 a.m., in room 2212, Rayburn House Office Building, Hon. Leo C. Zeferetti (chairman of the select committee) presiding.

Present: Representatives Leo C. Zeferetti, Frank J. Guarini, Tom Railsback, Robin L. Beard, Lawrence Coughlin, E. Clay Shaw, and Robert K. Dornan.

Staff Present: Patrick L. Carpentier, chief counsel; Roscoe L. Starek, III, minority counsel; Jennifer Salisbury, assistant minority counsel; Edward Jurith, staff counsel; George Gilbert, staff counsel; John Thorne, investigator; and C. Robert Pfeifle, press officer.

Mr. ZEFERETTI. Good morning, ladies and gentlemen.

This morning the committee will conduct a hearing on the critical issue of sentencing practices in narcotics prosecutions. I am sure that all of the witnesses who will testify here this morning agree with me that the swift and certain imposition of penalties on those who traffic in narcotics and other controlled substances is government's clearest signal that it will not deal lightly with these merchants of death and human destruction.

Our inquiry this morning will focus on a wide range of sentencing issues. The committee wishes to examine whether in fact the present use of intermediate sentencing, especially on the Federal level, imposes sufficient punishment on major drug traffickers serving as an effective deterrent to others or whether the increased use of definite terms of imprisonment is necessary.

We want to probe into the use and potency of the continuing criminal enterprise and racketeer-influenced and organized-crime statutes against major traffickers and their assets on one hand and the employment of sentencing alternatives for selected first offenders on the other. A further important consideration in the committee's study is the effect that any changes in the present sentencing structure will have on the judicial, correctional, and parole systems.

This raises the question of whether the establishment of a specialized narcotics court within the Federal judicial system would facilitate the prosecution of narcotics cases, bringing uniformity to bail and sentencing decisions and developing the expertise needed to prosecute the complex aspects of a major trafficking case; the tracing of assets and the forfeiture thereof.

It should be noted that the call for this hearing came from a member of this committee, our colleague, Robin Beard of Tennessee. Responding to reports concerning the early release of persons convicted in a major trafficking case, Mr. Beard asked that the committee hold hearings on sentencing practices.

I wish to make it unequivocally clear that it is not the objective of this hearing to delve into the facts or the propriety of actions taken in any particular case. I am sure that all of us can point to circumstances in which judicial sentencing authority has been too lenient in some drug prosecutions while too harsh, especially with first offenders, in other cases. Our aim this morning is to have a frank discussion regarding sentencing practices with a view toward developing recommendations to the appropriate legislative committees of the House as to what changes and resources are required to make punishment certain and deterrence a reality.

Before we begin testimony on this important subject, I wish to make one observation. Punishment, albeit an important weapon in combating drug abuse and trafficking, will not alone solve the problem of drug abuse in our Nation. While the certain incarceration of traffickers is necessary in the fight to rid us of this awesome disease, it only answers half of the problem. We must realize that incarceration of traffickers does not overcome the very real and staggering demand for the use of drugs by our society. A strong commitment must also be made for effective rehabilitation, treatment, and education programs if we are to reduce demand for the use of illicit drugs and thereby eliminate the market and vast profits the traffickers thrive on.

Before we begin testimony this morning, I would like my colleagues who may wish to make opening remarks to do so at this particular time.

Mr. BEARD. Thank you, Mr. Chairman. I wish to join with you in welcoming such distinguished witnesses to our hearings this morning.

During the course of my tenure with this committee, I have become increasingly concerned that our criminal penalties and sentencing laws do not deter drug traffickers from engaging in the lucrative drug-smuggling business. I am pleased, Mr. Chairman, to have this opportunity to question the witnesses about this issue:

First to determine how severe the problem of judicial leniency is; and

Second, to discuss alternatives to our present system.

Just recently, two incidents occurred which clearly illustrate how weak our sentencing laws are. In 1979, 5 men were convicted of smuggling 25 tons of marihuana into Virginia. At the time of their arrest, these men also had \$1.7 million in cash in their possession. The presiding judge sentenced the offenders to prison terms ranging from 10 years to 20 years, but last month the judge ordered the early release of three of the men. Of the three released, two had served less than a year in jail. The third had served only 13 months. Late last year in another case, several men were arrested and charged with conspiring to import 2,937,000 Quaalude pills and 7,500 pounds of marihuana into Florida. One of the men pleaded guilty to the charge, and in February a U.S. District Judge gave

the man a sentence of 5 years probation. He did not serve 1 day in jail.

I am appalled by these obvious abuses of judicial discretion, not only because I feel that the efforts of the police and the prosecutors to enforce the laws were severely undermined, but also because I am afraid that these incidents are not isolated cases. In fact, these cases could well prove to be the norm rather than the exception. Under our current Federal sentencing scheme, a first-time offender convicted of trafficking in tons of marihuana and kilograms of cocaine or heroin can expect to receive a prison sentence of 3 to 5 years and be eligible for parole after serving a year to a year and a half.

This is outrageous; all the more so because these drug smugglers often have millions of dollars in narcotics profits waiting for them when they get out of jail.

If we are to ever make a meaningful dent in our national drug abuse problem, we must reduce the incentive to participate in the narcotics business by significantly increasing the risk of conviction and certainty of long prison sentences. This may require amending our criminal laws so that judges and parole boards will no longer exercise broad discretion in determining how long a convicted drug smuggler will stay in jail. People who import and deal in dangerous drugs are as great a threat to our society as any invading army. The poison they push results in literally thousands of ruined and destroyed lives, particularly of the young.

I think it is time to declare an all-out war on drug traffickers, time to put them in prison and make sure they stay there. We need to make certain that no judge or parole board can undermine society's attack on drug pushers by letting them out of jail after some ridiculously short time. I hope to hear from our witnesses today on how we can rewrite our laws to stop this type of judicial sabotage of the law enforcement effort.

Thank you, Mr. Chairman.

Mr. ZEFERETTI. Thank you. Mr. Railsback?

Mr. RAILSBACK. Mr. Chairman, I don't have anything to say except to commend you for holding the hearings and also to say that I think that Mr. Beard has done the committee a real service by pushing for these hearings. I want to commend Mr. Beard.

Mr. ZEFERETTI. Thank you, Mr. Railsback. Mr. Coughlin?

Mr. COUGHLIN. Thank you, Mr. Chairman.

I join in commending you for holding these hearings, and our colleague, Robin Beard, for his interest in this subject. Certainly the certainty and proximity of substantial punishment in the drug field and other fields is a major, major problem in our criminal justice system today, and I know when we recently had some jurists and other people in the field from Colombia here, a country where we are trying to discourage them from growing these products, and at the same time they don't have any problem in their own country and they ship everything here, that has to be, it seems to me, because of the certainty and the proximity of punishment in these other countries that they don't have the kind of problems that we do.

Thank you, Mr. Chairman.

Mr. ZEFERETTI. Thank you. Mr. Shaw?

Mr. SHAW. Mr. Chairman, I would like to echo the praise that has been put upon you and I would like to say that as a minority member, and particularly as a freshman member of this select committee, I am particularly impressed by the nonpartisan way that we seem to be going about trying to find the solution to many of the problems.

Of course, I am particularly sensitive to this problem, being from the State of Florida, where we find that our economy is even becoming more and more affected by the flow of drugs. We see the economy of other countries, as has been pointed out, that have become more drug-dependent. I think that points out the urgency that we do establish a total Federal commitment to the elimination of drugs in this country if we are ever going to be able to stop this problem.

Mr. ZEFERETTI. Thank you, Mr. Shaw.

I thought we would get started by calling up the first two witnesses as a panel. They are two distinguished gentlemen and two distinguished attorneys general, the one from the State of Florida and the other from the Commonwealth of Virginia.

For an introduction of the attorney general of the State of Florida, I want to defer to my colleague, Mr. Shaw, for that introduction.

Mr. SHAW. Thank you.

It is a tremendous pleasure and honor for me to be able to introduce the next witness. We go back many years, having attended law school together, back at Stetson University a number of years ago. We first of all practiced in the city of Fort Lauderdale together for many years, but I think perhaps what I would like to say about my good friend, Jim Smith, this morning is, I know of no State elected official in this entire country that has spent more time in combating the problems and the spread of drugs than has the attorney general of the State of Florida, Jim Smith.

I think with that introduction, perhaps that is all that is needed as far as this committee is concerned. Jim, I am particularly grateful to you for what you have done for the State of Florida and what you are trying to do for the entire country and the tremendous amount of time and effort that you are spending on this most important subject.

Mr. ZEFERETTI. Thank you. If I might, although I am not from the State of Virginia, I would like to introduce and ask to step up to the table, also as a member of the panel, the attorney general from the Commonwealth of Virginia, J. Marshall Coleman, who has distinguished himself not only in the area of prosecution of those in drug trafficking, but in keeping his jurisdiction in such a way that I think he could add to this hearing this morning by giving us the kind of information that is so imperative if we are ever going to have an impact on this overall problem.

I welcome you both, really, and I thank you sincerely on behalf of the committee for spending this time with us.

Mr. Smith, I had the good fortune of having you in my office and going over some of the legislation that we thought was necessary on the Federal level a while back, and I really appreciated that meeting and I appreciate the opportunity for you to be with us this morning.

We can start in any manner. If you have statements, we will take them as part of the record, without objection, and you can feel comfortable in going in any direction you want.

TESTIMONY OF JIM SMITH, ATTORNEY GENERAL FOR THE STATE OF FLORIDA

Mr. SMITH. Thank you very much, Mr. Chairman.

I have a brief statement I would like to read. There is a more detailed statement I have given the committee for the record.

Clay, I appreciate very much that introduction. When you made reference to our law school days, I didn't know if you were going to start telling some stories that both of us are happy to forget, or not.

Mr. SHAW. No; there is even honor among politicians.

Mr. SMITH. We in Florida are delighted with the attention that the Congress and the administration are now giving the drug problem. I have said many, many times that we can win the drug war in this country. It will take a very strong national commitment which has been lacking, I think, and the main reason that the bad guys are winning this war right now.

As you know, it is the No. 1 crime problem in my State, unfortunately for me, to say that it is the largest single commercial activity in Florida today. We have no expectation of changing that situation or preventing it from getting worse without substantial help from the Federal Government. We have been greatly encouraged by the receptive and cooperative attitude of the Reagan administration and officials in the White House, and by the attitude of the Congress.

The concentration of smuggling activities in Florida has been accompanied by a steady increase in the overall rate of crime. Last year while the national increase was 10 percent, the rate for Florida was 18 percent, with a 27 percent jump in violent crimes alone. Much of this increase is attributed to the criminal activities surrounding the smuggling business: Turf wars, payoff disputes, and murders to silence witnesses.

Florida's controlled substance laws were substantially strengthened in 1979 in response to the circumstances that I have just outlined. The legislature enacted a schedule of mandatory penalties for various degrees of trafficking that have given Florida one of the toughest antismuggling laws in the Nation.

The mandatory penalties are determined by the type of contraband and which, of three degrees of seriousness based on amount of contraband, are specified in the conviction. Under the Florida statute, depending upon the ounces, pounds, or tons of the drug, an individual can be sentenced from 3 to 25 years. The law says these sentences may not be suspended, deferred, or withheld, and that no person convicted shall be eligible for parole before serving the minimum mandatory.

This law, a copy of which we have given to the committee, was followed in 1980 by a statute that I think gives us the full array that we need to win this battle at the State level by denying postconviction bail to smugglers.

An important feature of Florida's mandatory sentencing law is a provision allowing reduction of sentence for defendants who pro-

vide substantial assistance in the identification, arrest, or conviction of accomplices. The purpose of this section, obviously, is to penetrate the protective curtain of anonymity that surrounds the barons of the smuggling syndicates.

Florida has not had an opportunity, as yet, to fully evaluate the effectiveness of this law because it was sidelined, more or less, by constitutional challenges during 16 of the 24 months we have had it on the books. The basis of the challenge was a claim that the provision for reduction of sentence in return for substantial assistance was a violation of the equal protection clause of the U.S. Constitution. Florida's Supreme Court dismissed this claim in February in a unanimous decision.

We were confident that this would be the outcome, but the challenge had the effect of making judges and prosecutors reluctant to put strong cases at risk while the constitutional cloud existed. State authorities have made 30 cases in which the quantity of contraband would have permitted them to invoke the law; yet there have been only 3 in which defendants were sentenced under its provisions. There has, though, been a very interesting spinoff in this law being on the books. We have been told by authorities in Texas, Louisiana, and even California that they have noticed an increase in smuggling across their borders. In a significant number of cases where arrest resulted, defendants said they would have gone to Florida but changed destinations because of our minimum mandatory sentencing statute. This reluctance to face the State penalties has also been evident in joint Federal-State seizures in Florida. Suspects have attempted, or even asked in some situations, to be taken into Federal custody to avoid State prosecution.

The Texas Legislature, using the Florida model, has just enacted a schedule of penalties for trafficking aimed at professional smugglers, including a law like ours denying postconviction bail.

I suggest, Mr. Chairman, that the American coastline would look much more formidable to the syndicates and their mules if States and the Federal Government had such laws.

Terms of 3 to 5 years for drug trafficking are worth the risk when the money stakes are so high and the syndicates readily provide skilled defense lawyers; where things don't seem to be going well, passage out of the country to exile in luxury.

We must have State and Federal penalties that are uniformly tough and which contain strong incentives for defendants to assist in the prosecution of cases. Federal law has only recently been amended to increase penalties for large-scale smuggling; however, it is still painfully shy of carrying enough punch to constitute deterring the trafficking industry.

I am advised by prison officials in Florida that there is little likelihood that smuggling convictions under the mandatory law will have sufficient significant impact on the prison population to be a problem. I expect the same would probably be true relating to Federal convictions.

During the period in which Florida had 30 cases that would have fallen under the mandatory sentencing law, Federal drug enforcement agencies in Florida had 128 resulting in trafficking in our State. Considering Florida's standing as the Nation's leading importation State where Federal enforcement is concentrated, we can

see that the impact on Federal corrections would not be significant, at least under current conditions. The chief shortcomings of criminal justice everywhere today are lack of resources to arrest and convict and the absence of laws that fit the pattern of criminal activity.

It would be a serious oversight for this committee to propose tougher drug sentencing laws without accompanying statutes to reform bail procedures. Bail lost its significance long ago as a means of guaranteeing the appearance of drug defendants to stand trial. It is obvious to me that those engaged in trafficking are more concerned today with the price of bail than the length of sentence that might be imposed. The price of bail has become the price of freedom. In Florida's experience, bail of up to amounts like \$2 million have been an acceptable cost of doing business for a syndicate grossing \$100 million or \$200 million a year.

Florida's law denying postconviction bail to smugglers has in a number of cases resulted in cooperation by defendants in return for trial on lesser charges. Senator Chiles of Florida has introduced a bill, Senate bill 1253, that would establish conditions for denying bail to defendants who fall into certain categories. These would cover persons with previous narcotics offenses, persons on probation or parole, fugitives from justice, or those dangerous or likely to engage in further illegal activities.

I hope the Congress will seriously consider legislation of this kind and put an end to the farce of bail that exists in drug enforcement today. Likewise, Congressman Shaw and I have exchanged correspondence and information on bail statutes that I know he is considering for introduction.

Finally, I would like to mention the usefulness of RICO prosecutions in putting a financial bite on smugglers. The two-attorney RICO unit in my office has recovered more than \$1 million, 10 times what that unit cost the taxpayers, in less than 2 years that it has been in operation. This law, which contains criminal penalties and allows civil forfeiture of assets obtained in racketeering can put a serious crimp in the incentive for engaging in smuggling, which is money. We have done it successfully. We intend to do more.

The committee may want to look at the Federal RICO law and consider what might be done there and begin utilizing it on a wider scale.

I would like to say again that Florida appreciates very much your attention to the serious problems that we face in narcotics enforcement. I think I can speak for all Southern States when I say that we need your help and are glad that it is receiving the attention that it is today.

Thank you.

The CHAIRMAN. Thank you, Mr. Smith.

[Mr. Smith's prepared statement follows.]

PREPARED STATEMENT OF ATTORNEY GENERAL JIM SMITH, STATE OF FLORIDA

Mr. Chairman and members of the committee, I appreciate the opportunity to testify today on Florida's sentencing practices in narcotics cases.

We, in Florida, are pleased with the attention Congress and the Administration are now giving the problem of drug smuggling.

As you know, it is the number one crime problem in my state and, unfortunately, its largest single commercial activity--an illegal trade said to be worth between five and seven billion dollars a year.

We have no expectation of changing that situation--or preventing it from getting worse--without substantial help from the federal government.

Working with other states, the National Association of Attorneys General and the National Federation of Parents for Drug-Free Youth, we have made a series of recommendations for federal action that are now under active consideration.

We have been greatly encouraged by the receptive and cooperative attitude of Reagan Administration officials at the highest level.

Because Florida is geographically convenient to the leading source countries of Latin America, it has the most pervasive drug problem of any state.

The Drug Enforcement Administration estimates that 40 percent of the domestic demand for recreational drugs is supplied through the Florida connection.

I have seen estimates that as much as 70 percent of the marijuana and 80 percent of the cocaine are moved or brokered through smuggling syndicates based in Florida.

I have no reason to doubt this when more than 1,300 pounds of high-purity cocaine worth \$150 million are seized by state agents in a ten-day period, and we are told only about one in ten such shipments are interdicted.

The concentration of smuggling activity in Florida has been accompanied by a steady increase in the overall rate of crime. Last year, while the national increase was ten percent, the rate for Florida was 18 percent with a 27 percent jump in violent crime.

Much of this increase is attributed to the criminal activity surrounding the smuggling business, such as turf wars, payoff disputes and killings to silence witnesses.

Drug money is also flowing into the legitimate economy through banks, real estate purchases and business investments that facilitate the laundering of cash. We do not know the full extent to which it is being used to corrupt public officials, but we have no doubt it is being done.

Florida's controlled substance laws were substantially strengthened in 1979 in response to the weight of evidence of the circumstances I have just described.

The Legislature enacted a schedule of mandatory penalties for various degrees of trafficking that have given Florida one of the toughest anti-smuggling laws in the nation.

These range from three to fifteen years imprisonment for marijuana importation beginning at 100 pounds; three to fifteen years for cocaine above 28 grams and three to twenty-five years for hard drugs such as morphine, opium and heroin.

The mandatory penalties are determined by the type of contraband and which of three degrees of seriousness, based on amount of contraband, are specified in the conviction.

Each conviction is accompanied by a mandatory fine as well, ranging from \$25,000 for 100 or more pounds of marijuana to \$500,000 for 28 or more grams of hard drugs.

The law says these sentences may not be suspended, deferred or withheld and that no person convicted shall be eligible for parole before serving the mandatory minimum.

This law, a copy of which I will leave with the committee, was followed in 1980 by a statute denying post-conviction bail to smugglers.

This is a powerful damper on the romance of smuggling, particularly for the professionals who would otherwise expect to be released on bail of virtually any amount within a matter of hours.

An important feature of Florida's mandatory sentence law is a provision allowing reduction of sentence for defendants who provide substantial assistance in the identification, arrest or conviction of accomplices.

The purpose of this section, obviously, is to penetrate the protective curtain of anonymity that surrounds the barons of the smuggling syndicates. These are the people we must reach in order to break the sophisticated smuggling chain that crosses international boundaries.

Florida has not had an opportunity as yet to evaluate the effectiveness of this law because it was sidelined, more or less, by a constitutional challenge during 16 of the 24 months we have had it on the books.

The basis of the challenge was a claim that the provision for reduction of sentence in return for substantial assistance was a violation of equal protection rights. The Florida Supreme Court dismissed this claim in February.

We were confident this would be the outcome, but the challenge had the effect of making judges and prosecutors reluctant to put strong cases at risk while the constitutional cloud existed.

State authorities have made 30 cases in which the quantity of contraband would have permitted them to invoke the law, yet there have been only three in which defendants were sentenced under its provisions.

There has been an interesting spinoff, however. We have been told by authorities in Texas, Georgia, Louisiana and even California that they have noticed an increase in smuggling across their borders.

Texas officials verified this activity by tracing the purchase of property along the Gulf Coast to suspected smugglers seeking privacy and closer control of their activities.

In a significant number of cases where arrests resulted, defendants said they would have gone to Florida but changed destinations because of the mandatory sentences.

This reluctance to face the state penalties has also been evident in joint federal-state seizures in Florida. Suspects have attempted to be taken into federal custody to avoid state prosecution.

It is evident that traffickers who know about the Florida law are reacting in a way that shows their fear of it. We intend, not that it has been constitutionally upheld, to use it to make Florida a state in which smugglers place themselves at considerable risk.

The Texas Legislature, using the Florida model, has just enacted a schedule for penalties for trafficking aimed at the professional smuggler, including a law denying them post-conviction bail.

I suggest, Mr. Chairman, that the American coastline would look much more formidable to the syndicates and their mules if more states--and the federal government--had such laws.

Those who deal in dependency and addiction, and who reach for the young to ensure future markets for their goods, will not be deterred by anything less.

The staggering profits of the drug trade are a lure to criminality that borders on addiction itself.

Time after time in Florida we have seen defendants who have been released on six-figure bail going right back to smuggling--and getting caught again.

The ability of the syndicates to recruit from every segment of the population, including the professionals, by holding out the temptation of instant wealth is insidious.

A law enforcement officer earning \$10⁰⁰⁰ to \$12,000 a year and pressured by inflation and high interest rates is hard-pressed to turn his back on a \$25,000 payoff that can be earned overnight.

Financial institutions caught in the interest crunch find it difficult to turn away multimillion dollar deposits about which no questions are to be asked.

Sellers of real estate, high-speed yachts, airplanes and specialized electronic gear find it easy, with the economy in its current slump, to deal in cash that smells of drugs.

Attorneys who show up in courthouses even before the charges are typed, and who participate in the formation of secret land trusts for the investment of drug capital, have the same problem.

We simply have to deal harshly with a criminal enterprise of such scope and which is so all-pervasive as to threaten the very fabric of society.

Terms of three to five years for drug trafficking are worth the risk when the money stakes are so high and the syndicates readily provide skilled defense lawyers or, if things don't go well, passage out of the country to exile in luxury.

This insures the continued anonymity of the syndicate bosses. And, as I have said, replacements are virtually standing in line to do the actual work of smuggling.

We must bring the risks into better balance with the rewards.

We must place the financiers of trafficking in greater jeopardy.

We must have state and federal penalties that are uniformly tough and which contain strong incentives for defendants to assist in the prosecution of others.

Federal law has only recently been amended to increase penalties for large-scale smuggling. However, it is still painfully shy of carrying enough punch to constitute a deterrent to the trafficking industry.

I am advised by prison officials in Florida that there is little likelihood that smuggling convictions under the mandatory law will have sufficient impact on prison population to be a problem. I expect the same would be true of federal convictions.

During the period in which Florida had 30 cases that would have fallen under the mandatory sentence law, federal drug enforcement agencies had 128 resulting from trafficking in Florida.

Considering Florida's standing as the nation's leading importation state, where federal enforcement is concentrated, we can see that the impact on federal corrections would not be significant--at least under current conditions.

In 1979, there were 7,200 felony drug cases taken up by the circuit courts of Florida. Of these, 40 percent were disposed of in convictions or guilty pleas and 51 percent ended in acquittal or with adjudication withheld.

This appears to be a considerable fallout, but the fact is many of these drug defendants enter the prison system under other charges arising out of the same criminal activity.

For example, in a sample of 139 inmates sentenced for felony possession of marijuana, 62 of the cases also involved burglary, 31 involved armed robbery and 46 such offenses as aggravated assault or sexual battery.

Prosecutors will frequently proceed with these charges when circumstances are such that convictions are more likely and the defendants will serve an equal or greater amount of time.

Today, the chief shortcomings of criminal justice everywhere are lack of the resources to arrest and convict and absence of laws that fit the pattern of criminal activity.

It would be a serious oversight for this committee to propose tougher drug sentencing laws without accompanying statutes to reform bail procedures.

Bail lost its significance long ago as a means of guaranteeing the appearance of drug defendants to stand trial.

It is obvious to me that those engaged in trafficking are more concerned today with the price of bail than the length of sentence that might be imposed. The price of bail has become the price of freedom.

In one of the largest drug cases ever made by the Drug Enforcement Administration in Florida, the principal defendant was a man named Jose Fernandez who lived in Vero Beach in a house valued at \$750,000.

Fernandez was indicted in New Orleans on federal charges. Bail was set at \$20 million, reduced to \$10 million and later to \$500 thousand by a federal judge who said agents had not produced evidence he would forfeit bail. The defendant quickly put up the money.

I don't have to tell you that this man, who is said to have accumulated \$30 to 40 million in his years as a smuggling baron, did not appear in court.

In Florida's experience, bail of up to \$2 million has been an acceptable cost of doing business for a syndicate grossing \$100 or 200 million a year.

Florida's law denying post-conviction bail to smugglers has in a number of cases resulted in cooperation by defendants in return for trial on lesser charges.

Finally, I would like to mention the usefulness of RICO prosecutions in putting a financial bite on smugglers. The two-attorney RICO unit in my office has recovered more than \$1 million--ten times its cost to the taxpayers--in the two years it has been in operation.

This law, which contains criminal penalties and allows civil forfeiture of assets obtained in racketeering, can put a serious crimp in the incentive for engaging in smuggling--which is money.

We've done it successfully. We intend to do more. The committee may want to look at the federal RICO law and consider what might be done to begin utilizing it on a wider scale.

I want to say again that Florida appreciates your attention to the serious problems we face in narcotics enforcement. I think all of the southern border states join me in that statement.

In fact, the Southern Conference of Attorneys General adopted a resolution several weeks ago urging development of a comprehensive federal policy toward drug enforcement. The work of this committee is an essential aspect of any such policy.

I am honored that you asked me to testify. If there is anything else I can do to assist the committee in its work, consider me at your service.

Thank you.

Mr. ZEFERETTI. Mr. Coleman?

TESTIMONY OF J. MARSHALL COLEMAN, ATTORNEY GENERAL
FOR THE COMMONWEALTH OF VIRGINIA

Mr. COLEMAN. Thank you, Mr. Chairman and members of the committee.

The epidemic of drug trafficking which Attorney General Smith has talked about is reaching into Virginia. We are not at the same stage that Florida is in, and we have not gotten this far in reforming our laws, but I am here today to say to this select committee that the major drug problems so common to urban localities across America and so pervasive in Florida are now being encountered up and down the eastern seaboard.

Illegal drug trafficking and the problems that are associated with it have hit Virginia with full force, and Virginia is moving quickly to step up our antidrug trafficking law enforcement efforts. For the past 3 years our office, the State police, and others have sought authority to call a statewide grand jury, immunity for key witnesses in major criminal cases, greater access to grand jury minutes for prosecutors, and other measures which would enhance our fight against multijurisdictional crime.

Now, with major drug smuggling operations using our State and with increased evidence of organized crime elsewhere in Virginia, I believe that our legislature will provide those tools to our law enforcement officials.

Since I have been in office, I have been working for statewide standards for sentencing in order to make punishment by our courts more certain and more fair. I think it is awfully important that people be punished not on the basis of who they are, or where they live, or what judge decides the case, or what jury comes in with a verdict, but solely on the basis of the crime. Obviously drug smuggling is a gravely serious crime. We estimate that in Virginia a third of our violent crimes are associated with drugs, and I believe that the people in our State are waking up to the fact that certain punishment is a real deterrent to crime and the time for uniform sentencing has come. I hope it has come for the Congress as well.

We are also formulating legislation which will reform Virginia's bail laws so that those who traffic in drugs cannot simply pay a large bail and then skip the State. We intend to challenge drug traffickers on every front, but drug trafficking is an international crime. The Federal Government possesses uniquely useful resources which can be used to effect the quick and efficient eradication of illegal drug traffic on our east coast before it becomes more firmly entrenched. If we do not, and illegal drugs continue to pour into our country, then we will have no choice but to wage the costly fight against drugs on every street corner in America.

Virginia needs your help. There are several pieces of legislation that are currently before Congress which will benefit us directly. We strongly endorse the repeal of the Percy amendment to the International Security Act of 1978 which prohibits the U.S. Government from providing aid to foreign countries for herbicide spraying of marihuana. We must repeal the posse comitatus statute which

prohibits our military from providing information about suspected criminal activity to domestic law enforcement authorities.

It is especially important that the Navy be authorized to assist fully with interdiction efforts on the high seas and that adequate provision be made for the efficient routine sharing of information with State and local authorities. We need Federal legislation which will allow, with people caught in major narcotics operations, the setting of bail at levels which are a realistic deterrent to skipping the country. We need to set minimum Federal sentences for drug trafficking offenses, penalties that are commensurate with the great suffering caused by these drugs.

I also believe that severe restrictions should be imposed on any parole for drug traffickers.

Finally, I want to stress the need, which I believe is urgent, for all of us to cooperate closely in pursuing our drug enforcement goals. Today, lack of coordination among Federal agencies has been a frequent impediment to enforcement efforts. There needs to be a much closer relationship between the various Federal agencies involved and top State and local law enforcement officials. We have established in Virginia an association of Federal, State, and local law enforcement officials that meets on a regular basis to try to coordinate. It has been beneficial to Virginia and I am sure it would be beneficial in other States.

The attorney general of Florida and the Legislature of Florida have been the cutting edge in showing us the way in all of this. I commend them for what they are doing and I commend this committee for taking an interest in this subject and I want to promise the members of this committee the full and immediate cooperation of Virginia in the efforts that you are undertaking.

[Mr. Coleman's prepared statement follows:]

PREPARED STATEMENT OF J. MARSHALL COLEMAN, ATTORNEY GENERAL FOR THE
COMMONWEALTH OF VIRGINIA

GENTLEMEN: It is not novel to acknowledge the serious problem which illegal drug traffic presents to this nation. I realize that for each of you, and hundreds of other officials across this country, how to halt this growing menace is an abiding daily concern, a top priority among your public tasks.

I am here today to tell you that the major drug problems so common to urban locales across America, and so pervasive in the State of Florida in recent years, are now being encountered up and down the coast of the eastern United States.

I am here to tell you that illegal drug trafficking and the problems associated with it have hit Virginia with full force.

I am here to say that Virginia is acting now to minimize and prevent illegal drug traffic and its varied harmful impact.

And, on Virginia's behalf, I want to ask this Committee and the Congress to fully appreciate the nature of the problem besetting the Atlantic Seaboard states and I want to ask for your cooperation in several specific ways.

First, let me stress the nature of the problem we are facing.

Illegal drug trafficking has become one of this country's largest industries. United States Attorney General William French Smith recently reported that the retail value of illegal drugs reached \$78 billion in 1978. At the rate this traffic has grown, the national retail bill for illegal drugs could now easily be over \$100 billion a year.

Illegal drug trafficking presents overwhelming problems to law enforcement officials.

Drugs feed violent crime. Dealers fight over its control. Addicts commit daily crimes in order to buy it. It's estimated that as many as one-third of all violent crimes are drug-related.

We cannot ignore the threat that large amounts of uncontrolled cash pose to the integrity of our criminal justice system.

And let us not forget the personal tragedy which drugs bring to the user and his or her friends and family. Let us not forget the reason these drugs are illegal in the first place. These substances are controlled and must remain controlled because of their devastating effect on an individual's health, on an individual's ability to function, on an individual's sense of responsibility toward others.

Now I do not pretend that drug traffic is rampant in the State of Virginia, or that we have experienced its impact as has, for instance, the State of Florida. But we have certainly seen the head of this dragon. Only last week, a Virginia State Police spokesman speaking before a legislative commission called drug trafficking "the No. 1 criminal problem in Virginia."

From its initial days last January, the administration of President Ronald Reagan has made action against illegal drugs a national priority. Presidential Counselor Ed Meese underscored this to me in a private meeting last month, in which I briefed him on the drug problem in Virginia and sought his help for measures I'm outlining here today. Only two weeks ago, the renewed commitment to this cause which is now evident in the Congress was emphasized to me when I met with Senate Majority Leader Howard Baker and solicited his assistance with Paraquat legislation.

Two groups with which I am affiliated, the National Association of Attorneys General and the State Drug Enforcement Alliance, have asked in loud, clear terms that federal attention be focused on the drug problem where it is growing fastest—in the "arc" of states reaching from California across our southern border to Florida, and then up the Atlantic Coast to at least the Chesapeake Bay.

In recent years, national drug enforcement efforts have centered on the heroin traffic from Southeast Asia. Although heroin is readily available in Virginia's cities, and its purity has substantially increased in recent months, the bulk of our illegal drug traffic, and that of our sister states to the south, is in marijuana and cocaine. In fact, these coastal states are now the primary beachhead for illegal narcotics coming into the United States.

I want to direct your attention to the Atlantic Seaboard and the rapid increase in drug traffic we've experienced since Colombia became the main supplier of marijuana and cocaine to the States. And I want to note that since the State of Florida has implemented effective drug enforcement measures, we are seeing a rapid increase in illegal drug traffic further up the coast.

Only two weeks ago today, Virginia State Police and Drug Enforcement Administration personnel seized 15,000 pounds of marijuana in a farmhouse near the James River, a major Chesapeake Bay tributary. It was believed to be part of a shipment from Colombia.

Last December, a Panamanian vessel with a Colombian crew ran aground at the mouth of the York River, also a Chesapeake Bay tributary, with about 20 tons of marijuana aboard.

In December of 1978, State Police seized 13,000 pounds of Colombian marijuana brought ashore from the James River, of a total shipment estimated to be 25 tons. About \$2 million in cash was also confiscated from those arrested.

Virginia is moving quickly to step up our anti-drug trafficking law enforcement efforts.

At both the state and federal levels, we need better legal instruments to fight violent crime, drug traffickers and organized crime. For the past three years, my Office, Virginia's State Police, and others have sought authority to call a statewide grand jury, immunity for key witnesses in major criminal cases, greater access to grand jury records for prosecutors, and other measures which would enhance our fight against multi-jurisdictional crime.

Now, with major drug smuggling operations using our state, and with increased evidence of organized crime elsewhere in Virginia, I believe that our legislature will provide these tools to our law enforcement officials.

Since my first day in Office as Virginia's Attorney General, I have been fighting for statewide standards for sentencing, in order to make punishment by our courts both more certain and more fair. I believe that people are waking up to the fact that certain punishment is a real deterrent to crime and that the time for uniform sentencing has come.

Though we oppose gun control, we already provide an extra penalty in Virginia for crimes committed with a gun. I've proposed further toughening of this statute, and I think we're going to get it.

I'm very pleased with the mandatory minimum sentence for drug traffickers which was recently passed by the legislature and upheld by the courts in Florida, and we're going to seek similar legislation in Virginia.

Drug traffickers must know that if they're going to commit the crime then they'll have to "do the time." Our judiciary needs to understand the gravity of drug offenses. With sentencing uniformity set by our legislature, with the educational

impact of public opinion, and with corrective processes within our state court system, I am confident that Virginia's judges will be imposing future sentences which are commensurate with the crime committed.

We're also formulating legislation now which will reform Virginia's bail laws so that those who traffic in drugs cannot simply pay a large bail and skip the state.

We intend to challenge drug traffickers on every front.

But drug trafficking is an international crime. The federal government possesses uniquely useful resources which should be utilized to effect the quick and efficient eradication of illegal drug traffic on our east coast before it becomes firmly entrenched. If we do not, and illegal drugs continue to pour into this country, then we will have no choice but wage the costly fight against drugs on every street corner in America.

Virginia needs your help and we need it now. There are several pieces of legislation currently before Congress which will benefit us directly.

(1) We strongly endorse the repeal of the Percy Amendment to the International Security Act of 1978, which prohibits the United States Government from providing aid to foreign governments for herbicide spraying of marijuana.

The repeal of the Percy Amendment is included in both the House and Senate authorizations for the Foreign Assistance Act. It passed the Senate earlier this week. It has passed the House Foreign Affairs Committee and I strongly urge you and your colleagues to support it on the floor.

This measure will allow the use of the effective herbicide Paraquat to kill marijuana crops in the field. Marijuana tainted by Paraquat may have some harmful effects on those who smoke it. For this reason, I hope that the herbicides used can be dyed or scented as a warning to those who may purchase and use marijuana which has been sprayed before harvest.

The funds for spraying Colombian marijuana should be made available immediately and arrangements facilitated with the Colombian government. It is far easier and far less expensive to stop illegal drugs at their source. If Colombia seeks United States assistance in developing substitute crops in order to replace this export loss, then we should consider providing this aid.

(2) We must repeal the posse comitatus statute which prohibits our military from providing information about suspected criminal activity to domestic law enforcement authorities.

Both the House and Senate Armed Services Committees have voted to repeal this statute.

Although we do not wish for our military to become involved in domestic intelligence or law enforcement operations, their routine patrol of our borders and their capacity for surveillance represent an enormous potential for impeding the entry of illegal drugs by both sea and air. It is especially important that the Navy be authorized to fully assist with interdiction efforts on the high seas.

In repealing posse comitatus, adequate provision must be made for the efficient routine sharing of information with state and local authorities.

In addition to the repeal of posse comitatus, I would suggest to this Committee that consideration be given to assistance from the Central Intelligence Agency. Certainly information which they routinely develop could be useful to drug enforcement authorities.

(3) Interdiction or destruction of illegal drugs at the source costs only a fraction of what stopping an equivalent amount of drugs on the street costs.

Eradication of drugs in their source countries should be a top priority for the United States State Department and our embassies in these countries.

I support the provision of necessary resources to enable the Coast Guard to fully exercise its new authority to interdict drug smugglers on the high seas.

I would support legislation enabling the Federal Aviation Administration to assume specific responsibilities in reporting and intercepting planes used in drug smuggling, and in prosecuting lawbreakers.

The U.S. Customs Service is another strategically placed agency which can provide useful information on various international transactions.

(4) The full utilization of several appropriate federal agencies should constitute the most efficient means of using taxpayers' dollars to fight illegal drug traffic.

Congress should pass the legislation necessary to encourage the Internal Revenue Service to share with law enforcement authorities certain information indicating a crime may have been committed. Such changes in IRS procedures would aid law enforcement agencies in the investigation of major suspected narcotics traffickers.

Senate bill Nos. 732 and 1010 and House bill Nos. 1501 and 1502 would require that IRS take an affirmative role (acting with a court-ordered decree) when it has information that may be useful to the Justice Department.

Every American citizen has the obligation to inform law enforcement authorities should they have knowledge of a crime. The Internal Revenue Service, through its interpretation of the 1976 Tax Reform Act, has considered itself exempted from this obligation; Congress should clearly reject this notion.

(5) I welcome greater involvement in drug enforcement by the Federal Bureau of Investigation. More emphasis should be placed on seizing assets bought with drug money. The FBI has developed considerable expertise in tracking drug traffic cash. We may need broader federal legislation to allow the FBI and other agencies to more effectively seize drug traffickers' assets.

(6) I strongly agree with Attorney General Smith when he recently said that our war on drugs is being undermined by lenient bail procedures which let top suspected drug dealers flee prosecution at relatively low cost. Smith says that the Drug Enforcement Administration is now chasing 3,000 fugitives who fled after being caught the first time. DEA has only 2,000 agents.

We need federal legislation which will allow, with people caught in major narcotics operations, the setting of bail at levels which are a realistic deterrent to skipping the country. Perhaps bail should be set at the price which any confiscated drugs would sell for on the street. And we should deny bail pending appeal to people who have been convicted of major drug charges.

(7) We need to set minimum federal penalties for drug trafficking offenses—penalties commensurate with the varied suffering caused by these drugs. Severe restrictions should be imposed on any parole for drug traffickers.

Frankly, gentleman, from top to bottom, those persons pushing drugs in this country just do not perceive much risk in doing what they do. We need to change that with tough laws, tough enforcement, vigorous prosecution, and tough sentencing. And those of us with a sworn obligation to protect the public have a special responsibility to make our criminal justice system work.

(8) With all our drug enforcement activities, we must never neglect the inseparable relationship of narcotics racketeers and organized crime. Organized crime figures frequently call the shots in drug trafficking, bankrolling its operations and reaping its enormous profits.

Senate bill No. 814 and House bill No. 3268, the Organized Crime Act of 1981, designed to deal with organized crime and violent crime, is very supportive of federal and state drug enforcement and I support its passage.

(9) Finally, I want to stress the urgent need for all of us to cooperate very closely in pursuing our drug enforcement goals. To date, lack of coordination among federal agencies has been a frequent impediment of enforcement efforts.

There needs to be a much closer relationship between the various federal agencies involved and top state and local law enforcement officials.

I urge you to support and to assist the administration's efforts to establish a clear and workable delineation of the federal role in combatting illegal drug trafficking.

I promise you Virginia's full and immediate cooperation in all these endeavors.

Together we can succeed. Half-measures and separate efforts will not work. The scope and dimension of the problem should bind us to this task. Surely we cannot allow this corrupt, violent criminal industry to continue to flourish in our society.

Thank you.

Mr. ZEFERETTI. Thank you, Mr. Coleman.

I want to thank the both of you, really, for a very informative kind of testimony. We will start some of the questions. I am going to ask a few questions and then, if you will forgive me, I have to leave to go to another committee hearing and I will ask Mr. Beard to take over the chair at that time.

Let me ask the both of you: one of the things that we found in New York City was that the kind of mandatory sentences that the State imposed on drug cases or in prosecuting possession cases, that we found problems within the prison system and it had an impact on the whole criminal justice system overall because most of the cases that came before it had to be in its entirety, had trials and had to go forward. Nobody would bargain on those kinds of cases and nobody would have any plea-bargaining procedures to follow.

What is your feeling in getting on with plea bargaining on drug trafficking cases or drug possession cases, No. 1; and No. 2, what do you feel about the impact on the prison system overall?

Our problems have been that it is the city jail, the detention areas, that have had the biggest problems because they have been the ones that have been overcrowded. Second, they have been the ones that the Federal courts have created or have instituted mandates for those localities to comply with which they can't. There are minimum standards that they have to reach, and they have had that kind of a problem. So by creating a mandatory kind of sentencing procedure, with high bails and that kind, we have found an impact on detention areas and the criminal justice system overall.

I would just like both of you to touch on that kind of thing.

Mr. COLEMAN. Well, we have not gotten as far as Attorney General Smith has on this, but we find, with respect to the second question that about 40 percent of the people in the prisons in Virginia are there for nonviolent crimes. Now, that doesn't mean that we can release them or that we should. Many of them would have to be in jail or prison; I am satisfied of that. But I think the problem that we have identified is that no one is establishing the priorities of who ought to be behind bars.

We have a system in Virginia where we have to accept everyone that the local judges send to us. We have example after example of disparity, where a person in one part of the State gets a very long sentence for a crime that routinely is given probation in another part of the State. What we need to do, I think, in Virginia, with uniform sentencing, is to establish the priorities and say: "We have 10,000 spaces that are now available. Who do we want to go into those spaces? We want murderers, robbers, rapists, drug traffickers."

I think if we begin to establish the priorities up front we can handle the problem within the prison. What the general assembly has done in the past is to come in and release people early. For example, we had this a couple years ago. The general assembly came in and said that everyone that had not yet gotten parole would get out 6 months early, but the flaw in that was that the worst offenders were back on the street.

With respect to the second part, I like the idea of trying to have some sort of compromise between almost unfettered discretion, which is what we see in many States now, and mandatory sentencing, which leaves no discretion to the judge by establishing a system of presumptive sentencing which says that a prisoner must, or a criminal once convicted must be sentenced according to guidelines. There can be enhancements for his past offenses. There can be reductions for other factors. But in the final analysis, the serious offenders will go to jail and prison unless the judge will demonstrate in writing why that person ought not to go there.

The advantage of that to me is that it makes the exception very exceptional. It guides the hands of the judges, and if you look at our laws in any of the 50 States that have not yet adopted some system of mandatory or uniform sentencing, there really are no guidelines. The most important part of a trial to most defendants turns out to be how much time they are going to spend behind

bars, but it is a no man's land right now. There is nothing in the books that shows how much time a person should spend. I think if we guide the hands of our judges and give them a more rational way of sentencing, that we can accommodate our system to the needs in prisons and to the needs of plea bargaining.

Mr. ZEFERETTI. Don't you feel that kind of aspect, though, is going to lead itself to a little bit of fogging of the system? I don't know what kind of system you have in Virginia, but in New York, for argument's sake, everything comes out of the criminal court; everything comes out of one tunnel, so to speak, and there is really no classification of offense in that sense. Everybody that is coming through, the prosecutors go over the case and make a determination whether they want to go to trial or whether they want to take a plea and work it that way.

Unfortunately, under the drug provisions, it is mandatory that possession or trafficking in certain amounts, you are going to go to trial, which creates that kind of a problem for the prosecutors and for the district attorney's office to function, really, because there is a backlog of those kinds of cases.

Mr. COLEMAN. The prosecutors have spoken to me about this problem from the very beginning, and what we have done in the proposal that we have is to, I think, solve that problem. The prosecutors were concerned about two bites at the apple. We now have jury sentencing in Virginia. A lot of times a person will not take a jury because he is afraid the jury will give him a long sentence. Of course, the prosecutors have that as an advantage. They can ask for a jury themselves.

What we have done is to say that with the new uniform sentencing that a factor can be added or can be subtracted from the sentence for a guilty plea. I think that is constitutional, I think it is appropriate, and we can say to somebody: "You come in and plead guilty, you are going to do better. You are still going to have to serve time, but if you are convicted you are not going to get that credit at all."

Mr. ZEFERETTI. Do you think we should have a separate court?

Mr. COLEMAN. I don't think we need it in Virginia. I think that the courts that we now have can handle all of these cases and, in fact, the clogging of the courts in Virginia is not yet the problem that it is elsewhere.

Mr. ZEFERETTI. We have, under the mandatory structure, there is no plea bargaining. Here the first offender gets the same as those that have been involved in it over a period of time, and you are going to go to trial, you are going to go through the whole process.

Mr. COLEMAN. What I am trying to say, though, the suggestion that we have made is slightly different and Jim has some experience, so he can say better, but what we have tried to promote is the idea that we don't want to take all the flexibility and all the discretion out of the system; we think that you remove it one place, it shows up someplace else. There are less convictions. The charges are reduced. Somehow people are still getting discretion in the system if you take it all out in sentencing.

What we have said is that we want to provide guidelines. We want to provide a presumptive sentence which should guide the judges. They can subtract or add to it based on the factors, and

that one factor can be, if a person pleads guilty, he is still going to have to go to jail or prison, but he is not going to have to go for as long if he did not plead guilty and we believe that is constitutional and appropriate.

Mr. ZEFERETTI. Thank you.

Mr. SMITH, do you want to respond to that also?

Mr. SMITH. Yes, sir.

Overcrowding within the State prison system in Florida and at the jail level, city and county jails, is a tremendous problem in our State. We have one of the highest per capita prison populations in the country. I think we are third behind California and Texas. With the refugee problem we are experiencing now in southeast Florida, the county jails there and the State prisons in that area are tremendously overloaded. In fact, we had to go to the great extreme of filing suit against the Federal Government to try to get them to take some of those Mariel refugees into Federal custody, so it is a tremendous problem.

Our statute really, you know, if you are charged under trafficking there is no plea bargaining, and it is a 3- to 25-year minimum-mandatory sentence, but we think the problem is the extent in our State, that we have to approach it that way. Florida has been careful in the sentencing area. We don't have very many minimum-mandatory-type sentences across the board, but this is an area where we feel, to send a message that has to be sent to people that want to take the risk to engage in this kind of activity, the consequences when they are caught will be very, very severe.

We are committed in Florida, you know, to continue to build the kind of prison facilities we are going to have to have to take care of the problem. It is very expensive, \$30,000 to \$35,000 per bed to build a prison. We feel like we are going to have to build over the next 10 years to meet the needs that exist two 600-person facilities a year, so that tells you where our commitment is and our Governor is recommending those kinds of expenditures to our legislature.

Mr. SMITH. I hope you have better luck than we had.

Mr. ZEFERETTI. We are still fighting over where the location of the prison is going to be.

Mr. SMITH. We have that problem. I am going to Orlando Tuesday to kind of beat on their county commission a little bit about the need for a State facility there. Everybody wants them locked up but nobody wants them in their back yard.

Mr. ZEFERETTI. Nobody wants to spend the money, either.

Mr. SMITH. The other thing, though, that I think will get the politicians' attention, we have some counties in Florida now where for every inmate that is taken in, they have to release one or two, and the politicians have to start having to live with the consequence of a person who is released under a court-ordered cap like that going out and committing a violent crime, and with that blame being placed at their feet, they will start appropriating the money to build the cells.

Mr. ZEFERETTI. I would hope that you would take a look at my bill, which leads local government to that end and hopefully that kind of introduction would be accepted by all politicians.

Mr. BEARD?

Mr. BEARD. Thank you, Mr. Chairman.

Mr. Smith, you made the statement that the price of bail has become the price of freedom. This is something that I hear over and over again, and the case that you referred to in New Orleans where bail was set at \$20 million, reduced to \$10 million, and later to \$500,000, and the defendant quickly put up the money, and if I am not mistaken the defendant is no longer available.

What laws or what activities have taken place in Florida—and excuse me if I have not looked at your statement closely enough for the laws that you have on the books—but have you initiated a law to correct that situation?

Mr. SMITH. Our legislature passed last year a law denying individuals convicted under our trafficking statute any bail.

Mr. BEARD. I understand that.

Mr. SMITH. But we have a constitutional guarantee of bail pre-trial. We are looking at that with the thought of a constitutional amendment next year to modify—I think the District of Columbia has a bail provision that you have to go to court and show probable cause, you know, that the guy is not going to be there when it comes time for the trial.

We are looking at that. In the meantime, we are just trying to bring to the court's attention all of the horror stories, and it has happened, over and over, and over again in Florida, that you have got to set it at \$5 million or \$10 million or they will be gone. We have had up to \$1 million.

Mr. BEARD. Exactly. That is my point. I don't question the constitutional right of an individual, let's say, before conviction to be granted bail. The aspect that I am questioning is the ridiculously low bail for people dealing with hundreds of millions of dollars, that \$500,000 is just a drop in the bucket.

Would you recommend—and I would like to hear comments from Mr. Coleman also—that the Congress look at establishing some type of minimum bail, whether it be tagged onto the bail set as to the value of the contraband, or twice the street value, or try to discover some type of formula where they still have some type of flexibility but at least guarantee that these ridiculously low bails will no longer be the case?

Mr. SMITH. Perhaps some kind of a schedule could be worked out that would conform with the statute like ours, half the value, or whatever the street value of the drug might be, or something like that. It just shocks me that courts will continue to entertain bail-reduction hearings with the track record that has been established. I am just shocked that the court will entertain those kinds of hearings. There have just been too many stories of those people setting up shop down in South America or Central America, living like a king, and we know it is going to happen when they walk out of the courtroom. They laugh about it.

We have examples in Florida where a big load is coming in somewhere and the lawyer will show up in a little town the afternoon before to locate all the bail bondsmen so they can set up shop to get them out, \$100,000 or \$200,000 is just nothing.

Mr. BEARD. Have you had any situations in Florida where an individual lawyer representing a big drug dealer will come and try to negotiate with the county, contributions to the county or to a

charity, in efforts to have charges dropped? Have you ever had any precedent like that?

Mr. SMITH. We have some lawyers in Florida targeted, that represent some of the big boys in the drug business, and we feel like some of their activities perhaps can bring them into some kind of a conspiracy charge, and we are investigating a lot of things like that right now, so it is not appropriate for me to comment.

Mr. BEARD. I understand.

Mr. SMITH. It really was so absurd for awhile, to me, the situation where a lawyer will go into a small community the afternoon before a big load of pot is coming in to locate the bail bondsmen so his people won't have to sit in jail for a couple of hours. We are looking at some folks like that that we believe, with that kind of prior knowledge, might have to answer a conspiracy prosecution.

Mr. BEARD. Have you found that any of these attorneys operate out of more than just the State of Florida?

Mr. SMITH. Yes, sir; they get in their Learjets and go all over the place.

Mr. BEARD. Mr. Coleman, on the bail issue, do you have any comments?

Mr. COLEMAN. Yes, sir; one 30-second comment on the jail and prison problem. We, like the State of Florida, are experiencing problems with more and more prisoners as the demographic overload is reaching Virginia. But we have undertaken a real prison-building program. We have two new 500-man units that are going to come on next June, and we have three more in the planning stage.

Unlike what the chairman said, we found many of the communities are anxious to have them, that they fight over getting the prisons into some of these counties. I think that when you consider that our entire criminal justice system takes up less than 5 percent of the budget of Virginia, but yet concerns 99 percent of the people, that we are going to be able to build enough prisons to solve the problem.

On bail, I think that we have got to be sure that it is not simply a cost of doing business. Again, we have not been under siege for as long as Florida has, but we are seeing it happen in Virginia, where people will post bail and it is simply a business expense and we never see them again.

I am in favor of the next session of our general assembly reforming our bail laws to be sure that it is more than what it now is. I especially like the idea that Florida has come up with of denying bail for post-conviction appeals.

Mr. BEARD. Do you not think it would help if the Congress, in dealing with the Federal laws, could help set the example so we could maybe establish some type of consistency throughout this country?

Mr. COLEMAN. That is right, and that is one thing I forgot to bring out when I was talking earlier. The better job that the attorney general of Florida does, the tougher our job becomes, because what we are seeing happen is that Florida is now doing a very good job, I think, of dealing with the problem and people are starting to come up the coast further, to North Carolina, to South Carolina, and to Virginia, and we don't want to see it happen to us

there. We want to do these things before we get into the problems that Florida has suffered.

I think that if the Congress were to do it it would be helpful because we wouldn't have the case that the attorney general of Florida mentioned where people will ask to be taken into Federal custody rather than State custody.

Mr. BEARD [presiding]. Congressman Coughlin of Pennsylvania?

Mr. COUGHLIN. Thank you very much, Mr. Chairman.

Mr. Coleman, you expressed a preference, I guess I would say, for presumptive sentencing as opposed to a minimum mandatory sentence. I guess I wondered if you felt that presumptive sentencing carried the deterrent effect, perhaps, that a minimum mandatory sentence would carry.

Mr. COLEMAN. I think the problem with minimum mandatory sentencing is that criminals know what is going to happen if they commit certain crimes. They are not going to amount to anything, because the problem now is that people, I think, in Virginia and in other States, believe that there is always an out. There is parole, there is early release, there is probation, there is this judge, or that jury.

I think the advantage with presumptive sentencing is that it does not take away all the discretion from a judge and bind his hands, but it still designates certain crimes for which prison is the certain alternative. Now obviously we can't establish a system where everybody goes to jail for every offense, but I think we ought to designate the ones that they should go to jail and prison for.

I believe that presumptive sentencing is a much more workable system than mandatory sentencing because the experience with mandatory sentencing has been that discretion winds up someplace else. I know that in Boston that they had years ago a very tough mandatory law for carrying of firearms and they found a lot of people who were not criminal in any respect that had guns and had violated the law, and the result was that they would go to prison for it. You found that they got very few convictions then. In fact, even in Virginia we have a habitual offenders law, one of our few mandatory laws, for people who have a driving record that includes, among other things, three driving offenses under the influence.

You always see this shying away in cases of imposing that. I think there are two things you can do about it. One, I think, that we have improved in Virginia is by establishing a judicial inquiry and review board that is available to take corrective actions when judges don't follow the law. I think that establishing prison as the alternative for certain crimes but not establishing the precise sentence is a good alternative, and I think in other cases requiring that if a judge is going to depart from the guidelines that he has to justify that, and I would like to see the State have the ability to appeal that, because right now in Virginia if a judge releases someone who has committed a serious crime, I can't do anything about it and no citizen in Virginia can do anything about it.

I think that the double-jeopardy question ought to leave off once the conviction is determined. I think the question of sentencing can be a matter subject to appeal, and that is true in many States—or in some States, I should say.

Mr. COUGHLIN. Let me ask Mr. Smith only, do you actually have cases that you are aware of where lawyers go into a town in advance of a shipment, with knowledge that a shipment is coming in, and line up the bail bondsman ahead of time?

Mr. SMITH. That has happened in Florida; yes, sir.

Mr. COUGHLIN. That is an astonishing thing.

Mr. SMITH. It has been that brazen there, you know.

Mr. COUGHLIN. Wouldn't those attorneys be guilty of something or other?

Mr. SMITH. Well, we are looking at some of them real close. I hope that before too much time goes by that charges will be brought against some of these people.

Mr. COUGHLIN. They know a crime is about to be committed. I would guess that they would have to, to the extent of going out and arranging bail bonds, be guilty of something.

Mr. SMITH. The smugglers, they don't like to spend any time in those jails. I think the most delightful day that I had as attorney general was when a major criminal case was filed, and at the same time we filed a civil RICO action and were able to place liens on property, and houses, and cash that these people had to the extent that they couldn't raise their bail for several days, and they got to spend about 1 week in a very small county jail, and they were very uncomfortable. We hope that there will be more of that kind of thing in the future.

Mr. COUGHLIN. Do you feel that in Florida your mandatory minimum sentence law has had the effect of having judges reduce their rate of convictions?

Mr. SMITH. Well, the judges are not—I am not sure I understand your question. Not following the statute?

Mr. COUGHLIN. What I am trying to say is, do you find that convictions are less likely because of that law?

Mr. SMITH. No, sir; I don't think so. The judges are going to follow this statute. Because of the constitutional challenges the first 16 months it was on the books, prosecutors were reluctant to charge under it. We had about seven or eight circuit court judges that had declared it unconstitutional. Until we resolved that in the Florida Supreme Court, prosecutors just weren't bringing charges under it.

Now it is being used. We know that a lot of the unloading business is going to other States because of the stiff penalties. We are getting a lot of valuable information from people who are charged under this, and the only way they can have their time reduced is to provide us with information that will help in other prosecutions.

This is a very valuable tool that we think is beginning to work effectively and will work effectively.

Mr. BEARD. If the gentleman will yield, I would like to clear up one thing, because I know Mr. Coleman used the example of someone that is caught carrying a gun, that they had mandatory sentences in Massachusetts. You found some convictions not taking place because this man had a clean record.

But in your mandatory sentencing, you are talking about big drug pushers.

Mr. SMITH. Yes; that is the point. Our laws are not aimed at the casual user in any way. We start at 100 pounds of marihuana, you know, for a 3-year minimum mandatory; 10,000 pounds of marihuana would bring a 5-year minimum mandatory.

So it is aimed at the dealers, the big boys. It does not impact the casual user at all. The courts are not reluctant for that reason.

Mr. COLEMAN. Yes, sir; I would like to say I support that because I think he is exactly right. What I was trying to make a different point is you have got to be careful about the promiscuous use of mandatory sentencing, because you undermine the whole system. But when it is focused, as theirs is, on the dealers, I am convinced the judges would follow it. And I think we have remedies if they don't.

Mr. COUGHLIN. Thank you, Mr. Chairman.

Mr. SHAW. Mr. Chairman, I would also like to praise Mr. Coleman for the good work that he is doing in the area of drug enforcement. One of the things about living in Washington is you are constantly reminded of what is going on in Virginia. And I am glad you did make the point that what Florida does, does impact indeed upon Virginia, as it does the rest of the Nation.

You mentioned, I believe, in your testimony that 5 percent of the budget, State budget in Virginia is going toward the prison system.

Mr. Smith, do you have a comparable percentage, or do you know what it is with regard to Florida's budget?

Mr. SMITH. Florida spends about \$220 million a year on its State prison system, and we have about a \$9 billion State budget.

Mr. SHAW. It would appear to be substantially less than what Virginia is. I bring that up because one of the big, big problems that we have in Florida is not having kept pace, and my own county, Broward County, in the Fort Lauderdale area, is certainly one of those that is under one of the more severe jail caps that has been imposed by the Federal courts.

I would also like to say that I am particularly delighted to hear of the emphasis that Florida is now putting on the possible involvement of some attorneys. I think that, in the State of Florida, we have probably one of the best and most honorable bar associations of any State in the entire country. And I think that attorneys have been getting, in many instances, a bad rap, because I know in the years that I have practiced law that I found them, in most instances, to be extremely honorable.

However, I think that in order to maintain this, that it is necessary that we do have a very close vigil on those that are using the rights, the constitutional rights. And one thing that I feel is quite apparent is that to protect a defendant's rights, which is the responsibility of a lawyer, does not require him to slither down in the gutter with his client. This has happened, and it has happened far too frequently. And I think that perhaps the action that you are taking will get the vigorous endorsement of both the Florida and the American Bar Association, because I think that there are some attorneys who are abusing these rights and that they are actually entering into conspiracies.

I have even seen situations where there has been a tremendous amount of evidence that an attorney's fee can be predicated as a

percentage or a contingent fee on a successful operation of smuggling.

These are things which cannot be tolerated, and I think that those few that have abused the judicial system with the knowledge of an attorney should be dealt with as common criminals because that is exactly what they are.

Mr. SHAW. Attorney General Smith, if you would for one moment, I am familiar with the RICO system as it is in Florida. I don't know whether the rest of the—to the extent other people here on this committee have had experience with that. Could you expand on that just briefly, because I think this is something that is going to be sort of the wave of the future with regard to deterrent and being able to trace assets.

Mr. SMITH. Our State RICO statute is patterned after the Federal statute. Federal prosecutors, for the most part, have only utilized the criminal part of the RICO statute, and States that have RICO laws have used the civil forfeiture sections more than the Federal Government I made reference in my testimony that we got our legislature to create a civil RICO unit in my office less than 2 years ago. Those two lawyers in these cases are all tracing assets. It is very complicated, very time consuming, and you are always fighting some really good lawyers on the other side.

But in less than 2 years, they have recovered over \$1 million in four major cases, and have many, many other cases under investigation. It costs us \$100,000 a year to operate that unit. It is very cost effective, obviously, for recoveries of over \$1 million.

I think our legislature this year will give me—they are in conference committee now—six to eight additional lawyers, with the track record that we have been able to show them with just two.

But, again, when you can tie their assets up and take cash and the kind of recoveries we have had in cash, land and that kind of thing away from them, you really do hit them where it hurts the most.

One thing we have passed in our legislature this year, we have, as we got into these investigations, we keep running across secret land trusts, and have found that a lot of the drug people are hiding their land assets by utilizing the secret land trust. We passed a law that essentially establishes, let us place a lien like an Internal Revenue lien on the property and force the trustee, you know, to disclose to law enforcement units who the beneficiaries of that trust are. That law will be very, very helpful to us in civil RICO cases.

Mr. SHAW. I would like to just conclude my comments and questions with regard to this. I am extremely encouraged by the caliber of the gentlemen who are testifying. I think the entire thrust and direction of this particular hearing, I think there is a real message that can come out of it and will come out of it.

One thing that we all can agree on, as we do on many other things, is that we cannot overemphasize the immediacy of the problem, the emergency of the problem, and the need for this Government to take quick and all-out action.

Mr. SMITH. The drug war can be won without having to spend billions of dollars. If we can, I think, spend as little as \$200 million more at the national level than we have been spending and resume

spring operations in Colombia, places in Jamaica where they have asked for that kind of help to eliminate the drug at its source, we can, I think, within about 2 years, see a dramatic decline in illegal drugs entering the United States.

I want to echo what Clay has said, that it has been a bipartisan approach to solving what really is a national problem. I am a Democrat, but I have had great access to people in the White House to discuss this national problem and I am delighted at the kind of signals I see coming from the White House and from the Congress. I think more action has taken place in the last 3 or 4 months in terms of the repeal of the paraquat amendment, posse comitatus and things like that that send out the signals that need to be sent out and policy that needs to be established that will let us stem the flow of drugs coming into our country.

Mr. COLEMAN. Let me add just one thing to that. I couldn't agree more with what is happening in Washington is encouraging to us, because it is a geometrical relationship between the resources that are needed to stop the drug smuggling once they get to shore. What we find happens is a boat or a plane will come into Virginia and go up a river and go into one of the rural counties, and it will be spread like sand across the State.

If we could apprehend the boat as it is coming into the water, or the plane as happened in one case—we just happened to be in an airport when the plane landed. It was a complete coincidence. We were able to apprehend all of that, all of the people, and to get the contraband.

We had a case where the police opened up a suitcase and there was almost \$2 million in that suitcase. And I know that Florida can give you 100 examples for every one I can mention, but if we can have the cooperation of the Federal Government, through the Army and the Air Force and the Navy, and even the CIA, and also the State Department in spraying in the source countries, we could do more good than any single program we can take in an individual State to fight drug trafficking.

Mr. COUGHLIN. Let me join in saying we are really grateful in the committee for the caliber of the witnesses we have before us, people with the kind of experience you have and the kind of background that you have. It is a great help to this committee.

You mentioned, Mr. Coleman, in your statement a 1978 incident where the State police seized 13,000 pounds of marihuana. What happened to those people?

Mr. COLEMAN. Well that case is in court now. That is a sensitive matter which I have the responsibility for arguing the case next. It is something that we are going to seek to correct. It is strictly a State procedural point of whether or not a judge in Virginia can release people who have already been sent to prison and sentenced to stay there after they have gone.

It is a point of our Virginia law, and our argument is that they can't. Only the parole board or the Government can do that. And that is going to be heard by the Supreme Court next week.

Mr. COUGHLIN. How long did it take to bring them to trial initially?

Mr. COLEMAN. They initially were preparing a not guilty plea. Then, at the last moment, they pled guilty, and it didn't really take

much elapsed time between when they—it is a 1978 case. And they were released after they had served a year or less, and we didn't find out about that until several months later.

I would say there was not very much delay in having them tried and convicted the first time. Of course, now they are gone.

Mr. COUGHLIN. Mr. Smith, in Florida, what is the length of time between arrest and trial?

Mr. SMITH. We have a speedy trial rule that it seems many people get around. I have beaten my gums blue with the legislature this year trying to get more judges and prosecutors. Our system is broken down, it is so overloaded. On a per capita basis, we have far fewer police officers on duty in Florida than we had 5 years ago.

Our problem, really, is a tremendous population growth. We grew from 6 million people to 9.5 million over the last 10 years. That growth rate continues. Last year, we had about 38 million tourists visit our State. Unfortunately, some of them break the law while they are there. And we have an overloaded system. We have too much plea bargaining. We have to plea bargain or lose cases to comply with the speedy trial rule.

We have been urging our legislature that we have got to make up the 10 years of neglect that our system has suffered, that you can't increase resources in one part of the criminal justice system unless you do it across the board. There is about a \$250 million package that it appears our legislature will fund. But I caution people that that will get us back to the level we were at about 5 years ago. We still need tremendous resources.

State governments, I think, all over this country, are going to have to do what is being done at the national level, and that is very serious examination of programs. Unfortunately, a lot of things that governments have done for people, I think, are going give way so that government can get back to providing the most basic kinds of services that the public needs, and that certainly is public safety which, unfortunately, in many of our States today, we can't guarantee.

Mr. COUGHLIN. Thank you, Mr. Chairman.

Mr. BEARD. Thank you. I appreciate the cooperation of the witnesses, taking time from your busy schedules, and I think you have been a great help to the committee from your suggestions and your full statements. They will be submitted for the record. And hopefully we will be able to work with you in the future and be coming up with some good suggested laws to help make your job a little bit easier. So I thank you very much.

Mr. COLEMAN. Thank you.

Mr. SMITH. Thank you.

Mr. BEARD. We are very honored to have as the next witness the Honorable William Hungate, U.S. district judge, eastern district of Missouri, and a former colleague of ours.

Judge, we are delighted to have you here, sir.

**TESTIMONY OF HON. WILLIAM HUNGATE, U.S. DISTRICT
JUDGE, EASTERN DISTRICT OF MISSOURI**

Judge HUNGATE. Chairman Beard, Mr. Coughlin, it is nice to be with you. I wonder if that is a preview of things to come, Mr. Chairman. One never knows.

Mr. BEARD. This committee is a little bit different from other committees.

Judge HUNGATE. After hearing the prior witnesses, particularly the Florida testimony, I feel like I am in the minor leagues in Missouri. I have no desire to make the big leagues either.

It is a privilege to appear before a committee of the House, a body that I both respect and revere. I may have more affection for my family, I suppose, but they owe a great deal more to this body and the national heritage you hold in trust. Judges, Senators, Governors, and even Presidents may come to power through appointment or accession because of resignation or death; but no one becomes a Member of the House of Representatives that is not tested through election by the people. You accurately reflect the American people, warts and all.

I am only puzzled by how well the House functioned since I left it. As I have indicated, my staff played a large role, as they did when I was in Congress, in helping prepare my statement, and I would advise you that my senior law clerk is the niece of our former colleague, Al Quie of Minnesota. As I say, her judgment is excellent in all things but politics.

I would like to discuss, from my very brief experience as a district judge of about less than 2 years, how the sentencing appears from there. I was impressed with Mr. Coleman's statements concerning guidelines, parameters, or factors to be considered in sentencing, something the courts might be called upon to consider and weigh in sentencing.

I would say the most difficult job I have as a Federal judge, as I see it, is sentencing—"terra incognita," if those are clean words.

Now, I would take you along two paths, and one when they come in with a plea of guilty, of course. Now, under the Speedy Trial Act, that has been mentioned before, and some of these bail problems get to relating again to, I think, title II of the Speedy Trial Act.

But under that, there is basically a 70-day period in which they must be disposed of in the Federal system. The first 30 days is too quick, that is railroading. So, with minor exceptions, you can't do it in the first 30 days. So you, in effect, have a 40-day window in which to dispose of those criminal cases, and they take precedence over the rest of your docket, as I suppose they should.

You kind of get the feeling, I think, of how you go along there in other cases if you want a firm setting, this is a big case, lots of parties are coming from California, or wherever. It is all firm, maybe, except if you have the criminal matter that bounces in there, there is that 40-day period in which it must be disposed of.

Now, you will see I have filed with you what I have called exhibit A, which is right out of my "how to be a judge" form book. When you get a plea of guilty, it is very good when you get one, because other witnesses have mentioned the clog in the system. How, if defendants all took trials, how our dockets might back up and how many people we would add to the jail. We have the condition similar to what the prior witnesses mentioned in that our jails in St. Louis have been found inadequate and we have put them over in Illinois, probably 35 or 40 minutes away.

This leads to other problems that I will discuss later in the handling of business.

You gentlemen don't have time to go through exhibit A, but maybe your staff will sometime. As you go through there, you will find that somewhat tedious, and I wonder sometimes if some of the questions are best asked in an open courtroom. I see the reasons, "Are you under a psychiatrist's care? Have you taken narcotics? Have you had a drink in the last 24 hours?" I am glad they don't ask me that.

If we could rely, and I think we can, and if appellate courts thought we could, on the lawyers and defense attorneys performing this, some of these things you would rather tell people in a quiet room than in front of a room full of people.

You come on with a plea of guilty. The defendant persists in it even after all these questions, and he has got to answer them correctly. I would semiurge you to have your staff look over that rigamarole. It really becomes tedious.

After the finding of guilt, then, of course, you order a presentence investigation. Those are very helpful. I contrast pleas of guilty against those where you have a trial and they are found guilty, because that presentence investigation is the big picture, at least to me, when you don't have a trial. It brings you a lot of information. And what you have had is the defendant before you once, twice, three times would be a lot, to form an idea of what should be done with this person.

We believe we are blessed with a very capable probation and parole department in St. Louis. And that is the picture we get, we weigh that, and that contains recommendations normally as to how long they ought to be gone and what ought to be done with them.

Now, if you get a plea of not guilty, and they are later found guilty, of course, you are going to have a trial. And in narcotics cases, I can't vividly recall any where they wouldn't have a jury in that situation. They are going to want a trial. And the jury makes the decision. You sit there anywhere from 2 days to 2 weeks and hear sworn testimony, and people are cross-examined. In many of these cases, I would say half or more, the defendant will probably take the stand.

When you get that sort of a picture, you feel better able to make your own judgment. You still get the presentence report, and it is helpful. But you have another gage to apply in determining what the sentences should be.

We get those presentence reports. How fast do you get them? All of these little mechanical, practical things have an effect on sentencing, and certainly on the people before you. We get service within 2 weeks, which we think is very good, on the presentence report. We can act rather quickly.

Now, the court gets this presentence report in either situation, whether you have had a jury trial or whether you had a plea without a trial. You get this 1 or 2 days ahead of sentencing; that is our experience. That gives you a chance to look it over and it goes into the defendant's background. Some of you may have seen these reports. It contains some recommendation. And usually, I speak only for myself, I discuss that with the law clerk in my office, and I may discuss it occasionally with chief of the probation

and parole office in reaching some determination as to what sentence should be imposed.

Again, sentencing is the most difficult thing that I do. As to guidelines that are suggested, I would imagine most all of us would welcome such assistance. You sit in your office or take this home and study it over at night and then decide what ought to be done, and then you come to the courtroom, and there is mommy and daddy and the 8-year-old girl with the broken arm, and all this stuff, and you wonder whether you are really playing God in the right way.

Informal conferences with counsel in these cases occurs sometimes, but rarely. Probably when the defendant has cooperated or is agreeing to cooperate with the Federal authorities.

I had this happen once, meeting with the defense attorney and the Assistant U.S. Attorney, and working on whether this guy is going to cooperate and what is going to happen. The defense attorney is meeting his client, the defendant, an hour after they leave my office. I get a call in about an hour and a half that the client is shot dead. When they tell you that these boys play rough and they will do something to the witnesses, it is not all fairy stories. I believe that is true in narcotics cases. So defendants are afraid sometimes, and afraid to cooperate.

I have had what the street people call the slow guilty plea. The fellow was willing to cooperate. There was no question, really, about guilt. But he was afraid that if he openly cooperated or pleaded guilty, they would give it to him like that. So we tried the case and he was convicted, as I say, under what they call the slow guilty plea.

As a matter of practice, the attorney gets the presentence report a day ahead of sentencing and he makes notes concerning it. He confers with the prisoner. And at the time of sentencing, I would routinely ask if there are any errors in that report so they would call it to my attention, which gives you an opportunity to correct them if they exist.

After watching other judges I learned why formal sentencing is usually done on Friday afternoon. You may want to break out of the building after you do that. Some even feel the need of a drink. It is very difficult to be certain you have done the right thing in regard to your responsibilities to society and your responsibility to the defendant and you wonder if, in the long run, you have accomplished the purpose.

I mentioned the case of the family showing up and the little girl with the broken arm and, of course, in one of these cases, which was a narcotics case, I said, "Will they want to see their daddy?" And the guard says, "I want to go through that cast on that arm with an X-ray machine and everything else, the way this guy has been dealing."

So I don't find it a simple problem. There is a lot of pathos on the face of it and there may be a lot of chicanery right under the surface.

You give a guy 10 years—I have had this happen—you sentence him away on one of these for 10 years, and here is everybody crying, you know, and, "Marshal, they want to see their family for 30 minutes." And the marshal says, "Well, that would be a lot of

trouble." Well, as a judge, at least, I would tend to think, he is going away for 10 years, I think that is going to be lot of trouble.

But this goes right in the issues as mundane as the budget of the marshal's office. Facilities where we are not that adequate to permit those visits with appropriate security. And where they have to transport these people 30 minutes to an hour away, they are not really tuned up to where they can afford those things without some substantial inconvenience, if not hazard. The marshal's office cannot adequately permit this visitation and protect the public as well as they would like.

Allocution, hear from the defendant, hear from the defense counsel.

Mr. BEARD. If the gentleman would permit me to interrupt. Judge HUNGATE. Certainly, Mr. Beard.

Mr. BEARD. If the gentleman is so familiar with the buzzing of the bell—

Judge HUNGATE. Oh, yes.

Mr. BEARD. If you will tolerate our going in recess for 10 minutes, the committee will reconvene in 10 minutes.

Judge HUNGATE. Mr. Chairman, I like to think, throughout my career, I never missed an important quorum call.

Mr. BEARD. This is a real vote.

Judge HUNGATE. A real vote. OK, certainly.

Mr. BEARD. I doubt if it is very important.

Judge HUNGATE. All right.

[Recess.]

Mr. BEARD. The committee will come to order.

In checking before the House, I am afraid we are going to be having a series of these votes.

Judge HUNGATE. Let me jump on over as we file this in here. When he talked about factors, when I get to page 2 of this—I think you have exhibit B. These are actually salient factors, and I would like you to glance at that. We may have seen these.

That is the probation and parole office. That runs a maximum of—in reviewing cases that—some of them, we have had a sample of them.

Mr. BEARD. Where exactly—

Judge HUNGATE. Exhibit B, you should have it. Do you see it?

Mr. BEARD. Here it is.

Judge HUNGATE. It is just a one-page item here.

Mr. BEARD. Right.

Judge HUNGATE. And that is used by the probation and parole office. And if you get 11 on that, that is as high as you can get.

Now, I took a sample of some of the sentences we have on here, and I have got—let's see, I am looking just at cocaine convictions. Out of eight narcotics-related offenses, four are cocaine and three of them scored 11. They made the top score. Just looking at it, this guy just stole groceries or something and scored an 11, he is a prime candidate, I would say, to get out soon on probation or maybe be considered for probation and parole.

Apparently, in this area, you are dealing with people that don't fit the normal criminal pattern as we have seen it historically. They may be middle class. They may be middle age. They didn't get convicted before they were 26. They may be students.

Mr. BEARD. These are offenders, not pushers?

Judge HUNGATE. These are offenders that are convicted.

Mr. BEARD. I mean, are they users? Are they—

Judge HUNGATE. Oh, these people were convicted of possession with intent to distribute, that sort of a charge. They are not just sampling it. They are not in the Florida market at that big a quantity. Let us say \$14,000 worth of cocaine. I don't know where that puts you. Another case was 199 pounds of marihuana, \$36,000 worth of marihuana; 36 pounds of marihuana, another \$36,000. Methamphetamines, I don't know how to value those.

The point I would make is, when you consider the normal facts, it doesn't come out right. You have to go back to the severity of the offense, really, in weighing this. And things that normally, like no prior convictions, no prior incarceration, not convicted until after the 26th that would build up your score. They have got all that.

But we still face a very serious problem, which I don't need to mention to this committee. Again, your focusing attention on it is certainly helpful to all of us.

The factors that I would consider, normally you look at the score. Although, as I indicate, the severity of offense tends to outweigh the character of the individual in narcotics cases, their appearance in court, whether they understand what they are doing—whether they have cooperated with the Government, that usually enters in. Other policy considerations, sentencing patterns in the district.

Some of the judges, we have eight in our district, the eastern district in Missouri. And a fellow says, "We're known as the Siberia of sentencing." That shouldn't totally influence you, but it keeps you from putting them on probation. And you think it has some effect once that reputation is established.

Appellate court mandates, this is another factor. Sometimes you have a case that goes up on appeal and the appellate court will leave you a suggestion. Or maybe more than a suggestion as to what your sentencing practice should be. Societal interest, of course, protection of the public, and I guess that is what I am saying again when I show you an individual that scores as high as he could score on this test, but you still think he needs 5, 10, 15 years incarceration because of the very serious nature of these narcotics offenses and the poisoning effect that they are having on society.

But I mentioned factors. I think at least some of us tend to take into account that we are really trying this guy for something different than what he did, and how appropriate is the punishment that we are going to use.

I file an exhibit C also, gentlemen, which is a checklist which we furnished to the appointed attorneys. In a good many cases, you will have attorneys that are not really anxious to get these jobs. And this is to guide them in what they should tell these defendants, how to protect them.

The first thing, in my experience, defendants do when they get to the pen is file a motion to get out or reduce their sentence. And the second thing is sue their lawyer. So this is intended perhaps to be helpful to some lawyer that, against his will, is put in this position by court appointment, and to do his best job and meet the constitutional mandates.

I think it might be helpful, Mr. Chairman, just to take a question or two, if you have that at this point.

Mr. BEARD. Thank you. I appreciate your testimony and for giving us a little background for those of us who are not attorneys to see just what goes into some of the activities in the decisionmaking process.

Let me ask just right off the top, do you feel that the present Federal sentencing structure provides sufficient penalties against the major drug traffickers? Your particular district you stated is the Siberia of the districts, which indicates to me that there are others which might seem like the Disney World.

Judge HUNGATE. I am not sure if we had the problems we have heard related from Florida, if I would consider the sentencing alternatives adequate. I think they, in the limited experience I have had, if the maximums are used, I think they would tend to reach the problem, Mr. Chairman.

Mr. BEARD. If the maximums are used?

Judge HUNGATE. Well, the maximums that are available are adequate. I think the guideline and factors, I think if some committees somewhere can come down with these different items that they say should be considered—discussion was given to unfettered discretion, which some might feel that you really have now, as against a mandatory program.

As to a rigid mandatory setup, you would get your best information on that, I think, from some active U.S. attorneys and defense counsel as to what is really going to happen in that situation. Are they really going to get the charges reduced, or are they all going to be tried under the Speedy Trial Act. If all these people want trials, and if you will promise them all 20 or 50 years or life, I think that is what you will find, they will want jury trials. You will really have your system clogged.

In between there, and if I understood Mr. Coleman, he alluded to that sort of thing; the factors that should be considered, the gravity of the offense, the amount of the narcotic involved, the value of it, the purity of it, the length of time over which this offense has been carried on, as well as the man's prior record.

I think a listing of what the Congress has decided are the factors which should be considered, I can't imagine that most judges wouldn't welcome that guidance.

I still don't see that a guy that is up there for the first time and the guy that is up there for the 10th time on the same offense necessarily should have the same punishment. Maybe sometimes the first offender should have more. It would depend on other factors.

But I think some discretion is necessary. I think if you don't put it there, they will find a way to get it somewhere else.

Mr. BEARD. So you think that by using discretion, you stated that you have an adequate maximum. If the maximum was used, you could possibly get to the core of the problem.

But this is probably one of the reasons why we are having this hearing. We are finding in so many cases, the maximum is not being used; the minimum is being used. The minimum has never really fully served—

Judge HUNGATE. What I think I am endorsing, Mr. Chairman, would be in line with Mr. Coleman's testimony, as I understood it, that these are factors that will be considered. Now he may have gone a little further than that. I mean, maybe he is going to say that when you get these three factors, you get 30 years.

I don't know if I would go that far, but I could certainly see a designation of factors that are to be considered. And then you are in a position where you can say, "Well, he did not consider this factor. This was error not to do so."

Mr. BEARD. When you sentence a convicted drug violator, do you ever consider the parole board's release guidelines? How does that work? Does that play a part at all?

Judge HUNGATE. It certainly plays a part. That plays a part and, as I am on the bench longer, the fact is that I know what I am going to see is a bunch of post-trial motions. In the initial instance, you might try to decide exactly what you think the appropriate sentence is, and it is going to be in stone. If you find out that you are going to get all these motions, maybe that sentence should be higher. You can't raise them later. Maybe your initial sentence should be higher.

And then, if the prison authorities and others think it is justified, you could then put some more equity in it and probably also have a man that is going to get out, or a woman that is going to get out at sometime anyway, and maybe hope to work it that way.

Now, let me point out that the U.S. attorney in our district makes no recommendations, which I find interesting. You might try a case a week or 2 weeks or take a plea or whatever and, you know, you ask the defendant, you give him allocution. I have one guy take 1 hour and 5 minutes, he was thoroughly allocuted. Then you call on the U.S. attorney and he has no recommendation. And I promised him someday, I would say, "Well, hell, I don't care either. Bye-bye." I haven't reached that point.

But that is interesting. I don't know that I fully understand it.

Mr. BEARD. The gentleman from Florida, do you have any questions?

Mr. SHAW. This is perhaps a little bit outside of the scope of your statement, but I would like to proceed with it further. This is in regard to probation and parole.

When your parole commission gets the defendant—or at that point, I guess, the prisoner—this is usually the first time they have had a chance to look at the crime, or look at the offense, look at him, look at his character and everything else. They do not have the benefit of having gone through the testimony of the trial.

And also, I think perhaps more importantly, not necessarily in drug cases, but this would certainly apply in drug cases in some instances, they don't have the benefit of talking to the victim or having the victim in front of them.

That has always concerned me. It is somewhat of a lopsided view of the defendant. And somebody that can put on an awfully good face and come in and really appear to—

Judge HUNGATE. Con you.

Mr. SHAW. That's right.

Well, even judges can be conned.

Judge HUNGATE. Yes.

Mr. SHAW. But at least the other side gets a good shot at conning you also.

What would be your opinion with regard to some reform in parole and at least notifying the victims of the crime, notifying the judge, the State's attorney, or those offices as to the time of that hearing and give everyone an opportunity to appear?

Judge HUNGATE. Well, as one who was a prosecuting attorney for about 5 years, I think it would be a great idea to notify them. I had occasions in those days when I wasn't thrilled to find out that a guy was out in about 6 months after I put in considerable effort to try to get him in there.

Now, when you talk of victims and you talk of narcotics, we are talking a little bit about something else, as against somebody that is hit in the head with a—

Mr. SHAW. You are saying the general public is the victim.

Judge HUNGATE. That is right. And to make those cases, most of the time it is going to be a policeman or a patrolman or somebody from one of these agencies that has made the buy, and the fellow that is really doing business with them doesn't much want to be seen either.

Mr. SHAW. That is why I said this is a little bit out of the scope of your direct examination, but what would be your thoughts with regard to that, and other types of offenses also? Because I think those guidelines would carry through certainly on drug-related offenses.

Judge HUNGATE. Yes. And, Mr. Shaw, there is some problem there that I wish I could delineate better for you. There is some form, if we send it in, it is under the Freedom of Information Act. And there is some other form that probably isn't.

There is a sentencing form, after you have sentenced in court, and it comes through within a week later, in my experience, which outlines the offense. But you are right, it is a bare-bones description. It is not the same as going into detail about it.

On one occasion where I was under an appellate court restraint as to my sentencing, I indicated that I was given 20 years—I had been instructed to do. Although, if I had had a free hand, I would have given 40. And I think that recommendation probably went on. I hope that they see some of those comments when they consider probation and parole.

But your question as to whether notice would help, I can't see any damage to it. I think it would be a useful practice.

Mr. SHAW. Thank you.

Mr. BEARD. Has the gentleman finished?

Mr. SHAW. Yes.

Mr. BEARD. Let me thank the gentleman from Missouri.

There are several additional questions that I think we might—I know of a discussion that apparently went on during the break that you made that we find very interesting, and we would like to possibly followup with you on that. So, if the staff would do so, and we will go from there. It sounds very interesting.

Judge HUNGATE. Thank you.

Mr. BEARD. Judge, thank you.

Judge HUNGATE. I had to be reminded, you can always learn something in a congressional hearing. Thank you very much.

Mr. BEARD. Good to see you.

The next witness is Police Chief Joe Casey, who is the chief of police from Nashville, Tenn., and has been so for 8 years. The chief of police has been active in law enforcement work for over 30 years. He is now presently president of the Tennessee Police Chief Association, and is a member of the executive committee of the International Association of Chiefs of Police.

Chief Casey, it is an honor to have you, and we want to take this opportunity to thank you for coming up here on your valuable time.

If you want to summarize your statement, please feel free to do so, because all of it will be submitted for the record.

TESTIMONY OF JOE CASEY, CHIEF OF POLICE, NASHVILLE,
TENN.

Mr. CASEY. Thank you, Congressman Beard and other Congressmen who serve on this important select committee of our House of Representatives. It is indeed a distinct pleasure to have this opportunity to address myself to some of the pivotal concerns facing law enforcement officials across the country.

I especially welcome this forum because I feel my views are indicative of other law enforcement officers across this great Nation, who daily find their hands tied when attempting to deal with some quite serious problems.

I have been asked to address myself specifically to problems relating to the use of drugs and narcotics. After many years of service, most of my adult life, in the field of police work, the impact which drugs have on the incidence of crime in this Nation is staggering. And unfortunately, despite public announcements, we are no closer to winning this battle today than we were 10 years ago. In fact, we are falling farther and farther behind, as we as a society fail to recognize the dramatic consequences a tolerance to the use of drugs can and will result in.

It is not at all pleasant for me to have to say that I have witnessed this gradual erosion which has resulted in these anxieties. But I strongly feel that the single greatest factor leading to the spiritual decline in our Nation is the growth of crime which can be directly traced to the widespread use and demand for drugs.

As I earlier mentioned, the threats which we are facing are from beyond our borders, as well as from within. I must be frank to admit that I am more concerned and disturbed by the threat of aggression due to our internal weaknesses than I am of our ability to deter an attack from beyond should one occur.

Crime is very similar to cancer—both spread very quickly and eat away at its victims until it destroys them. The difference is we don't know yet what causes cancer. If we did, I feel confident that we would utilize every resource within our grasp to fight and destroy it. Unfortunately, this is not the case when it comes to crime. We have allowed the law to be interpreted to protect the criminal at the expense of the law-abiding person. We also know that approximately 80 percent of all crime is drug related. And yet, we are unwilling to take steps necessary to stop it from spreading.

A recent study revealed in 1960, only approximately 7 percent of our young adults have tried marihuana. By 1979, that figure

reached beyond 60 percent. And even more troubling is that the psychoactive component in marihuana has increased sharply over the past 10 years. And that report also said that two of every five high school seniors have used an illicit drug other than marihuana. The study went on to say that the use of illicit substances by American youths is probably higher than any other industrialized nation of the world.

Another study found that 243 heroin addicts committed 473,738 known crimes over an 11-year period, and that the average addict is six times as likely to commit a crime when addicted as when he is off regular opiates. To demonstrate even more quickly, I would like to briefly discuss the work of the vice squad of the Nashville police department.

From 1975 to 1980, the number of personnel in the unit was increased only by five officers. Yet, the street value of confiscated drugs has increased by 978 percent. In 1975, drugs valued at only \$172,000 were apprehended. Last year, that figure reached beyond \$1.6 million.

It is the feeling of the members of the vice squad that, despite this tremendous increase in confiscated drugs, our efforts are, in reality, going backward. We strongly feel that the increase can be attributed to the fact that there is such a great upsurge in the use of these drugs in our community. Just in our community, and I feel confident this pattern is shared elsewhere, over 75 percent of home burglaries and over 85 percent of all armed robberies that are tried in the criminal courts are related directly to the use of drugs.

The picture which I have tried to depict is not very pleasant—and it is even more disturbing for the officer on the streets who often sees weeks of efforts washed down the drain through a lenient judicial system that frequently appears to be more concerned with the rights of the criminals than those of the public. As you can probably surmise, I have some serious reservations with our existing legal system.

In conversations with law enforcement personnel across the country, it becomes evident that the frustrations felt by us in Nashville are representative of the feelings of others in police work in other parts of the country.

At this point, I feel that a brief discussion of a few specific examples would help identify the problem to you, the lawmakers of this Nation, and what we in the police department of Nashville feel is a complete miscarriage of justice. During the early 1970's, attempts were made to bring to trial some of the large heroin dealers in our community. Four of these dealers—Ronald McKinley, Maurice Goodner, Alphonso Wilson, and Derris Ellis—were arrested repeatedly with very little ensuing results in our State court system.

Out of a total of 98 arrests of these four persons, only one of the four was incarcerated by our State court system. And that one individual, Mr. Goodner, only received a sentence of 11 months and 29 days in the county workhouse, as his charges were consolidated into one charge of attempting to commit a felony. In fact, he served only 6 months of that sentence, the rest of the time being deleted from his sentence due to good behavior. By obtaining certain lawyers and having their cases set in certain courts, these defendants

were able to stay on the streets of Nashville, continuing to deal in drugs and human tragedy on a daily basis.

Only with the combined efforts of Federal authorities were these same four persons finally incarcerated and received sentences for their crimes. These are but a few examples, and if this panel would like additional documented information relating to what I call travesties of the judicial system, I will be more than happy to supply them.

I also would like to just show you, the committee—this is the record of those four individuals. Most of it is drug related.

Mr. BEARD. Are these the four individuals that had 98 arrests, and the total time served was 6 months?

Mr. CASEY. Yes, sir.

Clearly, I am not all that happy with the present state of prosecution of criminals. We have allowed the criminals to impose unbearable pain, grief, and an untold amount of cost on us, often at no cost to himself. One of the questions the chairman asked me to address is the issue of minimum sentencing and the impact it would have on the judicial and prison systems.

In Tennessee, we now have certain mandatory minimum sentences for persons convicted of drug offenses. This represents to me the first positive step toward turning the tide away from the criminal and to the protection of the average citizen who, in the past, has had to bear the burden alone.

We are now finding that when criminals face a minimum 10-year sentence, they have a tendency to shy away from plea bargaining hoping to be acquitted rather than face a 10-year sentence, which is the minimum for what we call class X offenses involving drugs. All of you have a copy of that law.

Recently one defendant thought he would take the system on rather than accept a 10-year sentence. He went to trial, and the verdict was 15 years. As I indicated earlier, for the first time, I feel the system worked for the protection of the public and not for the protection of the criminal whose dependence on drugs, either for his own use or for the sale to others, resulted in the original crime as well as many others against society.

Opponents of these minimum sentences point to the backlog in the court and overcrowded prisons as arguments against their adoption. I question the logic of these arguments when the facts demonstrate that if we turn these thugs loose on society, they will inflict more serious pain and misfortune on the innocent law-abiding citizens. I am convinced that if a criminal knows he will have to spend a certain period of time in prison, it will serve as a deterrent to the temptation to commit a crime, just as I believe that the death penalty for persons convicted of murder is a deterrent.

Two other questions brought to my attention in correspondence from the chairman involve judicial discretion in sentencing drug offenders and the creation of special narcotics courts to exclusively handle drug-related cases.

Unfortunately, I strongly feel that much of the problem can be directly related to widespread lack of knowledge about drugs on the part of our judges. I feel that, unlike narcotics officers schooled in the dangers of these addictive elements, judges simply do not

have a similar background. It could well be that the creation of special courts to deal with drug-related cases would serve an important purpose in our joint fight to wipe out this danger to society. I feel that a judge dealing almost exclusively with this problem would have the time to become completely educated on the effects these drugs have on individuals. Then the pushers who live only to inflict pain on others would at least face a judge aware of their damage to society.

Another benefit of such a court would be that repeated offenders would more readily come to the attention of the court so that the judge would be more familiar with the suspect's background and could possibly impose a sentence that corresponds to the defendant's harm to society.

On the other hand, such a court could be harmful if a judge was overly protective of persons accused of narcotics violations and was determined to work toward their rehabilitation when the evidence is clear that they would be beyond help, and that the only way to protect society would be to lock them up for a long, long time.

I have similar problems with allowing wide judicial discretion in the sentencing of drug offenders. As stated earlier, I completely support tough minimum sentences with no early parole. If judges are given wide latitude, as is often the case today, I feel the results would be detrimental to any real effort to combat this growing problem.

One final point mentioned by the chairman concerns sentencing alternatives to incarceration for first offenders. If the issue is mere possession, I am sympathetic to their problem and believe society should work with them to prevent any drug problem from growing. In other words, I am not adamant about locking up first offenders convicted of possession of small amounts of narcotics for a lengthy period. But when it comes to the pusher, grower, manufacturer, and importer, I have no compassion even for a first offender.

When a person makes the decision to sell drugs, any compassion that I may have for them is lost. They have become the dealers in death and misery to others and must be properly and severely punished. The drug problem is getting worse by the day, and our efforts to control it are failing. I tell you today that if this problem continues to grow, it will destroy our country. And I believe that if we cannot stop these people any other way, we must look at the possibility of enacting the death penalty for habitual pushers, major growers, manufacturers, and importers. The alternative is to allow for the continuation of our present system which just doesn't work. The facts clearly bear this out.

I have attempted to provide this committee with a brief overview of the problem as I see it. Obviously, I can only speak for myself. But in meeting after meeting with other law enforcement officials, I come away with a joint feeling of frustration.

We spend millions on rehabilitation programs designed to cure the drug addict. They work while the individual is under close supervision, but too frequently, the results are forgotten by the addict when he returns to the street. We feel that more than 90 percent of the so-called cured addicts return to their old ways once they get back on the streets. More money than ever before is being spent on these programs while we receive very little benefit.

Also, our educational programs are having very little positive results on the youth. In a survey conducted among some 1,500 Nashville high school students, only 7 percent indicated they believed the information they received was excellent and was indicative of the type information they needed to have. This clearly speaks of a great need in this area.

Clearly, law enforcement personnel can assist others by showing the true dangers of these drugs. And the judicial system can better support our efforts by getting tougher on criminals—especially those involving the sale of drugs or crimes directly related to drug dependency. If our institutions don't get tough on drugs, it is difficult for me to imagine our youth being able to comprehend the seriousness of the situation. When they see fellow classmates receive only a small sanction from dealing in drugs, they come away with the feeling that society doesn't really frown on their use. I seriously doubt if this is the picture we want to paint for our future generations.

Once again, I thank you for the opportunity to explain some of the frustrations felt by law enforcement personnel.

[The prepared statement of Mr. Casey follows:]

PREPARED STATEMENT OF JOE CASEY, CHIEF, POLICE DEPARTMENT OF METROPOLITAN NASHVILLE-DAVIDSON COUNTY, TENN.

Chairman Zeferetti, Congressman Beard from my home State of Tennessee, and other Congressmen who serve on this important select committee of our House of Representatives, it is indeed a distinct pleasure to have this opportunity to address myself to some of the pivotal concerns facing law enforcement officials across the country. I especially welcome this forum because I feel my views are indicative of other law enforcement officers across this great Nation who daily find their hands tied when attempting to deal with some quite serious problems.

I have been asked to address myself specifically to problems relating to the use of drugs and narcotics. After many years of service, most of my adult life, in the field of police work, the impact which drugs have on the incidence of crime in this Nation is staggering. And unfortunately, despite public announcements, we are no closer to winning this battle today than we were ten years ago. In fact, we are falling farther and farther behind as we as a society fail to recognize the dramatic consequences a tolerance to the use of drugs can and will result in.

Recently, I have become what some would consider quite outspoken over what I feel is the greatest danger facing this country—that being the rising rate of crime and the influence narcotics have on it, which we in law enforcement consider to be an alarming rate. This Nation and its institutions seem to be reeling before assaults—both from without and within its boundaries. Serious questions prevail as to our capacity to defend an assault from without—and to cope with an increasing deterioration of the moral and physical strength of our people coupled with an alarming decrease in our spirit, pride and sense of loyalty.

It is not at all pleasant for me to have to say that I have witnessed this gradual erosion which has resulted in these anxieties. But I strongly feel that the single greatest factor leading to the spiritual decline in our Nation is the growth of crime which can be directly traced to the widespread abuse and demand for drugs.

As I earlier mentioned, the threats we are facing are from beyond our borders as well as from within. I must be frank to admit that I am more concerned and disturbed by the threat of aggression due to our internal weaknesses than I am of our ability to deter an attack from beyond should one occur.

Today, our people live in constant fear, not only that of aggression by foreign nations but due to aggression of our fellow citizens—those citizens who live the life of crime. This in reality is the fear most worrying Nashvilleans and others across the country—those law-abiding citizens who are the heart and foundation of America. Since 1960, for example, there has been a 335 percent increase in rapes, murder, robberies and assaults in the United States.

Crime is very similar to cancer—both spread very quickly and eat away at its victim until it destroys them. The difference is we don't know yet what causes cancer. If we did, I feel confident that we would utilize every resource within our grasp to fight and destroy it. Unfortunately, this is not the case when it comes to

crime. We have allowed the laws to be interpreted to protect the criminal at the expense of the law-abiding person. We also know that approximately 80 percent of all crime is drug related, and yet we are unwilling to take those steps necessary to stop it from spreading.

A recent study revealed that in 1960, only approximately 7 percent of our young adults had tried marijuana. By 1979, that figure reached beyond 60 percent. And even more troubling is that the psychoactive component in marijuana has increased sharply over the past ten years. And the report also said that two of every five high school seniors have used an illicit drug other than marijuana. The study went on to say that the use of illicit substances by American youth is probably higher than in any other industrialized nation of the world.

Another study found that 243 heroin addicts committed 473,738 known crimes over an eleven year period and that the average addict is six times as likely to commit a crime when addicted as when he is off regular opiates. To demonstrate even more quickly, I would like to briefly discuss the work of the vice squad of the Nashville Police Department.

From 1975 to 1980, the number of personnel in the unit was increased only by five officers. Yet, the street value of confiscated drugs has increased by 978 percent. In 1975, drugs valued at only \$172,000 were apprehended. Last year, that figure reached beyond \$1.6 million. It is the feeling of members of the vice squad that despite this tremendous increase in confiscated drugs our efforts are, in reality, going backwards. We strongly feel that the increase can be attributed to the fact that there is such a great upsurge in the use of these drugs in our community. Just in our community—and I feel confident this pattern is shared elsewhere—over 75 percent of home burglaries and over 85 percent of all armed robberies that are tried in the criminal courts are related directly to the use of drugs.

The picture which I have tried to depict is not very pleasant, and it is even more discouraging for the officer on the streets who often sees weeks of efforts washed down the drain through a lenient judicial system that frequently appears to be more concerned with the rights of the criminal than those of the public. As you can probably surmise, I have some serious reservations with our existing legal system. In conversations with law enforcement personnel across the country, it becomes evident that the frustrations felt by us in Nashville are representative of the feelings of others in police work in other parts of the country.

Ask persons in different parts of the nation and you will hear the same voices of despair and the same complaints that the law-abiding citizen pays the penalty via a murder, a rape or a burglary while the criminal either goes scot free or faces a short term in some country club disguised as a rehabilitation institution. We hear that the same defendant with repeated charges continually appears with repeated continuances, repeated granted motions and repeated dismissal of the charges.

At this point, I feel that a brief discussion of a few specific examples would help identify the problem to you, the lawmakers of this Nation, and what we in the police department of Nashville feel is a complete miscarriage of justice. During the early 1970's attempts were made to bring to trial some of the large heroin dealers in our community. Four of these dealers—Ronald McKinley, Maurice Goodner, Alphonso Wilson and Derris Ellis—were arrested repeatedly with very little ensuing results in our State court system.

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In Tennessee, we now have certain mandatory minimum sentences for persons convicted of drug offenses. This represents to me the first positive step toward

turning the tide away from the criminal and to the protection of the average citizen, who in the past has had to bear the burden alone.

We are now finding that when criminals face a minimum of ten year sentences they have a tendency to shy away from plea bargaining hoping to be acquitted rather than face a ten year sentence which is the minimum for what we call class X offenses involving drugs. All of you have a copy of that law. Recently, one defendant thought he would take the system on rather than accept a ten year sentence. He went to trial and the verdict was fifteen years. As I indicated earlier, for the first time I feel the system worked for the protection of the public and not for the protection of the criminal whose dependence on drugs either for his own use or for the sale to others resulted in the original crime as well as many others against society.

I have repeatedly spoken out against plea bargaining. Prior to the adoption of these minimum sentences, even with a very good case, we would find the district attorney's office agreeing to a sentence of from one to three years. To make the situation even worse, the convicted person would be allowed to serve his time in the county workhouse rather than the state penitentiary. Here, they often were allowed to leave on various work release or rehabilitation programs. I know of one example where law enforcement officials were told of three different half way houses where the criminal could be found. We checked each one but he couldn't be found. Then, a news team began looking for the defendant and only when word got out around did he finally show up at the workhouse.

Opponents of these minimum sentences point to the backlog in the courts and overcrowded prisons as arguments against their adoption. I question the logic of these arguments when the facts demonstrate that if we turn these thugs loose on society they will inflict more serious pain and misfortune on the innocent law-abiding citizens. I am convinced that if a criminal knows he will have to spend a certain period in prison it will serve as a deterrent to the temptation to commit a crime, just as I believe that the death penalty for persons convicted of murder is a deterrent.

Two other questions brought to my attention in correspondence from the chairman involve judicial discretion in sentencing drug offenders and the creation of special narcotics courts to exclusively handle drug related cases.

Unfortunately, I strongly feel that much of the problem can be directly related to widespread lack of knowledge about drugs on the part of our judges. I feel that, unlike narcotics officers schooled in dangers of these addictive elements, judges simply do not have a similar background. It could well be that the creation of special courts to deal with drug related cases could serve an important purpose in our joint fight to wipe out this danger to society. I feel that a judge dealing almost exclusively with this problem would have the time to become completely educated on the effects these drugs have on individuals. Then the pushers who live only to inflict pain on others would at least face a judge aware of their damage to society.

Another benefit of such a court would be that repeated offenders would more readily come to the attention of the court so that the judge would be more familiar with the suspect's background and could possibly impose a sentence that corresponds to the defendant's harm to society. On the other hand, such a court could be harmful if a judge was overly protective of persons accused of narcotics violations and was determined to work toward their rehabilitation when the evidence is clear that they would be beyond help and that the only way to protect society would be to lock them up for a long, long time.

I have similar problems with allowing wide judicial discretion in the sentencing of drug offenders. As stated earlier, I completely support tough minimum sentences with no early parole. If judges are given wide latitude, as is often the case today, I feel the results would be detrimental to any real effort to combat this growing problem.

One final point mentioned by the chairman concerns sentencing alternatives to incarceration for first offenders. If the issue is mere possession, I am sympathetic to their problem and believe society should work with them to prevent any drug problem from growing. In other words, I am not adamant about locking up first offenders convicted of possession of small amounts of narcotics for a lengthy period. But when it comes to the pusher, grower, manufacturer and importer, I have no compassion even for a first offender.

When a person makes the decision to sell drugs, any compassion that I may have for them is lost. They have become the dealers in death and misery to others and must be properly and severely punished. The drug problem is getting worse by the day. And our efforts to control it are failing. I tell you today that if this problem continues to grow it will destroy our country, and I believe that if we can not stop these people any other way we must look at the possibility of enacting the death

penalty for habitual pushers, major growers, manufacturers and importers. The alternative is to allow for the continuation of our present system which just doesn't work. The facts clearly bear this out.

I have attempted to provide this committee with a brief overview of the problem as I see it. Obviously, I can only speak for myself. But in meeting after meeting with other law enforcement officials, I come away with a joint feeling of frustration. We spend millions on rehabilitation programs designed to cure the drug addict. They work while the individual is under close supervision but too frequently the results are forgotten by the addict when he returns to the street. We feel that more than 90 percent of the so-called cured addicts return to their old ways once they get back on the streets. More money than ever before is being spent on these programs while we receive very little benefit. Also, our educational programs are having very little positive results on the youth. In a survey conducted among some 1,500 Nashville High School students, only seven percent indicated they believed the information they received was excellent and was indicative of the type information they needed to have. This clearly speaks of a greater need in this area.

We often forget that drugs and alcohol are a major killer of our youth; 80 percent of all vehicle accidents involving teenagers are directly traced to alcohol or drug consumption. I feel that much of this problem can be traced to lax parents in what is commonly called a permissive age in which we live.

Clearly, law enforcement personnel can assist others by showing the true dangers of these drugs. And the judicial system can better support our efforts by getting tougher on criminals—especially those involving the sale of drugs or crimes directly related to a drug dependency. If our institutions don't get tough on drugs it is difficult for me to imagine our youth being able to comprehend the seriousness of the situation. When they see fellow classmates receive only a small sanction for dealing in drugs, they come away with the feeling that society doesn't really frown on their use. I seriously doubt if this is the picture we want to paint for our future generations.

Once again, I thank you for this opportunity to explain some of the frustrations felt by law enforcement personnel. I am willing to try to answer any questions you might have.

Mr. BEARD. I thank you, Chief Casey. That was a very sincere presentation and I felt a very adequate one. I think you very adequately pointed out the way I feel and the emotions I feel.

I know about your reaction if that individual makes that decision to become a drug pusher or manufacturer, even if it is a first offender, they should be prepared to pay the price.

It seems to me that we have totally forgotten about the fifth, sixth, seventh, and eighth graders, the young children who are now being brought into the drug cycle by these type people. And I personally feel no compassion for them. I feel much more compassion for the elementary school students and the young people whose lives will be destroyed by the drugs.

I think that we have our priorities totally fouled up. And hopefully the American people will start speaking out and giving the law enforcement officers the support that you so justly deserve.

Would you say that one of the major morale problems—knowing that there is always a morale problem of pay, of benefits, of this and that—but would you say that one of the biggest morale problems facing your force today is the lack of support once you have developed a case, once you go in for prosecution, then to see these individuals the officers dealt with, in some cases very dangerous circumstances, see these individuals walking the streets the next day or the next month? Would you say that is probably your No. 1 morale problem?

Mr. CASEY. Yes, Congressman, it is. It is very discouraging to a police officer who goes out and works many hours overtime without getting paid for it, in very dangerous situations, and make a good case. And then, for some technicality or some other reason, which is beyond explanation that I know of, nothing is done with these

people. And you look up, and they are the same people you have arrested day after day, the same people giving you the problems.

I agree with you. I have no compassion for people that make the decision that they are going to inflict pain and misery on, not only the young people, but the other people of this country, when they start selling drugs.

Mr. BEARD. Could you just briefly describe for the committee the sentencing scheme for convicted narcotics traffickers under the Tennessee law. The law that was passed in last—

Mr. CASEY. It was passed in 1979. The law calls for trial within 150 days of arraignment unless there is some good excuse in delay caused by the defendant. It denies bond pending appeal to any defendant convicted of a class X felony except murders in second degree. If he is convicted and then appeals it, he will have to spend his time. I mean he has to spend a minimum of 10 years, and he has to spend his time in the penitentiary. He can't spend it in the workhouse or jail.

It requires that all sentencing for class X felonies be determinant, that is, a particular number of years will be assessed rather than a minimum and a maximum sentence. It requires the district attorney to publicly explain the dismissal or reduction of any class X felony, such dismissal or reduction to be effective only with the consent of the court.

There are two ways an individual might be classified as a class X felonist, and this is in drug-related cases. One is by the mere possession of certain schedules of drugs under the Tennessee Code annotated. The other is by the actual sale of this substance in Tennessee.

We have six schedules of drugs. And to show a continuing enterprise, the buys must go down at least 24 hours apart. You must make three buys of schedule 1, 2, and 3. You only have to make three buys, and they have to be 24 hours apart.

In schedules 4, 5, and 6, you must make five buys. And also, any combination of the six schedules with five buys also classifies one as a class X felony. You can make class 1 and 4 cases of schedules 4, 5, and 6 and you can still class X a person.

Mr. BEARD. Your law isn't much different than the Federal laws.

Mr. CASEY. Well, now, they are. This hasn't always been, and in the case of the four people that I was telling you about, there were times that we were having to take—

Mr. BEARD. If I may quickly ask my last question, then I will go to the next gentleman. Did the law, the new law, address the bail situation prior to conviction?

Mr. CASEY. No. Unfortunately, it did not, and it caused serious problems.

I think, in some instances, especially if a person is classed X and was selling to minors, I don't think that person should be allowed bail.

Mr. BEARD. The gentleman from Florida?

I am sorry. The gentleman from Pennsylvania.

Mr. COUGHLIN. Thank you, Mr. Chairman.

This law was enacted when? The new law.

Mr. CASEY. 1969. I mean 1979.

Mr. COUGHLIN. So you have just really had little experience with it.

Mr. CASEY. We are just now getting to where we are getting some cases tried under it.

Mr. COUGHLIN. Based on your limited experience, how do you feel it is working?

Mr. CASEY. Let me explain one reason, because we are—when we first started making cases under it, it was appealed. Some of the attorneys there in Nashville tried to prove it was unconstitutional, but it was upheld.

Mr. COUGHLIN. Based on your limited experience, how do you feel it is working?

Mr. CASEY. I think it is a great step in the right direction. I think it is working real well. I think it is a great step in the right direction.

Mr. COUGHLIN. Do you think it will result in any reduction in the number of convictions?

Mr. CASEY. No, sir, I don't think it will result in any reduction of convictions.

Mr. COUGHLIN. Thank you, Mr. Chairman.

Mr. BEARD. The gentleman from Florida?

Mr. SHAW. Well, Chief, I would like to say that I like the way you talk.

Mr. CASEY. Thank you, sir.

Mr. SHAW. I think that we need more people in law enforcement talking that way. I can see where you may be discouraged and your morale may be down somewhat. I think that, from listening to you, that is encouraging you to work harder or try harder, which I certainly commend you for.

After some time with the mayor of the city of Fort Lauderdale resigning to come up here to Washington, during that period of time, I was dealing with the morale problems that you are speaking of. I would hear many of my policemen talk about the bail requirements, and they would make note of the fact that, before they could complete writing their report on the arrest that they had made, the defendant had posted bond and was back out on the street, and actually would beat them out to the street.

I think that this ties in, too, with what you were talking about as far as the classroom is concerned, that it is so important, that I think we have overweighted our whole criminal judicial system toward the edge of rehabilitation. We have forgotten substantially about the deterrent effect of what the system is supposed to have, and where it may not do "little Johnny" any good to put him in jail for selling drugs in school, it certainly is going to do the 30 other kids in the class that see him stay out for a while and see him not come back to school. It does them a tremendous amount of good.

When you look at the statistics, like you shared with us, as to the use of these drugs in the classroom in the public school system, and I think it is shocking and I quite agree with you that the future of this country is very much a part of what we are able to do to stem the tide of these drugs and the use of the drugs.

With regard to the sentencing procedures, does Tennessee have a problem with regard to the jail population now as other States do?

Mr. CASEY. Well, yes, sir. They say we—I am sure we do. But my fear in that is there is no deterrent for people to go to jail. It is too easy once they get there. And they know that they are not going to be there but a short time. We are going to make some excuse to turn them loose, if it is being overcrowded or whatever it might be.

I firmly believe that if we had stiff penalties and we put people to work once they went in that prison, not make it so easy for them, that we wouldn't have people running over each other committing crime and the population would go down. Now we may have a problem for a while, but I think it would take care of itself just over a short period of time.

The problem with us in this country is we don't mean what we say. We tell people, "If you go out here and you commit a certain crime, this is what is going to happen to you." But it never happens. Once we catch a person committing a crime, we try to make every excuse in the world to excuse that person committing that crime. We blame everything under the sun except that individual. We blame society, we blame a broken home, we blame everything but that individual.

We don't hold him accountable for what he has done to society. We have got to get the message to people in this country, the criminal, everybody. They have got to get the message: "This is the law. This is the penalty. And if you violate it and you are convicted, this is what is going to happen to you." Then demonstrate to them that that is what we mean.

When we do that, we are going to see a change in what is happening to us in this country. Nobody can tell me that our system should be so constructed, or so interpreted to where it benefits 5 percent of the people in this country and the other 95 percent of us have to suffer like we do, live literally afraid.

Where I think that the Federal people could probably help more in the fight against drugs, that we should get the message to people from other countries that bring that stuff into this country, if you do and you are caught, you are not going back home until you pay the penalty here.

And let us don't talk about money. \$1 million or \$2 million or \$5 million doesn't mean anything to these people. Last year, in this country alone, drugs was a \$64 billion tax-free business. So money don't mean anything to these people. We have got to make crime so expensive that the criminal, or the pusher, or whatever it might be, cannot afford it. Let us don't talk about money, because money don't mean nothing to them.

We have got to put them away for a good period of time, and we have got to make it while they are there something that they don't enjoy.

Mr. SHAW. Chief, you made some reference to some of the things that your own State legislature has done in recent years that are certainly helping you out quite a bit. What do you see that we can do here at the Federal level in order to make it more expensive to commit a crime such as that?

Mr. CASEY. Well, I think we have got to get the message to the people who bring that stuff into this country that we are not going to tolerate it any longer.

Then, I think, not only get that message to them, we have got to get the Federal laws to where, you know, I think the gentleman from Florida said that now people are wanting to go into the Federal court, because the State laws there are stiffer than the Federal penalty. The Federal penalty has got to be at least as stiff, or stiffer than the State penalties, because if you don't, they are going to be shifting around and trying to get into the system that is most lenient.

Mr. SHAW. Thank you.

Mr. CASEY. I think we must do something about the bond. It has got to be done. We have got people that continually get out here and are arrested for being pushers, growers, manufacturers, or importers. Once these people—you know, I haven't any problem with saying to everybody, "OK, the first time is on us. But the second time you do it, you better get ready, because it is going to be on you."

Mr. SHAW. Just tell them in the court, "Next time you come to court, bring your toothbrush."

Mr. CASEY. That is exactly right. Bring your work britches because we are going to put you to work.

Mr. SHAW. That is even a better answer.

Thank you.

Mr. BEARD. The gentleman from Pennsylvania?

Mr. COUGHLIN. No further questions.

Mr. BEARD. I think any other questions would be anticlimactic at this time.

The hope of this committee and the reason why this committee has asked for reauthorization in the past and has fortunately been given the reauthorization to continue to function is to try, somehow, to focus the attention of the American public and the Government, which has become so big and in many cases insensitive to the real critical problem of drugs that is just destroying the values of this country as we know them.

I would just hope that, through testimony such as yours and the testimony of the prior witnesses, the cooperation of the Judiciary Committee that will have to be the legislative committee to pass these laws, and through leadership of the administration, that we can see some firm results of saying to the people out there, that 5 percent, "If you make that decision to break the law, if you make that decision to give drugs that are going to destroy our fifth graders and our fourth graders or seventh graders, to destroy their lives, then be prepared to pay the price."

Chief, I commend you on what I consider one of the best pieces of testimony and a very moving piece of testimony. And I thank you so much for taking time from your busy schedule to appear before this committee.

Mr. CASEY. Thank you for allowing me.

Mr. BEARD. Let me in closing state that it should be noted for the record that Mr. Cecil McCall, Chairman of the U.S. Parole Commission, was invited to give testimony here this morning and desired to attend. However, Mr. McCall informed the committee that all the regional Commissioners were in Washington this week for a conference and that would prevent his appearance. So Mr. McCall will submit a written statement outlining the Parole Commission

views on these important issues, which will become part of the official record.

[The information referred to appears on p. 51.]

Mr. BEARD. I want to also, on behalf of the chairman of the committee, Mr. Zeferetti, take this opportunity to thank the witnesses for taking the time from their schedules to participate in this session. This will not be the end of this committee's study of the deterrent effectiveness of drug sentencing laws. You can all be assured that after today, the committee intends to reach out to responsible Federal officials and to continue this inquiry. We will continue to seek the views of State and local law enforcement officers on how the Federal enforcement effort can be enhanced.

So at this time, let me also, on behalf of the members, thank the staff for the excellent job they did in preparing for these hearings. A great deal of work goes into it. So, to the staff, I say thank you.

Mr. SHAW. Mr. Chairman, tomorrow, for the benefit of those who are here who care to attend, the Task Force on Law Enforcement will be meeting. We have a number of witnesses who will be with us, including the police chief of Miami, Florida and the State attorney of Dade County. I think we will have a continuation of this type of testimony, and I think it will be quite valuable.

Mr. BEARD. Thank you.

The committee is now adjourned.

[Whereupon, at 12:02 p.m., the committee adjourned, to reconvene subject to the call of the Chair.]



U.S. Department of Justice
United States Parole Commission

Office of the Chairman

Park Place, One North Park Building
5550 Friendship Blvd.
Bethesda, Maryland 20015

June 17, 1981

Honorable Leo C. Zeferetti
Chairman, Select Committee on
Narcotics Abuse and Control
Room H2-234, House Office Building Annex 2
Washington, D.C. 20515

Dear Congressman Zeferetti:

On behalf of the members of the Parole Commission, I wish to thank you for inviting us to provide our comments on sentencing provisions for drug traffickers.

For the reasons outlined in my previous testimony before the House Subcommittee on Criminal Justice (copies attached), we are not in favor of a mandatory sentencing approach to the problem of sentencing disparity. It has been a comparatively short time since Congress repealed the mandatory "no parole" provision of the Harrison Narcotics Act of 1956. Rather, we believe that the most important legislative improvement that could be made in present sentencing practice, would be to require a sentencing judge to provide findings and reasons for the sentence imposed.

Such a requirement would result in more consistent sentences, nation-wide, and a substantial increase in the quality of the information made available to the Parole Commission. One of our major difficulties with drug traffickers lies in accurately discerning the role of the offender in the crime and the amount of drugs actually imported or sold. Even where the conviction results from a trial (and plea-bargaining is the major process by which these convictions are obtained) the offense of conviction normally represents only an isolated transaction. Clearly, the Commission could enhance its effectiveness by use of reports which would more accurately distinguish between ringleaders and mere couriers, and between sophisticated, repeat offenders and those who are not likely to become reinvolved in the drug trade, in deciding whom to release and whom not to release. We recommend to the Select Committee the principle, espoused in the Conference Report to the Parole Commission and Reorganization Act of 1976, of avoiding incarceration that "represents a misapplication of tax dollars." (House Conference Report No. 94-835, at page 20).

Presently, the Parole Commission solicits information concerning reasons for sentencing from the sentencing judge on a form developed for that purpose (Form AO 235). Where specific information is received, we find it most helpful. However, this procedure is voluntary on the part of the court, and Form AO 235 is received in less than 10% of all cases. We earlier recommended to the Subcommittee on Criminal Justice that the sentencing court be required to state on the record its findings of fact and reasons for sentencing, and that this information be forwarded to the Parole Commission for its use. The Subcommittee adopted our recommendation but, as you know, the criminal code bill was not passed.

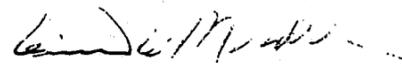
We have also worked with the Criminal Division of the Justice Department to establish a policy that the U.S. Attorney's Office provide the Parole Commission with specific information as to the nature and scope of the prisoner's offense. The Justice Department has now made it mandatory that such information be furnished on Form 792 provided for this purpose, and the Department is cooperating with us in attempting to obtain more use of such forms.

I do not feel that the Parole Commission is presently in a position to make a recommendation on the matter of a special narcotics court.

In sum, we believe that our present sentencing structure is the proper basis for reform efforts and that the Subcommittee should study the ramifications of any increased rigidity in federal sentencing options extremely carefully.

I hope that the above comments may prove helpful to the Select Committee on Narcotics Abuse and Control.

Sincerely,



CECIL C. McCALL
Chairman
U.S. Parole Commission

CCMcC/JAB/epw

Testimony of Cecil C. McCall
Chairman, United States Parole Commission
before the
Subcommittee on Criminal Justice
House Judiciary Committee
April 18, 1978

I. INTRODUCTION

Mr. Chairman, Members of the Subcommittee, I am Cecil McCall, Chairman of the United States Parole Commission. I am pleased to have the opportunity to appear before you this afternoon on behalf of the United States Parole Commission to express my views on H.R. 6869 and S.1437. My remarks will be addressed particularly to the subjects of sentencing and parole.

Mr. Chairman, I am deeply concerned that the Congress not adopt H.R. 6869 (or S. 1437) without substantial revision to those provisions dealing with the structuring of judicial sentencing discretion and the role of the Parole Commission in making release determinations. The reason for my concern is that this bill, as it now stands, proposes a system that is clearly not adequate to achieve its professed goals of reducing

disparity and uncertainty in criminal sentencing. Thus, I intend to offer my criticisms of this bill from a practical, rather than a theoretical viewpoint, and to outline for you what I believe would be a workable alternative.

In this regard, I wish to begin by emphasizing that the Parole Commission and Reorganization Act of 1976, which was the product of three years of joint study and effort by the Senate and House, offers us a realistic point of reference from which to start in turning H.R. 6869 into a system with a reasonable chance of success. As I will discuss later, it is my opinion that, with a number of amendments combining the best features of the 1976 statute and H.R. 6869, a sound and workable system could be established that would avoid the considerable risks which the enactment of an unrevised H.R. 6869 would entail.

II. PAROLE UNDER CURRENT LAW

Under current law, it is within the power of the trial judge, following a conviction, to decide whether to send the defendant to prison or to impose some other sanction; i.e. a period of probation, a jail term, a fine, or a "split sentence" (jail term followed by probation). If the decision is to imprison, then the judge decides, within broad statutory

limits, what the maximum term of imprisonment will be. If the term is for more than one year, the judge must also decide when the defendant will become eligible for parole consideration. However, parole eligibility cannot be delayed beyond one-third of the maximum imposed. (Prisoners with terms of a year or less do not become eligible for parole consideration.)

In making these determinations, judges are not governed by any explicit standards. Each judge is free to impose (within the statutory limit) whatever sentence he feels is appropriate to suit the offender before him. Moreover, there is no requirement that the judge provide reasons for choosing a particular sentence, and there is no avenue of appeal unless the defendant can argue that the sentence represents a patent abuse of discretion. The effective result is that judicial discretion in imposing sentences is, for practical purposes, unreviewable.

In the case of prisoners eligible for parole (i.e. all prisoners with sentences of more than one year), the United States Parole Commission has the authority to determine the actual length of imprisonment. It does this by deciding whether or not a prisoner will be released on parole prior to the expiration of the maximum term imposed less statutory good time. (Statutory good time normally entitles a prisoner

to release at about two-thirds of the maximum term imposed.)

In making its determinations, the Parole Commission is required to exercise its discretion pursuant to a guideline system taking into account the severity of the prisoner's offense and the probability of future criminal conduct (determined primarily by reference to past criminal history). The system was originally developed by the United States Board of Parole in 1972 and was subsequently mandated by Congress in the Parole Commission and Reorganization Act of 1976. While the guidelines provide a set of explicit norms for decision-making, they are not designed to remove the discretion necessary to account for unusual factors in individual cases. About twenty percent of the Commission's decisions are outside the indicated guideline range, and in these cases, the Commission is required to furnish the prisoner with a specific statement of reasons. (See Appendix I.)

Thus, the Parole Commission effectively determines the actual duration of imprisonment, pursuant to its guidelines, for the twenty-five percent of all sentenced defendants who are sent to prison with terms of more than one year.

Moreover, the legislative history of the 1976 law specifically recognized that the parole guideline system has the practical effect of reducing unwarranted disparity in the criminal sentences of these prisoners. However, the Commission cannot reduce disparity in the determination of who goes to prison and who does not, nor does it have jurisdiction over prisoners with sentences of one year or less. (These categories comprise the remaining seventy-five percent of all sentenced defendants.)

III. WHAT H.R. 6869 PROPOSES

As presently written, H.R. 6869 would create a Sentencing Commission to promulgate guidelines for judicial sentencing determinations. The Sentencing Commission would set its guidelines within maximum limits established by Congress for the various classes of crimes. The judges would be required to apply these guidelines in making the threshold choice as to whether to impose a sentence of imprisonment or some lesser sanction. They would also be required to apply the guidelines in deciding the length of each sentence imposed, including terms of imprisonment and probation, and the amounts of fines.

Sentences of imprisonment in nearly all cases would be imposed to be served in full, without possibility of

release on parole and with very limited statutory time-off for good behavior. (The most a prisoner could earn would reduce his term by only ten percent.) Eligibility for release on parole would be permissible only in cases in which incarceration was deemed necessary to provide needed correctional treatment.

Judges would also be required to provide reasons for any sentence outside the guidelines. A sentence below the guidelines could be appealed by the prosecutor, and a sentence above the guidelines could be appealed by the defendant. However, there would be no appeal of right if the sentence were within the guidelines, leaving the interpretation and application of the guidelines largely to the discretion of the individual judge, guided only by statements of general policy issued by the Sentencing Commission.

In sum, the bill transposes to the judiciary the basic guideline concept as developed by the Parole Commission, and effectively eliminates the participation of the Parole Commission in determining how long federal prisoners will be confined. The Sentencing Commission is established as a policy-setter, but is not given any means of reviewing individual decisions or ensuring compliance with its policy.

IV. THE ASSUMPTIONS BEHIND H.R. 6869 AND S. 1437

The proposed elimination of the Parole Commission's role in determining actual durations of confinement is based upon three critical assumptions:

First: that the U. S. Parole Commission's guidelines can be administered by about 550 district court judges (under limited appellate review by eleven different Courts of Appeal) with as much success in controlling unwarranted disparity in the service of criminal sentences as has been the case under the administration of the Parole Commission (a single, small agency);

Second: that once a sentence of imprisonment is imposed pursuant to these guidelines, there will be no need for periodic review, regardless of the length of sentence; and

Third that prison terms (and prison population) will not be in danger of substantially increasing under a system of "flat-time" sentences imposed pursuant to guidelines.

I will address these concerns in the order I have just stated them.

V. CAN WE DO WITHOUT THE PAROLE RELEASE FUNCTION AND STILL REDUCE UNWARRANTED DISPARITY?

The transfer of the U.S. Parole Commission's guidelines to about 550 federal district judges, and the proposed abolition

of the federal parole release function in nearly all cases, is, in my opinion, not likely to be successful if measured by the criterion of reducing unwarranted disparity and uncertainty in sentencing decisions.

To be sure, giving the district judges a guideline system (whether obligatory or merely advisory) could be a successful method of bringing some measure of consistency into determinations of whether to send an offender to prison or not (the "in-out" decision). I am in favor of that. Also, such standards could meet much of the public's concern for certainty of punishment (e. g., whether white collar offenders should be sent to prison).

However, there would be serious obstacles preventing a judicial guideline system from effectively controlling unwarranted disparity in actual lengths of imprisonment served, under a system of "flat-time" sentences without possibility of parole.

The relevant considerations are the following:

1. Problems with the application of guidelines by 550 district judges.

(A) Disparity of interpretation: The bill proposes that a highly complicated system of guidelines be applied by officials usually trained in matters having little relation

to the study of criminal behavior, for whom sentencing is only a small part of an extremely busy and demanding schedule. (A district judge, on the average, imposes annually fewer than thirty sentences of imprisonment exceeding one year.) We can hardly expect that a widely disparate group of about 550 of these officials will apply the guidelines with any notable degree of consistency of interpretation, when they have so little time to devote to the task or to develop familiarity with it, and when each judge is applying the guidelines individually. Judges certainly have no inherent tendency to conform their sentencing decisions, even when faced with precisely identical circumstances. In fact, the disparity study conducted several years ago by the Federal Judicial Center in the Second Circuit showed just the opposite tendency.

As for the complexity of the guidelines, I can only testify from my own experience that the Parole Commission's guidelines are complex enough to give rise to continual questions of interpretation. I expect that guidelines covering all the sentencing possibilities (not just the duration-
al determination for the twenty-five percent of defendants sentenced to terms of more than one year) would be even more complex and subject to interpretation than the Parole Commission's guidelines now are. It is certainly ingenious

in the extreme to assert (as the proponents of this bill have asserted) that the Sentencing Commission's guidelines could be made so fully "determinate" that 550 federal judges sitting individually would have no problems in conforming their sentences to a coherent policy.

(B) The traditional independence of judges: The traditional independence of our judiciary is a factor which has historically protected against government abuse of private freedoms, but which has made judges, as a body, difficult to coordinate and direct. Given this background, it seems to me more than likely that many judges will tend to interpret the guidelines to suit their individual concepts of justice, rather than follow the policies which the Sentencing Commission would be dictating to them. This factor would certainly add to the overall degree of disparity.

2. Problems with the Sentencing Commission.

While the Sentencing Commission is responsible for establishing the guidelines to be applied by the judiciary, it is given no means of ensuring compliance by the judges in interpreting its policies. Moreover, the Sentencing Commission would be restricted to issuing statements of general policy only, and it could not review particular cases except for purposes of research and monitoring, after the sentence became

final. It would also have no say in the direction taken by the various courts of appeal in interpreting the guidelines which it would promulgate.

Since the Sentencing Commission could probably not be given any effective enforcement powers because of the Constitutional problems that such a proposal would entail, we are left with an agency that would have a tremendous task, but no real means of seeing it accomplished.

This is not to say that some form of Sentencing Commission should not be enacted. As I will later propose, an advisory body setting guiding standards for the decision as to who goes to prison, and who does not, could serve an invaluable role in the criminal justice system.

3. Problems with appellate review as a compliance mechanism for judicial guidelines.

(A) Sentences outside the guidelines: While the review function lacking in the Sentencing Commission has been entrusted to the courts of appeal, these already overburdened courts have been historically reluctant to review the merits of criminal sentences other than for a clear abuse of discretion. Under this proposed bill, sentences outside the guidelines, and the frequency of their use, would be virtually committed

to the district court's discretion provided only that the judge finds that "an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." This is hardly any change from the broad discretion presently exercised by district judges and traditionally respected by the courts of appeal. Thus, most sentences outside the guidelines would be likely to be upheld, regardless of disparity from sentence to sentence.

(B) Lack of adequate appellate rights: Compounding the above problem is the fact that there would be no appeal of right in cases where the sentence imposed was within the guidelines, but a misapplication of the guidelines by the sentencing judge is alleged. (H. R. 6869 would provide an appeal of right only for sentences outside the guidelines.)

As for the review mechanism which this bill proposes for such problems (challenging the legality of the sentence under Rule 35 of the Federal Rules of Criminal Procedure), this procedure would seem to me unfairly cumbersome for a defendant, especially when viewed against the Parole Commission's practice of permitting administrative appeals in any case of parole denial. For example, a frequent ground of appeal before the Parole Commission is that good cause exists for a decision below an

otherwise properly calculated guideline range. This common (and very reasonable) form of argument would not be permissible under H. R. 6869.

(C) Would total appellate review solve the problem?

The answer to this question is clearly "No".

In the first place, the burden, judging by the volume and variety of appeals before the Parole Commission, would be enormous, and we should not lose sight of the fact that we are talking about three-times as many cases as are presently within the Parole Commission's jurisdiction (and a corresponding increase in complexity of the issues).

In the second place, it is inconceivable to me how the eleven different courts of appeal will achieve any degree of consistency in their interpretation of the many complex questions that application of the guidelines will raise. The courts of appeal themselves are frequently in disagreement on substantive questions of law, and there is no indication in this bill that appellate interpretation of the guidelines will not follow the same pattern.

(D) Inconsistency of purpose: In short, the proponents of H. R. 6869 have sought to achieve inconsistent goals. On the one hand, the bill before you

recognizes the need to protect the already over-burdened courts of appeal from a drastic increase in workload, and on the other hand, the bill relies upon the courts of appeal to police the application of the sentencing guidelines with enough rigor to ensure that unwarranted disparity is kept under control. In my opinion, neither goal would be met.

4. Problems with hidden prosecutorial discretion.

The subject of hidden prosecutorial discretion and its potential for causing unjustifiable disparity in the treatment of criminal defendants is a very serious one. We do not know what effect the bill would have on this factor. (85 percent of all sentences are now the result of a plea.) I cannot recommend that this Subcommittee approve any legislation that might have the effect of increasing the degree of disparity for which prosecutorial decisions might be responsible. There is certainly reason to assume that with specific sentencing guidelines, a good deal of discretion will be shifted to the prosecutor, who, in bringing or dropping charges, will be a much more important determinant of the ultimate sentence than he is at present. (At present, prosecutorial decisions are made in the context of broad legislative sentencing limits, and no prosecutorial agreement is permitted to bind the Parole Commission's decision.) Instead of bringing the exercise of discretion "out in the open", as

the proponents of this bill assert it will do, the bill seems likely instead only to shift discretion away from the Parole Commission and place it in the hands of the prosecutors.

In addition, there appears to be some doubt, with the continuing impact of the Speedy Trial Act, as to whether pleas involving sentence-bargaining under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure are on the increase or not. We need much more evidence on this point. Also, I think that a guideline system as "determinate" as this bill now contemplates might well be a fresh incentive to prosecutors to do much more sentence-bargaining than they now do. All these questions need answers before such a precipitate measure as this bill proposes could be safely enacted.

5. Contrasting advantages offered by the Parole Commission.

In contrast to the enormous problems that I think the system proposed in H.R. 6869 would create, I believe that the Parole Commission's present system offers a very simple, workable alternative for bringing sense and order into the setting of prison terms. (This assumes, of course, that a reduction of disparity in the critical decision as to who goes to prison and who does not is achieved by appropriate standards for the judiciary. It also assumes that there would be some form of appropriate statutory limitation on sentencing choices

when the decision is made to send a defendant to prison for a term exceeding one year, so that the Parole Commission could in fact effectively set the duration of confinement in all such cases.)

The Parole Commission (unlike a group of 550 district judges) offers a small, collegial body of nine commissioners and a corps of thirty-six hearing examiners. It is both decision-maker as well as policy-setter, permitting the constant measuring of its policies and its guidelines against the reality of the results achieved. The Commissioners and staff are also full-time parole decision-makers, devoting full attention to the complexities of criminal behavior and interpretation of the guidelines. Moreover, its hearing examiner staff can be more easily trained and instructed in a consistent approach than either judges or probation officers.

As a collegial body, the Commission's decisions are produced by staff and Commissioners acting in concert, with numerous checks and balances offered by a structured system of group decision-making. This feature can be contrasted to the situation of a single trial judge, who under H.R. 6869, would be required once and for all to fashion a just sentence that would be unalterable once imposed.

The parole guideline evaluation is initially made by a team of hearing examiners after an in-person hearing, and the initial decision is produced by the Regional Commissioner and hearing examiners voting together. If the Regional Commissioner wishes to override his staff by more than six months, he must seek the concurring vote of another Commissioner. A prisoner can ask that any decision be first reconsidered by the Regional Commissioner, and then (if a satisfactory result is not achieved) that it be reviewed again by the National Appeals Board, a permanent body of three Parole Commissioners in Washington, D. C. These appeals can be decided with considerably more dispatch than appeals can be before the courts. (The appeals are under statutory deadlines of thirty and sixty days, respectively.) Moreover, I would seriously question whether a sentencing court (85 percent of whose decisions, on the average, are the results of pleas) is a more "open" institution than the Parole Commission now is under the 1976 statute.

In addition, the Commission can closely monitor its compliance with its own rules, permitting timely response in the case of unexplained deviations from policy. It can also monitor the percentage of decisions outside the guidelines and take appropriate action if that percentage should deviate to an unacceptable degree.

It is therefore incomprehensible to me why this efficient and workable model is proposed to be discarded in favor of dealing with the morass of problems that this bill would cause. I am especially concerned in view of the fact that the proponents of H.R. 6869 have failed to offer any substantial evidence or indication that the abolition of the parole release function would not lead to an increase in unwarranted sentencing disparity, rather than a reduction.

VI. CAN WE ELIMINATE REVIEW BY THE PAROLE COMMISSION?

The fact that these "flat-time" sentences would be imposed under guidelines does not eliminate the need for periodic review by the Parole Commission, particularly in those sentences of imprisonment requiring more than one year of incarceration.

I agree with the proponents of H.R. 6869 that certainty on the part of prisoners as to their ultimate release dates is a generally desirable factor, psychologically for the prisoner, as well as for the public and prison administrators. The Parole Commission itself follows a system of informing most prisoners of their presumptive release dates (contingent upon continued obedience to prison rules) within 120 days after their sentences have begun. However, the bill before you becomes excessive in the pursuit of "certainty" when it proposes to set sentences in concrete and eliminate parole altogether.

There are a number of important reasons to retain the reviewing function of the parole authority.

1. Balancing attitudes toward the offender and his crime.

In some cases, an individual judge can impose a sentence under pressure of a personal or community reaction that may, with the passage of time or distance of involvement, be seen as clearly excessive. (This could either be a sentence above the guidelines, or a sentence within the guidelines when the decision should have been below.)

In this regard, one valid function of review by a paroling authority is to provide an objective (and national) view of the offense to balance that of the individual judge. I strongly disagree with the proposition that a concern for satisfying local attitudes should outweigh the concern for a consistent federal approach to the imprisonment of federal offenders. Furthermore, cases of high public visibility are generally the unusual ones in which the defendant is already well-known (for example, a public official), or the subject of concentrated media coverage. With respect to the vast majority of routine court dispositions, however, individual criminal sentences are not the focus of public attention, nor could public consensus in such cases be easily measured.

I should also point out that an excessive concern for satisfying community attitudes in federal sentencing could lead to some inextricable problems. For example, how do we analyze the case of a marijuana smuggler arrested in Texas (where public condemnation of the drug is severe), whose illicit goods were actually in transit for intended sale in Oregon (where public condemnation is less than in Texas), other than by treating the matter strictly as a federal offense?

2. The need for review where a sentence is based on a prediction of risk that is no longer valid.

I think most judges would agree with me that they are not seers or prophets, and cannot be expected to fashion a sentence based on an assessment of the offender's future behavior that will remain valid regardless of any changes that might take place. Many events can, and do occur during the service of a sentence (particularly a lengthy one) that would reasonably constitute a change in circumstances significant enough to render further incarceration wasteful and unjust. For example, illness, the effects of aging and maturity, or exceptional efforts at self-improvement that are clearly meaningful in terms of the prisoner's chances for future success, would fall into this category. (The architects of the Parole Commission and Reorganization Act of 1976 recognized

the importance of this concern, and provided for periodic review of each case in which parole is denied.) While our methods of predicting future behavior are nowhere near perfect, I am convinced that no sensible person would willingly forgo the opportunity to review such a sentence at suitable intervals.

Moreover, requiring an offender to serve to the expiration of his sentence, when he could at some point be safely and appropriately released after review by the paroling authority, represents a misapplication of our tax dollars and a waste of human resources. Yet, the proponents of H.R. 6869 would remove from our criminal justice system any systematic means whereby even the most lengthy sentences could be reviewed.

3. The Shift of discretion to prison staff.

Leaving such cases to the attention of sentencing judges upon the urging of prison staff (as this bill does) would be a clearly ineffective and inequitable way of controlling problems created by the lack of a paroling authority. (It would also be an ironic regression to the 19th Century and the conditions that engendered the creation of independent parole boards in the first instance.) Without parole, there is also the distinct possibility of extensive

(and uneven) use of furloughs and other release programs as a substitute measure. You simply cannot eliminate discretion without being prepared to see it surface some place where it doesn't belong.

4. Preventing the abandonment of rehabilitative programs and research.

Another major factor is the prospect that this bill would encourage the abandonment of the search for demonstrably successful rehabilitative programs. While it is true that present techniques of institutional training are uncertain in their ultimate effectiveness, even the proponents of H.R. 6869 agree that continued research and development may well change our perception of these programs in five or ten years. I cannot imagine that educative programs accomplish so little for prisoners that we can afford to abandon the endeavor to identify specific programs that represent a better way of spending tax dollars than others. Without a parole authority possessing the necessary degree of flexibility over release decisions, the impetus for this research will be seriously diminished, and reversion to wholesale warehousing of large numbers of prisoners will be the likely result.

5. Changes in societal attitude toward the offense.

Without a paroling authority, no adjustment could be made over a period of years for reduced social perceptions

of crimes that were once viewed more severely. We may well be seeing this kind of evolution particularly in the area of drug offenses. For a past example, the Parole Commission has seen this phenomenon in the case of Harrison Narcotics Act sentences, originally ineligible for parole, after Congress in 1974 retroactively repealed the statutory parole ineligibility provision. The Commission was then in a position to respond, and did respond, equitably and efficiently in the processing of individual cases. (The history of the Harrison Narcotics Act "flat-time" sentence experiment should also offer a sober reflection to the enthusiasts of determinate sentencing.)

6. Maintaining institutional discipline.

While earlier drafts of S. 1437 eliminated institutional good time, the most recent proposal reintroduces good time of up to ten percent, and provides a complex process for awarding this good time. However, the most good time that appears to be subject to forfeiture for even the worst misconduct is three days. This feature places prison officials in a plainly untenable position in dealing with the prisoner who turns out to be a serious discipline problem.

It should take only rudimentary expertise in corrections and a recollection of very recent history to recognize the explosive combination of elements which this

scenario would assemble:

- (a) longer sentences;
- (b) no hope of parole;
- (c) serious overcrowding; and
- (d) no "good time" for good behavior.

In contrast to this, a paroling authority could discipline serious prison misconduct by deferring the date of release for an appropriate period of time, without the need for a cumbersome (and unevenly administered) system of good time awards.

VII. WOULD ENACTMENT OF H. R. 6869 LEAD TO AN INCREASE IN PRISON POPULATION, AND WHAT ARE THE CONSEQUENCES IF IT DOES?

In my opinion, the enactment of this legislation would probably lead to increasingly lengthy prison terms. If that happens, Congress should be prepared for a corresponding (and expensive) increase in prison population (which is presently severely overcrowded with about 30,000 prisoners).

1. The consequences in terms of federal expenditures.

According to Bureau of Prisons' statistics, federal prisoners eligible for parole (prisoners with sentences of more than one year) now serve an average of 41.8 percent of their sentences. This is an estimated cumulative time in custody of 263,908 months for prisoners sentenced each year.

Even if this percentage were increased to only 50 percent of past sentences under the flat-time provisions of this bill, this would add 52,066 cumulative months in custody at an estimated yearly cost of \$32,940,713 just for operational expenditures, with an estimated capital construction cost of \$179,743,384 to build the prisons to house these additional prisoners. If prisoners served 90 percent of sentences imposed today, this would add an additional 304,846 cumulative months in custody, at an estimated yearly cost increase of \$192,865,921 in operational expenditures, and an estimated capital construction cost increase of \$1,052,389,771. All these estimates are based on the Bureau of Prisons' own figures of \$7,592 per bed for operational costs and \$39,000 per bed for construction costs, and do not take inflation into account. (See Appendix).

With such consequences in mind, even for relatively slight increases in actual sentence length, it should be clear that a number of features in this bill present very serious problems.

2. Factor's pointing to increased prison population.

The Sentencing Commission, as well as the judges who would implement the guidelines, would have no opportunity to

assess, the real effects of the sentences they impose in terms of the actual conditions of prison life. Thus, sentences are likely to be seen in terms of symbolic time only abstractly related to the offense, without a realistic basis in the resources and ability of our prison system. This factor might certainly increase both the guideline ranges as well as individual sentences to unacceptable (and dangerous) levels.

In addition, while the parole release function is almost entirely eliminated, and statutory good time is severely reduced, there is no incentive for judges to switch from thinking in terms of the lengthy sentences they are used to dealing out, to the "real time" they would now be dispensing. What is even more disturbing is that the statutory maxima authorized in the bill do not appear to be reduced by an amount sufficient to encourage judges to think in terms of this "real time", nor is there any guarantee that the guidelines themselves will prevent unrealistic sentences.

3. The Sentencing Commission's inability to respond to overcrowding.

Although the bill mandates the Sentencing Commission to consider overcrowding, it does not provide the safety valve mechanism available to a paroling authority. if the prison

population climbed to unacceptable levels, the Sentencing Commission could only reduce the guideline ranges for future cases (although even this would involve a substantial time lag). However, this method would only create disparity between those sentenced before and after the change. In contrast, the Parole Commission could make immediate but smaller changes equally throughout the prison population in order to produce the desired result. This is not to argue that the parole authority should be used routinely to control institutional populations; it only acknowledges the unique ability of the paroling system to take into account an important reality that the Sentencing Commission could not.

VIII. THE EFFECT OF THIS BILL ON THE STATES

Finally, I would like to address one important ramification of this bill that this subcommittee should be careful to consider. As the former Chairman of a State paroling authority, I am well acquainted with the present climate in the States with regard to the area of sentencing reform. There is considerable danger that the impetus created by federal Congressional enthusiasm for a sentencing system founded nearly exclusively on the desire for "certainty" in the imposition and service of criminal sentences, may encourage the passage of hasty and ill-conceived statutes by State legislators.

It is, I think, the present responsibility of Congress to apply some prudence and caution to this forward movement, before the "reform" impetus gets out of hand and produces a regrettable series of mistakes. Thus, you should be prepared to spend a good deal of time with the sentencing and parole provisions of this bill, to work toward the development of a system that we are reasonably certain can succeed in the context of present realities, and that will temper the current ardor for sentencing reform with moderation and prudence.

IX. OTHER TECHNICAL PROBLEMS.

Before concluding, Mr. Chairman, I should observe that there are numerous technical difficulties I have with related features of this bill. For example, I do not believe that the system of parole supervision provided by this bill adequately meets its otherwise laudable goal of seeking to ensure an effective measure of supervision for all released offenders who show a need for it. I will be glad to furnish your staff with suggestions for improvement in this and several other related areas, should you wish me to do so.

X. ALTERNATIVE PROPOSAL

In conclusion, Mr. Chairman, I urge this Subcommittee not to approve H.R. 6869 as it is presently written. Instead, I recommend to the Subcommittee that it consider the following alternative approach.

I think that the establishment of some form of policy-making body to promulgate guidelines for the structuring of judicial discretion in making the critical choice between fine, probation, a "split" sentence (probation with a year or less of confinement), or incarceration, would be a major step forward. (It would also be an undertaking of major proportions for the agency charged with that responsibility.)

However, I think that it is essential that you retain the present role of the Parole Commission in determining actual duration of confinement in the twenty-five percent of all criminal sentences that involve imprisonment of more than one year.

This would preserve the gains made by Congress in the development of the Parole Commission and Reorganization Act of 1976, while achieving a realistic solution of the problem of unwarranted sentencing disparity. I would also

recommend that in retaining the release function of the Parole Commission, the Subcommittee also adopt the Commission's procedure of setting a presumptive release date at the outset of each sentence, as well as its flexibility to provide continued review of each case, in order to increase the factor of certainty without sacrificing considerations of individual justice.

Mr. Chairman, this concludes my remarks for this afternoon.

APPENDIX

ESTIMATED INCREASE IN COST OF INCARCERATION

The current Bureau of Prisons' discharge file contains records for 8,467 original releasees, with sentences of more than one year, released to detaining authorities or the community between January 1, 1977 and December 31, 1977, with valid sentence computation data.

For this sample (n=8,467) the cumulative total sentence imposed is 504,213 months (average total sentence imposed is 59.55 months), and the cumulative time in custody is 210,564 months (average time in custody is 24.87 months).

This sample, however, excludes (among others) prisoners sent directly to community treatment centers from the courts. Data provided the Administrative Office of the United States Courts indicates that for 1974, there were 10,612 convicted defendants sentenced to a term of imprisonment of more than one year (see Table 1). Thus conservatively estimating the current number of original releasees with sentences of more than one year at 10,612, the statistics presented in Table 2 would be applicable.

Table 1
 United States District Courts
 Type and Length of Sentences of Convicted Defendants (a)

TOTAL	TERMS OF IMPRISONMENT					Split Sentence (probation term)	Probation	Probation w/o supervision suspended sentence	Fine Only
	0-12 months	13-24 months	25-36 months	37-60 months	61 & over months				
36,252	2,838	2,534	2,042	3,734	2,302	1,991	17,577	1,216	2,018

84

(a) Source: Federal Offenders In United States District Courts 1974,
 Administrative Office of the United States Courts,
 Washington, D.C. 20544, p. 20-21.

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Table 2

Estimated Increase In Cost of Incarceration

Percent of Total Sentence Served	Estimated Cumulative Time In Custody (in months)	Estimated Increase In Cumulative Time In Custody (in months)	Estimated Increase In Total Operation Cost Per Year (a)		Estimated Additional Capitol Cost to Confine Increased Population (b)
			Amount	Percent	
41.76% (c)	263,908	—	—	—	—
50%	315,974	52,066	\$32,940,713	20%	\$179,743,884
60%	379,169	115,261	\$72,922,015	44%	\$397,905,356
70%	442,364	178,456	\$112,903,317	68%	\$616,066,827
80%	505,559	241,651	\$152,884,619	92%	\$834,228,299
90%	568,754	304,846	\$192,865,921	116%	\$1,052,389,771
100%	631,949	368,041	\$232,847,223	139%	\$1,270,551,243

85

a: Estimated total cost of incarceration based on estimate of \$7,592.00/year, excluding capitol costs. Source: Ronald J. Waldron, United States Bureau of Prisons.
 b: Based on current projected construction costs of \$39,000 per bed. Source: Donald Voth, United States Bureau of Prisons. Note: This estimate does not include expected increase in construction cost due to inflation.
 c: Average percent of total sentence now served.

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STATEMENT OF
CECIL C. McCALL, CHAIRMAN
UNITED STATES PAROLE COMMISSION

I. INTRODUCTION

Mr. Chairman, members of the Subcommittee, I am Cecil McCall, Chairman of the United States Parole Commission. I am pleased to have the opportunity to appear before this Subcommittee today to present my views on the issues of sentencing and parole.

I share what I perceive to be the Subcommittee's concern that our sentencing statutes and procedures stand in need of reform and that we need a sentencing system that the public can better understand. But we also need to attune to a complex set of practical problems which surround the task of setting prison terms. Without careful attention to practical issues, even the best intentioned sentencing reform effort will likely be rendered ineffective; or worse, will result in more disparity and injustice than we have at present.

II. BACKGROUND

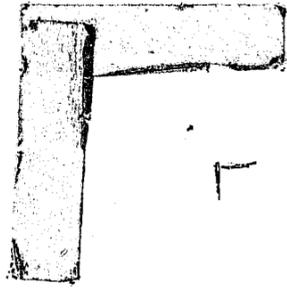
Seven years ago the Parole Commission, then called the Board of Parole, became the first operating criminal justice agency to adopt explicit guidelines to ensure that similarly situated offenders would be treated consistently in the determination of prison terms. To date, the Parole Commission has had the experience of applying the guidelines in over 60,000 cases.

Three years ago Congress expressed its approval of these guidelines and made them a central feature of the Parole Commission and Reorganization Act. The legislative history of this Act recognized that a prime function of the Parole Commission was to reduce sentencing disparity by balancing the differences in sentencing practices which exist among the numerous federal judges.

Two years ago the Parole Commission adopted a procedure of setting presumptive parole dates after hearings held within the first four months of commitment to eliminate unnecessary uncertainty in the time to be served. (This procedure was adopted with the support of Congressman Robert W. Kastenmeier, one of the primary sponsors of the Parole Commission and Reorganization Act.) Once set, a presumptive date may be moved forward only for substantial changes in circumstances or moved back in cases of significant institutional misconduct.

Today we are faced with a proposal to abolish parole release in favor of an untried sentencing system.

So much has been said and written publicly about criminal code reform that we have to be careful least the public believe, if they don't already, that you are considering a crime control measure. It is doubtful if criminal code reform will reduce crime. The purpose of your sentencing reform effort, as I understand it, is to reduce unwarranted disparity in criminal penalties. This is, in itself, a worthy goal and it is on this basis that the Subcommittee's effort should be judged.



CONTINUED

1 OF 2

Parole guidelines cannot eliminate all disparity in sentencing. There should be guidelines to help judges make sentencing decisions. But I cannot understand why a plan to reduce judicial sentence disparity should abolish the parole release function, the one effective disparity-reducing tool we now have, particularly before the proposed substitute has been adequately tested. Therefore, I encourage you to adopt the alternate proposal at page 123, lines 23-33, of your August 24, 1979 draft bill, which would retain the parole guidelines and other features of the Parole Commission and Reorganization Act of 1976, in conjunction with the addition of sentencing guidelines.

III. PROBLEMS WITH ELIMINATION OF PAROLE RELEASE

The text of this Subcommittee's working draft would abolish parole and tackle the problem of sentence disparity by creating sentencing guidelines. Judges would be required to give an explanation of how the guidelines are applied to each case and defendants would be given a limited right of appeal. In sum, the text of this draft transposes to the judiciary the basic guideline concept as developed by the Parole Commission and eliminates the Parole Commission's role in determining the prisoner's actual duration of confinement. While this solution appears theoretically tidy, it is my opinion that there are a number of serious practical problems with this approach.

The proposed elimination of the Parole Commission's role in determining actual duration of confinement is based upon three critical assumptions:

First: that the U.S. Parole Commission's guidelines can be administered by about 550 district court judges (under limited appellate review by eleven different courts of appeal) with as much success in controlling unwarranted disparity in the service of criminal sentences as has been the case under the administration of the Parole Commission (a single, small agency);

Second: that once a sentence of imprisonment is imposed pursuant to these guidelines, there will be no need for periodic review, regardless of the length of sentence; and

Third: that prison terms (and prison population) will not be in danger of substantially increasing under a system of "flat-time" sentences.

I will address these concerns in the order I have just stated them.

A. CAN WE DO WITHOUT THE PAROLE RELEASE FUNCTION AND STILL REDUCE UNWARRANTED DISPARITY?

The transfer of the U.S. Parole Commission's guidelines to about 550 federal district judges, and the abolition of the federal parole release function is, in my opinion, not

likely to be successful if measured by the criterion of reducing unwarranted disparity and uncertainty in sentencing decisions.

To be sure, giving the district judges a guideline system (whether obligatory or merely advisory) could be a successful method of bringing some measure of consistency into the presently unregulated determinations of whether to send an offender to prison or not (the "in-out" decision) and the setting of the maximum term. I am in favor of that.

However, there would be serious obstacles preventing a judicial guideline system from effectively controlling unwarranted disparity in actual lengths of imprisonment served, under a system of "flat-time" sentences without possibility of parole.

1. Problems with the application of guidelines by 550 district judges.

Disparity of interpretation: The bill proposes that a highly complicated system of guidelines be applied by officials usually trained in matters having little relation to the study of criminal behavior, for whom sentencing is only a small part of an extremely busy and demanding schedule. (A district judge, on the average, imposes annually fewer than thirty sentences of imprisonment exceeding one year.) We can hardly expect that a widely disparate group of about 550 of these officials will apply the guidelines with any notable degree of consistency of interpretation, when they have so little time to devote to the task or to

develop familiarity with it, and when each judge is applying the guidelines individually. Judges certainly have no inherent tendency to conform their sentencing decisions, even when faced with precisely identical circumstances. In fact, the disparity study conducted several years ago by the Federal Judicial Center in the Second Circuit showed just the opposite tendency.

As for the complexity of the guidelines, I can only testify from my own experience that the Parole Commission's guidelines are complex enough to give rise to continual questions of interpretation. I expect that guidelines covering all the sentencing possibilities (not just the durational determination for the twenty-five percent of defendants sentenced to terms of more than one year that now come under the jurisdiction of the Parole Commission) would be even more complex and subject to interpretation than the Parole Commission's guidelines now are. Moreover, the traditional independence of our judiciary is a factor which has historically protected against government abuse of private freedoms, but which has made judges, as a body, difficult to coordinate and direct. It is certainly ingenious in the extreme to assert (as the proponents of S.1437 have asserted) that the Sentencing Commission's guidelines could be made so fully "determinate" that 550 federal judges sitting individually would have no problems in conforming their sentences to a coherent policy.

2. Problems with the Sentencing Committee's Role.

While the Sentencing Committee is responsible for establishing the guidelines to be applied by the judiciary, it is given no means of ensuring compliance by the judges in interpreting its policies. Moreover, the Sentencing Committee would be restricted to issuing statements of general policy only, and it could not review particular cases except for purposes of research and monitoring, after the sentence became final. It would also have no say in the direction taken by the various courts of appeal in interpreting the guidelines which it would promulgate. Thus, we are left with an agency with a tremendous task, but no real means of seeing it accomplished.

This is not to say that some form of Sentencing Committee should not be enacted. It merely points out some of its limitations when applied to the critical issue of determining prison terms.

3. Problems with appellate review as a compliance mechanism for judicial guidelines.

Appellate review of sentences is not a complete solution to the disparity problem. With appeals of sentencing decisions going to 11 courts of appeals, there are that many possibilities for conflicts among the circuits. Moreover, courts of appeals have a tradition of paying great deference to sentencing decisions of the district judges. In addition, the appellate courts are pressed to meet their current workload. The national average

time for deciding federal criminal appeals is 9.1 months. I sincerely doubt that there would be a uniform level of consistency or activism in the consideration of sentence appeals, with appellate decision-makers who are even further removed from the day-to-day sentencing process.

4. Contrasting advantages offered by the Parole Commission.

In contrast to the enormous problems that I think the system described would create, I believe that the Parole Commission's present system offers a very simple, workable alternative for bringing sense and order into the setting of prison terms. (This assumes, of course, that a reduction of disparity in the critical decisions as to who goes to prison and who does not is achieved by appropriate standards for the judiciary).

The Parole Commission (unlike a group of 550 district judges) offers a small, collegial body of nine Commissioners and a corps of thirty-six hearing examiners. It is both decision-maker and policy-setter, permitting the constant measuring of its policies and its guidelines against the reality of the results achieved. The Commissioners and staff are also full-time parole decision-makers, able to devote full-time attention to the complexities of criminal behavior and interpretation of the guidelines. Moreover, its hearing examiner staff can be more easily trained and instructed in a consistent approach.

As a collegial body, the Commission's decisions are produced by staff and Commissioners acting in concert, with numerous checks and balances offered by a structured system of group decision-making. This feature can be contrasted to the situation of a single trial judge who under the system described in your text would be required once and for all to fashion a just sentence that would be unalterable once imposed.

The parole guideline evaluation is initially made by a panel of hearing examiners after an in-person hearing, and the initial decision is produced by the Regional Commissioner and hearing examiners voting together. A prisoner can ask that any decision be first reconsidered by the Regional Commissioner, and then (if dissatisfied) may have such decision reviewed by the National Appeals Board, a permanent body of three Parole Commissioners in Washington, D.C. These appeals can be decided with considerably more dispatch than appeals before the courts.

In addition, the Commission can closely monitor its compliance with its own rules, permitting timely response in the case of unexplained deviations from policy. It can also monitor the percentage of decisions outside the guidelines and take appropriate action if that percentage should deviate to an unacceptable degree.

It is therefore incomprehensible to me why this efficient and workable model is proposed to be discarded in favor of dealing with the morass of problems that this bill would cause.

I am especially concerned in view of the fact that the proponents of bills, such as S.1437, have failed to offer any substantial evidence or indication that the abolition of the parole release function would not lead to an increase in unwarranted sentencing disparity, rather than a reduction.

B. CAN WE ELIMINATE PERIODIC REVIEW BY THE PAROLE COMMISSION?

The fact that these "flat-time" sentences would be imposed under guidelines does not eliminate the need for periodic review by the Parole Commission, particularly in substantial sentences of imprisonment.

I agree with the proponents of S.1437 that certainty on the part of prisoners as to their ultimate release dates is a generally desirable factor, psychologically for the prisoner, as well as for the public and prison administrators. The Parole Commission itself follows a system of informing most prisoners of their presumptive release dates (contingent upon continued obedience to prison rules) within 120 days after their sentences have begun. However, the bill before you becomes excessive in the pursuit of "certainty" when it proposes to set sentences in concrete and eliminate parole altogether.

There are a number of important reasons to retain the reviewing function of the parole authority.

1. The need for review where a sentence is based on a prediction of risk that is no longer valid.

I think most judges would agree with me that they are not seers or prophets, and cannot be expected to fashion a sentence based on an assessment of the offender's future behavior that will remain valid regardless of any changes that might take place. Many events can, and do occur during the service of a sentence (particularly a lengthy one) that would reasonably constitute a change in circumstances significant enough to render further incarceration wasteful and unjust. For example, illness, the effects of aging and maturity, or exceptional efforts at self-improvement that are clearly meaningful in terms of the prisoner's chances for future behavior, would fall into this category. (The architects of the Parole Commission and Reorganization Act of 1976 recognized the importance of this concern, and provided for periodic review of each case in which parole is denied.) While our methods of predicting future behavior are nowhere near perfect, I am convinced that no sensible person would willingly forego the opportunity to review long term sentences at suitable intervals.

Moreover, requiring an offender to serve to the expiration of his sentence, when he could at some point be safely and appropriately released after review by the paroling authority, represents a misapplication of our tax dollars and a waste of human resources. Yet, the proponents of flat sentences would

remove from our criminal justice system any systematic means whereby even the most lengthy sentences could be reviewed.

Leaving such cases to the attention of sentencing judges upon the urging of prison staff (as this bill does) would be a clearly ineffective and inequitable way of controlling problems created by the lack of a paroling authority. (It would also be an ironic regression to the 19th Century and the conditions that engendered the creation of independent parole boards in the first place.)

2. Changes in societal attitude toward the offense.

Without a paroling authority, it would be cumbersome to make adjustments for reduced social perceptions of crimes that were once viewed more severely. We may well be seeing this kind of evolution particularly in the area of drug offenses. For a past example, the Parole Commission has seen this phenomenon in the case of Harrison Narcotics Act sentences, originally ineligible for parole. After Congress in 1974 retroactively repealed the statutory parole ineligibility provision, the Commission was then in a position to respond, and did respond, equitably and efficiently in the processing of individual cases. (The history of the Harrison Narcotics Act, a "flat-time" sentence experiment, should also offer a sober reflection to the enthusiasts of determinate sentencing.)

The Subcommittee's working draft recognizes that there must be a procedure for reconsidering a sentence where circumstances have changed. Section 3704 of the draft would allow the sentencing judge to reduce the sentence on the motion of the defendant or the Bureau of Prisons in these circumstances. The problem again is that there is no check against the possibility of widespread disparity among the 550 district judges who will exercise this power. The result could be something like 550 de facto parole boards. What might be compelling reasons for sentence reduction to one judge might not be so persuasive to another. And I do not mean to discredit the abilities of judges to make these decisions. The problem here is not so much making jurisprudentially correct or just decisions. There is often more than one way to do justice. The problem here is following a consistent way of doing justice from one case to the next. The Parole Commission has the advantage of being a single nationwide body which can make consistent responses to similar situations. Returning each case to the sentencing court on the motion of the prisoner seems to be a rather cumbersome, and likely disparity producing, way of attempting to accomplish this goal.

3. A hidden parole system.

Another area of post-sentence administration which could turn into de facto parole is community release placements by prison officials. Early placement in halfway houses, work

release and study release, and extended furloughs all bear some similarity to parole. These can all be valuable programs, but they are not designed as substitutes for parole. If parole is abolished, I think the pressures will be very strong to use these programs as replacements for parole. If overcrowding becomes a problem, for example, you could see increased use of halfway houses. And when they become overcrowded, you could see their residents being given permission to live at home. The question is whether you want these decisions made under these circumstances, likely as a response to local institutional needs, or whether you want a visible parole system with a national paroling policy.

C. WOULD ENACTMENT OF FLAT SENTENCING LEAD TO AN INCREASE IN PRISON POPULATION, AND WHAT ARE THE CONSEQUENCES IF IT DOES?

In my opinion, the enactment of this legislation would lead to increasingly lengthy prison terms. If that happens, Congress should be prepared for a corresponding (and expensive) increase in prison population (which is presently overcrowded with about 26,000 prisoners).

1. The consequences in terms of federal expenditures.

According to Bureau of Prisons' statistics, federal prisoners eligible for parole (prisoners with sentences of more than one year) now serve an average of 41.8 percent of their sentences. This is an estimated cumulative time in

custody of 263,908 months for prisoners sentenced each year. Even if this percentage were increased to only 50 percent of past sentences under the flat-time provisions of this bill, this would add 52,066 cumulative months in custody at an estimated yearly cost of \$32,940,713 just for operational expenditures, with an estimated capital construction cost of \$179,743,884 to build the prisons to house these additional prisoners. If prisoners served 60 percent of sentences imposed today, this would add an additional 115,261 cumulative months in custody, at an estimated yearly cost increase of \$72,922,015 in operational expenditures, and an estimated capital construction cost increase of \$397,905,356. All these estimates are based on the Bureau of Prisons' own figures of \$7,592 per bed for operational costs and \$39,000 per bed for construction costs. Moreover, these are last year's figures and do not take inflation into account. (See Appendix).

With such consequences in mind, even for relatively slight increases in actual sentence length, it should be clear that a number of features in this bill present very serious problems.

2. Factors pointing to increased prison population.

The Sentencing Committee, as well as the judges who would implement the guidelines, would have no opportunity to assess the real effects of the sentences they impose in terms of the

actual conditions of prison life. Thus, sentences are likely to be seen in terms of symbolic time, only abstractly related to the offense, without a realistic basis in the resources and ability of our prison system. This factor might certainly increase both the guideline ranges as well as individual sentences to unacceptable (and dangerous) levels. Obviously I cannot predict this with absolute certainty. No one has seen the sentencing guidelines yet. But the public is accustomed to hearing that serious offenders are receiving long prison sentences. These are also the kinds of sentences that judges are accustomed to working with. The Parole Commission on the other hand, deals with much shorter periods of actual confinement. Perhaps the Judicial Conference and sentencing judges would be able to make this kind of adjustment in their thinking about sentences, but this is a serious risk that we would be taking. If sentences appear overnight to go down to about one-third or one-half of their present level, I predict that there will be complaints of undue leniency and calls to "get tough" by increasing sentences, and I think this pressure will be extremely difficult to resist.

3. The Sentencing Committee's inability to respond to overcrowding.

Although the bill directs the Sentencing Committee to consider overcrowding, it does not provide the safety valve mechanism available to a paroling authority. If the prison

population climbed to unacceptable levels, the Sentencing Committee could reduce the guideline ranges for future cases (although even this would involve a substantial time lag). However, this method would only create disparity between those sentenced before and after the change. In contrast, the Parole Commission could make immediate but smaller changes equally throughout the prison population in order to produce the desired result. This is not to argue that the parole authority should be used routinely to control institutional populations; it only acknowledges the unique ability of the paroling system to take into account an important reality that the Sentencing Committee could not.

IV. RECOMMENDATIONS

In my opinion, the Subcommittee should adopt the alternative proposal setout at page 123, lines 23-33 of the August 24th draft bill. That is, a sentencing committee would be created in the Judicial Conference to establish guidelines for judicial sentencing decisions. The Parole Commission would be retained with jurisdiction over the last half of the sentence pursuant to parole release guidelines and the provisions of the Parole Commission and Reorganization Act. Good time would be eliminated and statutory maximum terms would be reduced correspondingly. To further implement this system, you should delete section 3704 of the working draft and allow the parole system to handle post-sentence matters under the Parole Commission and Reorganization Act of 1976.

A dual authority system, with sentencing judges and the Parole Commission both operating under guidelines, offers the most promise for fair and equitable setting of prison terms. This is essentially the type of system recommended by the American Bar Association Standards Relating to Sentencing Alternatives and Procedures. One question which naturally arises at this point is whether it is a duplication of effort to have both sentencing judges and the Parole Commission involved in prison term decisions. The recent ABA Task Force on Sentencing Alternatives and Procedures has addressed precisely this point:

Admittedly, the consequence of endorsing both sentencing guidelines and parole guidelines is to permit a degree of duplication. But the neatest, most streamlined system is not necessarily the wisest or the safest. Both the sentencing and the parole processes have their special focal point. At sentencing, it is likely to be the "in/out" decision of whether to impose confinement or probation; at the parole stage, the focus shifts to "real time" and the average length of actual confinement for those similarly situated. Discretion needs structuring at both of these levels.

Sentencing guidelines are clearly needed for the decision as to probation, conditional discharge, fine, or imprisonment and for the decision as to the length of the maximum sentence. Writing guidelines for these decisions and applying those guidelines properly will be major tasks in themselves. It is to be noted that about 75 percent of all convicted federal criminal defendants receive probation, fines or imprisonment of one year or less; decisions not presently regulated by guidelines at all. Leaving the existing parole system in place to determine the duration of the prison term in the remaining 25 percent of cases sentenced to prison terms in excess of one year is a logical final step in the process.

V. MISCELLANEOUS ISSUES

Before I finish, I would like to briefly discuss two points which I know are matters of concern to you.

The first is the purpose of incarceration. As I understand the draft of the Subcommittee, it is not intended that offenders should be sent to prison or kept there solely because they need rehabilitation. Although some parole boards may have been criticized in the past for placing too much emphasis on a perceived "need for treatment," that is not the policy or the practice of the Parole Commission. The parole guidelines make that clear.

The second subject is what has been called "truth in sentencing." I understand the Subcommittee's concern about this issue and I believe that the draft bill's elimination of good

time is a very substantial step toward achieving this goal. Presently, institutional good time can take off from one-third to almost one-half of the sentence imposed by the court. This chunk of the sentence is completely illusory because no one ever serves it. Although good time can be forfeited for violation of institutional rules, it is invariably restored after a subsequent period of time. Thus, the large amounts of time credited under the good time laws are largely responsible for what is perceived as a lack of truth in sentencing. Adopting the alternative proposal on page 123, lines 23-33, of the Subcommittee's working draft would deflate the unreal portion of prison sentences, thus moving in the direction of more truth in sentencing without losing the useful functions which parole now performs.

APPENDIX

ESTIMATED INCREASE IN COST OF INCARCERATION

The current Bureau of Prisons' discharge file contains records for 8,467 original releasees, with sentences of more than one year, released to detaining authorities or the community between January 1, 1977 and December 31, 1977, with valid sentence computation data.

For this sample (n=8,467) the cumulative total sentence imposed is 504,213 months (average total sentence imposed is 59.55 months), and the cumulative time in custody is 210,564 months (average time in custody is 24.87 months).

This sample, however, excludes (among others) prisoners sent directly to community treatment centers from the courts. Data provided the Administrative Office of the United States Courts indicates that for 1974, there were 10,612 convicted defendants sentenced to a term of imprisonment of more than one year (see Table 1). Thus conservatively estimating the current number of original releasees with sentences of more than one year at 10,612, the statistics presented in Table 2 would be applicable.

Table 1
 United States District Courts
 Type and Length of Sentences of Convicted Defendants (a)

TOTAL	TERMS OF IMPRISONMENT					Split Sentence (probation term)	Probation	Probation w/o super- vision suspended sentence	Fine Only
	0-12 months	13-24 months	25-36 months	37-60 months	61 & over months				
36,252	2,838	2,534	2,042	3,734	2,302	1,991	17,577	1,216	2,018

(a) Source: Federal Offenders In United States District Courts 1974,
 Administrative Office of the United States Courts,
 Washington, D.C. 20544, p. 20-21.

Table 2

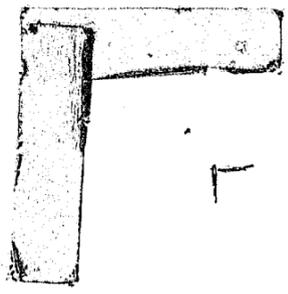
Estimated Increase in Cost of Incarceration

Percent of Total Sentence Served	Estimated Cumulative Time In Custody (in months)	Estimated Increase In Cumulative Time In Custody (in months)	Estimated Increase In Total Operation Cost Per Year (a)		Estimated Additional Capital Cost to Confine Increased Population (b)
			Amount	Percent	
41.76% (c)	263,900	—	—	—	—
50%	315,974	52,066	\$32,940,713	20%	\$179,743,884
60%	379,169	115,261	\$72,922,015	44%	\$397,905,356
70%	442,364	178,456	\$112,903,317	68%	\$616,066,827
80%	505,559	241,651	\$152,884,619	92%	\$834,228,299
90%	568,754	304,846	\$192,865,921	116%	\$1,052,389,771
100%	631,949	368,041	\$232,847,223	139%	\$1,270,551,243

a: Estimated total cost of incarceration based on estimate of \$7,592.00/year, excluding capital costs. Source: Ronald J. Waldron, United States Bureau of Prisons.

b: Based on current projected construction costs of \$39,000 per bed. Source: Donald Voth, United States Bureau of Prisons. Note: This estimate does not include expected increase in construction cost due to inflation.

c: Average percent of total sentence now served.



END