THE UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

6-00771

UNITED STATES SENTENCING COMMISSION

NOTICE OF PUBLIC HEARING

Agency: United States Sentencing Commission
Action: Notice of Public Hearing

SUMMARY: This notice announces a public hearing on criminal offense seriousness scheduled by the U.S. Sentencing Commission for Tuesday, April 15, 1986.

Date: April 15, 1986
Time: 10 a.m. ~~4 p.m.~~
Location: U.S. Sentencing Commission Hearing Room, 14th Floor of the North Office Tower at National Place, 1331 Pennsylvania Avenue, Washington, D.C. 20004
Further Information: Contact Paul K. Martin, Communications Director, 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, D.C. 20004, (202) 662-8800.

SUPPLEMENTARY INFORMATION: The U.S. Sentencing Commission was established under the Comprehensive Crime Control Act of 1984 and is an independent commission in the Judicial Branch. The Commission is charged with developing a national sentencing policy, and pursuant to that, sentencing guidelines for the federal courts. The topic of this hearing, the ranking of offenses by seriousness, is a crucial step in developing sentencing guidelines.

Written statements on this topic may be submitted to the the U.S. Sentencing Commission, 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, D.C. 20004.

Federal Register: Please bill

U.S. Sentencing Commission
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AGENDA

United States Sentencing Commission
Public Hearing on Offense Seriousness
April 15, 1986

10 a.m.	Chairman William W. Wilkins, Jr. Opening Remarks
Testimony:	
10:15 a.m.	The Association of the Bar of the City of New York Speaker: Peter Walsh
10:30 a.m.	Federal Probation Officers Association Speaker: Susan Smith
10:45 a.m.	Federal Public Defenders Association Speaker: Owen Walker
11 a.m.	National Rifle Association Speaker: David Connover
11:15 a.m.	American Civil Liberties Union - National Prison Project Speaker: Alvin Bronstein
BREAK	
11:45 a.m.	National Interreligious Service Board for Conscientious Objectors Speaker: Rev. L. William Yolton
12 noon	Washington Legal Foundation Speaker: Paul Kamenar
12:15 p.m.	The Institute for Government and Politics Speaker: Patrick McGuigan
12:30 p.m.	Crime Magazine Speakers: David Jones, Stephen Jennings
12:45 p.m.	National Association of Criminal Defense Lawyers Speaker: Benson Weintraub
1 p.m.	Chairman Wilkins Closing Remarks

OFFENSE SERIOUSNESS QUESTIONNAIRE

INSTRUCTIONS: This questionnaire presents sixteen crime scenarios which you are asked to rank in order of seriousness. In the box beside each, please rank the relative seriousness of the offense from 1 to 16, number 1 being the most serious and number 16 the offense you deem least serious among those presented. Please attempt to differentiate each offense with a unique rank from 1 to 16. If, however, in your opinion two offenses are essentially identical in seriousness, you may assign the same number to both offenses (for example, 5). In that case, do not assign the next number in the sequence (6), but rather assign 7 to the offense that follows in seriousness.

You may write in additional comments in the space provided on page 4. Please indicate your name, organizational affiliation, and the organization's address and phone number.

Name: _____

Organization: _____

Address: _____

_____

Phone: _____

A. The reported head of an organized crime family is found guilty of racketeering in a corrupt organization (RICO). The predicate offenses involved violent crimes and frauds. ____

B. A chemical corporation's valuable machinery will be damaged unless toxic chemicals are released into a stream. The chemicals pose no no risk to human life. After approval by the company's board of directors, the plant manager releases the chemicals which kills a substantial number of fish. The corporation is convicted of a felony for polluting the environment. ____

C. An estranged husband is convicted of first degree murder for shooting his wife at her place of employment in a federal building. ____

D. A draft evader is convicted after a presidential order suspending the draft, though the evasion took place prior to the suspension order. ____

E. An Assistant Secretary of Defense is convicted of accepting a $10,000 bribe from a bidder on a multimillion dollar defense contract in which the bidder is awarded the contract over an equally qualified and priced bidder. ____

F. A person enters a bank and hands a teller a note which says "Give me cash or you're in big trouble." The teller fills a sack with $10,000. The offender did not have a weapon. ____

G. A bank teller is caught embezzling $10,000 from a federal bank at a time when a number of unsolved embezzlements have been reported around the country. ____

H. A government employee takes and sells several documents to the Soviet Union during peacetime. The documents reveal technical details about defense systems which now must be altered at a cost of $15 million. ____

I. A Coast Guard inspection of a boat at sea heading into Miami leads to the conviction of the captain for possession with intent to distribute heroin with a street value of $15 million. ____

J. A hiker in a national forest shoots at a forest ranger, but misses. ____

K. A wholesale automobile dealer is convicted of altering odometers on the used cars he sold. It is documented that he altered odometers on over 200 automobiles with the average "roll back" being 50,000 miles per car. ____

L. The president of a small college is convicted of making false statements to the department of education so that the financially troubled school could receive assistance through federal financial programs. A total of $750,000 was illegally received by the school through this fraud. ____

M. A camper is convicted for camping in a federal park without a permit and starting a campfire which resulted in a forest fire. The fire was brought under control rather quickly without extensive destruction. ____

N. An elderly woman receives her deceased husband's social security check for several months after his death. She forges his name and thereby receives $3,000 worth of undeserved benefits before being detected. ____

O. An individual with a prior felony record buys a .410 gauge shotgun from a hardware store. In the process he signs the required federal forms wherein he swears that he has never been convicted of a crime. He is convicted of receipt of a firearm by a felon and falsely completing the form. ____

P. A person intentionally perjures himself during the trial of a friend by testifying falsely about the defendant's whereabouts during the commission of a crime. ____

Comment

Walsh

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

COMMITTEE ON CRIMINAL LAW

JOHN H. DOYLE, III
CHAIR
666 THIRD AVENUE
NEW YORK 10017
(212) 850-0753

JUDD BURSTEIN
Treasurer
150 EAST 58TH STREET
NEW YORK 10022
(212) 486-1717

Anthony Princi, Esq.
Secretary
(212) 850-0808

April 9, 1986

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Washington, D.C. 20530

Re: Council of Criminal Justice
Subcommittee on United States
Sentencing Commission Guidelines

Dear Chairman Wilkins:

On behalf of the Association of the Bar of the City of New York, I would like to thank you very much for the opportunity to give our views and to assist the Commission in ranking crimes. Your letter and the accompanying questionnaire were reviewed by the Subcommittee of our Association's Council on Criminal Justice. At the outset, I would like to note that this is not a formal opinion of the Association itself, but rather an effort by the Council to directly assist the Commission in its work.

In reviewing the questionnaire, we did not attempt to derive or settle upon any particular philosophical basis for ranking crimes or for sentencing, although there was obviously a considerable amount of discussion which bore on this.

In arriving at the rankings which are listed below, some of the Commissions's examples yielded a consensus virtually from the outset, while others generated a considerable, initial spread as to the appropriate placement. Despite the diversity of membership on the Subcommittee, we found we could agree on placements by permitting a two-point

variation in the placement. Obviously, at some points, this generated an overlap.

A brief word about our methodology. We evaluated the crime list individually, then meeting together, struck the highest and lowest ratings given a particular crime (by outliers), and then discussed the range to see whether participants could come to an agreement.

The list which follows gives the rankings in descending order of severity.

1-2	A	RICO
1-3	H	Espionage
2-4	C	Murder
3-5	I	Drugs
4-5	E	Bribery
7-8	F	Bank Robbery
7-9	P	Perjury
8-10	O	Firearms Offense
10-11	K	Commercial Fraud (odometers)
10-12	L	Fraud (college president)
10-12	G	Embezzlement
11	B	Toxic Substances
13-15	D	Draft Evasion
15-16	N	Forgery
15-16	M	Camping, Forest Fire
-----	J	Shooting at Ranger

When we had completed the ranking of crimes, we turned our attention to the questions posed by you in your letter of March 19, 1986. Responding to the question of whether the manner of carrying an offense should affect ranking, our members felt it obvious that it should, in general. The robbery committed with a gun was believed clearly more serious than that committed without a weapon. On the question of forgery versus counterfeiting, however, we were evenly divided, with much attention given to possible differences among the participants in the crime.

As to the appropriateness of certain sanctions to particular crimes, there was a clear consensus among us that there should be no <u>per se</u> rule which would impose an inviolate linkage of crime and sanction. Subcommittee members expressed the belief that such a rule would be very dangerous and would have the effect of substantially limiting the flexibility a judge might require to respond appropriately in a particular case.

We look forward to attempting to answer your questions before the Commission next week, and would be happy to assist the Commission further in any way you think appropriate.

Very truly yours,

Peter J. Walsh

Peter J. Walsh
Member of Subcommitee on
Sentencing Guidlines

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variation in the placement. Obviously, at some points, this generated an overlap.

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Ranked very low - why?

When we had completed the ranking of crimes, we turned our attention to the questions posed by you in your letter of March 19, 1986. Responding to the question of whether the manner of carrying an offense should affect ranking, our members felt it obvious that it should, in general. The robbery committed with a gun was believed clearly more serious than that committed without a weapon. On the question of forgery versus counterfeiting, however, we were evenly divided, with much attention given to possible differences among the participants in the crime.

As to the appropriateness of certain sanctions to particular crimes, there was a clear consensus among us that there should be no <u>per se</u> rule which would impose an inviolate linkage of crime and sanction. Subcommittee members expressed the belief that such a rule would be very dangerous and would have the effect of substantially limiting the flexibility a judge might require to respond appropriately in a particular case.

- In considering appropriate punishment for most "white collar criminals" who are not dangerous to community, do you feel it is possible to provide a just, deserved punishment & one of sufficient value as a deterrent value, w/o prison?

We look forward to attempting to answer your questions before the Commission next week, and would be happy to assist the Commission further in any way you think appropriate.

Very truly yours,

Peter J. Walsh

Peter J. Walsh
Member of Subcommitee on
Sentencing Guidlines

Testimony:

1. Manner of committing crime clearly impt.
2. Type of crime & linkage - no per se rule
3. Personal harm - harm to property or environment makes crime more seriousness
4. Attempt should rank just below the actual, completed.
5. White collar - fraud - concerned about need for deterrence more than j.d.
6. Conspiracy (completed) similar to attempt
7. Whether sentencing should reflect actual crime or charged crime? How to det. actual crime.
8. Regional pts. of view should be discounted.

S. Smith

PREPARED STATEMENT

BY

ROBERT L. THOMAS, PRESIDENT

FEDERAL PROBATION OFFICERS ASSOCIATION

FOR THE

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON

OFFENSE SEVERITY

APRIL 15, 1986

WASHINGTON, D. C.

I AM ROBERT L. THOMAS, PRESIDENT, FEDERAL PROBATION OFFICERS ASSOCIATION, AND CHIEF PROBATION OFFICER, DISTRICT OF ARIZONA. I WISH TO THANK CHAIRMAN WILKINS AND ALL MEMBERS OF THE U. S. SENTENCING COMMISSION FOR THIS OPPORTUNITY TO ADDRESS THE COMMISSION ON THE QUESTION OF OFFENSE SEVERITY.

THE COMMISSION'S INSTANT TASK IS INDEED FORMIDABLE, THE GENESIS OF WHICH CONFRONTS FEDERAL PROBATION OFFICERS EACH TIME THEY INVESTIGATE, EVALUATE, AND RECOMMEND HOW A GIVEN INDIVIDUAL OR ORGANIZATION CHARGED WITH A CRIMINAL VIOLATION, IS TO BE SANCTIONED.

EVEN THOUGH PROBATION OFFICERS CONFRONT THE ISSUE OF DETERMINING OFFENSE SEVERITY ON A DAILY BASIS, THEY TOO EXPERIENCE A RANGE OF DIVERSE OPINION WHEN IT COMES TO RANKING SPECIFIC CRIMES OR CATEGORIES OF CRIMES.

IT HAS BEEN SAID, "A SERIOUS CRIME IS ONE THAT AFFECTS ME, MY FAMILY OR LOVED ONES DIRECTLY. ALL OTHER CRIMES HAPPEN TO "THE OTHER GUY."

THE SERIOUSNESS OF CRIME IS BY NO MEANS CLEAR-CUT, OR ANYWHERE CLEARLY STATED. OUR JUDGMENTS ABOUT THE CRIMINAL, INCLUDING SEVERITY OF THEIR CRIMES, ARE IMBEDDED IN OUR UNIQUE SOCIAL INSTITUTIONS. THESE JUDGMENTS ARE FURTHER

COLORED BY CONSIDERATIONS OF RACE, ETHNIC ORIGIN, SOCIO-ECONOMIC STATUS, GEOGRAPHIC PERIMETERS, OCCUPATION, AND A HOST OF OTHER VARIABLES WHICH HEIGHTEN OUR SAMENESS AND IDENTIFY OUR DIFFERENCES.

TOO OFTEN, WHEN WE SPEAK OF CRIME, WE SPEAK OF LEGAL CATEGORIES OR DEFINITIONS RATHER THAN SPECIFIC PERSONAL WRONGS. JUDICIAL SANCTION HAS BECOME THE RESOLUTION OF NOT WHAT WAS DONE, BUT RATHER HOW, WHEN, WHERE AND TO WHOM BY WHOM. THESE VARIATIONS HAVE FOUND THEIR WAY INTO THE PENAL CODE AND THE WIDE RANGE OF POSSIBILITIES WITHIN EACH CRIME TYPE FURTHER CONFOUNDS THE SERIOUSNESS ISSUE.

FOR MOST AMERICANS, WHO ONLY WISH TO BE SAFE ON THE STREETS AND SECURE IN THEIR HOMES, VIOLENCE, OR THREAT OF VIOLENCE, IS CONSIDERED THE MOST SERIOUS CRIME. A LIFE IS TAKEN DURING THE COMMISSION OF SOME ILLEGAL ACT AND IT MATTERS NONE AT ALL TO THE VICTIM'S FAMILY WHETHER THE ACT IS LEGALLY DEFINED A SPECIFIC DEGREE OF MURDER, VOLUNTARY OR INVOLUNTARY MANSLAUGHTER, ETC. A PERSONAL AND IRREVERSIBLE LOSS HAS OCCURRED.

THE QUESTION OF CRIME, ITS RELATIVE SERIOUSNESS AND HOW SOCIETY CAN BEST DEAL WITH ITS OUTCOME HAS DRIVEN CRIMINAL JUSTICE RESEARCHERS SINCE SHORTLY AFTER ADAM AND EVE PURLOINED

THE FORBIDDEN FRUIT. WE ARE NO CLOSER TO A CONCLUSIVE ANSWER AND OUR ATTEMPTS AT AFTER-THE-FACT RESOLUTION CONTINUE FULL CIRCLE.

SOCIETY DICTATES HOW ITS INSTITUTIONS WILL ADDRESS ANY GIVEN PROBLEM. WE HAVE PASSED THROUGH THE MEDICAL MODEL TREATMENT MODALITY AND ARE ENTERING THE REALM OF JUST DESSERTS AND DETERMINATE SENTENCING - AGAIN. BUT THESE ARTIFICIAL AND SHORT-LIVED RESPONSES TO CRIME AND THE CRIMINAL FAIL FOR THE MOST PART TO GRASP THE REALITY THAT PEOPLE WANT TO BE SAFE. PEOPLE RANK SEVERITY OF CRIME PRIMARILY ON THE BASIS OF INJURY SUFFERED. THIS WAS THE CONCLUSION TENDERED BY THE U. S. DEPT. OF JUSTICE SPONSORED 1985 NATIONAL SURVEY OF CRIME SEVERITY AND MY OWN LIMITED SURVEY USING THE COMMISSION'S SEVERITY QUESTIONNAIRE, DONE IN PREPARATION FOR THIS HEARING.

ATTENDANT TO THE SERIOUSNESS QUESTION, THE MANNER IN WHICH AN OFFENSE IS CARRIED OUT SHOULD BE A FACTOR <u>EXCEPT</u>, IN MY JUDGMENT, WHEN LIFE IS LOST OR PERMANENT DISABILITY RESULTS, VIOLATION OF PUBLIC TRUST OCCURS, NATIONAL SECURITY IS COMPROMISED, OR ORGANIZED CRIME IS INVOLVED. THESE CRIMES MANDATE CONFINEMENT WITH LITTLE OR NO REGARD FOR HOW THE ILLEGAL ACT WAS PERPETRATED.

THE QUESTION OF SANCTION GETS TO THE HEART OF THE DISPARITY QUESTION. BUT, WHEN DOES LEGITIMATE JUDICIAL DISCRETION

BECOME DISPARITY? IF THERE IS FAULT, IT IS NOT IN THE EXERCISE OF ALLOWED DISCRETION BUT RATHER, THAT CURRENT LEGAL PARAMETERS ARE TOO BROAD. IF STRICT ACCOUNTABILITY IS DESIRED, NARROW THE GUIDELINES FOR BOTH PROSECUTOR AND JUDGE, WHICH IN TURN RESTRICTS DISCRETION AND ENHANCES ACCOUNTABILITY - LEGITIMATELY, REASONABLY.

IN THIS TIME OF MONETARY RESTRAINT, BROUGHT CLOSER TO HOME BY GRAMM-RUDMAN-HOLLINGS, A WINDOW OF OPPORTUNITY HAS OPENED - THAT IS, RE-EXAMINATION OF SANCTIONS AND THEIR APPROPRIATENESS FOR ALL OFFENSES, BUT SPECIFICALLY FOR CERTAIN NON-VIOLENT AND/OR PROPERTY OFFENSES. WHEN SEVERITY IS DETERMINED, DEGREE AND QUALITY OF SANCTION BECOMES CLEARER. THE FEDERAL SYSTEM NEEDS ENFORCEABLE COMMUNITY-BASED ALTERNATIVES TO INCARCERATION FOR THESE LESSOR OFFENDERS. IT CAN BE SAID THAT AT ONE END OF THE CONTINUUM, ALTERNATIVES TO CONFINEMENT BEGIN AT BIRTH, AND AT THE OTHER, SOME FORM OF HOME CUSTODY WITH APPROPRIATE ELECTRONIC SAFEGUARDS TO MONITOR, ENFORCE AND DETECT VIOLATIONS. IN REALITY WE ARE LIMITED BY CONVENTION, OUR IMAGINATIONS, AND THE LAW.

THIS COMMISSION HAS AN OPPORTUNITY TO IMPACT POSITIVELY ON THE CRIMINAL JUSTICE SENTENCING PROCESS. WHAT IS DONE HERE WILL AFFECT THE FEDERAL JUDICIARY FOR MANY YEARS. WE IN FEDERAL PROBATION TAKE OUR STATUTORY RESPONSIBILITIES SERIOUSLY AND ASK THAT THE SENTENCING COMMISSION BE INNOVATIVE,

YET REALISTIC, IN ESTABLISHING PRIORITIES AND IN REAFFIRMING OUR BASIC VALUES OF RIGHT AND WRONG.

THE FEDERAL PROBATION OFFICERS ASSOCIATION, AND THE 1,942 OFFICERS IT REPRESENTS, APPRECIATES THIS OPPORTUNITY TO WORK FOR AND WITH THE COMMISSION. BUT, WHILE WE CAST OUR COLLECTIVE EYE TO THE FUTURE, LET US ENDEAVOR TO KEEP OUR FEET ON THE GROUND.

THANK YOU AGAIN FOR ALLOWING THIS TESTIMONY. I WILL BE GLAD TO RESPOND TO ANY QUESTIONS THE COMMISSION MEMBERS HAVE ON AREAS COVERED IN THIS PRESENTATION.

O. Walker

M E M O R A N D U M

April 10, 1986

TO: United States Sentencing Commission

FROM: Federal Defender Legislative Committee

RE: Ranking of Offense Seriousness

I.

INTRODUCTION

This memorandum is submitted on behalf of the Federal Defenders by their Legislative Committee in response to Judge Wilkins' letter of March 19, 1986 seeking our response to an offense seriousness questionnaire prepared by the Sentencing Commission, along with our views on several issues related to the rating of offense seriousness which are to be discussed at the Commission's hearing on April 15, 1986.

II.

THE OFFENSE SERIOUSNESS QUESTIONNAIRE

Upon receipt of the offense seriousness questionnaire, the Federal Defender Legislative Committee distributed it to Federal Defender offices throughout the country for completion. To date, we have received completed questionnaires from twenty-five offices. All of the responses to the questionnaire have been combined in a chart which is attached hereto as Appendix A.

We have also analyzed the responses to ascertain areas of agreement and disagreement among the Defenders. For each case, the range of rankings among the twenty-five responses has been compiled. This information regarding the "gross range" for each case is shown in Column A of Appendix B attached hereto. In addition, with respect to each case we excluded the two extreme high and two extreme low rankings and, using the remaining twenty-one responses, completed a "net range" calculation for each case. This net range information is shown in Column B of Appendix B. In those cases in which the net range high number does not exceed the net range low number by more than four, we have concluded that there is sufficient consensus among the responding Defenders to assign the case a general seriousness ranking. Eleven of the cases in the questionnaire fall into this category and the consensus ranking for each of these cases (high, upper middle, middle, low middle, and low seriousness) is noted in Column C of Appendix B. In the remaining five cases, the extremes of the net range were greater than four numbers apart and we concluded that no meaningful consensus could be said to exist among the Defenders. Consequently, there are no general rankings of seriousness noted for these cases.

In addition to evaluating the questionnaire responses to identify cases in which a general consensus existed among the Defenders, we have added the numerical rankings assigned to each case in each of the twenty-five responses. The resulting cumulative totals were then utilized to give each case a cumulative

ranking from 1 to 16. The cumulative totals and the cumulative ranking which these totals yield are shown in Columns D and E of Appendix B. It should be noted that in some cases these cumulative rankings are the result of extremely varied individual responses by the Defenders and, therefore, they do not reflect a true consensus among the Defenders.

Finally, we have reviewed the comments submitted by the individual Defenders who responded to the questionnaire in order to identify the considerations which the Defenders felt were significant in their ranking of the individual cases.

A. Cases in Which a Consensus Exists Among the Defenders:

As noted earlier, there appears to be a consensus among the Defenders as to the general seriousness ranking of eleven of the cases included in the questionnaire. Cases A, C and H were ranked as cases of high seriousness. Cases E and I were ranked as cases in the upper middle category. Case F was ranked in the middle category. Cases G and O were ranked in the lower middle category, and cases D, M and N were ranked as cases of low seriousness. The reasons expressed for these rankings are discussed below.

Case A (Organized Crime Case) - Twenty-three of the Defenders placed Case A among the three most serious cases in their ranking. The factors in this case which were cited in support of its high ranking were the existence of organized group activity, the presence of violent behavior, the suggestion of careful planning implicit in the fraudulent predicates, and the apparent extended

length of time over which the offense was committed. The combination of these factors was viewed by the Defenders as posing the threat of both physical and economic harm to individuals, thus impacting substantially on society as a whole. It was for these reasons that this case was ranked as one of high seriousness.

Case C (Murder) - All of the responding Defenders ranked this case among the top four in seriousness and sixteen ranked it as the most serious offense. While the case does not involve group activity, any economic harm, or any criminal behavior over an extended period of time, the fact that it involved violent behavior leading to a loss of life led to its high rating. The responses with respect to this case point up the fact that the taking of human life, even under circumstances which suggest that a repetition of such conduct by the offender is not likely, is viewed as an evil of such magnitude that the offense must be categorized as of the highest seriousness.

Case H (Espionage) - The net range of the rankings for this case was 2 to 5, placing it in the high seriousness category. While the case lacks any element suggesting a threat to the safety of any particular individual, the general threat to the national security and the safety of the general populace were significant elements in its high ranking. Other factors which are present here which support this high ranking are the breach of a sensitive public trust, the apparent planning which must have been involved, the pecuniary motive of the defendant, the apparent insensitivity to

the great danger his conduct posed to the nation, and the economic cost of redressing the harm caused by the offense.

Case I (Heroin Importation) - The net range of the rankings of this case was 3 to 6, placing it in the upper middle seriousness category. The factors cited in support of viewing this as a relatively serious offense were the fact that it was part of group activity involving planning and premeditation, and that the large quantity of drugs involved posed a great danger to the health and well-being of the large number of persons who would ultimately consume them. Also, the substantial indirect threat to the safety and economic well-being of the general populace which arises from the crimes committed by drug users was viewed as a significant factor. This case might have been ranked even higher by some Defenders if there had been a clear indication that the captain was a principal in the narcotics operation, rather than a courier.

Case E (Bribery) - The net range of the rankings of this case was 4 to 8, placing it in the upper middle seriousness category. The significant factors which were cited as warranting the relatively high ranking of this offense were the high status of the offender, the breach of the high level trust involved, and the obvious planning and premeditation which his conduct entailed. These factors were viewed as rendering the conduct here more blameworthy than it might otherwise be in a case involving a bribe payment of this amount from a qualified contractor. While several of the Defenders are dubious of the extent to which general deterrence

is effective in many situations, the high visibility of the offense and offender in this case leads us to view the factor of deterrence as a significant consideration here. Thus, while this case does not involve any of the group activity, violence, or threat to personal or general safety which characterized the other highly ranked offenses, we believe that it should, nevertheless, be ranked as relatively serious.

Case F (Unarmed Bank Robbery) - The net range of the rankings of the unarmed bank robbery was 6 to 10, placing it squarely in the middle range category. The crime apparently involved some degree of planning, raised a threat of physical harm which undoubtedly caused fear to the victim, and also raised the possibility that efforts of security personnel to respond to the offense would give rise to physical violence. On the other hand, the actual dollar loss was relatively small and the offender apparently had no real intent to cause physical harm.

Case G (Bank Embezzlement) - The net range of the rankings of this offense was 9 to 13, reflecting a consensus that this case falls in the lower middle category of seriousness. While the monetary loss was the same as in the unarmed bank robbery, this case was ranked as less serious because of the absence of any threat of physical harm. The different ranking of these two offenses clearly illustrates the extent to which concerns about even a mere threat to use physical force (and the personal fears that such a threat engenders) weigh heavily as a factor in assessing the seriousness of criminal behavior. Also, while the teller here may be

said to have breached a trust, the Defenders believe that at this level of responsibility (in contrast to the situation in Case E), this should not be a significant factor. Similarly, we felt that at this low visibility level, general deterrence has little effect and should not result in more severe treatment. There were suggestions, however, that if this conduct were shown to be part of a pattern of planned behavior over a period of time, the seriousness ranking of this offense should be increased.

Case O (Felon/Gun) - The net range of the rankings of this offense was 9 to 13, identical to that of the bank embezzlement. This relatively moderate seriousness ranking was based on the fact that the weapon involved was a long-barreled, non-concealable, low powered hunting weapon and that there is no indication in the facts as presented that it was intended to be used to harm other persons. Several Defenders indicated that their ranking of this offense would be higher if the fact pattern indicated that the offender had a prior conviction for a violent offense, or if the weapon involved were a handgun.

Case N (Social Security Checks) - The net range of the rankings of this offense was 12 to 16, placing it in the low seriousness category. This low ranking was based on a number of factors. While the forging and cashing of the deceased husband's checks was calculated to realize personal financial gain, the actual receipt of the checks resulted from a failure to act rather than affirmative misconduct. The amount of financial loss is relatively small and there is no identifiable individual victim. The Defenders

as a group viewed this as an offense which posed little danger and, therefore, as one of low seriousness.

Case M (Camping/Fire) - The net range of the rankings of this case was 13 to 16. The major factors in the universally low ranking given this offense were the absence of an intent to cause any harm, the low level of the damage done, and the fact that none of the damage affected other persons.

Case D (Draft Evader) - The net range of the rankings of this offense was 14 to 16. As such, it was viewed as the least serious of the cases presented. While the conduct here indirectly caused harm to another person (the individual who was drafted in the place of the offender), it was assumed that this was not a harm intended by the offender. The intervening suspension of the draft and the assumption among many Defenders that the defendant may have been motivated by moral, ethical or political concerns also substantially affected the ranking of this offense.

B. Cases in Which no Consensus was Established Among the Defenders:

As noted earlier, in five of the cases the net range of the rankings was so wide as to reveal a lack of consensus among the Defenders as to the appropriate ranking of the offense. Analysis of these cases reveals that each involved competing factors which apparently were weighed quite differently by the individual Defenders. These are discussed below.

Case B (Pollution) - The net range of the rankings of this offense was 6 to 15, thus running the gamut from an upper middle seriousness rating to a low seriousness rating. Those who viewed this offense as more serious cited the calculated group decision to violate the law without regard to the harm to the environment. Those who viewed it as much less serious focused on the absence of the risk of any harm to human life and the absence of any indication of economic loss.

Case J (Hiker/Sniper) - This case also produced a very wide disparity in ranking, with the net range running from 2 to 9. This was due in part to an ambiguity in the facts, as some Defenders were uncertain as to whether the defendant intended to shoot the ranger. Others viewed the offense as of only middle range seriousness because of absence of any actual harm. Those who viewed this as a very serious offense (eleven Defenders ranked this 4, 3 or 2 in their response) focused on what they understood to be an intent to shoot and, therefore, do harm to another human being. These Defenders viewed the element of blameworthiness as far more important than the fortuitous fact that the ranger was not hit by the shot.

Case K (Car Salesman) - The net range of the rankings in this case extends from 7 to 13. Those who viewed this offense as more serious focused on the fact that it was premeditated, took place over a period of time, and caused economic harm to a sizable number of individual victims. Those who ranked this offense toward the low or low middle end of the scale focused on the fact that the offense was non-violent.

Case L (College President) - The Defenders came close to a consensus placing this offense in the lower middle range of seriousness, but did not as the net range was 9 to 14. Those who viewed this case as less serious focused on the fact that the defendant acted out of concern for the school and not for personal enrichment, and that, although the amount of money involved was great, there were no individual victims. For others, the amount of money and the premeditated nature of the fraud resulted in a more serious ranking.

Case P (Perjury) - The net range of the rankings for this case was 4 to 11, suggesting widely varied views on the severity of this offense. Those who viewed this offense as serious cited its impact on the integrity of the justice system. The reasons why other Defenders considered this offense as less serious are unclear, as there was insufficient comment provided with their responses. There was a suggestion by some Defenders that in the absence of an indication of the nature of the offense charged at the trial in which the perjury occurred, it was difficult to rank this as a serious offense.

III.

HOW SHOULD THE RELATIVE SERIOUSNESS OF OFFENSES BE ASSESSED?

The discussion above of the Defenders' rankings of the case examples in the Commission's questionnaire suggests that the assessment of the seriousness of particular offenses should be based

on a consideration of factors which measure both the gravity of the harm caused by the offense and the blameworthiness of the offender. The factors which emerge from the cases as most significant are the extent to which the offense poses a danger or the threat of danger to the physical safety of individual victims and members of the general public, the extent to which the offense causes economic loss to individuals and the number of individuals who suffer such economic loss, the extent to which the offense involves group activity, the length of time over which the offense was committed, the extent to which the offense involves a breach of a high public or sensitive trust upon which the confidence of the population in our institutions is dependent, the degree of planning and premeditation involved in the offense, the extent to which the offender intended and could foresee the harm inflicted by his behavior, and the motivation of the offender in committing the offense.*

Certain of these factors clearly weigh very heavily in the evaluation of the seriousness of an offense. Thus, for example, it is clear from the responses of the Defenders that the fact that an offense involves violence or the threat of personal injury to others is considered an important factor which militates in favor of a high seriousness rating. This reflects the general public concern for

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* It should be emphasized that in determining which of these factors are present in a particular case, sentencing judges should look only to the offense of conviction and such other facts as are established in accordance with the procedures proposed in the "Federal Defender Position Paper on Fact Finding in Guideline Sentencing" which has been previously submitted to the Commission.

personal safety, a concern which is expressed in several of the provisions of the Crime Control Act of 1984. However, we urge that the Commission, in developing its seriousness rankings, avoid rigid categorizations which are based solely on this factor and which do not take into account the relevance of the other considerations noted above. The approach to ranking offense seriousness must be multi-dimensional and not based on simple classifications of offenses. Not all offenses in which an element of violence or the threat of physical harm is present are more serious than white-collar crimes. Considerations of the offender's intent or lack of premeditation must also be taken into account. In some offenses involving physical force, these other considerations may well warrant an assessment that the offense is less serious than a white-collar crime which involved planning, group action and widespread economic loss.

IV.

SHOULD THE MANNER OF COMMITTING AN OFFENSE AFFECT ITS RANKING MORE OR LESS THAN THE HARM CAUSED?

The question of whether the manner of committing an offense should affect its seriousness rating more or less than the harm caused is an extremely difficult one. In most cases, the manner employed to carry out an offense will itself result in an increase in the harm that is caused. Thus, for example, in Case F in the Commission's questionnaire, the bank robber's manner of committing the offense resulted in a greater harm than that caused

by the bank employee in Case G, because the use of a threat by the bank robber put the victim teller in fear and undoubtedly caused some psychological trauma. Similarly, if the bank robber in Case F had actually displayed and used a weapon, the difference in the manner between that situation and the facts as given in Case F would result in an even greater degree of apprehension and harm. Thus, although these situations the manner in which the offense is committed may be of more significance than the amount of money taken, the reason for this is the new and different kind of harm which arose from the differences in the manner employed.

On the other hand, if one were comparing the offense of the bank robber who realized $5,000 in Case F with that of a bank officer who, as a result of embezzlements over a period of years, stole $300,000 from the bank, the balance might be struck differently. In comparing these two situations, the added element of harm created by the bank robber's threatening note pales in contrast to the substantially greater amount of monetary loss caused by the bank officer. In such a case, the differences in the degree of monetary loss would seem clearly to be more important than the different manner in which the two offenses were committed.

With respect to the Commission's question regarding the counterfeiting and check offenses, the responses of the Defenders were varied. Some, focusing on the planning and sophistication involved in the production of the counterfeit currency and the number of individuals who might suffer losses as a result, viewed that as the more serious offense. Others, however, felt that the fact of

the theft of checks from individuals who were dependent on their Social Security payments rendered the check offense more serious.

IV.

ARE CERTAIN KINDS OF SANCTIONS MORE APPROPRIATE FOR CERTAIN KINDS OF CRIMES?

The Federal Defenders believe that the choice of which sanctions are appropriate in a particular case should depend on a careful evaluation of the offense and the circumstances under which it was committed. We believe that in all cases the Commission and sentencing judges should look to the least restrictive sanction which gives effect to the purposes to be served by the sentence. Incarceration should be utilized only where it is determined to be necessary to accomplish those puposes in the particular case. We recognize that the relative importance of different sentencing purposes (e.g., incapacitation, deterrence, rehabilitation) may vary from offense to offense and thus impact upon the choice of sanction. However,

we would like to reserve for a further submission our views on the appropriateness of particular sanctions for particular offenses.

	Organized Crime A	Pollution B	Murder C	Draft Evader D	Bribery E	Unarmed Bank Rob. F	Bank Embezzlement G	Espionage H	Heroin Importation I	Hiker/Sniper J	Car Salesman K	College President L	Camping/Fire M	Soc. Security Checks N	Felon/Gun O	Perjury P
C.D.Cal.	2	7	1	16	6	9	12	3	5	4	10	13	14	15	11	8
N.D.Cal.	3	15	1	16	6	7	8	4	5	2	10	14	13	12	11	9
W.D.Wash.	1	8	2	16	6	7	13	3	4	5	11	9	14	15	12	10
Colo.	2	9	3	16	6	7	13	1	4	11	10	14	13	15	12	8
Kansas	5	11	1	14	13	8	10	2	3	4	7	12	16	15	9	6
W.D.Mo.	2	11	1	14	8	7	9	6	5	2	12	10	16	15	13	4
E.D.Mo.	2	13	3	14	6	8	10	1	9	5	7	14	16	16	13	4
E.D.N.C.	1	10	1	16	8	7	12	4	5	3	9	11	15	14	13	6
W.D.Tenn.	4	14	1	15	8	7	9	3	5	2	13	10	16	12	11	6
M.D.Fla.	1	8	4	16	5	9	13	2	3	11	7	6	14	15	12	10
E.D.La.	1	9	2	14	6	7	12	4	5	3	8	10	13	16	11	15
Minn.	2	3	1	16	4	9	14	4	5	6	7	10	13	16	12	11
E.D.Mich.	2	6	1	15	7	8	12	4	3	5	11	13	14	16	10	9
N.D.Oh.	2	9	1	8	6	10	13	3	4	7	11	12	14	15	16	5
W.D.Pa.	1	15	1	14	4	5	9	3	6	7	8	10	16	11	13	12
E.D.Pa.	1	9	2	16	8	10	11	4	5	3	6	13	14	15	12	7
N.J.	2	8	1	14	6	9	11	5	3	7	10	13	15	16	12	4
Conn.	2	6	1	16	7	10	11	4	5	3	9	13	15	14	12	8
S.D.N.Y.	2	9	1	14	5	8	12	4	6	3	11	13	15	16	10	7
Okla.	3	7	1	15	2	10	11	4	5	9	8	14	12	16	13	6
W.D.Texas	3	15	1	14	7	6	11	1	4	5	7	7	16	13	12	10
S.D.Texas	1	8	4	12	7	6	9	2	3	5	13	10	15	16	14	11
Arizona	2	10	1	15	6	7	12	5	4	3	13	9	16	14	8	11
N.Mex.	1	3	4	16	6	9	9	2	5	8	11	14	13	15	12	7
P.R.	1	11	3	16	10	9	5	7	2	8	12	13	15	14	4	6

Case	A Gross Range	B Net Range	C	D Cum. Total	E Cum. Rank
A (Organized Crime)	1 - 5	1 - 3	High	49	2
B (Pollution)	3 - 15	6 - 15	No Cons.	234	9
C (Murder)	1 - 4	1 - 4	High	43	1
D (Draft Evader)	8 - 16	14 - 16	Low	368	16
E (Bribery)	2 - 13	4 - 8	Upper Middle	163	6
F (Unarmed Bk.Rob.)	5 - 10	6 - 10	Middle	199	7
G (Bk.Embezzlement)	5 - 14	9 - 13	Lower Middle	270	11
H (Espionage)	1 - 7	2 - 5	High	85	3
I (Heroin Import.)	2 - 9	3 - 6	Upper Middle	113	4
J (Hiker/Sniper)	2 - 11	2 - 9	No Cons.	131	5
K (Car Salesman)	6 - 13	7 - 13	No Cons.	241	10
L (College Pres.)	6 - 14	9 - 14	No Cons.	287	12
M (Camping/Fire)	12 - 16	13 - 16	Low	363	14
N (Soc.Sec. Checks)	11 - 16	12 - 16	Low	367	15
O (Felon/Gun)	4 - 16	9 - 13	Lower Middle	288	13
P (Perjury)	4 - 15	4 - 11	No Cons.	200	8

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S.D.Texas	1	8	4	12	7	6	9	2	3	5	13	10	15	16	14	11
Arizona	2	10	1	15	6	7	12	5	4	3	13	9	16	14	8	11
N.Mex.	1	3	4	16	6	9	9	2	5	8	11	14	13	15	12	7
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Conover

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

STATEMENT
OF
J. WARREN CASSIDY
EXECUTIVE DIRECTOR
INSTITUTE FOR LEGISLATIVE ACTION
BEFORE THE
THE UNITED STATES SENTENCING COMMISSION
APRIL 15, 1986

DRAFT TESTIMONY BEFORE THE U.S. SENTENCING COMMISSION

My name is J. Warren Cassidy and I am Executive Director of the National Rifle Association's Institute for Legislative Action.

On behalf of the more than 3 million members of the National Rifle Association, I thank you for giving me this opportunity to contribute to your valuable efforts. Our NRA Bylaws detail the purposes and objectives of our association; and second among those purposes is "to promote public safety, law and order, and the national defense."

Thus we share a keen interest in sentencing and sentencing standards as effective ways to reduce violent crime, particularly violent crime in which dangerous weapons are used.

I wish to address sentencing and sentencing procedures from three perspectives: first, the armed criminal and weapons of choice; second, the armed career criminal and drug traffickers; and finally, violators of regulatory firearms laws.

Since 1958, the NRA has advocated mandatory terms of imprisonment for persons who use firearms, and other weapons, to commit violent crimes. Such penalties were included in a potentially effective crime-control provision of the Gun Control Act of 1968, and its reform legislation, the Firearms Owners Protection Act, where the mandatory penalty provisions also apply to the use of firearms in drug-trafficking offenses.

During the first two decades, our stand on mandatory penalties emanated from common sense alone; now, however, hard evidence from states which support this public policy proves conclusively the merit of imposing fixed jail time on violent criminals. The NRA has supported mandatory penalty legislation in dozens of states, including Arizona, Florida, South Carolina, Idaho, California, Michigan, Virginia and others. In the District of Columbia, we campaigned for an initiative in 1983 that passed 73 percent to 27 percent, in an overwhelming display of public approval for a measure that at least held the promise of curbing violent crime. That law has worked. In Washington, D.C., the adoption of mandatory penalties saw the violent crime rate fall by 18 percent and the

homicide rate by 7 percent between 1982 and 1984. I should add that these crime decreases stand in sharp contrast to the 48 percent rise in violent crime and a 14 percent rise in the homicide rate (1976-1982) which D.C. experienced after its City Council imposed a city-wide handgun ban in February 1977.

Throughout the nation, mandatory penalties show particular effectiveness in reducing predatory crimes like murder and robbery — the crimes research shows are most feared by citizens. Delaware and Maryland have both shown substantial drops in homicide and measurable declines in robbery while the rest of the South Atlantic saw robbery increase between 1972 and 1984. Between 1974 and 1984, both Arizona and Arkansas led their regions in homicide declines and notched substantial reductions in robbery. The Georgia homicide rate fell 32 percent while falling but 13 percent in the rest of the South Atlantic between 1976 and 1984, and the state's robbery rate remained almost unchanged while rising 13 percent in the region. With mandatory penalties, between 1975 and 1984, South Carolina and Virginia recorded 37 percent and 33 percent drops in homicide rates respectively, and 7 percent and 26 percent drops in the state robbery rates.

While these strides in crime control are significant, I submit that they are limited by targeting firearms as the only crucial weapon carried by dangerous criminals. Victimization studies of the U.S. Department of Justice demonstrate that persons who use knives to commit violent crimes, such as assault and robbery, are more likely to injure their victims. It is the willingness to inflict bodily injury on the part of the criminal that is the crucial factor, and we must target those criminals who equip themselves with deadly weapons of any kind if we are to succeed in controlling violent, criminal attacks.

In this regard, the state of Georgia has a well-written statute. Georgia's criminal code includes both firearms and knives under the provision for mandatory sentencing for possession during the commission of a crime. The expansion of provisions like this is to include all "dangerous" or "deadly" weapons is the next logical step.

We would encourage this Commission to adopt a policy guideline for judges and parole boards to take into account the importance of minimizing the disparity in sentencing between violent criminals who use firearms and those who use other dangerous weapons. Violence is the common denominator; the tool used to commit that violence should not be treated selectively or focus solely on firearms as federal law currently mandates.

Second, the effectiveness of mandatory penalties on armed career criminals and drug traffickers must be weighed. Massive evidence indicates that if armed career criminals, who commit vastly more than their share of crimes, are subjected to mandatory penalties, dozens of crime per year will be prevented. Indeed, some of the research from John Ball, J.W. Shaffer, and David Nurco ("Day to Day Criminality of Heroin Addicts in Baltimore") suggests a prevention rate of up to 215 crimes per year per career criminal incarcerated. Such benefits to society are confirmed by a Rand Corporation study ("Varieties of Criminal Behavior," by Jan and Marcus Chaiken), the Wright-Rossi felon survey ("The Armed Criminal in America"), and other studies. Career criminals represent such a relatively small percentage of the criminals in this country that any fear of prison overcrowding is unwarranted. Prison space will always be adequate to house them. Other, less dangerous and unarmed criminals may serve shorter terms as a result, but these criminals pose far less of a threat to society than the repeat offenders.

The importance of adding armed drug-traffickers to those subject to mandatory terms of imprisonment in federal law is clear. Drug-trafficking is a crime which disproportionately involves the federal government. Most violent crimes are state offenses, and such criminals comprise the bulk of state prisoners. That is not the case with drug-traffickers, who represent a relatively small percentage of state felons, but a relatively large proportion of federal prisoners. And the increasing federal role in trying to curtail the problems of drug-trafficking and the crimes associated with the business justifies stringent penalties for armed drug-traffickers.

In any consideration of mandatory penalty legislation, it must be noted that these provisions can only be effective to the extent that they are requested by prosecutors and imposed by judges. It is incumbent on this Commission, in my estimation, that you encourage a sentencing policy and guidelines which call on judges to be faithful to law regarding mandatory penalties. The most recent thorough statistical study of judicial discretion in using mandatory penalties was conducted by Professors Alan Lizotte and Marjorie Zatz on California law ("The Use and Abuse of Sentence Enhancement for Firearms Offenses in California") where they found that judges only imposed the sentence on robbers after they had been convicted for their fourth robbery in a three-year period. Had California judges fully used the law, these robbers would not have been on the streets free to commit their second, third, and fourth crimes.

Finally, the NRA draws a sharp distinction between mandated jail terms for those violent criminals who pose a threat to society and those individuals who commit technical violations of regulatory firearms laws.

This distinction is particularly acute at a time when the nation must balance the need for citizen safety against the problem of prison overcrowding.

Judicial discretion and leniency may be called for when dealing with persons who have committed minor, victimless, technical, and paperwork violations of federal gun laws. In general, we oppose stringent or mandatory sentencing of persons who carry or transport firearms in violation of federal, state, or local law. It is a victimless crime which is committed rather frequently, and innocently. It is estimated that some five to twelve million Americans may carry firearms for protection, and millions more transport firearms at some time, quite often in technical violation of one or more of the 20,000 restrictive gun laws on the books. Weapons offenses such as these are not perceived as particularly important by the American public, as indicated by a U.S. Justice Department "National Survey on Crime Severity," and as revealed in the classic study of "The American Jury" by Harry Kalven and Hans Zeisel. In these cases, severe sentencing does not work to reduce crime, but only to work an injustice.

My home state of Massachusetts adopted a mandatory prison term for carrying a firearm without a license. The result? The Bay State has seen its violent crime rate skyrocket, its homicide rate mirror national trends, but its prisons incarcerate persons who had never before committed crimes and who were not arrested attempting to commit a violent crime. Indeed, the most recent egregious case involved a citizen who used an unlicensed firearm in self-defense and now faces a one year mandatory jail sentence. Authorities had previously refused to act against the man's antagonist despite threats the citizen had received from his assailant — a man with a police record. The state Supreme Court recently upheld that sentence for carrying under the Bartley-Fox mandatory sentencing law, although the use of the gun was found by the jury to be justifiable self-defense, saying that "Before the days of a mandatory one-year sentence, the special circumstances involving the accused could be reflected reasonably in the sentencing . . . That option is no longer available ...."

The mandatory penalty provision was imitated in New York. And now a subway employee — working in a system where courts have ruled the police have no obligation to protect citizens from violent crime — faces a potential mandatory penalty for carrying a handgun with which he saved his life from a violent assault inflicted by two robbers.

We deplore the mindset that would send an otherwise law-abiding citizen to jail for a firearms law violation discovered as a consequence of defending his own life from criminal attack. Certainly, a violation of these carry laws in the interest of self-defense is less serious than a judge's rejection of a law calling for a mandatory sentence for armed violent criminals in the interest of prison overcrowding.

Although carrying a firearm without a permit was not on the "Offense Seriousness Questionnaire" sent out by this Commission, when it appears in Justice Department surveys of perceived offense seriousness, the public at large tends to rank it as relatively inconsequential. Likewise, on your questionnaire, we would rank those offenses which actually involve firing a gun in an attempt to injure or kill as very serious. The "estranged husband" convicted of murdering his wife, incident "C", should be ranked most serious of the 16 situations presented. Incident "J" — where a hiker shoots at a forest

ranger — should also be ranked as a grave crime. Incident "O," however, is much more difficult to judge accurately, and it serves to point up a common problem with regulatory firearms laws. The phrase "individual with a prior felon record" could mean many different things, from a dangerous and violent criminal, to a college student convicted of destruction of property in a fraternity prank. Yet both individuals are treated alike under current law, and most who answered the questionnaire probably envisioned the former as the object of the question. Unfortunately, "true" criminals are not apprehended in that manner; the law succeeds only in capturing those who conduct themselves as, and believe themselves to be, law-abiding citizens.

We urge this Commission to establish a policy and guidelines with regard to technical violations of the federal gun laws. Under current law, all violations of the Gun Control Act of 1968 are felonies, subject to penalties of up to five or ten years imprisonment and fines of up to $5,000 to $10,000. Congress is currently considering the Firearms Owners Protection Act which, if passed, would make it necessary to prove that violations of the federal gun law were willful for many of the technical, paperwork violations of the law, and which would reduce some of the offenses to misdemeanor level.

I hope that reform legislation passes. It would not, however, entirely solve the problems faced by gun owners. Aside from the mandatory penalties for committing violent or drug-trafficking crimes with guns, most of the offenses possible under the Gun Control Act, whether felony or misdemeanor, would remain malum prohibitum rather than malum in se offenses.

We should recommend that in most instances — either under current law or under the revised law, if Congress passes and the President signs the Firearms Owners' Protection Act — the federal sentencing guidelines should mirror those in the FOPA.

We believe a sentencing guideline could well be patterned after U.S. v. Ruisi (460 F. 2d 153), where the judge, recognizing the technical guilt but absence of malice in the defendants, established a sentence of one day's probation. We find that to be a model sentencing guideline or policy for such cases. Persons who commit these often unknowing, but assuredly petty, offenses, should not really be punished. For such

generally law-abiding persons, the mere embarrassment of arrest, the expense of hiring an attorney and possibly losing one or more firearms to forfeiture, and the ignominy of a criminal conviction record, are adequate -- indeed, excessive -- punishment. Additional fines or jail time would be a superfluous injustice.

We believe that sentencing guidelines should be aimed at swift and certain punishment for serious, violent, and dangerous armed criminals, but at a policy of leniency for technical, paperwork and malum prohibitum violations of laws regarding firearms acquisition, transfer, transportation, and disposition among the generally honest gun owners of this country.

Thank you.

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

May 21 1986

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

On April 15, 1986, the National Rifle Association's Institute for Legislative Action testified on the topic of "offense seriousness." Please accept this letter as an addition to the record of the proceedings of this Commission.

From May 11 to May 14, The Washington Post ran a series of articles that examined Washington, D.C.'s three-year old mandatory sentencing law for drug offenders and criminals who used firearms during the commission of their crimes. The message contained in the article was highly disturbing, and serves to substantiate some of the charges we made during testimony in front of the Commission.

The following quotes are representative of the article as a whole.

* " 'Swift and certain punishment, other than getting a boot on your car, does not exist,' said Officer Dan Wagner of the 3rd District vice squad." (Cases involving drug offenders take almost a year to resolve, according to the Post series.)

* "Not all judges are as determined as (Judge Bruce) Beaudin. But collectively they have defused the legislation's intent, aided by seasoned court employes such as (Bill) Erhardt who in the past three years have combed the law books looking for every possible way around the sentencing law."

* "Like Beaudin, many judges contend that community residents who approve laws like the mandatory sentencing measure simply don't understand what a judge does or what the track record for Superior Court judges has been."

* " 'I understand the community's concern and why they passed the law. But I think it comes from not really knowing what's going on down here,' said Superior Court Judge Nan R. Hughes."

Judges are not the only culprits responsible for circumventing the will of the electorate.

* "Prosecutors estimated that the gun law is applied in about 150 indictments a year, and in most the sentencing requirement is eliminated through plea bargaining."

* "Despite voters' passage of a mandatory sentencing law for drug offenders in 1982, plea bargaining that often circumvents the new law remains the primary method of moving cases through the system."

* ". . . . Fridie's court-appointed attorney and a fast-talking fixture of the city's courts was . . . working out a deal . . . In exchange, prosecutors agreed to withhold papers informing the court of his previous drug conviction."

* "One prosecutor, who insisted on anonymity, said, 'A lot of times I felt like I was going behind the voters' backs.'"

The mandatory sentencing provisions were approved in a voters' initiative by almost a three to one margin. Washington, D.C., residents certainly did know what was "going on down here" when they voted to keep drug offenders and violent criminals off the streets and out of their neighborhoods.

Thank you once again for this opportunity to express our views.

Sincerely,

David W. Conover
Researcher/Writer
Information & Member Services

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

May 21 1986

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

On April 15, 1986, the National Rifle Association's Institute for Legislative Action testified on the topic of "offense seriousness." Please accept this letter as an addition to the record of the proceedings of this Commission.

From May 11 to May 14, The Washington Post ran a series of articles that examined Washington, D.C.'s three-year old mandatory sentencing law for drug offenders and criminals who used firearms during the commission of their crimes. The message contained in the article was highly disturbing, and serves to substantiate some of the charges we made during testimony in front of the Commission.

The following quotes are representative of the article as a whole.

* " 'Swift and certain punishment, other than getting a boot on your car, does not exist,' said Officer Dan Wagner of the 3rd District vice squad." (Cases involving drug offenders take almost a year to resolve, according to the Post series.)

* "Not all judges are as determined as (Judge Bruce) Beaudin. But collectively they have defused the legislation's intent, aided by seasoned court employes such as (Bill) Erhardt who in the past three years have combed the law books looking for every possible way around the sentencing law."

* "Like Beaudin, many judges contend that community residents who approve laws like the mandatory sentencing measure simply don't understand what a judge does or what the track record for Superior Court judges has been."

* " 'I understand the community's concern and why they passed the law. But I think it comes from not really knowing what's going on down here,' said Superior Court Judge Nan R. Hughes."

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Sincerely,

David W. Conover
Researcher/Writer
Information & Member Services

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

THE NATIONAL PRISON PROJECT

1616 P Street, NW
Washington, DC 20036
(202) 331 0500

Alvin J. Bronstein
EXECUTIVE DIRECTOR

Steven Ney
CHIEF STAFF COUNSEL

Adjoa A. Aiyetoro
Elizabeth R. Alexander
Edward I. Koren
Mary E. McClymont
Nkechi Taifa-Caldwell
Urvashi Vaid
STAFF COUNSEL

Jan Elvin
EDITOR, NPP JOURNAL

Sharon R. Goretsky
ADMINISTRATIVE DIRECTOR
RESEARCH ASSOCIATE

Daniel E. Manville
RESEARCH ASSOCIATE

National Headquarters
132 West 43 Street
New York, NY 10036
(212) 944 9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

April 2, 1986

Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
Washington, D.C. 20530

Dear Judge Wilkins;

I am responding to your letter of March 19 and enclose herewith my response ranking the seriousness of the crime scenarios on the Offense Seriousness Questionnaire. Rather than prepare comments on the questionnaire form, I will incorporate them by example as I address the questions contained in your letter. And because of the shortness of time and other pressing commitments, I would ask that this letter be considered the substance of my proposed testimony at the April 15 hearing. Your questions and my responses follow.

1. How should the Commission compare the relative seriousness of different kinds of crime?

Too often, there is a tendency to look narrowly at a particular crime as an event and then react instinctively to the event without examining a variety of elements. For example, I circulated the questionnaire to a dozen members of my staff and almost half rated the "estranged husband shooting his wife" as the most serious offense listed. In discussion with them it became clear that they reacted solely to the outrageousness of one person killing another without considering the range of elements or issues that I believe should guide the Commission in establishing degrees of offense severity.

One element is the number of persons actually or potentially injured by the offense. On this the wife shooting ranks very low while the organized crime head, the boat captain importing heroin and the fraudulent automobile dealer, as examples, rank high. For the former, it is the wife and her family who suffer while the acts of the latter three involve hundreds to thousands of victims.

Another issue is whether and to what degree personal gain was involved. Again, the estranged husband's act, the college president who makes false statements to obtain assistance for the college, the illegal camper and the person who provides a false alibi for a friend would rank very low. The organized crime figure, the polluting chemical corporation, the government officials accepting bribes or selling defense documents, the bank robber and the embezzler, etc., get high ranking here.

Certain offenses can be ranked differently because of other multiple elements. I would rank the bank teller's crime as more serious than the bank robber. They are both $10,000 robbers but the bank embezzler also violated a trust placed in him by his employer.

There has been much debate in this country about the efficacy of achieving general deterrence by severely punishing those offenders who are apprehended. In light of our very low rate of reporting crime, our low apprehension rates and the resulting uncertainty of punishment, we cannot achieve general deterrence for most criminality with a policy of severe sanctions. There are, however, numerous studies in Western Europe which clearly find two exceptions to the "no general deterrence" result. One, drunk driving, has no applicability to the Commission's task. The other, economic or "white collar" crime, does. I believe it is acceptable justice policy to consider deterrence, where it is capable of being achieved, in determining offense severity.* Thus, the chemical corporation, the corrupt government officials, the embezzler, the car dealer and the bank president get high ranking. If a person contemplating an economic crime thinks there is a possibility of apprehension and the certainty of severe sanctions if caught, he will think twice. The so-called street criminal, like the bank robber or the ex-felon who illegally purchases a gun, and the aberrational actor who shoots his wife rank low. Persons who commit "crimes of passion", killing their spouses or lovers, do not stop to think about the possibility of punishment.

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* I am offering my personal opinion here as ACLU policy on Criminal Sentences expressly opposes general deterrence as the basis for incarceration.

Another element is the likelihood of repeated criminality without a severe sanction, thereby placing society at risk. Again, the man who shot his wife ranks very low as this kind of person almost never repeats his crime and poses no threat to society at large; the organized crime figure is almost always a repeater and remains a constant danger to society.

Finally, there is the element of the degree to which a particular kind of criminality threatens the fabric of our democratic society. I do not believe that the common street criminal or the person who commits one illegal act motivated by a real or perceived need, emotional, financial or political, is a serious threat to society. The bank robber, the wife killer, the draft evader, the forest hiker, the camper and the elderly woman get low ranking here. On the other hand, I consider economic criminals, corporate lawlessness and official corruption to be most threatening to our society. The illegal activity of judges, legislators, government officials or police officers are serious violations of the law and of public trust and they beget lawlessness. Many so-called street criminals believe they are justified, or at least not wrong, in stealing because they see that prominent politicians and officials are stealing.

Although there is a great deal of surface anger and fear which results from street crime, there is a deeper feeling of hopelessness, distrust and immorality created by official lawlessness. Why bother to obey the rules of society when our leaders break them all the time!

2. Should the manner of carrying out an offense affect a ranking more or less serious than the harm caused by the offense?

The same elements, or most of them, set forth in answer to question 1 should be applied here. A bank robbery of $10,000 committed with a gun is more serious than a bank robbery of $100,000 without a gun because of the potential for serious injury with a weapon. Again, the senior defense official's acceptance of a $10,000 bribe is far more serious than a $1,000,000 bank robbery because of the official lawlessness involved and the potential for general deterrence.

Both factors, manner and harm, need to be measured against the various elements set forth above.

3. Are certain kinds of sanctions more appropriate for certain kinds of crimes?

Deprivation of an individual's physical freedom is one of the most severe interferences with liberty that the state can impose. Imprisonment is harsh, frequently counterproductive, and costly. There should be, therefore, a heavy burden of justification on the imposition of a prison sentence.

Again, the elements set forth in answer to question 1 should be examined in answering this question. Imprisonment generally should be utilized only for those who injure large numbers of people, who constitute a real danger or whose lawlessness threatens the fabric of our society. For others, imprisonment should only be utilized as a last resort after all other possible sanctions have been attempted. Thus, for example, on the facts furnished in the scenarios, the corrupt government official should receive a prison term and the unarmed bank robber or the draft evader should not.

To summarize then, for the purpose of ranking offense by seriousness, the Commission should consider the following elements: the number of persons actually or potentially injured; the degee of personal gain involved; whether the illegal act also violated a specific trust; whether there is a possibility of achieving general deterrence; the likelihood of repeated criminality without a severe sanction thereby placing society at substantial risk; and whether the act contributes to a general perception of lawlessness thereby threatening the fabric of our society.

I continue to be willing to assist you in your important work.

Sincerely,

Alvin J. Bronstein

Alvin J. Bronstein

cc: Paul K. Martin, Communications Director

Should only imprison the most serious & dangerous.
Don't imprison for punishment.

Formed: 1940

NISBCO

National Interreligious Service Board for Conscientious Objectors

APRIL 18, 1986
MR. PAUL MARTIN, ESQ.
U. S. SENTENCING COMMISSION
1331 PENNSYLVANIA AVE.
SUITE 1400
WASHINGTON, DC 20004

DEAR PAUL:

I HAVE ENCLOSED AN AMENDED SUBMISSION OF TESTIMONY. THE MATERIAL I GAVE YOU ON FRIDAY WAS LITERALLY A FIRST DRAFT. IT WAS HOT OFF MY WORD PROCESSER AT HOME, AND MOSTLY OUT OF MY HEAD.

I HAVE ADDED SOME OF THE CONCLUSIONS I PRESENTED IN MY ORAL TESTIMONY, CORRECTED A WORD OR TWO, FILLED IN A SENTENCE IN WHICH THE MIDDLE HAD DROPPED OUT. I TRUST THAT THIS PROCEDURE IS ACCEPTABLE.

I WOULD LIKE TO DROP BY TO READ THE "BLACK BOOK." I WISH I HAD TIME TO DO SO BEFORE PREPARING THE TESTIMONY. I'M PLEASED THAT AS A LAY PRESENTER AMONG SO MANY LAWYERS I DID NOT LOOK SO BAD, BY COMPARISON.

WOULD IT HELP THE COMMISSION WERE THERE TO BE OTHER SUBMISSIONS FROM THOSE NOT QUITE SO ANTAGONISTIC TO THE WORK OF THE COMMISSION AS SOME OF THE GROUPS TESTIFYING OBVIOUSLY ARE?

THANK YOU AGAIN FOR THE OPPORTUNITY TO TESTIFY. ONE QUESTION THAT COULD NOT BE ANSWERED IN THE TIME AVAILABLE WAS "HOW MANY COS ARE THERE, OR WERE THERE?" I SAID WE DIDN'T KNOW. THERE ARE STATISTICS, BUT THEY ARE NEARLY MEANINGLESS. I'LL WRITE A CAREFUL LETTER TO EXPLAIN THE PROBLEM.

YOURS TRULY,

L. WILLIAM YOLTON

P.S.: PLEASE NOTIFY ME OF THE SCHEDULE OF ADDITIONAL HEARINGS, AND KEEP ME ON ANY MAILING LIST YOU MAINTAIN FOR INFORMATION...

Suite 600, 800 Eighteenth St., NW, Washington, DC 20006-3599 (202) 293-5962

REV. L. WILLIAM YOLTON, Executive Director
SHAWN PERRY, Associate Director for Program
CHARLES MARESCA, Associate Director/Counseling
REV. RON MARTIN-ADKINS, Associate Director for Constituency Services
ANN MARIE CLARK, Associate Director/Editor
CHARLES EPP, Assistant Director for Legislative Liaison
JOSEPH S. TUCHINSKY, Midwest Representative
HERMAN WILL, JR., ESQ., Northwest Representative
GERALD SHENK, Southwest Representative

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

OFFICE OF THE
EXECUTIVE DIRECTOR

(202) 828-6320

May 9, 1986

Commissioner Michael K. Block
The United States Sentencing Commission
1331 Pennsylvania Avenue N.W.
Suite 1400
Washington, D.C. 20004

Dear Commissioner Block:

Per your request, please consider this letter an addendum to our written testimony delivered on April 15, 1986.

With regard to specific lengths of sentence for the use of weapons in the commission of violent crime, we support the provisions of the recently-passed Firearms Owners' Protection Act. That legislation provides for an additional mandatory five-year sentence for carrying or using a firearm during and in relation to a crime of violence. For the second offense, the penalty is increased to ten years. The certainty of punishment is ensured by the fact that these penalties may not run concurrently with the sentence for the primary crime, nor may they be shortened with probation or parole.

The National Rifle Association also recommends similar penalties for the carrying of any deadly weapon during and in relation to a crime of violence. Again, five years for the first offense and ten years for the second are acceptable. We have supported slightly shorter sentence enhancements from time to time, for this reason: The length of sentence for misusing weapons in the commission of violent crimes is less crucial than the certainty that those punishments will be meted out.

That swift and certain punishment is a deterrent to criminal weapons-carrying was recently confirmed by the study, "The Armed Criminal in America" (July, 1985). That weapons use as a whole is a problem meriting our concern was likewise confirmed by the Bureau of Justice Statistics study, "The Use of Weapons in Committing Crime" (January, 1986).

The Wright-Rossi felon survey, commissioned by the U.S. Justice Department under a grant from the National Institute of Justice, indicated that mandatory penalties or sentence enhancements may be significant deterrents to weapons carrying by criminals. Almost 70% of the respondents who did not carry firearms but did carry other weapons said the prospect of getting "a stiffer sentence" for their crime if they carried a firearm was a "very important" or "somewhat important" factor in their decision not to carry a firearm. Even more impressively, fully 79% of those who carried no weapon indicated that the fear of stiffer sentences was "somewhat" or "very important" to them.

Yet a focus on criminal misuse of firearms without attention to other weapons is misguided, as the Bureau of Justice Statistics demonstrated. Between 1973 and 1982, there were twice as many victimizations by criminals using weapons other than firearms as those carried out with firearms. In addition, victims were almost twice as likely to be injured by a knife-wielding criminal as by a gun-toting one.

The National Rifle Association also recommends that the federal government prosecute "two-time losers" for mere possession of a firearm under the Gun Control Act of 1968. This prosecution should be in addition to prosecution for their federal crime of violence and the imposition of the mandatory penalty. Furthermore, we urge the Commission to recommend that recidivist state offenders with previous convictions for violent offenses also be prosecuted for violations of the Gun Control Act of 1968 when it is applicable. In this way, the purpose of GCA '68 -- "to provide support to federal, State, and local law enforcement officials in their fight against crime and violence . . . ." -- will be fulfilled. As the Wright-Rossi survey, as well as the earlier Rand study of California inmates (1980), demonstrated, keeping active, violent, career criminals off the street will greatly reduce the rate of violent crime.

Thank you for your interest in our views. We look forward to continuing a dialogue with this Commission.

Best wishes.

Sincerely,

J. Warren Cassidy
Executive Director

final

NISBCO

National Interreligious Service Board for Conscientious Objectors

Formed: 1940

TESTIMONY ON THE GRADING AND DURATION OF SENTENCES

before the

U. S. SENTENCING COMMISSION

on behalf of the

National Interreligious Service Board
For Conscientious Objectors

by Rev. L. William Yolton
Executive Director

April 15, 1986

Suite 600, 800 Eighteenth St., NW, Washington, DC 20006-3599 (202) 293-5962

REV. L. WILLIAM YOLTON, Executive Director
SHAWN PERRY, Associate Director for Program
CHARLES MARESCA, Associate Director/Counseling
REV. RON MARTIN-ADKINS, Associate Director for Constituency Services
ANN MARIE CLARK, Associate Director/Editor
CHARLES EPP, Assistant Director for Legislative Liaison
JOSEPH S. TUCHINSKY, Midwest Representative
HERMAN WILL, JR., ESQ., Northwest Representative
GERALD SHENK, Southwest Representative

I am L. William Yolton, the Executive Director of the National Interreligious Service Board for Conscientious Objectors (NISBCO). I am a Presbyterian minister who has been a pastor, campus minister, church administrator, and a teacher in divinity school. During the Vietnam era when I was the denominational Secretary for Conscience and War, I was also the chair of the Interfaith Committee on Draft and Military Information, and the chair of Prisoner Visitation and Support. I am also on the board of the Central Committee for Conscientious Objectors.

NISBCO is a coalition of thirty-four religious bodies organized to defend and extend rights of conscientious objectors. The coalition includes the Synagogue Council of America, the U.S. Catholic Conference, most of the denominations in the National Council of Churches such as Presbyterians, Lutherans, and Methodists, and the historic peace churches usually identified as Mennonites, Brethren, and the Religious Societies of Friends. Such an unusually broad coalition is maintained in part by the narrow focus of concern, the support of conscience and opposition to war.

In addition to the primary activity of counseling and information, NISBCO also represents its constituents' interest to the government and monitors developments in conscientious objection and conscription. In the course of this activity NISBCO has become an expert in conscription law and on the situation of conscientious objectors in the armed forces. Since the second World War, NISBCO has organized and conducted visita-

tion among war objectors in prison, now accomplished through a similarly expanded coalition.

On behalf of NISBCO, I address the grading of offenses committed under the Military Selective Service Act and the related question of the duration of incarceration. Our sister organization, the Central Committee for Conscientious Objectors will be submitting written testimony. When the opportunity arises, I hope to talk to you on matters of alternatives to incarceration and on the characteristics of offenders.

I shall begin by sketching out a perspective on the draft system and its sentencing problems. It can be argued that violations of the Military Selective Service Act may be the most difficult to fit into a rational sentencing scheme. Since the initial determination of most of the cases that eventually come to trial is made by ill-trained or untrained lay boards operating with rules that are at points demonstrably illegal, or without due process guarantees, it is no surprise that the conviction rate in these cases is the lowest of all classes of crimes prosecuted by the Justice Department.[1] (By 1972 twelve percent of inductees were indicted. In 1967 three-fourths of defendants were convicted, but by 1975 only seventeen percent.)

It is also the most erratically enforced statute on the books even including that list of absurdities invoked as reasons

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1 Lawrence M.Baskir and William A. Strauss, Chance and Circumstance, the Draft, the War, and the Vietnam Generation. New York, Knopf, 1978. See the various charts such as Figure 1 on p. 5.

to revise the criminal code: interfering with a carrier pigeon, accosting a woman on a river boat, and so forth. The latter are just not enforced. Prosecution of MSSA infractions depends on the political climate, the whim of prosecutors as well as Justice's policy, the great variety of offenders, the politics of appointments of volunteers to Selective Service, the degree of sensitivity to issues of conscience and justice which the present military officers in command of the Selective Service System have developed, and on the vagaries of politics around hot and cold wars.

Offenses committed under the act vary widely according to the character and position of the offenders. The highly principled religious man may openly refuse induction for conscience sake; others expediently evaded the draft by falsifying medical records;, some did not appear for a physical examination because it wasn't convenient; many ignored with impunity the requirement to report their current address (my guess is that 20 percent of registrants are always in violation); and, the violations by Selective Service employed and volunteer personnel such as the local board clerk who boasted of never allowing a CO claim were not prosecuted. The Act, the Regulations and the accompanying administrative instructions did not help to make sense of a situation in which the penalty at section 12 punished everyone alike. The Report of the Committee on the Judiciary, U. S. Senate, to accompany S. 1437 aptly described the Military Selective Service Act:

50 U.S.C.App.462 is an awkwardly drafted provision. In addition to defining specific offenses, often in obscure language, it generally makes it a crime, punishable by imprisonment for up to five years, to violate any provision of the statute, or regulation or administrative order issued thereunder.

> The principal offenses under section 462 involve failure to register, or to report for or submit to induction; failure to report for a physical examination; and failure to keep one's local selective service board advised of a change of address, or to carry one's selective service card on his person. Offenses can be committed by persons subject to the law (e.g., failure to register), officials of the Selective Service System,and other agencies (e.g., false examination reports), and "outsiders" (e.g., making false statements in behalf of registrant, or printing counterfeit selective service cards). The uniform felony classification has led to non-prosecution of many minor violations. Since the purpose of the statute is primarily to encourage men to serve in the armed forces (or alternative civilian work programs) rather than put them in jail, the policy of the Selective Service System and the Department of Justice with respect to registrants has been to punish principally persistent refusals to serve. The bulk of prosecutions have therefore been for disobeying orders of a selective service board to report for induction or civilian work. An exception has been the making of false statements, which is generally considered to warrant prosecution.[2]

Selective Service cases became the largest category of prosecutions initiated by Justice in 1971. For a while, educated and highly motivated young men were sent to prison. 3000 went to jail. Many more, 200,000, were charged. A conservative estimate of 250,000 non-registrants were never charged.

Norman Carlson, the Director of the Federal Bureau of Prisons, has been very supportive of a ministry to the war objectors in prison, and to the successor ministry that COs in

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[2] (p. 198)

prison helped generate, a ministry to all those who do not have other visitors. Still, he has had to deal with the organizing of the Federal Correctional Institutions by men who would not accept the conventional wisdom "to do your own time" but sought to improve the conditions of others. Danbury, for instance, was tied up in a strike organized by the war objectors around work conditions.[3]

Though there is no authority for inductions at this moment, prosecutions are proceeding sporadically against non-registrants. Justice has had over 200,000 cases turned over from Selective Service for investigation. As of the last accounting, 148 have been disposed of.

Of the twenty prosecutions there have been four dismissals, one of the prosecutions was against a Laotian immigrant who did not understand English, and when registration was finally explained to him he complied, but it counts as a conviction. The case of a conscientious objector was dismissed when it was shown that the government had all the information necessary to constructively register him without his signature on the card, which had been his position all along. The most recent prosecution is of a young man who tried unsuccessfully to enlist on six occasions, and had consistently failed the qualifying examination, and who has registered.[4] Given the Solicitor General's account

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[3] Stephen M. Kohn, Jailed for Peace. Westport, Conn., Greenwood Press, 1986. p. 82-85.

[4] The Reporter for Conscience'Sake, NISBCO, March, 1986.

of the "beg" policy in Selective Service prosecutions in his argument before the Supreme Court which was the basis for the determination that there is no policy of selective prosecution, either Wayte was decided on the basis of misrepresentation by the Government or this new defendant has an impeccable defense.

Despite the opportunity to select for prosecution the most winnable cases, convictions are well under the 95% rate for index crimes. Were all the outstanding cases to be decided for the government, the government would still be losing at a rate of four times the average.

I have attached a chart of the status of Selective Service cases as of the end of 1985. The chart shows the disposition for those convicted. There has been wide variation, some to probation, others to court ordered community service, another fined the maximum so that his trust fund for education would be depleted, another sentenced to four years, twice the sentence for a violator in the Soviet Union.

Since the introduction of S.1 in the 93rd Congress, I have followed the proposed legislation for the reform of the Federal Criminal Code. Making a coherent body of law out of two hundred years of piecemeal legislation has eluded Congress. It has been too big a job, and the reform is taking place piecemeal. The revision of the Military Selective Service Act and its homologization with other statutes is delayed. I understand that the Thurmond version (S.829) of the sequence of bills reforming the Federal Criminal Code took "the easy way out" for Congress,

were the largest category of crimes reported by the Justice Department. Since prosecutions dragged on until the Ford amnesty in 1984 and the inductions had ceased since 1972, the exemplary, or deterrent effect of the sentences became virtually meaningless.

Many of those convicted were victims of the failure of the Selective Service System to process claims properly. Sometimes the problem was in bias against conscientious objectors, sometimes the bias was racial. In the Cassius Clay case the local board clerk boasted that they had never allowed a conscientious objector claim. Arthur Burkhart Banks was convicted after his local Georgia draft board rejected his CO claim. Banks was well known in New York City for his off-Broadway portrayal of Frederick Webster Douglass; but that did not cut much ice in the heat of prejudice in Georgia.

It was the same in other parts of the country. Weldon Lodwick was convicted in Pittsburgh when his defense, a conscientious objection that was supported by the official teaching of the Presbyterian Church about justifiable war, was ruled as not qualifying under Section 6(j) of the Act. Had Lodwick been in Britain, Australia, or the Netherlands, or West Germany, his defense would have qualified. The judge acknowledged Lodwick's sincerity and conscientiousness, and sentenced him to probation for two years to continue teaching mathematics at Boggs Academy in Keysville, Georgia. The state then withdrew his teaching certificate because he was a felon, and withdrew accreditation

or to put it more favorably, the only feasible way to get agreement. It turned over the complex issue of grading offenses to the Sentencing Commission. And here you are.

Beginning with S. 1431 in the 95th Congress (1977) all proposed reforms of the U.S. Criminal Code undertook a reform of sentencing embodying a system of grading the offenses and correlating that grading to the sentencing provisions. With respect to Selective Service law violations, the offenses were graded Felony D, Felony E, and Misdemeanor A. The classification was differentiated according to whether or not the offense was committed in time of war or national defense emergency, during a peacetime draft, or at all other times. No differentiation has been made for the varieties of offenses that are committed under the Act. Many acts, such as failure to follow the regulations of the system, are punishable but usually not prosecuted, partly because the penalty is not discrete for these offenses, but certainly because the system has no incentive to report on itself.

The sentencing limit for offenses against the Selective Service act is now a maximum of five years imprisonment and/or $250,000 fine, up from a maximum of $10,000 since the Comprehensive Crime Control Act. This punishment is an improvement over the conditions of World War I, when seventeen objectors died in prison of abuse suffered under the hands of the military guards. We have become more enlightened.

In 1971, the violators of the Military Selective Service Act

from the school since its mathematics department was now headed by an uncertifiable teacher.

The Sentencing Commission should consider the grading of Military Selective Service offenses as a priority concern in reforming sentencing. The wide variation in sentences during the Vietnam era, from five years regularly given to black resisters, to one hour given to a group of Puerto Rican nationalists, promotes disrespect for the law.

The fact that the maximum sentences were given uniformly to those who contravened other informal norms in the society, e.g., organizing blacks for equal justice, or organizing anti-war activity shows that the availability of draconian penalties made it possible to use the draft law for other repressive purposes. In 1966, students at the University of Michigan were ordered to induction when they protested the war. Walter Collins, a graduate student and organizer for the Southern Conference Educational Fund, was denied his CO claim and sentenced to five years. While in prison he was not credited with good time, even though he tutored other prisoners and helped organize the library. Cleveland C. Sellers, a founder and national officer of the Student Nonviolent Coordinating Committee, was similarly indicted and sentenced to five years. When Martin Luther King, Jr., urged an end to the Vietnam war, he was attacked by both civil rights leaders and segregationists. Representative O. C. Fisher of Texas called for King's indictment under the

Selective Service Act.[5]

The widespread bias against those who were unconventional conscientious objectors, moral and ethical objectors, or just Roman Catholics or Presbyterians instead of Mennonites or Quakers, led to denials of claims, convictions and overly punitive sentences. David H. Mitchell, III, was sentenced to five years for ethical convictions that were eventually vindicated in Welsh, (1970). Jim Wilson, a Roman Catholic CO, was ridiculed by the trial judge for being "immature" and "arrogant." 72 percent of the convicted were either nonreligious or from a nonpacifist church. Seven percent were from pacifist churches reflecting the change in policy from insistence on cooperation with Selective Service by traditional peace churches to permission for active resistance (Young Friends national conference in 1968, Mennonite Central Committee in 1970). Twenty-one percent were Jehovah's Witnesses.

Successive decisions by the Supreme Court liberalized the interpretation of "religious training and belief" so that non-theists (Seeger, 1965) and moral and ethical conscientious objectors (Welsh, 1970) also qualified. It was not until Gutknecht (1970) that the practice of drafting protesters ahead of others was ruled unconstitutional. In the final year of inductions more CO claims were granted than men were inducted into the armed forces.

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[5] Kohn, op. cit., p.80.

I expect that the next draft will have just as many problems as the last. The most recent regulations published for comment (December 27, 1985) continue a trend to limit the rights of registrants, eliminating due process provisions, or ignoring the comments previously submitted which identified illegal or unworkable regulations.[6] Every day NISBCO receives documentation from young people seeking to establish now their claims as conscientious objectors when inductions and classification resume.

The most recent regulations further militarized Selective Service so that we can expect thousands of peace church young people who would have cooperated with Selective Service will now become non-cooperators.[7] The long-standing arrangements for religiously sponsored alternative service projects which were reaffirmed by Congress in 1971 have been eliminated by Selective Service.

The churches' strong opposition to government policy in Central America, coupled with the active cooperation of many congregations in the sanctuary movement, has alerted young people to issues they would have ignored. New positions on peacemaking and opposition to nuclear war are now part of the fabric of

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religious life. The Roman Catholic Bishops Pastoral Letter on nuclear weapons is being taught in their schools. Despite the fact that those who face an almost certain resumption of conscription during the next decade have grown up since the Vietnam era, awareness of the issue of participation in war is the highest ever in peacetime. NISBCO's case load is now about one third Roman Catholic. At the beginning of the Vietnam era, they comprised less than one percent of those granted CO status.

The consideration of motivation should enter into the determination of duration. Those who oppose the conscription system on conscientious grounds and who will not register should be given some consideration as the courts already have by diversion.

Although NISBCO has no policy on sentencing Selective Service violators, since it opposes conscription in principle, I have some suggestions based on our experience. I can put myself into the secularized framework of public policy formation.

Certainly, five years is too long. Other countries have more liberal CO requirements, and incarceration much shorter. The two countries with comparable rates of incarceration to that of the United States are more liberal, despite the fact that they are now actively conscripting. In the Soviet Union the sentence only two years. South Africa, which only enacted a provision for narrowly defined conscientious objection in 1983, imprisons for up to six years; but, even there sentences have been one month

and for one year.[8]

Sentences during wartime should be no longer than the term of service of the conscript, two years. That will satisfy the purpose to punish and to deter others who would evade service. During a peacetime draft, when no risk of life is involved for the conscript, and enlistments are still advertised for their job and educational value, one year should be the maximum. When only registration is being conducted, as at the present time, the maximum duration should be four months, which is the present policy of the parole board.

One of the objectives of sentencing is incapacitation. It is hard to see how those who are willing to go to jail for their beliefs will be stopped from continuing their "crime" during the sentence. Both Arlo Tatum and Larry Gara served two prison sentences for their opposition to war and the draft.

When opportunity is provided, I will expand on the topic of alternatives to incarceration. I want now to anticipate that discussion because it has bearing on the duration of sentences for conscientious war objectors.

Those of us who have worked for years with conscientious objectors wonder what "rehabilitation" means for them. They want to continue as farmers in a simple life of non-resistance, or perhaps to continue their education to become doctors and

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servants of the poor.[9] Would rehabilitation mean that they are now, influenced by the violence of prison, ready to do violence to others, to kill on command?

While admiring the wit of the sentence for David Wayte who served almost six months under house arrest, instead of continuing his work in a home for the aging and in a soup kitchen, I do not think it accomplished its announced purpose of deterring other COs from resisting the draft. Depriving people of the opportunity to do good for others does punish the CO, but it certainly will not stop those others who have high motives of nonviolence and love for others from linking them to opposition to killing others in war. When Andy Mager was sentenced in 1985 for refusing to register for the draft, other young men, who had listened to his arguments at his trial, then announced their own public refusal to register for the draft.

My ideal in sentencing, would include a return to the provisions of the 1948 Universal Military Training and Service Act which provided an absolute exemption for conscientious objectors. Even Great Britain at the height of World War II was able to give exemptions to some COs and require alternative service of others, and had a much broader definition of conscientious objection, so as to include so called "selective objectors" and political objectors.

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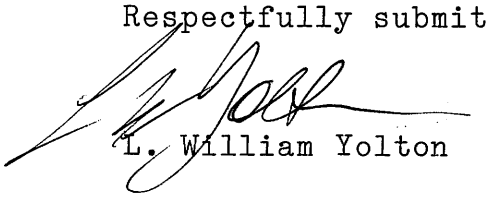
[9] The Reporter, Dec. 1985 tells the story of David Fletcher, a military doctor who has been unable to get his conscientious objector claim processed by the army. Medical specialists have a disproportionate share of CO claims, in my experience. That fits the practice in the armed forces of reassigning those who have sought non-combatant service to the Medical Corps.

Respectfully submitted,



L. William Yolton

draft for submission in advance, April 11, 1986

1st. Draft

Formed: 1940

NISBCO

National Interreligious Service Board for Conscientious Objectors

TESTIMONY ON THE GRADING AND DURATION OF SENTENCES

before the

U. S. SENTENCING COMMISSION

on behalf of the

National Interreligious Service Board
For Conscientious Objectors

by Rev. L. William Yolton
Executive Director

April 15, 1986

Suite 600, 800 Eighteenth St., NW, Washington, DC 20006-3599 (202) 293-5962

REV. L. WILLIAM YOLTON, Executive Director
SHAWN PERRY, Associate Director for Program
CHARLES MARESCA, Associate Director/Counseling
REV. RON MARTIN-ADKINS, Associate Director for Constituency Services
ANN MARIE CLARK, Associate Director/Editor
CHARLES EPP, Assistant Director for Legislative Liaison
JOSEPH S. TUCHINSKY, Midwest Representative
HERMAN WILL, JR., ESQ., Northwest Representative
GERALD SHENK, Southwest Representative

tion among war objectors in prison, now accomplished through a similarly expanded coalition.

On behalf of NISBCO, I address the grading of offenses committed under the Military Selective Service Act and the related question of the duration of incarceration. Our sister organization, the Central Committee for Conscientious Objectors will be submitting written testimony. When the opportunity arises, I hope to talk to you on matters of alternatives to incarceration and on the characteristics of offenders.

I shall begin by sketching out a perspective on the draft system and its sentencing problems. It can be argued that violations of the Military Selective Service Act may be the most difficult to fit into a rational sentencing scheme. Since the initial determination of most of the cases that eventually come to trial is made by ill-trained or untrained lay boards operating with rules that are at points demonstrably illegal, or without due process guarantees, it is no surprise that the conviction rate in these cases is the lowest of all classes of crimes prosecuted by the Justice Department.[1] (By 1972 twelve percent of inductees were indicted. In 1967 three-fourths of defendants were convicted, but by 1975 only seventeen percent.)

It is also the most erratically enforced statute on the books even including that list of absurdities invoked as reasons

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1 Lawrence M.Baskir and William A. Strauss, Chance and Circumstance, the Draft, the War, and the Vietnam Generation. New York, Knopf, 1978. See the various charts such as Figure 1 on p. 5.

> 50 U.S.C.App.462 is an awkwardly drafted provision. In addition to defining specific offenses, often in obscure language, it generally makes it a crime, punishable by imprisonment for up to five years, to violate any provision of the statute, or regulation or administrative order issued thereunder.
>
> The principal offenses under section 462 involve failure to register, or to report for or submit to induction; failure to report for a physical examination; and failure to keep one's local selective service board advised of a change of address, or to carry one's selective service card on his person. Offenses can be committed by persons subject to the law (e.g., failure to register), officials of the Selective Service System,and other agencies (e.g., false examination reports), and "outsiders" (e.g., making false statements in behalf of registrant, or printing counterfeit selective service cards). The uniform felony classification has led to non-prosecution of many minor violations. Since the purpose of the statute is primarily to encourage men to serve in the armed forces (or alternative civilian work programs) rather than put them in jail, the policy of the Selective Service System and the Department of Justice with respect to registrants has been to punish principally persistent refusals to serve. The bulk of prosecutions have therefore been for disobeying orders of a selective service board to report for induction or civilian work. An exception has been the making of false statements, which is generally considered to warrant prosecution.[2]

Selective Service cases became the largest category of prosecutions initiated by Justice in 1971. For a while, educated and highly motivated young men were sent to prison. 3000 went to jail. Many more, 200,000, were charged. A conservative estimate of 250,000 non-registrants were never charged.

Norman Carlson, the Director of the Federal Bureau of Prisons, has been very supportive of a ministry to the war objectors in prison, and to the successor ministry that COs in prison helped generate, a ministry to all those who do not have other visitors. Still, he has had to deal with the organizing of the Federal Correctional Institutions by men who would not accept

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[2] (p. 198)

either Wayte was decided on the basis of misrepresentation by the Government or this new defendant has an impeccable defense.

Despite the opportunity to select for prosecution the most winnable cases, convictions are well under the 95% rate for index crimes. Were all the outstanding cases to be decided for the government, the government would still be losing at a rate of four times the average.

I have attached a chart of the status of Selective Service cases as of the end of 1985. The chart shows the disposition for those convicted. There has been wide variation, some to probation, others to court ordered community service, another fined the maximum so that his trust fund for education would be depleted, another sentenced to four years, twice the sentence for a violator in the Soviet Union.

Since the introduction of S.1 in the 93rd Congress, I have followed the proposed legislation for the reform of the Federal Criminal Code. Making a coherent body of law out of two hundred years of piecemeal legislation has eluded Congress. It has been too big a job, and the reform is taking place piecemeal. The revision of the Military Selective Service Act and its homologization with other statutes is delayed. I understand that the Thurmond version (S.829) of the sequence of bills reforming the Federal Criminal Code took "the easy way out" for Congress, or to put it more favorably, the only feasible way to get agreement. It turned over the complex issue of grading offenses to the Sentencing Commission. And here you are.

Military Selective Service offenses as a priority concern in reforming sentencing. The wide variation in sentences during the Vietnam era, from five years regularly given to black resisters, to one hour given to a group of Puerto Rican nationalists, promotes disrespect for the law.

The fact that the maximum sentences were given uniformly to those who contravened other informal norms in the society, e.g., organizing blacks for equal justice, or organizing anti-war activity shows that the availability of draconian penalties made it possible to use the draft law for other repressive purposes. In 1966, students at the University of Michigan were ordered to induction when they protested the war. Walter Collins, a graduate student and organizer for the Southern Conference Educational Fund, was denied his CO claim and sentenced to five years. While in prison he was not credited with good time, even though he tutored other prisoners and helped organize the library. Cleveland C. Sellers, a founder and national officer of the Student Nonviolent Coordinating Committee, was similarly indicted and sentenced to five years. When Martin Luther King, Jr., urged an end to the Vietnam war, he was attacked by both civil rights leaders and segregationists. Representative O. C. Fisher of Texas called for King's indictment under the Selective Service Act.[5]

The widespread bias against those who were unconventional conscientious objectors, moral and ethical objectors, or just

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[5] Kohn, op. cit., p.80.

or deterrent effect of the sentences became virtually meaningless.

Many of those convicted were victims of the failure of the Selective Service System to process claims properly. Sometimes the problem was in bias against conscientious objectors, sometimes the bias was racial. In the Cassius Clay case the local board clerk boasted that they had never allowed a conscientious objector claim. Arthur Burkhart Banks was convicted after his local Georgia draft board rejected his CO claim. Banks was well known in New York City for his off-Broadway portrayal of Frederick Webster Douglass; but that did not cut much ice in the heat of prejudice in Georgia.

It was the same in other parts of the country. Weldon Lodwick was convicted in Pittsburgh when his defense, a conscientious objection that was supported by the official teaching of the Presbyterian Church about justifiable war, was ruled as not qualifying under Section 6(j) of the Act. Had Lodwick been in Britain, Australia, or the Netherlands, or West Germany, his defense would have qualified. The judge acknowledged Lodwick's sincerity and conscientiousness, and sentenced him to probation for two years to continue teaching mathematics at Boggs Academy in Keysville, Georgia. The state then withdrew his teaching certificate because he was a felon, and withdrew accreditation from the school since its mathematics department was now headed by an uncertifiable teacher.

The Sentencing Commission should consider the grading of

Roman Catholics or Presbyterians instead of Mennonites or Quakers, led to denials of claims, convictions and overly punitive sentences. David H. Mitchell, III, was sentenced to five years for ethical convictions that were eventually vindicated in Welsh, (1970). Jim Wilson, a Roman Catholic CO, was ridiculed by the trial judge for being "immature" and "arrogant." 72 percent of the convicted were either nonreligious or from a nonpacifist church. Seven percent were from pacifist churches reflecting the change in policy from insistence on cooperation with Selective Service by traditional peace churches to permission for active resistance (Young Friends national conference in 1968, Mennonite Central Committee in 1970). Twenty-one percent were Jehovah's Witnesses.

Successive decisions by the Supreme Court liberalized the interpretation of "religious training and belief" so that non-theists (Seeger, 1965) and moral and ethical conscientious objectors (Welsh, 1970) also qualified. It was not until Gutknecht (1970) that the practice of drafting protesters ahead of others was ruled unconstitutional. In the final year of inductions more CO claims were granted than men were inducted into the armed forces.

I expect that the next draft will have just as many problems as the last. The most recent regulations published for comment (December 27, 1985) continue a trend to limit the rights of registrants, eliminating due process provisions, or ignoring the comments previously submitted which identified illegal or

highest ever in peacetime. NISBCO's case load is now about one third Roman Catholic. At the beginning of the Vietnam era, they comprised less than one percent of those granted CO status.

The consideration of motivation should enter into the determination of duration. Those who oppose the conscription system on conscientious grounds and who will not register should be given some consideration as the courts already have by diversion.

Although NISBCO has no policy on sentencing Selective Service violators, since it opposes conscription in principle, I have some suggestions based on our experience. I can put myself into the secularized framework of public policy formation.

Certainly, five years is too long. Other countries have more liberal CO requirements, and incarceration much shorter. The two countries with comparable rates of incarceration to that of the United States are more liberal, despite the fact that they are now actively conscripting. In the Soviet Union sentences are only two years (maximum of three). South Africa, which only enacted a provision for narrowly defined conscientious objection in 1983, imprisons for up to six years; but, even there sentences have been one month and for one year.[8]

Sentences during wartime should be no longer than the term of service of the conscript, two years. That will satisfy the purpose to punish and to deter others who would evade

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My ideal in sentencing, would include a return to the provisions of the 1948 Universal Military Training and Service Act which provided an absolute exemption for conscientious objectors. Even Great Britain at the height of World War II was able to give exemptions to some COs and require alternative service of others, and had a much broader definition of conscientious objection, so as to include so called "selective objectors" and political objectors.

Absent a change in the law, the sentencing judge should determine sincerity (the trial would not have had a <u>de novo</u> review of the determination of Selective Service on the conscientious objection claim, or the defendant may have taken a position outside the narrow provisions of current Selective Service law). Then a probationary sentence, depending upon the grading of the offense correlated with whether the offense was committed in time

I am L. William Yolton, the Executive Director of the National Interreligious Service Board for Conscientious Objectors (NISBCO). I am a Presbyterian minister who has been a pastor, campus minister, church administrator, and a teacher in divinity school. During the Vietnam era when I was the denominational Secretary for Conscience and War, I was also the chair of the Interfaith Committee on Draft and Military Information, and the chair of Prisoner Visitation and Support. I am also on the board of the Central Committee for Conscientious Objectors.

NISBCO is a coalition of thirty-four religious bodies organized to defend and extend rights of conscientious objectors. The coalition includes the Synagogue Council of America, the U.S. Catholic Conference, most of the denominations in the National Council of Churches such as Presbyterians, Lutherans, and Methodists, and the historic peace churches usually identified as Mennonites, Brethren, and the Religious Societies of Friends. Such an unusually broad coalition is maintained in part by the narrow focus of concern, the support of conscience and opposition to war.

In addition to the primary activity of counseling and information, NISBCO also represents its constituents' interest to the government and monitors developments in conscientious objection and conscription. In the course of this activity NISBCO has become an expert in conscription law and on the situation of conscientious objectors in the armed forces. Since the second World War, NISBCO has organized and conducted visita-

to revise the criminal code: interfering with a carrier pigeon, accosting a woman on a river boat, and so forth. The latter are just not enforced. The draft law is not enforced justly. Prosecution of MSSA infractions depends on the political climate, the whim of prosecutors as well as Justice's policy, the great variety of offenders, the politics of appointments of volunteers to Selective Service, the degree of sensitivity to issues of conscience and justice which the present military officers in command of the Selective Service System have developed, and on the vagaries of politics around hot and cold wars.

Offenses committed under the act vary widely according to the character and position of the offenders. The highly principled religious man may openly refuse induction for conscience sake; others expediently evaded the draft by falsifying medical records; some did not appear for a physical examination because it wasn't convenient; many ignored with impunity the requirement to report their current address (my guess is that 20 percent of registrants are always in violation); and, the violations by Selective Service employed and volunteer personnel such as the local board clerk who boasted of never allowing a CO claim were not prosecuted. The Act, the Regulations and the accompanying administrative instructions did not help to make sense of a situation in which the penalty at section 12 punished everyone alike. The Report of the Committee on the Judiciary, U. S. Senate, to accompany S. 1437 aptly described the Military Selective Service Act:

the conventional wisdom "to do your own time" but sought to improve the conditions of others. Danbury, for instance, was tied up in a strike organized by the war objectors around work conditions.[3]

Though there is no authority for inductions at this moment, prosecutions are proceeding sporadically against non-registrants. Justice has had over 200,000 cases turned over from Selective Service for investigation. As of the last accounting, 148 have been disposed of.

Of the twenty prosecutions there have been four dismissals, one of the prosecutions was against a Laotian immigrant who did not understand English, and when registration was finally explained to him he complied, but it counts as a conviction. The case of a conscientious objector was dismissed when it was shown that the government had all the information necessary to constructively register him without his signature on the card, which had been his position all along. The most recent prosecution is of a young man who tried unsuccessfully to enlist on six occasions, and had consistently failed the qualifying examination, and who has registered.[4] Given the Solicitor General's account of the "beg" policy in Selective Service prosecutions in his argument before the Supreme Court which was the basis for the determination that there is no policy of selective prosecution,

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[3] Stephen M. Kohn, Jailed for Peace. Westport, Conn., Greenwood Press, 1986. p. 82-85.

[4] The Reporter for Conscience'Sake, NISBCO, March, 1986.

Beginning with S. 1431 in the 95th Congress (1977) all proposed reforms of the U.S. Criminal Code undertook a reform of sentencing embodying a system of grading the offenses and correlating that grading to the sentencing provisions. With respect to Selective Service law violations, the offenses were graded Felony D, Felony E, and Misdemeanor A. The classification was differentiated according to whether or not the offense was committed in time of war or national defense emergency, during a peacetime draft, or at all other times. No differentiation has been made for the varieties of offenses that are committed under the Act. Many acts, such as failure to follow the regulations of the system, are punishable but usually not prosecuted, partly because the penalty is not discrete for these offenses, but principally because the system has no incentive to report on itself.

The sentencing limit for offenses against the Selective Service act is now a maximum of five years imprisonment and/or $250,000 fine, up from a maximum of $10,000 since the Comprehensive Crime Control Act. This punishment is an improvement over the conditions of World War I, when seventeen objectors died in prison of abuse suffered under the hands of the military guards. We have become more enlightened.

In 1971, the violators of the Military Selective Service Act were the largest category of crimes reported by the Justice Department. Since prosecutions dragged on until the Ford amnesty in 1974 and the inductions had ceased since 1972, the exemplary,

unworkable regulations.[6] Every day NISBCO receives documentation from young people seeking to establish now their claims as conscientious objectors when inductions and classification resume.

The most recent regulations further militarized Selective Service so that we can expect thousands of peace church young people who would have cooperated with Selective Service will now become non-cooperators.[7] The long-standing arrangements for religiously sponsored alternative service projects which were reaffirmed by Congress in 1971 have been eliminated by Selective Service.

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of war, during a peacetime draft or during a time of registration only, either suspended without supervision, or to court ordered community service arranged so that the service interest of the defendant is considered. (It should be noted that some COs have valid scruples against compelled service.) Depending on the circumstances and the times, such community service might be fulfilled in part-time or full-time arrangements. Churches and other community organizations regularly cooperate with the courts in finding suitable opportunities for service.

Sentences should not be imposed to punish the exercise of first amendment rights of expression, nor should sentences require war objectors to refrain from public speech. Ample provision is available to prosecute for "aiding and abetting."

Where the violator was determined to have acted for primarily selfish reasons, alternatives to incarceration should still be followed, though sanctions such as fines may be imposed. Most offenses will have been committed when the violator was nineteen or twenty years of age, which is the age of the first priority selection group in the order of call. The first failure to register would have occurred at age eighteen, and the principles of youthful offender treatment should be observed. Only in cases of aggravating factors such as deceit and personal gain should the sanctions include significant loss of personal liberty.

Respectfully submitted,

L. William Yolton

Nonregistrants Given Widely Varying Sentences

NONREGISTRANT	DATE OF INDICTMENT	LOCATION	SENTENCE	CURRENT STATUS
Gary Eklund	9/1/82	Iowa	2 yrs. in prison	released after 4½ months
Enten Eller	7/1/82	Virginia	2 yrs. community service	completed sentence
Charles Epp	9/22/83	Kansas	none	charges dropped,CO acknowledged
Russ Ford	7/30/82	Conn.	30 days jail (time served while awaiting trial)	completed sentence
Jon Harshbarger *	arraigned 9/30/85	Indiana	2 yrs community service, $1,500 fine	plead guilty before indictment, serving sentence
Ed Hasbrouck	10/6/82	Mass.	6 months prison	released after 4½ months
Paul Jacob	9/23/82	Arkansas	6 mo. prison, 4½ years suspended	released after 5 months
Gillam Kerley	9/9/82	Wisconsin		gov't. is appealing district judge's dismissal of case
Andy Mager	8/22/84	New York	6 months prison, 2½ years suspended	completed sentence
Phetsamay Maokham Phio	12/13/84	Louisiana	none	registered, charges dropped
Rusty Martin	10/5/82	Iowa	$10,000 Fine, attend 2 naturalization ceremonies, register	completing sentence
Sam Matthews	3/10/83	Indiana	1 year and 1 day	released after 2 mo.
Michael McMillan	9/1/82	Wisconsin	none	registered, charges dropped
Dan Rutt	1/20/83	Michigan		judge waiting result of *Schmucker*
Ben Sasway	6/30/82	Calif.	2½ years prison	released after 4½ months
Steve Schlossberg	10/3/83	none	registered, SSS acknowledged CO claim, charges dropped	
Mark Schmucker	7/22/82	Ohio	3 years probation, including 2 yrs. community service and $4,000 fine	served part of sentence; District Court hearing arguments on selective prosecution
Kendall Warkentine	9/22/82	Kansas	2 yrs unsupervised probation	registered as CO
David Wayte	7/22/82	Calif.	6 mo. house arrest barred from community service in those 6 months	serving sentence

The sentencing of David Wayte highlighted the wide variety of sentences that have been given to convicted nonregistrants. We thought REPORTER readers might like to have an overview of the current status of indicted nonregistrants. This is a chart that was developed by Ann Clark and updated by Chuck Epp.

*** Information was current as of December 10, 1985.**

THE INSTITUTE FOR GOVERNMENT AND POLITICS

STUART ROTHENBERG
PATRICK B. McGUIGAN
Directors

721 SECOND STREET, N.E. WASHINGTON, D.C. 20002 202-546-3013

REVISED

TESTIMONY

PATRICK B. McGUIGAN

DIRECTOR, JUDICIAL REFORM PROJECT

INSTITUTE FOR GOVERNMENT AND POLITICS

The United States Sentencing Commission
Hearing on Offense Seriousness
April 15, 1986
Washington, D.C.

TESTIMONY OF

PATRICK B. MCGUIGAN

Judge Wilkins and members of the Sentencing Commission, I appreciate this opportunity to present my views on some of the important issues you face as you develop firm, effective sentencing guidelines for the federal system.

The Institute for Government and Politics is a division of the Free Congress Research and Education Foundation, a public policy research organization based here in the nation's capital. Since 1980, I have been Director of the Judicial Reform Project, one of the activities of the Institute. We have published several books on legal policy questions, including two books specifically on criminal justice issues. A third book in this area, Crime and Punishment in Modern America, will be released this summer. Obviously, the work of the U.S. Sentencing Commission is of vital importance to our organization and to the thousands of Americans who support our research activities.

It is important for me to begin by stressing a point I have raised in earlier correspondence with one member of the Commission. Specifically, it seems to me that the Commission is taking an incorrect approach to its agenda. Your first step should not be to collect hordes of data or factors, but rather to decide policy. Moreover, it is crucial that your policy-making decisions be appropriately limited. The kind of sample cases you sent me are not so much illustrative of the problems you face, or of the decisions you should be making, as they are instead of a flawed approach.

The very nature of the data-collection process you are apparently undertaking represents a hidden policy agenda that I believe is antithetical to the purposes of the Commission as I -- and I believe many other supporters of the Comprehensive Crime Control Act -- understood those purposes.

The primary goal of the Commission should be to establish sentencing guidelines designed, first and foremost, to promote Truth in Sentencing as a

policy goal. The American people deserve to have a sentencing policy which is open and known -- and understood -- and not a sentencing policy masked by sociological gobbledygook. It sounds to me as if you are looking at masses of complicated -- and thoroughly irrelevant -- criteria. As Jack Kress puts it in his seminal book, Prescription for Justice, the central purpose of sentencing guidelines "is to open a system too long shielded from public scrutiny."

It does not appear to me that your functional committee structure facilitates that central purpose. Rather, it allows, and even encourages, a mindset that gives great weight to issues of relative insignificance. Indeed, I note that not one of your several committees even mentions the primary issue of underlying and consistent policy-setting.

Moreover, I find astonishing the time-consuming and incredibly costly data collection process the Commission appears to be undertaking. From your earlier communications to me, one might assume that no previous work has been done in collecting lists of factors or ranking offenses. To the contrary, literally millions of tax dollars -- most of it at the federal level -- has already been expended to these same ends. The Commission can successfully meet the "tight" deadlines it has and, furthermore, save the law-abiding taxpayers enormous sums of money by reviewing the data and legislation already in hand.

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For all intents and purposes, Minnesota adopted a purely "just deserts" model, with no concern for deterrence, crime control or public safety in the formation of sentencing guidelines. This approach is absolutely antithetical to everything the U.S. Congress believed when it passed the legislation.

(As an aside, I might also stress that the existing Parole Commission is invalid as a model for the U.S. Sentencing Commission's work. Leave the determination of moral blameworthiness, justice for the offender and other aspects of "just deserts" theory to the Almighty. Your job is to develop sentencing guidelines designed to promote deterrence of crime through the punishment of criminals.) Frankly, this sort of thing is starting to get obscene. Americans communicated quite effectively in 1984 their determination that criminals be incarcerated. It will be a tragedy if those who described the Comprehensive Crime Control Act of 1984 as "dead on arrival" in the House of Representatives wind up being the ones who manage and implement its provisions. The mentality that ferrets out rehabilitationist minutiae instead of concentrating on central policy goals lead the Commission to repeat just such errors in its work, should the Commissioners proceed on the path they are already following.

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Name: Pat McGuigan

Organization: Institute for Gov't & Politics

Address: 721 Second St., N.E.
Washington, D.C. 20002

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1st. Draft

THE INSTITUTE FOR GOVERNMENT AND POLITICS

STUART ROTHENBERG
PATRICK B. McGUIGAN
Directors

721 SECOND STREET, N.E. WASHINGTON, D.C. 20002 202-546-3013

TESTIMONY

PATRICK B. McGUIGAN

DIRECTOR, JUDICIAL REFORM PROJECT

INSTITUTE FOR GOVERNMENT AND POLITICS

The United States Sentencing Commission
Hearing on Offense Seriousness
April 15, 1986
Washington, D.C.

TESTIMONY OF

PATRICK B. MCGUIGAN

Judge Wilkins and members of the Sentencing Commission, I appreciate this opportunity to present my views on some of the important issues you face as you develop firm, effective sentencing guidelines for the federal system.

The Institute for Government and Politics is a division of the Free Congress Research and Education Foundation, a public policy research organization based here in the nation's capital. Since 1980, I have been Director of the Judicial Reform Project, one of the activities of the Institute. We have published several books on legal policy questions, including two books specifically on criminal justice issues. A third book in this area, Crime and Punishment in Modern America, will be released this summer. Obviously, the work of the U.S. Sentencing Commission is of vital importance to our organization and to the thousands of Americans who support our research activities.

It is important for me to begin by stressing a point I have raised in earlier correspondence with one member of the Commission. Specifically, it seems to me that the Commission is taking an incorrect approach to its agenda. Your first step should not be to collect hordes of data or factors, but rather to decide policy. Moreover, it is crucial that your policy-making decisions be appropriately limited. The kind of sample cases you sent me are not so much illustrative of the problems you face, or of the decisions you should be making, as they are instead of a flawed approach.

The very nature of the data-collection process you are apparently undertaking represents a hidden policy agenda that I believe is antithetical to the purposes of the Commission as I -- and I believe many other supporters of the Comprehensive Crime Control Act -- understood those purposes.

The primary goal of the Commission should be to establish sentencing guidelines designed, first and foremost, to promote Truth in Sentencing as a

policy goal. The American people deserve to have a sentencing policy which is open and known -- and understood -- and not a sentencing policy masked by sociological gobbledygook. It sounds to me as if you are looking at masses of complicated -- and thoroughly irrelevant -- criteria. As Jack Kress puts it in his seminal book, Prescription for Justice, the central purpose of sentencing guidelines "is to open a system too long shielded from public scrutiny."

It does not appear to me that your functional committee structure facilitates that central purpose. Rather, it allows, and even encourages, a mindset that gives great weight to issues of relative insignificance. Indeed, I note that not one of your several committees even mentions the primary issue of underlying and consistent policy-setting.

Moreover, I find astonishing the time-consuming and incredibly costly data collection process the Commission appears to be undertaking. From your earlier communications to me, one might assume that no previous work has been done in collecting lists of factors or ranking offenses. To the contrary, literally millions of tax dollars -- most of it at the federal level -- has already been expended to these same ends. The Commission can successfully meet the "tight" deadlines it has and, furthermore, save the law-abiding taxpayers enormous sums of money by reviewing the data and legislation already in hand.

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Revised Version

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FEDERAL SENTENCING GUIDELINES: TASKS PROPOSED FOR THE UNITED STATES SENTENCING COMMISSION

THE SERIOUSNESS OF THE OFFENSE

David A. Jones
L. Stephen Jennings

I. Overview.

Probably the most important single criterion in Guideline sentencing is the "seriousness" criterion. Most states that have adopted sentencing Guidelines have undertaken initially to quantify "seriousness" as the major Guideline criterion, to be followed eventually by other factors such as the offender's "background." Most Americans would agree that an offense -- any given offense -- can be measured roughly such as by placing it in between two other offenses, one deemed a more serious crime, the other a less serious one. This process may be repeated as many times as felt necessary, so that, as a result, a continuum of crimes may be constructed whereon an ordinal hierarchy of offenses emerges. This is a relatively easy task to perform, with substantial, if not total, concensus among most right-thinking persons.

The harder effort, by far, is weighting, rather then merely ordering, the hierarchy of crimes. Most states seem not to have addressed this issue in any detail, some not at all. For instance, within sentencing Guidelines states such as Pennsylvania have established ten offense gravity scores ("OGS") ranging from a low of "1" to a high of "10." Unsurp-

risingly, homicides have tended to occupy OGS "10", whereas misdemeanors have filled the ranks of the lowest OGS ranking ranges, such as "1" and "2". Such distinctions are unlikely to provoke significant criticism. Greater difficulty arises when one compares any two given offense gravity scores, however, particularly at the upper levels. For instance, Pennsylvania places Involuntary Deviate Sexual Intercourse in an OGS of "9", just under the homicides that occupy an OGS "10". Similarly, Pennsylvania places Burglary within three contiguous offense gravity scores: "5", "6" and "7", depending upon circumstances surrounding perpetration of the offense. A critical question, therefore, arises: should the difference between an OGS "5" and "6" be the same as the difference separating an OGS "9" and "10"? Are these offense gravity scores ordinal only, or are they interval ranges? Instead of there being arithmetric progressions from one OGS to the next, proceeding upward, should there be geometric progressions? Thus, if a "Guideline" sentence for an offense having an OGS of "6" were to be six years, for easy figuring, should a "Guideline" sentence for an offense having an OGS of "7" be seven years or, perhaps, should it be eight or nine years, even ten?

II. Establishing Offense Gravity Scores ("OGS").

No task seems to be more difficult than, or even as difficult as, setting offense gravity scores (OGS) for each statutory crime. Yet, this task has to be done if any Guideline sentencing structure is to be implemented. Undoubtedly, this is the first major task the Sentencing Commission would

confront, on a substantive rather than a procedural level as it goes about its business. Where does a commission begin?

Two outer parameters have to be set, rather arbitrarily, from the beginning. In practice, one of these is rather obvious: the lowest OGS should be "1" rather than "0", simply because any crime, no matter how trivial, must have a certain degree of "gravity," otherwise why is it a crime? Setting the upper ceiling on offense gravity scores is much harder. Commissions seem to prefer fewer, rather than a larger number of, offense gravity score ranges. Thus, the tendency exists for sentencing commissions to set convenient ceilings such as "10" and then labor to fit all crimes between such a confining space as "1" and "10". The Sentencing Commission is urged to avoid this mistake.

Instead, the Commission should begin at OGS "1", then progress upward through as many intervals (ordinals) as seem necessary to fully distinguish the comparative seriousnesses of <u>all</u> criminal offenses. Hence, the Commission might wind-up with 23 OGS ranges, for instance, rather than an even-numbered ten or twenty. Sentencing should not be equated with playing the piano; we are not limited to eight notes per octave, or to a finite number of octaves.

The difference between offense gravity scores must be meaningful to be effective, or even to be fair. In some states, such as Pennsylvania, the difference between one OGS and the ones immediately above or below it may be but a matter of a few months. Too <u>many</u> months are crammed into the total of ten OGS, largely because Pennsylvania spread out its OGS ac-

ross the range of minimum sentences only, ignoring completely the range of maximum sentences. The United States Sentencing Commission should not repeat this mistake.

The authors believe it to be difficult, and virtually impossible, to construct offense gravity scores meaningfully in fewer than twenty OGS categories. This should not be witnessed as being inconsistent with what has just been said: that the Commission should not constrain itself by presetting any fixed number of OGS categories. Rather, the Commission is urged to spread-out OGS ranges across the full sentencing gamut permissible for every crime -- across both minimum and maximum sentence, using ranges that have self-significance both to the offender and to the public. Thus, the Commission should avoid ranges distinguished by only a matter of weeks, and, instead, should calculate most ranges at intervals of at least six months.

The United States Code offers a wider assortment than most states in terms of both number of different crimes and seriousness of crimes. Federal law encompasses traditional "common law" crimes plus numerous "special" offenses arising, for instance, under the Internal Revenue Code and similar statutes. The difference between failure to file an employer's quarterly return and espionage, also, is a greater difference than exists between offenses under many state laws. This characteristic compels the Sentencing Commission to use a larger number of offense gravity scores. Yet, ultimately, the Commission will have to select its own intervals; there is no "cookbook" from which it may draw this information.

III. Aggravation and Mitigation.

Most crimes are not "cut and dry" in terms of the harm perpetrated upon the victim(s) thereof. Yet, is not the sentencing judge, rather than this Commission, the proper authority to distinguish factual differences in offender conduct that may impact on sentence?

We have learned from Gregg v. Georgia, 428 U.S. 153 (1976) and other similar cases that (a) aggravating as well as mitigating circumstances can be articulated generally and (b) this may improve the Constitutional muster of the sentencing process. Of the two, perhaps, aggravating circumstance is easier to articulate than mitigating circumstance, yet neither fosters wide concensus except, maybe, within the narrow confines of capital offenses. Yet, the Gregg criteria could be a starting point. They do not have to be limited only to crimes for which the death penalty is permissible.

Again, we do not intend to provide the Commission any "cookbook" of aggravating or mitigating circumstances. We do offer suggestions as to categories of aggravation and mitigation. These might include the status of the offender and/or the victim (offender a previously-convicted felon; victim a police officer or a child); the conduct of the offender during, immediately before, or immediately after commission of the offense; actual harm befalling a victim (loss of ones entire home through arson) or the Government (loss of a vital national secret); and the liklihood of restitution. Potential ruin of a victim, like attempted murder, should be punished; but actual ruin of a victim's property or a Government

secret, like actual murder, should be punished more severely than its mere attempt.

IV. Violence and Constructive Violence.

One major distinction the Commission may wish to consider as it formulates our National sentencing policy is whether a given crime has involved violence, actual or constructive. Our Nation suffers from violent crime that makes citizens afraid to walk our streets at night or, sometimes, even during the day. The mugger who knocks elderly ladies on the head to steal their pocketbooks is a violent criminal. Also, the drug trafficker is a violent criminal, because he encourages muggers to knock ladies on the head, in order to raise funds sufficient to purchase drugs.

What about the drug-banker? The principal management of those banks that "launder" drug money either knowingly or under circumstances where it is evident they should have realized what they were doing, must be held accountable as violent criminal offenders, particularly where their conduct has endured over a significant time interval and contributed substantially to the bank's prosperity. Principal managers who fall into this category would be branch managers who repeatedly fail to report cash transactions; but, also, chief executive and chief financial officers of banks that repeatedly transfer large sums to offshore correspondents, frequently in violation of our tax policies.

Our National Sentencing Policy must reflect current reality: we are at war with drug traffickers, terrorists or

any group of criminal offenders whose mission, primary or secondary though it may be, is to destroy our way of life. The individual criminal must be punished. The criminal syndicate has to be destroyed. This Commission must formulate a clear and comprehensible distinction between the two sorts of criminals, and punish the latter far more severely than the former whenever possible.

1st. Draft

Executive Summary

FEDERAL SENTENCING GUIDELINES: TASKS PROPOSED FOR THE UNITED STATES SENTENCING COMMISSION

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1. Introduction.

Federal sentencing Guidelines are inadequate presently, and the opportunity exists for the United States Sentencing Commission to reform Federal senrencing practices. This opportunity has been long-coming, and it may not present itself again during our lifetimes. For this reason, the Commission must consider immediate and sweeping changes, rather than modest ones that would be less provocative but far less worthwhile. Sentences must reflect the will of the American people and be applied consistently with but a minimum of disparity. To be effective, criminal sentences have to exert an impact upon criminal behavior, either by reducing existing crime or deterring potential crime.

The Sentencing Commission should avoid becoming bogged-down in detail. Actual sentences imposed in given cases remain, and should remain, the prerogative of jurists. Rehabilitation, if this concept be workable at all, remains and should remain the province of correctional specialists. The task of the Commission is not to become embroiled in sentencing debate or in the differential effects various sentences may have upon offenders bearing peculiar characteristics. The task of the Commission is to set an American sentencing policy and an agenda for its implementation. Time is of the essence. Already, the Commission is behind schedule.

2. Setting Guidelines Parameters.

An initial, and perhaps the initial, task of the Commission must be to establish clear parameters within which to establish its Guidelines. Is the Commission going to propose Guidelines for every sentence involving violation of the Federal laws, or is it going to concentrate on major crimes? Is the Commission going to concern itself only with minimum sentences, or with maximum and mandatory sentences as well? How many criteria does the Commission wish to include in the sentencing process under its Guidelines? For instance, will the Commission go beyond severity of offense and the offender's background? How specific will the Commission become in prescribing aggravating and/or mitigating circumstances? Will the Commission be willing to recommend differential Guideline sentences for different aspects of the same generic crime, or remain content simply to set a Guideline for each crime as enumerated by the Congress in the United States Code?

The Commission should emphasize the harmfulness of serious crimes by imposing either mandatory sentences for these offenses or Guidelines that, in most instances, require the offender to serve a substantial proportion of his maximum sentence. As a set rule, the Commission will be better off if it adopts fewer rather than more criteria for Guideline sentencing. As states have done in regard to capital punishment, the Commission should enumerate examples of aggravating circumstances; perhaps, at the very least, it should narrowly define mitigating circumstances, to avoid the natural tendency of jurists simply to ignore Guidelines and impose sentences below the appropriate Guidelines for many offenses/offenders. The Commission might well create mandatory sentences, but only where

necessary and proper and, then, only when all aspects of the mandatory sentence are reflective of sound policy. For instance, a Guideline might prescribe a mandatory term of imprisonment for the commission of a crime while brandishing a weapon, but not for mere possession of a weapon during commission of a crime.

3. The "Seriousness" of the Offense.

Probably the most important single criterion in Guidelines sentencing is the "seriousness" criterion. Of the states that are known to have adopted Guidelines in recent years, most, if not all, have short-shrifted this criterion for one or more of several reasons. First, it is not possible to quantify seriousness on a ten-point, much less on a seven- or eight-point scale. At least twenty points should be used in distinguishing seriousness across the spectrum from the most dangerous offenses to the most trivial. Moreover, the Commission should offer brief but genuine reasons, via a commentary, for seriousness criteria; for instance, why should Rape be a 16 instead of an 18 or a 14, for instance?

Violent crime is what seems to be plaguing the Nation at the moment. Therefore, violent crime is "serious" and must be punished as such. But what constitutes "violent" crime? Beyond the obvious such as murder, robbery, and forcible sexual offenses, should such crimes as burglary and arson be deemed "violent?" What about drug trafficking, particularly in addictive contraband? How far removed from the "street" should a co-conspirator be and still be punished for the violence of his/her conduct? For instance, should a banker who intentionally "launders" drug money be punished as a violent offender, just as if he dealt in the dirty substances on the street? Offenses that may reasonably be expected to cause physical harm are

violent offenses and should be punished as such.

"White collar" crime may be viewed as being less-serious, at least in some respects. Today, we tend to witness this as a burgeoning category of offense, going far beyond what Edwin H. Sutherland had in mind when he coined the word nearly forty years ago. Is a drug banker a "white collar" criminal? We would say not, because of the physical injury his crime causes to victims. Is a large-scale securities con artist a "white collar" offender? We would say not, because of the psychological torture this kind of an offense can mean to victims of it. On the other hand, common offenses such as embezzlement, commercial bribery, and trade secret theft might be viewed more accurately as strictly "white collar" and be punished less-severely than most violent crimes.

4. The Offender's Background.

Just as the seriousness factor cannot be quantified in fewer than twenty points, the offender's background can and should be so quantified in no more than three points: first offender (never before convicted of a serious crime); previous offender (convicted before of a serious crime, but on not more than two prior occasions); and recidivist (convicted before of three or more serious offenses). Currently, states try to typologize offenders in up to ten categories based upon prior record. A person who accumulates four felony convictions is a career criminal, no matter how one looks at it. No further "break(s)" ought to be given. No truly first offender convicted of any single offense (not in conjunction with other crimes) should be sentenced to imprisonment. The Commission should reject the "taste of jail" concept as far too expensive and without value. Previous offenders should not be entitled to probation, ordinarily,

and recidivists should be sentenced to lengthy terms of imprisonment without "good time" and without parole. Serious offenses committed by repeat offenders should no longer bring "newspaper sentences" but actual, predictable time.

Credit has to be given to a convicted offender, especially to a first offender, for positive aspects of his background. Thus, for instance, a politician convicted of a corrupt act should be evaluated in relation to the benefits he has provided to his community earlier. Older persons should be given credit for their positive life experiences, while young thugs must be punished for "taking away" without having "given" suring their brief interactions with society. Thus, the Commission should encourage mitigation as well as aggravation in sentencing, but not out of sympathy, only as a result of evidence as to the offender's demonstrated worth from past deeds. Thus, the tax evader who has paid thousands of dollars to the Internal Revenue Service over a lifetime might be more forgiven for evasion during a single year than an evader who has rarely, if ever, paid significant taxes, either because of his youth, his lack of industriousness, or his consistent unwillingness pay taxes at all.

5. Record Keeping.

States seem to be unreasonably slovenly in their record-keeping, not only as to offender criminal histories, but as to judicial sentences. Prosecutors seem unwilling or unable to allege, much less to document, the true and complete criminal histories of many convicted offenders. Moreover, state court judges seem unwilling to generate written sentencing reports, perhaps because they fear being monitored by the public; perhaps because of laziness or apathy. Federal jurists must keep proper records, and transmit the same to NCIC or a suitable repository from which records may be retrieved rapidly.

Offenders should be curtailed from "washing-out" multiple offenses by pleading guilty to one or to a few before authorities are able to identify and articulate their criminal case histories. Similarly, judges seem much too eager to impose sentences quickly, at the expense of researching thoroughly each offender's criminal record. Presentence investigations and reports should be mandatory before sentencing of potentially dangerous offenders, in particular, and these investigations (plus the resulting reports) should be certified by both probation officer (investigator) and prosecutor to be true and complete. Guideline sentencing can work only when it is the product of accurate information fully updated to moment of sentencing.

6. Revision of Guidelines.

The task of the United States Sentencing Commission is ongoing, and the Commission should take very seriously its monitoring responsibilities. Therefore, errors made in drafting initial Commission Guidelines may be rectified subsequently. However, Guidelines should not be undertaken against a premise that they will be fleeting concepts, here today but gone tomorrow. It is far easier to enact Guidelines initially than to revise and re-revise the same. In addition, too many revisions become confusing, and convicted offenders come understandably to regard them as being unfair. Justice should be swift and certain, but fair. So should be our sentencing Guidelines. The Commission must make every effort to formulate the correct set of Guideliness the first time around. It may not enjoy subsequent chances.

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TESTIMONY OF BENSON B. WEINTRAUB, ESQ. ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) REGARDING THE ISSUE OF "OFFENSE SEVERITY" IN A PUBLIC HEARING BEFORE THE UNITED STATES SENTENCING COMMISSION (APRIL 15, 1986)

I am an attorney with the Miami Law Firm of Bierman, Sonnett, Shohat & Sale, P.A. My practice is limited to representing federal offenders in post conviction proceedings, including sentecing and parole. I am appearing in my capacity as Vice-Chairman of the National Association for Criminal Defense Lawyers Sentencing Commission Liaison Committee.

The National Association of Criminal Defense Lawyers believes that continued recognition and adherence to the Bill of Rights by the Judiciary, Legislative and Executive Branches of Government are necessary to sustain the quality of the American System of Justice. "The mission of NACDL is to preserve the adversary system of justice; to maintain and foster independent and able criminal lawyers; and, to ensure justice and due process for those persons accused of crime."

The NACDL Sentencing Commission Liaison Committee has reviewed the preliminary draft of the Commission's "Black Book" containing tentative classification of offenses. Members of the Committee are in the process of rating the relative seriousness of each offense.

The NACDL Sentencing Commission Liaison Committee has reached a consensus indicating that the sentencing scheme should take into consideration the seriousness of the offense and the

nature of the injury but should use very broad categories with specific sub-categories in establishing offense severity levels. The Parole Commission has established relatively narrow and general categories but the Sentencing Commission's ranking procedure must give more "individualized" consideration to the actual offense characteristics exhibited by the offender. The duration of actual federal confinement (parole release) under the present system depends upon a rather mechanical application of the parole guidelines as measured, for example, in drug offenses, by the quantity of drugs involved, or in property offenses through the dollar amount of the offense behavior.

Although the Parole Commission has made a valiant attempt to provide a one-step lower category for offenders with "peripheral" involvement in drug offenses, that ambiguous phrase is not always easy to apply. With amounts of money, physical injury, or drugs involved, there must be some correlative standard that delineates the participation of offenders. This will require a multiple indexing system far more complicated than the Parole Commission now uses which would be the only way to fairly and properly rate the severity of offenses in the sentencing guidelines.

In adopting a sentencing guideline system, the Commission must not lose sight of the traditional judicial caveat that "the sentencing process is intended to allow the Sentencing Judge to take individual circumstances into consideration while adhering the sentencing standards provided by statute." United

States v. Garrett, 680 F.2d 650, 652 (9th Cir. 1982); United States v. Foss, 501 F.2d 522, 528 (1st Cir. 1974); United States v. Thompson, 483 F.2d 257, 529 (3rd Cir. 1973). In establishing a system of offense severity, it is important that the Commission and Sentencing Judges be "properly informed of the role of the various participants" in the underlying offense behavior. United States v. Fields, 730 F.2d 460, 461 (6th Cir. 1984).

In preparing this testimony, I have consulted with other members of the NACDL Sentencing Commission Liaison Committee, including J. Robert Cooper, Esq., a former member of the United States Parole Commission now in private practice, and Alan Ellis, Esq., both of whom, in addition to myself, limit their practices to matters before the Parole Commission. Our collective experience in matters before the Parole Commission lead us to suggest that it is imperative for the sentencing guidelines, in rating the relative seriousness of offense behavior, to concentrate on establishing meaningful "grading factors" or features within an offense severity level to delineate between offenders according to their actual levels of culpability. The Parole Commission, through its use of aggravating or mitigating factors authorized by 18 U.S.C. §4206(c), has made an attempt to rate offense behavior according to the individual offense characteristics of the prisoner. We are suggesting the use of separate categories within the sentencing guideline range, not above or below the guidelines as the Parole Commission now operates. Our experience under the parole guideline system

suggests that the guidelines are applied rather mechanically without giving any meaningful consideration to the offender's actual level of culpability. Several federal courts have noted that the parole guidelines are strictly applied, constituting an "unyielding conduit" void of "substantial flexibility." United States ex rel Forman v. McCall, 709 F.2d 852, 862-63 (3d Cir. 1983). It has been estimated that between 88% and 94% of the Parole Commission's decisions are rendered within the range of the guidelines. Geraghty v. U.S. Parole Commission, 579 F.2d 238, 267 (3rd Cir. 1978). The Parole Commission's rigid and mechanical application of the guidelines should serve as an example to this Commission of a system that does not build into its guidelines the flexibility required to hold an offender accountable only for his own conduct and not for the conduct of criminal associates over whom he or she had no knowledge of or ability to control. Many offenders, for example, convicted of conspiracy but who played a rather marginal role in the offense, are now held accountable for the full scope and breadth of the conspiracy. That practice is inherently unfair and denies individualized consideration.

In drug offenses, for example, the Parole Commission utilizes a semantic distinction between the role of various offenders in a drug transaction. The Commission distinguishes between those offenders who are "peripherally" involved in the offense and those who have "non-peripheral" involvement. 28 C.F.R. §2.20, Chapt. 13-General Notes and Definitions-Subchapt.

B-#14. Under the Parole Guidelines, the only type of person who generally qualifies for the "peripheral" category, one offense level below the non-peripheral offense level, is a person with no relevant special skills generally hired as a courier of drugs. In drug offenses, however, there are other types of offenders who have neither relevant special skills nor a proprietary interest in the drugs but who, by virtue of the strict application of the Parole Commission's definitions, do not qualify for the "peripheral" category. For example, an offender who acts as a middleman or broker is held as accountable as the principal who actually owns the drugs and is the prime organizer of the offense behavior. That practice is clearly inequitable and completely ignores the reality of the offense characteristics exhibited by drug offenders by drawing a line of demarcation only between couriers and others.

Therefore, we propose that in rating the relative seriousness of drug offenses, the Commission should create at least four sub-categories within the offense severity levels to accurately reflect the degree of culpability and offense characteristics of the individual offender. For example, the highest, most severe sub-category would be reserved for the "primary organizer." The second most severe category should reflect those offenders in "high level management," but who do not have a direct proprietary interest in the ownership of the drugs. The next level should be for "facilitators" or "low level management." The least culpable level of offender in this type

of case, the "worker" or "courier," should be rated lowest. NACDL will endeavor to develop working definitions for these categories and will supply such definitions to the Commission within the coming weeks. Through this type of extensive delineation between levels of culpabilty, we believe that the Commission will best be able to fullfill its statutory mandate by holding offenders accountable to society only to the extent of their actual culpability and demonstrated offense characteristics.

In terms of rating the relative seriousness of federal offenses, the members of the NACDL Sentencing Commission Liaison Committee were unable to reach a unanimous consensus. The NACDL Committee generally believed that crimes of violence and national security offenses should be rated highest. The middle range of offenses should include property offenses, including some forms of fraud. However, in rating the relative seriousness of certain fraud offenses, the Commission must develop a system of subcategories, similar to the types of categories suggested for drug offenses, reflecting, among other things, the dollar amounts of the offense behavior, the amount of money actually obtained by the offender, and most importantly, the offender's actual role in the offense itself. The Committee also believes that weapons offenses, again, dependent upon the scope of the offense behavior, including number and types of weapons, should be considered in rating the relative seriousness of any weapons type of offense. Drug offenses, we generally believe, should also be rated in the middle range, but there was a split among the

members of the Committee as to the relative seriousness of drug offenses. We recognize that the proliferation of drugs and narcotics represents American Society's greatest contemporary problem. As members of the community, we are all concerned with the devastating effects of drugs upon the fabric of the community. We believe, however, that the Sentencing Commission should differentiate between hard drugs, including cocaine and heroin, from other drugs such as marijuana. In terms of relative seriousness, we believe that cocaine and heroin offenses, according to weight and the individual offense characteristics exhibited by the offender, should be considered in classifying such offenses.

Those types of offense behavior which we belive should fall into the low end of relative seriousness include those offenses generically called "white collar" offenses. In addition to white collar offenses, including tax offenses, acts of form omission, regulatory violations, etc., we believe that immigration offenses and offenses against government process, including perjury, obstruction of justice, and the like, should also be rated in the low severity range with sentencing judges able to exercise their discretion to go above that range when there are particularly aggravating circumstances or offense characteristics, such as abuse of a fiduciary position.

Our decision to recommend to the Commission that white collar offenses be treated less severely than other types of offenses discussed today is based, in large part, on the assump-

tion that traditional white collar business type offenders do not require long periods of incarceration or supervision to carry out the purposes of the Sentencing Commission's mandate, including an assurance that the guidelines reflect the general "appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense..." 28 U.S.C. §994(c) (emphasis supplied). See also, Ogren, The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Againt White Collar Crime, 11 Am. Crim. L. Rev. 959, 975 (1973). See also, Renfrew, The Paper Label Sentences: An Evaluation, 86 Yale L.J. 590, 592-93 (1977).

There are, however, a number of offenses falling into the white collar category which should be dealt with more severely than other white collar offenses. For example, cases involving public corruption may technically involve the commission of white collar crimes, but the community has a greater interest in ensuring that the public trust is not abused by government officials than in imposing sanctions upon similar technical crimes committed by private parties. Again, our focus today is in evaluating the relative seriousness of federal offenses when compared against other federal offenses and offenses within the same category of offenses. We feel that through the extensive use of "grading factors" and other features designed to ensure individualized sentencing consideration, the

Commission can structure the offense severity levels appropriately. However, when there are particularly aggravating or mitigating factors, sentencing judges will have the discretion, for cause shown, to impose a sentence above or below the indicated guideline range. However, in rating the relative seriousness of offenses, we belive that it is critical for the Commission to incorporate distinctions within such categories to allow sentencing judges maximum flexibility within a given offense severity level, reserving the decision to go above or below the guidelines based upon more specificaly individualized factors relating to the offender and the offense.

Under current Parole Commission practices, an offender convicted under the RICO statute is designated, at a minimum, to the Category 5 offense severity level indicating a range of 24-36 months to be served before release. In many cases, prosecutorial charging decisions with respect to RICO involve the application of this statute to businessmen who commit two predicate acts of racketeering, for example, mail fraud and wire fraud. The fact that the prosecutor makes an initial determination to invoke this statute serves to differentiate that offender in parole proceeding from the traditional mail fraud or wire fraud white collar offender. We urge the Sentencing Commission to use caution in that regard.

The proliferation of "organized crime" in our society is a tremendous problem. However, the government's frequent use of the anti-racketeering statutes against "ordinary" businessmen

serves to unnecessarily enhance the actual amount of time required to be served by such offenders under the parole system.

We believe that where the government demonstrates, by clear and convincing evidence, that the offender is part of a large scale criminal organization, that fact, of itself, might justify a decision above the indicated guideline range. However, it is important that a sentencing procedure similar to that established in United States v. Fatico, 579 F.2d 707 (2nd Cir. 1978) be developed to ensure that the defendant receives all necessary due process safeguards in defending himself against such charges. The point is that the issue of "organized crime" or membership in a criminal organization should not be built into the offense severity level itself. Rather, it should be left to the discretion of the Sentencing Judge to be considered as an aggravating offense characteristic warranting a decision above the indicated guideline range. This procedure would represent a quantum leap in due process safeguards which is currently found lacking in the Parole Commission's guideline system.

Finally, as representatives of the organized Defense Bar, we encourage the Commission, in developing the guidelines, to be ever mindful of the Sense of the Senate Resolution (§239) urging that prisons be used only in cases calling for incapacitation and not where the principal purpose of sentencing is deterrence or retribution. The resolution also calls for the "increased use of restitution, community service, and other alternative sentences" for "non-violent and non-serious"

offenders. The Federal Prison System is already bulging and the cost to build and operate new institutions is astronomical. In developing the sentencing guidelines, we urge the Commission, in the promulgation of its policy statements, to have Sentencing Judges first determine whether prison is an appropriate sanction at all. See generally, Lasker, J., Presumption Against Incarceration, 7 Hofstra L. Rev. 407 (1979); Herlands, J., When and How Should a Sentencing Judge Use Probation, 35 F.R.D. 487, 494 [Institute on Sentencing] (1964).

In conclusion, the National Association of Criminal Defense Lawyers believes that through a system of extensive grading factors or features within an offense severity level, the Commission and Sentencing Judges can improve the traditional function of the Courts to "individualize" criminal sentences according to the offender's level of culpability, personal background and social history, while taking into account any aggravating or mitigating factors of the case. The guidelines, if they are to be effective, should be easy to understand, practical, and preserve sufficient judicial discretion to individualize the sentence. The guideline structure should establish broad ranges for general offenses and then list sub-classes or factors which would take into account the individual offense characteristics of the offender. Probation should be available for a great many offenses, because the Court can condition probation with up to one year of confinement. The Sentencing Commission should be an independent beacon for positive federal

sentencing and correctional reform. In carrying out its mandate, we feel that the single most important factor, in determining the relative seriousness of offenses, is to consider the individual offense characteristics of the offender without over-generalizing such roles, as has been our experience with the United States Parole Commission.

I would be pleased to entertain any questions from the Commission. Thank you.