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Disparate treatment in the criminal justice system results from the broad discretion given to judges, U.S. attorneys, and law enforcement and parole officials. Disparity is not limited to the sentencing process but is a problem that exists throughout the federal justice system from arrest through parole. Although these disparities do exist in criminal prosecutions and sentences and are caused, in large part, by the discretion exercised by U.S. attorneys and district judges, they are not readily apparent because of the lack of program monitoring and reporting. In criminal sentencing, disparity exists in three areas when judges exercise discretion: in the decision to incarcerate a convicted defendant, in the length of sentence imposed on an offender, and in the use of sentencing provisions that affect the time a defendant must serve before being considered for parole. The discretion exercised by prosecutors also results in disparate treatment. U.S. attorneys have the authority to prosecute or decline prosecution, determine the specific offense to be prosecuted, and reduce charges or plea bargain. As a result, U.S. attorneys can control, in part, the possibility of the punishment and broaden or narrow the range of sentence to be imposed. A comprehensive approach is needed to reduce unjustified disparity. (RRS)

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STATEMENT OF

WILLIAM J. ANDERSON, DEPUTY DIRECTOR,

GENERAL GOVERNMENT DIVISION

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

HOUSE COMMITTEE ON THE JUDICIARY

ON DISPARITIES IN CRIMINAL

SENTENCING AND PROSECUTIVE PRACTICES

IN FEDERAL DISTRICT COURTS

Mr. Chairman and Members of the Subcommittee:

As requested, our testimony today will focus on the work we performed relative to disparities in criminal sentencing and prosecutive practices in the Federal criminal justice system. Although our final report has not yet been completed, we will discuss our progress to date and provide information that may be helpful during this Subcommittee's consideration of H.R. 6869 and its companion bill, S. 1437. Our testimony by no means covers all aspects of these bills; however, the information we are about to present, particularly with respect to prosecutive and sentencing disparities, should be useful to you during your deliberations.

Certain provisions contained in these bills demonstrate the concern that Congress has about the existing disparities in the sentencing process and we believe that many of these provisions have merit. However, we found that disparity is not limited to the sentencing process, but is a problem that exists throughout the Federal justice system, from arrest through parole. In order to comprehensively deal with disparity as a system problem, we believe that more emphasis should be placed on guiding and monitoring the use of discretion throughout the process. Before this can effectively be done, however, adequate disparity data must be collected and analyzed to better assess the nature, extent, and impact of the problem.

Our testimony today focuses on the two most visible points of disparity, prosecution and sentencing. We will illustrate that disparities (1) do exist in criminal prosecutions and sentences, (2) are caused, in large part, by the discretion exercised by U.S. attorneys and district judges, (3) are not readily apparent because of the lack of program monitoring and reporting, and (4) must be addressed in a comprehensive and careful manner if feasible solutions are to be developed.

Our information is based on a review of case files and probation reports for selected crimes, and interviews with judges, court administration personnel, and U.S. attorneys in five district courts (Eastern District of New York, Southern District of California, Central District of California, Western District of Texas, and the Northern District of Alabama).

The statistics and case examples we will present show a pattern of substantial differences in sentencing and prosecutive practices among U.S. attorneys and district courts. We recognize that some of these disparities are explainable and justified due to the types of crimes and the characteristics of the defendants. However, the desirability of some other differences may be questionable. These differences occur when different treatment is imposed on defendants with similar backgrounds convicted of similar crimes. Based on available data and studies, such as the Second Circuit sentencing study, we believe that disparities of this type may pose a significant problem to the administration of criminal justice.

I will now summarize our findings and conclusions.

DISPARITY IN CRIMINAL SENTENCES AND PROSECUTIONS

As you know, discretionary decisions made by each segment of the Federal justice system affect the way criminal defendants are treated and, ultimately, the effectiveness of the system itself. The treatment of a particular defendant from the time of arrest and prosecution through the courts and parole is determined by how Federal officials throughout the process exercise their discretionary powers. In many instances, these discretionary decisions result in disparities, where defendants comparably situated and with similar backgrounds may be convicted of similar offenses, but receive different treatment.

For example, in criminal sentencing, disparity exists in three areas where judges exercise discretion

--in the decision to incarcerate a convicted defendant;

--in the length of sentence imposed on an offender; and

--in the use of sentencing provisions that affect the time a defendant must serve before being considered for parole.

Disparity in decisions to incarcerate

The following statistics indicate disparity in the first aspect of the process I mentioned--the decisions to incarcera e.

In the 12 months ending June 30, 1977, about 41,000 criminal defendants were convicted and sentenced in U.S. district courts. Although about 19,000 or 47 percent of these received prison sentences, the percentage of offenders who were incarcerated differed greatly among districts. For example, the Southern District of Georgia incarcerated 7 percent of convicted offenders compared to 77 percent in the Northern District of Florida.

The differences in the number of criminal defendants receiving prison sentences among districts are more evident when comparing sentences for a specific violation. Thus, in the District of Minnesota, 84 percent of the defendants convicted of larceny and theft violations were imprisoned, while the District of Colorado imprisoned only 8 percent of these types of offenders.

A comparison of actual court cases demonstrates more fully the existence of this type of disparity. For example, in one district, a 40-year old defendant with no prior felony arrests or convictions, pleaded guilty to embezzling almost $31,000 from a bank. The defendant received a 3-year prison sentence. In contrast, a defendant in another

district, age 35 with no prior record, also pleaded guilty to bank embezzlement totalling about $33,000, but received only probation.

Disparity in the length of sentence

In addition to disparity in incarceration decisions, differences also exist in the lengths of the sentences imposed. The average prison sentence for all districts for the year ending June 30, 1977, was almost 4 years. The range of average sentences in districts varied significantly from less than 1 year in the District of New Hampshire to more than 8 years in the Eastern District of North Carolina.

By comparing specific violations, differences in the length of confinement become even more apparent. For example, the average sentence for bank robbery ranged from 7 years in the Southern District of New York to almost 18 years in the District of South Carolina.

Actual court cases in several districts show the impact of this type of disparity on defendants' sentences. Thus, a defendant who pleaded guilty to two counts of conspiracy to possess with intent to distribute heroin was sentenced to 12 years imprisonment on each count, to run consecutively, plus 30 years special parole. This results in a total prison term of 24 years. The defendant's only previous conviction, for which he was on parole, was for using the

telephone to facilitate distribution of cocaine. In another district, a defendant with an extensive prior record, was convicted on three counts of essentially the same offenses and received a prison term of 7 years for each count plus 10 years parole. However, because the terms were set to run concurrently, the total prison time imposed was only 7 years.

Disparity in use of statutory provisions

The third area of sentencing disparity results from the different statutory sentencing provisions that can be used. These statutes affect the time a defendant must serve before being considered for parole. Depending on the sentencing statute used, two defendants who are sentenced to identical prison terms could be eligible for parole at vastly different times.

A wide range exists in the use of different sentencing statutes among the 94 districts. For example, in the Southern District of Mississippi, 6 percent of the individuals who were imprisoned in fiscal year 1975 were sentenced under early parole provisions, compared to 78 percent in the District of Kansas.

Different applications of sentencing statutes were also evident in cases we examined. For example, a 28-year old defendant pleaded guilty to armed postal robbery, the most

recent offense in his extensive record. He received a 25-year prison sentence and was not eligible for parole until he served one-third of his sentence or 8 1/3 years. In another district, a 32-year old armed bank robber with several prior convictions and a history of drug addiction was sentenced to 15 years in prison. The defendant in this case was eligible, at the discretion of the U.S. Parole Commission, for immediate parole.

Disparity in criminal prosecutions

Disparity is not limited to sentencing; it also occurs in prosecutive practices. U.S. attorneys have the authority to decide which cases to prosecute, what charges to bring, and the extent to which plea bargaining is used. In a recently issued GAO report, we presented detailed information on the prosecutive differences from one district to another. 1/ (See attachment.)

We identified several examples of prosecutive disparity, one of which I'd like to share with you.

A defendant with no prior record pleaded guilty to embezzling $380 from a bank. He received 2 years probation. In contrast, a defendant in another district, who embezzled $650 was not even prosecuted.

1/"U.S. Attorneys Do Not Prosecute Many Suspected Violators of Federal Laws" GGD-77-86, February 27, 1978.

The Department of Justice recognizes the existence of disparity in criminal prosecutions. In fact, it is currently conducting a study to establish empirically the extent of this disparity in prosecutive discretion. This study is scheduled to be completed in 12-18 months and will be used as a basis for developing prosecutive guidelines for providing uniformity and consistency in prosecutive practices.

DISCRETION CAUSES DISPARITY

As I previously mentioned, disparate treatment in the criminal justice system results from the broad discretion given to judges, U.S. attorneys, law enforcement and parole officials. In the absence of more explicit guidance, there is much room for the application of individual judgment, and reasonable people can differ considerably in their judgments of how best to handle a particular situation.

An example of how discretion comes into play is the general lack of specificity in the U.S. Criminal Code on the basic objectives of criminal sanctions. We found that judges use different goals, such as rehabilitation, deterrence, incapacitation, and punishment, as the basis for their sentencing decisions. The philosophy of each judge determines the goal or combination of goals that are used. This factor contributes to the reasons why criminal defendants receive disparate sentences in Federal courts.

H.R. 6869 proposes to guide the application of this discretion by specifying multiple goals judges should consider at the time of sentencing. Judges, however, would still retain discretion to determine the weight assigned to any of the specified goals.

In addition to not specifying the goals of a sentence, the U.S. Criminal Code provides little guidance or criteria for judges to use in determining the severity of a sentence or which statutory provision to use in sentencing a convicted individual. These are the provisions that affect not only the length of a sentence that can be imposed, but also the time an individual must serve before being considered for parole.

The sentencing guideline concept proposed in H.R. 6869 would establish systematic guidance and criteria to guide judicial discretion in decisions concerning sentence length. We believe, however, that similar criteria is needed to guide judge's decisions that affect parole.

The discretion exercised by prosecutors also results in disparity in the way criminal defendants are treated. U.S. attorneys have the authority to

--prosecute or decline prosecution,

--determine the specific offense to be prosecuted, and

--reduce charges or plea bargain the case.

As a result of this discretionary power, the U.S. attorney in each of the 94 district courts can (1) control, in part, the possibility of the punishment, and (2) broaden or narrow the range of sentence that can be imposed upon conviction. Therefore, the treatment of defendants depends to a great extent on which district is involved.

LACK OF DATA INHIBITS PROBLEM DEFINITION

Although the judicial branch gathers some sentencing data, sufficient information is not available to determine the extent of disparities in sentencing decisions. Only limited information is available for determining the adequacy of the types and lengths of sentences imposed or whether the appropriate sentencing statutes were used.

H.R. 6869 would require judges to state in open court the reasons for imposing a particular sentence. This type of information is important for two reasons. First, the appellate review mechanism that would be established by the bill could use this information in reaching its decisions. Second, by compiling and analyzing this information, assessments can be made of the extent and impact of disparity in these judicial decisions.

There is also a data shortfall in the executive branch, particularly with respect to the prosecutive function. There is insufficient information for determining whether suspected offenders are being prosecuted consistently among

districts. Nor has the Department of Justice established any mechanism to monitor the use of prosecutive discretion to insure that it is applied fairly and promotes equity.

COMPREHENSIVE APPROACH NEEDED TO REDUCE UNJUSTIFIED DISPARITY

There is a need for a comprehensive approach for minimizing undesirable prosecutive and sentencing disparities in the criminal justice system. Numerous legislative proposals have been made in the past for solving this problem, but these proposals have only been directed at reducing disparity in sentencing decisions and have not addressed the problem in other parts of the Federal justice system. Discretion must be guided and monitored throughout the process, from arrest through parole, and data must be gathered and analyzed to assess how well the process is operating.

Correcting sentencing disparity will only solve part of the problem, and indeed, may aggravate it in the prosecution phase of the criminal justice system. For example, numerous proposals have been considered for structuring judicial discretion by adopting mandatory minimum sentencing concepts. Judges would then be required to impose a minimum period of incarceration on defendants convicted of specific offenses. This would reduce the amount of disparity in confinement rates. However, the problem of disparity

would still exist if U.S. attorneys decided to prosecute for a lesser offense because they believe the mandatory minimum penalty is too harsh for the particular offender. Since this could shift disparities from the courts to another portion of the process, differences in the treatment of defendants would not be effectively minimized.

CONCLUSIONS

Despite considerable attention, disparity of offender treatment continues to be a problem throughout the Federal criminal justice system. Undesirable disparities, such as those we discussed earlier, run counter to notions of equal treatment in the criminal justice system, and potentially lead to disrespect for the judicial process and the law itself.

This disparity results from the exercise of discretion by Federal decisionmakers throughout the criminal justice system.

--Prosecutors do not have uniform policies and guidelines to decide what violations of the criminal statutes to prosecute.

--Prosecutors do not have systematic procedures and controls to insure that plea bargaining is being practiced in a consistent manner.

--Judges, in the absence of explicit congressional guidance, have much latitude in deciding whether to even incarcerate an offender.

--Judges have limited system criteria or standards to determine the proper severity of a sentence within the wide sentencing ranges.

--Judges have limited system criteria to insure consistent use of sentencing statutes that affect an offender's eligibility for parole; hence, also the amount of time spent in prison.

Although the sentencing provisions of H.R. 6869 would constrain and guide discretion in some of these areas, we believe that more comprehensive action is needed. Enactment of piecemeal solutions, particularly with respect to judicial discretion, will reduce disparity in the sentencing portions of the process, but may aggravate it elsewhere.

The first necessary step, in any event, is to collect the data needed to adequately assess the nature and extent of the problem. For example, we believe that the judicial branch should gather and maintain data on specific reasons why judges impose a certain period of incarceration, the justification for the length of time imposed, and why a

particular sentencing statute was selected. We believe similar data should also be gathered by prosecutors, law enforcement and parole officials, including but not limited to, information on (1) why an investigation was conducted, (2) why it was prosecuted, (3) why plea bargaining was used, or (4) why parole was granted. After this data has been compiled and analyzed, Congress would be in a better position to identify the causes of disparity, assess the extent of the problem, and propose a comprehensive plan to solve it.

We believe that the Administrative Office, in conjunction with the Judicial Conference should

--establish policy guidance and review mechanisms to insure that criminal sentencing is consistent and fair among districts in conformance with existing criminal statutes, and

--provide information to the Congress on the progress and problems experienced in applying the sentencing statutes.

We believe that the Department of Justice should, to the extent possible

--establish uniform rules and procedures for all U.S. attorneys to use in deciding what violations of the criminal statutes to prosecute;

--provide U.S. attorneys with policies and

procedures to govern their use of plea bargaining so that consistency in plea bargaining practices can be achieved throughout all districts; and

--provide Congress the necessary information to assess how well the system is working.

The Congress should take action to insure that the discretion of officials in the criminal justice system is constrained and guided. There is a need to identify and devise remedies for undesirable disparities throughout the system. The courts are only part of the problem. Disparate treatment also results from the discretionary powers of officials in other parts of the criminal justice system.

This concludes my prepared statement. We hope this information and the information in our final report will assist the Subcommittee in its deliberation of H.R. 6869. We would be pleased to respond to any questions.

EXAMPLES OF PROSECUTIVE PRIORITIES ESTABLISHED IN SIX U.S. ATTORNEYS' OFFICES

Amount Necessary for Prosecution

District	Marijuana	Heroin	Bank embezzlement	Theft from interstate shipment	Obscene matter
1	2.2 lbs.	No guidelines	No guidelines	No guidelines	Large commercial venture
2	25 lbs.	1/2 oz.	No guidelines	$ 500	Large commercial venture
3	Must be distributor	1 gram	$5,000	$1,500	No prosecution
4	100 lbs.	No guidelines	$1,000	$5,000	Large commercial venture
5	100 lbs.	2 oz.	$ 500	No guidelines	Large commercial venture
6	50 lbs.	No guidelines	$1,000	$1,000	No guidelines

Source: "U.S. Attorneys Do Not Prosecute Many Suspected Violators of Federal Laws" GGD-77-86, February 27, 1978