BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

9457

Reducing Federal Judicial Sentencing And Prosecuting Disparities: A Systemwide Approach Needed

Despite considerable attention, differences in the treatment of offenders continue to be a problem throughout the Federal criminal justice system. Although some differences in treatment are necessary, other disparities create doubt about the fairness of the system. The most obvious occur at the time of prosecution and sentencing of defendants with similar backgrounds, accused of similar offenses.

GAO recommends a comprehensive effort to collect and analyze data on the extent of the problem and, based on such an analysis, recommends actions to guide official discretion throughout the system.

004107

GGD-78-112
MARCH 19, 1979

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-171019

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the problem of disparity in criminal sentencing and prosecution in the Federal criminal justice system. Disparity is caused basically by the uncontrolled discretion which operates throughout the system. The report points out that disparity does exist; however, its extent and severity is unknown. An ineffective reporting mechanism within the criminal justice system prohibits assessing the disparity problem and its impact on defendants. Without such an assessment, comprehensive solutions to deal with undesirable disparity cannot be identified or developed. Chapter 5 contains recommendations to the judiciary and the Attorney General which, if implemented, would allow the criminal justice system the opportunity to address the problem of disparity and its role in criminal justice.

We made our review pursuant to the December 1968 agreement between the Director, Administrative Office of the U. S. Courts, and the Comptroller General provided for in the September 1968 resolution of the Judicial Conference of the United States.

Copies of this report are being sent to the Director, Office of Management and Budget; the Attorney General; and the Director, Administrative Office of the U.S. Courts.

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

REDUCING FEDERAL JUDICIAL SENTENCING AND PROSECUTING DISPARITIES: A SYSTEMWIDE APPROACH NEEDED

D I G E S T

Throughout the Federal criminal justice system, the type of treatment a person accused of a crime receives from the time of arrest and prosecution through court proceedings and parole may be substantially different from the treatment of other persons accused of the same crime under similar circumstances. Wide disparities can occur.

While one defendant may be prosecuted, another may not. Defendants who are prosecuted for the same type crimes often are charged differently or achieve different results from plea bargaining.

If convicted of a crime, accused persons may also receive different treatment at the time of sentencing. Official discretion frequently determines whether a defendant is incarcerated, the length of sentence imposed, and provisions affecting the time of incarceration before parole will be considered.

While differences in crimes and in defendant characteristics necessitate different treatment and are justified, other types of disparities are questionable and raise doubts about the fairness of the system.

The Department of Justice has recognized the inconsistencies in the system and is conducting three studies to determine the extent of disparity resulting from sentencing and prosecutive decisions. These studies will be used as a basis for developing proposals to minimize unwarranted disparities.

The major reason differences occur is attributable to the limited information available to officials exercising discretion and to the lack of guidance and

disparities and to assess the extent and impact they have on all parts of the process.

Although the judicial branch gathers some sentencing data, only limited information is available for determining whether the types and length of sentences are adequate or whether statutes used in sentencing are appropriate. The lack of data reporting procedures and an effective reporting mechanism prohibits properly identifying the problem. A comprehensive assessment cannot be made of the extent and impact of undesirable disparities until adequate information is gathered. (See p. 17.)

If a Federal sentencing commission is established as proposed in legislation considered in the 95th Congress, it could serve as the focal point for collecting the necessary data and performing a comprehensive assessment. (See ch. 4.)

RECOMMENDATIONS TO THE JUDICIARY

The Judicial Conference, in cooperation with the Attorney General, should undertake a comprehensive assessment of the nature and extent of undesirable sentencing disparity in the Federal criminal justice system.

Since the sentencing data needed for such an assessment is not currently being maintained, the Judicial Conference should request the assistance of the circuit councils and district judges and the Administrative Office of the U.S. Courts in maintaining and collecting the necessary data. Sufficient data should be compiled to identify the nature, extent, and cause of unequal treatment and the impact of such treatment on defendants and the justice system. On the basis of the results of the assessment, the Judicial Conference should

--establish appropriate policy guidance for judges to use, at their discretion, in sentencing decisions;

method of developing certain issues presented in the report. Chapter 6 contains a discussion of the Department's concerns and GAO's analysis.

Contents

CHAPTER 1

INTRODUCTION

The Federal criminal justice system was designed to assure fair and equitable justice--to the defendant and the public. In recent years, however, the incidence of crime and diversity of punishment have increased to the point that the public is questioning the adequacy of the justice system to protect society and to deal with convicted defendants in a fair and certain manner. The Congress shares this concern and is considering proposals that would substantially reform the process. On April 24, 1978, we testified on the matters discussed in this report before the Subcommittee on Criminal Justice, House Committee on the Judiciary, as part of its hearings to recodify the Federal criminal laws.

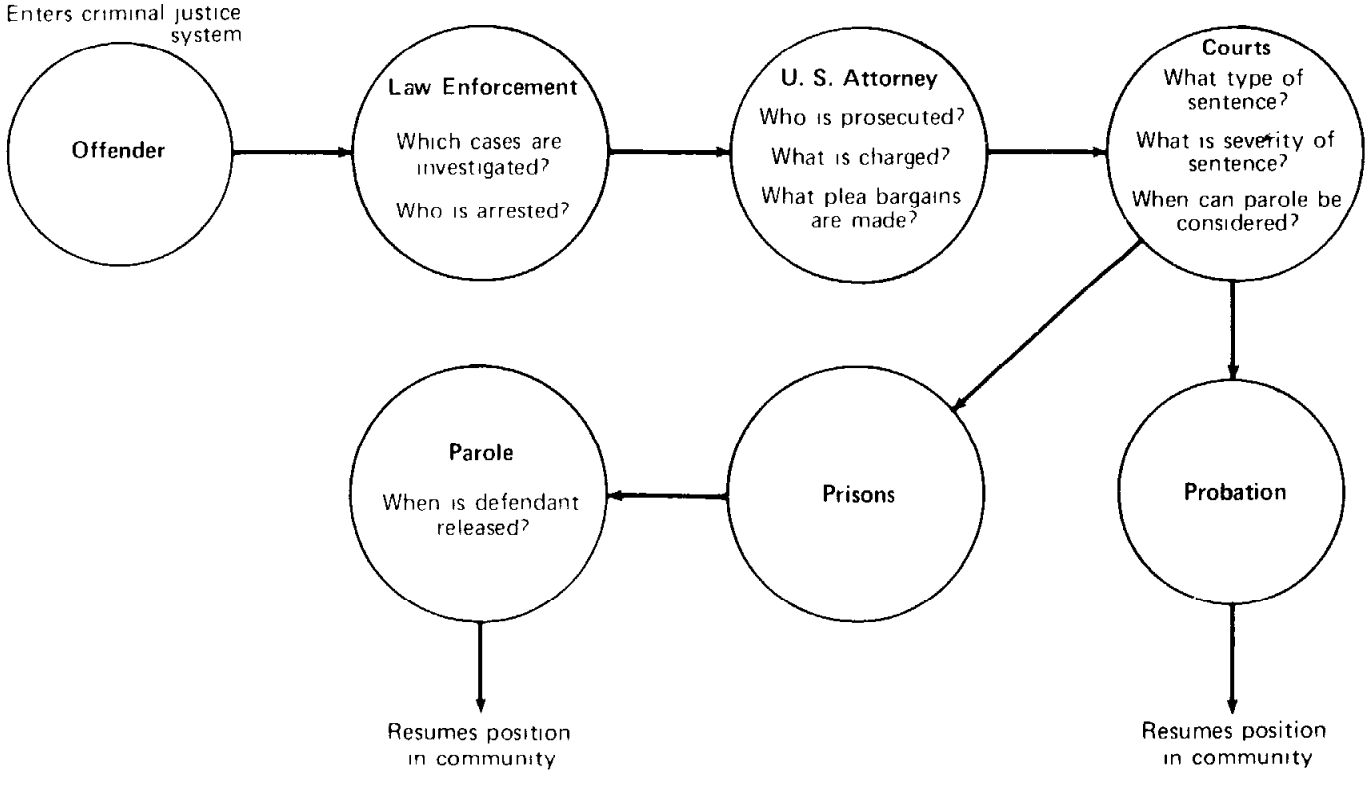
Our review was directed at determining how decisions about criminal defendants are made throughout the Federal justice process, particularly at the points of prosecution and sentencing. We studied the decisional processes in 5 of the 95 U.S. district courts. These courts accounted for almost 14 percent of the 41,468 defendants convicted and sentenced in Federal courts during the 12-month period ending June 30, 1977. (See ch. 7.)

DECISIONS MADE IN THE FEDERAL CRIMINAL JUSTICE SYSTEM

In Federal courts, evidence for criminal prosecution is generally developed by various law enforcement and regulatory agencies. The evidence is often referred directly to a U.S. attorney, the chief law enforcement representative of the Attorney General, who usually decides whether to institute a criminal proceeding and the specific charges that will be prosecuted. As of June 30, 1978, there were 94 U.S. attorneys.

The Judicial Conference is the policymaking body for the Federal judicial system. It consists of 25 members: the Chief Justice of the United States, the chief judge of each of the 11 circuits, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each circuit. The Judicial Conference's areas of interest include the condition of the business in the courts, assignment of judges, just determination of litigation, general rules of practice and procedures, promotion of simplicity in procedures, fairness in administration, and elimination of unjustifiable expense and delay.

DECISIONS MADE IN THE FEDERAL CRIMINAL JUSTICE SYSTEM



CHAPTER 2

DEFENDANTS ARE SUBJECT TO SUBSTANTIAL DIFFERENCES IN TREATMENT IN THE FEDERAL JUSTICE SYSTEM

Criminal defendants are subject to substantially different treatment in the Federal justice system. Wide disparities occur in the way defendants are treated throughout the system, although they are most visible at the time of sentencing and prosecution of comparably situated criminal defendants with similar backgrounds, accused of similar offenses.

Differences in crimes or defendant characteristics necessitate different treatment and are justified. Other types of disparity, however, are questionable and raise doubts about the fairness of the system. While undesirable disparity exists, its extent and impacts are unknown. Data essential to identifying and quantifying the disparity problem is almost nonexistent.

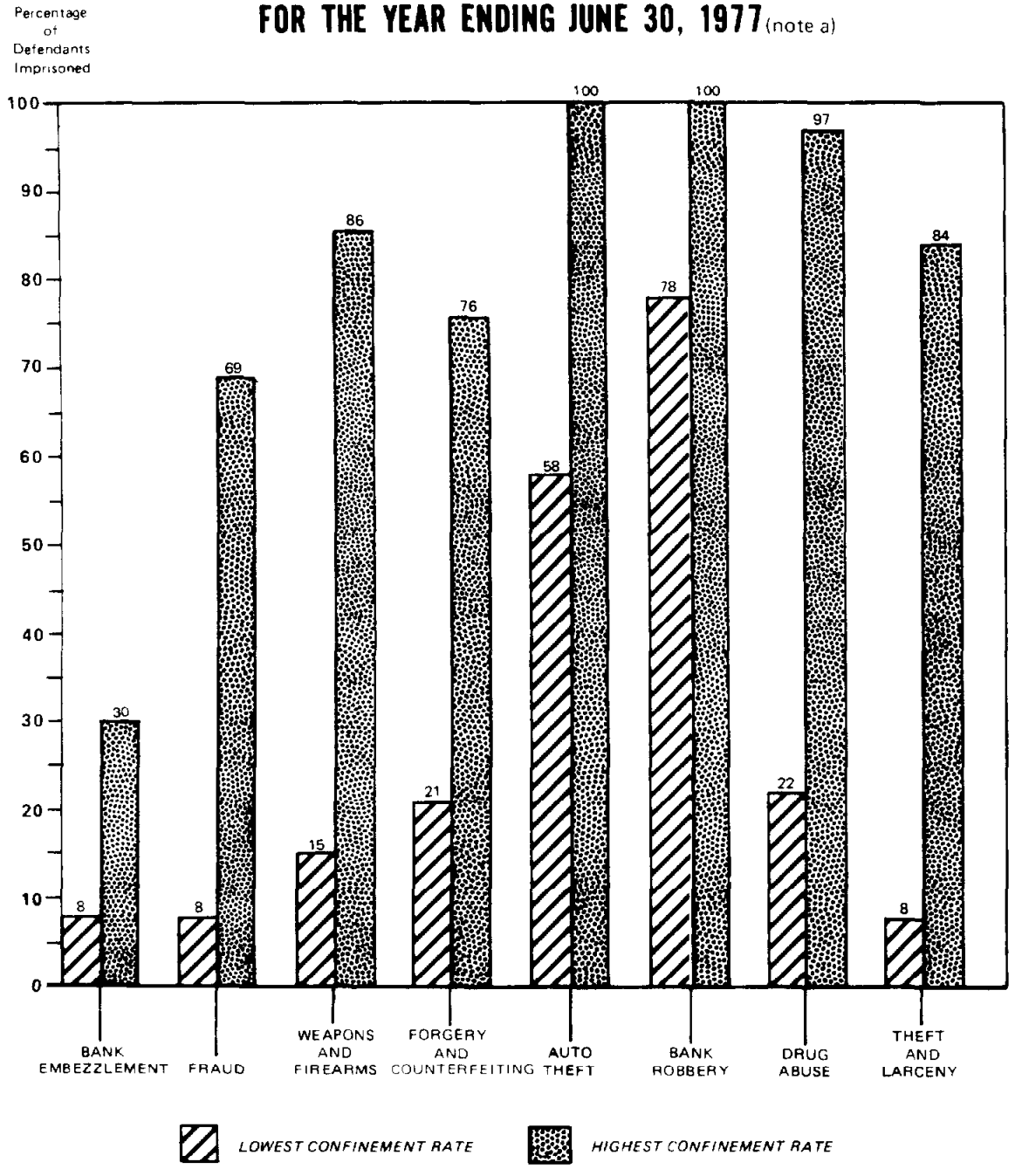
DISPARITY IN CRIMINAL SENTENCING

In sentencing, differences occur in decisions to incarcerate offenders, the length of sentences imposed, and the use of statutory sentencing provisions that affect the earliest time offenders can be considered for parole. Although most judges interviewed agreed that these disparities exist, they had mixed views as to the severity of the problem.

Differences in decisions to incarcerate

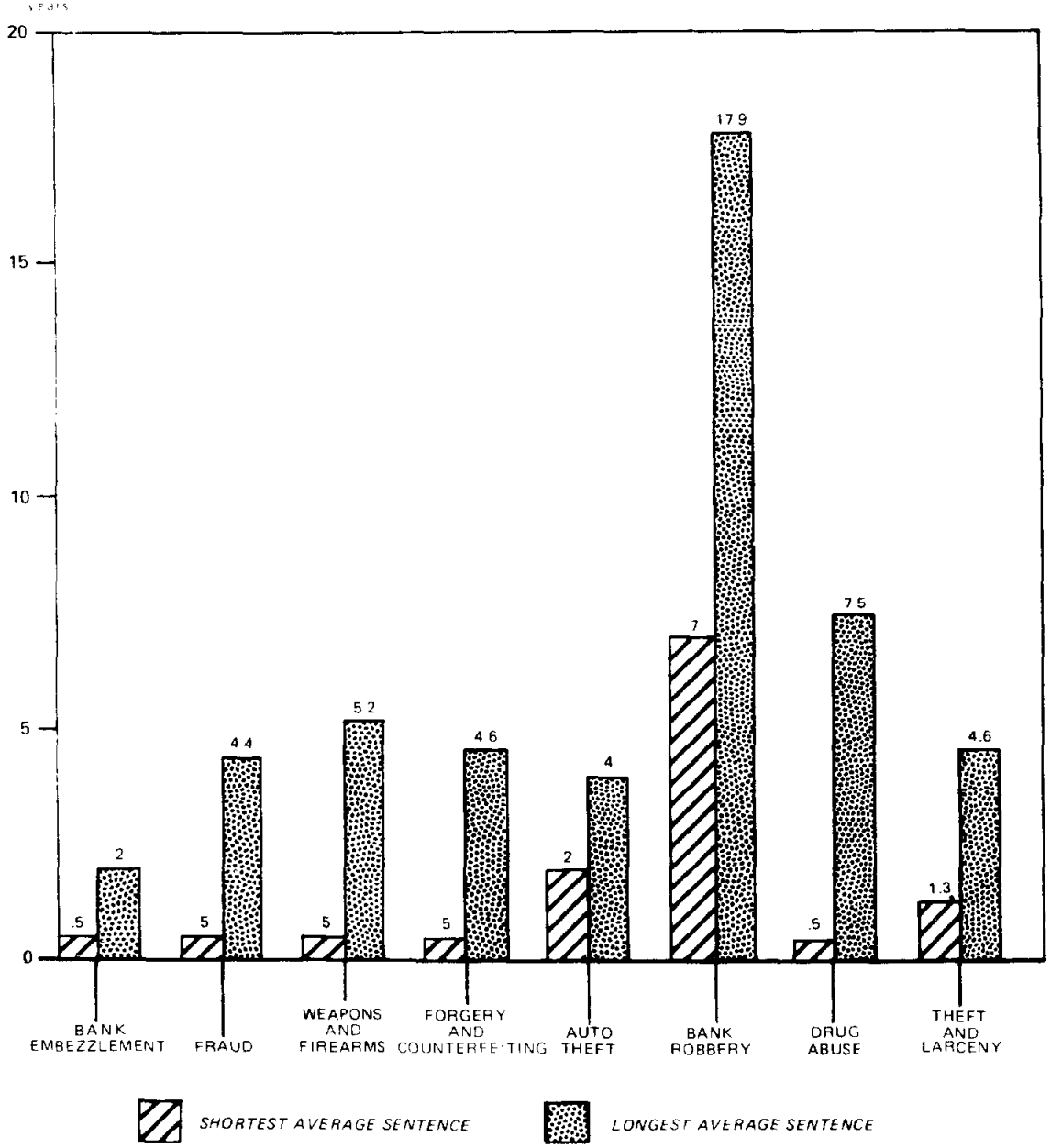
Perhaps the most crucial decision in sentencing is whether to incarcerate an offender. In the 12 months ending June 30, 1977, 41,468 criminal defendants were convicted and sentenced in U.S. district courts. Forty-seven percent (19,613) received prison sentences. The percentage of offenders who received prison sentences for all offenses differed greatly among district courts. For example, the southern district of Georgia incarcerated 7 percent, compared to 77 percent in the northern district of Florida. It is likely that the variation between these districts results, in part,

RANGE OF IMPRISONMENT RATES FOR SELECTED OFFENSES IN U. S. DISTRICT COURTS FOR THE YEAR ENDING JUNE 30, 1977 (note a)



a/ INCLUDES ONLY DISTRICTS HAVING 25 OR MORE SENTENCES IMPOSED IN EACH OFFENSE CATEGORY

RANGE OF AVERAGE SENTENCE LENGTH IMPOSED FOR SELECTED OFFENSES IN U. S. DISTRICT COURTS FOR THE YEAR ENDING JUNE 30, 1977 (note a)



a/ INCLUDES ONLY DISTRICTS HAVING 25 OR MORE SENTENCES IMPOSED IN EACH OFFENSE CATEGORY

The effects of disparate applications of these statutes were also evident in cases we found. For example, a 28-year-old defendant (case E, app. II) pleaded guilty to armed postal robbery, the most recent offense in his extensive record. He received a 25-year prison sentence and was required under 18 U.S.C. 4205(a) to serve 8-1/3 years before becoming eligible for parole. In another district, a 32-year-old armed bank robber (case F, app. II) with several prior convictions was sentenced to 15 years in prison. His parole eligibility was set under 18 U.S.C. 4205(b) (2), meaning that he was eligible for immediate parole at the discretion of the U.S. Parole Commission.

DISPARITY IN CRIMINAL PROSECUTIONS

Disparity is not limited to sentencing; it also occurs in prosecutive practices. U.S. attorneys generally decide which cases to prosecute, what charges to bring, and the extent to which plea bargaining is used.

In a recent report 1/, we presented detailed information on the prosecutive differences from one district to another. (See app. V.) During fiscal years 1970-76, U.S. attorneys declined to prosecute 62 percent of the criminal complaints available for prosecution. In addition, district court judges estimated that some type of plea bargaining occurs in a large percentage of criminal cases. Because these decisions are largely at the discretion of each U.S. attorney, there is a great opportunity for disparity to occur. U.S. attorneys are not required to maintain data on their decisions, and we were unable to assess the amount of prosecutive disparity that existed or to identify which prosecutive decisions caused the disparity.

We did, however, identify specific instances where prosecutive disparities occurred. In one district, the prosecution of a suspect charged with interstate transportation of a stolen motor vehicle was declined because there was no evidence that the suspect belonged to a criminal ring and he had no criminal background (case G, app. II). A 21-year-old defendant with a very minimal record of traffic violations, however, was prosecuted

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

CHAPTER 3

BROAD DISCRETION AND LACK OF DATA CAUSES DISPARITY

The major reasons disparity exists in the Federal process are (1) the lack of information available to officials who exercise discretion and (2) the very limited guidance and criteria for the officials to use when exercising their discretion. The situation exists in virtually all areas of the criminal justice system. The identification of undesirable disparities, the frequency of those disparities and the effect they have on criminal defendants and the system cannot be adequately determined because the system's current reporting mechanism fails to produce sufficient information to make such an assessment.

PRINCIPAL AREAS OF DISCRETION

Discretion is allowed within all areas of the criminal justice process, from enforcement and prosecution through the courts and parole. In the absence of specific guidance or criteria, there is much room for individual judgment, and reasonable people can differ considerably in their judgment of how best to handle a particular situation. As a result, the end product of the process is often disparity in the treatment of criminal defendants.

Judicial discretion

One of the most difficult decisions made in the administration of the criminal justice system involves a judge's responsibility to impose an appropriate sentence on a convicted defendant. The difficulty of this task is partly attributable to the lack of specificity in the U.S. Criminal Code. Judges must generally determine an appropriate sentence without any of the following:

--Congressional guidance on the goals of sentencing for judges to use in deciding whether to impose a term of imprisonment, probation, or a fine on a convicted defendant.

the basis for a particular sentence and would establish an appellate mechanism to review sentencing decisions that fell outside the guideline range. (See ch. 4.)

Prosecutive discretion

Federal prosecutors also have broad discretion in key decisions that ultimately affect the treatment criminal defendants receive. U.S. attorneys use discretion in deciding

--to seek or decline prosecution,

--which specific offense to charge the accused, and

--to reduce charges or plea bargain a case.

As a result of their discretionary power, the U.S. attorney in each district (1) controls, in part, the possibility of punishment and (2) in some cases may effectively broaden or narrow the range of a sentence that a judge can impose upon conviction. Therefore, the treatment of defendants depends to a great extent on which U.S. attorney is involved.

Because of heavy workloads, lack of evidence, insufficient staff, and/or because the complaint did not warrant the cost of prosecution, U.S. attorneys declined to prosecute 62 percent of the criminal complaints available for prosecution during fiscal years 1970 to 1976. In order to handle the large number of complaints, each U.S. attorney has established his own priorities and guidelines for declining cases. (See app. V.) These guidelines, however, are not uniform, nor do they reflect a national policy. As a result, disparity in criminal prosecutions may occur when a defendent in one district is formally charged with an offense but never prosecuted, whereas another defendant, similarly charged--in the same or another district--is prosecuted.

As stated on page 12, the Department of Justice recognizes the existence of disparities in case declination decisions and is currently conducting two studies which will identify the extent of disparities and develop proposals to minimize unwarranted disparities in prosecutive decisions.

The offense charged and plea bargains may also affect a defendant's sentence by limiting the sentencing options available to a judge. For example, there are frequently a number of different statutes under which a defendant may be

occurrence and extent of potentially undesirable disparities in law enforcement decisions. The setting of law enforcement priorities was used as another example of an area where disparate treatment does occur in the criminal justice system.

Once an offender is eligible for parole, the U.S. Parole Commission decides what part, if any, of the remaining sentence must be served before a prisoner is released from the corrections institution. Although the law provides some guidance for the Parole Commission to use in making this decision, discretion plays a key role in the ultimate parole release decision. In the past, the Parole Commission has been severely criticized for disparities in its decisions. In an attempt to reduce this disparity, the Parole Commission developed guidelines that it has been using in its parole decisions since 1972. This commendable attempt at guiding parole discretion is discussed more fully in appendix III.

LACK OF DATA INHIBITS PROBLEM DEFINITION

The lack of monitoring or data reporting procedures and an effective reporting mechanism prohibits a proper identification of disparity. Lacking these tools, a comprehensive assessment cannot be made of the extent and impact of undesirable disparities in the criminal justice system. Without such an assessment, solutions will be difficult to identify and justify, and the disparity problem will continue to exist.

Although the judicial branch gathers some sentencing data, 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. More important, the available information is not sufficient for determining the extent of undesirable disparities in sentencing decisions.

Sufficient data is needed to establish the

--goals that should be considered at the time of sentencing and the priority that should be assigned to each goal,

--criteria that should be followed for selecting a particular length of sentence within the wide sentencing range, and

CHAPTER 4

COMPREHENSIVE APPROACH NEEDED TO REDUCE UNDESIRABLE DISPARITY

The criminal justice system needs to adopt a comprehensive approach for minimizing undesirable prosecutive and sentencing disparities. The numerous legislative proposals that have been made in the past for solving this problem have been directed at reducing disparity in sentencing decisions and parole. They have, in general, not addressed the problem in other parts of the Federal justice system. If undesirable disparities are to be effectively identified and reduced, discretion should be guided throughout the process, from arrest through parole, and data must be collected and analyzed to assess how well the process is operating.

SENTENCING PROPOSALS IN S. 1437 AND H.R. 6869

Although the 95th Congress considered numerous legislative proposals for reducing disparity in the Federal criminal justice system, two bills, S. 1437 and H.R. 6869, received the most attention. On January 30, 1978, the Senate passed S. 1437, a bill to reform the U.S. Criminal Code. A House version, H.R. 6869, was being considered by the Subcommittee on Criminal Justice, House Committee on the Judiciary, at the time of our review. The sentencing provisions of both bills were directed at reducing sentencing disparities by providing mechanisms to guide the exercise of judicial discretion.

Although both bills proposed to guide judicial discretion by specifying the multiple goals judges should consider at the time of sentencing, judges would retain the discretion to determine the weight assigned to any of the specified goals. Also, the bills would have established a U.S. Sentencing Commission responsible for developing guidelines for judges to use in making sentencing decisions. These guidelines would provide judges with criteria to use in deciding appropriate sentence length and the time a defendant must serve before being considered for parole. Judges would still retain discretion to sentence outside the guidelines, but they would be required to state in open court their justification for the decision.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

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

Disparity in the Federal process results from the lack of information available to officials who exercise discretion and the very limited guidance and criteria for those officials to use when exercising their discretion. The situation exists in virtually all areas of the criminal justice system.

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

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

--Judges have substantial latitude in deciding whether to incarcerate an offender.

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

--Judges have limited systemwide criteria to ensure consistent use of sentencing statutes that affect the earliest time an offender can be considered for parole.

Without data and controls over these discretionary areas, disparity will continue to be a problem. The lack of monitoring or data reporting procedures and an effective reporting mechanism also compounds the problem by inhibiting identification of undesirable disparity, an assessment of its extent and impact in the system, and the development of feasible solutions.

RECOMMENDATIONS TO THE ATTORNEY GENERAL

We recommend that the Attorney General, to the extent possible, use the results of the ongoing assessment of prosecutive disparity as a basis for

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

- --providing 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

- --establishing a reporting and review mechanism to collect data on prosecutive decisions and to periodically study the adequacy of these decisions.

DEPARTMENT OF JUSTICE

The Department of Justice shares the goals sought to be achieved by the recommendations in our report. Its overall analysis of the report's findings and criticisms, however, reflects a basic misunderstanding of the report's message. (See app. IX.) According to the Department, our report states that much of the disparity in the treatment of defendants is due to "arbitrary and irrational exercises of discretion on the part of prosecutors and sentencing judges * * *."

On the contrary, at no time do we attribute the existence of disparity to arbitrary and irrational decisionmaking. Page 13 of the report clearly states that the major reasons disparity exists in the Federal process are (1) the lack of information available to officials who exercise discretion and (2) the very limited guidance and criteria for officials to use when exercising their discretion. The report says that "in the absence of specific guidance or criteria, there is much room for individual judgment, and reasonable people can differ considerably in their judgment of how best to handle a particular situation." As a result, the end product of the process is often disparity in the treatment of criminal defendants, which is sometimes warranted and other times unwarranted.

The Department also cites the report is stating that "differing treatment of offenders in any stage of the Federal criminal justice system is undesirable." Our report does not make that statement. Rather, it says on page 5, that "differences in crimes or defendant characteristics necessitate different treatment and are justified." We question other disparities that occur when comparably situated criminal defendants with similar backgrounds, accused of similar offenses, receive different treatment.

The Department also said that our report advocates imposing strict guidelines on prosecutors and judges to eliminate disparity in their decisions. We believe that judges and prosecutors need to have a certain degree of discretion so that the decisions they make reflect individualized treatment of criminal defendants. We do not suggest, however, that judicial and prosecutive discretion be dictated by strict guidelines. We do believe that discretion cannot go totally unguided and that basic policy

Data gathered during our review showed that disparity has been a concern of the criminal justice system for some time; yet actions to deal with it have been limited. We reviewed over 400 criminal cases to develop the case examples that show questionable differences in the treatment of defendants, identified numerous studies that address the problem of disparate treatment (see app. VI) and analyzed several of these studies, and talked to various court and justice officials, including 25 district judges, about the problem of disparity and the actions needed to rectify it.

The Department agrees that disparity exists and that the problem has been recognized for some time. We recognize that disparity is difficult to identify, especially with the current lack of records and accountability within the criminal justice system. We believe, however, that disparity has surfaced as a very important problem and should be dealt with accordingly. The criminal justice system should be compiling and analyzing data that would shed some light on the extent and severity of the disparity problem. This would provide a basis for actions to be taken to guide the various criminal justice system officials in exercising their discretion when administering laws. Although the Department questioned the adequacy of our audit scope, it agreed with the report's conclusion that disparity is a problem in the criminal justice system and has been for some time.

The Department is also concerned over the way the report addresses the proposed sentencing provisions of S. 1437. The Department said that we attack the provisions as being of little value. We state on page 20 of the report that the sentencing provision would represent an improvement over the existing situation, but that more needs to be done in the criminal justice system. In fact, comprehensive solutions must be adopted to attack the disparity problem.

Data must be collected and analyzed by the executive and judicial branches (or in conjunction with a Federal sentencing commission similar to the one proposed by S. 1437) to assess the disparity impact on the entire criminal justice system. We believe that the sentencing provision is a step in the right direction and the first real attempt to systematically address the problem of disparate sentencing. We also believe, however, that because disparate treatment of defendants is present in all aspects of the criminal justice system, much more has to be accomplished. While we

CHAPTER 7

SCOPE OF REVIEW

We performed our review at U.S. District Courts, probation offices, U.S. attorneys' offices, and other criminal justice agencies in Washington, D.C., the eastern district of New York (Brooklyn), southern and central districts of California (San Diego and Los Angeles), the western district of Texas (San Antonio), and the northern district of Alabama (Birmingham).

The information developed was obtained through

--discussions with 25 district judges and other criminal justice officials;

--review and analysis of numerous studies of sentencing at the Federal, State, and local levels;

--review of over 400 cases and probation reports at several judicial districts; and

--analysis of criminal justice statistics provided by the Administrative Office of the U.S. Courts.

APPENDIX I

JUDICIAL DISTRICT	IMPRISONMENT RATE (percent)	AVERAGE SENTENCE LENGTH (months)
Middle Florida	65	30
Southern Florida	65	30
Northern Georgia	63	45
Middle Georgia	13	60
Southern Georgia	7	45
Eastern Louisiana	37	36
Middle Louisiana	39	29
Western Louisiana	18	36
Northern Mississippi	42	29
Southern Mississippi	56	42
Northern Texas	64	40
Eastern Texas	52	38
Southern Texas	52	37
Western Texas	59	64
Canal Zone	50	26
Eastern Kentucky	72	50
Western Kentucky	51	57
Eastern Michigan	61	48
Western Michigan	32	57
Northern Ohio	48	46
Southern Ohio	61	52
Eastern Tennessee	63	44
Middle Tennessee	38	41
Western Tennessee	58	56
Northern Illinois	55	33
Eastern Illinois	56	87
Southern Illinois	51	49
Northern Indiana	62	51
Southern Indiana	65	59
Eastern Wisconsin	43	51
Western Wisconsin	47	22
Eastern Arkansas	55	30
Western Arkansas	43	31
Northern Iowa	31	59
Southern Iowa	48	71
Minnesota	68	37
Eastern Missouri	71	57
Western Missouri	30	33
Nebraska	37	56
North Dakota	42	50
South Dakota	33	37
Alaska	38	51
Arizona	72	37

CASE PROFILES

	CASE A	CASE B
Offense	Possession with intent to distribute 0.6 oz. of heroin (21 U.S.C. 841 (a)(1))	Possesion with intent to distribute 2.0 oz. of heroin and 2.0 oz. of cocaine (21 U.S.C. 841 (a)(1))
Number of counts	1	1
How convicted	Plea	Plea
Age at conviction	26	26
Sex	Female	Male
Prior record	None reported	One minor offense
Narcotics use	Heroin addict	None reported
Current employment	Record indicates good work record, however, specific occupation not shown	None reported as current has history of bartending
Sentence imposed	3 years probation	4 years imprisonment 5 years special parole

APPENDIX II

CASE PROFILES

	CASE E	CASE F
Offense	Armed robbery of a postal facility (18 U.S.C. 2114)	Armed bank robbery (18 U.S.C. 2113
Amount involved	$700	$2,873
Number of counts	1	3
How convicted	Plea	Plea
Age at conviction	28	32
Sex	Male	Male
Prior record	Extensive criminal record including at least four prison terms for felony convictions	Extensive criminal record including at least three prison terms for felony convictions
Narcotics use	Record of drug addiction	Heroin addict
Current employment	None reported	None reported
Sentence imposed	25 years imprisonment (mandatorily required by statute)	15 years imprisonment

APPENDIX II

CASE PROFILES

	CASE I	CASE J
Offense	Misapplication of bank funds by a bank employee (less than $1,000) (18 U.S.C. 656)	Misapplication of bank funds, embezzlement (less than $1,000) (18 U.S.C. 656)
Amount involved	$380.00	$650.00
Number of counts	1	1
How disposed	Plead guilty	Not charged
Age at disposition	24	Unknown
Sex	Male	Male
Prior record	None	Unknown
Narcotics use	None reported	None reported
Sentence imposed	2 years probation	Case declined

APPENDIX II

APPENDIX III

independence, or are just not workable in large districts with multiple courts. A 1975 study 1/ of sentencing disparity in the districts of eastern New York and northern Illinois found the disparity-reducing effect to be rather small, about 10 percent, in cases where council deliberations were used. Even if disparity were substantially reduced by sentencing councils, the reductions would only occur in the districts with the council. Disparities occur not only among judges within districts, but also among districts.

PAROLE GUIDELINES

In response to severe criticism about management of its parole function, the U.S. Parole Commission implemented specific guidelines for parole decisionmaking beginning in 1972. The guidelines were an attempt to constrain and guide parole discretion but not reduce it to the point that individual circumstances of a particular case could not be considered in the parole decision.

The Research Director of the U.S. Parole Commission said that unguided exercise of discretion can lead to arbitrary and capricious decisionmaking, decision inequity, and disparity. On the other hand, the rigid application of fixed and mechanical rules (e.g., mandatory sentences) can lead to undesirable and unjust results.

The Commission's guidelines were an effort to balance the above considerations and provide more rational, consistent, and equitable decisionmaking without removing individual case consideration. The guidelines articulate the major elements considered in parole selection and the weight customarily given to them. It considered three major elements: the nature (gravity) of the current offense, parole prognosis, and institutional behavior.

The table on page 41 displays the guidelines for decisionmaking presently used by the Commission for adult cases. Separate guidelines are used for youth and Narcotic Addict Rehabilitation Act cases. On the vertical axis,

1/Diamond, Shari; Zeisel, Hans, "Sentencing Councils: A Study of Sentence Disparity and its Reduction." (University of Chicago Law Review, vol. 43, Fall 1975, pp. 109-149).

APPENDIX III

U.S PAROLE COMMISSION GUIDELINES FOR DECISION-MAKING AVERAGE TIME SERVED BEFORE RELEASE (INCLUDING JAIL TIME)

ADULT

OFFENSE CHARACTERISTICS Severity of Offense Behavior (EXAMPLES)	OFFENDER CHARACTERISTICS Parole Prognosis (salient Factor Score) VERY GOOD (11 TO 9)	GOOD (8 TO 6)	FAIR (5 TO 4)	POOR (3 TO 0)
LOW Escape [open institution or program (e.g., CTC, work release)-absent less than 7 days] Marihuana or soft drugs, simple possession (small quantity for own use) Property offenses [theft or simple possession of stolen property] less than $1,000	6-10 months	8-12 months	10-14 months	12-18 months
LOW MODERATE Alcohol law violations Counterfeit currency (passing/possession less than $1,000) Immigration law violations Income tax evasion (less than $10,000) Property offenses [forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell] less than $1,000 Selective Service Act violations	8-12 months	12-16 months	16-20 months	20-28 months
MODERATE Bribery of a public official (offering or accepting) Counterfeit currency (passing/possession $1,000 to $19,999) Drugs Marihuana, possession with intent to distribute/sale [small scale (e.g., less than 50 lbs.)] "Soft drugs", possession with intent to distribute/sale (less than $500) Escape [secure program or institution, or absent 7 days or more no fear or *threat used*] Firearms Act, possession/purchase/sale (single weapon not sawed-off shotgun or machine gun) Income tax evasion ($10,000 to $50,000) Mailing threatening communication(s) Misprison of felony Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $1,000 to $19,999 Smuggling/transporting of alien(s) Theft of motor vehicle (not multiple theft or for resale)	12-16 months	16-20 months	20-24 months	24-32 months
HIGH Counterfeit currency (passing/possession $20,000 to $100,000) Counterfeiting (manufacturing) Drugs Marihuana, possession with intent to distribute/sale [medium scale (e.g., 50 to 1,999 lbs.)] "Soft drugs", possession with intent to distribute/sale ($500 to $5,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons) Mann Act (no force commercial purposes) Theft of motor vehicle for resale Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $20,000 to $100,000	16-20 months	20-26 months	26-34 months	34-44 months
VERY HIGH Robbery (weapon or threat) Breaking and entering [bank or post office--entry or attempted entry to vault] Drugs Marihuana, possession with intent to distribute/sale [large scale (e.g., 2,000 lbs or more)] "Soft drugs", possession with intent to distribute/sale (over $5,000) "Hard drugs", possession with intent to distribute/sale (not exceeding $100,000) Extortion Mann Act (force) Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] over $100,000 but not exceeding $500,000	26-36 months	36-48 months	48-60 months	60-72 months
GREATEST I Aggravated felony (e.g., robbery, Weapon fired no serious injury) Explosive detonation (involving potential risk of physical injury to person(s) no serious injury occurred) Robbery [multiple instances (2-3)] Hard drugs [possession with intent to distribute/sale large scale (e.g., over $100,000)] Sexual act-force (e.g., forcible rape)	40-55 months	55-70 months	70-85 months	85-110 months
GREATEST II Aggravated felony serious injury (e.g., injury involving substantial risk of death, or protracted disability, or disfigurement) Aircraft hijacking Espionage Kidnaping Homicide (intentional or committed during other crime)	Greater than above -- however, specific ranges are not given due to the limited number of cases and the extreme variation possible within the category			

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance
2. If an offense behavior is not listed above the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used
4. If an offense behavior involved multiple separate offenses, the severity level may be increased
5. If a continuance is to be given, allow 30 days (1 month) for release program provision
6. "Hard drugs" include heroin, cocaine morphine or opiate derivatives, and synthetic opiate substitutes "Soft drugs" include, but are not limited to, barbiturates, amphetamines, LSD, and hashish
7. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior if such behavior was consummated If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense

Given the offense severity rating and parole prognosis estimate, the guidelines show the customary or policy sentence range specified for a particular case. For example, an adult offender convicted of embezzling $15,000 with a parole prognosis rated good (salient factor score of 8-6), could expect to be considered for parole between 16 to 20 months after incarceration.

The final factor considered in the parole decision is the individual's institutional behavior. The guidelines presume that an individual will have maintained a satisfactory record of institutional conduct and program achievement. Individuals who have demonstrated exceptionally good institutional program achievement may be considered for release earlier than the specified guidelines range. On the other hand, individuals whose institutional conduct or program achievement is rated as unsatisfactory are likely to be held longer than the range specified.

Based on the Parole Commission's experience (October 1975 through September 1976), about 82 percent of the decisions made at initial parole hearings have been within the guidelines. Though the guidelines have no effect on the disparity in the original decisions to imprison or not, they appear to be a commendable attempt at introducing some manageable uniformity into the parole system.

DETERMINATE SENTENCING

There are a variety of determinate sentencing plans which have been proposed, but not implemented, in the Federal system. Among these, the most prominent are flat-time, presumptive, and mandatory minimum sentencing.

Under the flat-time sentencing, judges would specify a definite sentence if they impose a prison sentence at all. It would be served in full without early release on parole, although some reduction in time could be granted for good behavior in prison.

Mandatory minimum sentencing concepts deal only with discretion at the low end of the sentencing spectrum. Judges would be required to impose a certain minimum sentence (1 year, for example) on everyone convicted of a specific offense (perhaps for illegal possession of a firearm). Broad discretion would be retained, however, to exceed the minimum sentence up to a statutory maximum term.

SENTENCE GUIDELINES

Sentence guidelines are viewed as another approach to structuring judicial discretion. Under the guideline concept, a policymaking body, such as a sentencing commission, appellate court, or parole authority, would be responsible for devising explicit sentencing policy in accordance with broad criteria set by the Congress. This policy formulation would involve articulating the primary factors to be considered at sentencing and the customary weights given to each. For each combination of major decision elements, a specific policy or sentencing range would be provided. This approach is similar to the guidelines currently being used by the U.S. Parole Commission. Although judges would be required to apply the guidelines, they would still retain discretion to depart from them with required justification.

APPELLATE REVIEW

As a reform in itself, appellate review would probably do little to reduce sentencing disparity. A primary factor limiting the utility of this plan is a reason for disparity in the first place--lack of directives and guidelines. Without these, and a requirement that sentences be justified in writing, there is little for an appellate judge to measure a sentence against, except his own notion of propriety.

In combination with the establishment of sentencing goals and criteria, appellate review would provide an opportunity for correcting grossly unjust sentences, thus reducing disparity. In our discussions with district judges, appellate review received mixed comments. Several judges would welcome such reform, one of them stating that it would help to reduce unduly harsh sentences. Those who objected gave several reasons such as: it would further burden the appellate courts, add to district judges' workloads by requiring written sentence justifications, and require appellate judges to make final sentencing decisions instead of the trial judges who are the only ones with complete information on the defendant.

SENTENCING COMMISSION

Establishment of a sentencing commission, though not a reform as such, is a major part of several reform measures offered to reduce disparity, including S. 1437 and H.R. 6869. Under this concept, a commission would be the instrument for

APPENDIX IV

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

U.S. ATTORNEYS DO NOT PROSECUTE MANY SUSPECTED VIOLATORS OF FEDERAL LAWS

D I G E S T

U.S. attorneys are the chief Federal law enforcement officers in the 94 Federal judicial districts. Their prime responsibility is to prosecute suspected violators of Federal laws. However, because of increased crime and limited staff resources, far more criminal complaints are received than can be prosecuted. Hence, U.S. attorneys have had to be selective in criminal prosecutions. The way prosecutive selectivity is administered affects the entire Federal criminal justice system.

During fiscal years 1970-76, U.S. attorneys declined to prosecute about 62 percent of the 1.2 million criminal complaints referred to them. Many of these complaints were declined because of legal deficiencies, such as lack of evidence, or inability to determine criminal intent. However, many of the declined complaints could have been prosecuted but were declined because the U.S. attorneys believed that the circumstances of the cases did not warrant the cost of prosecution and/or staff was not available to handle heavy workloads.

In the four Federal judicial districts GAO reviewed, at least 22 percent of the complaints that were declined during fiscal years 1975 and 1976 were considered prosecutable. Most of these declined complaints involved nonviolent felonies. As a result, no determination of the suspects' guilt or innocence was ever made. Those suspects who actually committed the

GGD-77-86

who qualify for a pretrial diversion program.

The Department of Justice agrees that the findings in this report are accurate. It also agrees that it should (1) attempt to eliminate unwarranted disparities in the enforcement of Federal criminal laws and (2) develop alternatives to criminal prosecution for dealing with the overflow of prosecutable complaints.

The Department said it is developing prospective discretion guidelines and studying the prosecutive policies and practices of the U.S. attorneys' offices. It also said that it is actively engaged in the analysis and evaluation of an experimental pretrial diversion program begun in 1974 and that it had recently developed a statutory proposal to increase the criminal jurisdiction of Federal magistrates by permitting them to try all misdemeanor cases.

The Department voiced some concern over the way GAO addressed certain issues contained in the report. Its concerns and GAO's evaluation are discussed in chapter 3.

SELECTED BIBLIOGRAPHY OF SENTENCING DISPARITY STUDIES

American Bar Association Project on Standards for Criminal Justice. Standards Relating to Sentencing Alternatives and Procedures. American Bar Association: New York, September 1968.

Berger, Mark. "Reducing Sentencing Disparity: Structured Discretion and the Sentencing Judge." Journal of Missouri Bar, (1976), pp. 414-420.

Center for Criminal Justice. And NOBODY Can Get You Out. Harvard Law School, 1968.

Coffee, Jr., John C. "The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice." Michigan Law Review, (Aug. 1975).

Dawson, Robert O. Report of the American Bar Foundation. "Sentencing: The Decision as to Type, Length and Conditions of Sentencing." Boston and Toronto: Little, Brown and Company, 1959.

Diamond, Shari Seidman, and Zeisel, Hans. "Sentencing Councils: A Study of Sentence Disparity and Its Reduction." University of Chicago Law Review 43 (Fall 1975), pp. 109-149.

Eaglin, James, and Partridge, Anthony. "An Evaluation of the Probable Impact of Selected Proposals for Imposing Mandatory Minimum Sentences in the Federal Courts." Federal Judicial Center, (July 1977).

Final Report of the Joint Committee on New York Drug Evaluation. The Nation's Toughest Drug Law: Evaluating the New York Experience. Association of the Bar of the City of New York Drug Abuse Council, Inc. (1977).

Fogel, David. We Are the Living Proof: The Justice Model for Corrections. Cincinnati: W.H. Anderson Co., 1975.

Frankel, Marvin E. Criminal Sentences: Law Without Order. New York: Hill and Wang.

Gaylin, Willard. Partial Justice--A Study of Bias in Sentencing. New York: Alfred A. Knopf, 1974.

Tonry, Michael H. Sentencing Guidelines and Sentencing Commissions--An Assessment of the Sentencing Reform Proposals in the Criminal Code Reform Act of 1977. Preliminary draft.

Twentieth Century Fund Task Force on Criminal Sentencing. Fair and Certain Punishment. New York: McGraw Hill, 1976.

Von Hirsch, Andrew. Doing Justice: The Choice of Punishments. New York: Hill and Wang, 1976.

Wilkins; Kress; Gottfredson; Caplin; and Gelman. "Sentencing Judicial Discretion." Criminal Justice Research Center, October 1976.

Yeager, Matthew G. Do Mandatory Prison Sentences for Handgun Offenders Curb Violent Crime? The United States Conference of Mayors, 1976.

justice process and develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing . . . .". With respect to these goals, Judge Zirpoli stated "the laudable goals of the Sentencing Commission, if achieved, would be of invaluable assistance to the entire system of criminal justice."

In addition, the Judicial Conference has recommended that the Sentencing Commission, if one were established, be under the control of the Judicial Conference and that appropriate amendments to S. 1437 be made so that the Administrative Office would provide the necessary data to the Commission for the development of the guidelines. As originally passed, the bill would have set up a commission which would duplicate in these respects the functions of the Administrative Office. Judge Zirpoli in his testimony noted that the Administrative Office is now collecting a substantial amount of information with respect to sentencing of defendants.

In the House bill, H.R. 13959, the Judicial Conference is given the responsibility of establishing advisory guidelines and to collect and analyze on a continuing basis data on the sentences imposed by the federal courts. The Administrative Office would collect and provide the necessary data under this legislation.

In light of these actions of the Judicial Conference and the Congress, I am in complete agreement with the recommendations that the Judicial Conference undertake a comprehensive assessment of the nature and extent of undesirable sentencing disparity existing in the federal criminal justice system. The Administrative Office is prepared, with sufficient fiscal support, to maintain and collect the necessary data. I also agree with the conclusion that the Judicial Conference establish appropriate policy guidance for judges to use, at their discretion, in sentencing decisions. The informed exercise of discretion is essential in our criminal justice system.

I reiterate the recommendation of the Judicial Conference, that if a Sentencing Commission or other entity is established to perform the assessment and issuance of the guidelines, it be explicitly made subject to the authority of the Judicial Branch alone. Sentencing is so inseparable from the judicial function vested in the courts by Article III of the Constitution that control of a separate agency by the Executive Branch would create a conflict in the application of the principle of separation of powers.

There are differences in treatment of defendants within the federal criminal justice system. A portion of these can undoubtedly be attributed to the congressional authorization and approval of individualized sentencing for criminal defendants in the federal criminal system rather than single type sentences for everyone convicted of the same offense.

APPENDIX VIII

United States Department of Justice
United States Parole Commission
Washington, D.C. 20537

Office of the Chairman

August 15, 1978

Mr. Victor L. Lowe, Director
United States General Accounting Office
General Government Division
Washington, D. C. 20548

Re: Proposed Report to Congress on Disparities in Federal Prosecutive and Sentencing Practices

Dear Mr. Lowe:

Thank you for your letter of August 11, 1978. Overall, we found this report to be quite informative and were pleased that it recognized the innovations made in this area by the Parole Commission.

There are several pages, however, where it appears minor changes would be appropriate.

On p. 17, the sentence, "Since the law provides little guidance. . ." appears inaccurate. While discretion does play a key role in parole decision-making, since the Parole Commission and Reorganization Act of 1976 (which provided a specific mandate to continue the Parole Commission's administratively developed guideline system) the legislative criteria for parole decision-making are much clearer (see 18 U.S.C. 4206 and particularly the Report of the Committee of Conference relating to this section.) Also, the guidelines were first used in 1972, not 1974.

APPENDIX IX

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

NOV 27 1978

Mr. Allen R. Voss
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Voss:

This is in response to your request to the Attorney General for the comments of the Department of Justice on your draft report entitled "Disparities in Federal Prosecutive and Sentencing Practices."

Essentially, the report states that there are substantial differences in the treatment of defendants, that much of this disparity is due to arbitrary and irrational exercises of discretion on the part of prosecutors and sentencing judges, that differing treatment of offenders in any stage of the Federal criminal justice system is undesirable, and that the appropriate means of eliminating disparity is to impose strict guidelines to control the actions of prosecutors and judges. The report concludes that only a comprehensive and simultaneous attack on disparity in all phases of the criminal justice system will be in any measure successful, but it further cautions that because of a "lack of data" we will not be able to initiate such a program for some time.

While we share the goals sought to be achieved by the recommendations of the report, it is disturbing to us in two major respects. First, it comes to several conclusions and makes numerous recommendations without any evidence of a serious effort having been made to research and analyze the complex problem of disparate treatment of offenders in the Federal criminal justice system. Curiously, the report repeatedly complains that there is little data to indicate the extent of the disparity problem or its cause, yet this often cited lack of data does not seem to have impeded GAO in making its sweeping conclusions.

encumber the law enforcement process by generating a new area of procedural litigation. We must be somewhat cautious in turning to the use of guidelines to solve the disparate treatment of offenders, for the law is not settled on the issue of whether guidelines or internal regulations give rise to substantial rights in the defendant. If the courts were to hold that prosecutors were legally bound to follow such guidelines and that a failure to do so would result in a dismissal of indictment or reversal of conviction, it would be advisable to severely limit the use of guidelines lest they serve as a technical route by which the guilty could go free. Given these potential hazards, it may be that other means of addressing the problem of unwarranted disparity may be more appropriate. In any event, that is a judgment that cannot be made until our review is completed.

On page 16, the report contains a cursory reference to the exercise of discretion by law enforcement officials in which it is stated that such officials "set their own investigative priorities primarily due to resource limitations and the nature of criminal violations in their geographical area." According to the report, this leads to "disparate treatment" of suspected violators by Federal law enforcement agencies, since "investigative criteria are inconsistent throughout the Nation." Although no recommendation is made regarding this matter, we wish to point out the misleading nature of this passage. In the first place, the setting of investigative priorities on the basis of the resources available and the type of offenses committed in different parts of the county does not mean that "investigative criteria are inconsistent throughout the Nation." Investigative priorities may differ in response to local or regional conditions, but difference is not the same as inconsistency. Some districts' caseloads will, and properly so, reflect the urban financial nature of their circumstances and the concern of the people in the district with financial crime. Other districts will reflect their local concern with the environment and preservation of wildlife. The differences between saving a bank from fraud or a forest from cutting is not easily shown on a statistical chart, if at all. Yet each is a priority of that district and the country. Of particular importance to us is the fact that the report does not suggest that such differences are irrational or that they lead to unfair disparities in the treatment of suspected violators. Nevertheless, given the focus of the report on unwarranted disparity in the exercise of discretion

legislation, administrative mechanisms will have been developed to ensure that exercises of prosecutorial discretion do not thwart realization of the objectives of sentencing reform.

As an overall observation, we detect throughout the report a casual blurring of the crucial distinctions between the potential for disparity and actual disparity, and between disparity that can fairly be justified on the basis of rational considerations and disparity that cannot be so justified. To be sure, there are several references to the difficulty of assessing the nature, extent and effect of disparity, but such disclaimers do not effectively counteract the image, created by the draft's imprecision, of a system plagued throughout by irrational disparities. Since the scope of coverage on which the report is based was quite modest, as indicated on page 29, and plainly would not support any such broad conclusion, we think the draft should be modified to clarify the above distinctions and to focus more precisely on the issue at hand.

Finally, we believe that the draft report's specific recommendations to the judiciary should be modified to reflect recent initiatives undertaken by the Department. Through the Federal Justice Research Program, which is administered by the Department's Office for Improvements in the Administration of Justice, we have begun a comprehensive study of Federal sentencing practices. When completed in about 18 months, it will provide information on the extent and nature of sentencing disparity, as well as evaluate alternative methods of structuring sentencing discretion. We also expect that this study will provide guidance for the establishment of an information system for the periodic review of sentencing.

We appreciate the opportunity to comment on the draft report. Should you desire any additional information, please feel free to contact us.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

GAO NOTE: The page references contained in the agencies' comments have been revised to agree with the page numbers in this report.

(18841)

* U.S. GOVERNMENT PRINTING OFFICE : 1979 O - 620-167/89

within the Federal criminal justice system, the reader might easily conclude--erroneously, in our view--that this is another area in which lack of guidance results in unwarranted disparities.

Pages 19-20 and 22 of the report make the point that "the interdependence of various segments of the (criminal justice) process and the need to maintain a certain degree of discretion in the system" suggest that a "comprehensive approach" to reducing disparity is needed--one that will guide discretion throughout the process from arrest through parole. More specifically, the report warns that "correcting sentencing disparity will solve only part of the problem and may indeed aggravate it in the prosecution phase of the criminal justice system." We do not disagree with these observations, but are concerned that they might be construed as support for the notion that Congress should not enact legislation designed to guide the discretion of sentencing judges without simultaneously addressing the question of discretion exercised by Federal prosecutors. We think that type of "comprehensive approach" would unwisely postpone implementation of badly needed sentencing reforms, as well as possibly delay the proposed substantive revision of the Federal criminal laws, and is unnecessary in any event.

In our view, the sentencing provisions of the proposed Federal Criminal Code represent a comprehensive approach to sentencing which will reduce unequal treatment of similarly situated defendants, yet retain a degree of flexibility in sentencing necessary to deal with each offender individually. In addition, the proposed Sentencing Commission will continually collect and analyze data to assist in the development and revision of sentencing guidelines. One of the most laudable points of the sentencing provisions of S. 1437 is that it provides sufficient flexibility to accommodate change as we increase our understanding of sentencing issues. We are persuaded that more than sufficient thought and research has been devoted to these provisions and that they are ready for legislative action and implementation.

We are well aware of the need to coordinate prosecutorial policies and practices with changes in sentencing practices proposed in the pending legislation. Indeed, one of the major purposes of the Department's prosecutorial policies study is to provide the basis for such coordination. Our expectation is that by the time the new sentencing provisions take effect, two years after enactment of the proposed

Second, it attacks the sentencing provisions of the proposed Federal Criminal Code, S. 1437, on the grounds that even a comprehensive plan to reduce sentencing disparity will be of little value, since any reduction in sentencing disparity that it might achieve will only produce even greater prosecutive disparity.

Disparities in prosecutive and sentencing practices have been identified by the Department of Justice as a problem area for some time. As the GAO report acknowledges on page 12, the Department is currently conducting studies on the extent of disparity in both prosecutive decision-making and sentencing. These studies may well result in some of the same recommendations and conclusions as those voiced in the GAO report, but it would have been preferable for GAO to reach such conclusions as a result of research designed to collect and analyze necessary data before offering unsupported recommendations.

Although the report refers to only two studies being conducted by the Department, a third study is also in progress. This study is being conducted jointly by the Office for Improvements in the Administration of Justice and the Executive Office for U.S. Attorneys at eleven U.S. attorney offices in preparation for establishing a case-weighting system. Part of that project involves an examination of current litigation practices in those offices to determine the extent of disparity in decisionmaking, both within and among offices.

Another of our studies involves a survey of the policies and practices of all U.S. attorneys concerning their exercise of discretion in criminal cases. This review of Federal criminal prosecution policies and practices is intended to result in the development of proposals for ensuring that such policies and practices are in accord with Federal law enforcement priorities and minimize unwarranted disparities in the exercise of discretion by Federal prosecutors. While the end product of this review may be the development of prosecutorial guidelines, that is by no means certain. Guidelines are not the only means of attempting to reduce unwarranted disparities in the exercise of prosecutorial discretion, and are not without potential disadvantages. Unless carefully drawn, they may interfere with the flexibility needed to respond to the uniqueness of particular cases and variations in local conditions, and may unduly

APPENDIX VIII

Mr. Victor L. Lowe
August 15, 1978
Page Two

On p. 39-42, an outdated set of guidelines is described. Enclosed are current guidelines and salient factor score. Therefore, the following corrections are in order:

P. 40, lines 21 and 23 (six seven)
P. 41, substitute current guidelines
P. 40, line 7 (education)
P. 42, substitute new salient factor score

Sincerely,

Cecil C. McCall
Chairman

CCMc:br

Enc(s)

The report quite correctly points out however that some of these differences can appear to be questionable on their face without reference to those differential factors which are crucial to the sentencing decision. When only a limited number of factors are known to the reviewer, valid quantitative comparisons are impossible.

The report might be improved by showing an awareness of the fact that different courts have different mixes of cases. For example, it is likely that the enormous variation noted between the 7 percent imprisonment rate for the Southern District of Georgia versus the 77 percent rate in the Northern District of Florida has something to do with the fact that the total figures for the Southern District of Georgia include all of the minor traffic offenses committed on military reservations in that district. Furthermore, in the Northern District of Florida, it is most probable that the drug abuse violations have to do with large importers of such substances while the Southern District of Mississippi has far more cases of individuals arrested in possession of small amounts. It should be understood that these raw figures presented, are reflections of differences in the case mix and even in some of the methods of counting the cases. The report could be improved if it was noted that the data can only be considered to be a tentative indicator of the existence of disparity and not proof of undesirable disparity. In the case profiles, cases E and F on page 35 cannot be compared. The postal robbery statute carries a mandatory 25-year penalty. The sentencing judge has no discretion.

Thank you again for the opportunity to comment and if I can be of any further assistance, please do not hesitate to call upon me.

Sincerely yours,

William E. Foley
Director

APPENDIX VII

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E FOLEY
DIRECTOR

JOSEPH F SPANIOL, JR
DEPUTY DIRECTOR

September 12, 1978

Mr. Victor L. Lowe
Director, General Government
Division
U. S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Lowe:

I appreciate your affording me an opportunity to comment on the draft of a proposed report on disparities in federal prosecutive and sentencing practices. The report has been circulated within this office for review. I will confine my comments to those sections having to do with the sentencing practices rather than those which have to do with federal prosecutive practices.

During the past six years, the Judicial Conference of the United States, working through its Committee on the Administration of the Criminal Law, has reported to Congress the results of its study of the various provisions of bills to reform the federal criminal laws. One of the areas which has received the attention of the Committee and the Conference, as well as this Office, has been the new legislation on sentencing. In April of 1978, Judge Alfonso Zirpoli, testifying before the House Judiciary Committee, Subcommittee on Criminal Justice, on H.R. 6869 and S. 1437, addressed directly the question of the establishment of a Sentencing Commission and its functions. Judge Zirpoli's comments were addressed largely to the provisions of S. 1437 as it had passed the Senate. S. 1437 sets forth the goals of the Sentencing Commission which are to establish sentencing policies and practices for the federal criminal justice system that would assure the meeting of the purposes of sentencing outlined elsewhere in the Act and "to provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . . reflect to the extent practicable advancement in knowledge of human behavior as it relates to the criminal

Green, Theodore S.; Ward, John D.; and Arcuri, Alan. "Plea Bargaining: Fairness and Inadequacy of Representation." Columbia Human Rights Review 7, No. 2 (1976), pp. 495-527.

Harr, Keith D., and Lura, Russell. "The Geography of Justice--Sentencing Variations in U.S. Judicial Districts." Judicature 57, No. 9 (Apr. 1974).

Kennedy, Edward M. "Criminal Sentencing: A Game of Chance." Judicature 60, No. 5 (Dec. 1976).

Kuh, Richard A. "Balancing the Scales of Justice: How to Make Plea Bargaining Work." New Leader, (Jan. 7, 1974).

McClure, Barbara P. "Crime: Sentencing Reform." Library of Congress Research Service, October 1977.

Morris, Norval. The Future of Imprisonment. University of Chicago Press, 1974.

O'Donnell, Pierce; Churgen, Michael; and Curtis, Dennis. Toward a Just and Effective Sentencing System: Agenda For Legislative Reform. Washington, D.C.: Williams and Connolly.

O'Leary, Vincent; Gottfredson, Michael; Gelman, Arthur. "Contemporary Sentencing Proposals." Criminal Law Bulletin, September/October 1975.

Palmer, Larry I. "A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing." Georgetown Law Review 62, No. 1 (Oct. 1973).

Partridge, Anthony, and Eldridge, William. "The Second Circut Sentencing Study." Federal Judicial Center, August 1974.

Paulsen, Conrad G. Reporter, Joint Committee on Continuing Legal Education of the American Law Institute and American Bar Association. The Problem of Sentencing. American Law Institute, 1962.

Singer, Richard. "In Favor of 'Presumptive Sentences' Set by a Sentencing Commission." Rutgers University Law Review, 1978.

Tiffany, Lawrence; Avichoi, Yakov; and Peters, Geoffrey W. "A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-1968." Journal of Legal Studies, June 1975, pp. 369-390.

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 commerical venture
3	Must be distributor	1 gram	$5,000	$1,500	No prosecution
4	100 lbs.	No guidelines	$1,000	$5,000	Large commerical venture
5	100 lbs.	2 oz.	$ 500	No guidelines	Large commerical venture
6	50 lbs.	No guidelines	$1,000	$1,000	No guidelines

Source: GAO report titled, "U.S. Attorneys Do Not Prosecute Many Suspected Violators of Federal Laws" (GGD-77-86, Feb. 27. 1978).

APPENDIX V

offense charged therefore avoided suitable legal action.

Because more complaints are being received than can be handled, many U.S. attorneys have developed their own prosecutive priorities and guidelines. Each U.S. attorney differs on what these should be and how they should be used. As a result:

--Suspected violations of certain criminal statutes are generally not being prosecuted.

--Suspected violations of other criminal statutes are being prosecuted in one U.S. attorney's district but not in another.

--Several law enforcement and regulatory agencies are sometimes receiving inadequate prosecutive support.

What can be done?

Alternatives to prosecution in Federal district courts and improvements in the present system of prosecution need to be considered.

GAO recommends that the Attorney General (1) review the priorities and guidelines of all U.S. attorneys to make them as uniform as possible and (2) develop for congressional consideration a comprehensive proposal for dealing with complaints which are not being prosecuted because of workload. This proposal should include the results of consideration by the Department of Justice of any alternatives to handle the problem, such as giving agencies civil fine authority and deferring criminal prosecution for suspects

studying the sentencing process, formulating standards and criteria, and actually adopting the standards, subject to congressional approval. Commission members could be judges and/or other experts from the criminal justice field. One of the commission's primary benefits, as seen by its supporters, is that its permanent status would allow it to continually analyze sentencing standards and revise them when necessary.

The district judges we interviewed were generally opposed to the idea of a commission setting standards for the courts to follow. Some argued that it is the Congress' responsibility to set any goals for standards, while others see such change as taking away the independence of the judiciary.

Another approach which has attracted much attention is presumptive sentencing. Under this approach, the Congress would decide the maximum sentence allowed for a specific crime, as well as what the "presumptive" sentence should be for a "typical" first offender convicted of a "typical" crime. In the absence of legislatively determined aggravating or mitigating circumstances (a second offense would be considered an aggravating factor), the sentencing judge would be expected to impose the presumptive sentence on all first offenders convicted of that crime. In special circumstances, judges would be permitted to depart from the presumptive sentence with written justification. All sentences departing from the presumptive sentence by more than a specified percentage (25 percent, for example) would be automatically reviewable by the appellate court. Parole would be severely limited under presumptive sentencing.

Proponents of the various determinate sentencing plans argue that such plans would increase the certainty of imprisonment as a punishment and provide a deterreht effect on many forms of criminal behavior. In addition, they believe mandatory imprisonment, if it does nothing else, could slow down the rising crime rate simply by taking more criminals off the streets. Finally, it is believed the determinate sentencing plans would eliminate disparity and assure all offenders equal treatment.

Those who argue against determinate sentencing say it will produce serious problems. First, they argue that it is unlikely that the Congress would specify in advance all the possible factors necessary to make sentencing consistent with the principles of equity and justice. Minimum sentences may be unsound because they stereotype a wide variety of offenders and allow sentencing judges no options. The majority of the judges interviewed opposed most forms of determinate sentencing, one reason being that "humanness" would be taken out of a process that involves different crimes and different people.

While determinate sentencing practices may provide that persons sentenced under the same provision will receive similar sentences, disparity itself might not be eliminated. For example, disparity would still exist if U.S. attorneys decide not to prosecute under a certain statute because they believe the mandatory sentence is too harsh for the particular offender. Thus, disparity would occur in prosecution, not in sentencing.

APPENDIX III

U.S. PAROLE COMMISSION
COMPUTATION OF
SALIENT FACTOR SCORE

Register Number _____ Name _____

ITEM A _____ ☐

No prior convictions (adult or juvenile) = 3
One prior conviction = 2
Two or three prior convictions = 1
Four or more prior convictions = 0

ITEM B _____ ☐

No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

ITEM C _____ ☐

Age at first commitment (adult or juvenile):
26 or older = 2
18 - 25 = 1
17 or younger = 0

*ITEM D _____ ☐

Commitment offense did not involve auto theft or checks(s) (forgery/larceny) = 1
Commitment offense involved auto theft [X], or check(s) [Y], or both [Z] = 0

*ITEM E _____ ☐

Never had parole revoked or been committed for a new offense while on parole, and not a probation violator this time = 1
Has had parole revoked or been committed for a new offense while on parole [X], or is a probation violator this time [Y], or both [Z] = 0

ITEM F _____ ☐

No history of heroin or opiate dependence = 1
Otherwise = 0

ITEM G _____ ☐

Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

TOTAL SCORE _____ ☐

* NOTE TO EXAMINERS:
If item D or E is scored 0, place the appropriate letter (X, Y or Z) on the line to the right of the box.

seven offense severity categories are provided to consider the gravity of the offender's present Federal offense behavior. In each of the seven categories, the Commission has specified a number of offense behavior examples. For example, embezzlement of less than $20,000 is in the moderate offense category; embezzlement of $20,000 to $100,000 is in the high offense category.

On the horizontal axis of the guidelines, four categories of parole prognosis are provided. The parole prognosis is determined by computing the offender's salient factor score. The worksheet on page 42 illustrates how this score is computed. Some of the factors considered are the individual's prior record, employment status and drug dependence. By computing the salient factor score, an offender is placed in one of the four parole prognosis categories: poor, fair, good, or very good.

ALTERNATIVE TECHNIQUES FOR ATTEMPTING TO REDUCE SENTENCING DISPARITY

Various techniques have been proposed or implemented to reduce disparity and introduce some uniformity into the Federal sentencing process. A number of these techniques are discussed below.

SENTENCING INSTITUTES

Convened periodically at the discretion of the Federal Circuit Courts of Appeals and/or the Attorney General, sentencing institutes are simply meetings of judges and other criminal justice experts. Such institutes have been conducted in the Federal judiciary since 1959 (pursuant to 28 U.S.C. 334) to promote uniformity in sentencing. During these meetings, sentencing objectives and procedures are discussed, and case studies are conducted.

Several district judges told us that they believed the institutes were worthwhile in promoting the dissemination of ideas. However, there is little evidence that the institutes have greatly altered the sentencing attitudes or practices of judges. Unfortunately, the potential for sentencing institutes to reduce disparity is somewhat limited due to the infrequency and short duration of such meetings and the fact that no binding decisions are made at them.

SENTENCING COUNCILS

Sentencing councils, which are advisory panels of several or all judges within the districts, are currently operating in four Federal judicial districts (eastern district of Michigan, eastern district of New York, northern district of Illinois, and the district of Oregon). These councils enable the sentencing judges, before they impose sentence, to obtain their colleagues' views on a case and discuss various sentencing options. On the basis of the council meeting, sentencing judges may or may not revise their own judgment as to the appropriate sentence.

Judges we interviewed in the eastern district of New York believe that this type of council is effective in introducing uniformity and lessening disparity. However, many judges in districts where councils are not operating believe that they are more work, take away from a judge's

CASE PROFILES

	CASE G	CASE H
Offense	Interstate transportation of a stolen motor vehicle (18 U.S.C. 2312)	Interstate transportation of a stolen motor vehicle (18 U.S.C. 2312)
Number of counts	1	1
How disposed	Not charged	Plead guilty
Age at disposition	Unknown	21
Sex	Male	Male
Prior Record	No criminal background	Two traffic violations, one misdemeanor
Narcotics use	None reported	None reported
Sentence imposed	Case declined	5 years probation

APPENDIX II

CASE PROFILES

	CASE C	CASE D
Offense	Conspiracy to possess with intent to distribute 42.2 oz. of heroin (21 U.S.C. 846) and aiding and abetting (18 U.S.C. 2)	Conspiracy (21 U.S.C. 846), possession with intent to distribute 36.9 oz. of heroin (21 U.S.C. 841 (a)(1)), and aiding and abetting (18 U.S.C. 2)
Number of counts	2	3
How convicted	Plea	Trial
Age at conviction	28	41
Sex	Male	Male
Prior record	One conviction (use of telephone to facilitate distribution of cocaine); on parole at time of offense	Extensive record including convictions for assualt, burglary, sale of counterfeit obligations; on parole at time of offense
Narcotics use	None reported	None reported
Current employment	None reported	None reported
Sentence imposed	12 years imprisonment, 15 years special parole on each count to run consecutively (total sentence: 24 years imprisonment, 30 years special parole)	7 years imprisonment to run concurrently, 10 years parole

APPENDIX II

APPENDIX I

JUDICIAL DISTRICT	IMPRISONMENT RATE (percent)	AVERAGE SENTENCE LENGTH (months)
Northern California	58	55
Eastern California	55	42
Central California	53	41
Southern California	61	26
Hawaii	11	30
Idaho	50	50
Montana	32	58
Nevada	47	60
Oregon	66	57
Eastern Washington	61	25
Western Washington	29	47
Guam	59	a/36 to 60
Colorado	36	43
Kansas	57	45
New Mexico	66	57
Northern Oklahoma	53	47
Eastern Oklahoma	35	83
Western Oklahoma	58	52
Utah	23	a/12 to 36
Wyoming	41	48

a/Average length of sentences not available. The greatest number of sentences were imposed in the range of months shown.

IMPRISONMENT RATES AND AVERAGE LENGTH OF SENTENCES FOR ALL CRIMES BY DISTRICT FOR THE YEAR ENDED JUNE 30, 1977

JUDICIAL DISTRICT	IMPRISONMENT RATE (percent)	AVERAGE SENTENCE LENGTH (months)
District of Columbia	53	53
Maine	34	a/12 to 36
Massachusetts	45	29
New Hampshire	21	a/1 to 12
Rhode Island	27	36
Puerto Rico	50	63
Connecticut	40	36
Northern New York	36	26
Eastern New York	47	43
Southern New York	49	40
Western New York	37	54
Vermont	50	28
Delaware	42	43
New Jersey	34	52
Eastern Pennsylvania	44	43
Middle Pennsylvania	44	68
Western Pennsylvania	65	57
Virgin Islands	67	30
Maryland	39	61
Eastern North Carolina	55	98
Middle North Carolina	66	37
Western North Carolina	33	54
South Carolina	54	75
Eastern Virginia	36	37
Western Virginia	34	60
Northern West Virginia	57	38
Southern West Virginia	51	44
Northern Alabama	46	45
Middle Alabama	48	42
Southern Alabama	57	47
Northern Florida	77	48

a/Average length of sentences not available. The greatest number of sentences were imposed in the range of months shown.

do not suggest postponing any effort to quantify the disparity problem, we believe the effort should not be limited to only certain aspects of the defendant's involvement within the criminal justice system.

guidance must be provided to promote fair and equitable treatment of all criminal defendants in prosecutive as well as judicial decisions.

The Department also said that our report concludes that "only a comprehensive and simultaneous attack on disparity in all phases of the criminal justice system will be in any measure successful." We totally disagree with the Department's analysis of this section of the report. As stated on page 20, we believe that the sentencing concepts of S. 1437 would be a good first step toward reducing undesirable disparities in sentencing decisions. What the report points out, however, is that disparate treatment of defendants is a systemic problem and can occur in all phases--sentencing, prosecution, law enforcement, etc. As a systemic problem, then, more needs to be done if disparity is to be identified, quantified, and analyzed throughout the system. Only then can viable solutions be developed.

The Department's comments, which reflect an apparent misunderstanding of the thrust of the report and obvious confusion about some of the report's criticisms, also tend to minimize and obscure the validity of certain of the report's conclusions and recommendations. A discussion of the Department's concern and our analysis follows.

The Department said that the report comes to several conclusions and makes numerous recommendations without any evidence of a serious effort having been made to research and analyze the complex problem of disparate treatment of offenders in the Federal criminal justice system. It said that the report repeatedly complains that there is little data to indicate the extent of the disparity problem or its cause, yet does not let this lack of data impede GAO from making sweeping conclusions regarding the disparity issue.

We disagree with the Department's observations and believe that the report's conclusions and recommendations are well founded and truly supported by the evidence gathered during our review. In short, the main conclusion in the report is that disparity does exist. The magnitude and impact of undesirable disparity, however, is unknown. Because undesirable disparity runs counter to the notions of equal treatment of defendants in the criminal justice system, efforts should be taken to comprehensively address the disparity issue with the objective of isolating the instances of undesirable disparity and developing solutions to rectify it.

CHAPTER 6

AGENCY COMMENTS AND OUR EVALUATION

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

The Administrative Office generally agreed with our findings, conclusions, and recommendations. (See app. VII.) It concurred that there are differences in treatment of defendants within the Federal criminal justice system. The Administrative Office said a portion of these differences can undoubtedly be attributed to the congressional authorization and approval of individualized sentencing for criminal defendants in the Federal criminal system rather than single-type sentences for everyone convicted of the same offense. According to the Administrative Office, our report quite correctly points out that some of these differences can appear to be questionable on face value without reference to those differential factors which are crucial to the sentencing decision. The Administrative Office also agreed that when only a limited number of factors are known to the reviewer, valid comparisons are impossible.

The Administrative Office fully agreed with the recommendation that the Judicial Conference undertake a comprehensive assessment of the nature and extent of undesirable sentencing disparity existing in the Federal criminal justice system. The Office said it is prepared, with sufficient fiscal support, to maintain and collect the necessary data.

The Administrative Office also agreed with our recommendation that the Judicial Conference establish appropriate policy guidance for judges to use, at their discretion, in sentencing decisions and said that such guidance in exercising discretion is essential in the criminal justice system.

U.S. PAROLE COMMISSION

The Parole Commission found our report to be quite informative and was pleased that we recognized the innovations it had made in this area. Aside from minor changes, the Parole Commission voiced no problems with the report's findings, conclusions, or recommendations. (See app. VIII.)

Although the sentencing provisions of legislation considered by the 95th Congress (S. 1437 and H.R. 6869) provided for monitoring and guiding discretion in several of these areas, we believe that a more comprehensive approach is needed. The interdependence of various segments of the process and the need to maintain a certain degree of discretion in the system indicates to us that corrective action should be comprehensive. Enactment of piecemeal solutions, particularly with respect to judicial discretion, will reduce disparity in the sentencing portions of the process, but may encourage it elsewhere.

RECOMMENDATIONS TO THE JUDICIARY

We recommend that the Judicial Conference undertake a comprehensive assessment of the nature and extent of undesirable sentencing disparity existing in the Federal criminal justice system. This assessment should consider recent initiatives undertaken by the Attorney General in this area.

Since the sentencing data needed for such an assessment is currently not being maintained, the Judicial Conference should request the assistance of the circuit councils and district judges and the Administrative Office of the U.S. Courts in maintaining and collecting the necessary data. Sufficient data should be generated to identify the nature, extent, and cause of undesirable disparity and to assess the impact of the problem on criminal defendants and the justice system.

Based on the results of the assessment, the Judicial Conference should

- --establish appropriate policy guidance for judges to use, at their discretion, in sentencing decisions;
- --establish a reporting and review mechanism to collect sentencing data and to periodically study the adequacy of sentencing decisions; and
- --request from the Congress any legislative statutory or rule changes needed to improve the sentencing process and to provide assurance that sentencing of criminals is consistent and fair among and within districts.

Further, their sentencing decisions would be subject to appellate review.

Sentence justification information is important for two reasons. First, an appellate review mechanism could use this information in reaching its decisions. Second, by compiling and analyzing this information, assessments could be made of the extent and impact of disparity in these judicial decisions.

PIECEMEAL SOLUTIONS DETER SUCCESS

Although the proposed sentencing concepts in S. 1437 and H.R. 6869 would represent an improvement on the existing situation, we believe more needs to be done. If undesirable disparities are to be identified and reduced, comprehensive solutions must be adopted to attack the problem. Data must be collected and analyzed, by the executive and judicial branches or in conjunction with the proposed U.S. Sentencing Commission, to assess the extent and impact of undesirable disparity throughout the criminal justice system. Based on this assessment, comprehensive actions should be taken to guide discretion from the time of arrest and prosecution, through the courts and parole. Finally, a monitoring mechanism should be established to assess how well the process is working and to determine additional actions that should be taken to improve the system.

Correcting sentencing disparity will only solve part of the problem and may indeed aggravate it in the prosecution phase of the criminal justice system. For example, the Congress has considered numerous proposals for reducing disparity, such as adopting mandatory minimum or flat-time sentencing concepts. If a mandatory minimum sentencing philosophy were adopted, judges would, in general, 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. Disparity would still exist, however, if U.S. attorneys decided to prosecute for a lesser offense because they believed the mandatory minimum penalty for the more serious offense would be too harsh for the accused defendant. Consequently, disparity in this context would not be eliminated, it would merely be shifted from the courts to another place in the process.

--criteria for determining the time an individual must serve before being considered for parole.

Sentencing disparity will continue unless action is taken to guide and monitor judges' discretion. To determine the most effective method of accomplishing this, adequate data should be collected and analyzed on the severity of the disparity problem and the areas that need the most attention.

There is also little data in the executive branch, particularly with respect to the prosecutive function. Sufficient information does not exist to determine whether suspected offenders are being prosecuted consistently among U.S. attorneys. The Department of Justice has not established a mechanism to monitor the use of prosecutive discretion to ensure that it is applied fairly and that it promotes equity. Until adequate data is compiled, proper assessment of the extent and impact of undesirable prosecutive disparities is not possible.

At the present time, according to a Department of Justice report prepared by the Statistical Systems Policy Review group, "any overall effort to control crime must base its strategy on hunch, opinion, prejudice, and occasional fragments of information totally inadequate to the magnitude of the problem." We agree with the Department of Justice that the information currently available is inadequate to assess many existing problems in the criminal justice system. The lack of adequate data is a prime reason why undesirable disparities continue in criminal sentences and prosecutions and why feasible solutions have not been developed.

prosecuted for a particular criminal act. These criminal statutes may carry different maximum sentences. The U.S. attorney's decision to prosecute an offense under a particular criminal statute can affect the sentence range available upon conviction. To illustrate, a person accused of bank robbery can be charged with "bank robbery," which has a maximum penalty of $5,000 and 20 years, or "stealing from a bank," which has a $5,000 and 10-year maximum sentence. Subject to considerations involving the sufficiency of evidence, U.S. attorneys have discretion to charge a defendant accused of armed bank robbery with either one or both of these statutes. This can result in similarly situated defendants being charged and possibly convicted under different statutes, thereby restricting the maximum sentence a judge can impose.

U.S. attorneys also have authority to plea bargain with defendants, whereby charges will be dropped or reduced in exchange for a guilty plea to a lesser offense. As stated on page 11, plea bargaining occurs in a large percentage of criminal cases. Plea bargaining can have a significant effect on the disposition and sentence of a convicted defendant. Since U.S. attorneys do not have systematic procedures and controls governing the use of plea bargaining, the opportunity for disparate plea bargaining decisions is significant.

Other points of discretion

Law enforcement and parole officials also exercise discretion in decisions that affect the ultimate disposition of a criminal defendant in the justice process. Law enforcement officials decide what to investigate and who to arrest. They set their own investigative priorities primarily based on resource limitations and the nature of criminal violations in their geographical area. Since investigative criteria are inconsistent throughout the Nation, suspected violators are subject to disparate treatment by Federal law enforcement agencies.

The Department of Justice, in commenting on our report, was concerned that the reader may interpret all differences and inconsistencies in law enforcement priorities as unwarranted disparities. Our analysis of law enforcement priorities showed that differences do exist, as they do in sentencing and prosecutive phases of the system. Like sentencing and prosecution, little is known about the

--Criteria or standards for deciding the proper severity of a sentence within the wide sentencing ranges.

--Criteria to provide consistent application of the various parole eligibility statutes.

The U.S. Criminal Code does not specify the basic goal or purpose for criminal sanctions. Through discussions with judges, we found that judges use different goals, such as rehabilitation, deterrence, incapacitation, and punishment, as the bases for their sentencing decisions. The particular goal or combination of goals used is determined by the philosophy of each judge. For example, one judge we interviewed said that he had no particular goal but believed that all of the traditionally stated purposes are important. Another judge believed that punishment is the primary goal, with deterrence, incapacitation, and rehabilitation following. As long as judges use different sentencing goals, criminal defendants will receive different treatment in Federal courts.

Another factor contributing to sentencing disparity is the wide range of possible sentences allowed by the U.S. Criminal Code. For example, bank robbery is punishable by a sentence ranging from probation to 20 years imprisonment and/or a $5,000 fine. Federal law contains no guidelines or criteria to help judges decide where within this broad range to sentence a convicted individual. Without guidance on such questions, it seems inevitable that judges will follow different courses.

The U.S. Criminal Code also provides district judges with little guidance or criteria for determining which statutory provision to use in sentencing a convicted individual. As indicated in chapter 2, these provisions indirectly affect the length of a sentence that must be served, and directly affect the time an individual must serve before being considered for parole. Different applications of these statutes can result in defendants sentenced for the same crime and for the same length of time becoming eligible for parole at vastly different times.

The sentencing provisions of S. 1437 and H.R. 6869 would require the establishment of guidelines for judges to use in determining appropriate sentence length and the time an individual should serve before being considered for parole. These bills would also require judges to explain

in another district and received 5 years probation for a similar offense (case H, app. II).

Another illustration of prosecutive disparity involved embezzlement. A defendant with no prior record (case I, app. II) was charged with and pleaded guilty to embezzling $380 from a bank. He received 2 years probation. In contrast, a defendant in another district was accused of embezzling $650 (case J, app. II). He was not prosecuted, despite the fact that the case was considered prosecutable by the U.S. attorney.

The Department of Justice recognizes the existence of disparity in criminal prosecutions and sentences and is conducting three studies to establish empirically the extent of disparity resulting from sentencing and prosecutive decisions. First, a prosecutive disparity study, scheduled to be completed in the summer of 1979, is intended to result in the development of proposals for insuring that prosecutive policies and practices are in accord with Federal law enforcement priorities and that unwarranted disparities in prosecutive decisions are minimized. Second, a sentencing disparity study is ongoing and is to be completed by December 1979. This study is expected to develop data that could be used in creating sentencing guidelines. Finally, an ongoing case-weighting study is expected to be completed by April 1979. This project will examine current litigation practices in 11 U.S. attorneys' offices to determine, among other things, the extent of disparity in litigative decisions both within and among the offices.

Differences in use of statutory provisions

The third area of sentencing disparity involves 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.

Statutory provision	Parole eligibility	Application
18 U.S.C.:		
4205(a) - Regular Adult	Must serve 1/3 of sentence imposed, except for life sentences and those greater than 30 years, in which case the minimum is 10 years.	All offenders
4205(b)(1) - Regular Adult	Left to judge, but must be less than or equal to 1/3 of sentence imposed.	All offenders
4205(b)(2) - Regular Adult	Any time, at discretion of Parole Commission.	All offenders
4254 - Narcotic Addict Rehabilitation Act	Following 6 months of treatment, with certification from Surgeon General	Narcotic addicts

Overall, the use of these statutes varies significantly among 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.

recognize that there still may be differences between the cases compared--such as the backgrounds of the defendants--and that those differences could account for some of the differences in the sentences imposed. From a purely statistical standpoint, however, it is unlikely that undocumented differences completely explain the total variances of the sentences imposed.

Differences in length of sentences

For those offenders who were imprisoned, the length of the sentences imposed varied greatly. The average prison sentence for all districts for the year ending June 30, 1977, was almost 4 years, yet the average sentence ranged from a low of less than 1 year in the district of New Hampshire to more than 8 years in the eastern district of North Carolina.

Differences in the length of confinement were also apparent when specific violations were compared. As the chart on page 9 indicates, vast differences existed among districts in the length of confinement for selected offenses. For example, the average sentence for drug-related crimes ranged from less than 1 year in the district of Hawaii to more than 7 years in the middle district of Florida.

A review of cases in several districts surfaced specific examples of disparity in sentence length. One case involved a defendant (case C, app. II) who pleaded guilty to two counts of conspiracy to possess with intent to distribute 42.2 ounces of heroin. The defendant was sentenced to 12 years imprisonment on each count, to run consecutively, for a total prison term of 24 years, plus 30 years special parole. 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 (case D, app. II) with an extensive police record was convicted on three counts of conspiracy and possession with intent to distribute 36.9 ounces of heroin and received a prison term of 7 years for each count plus 10 years special parole. Since the terms were set to run concurrently, the total prison time imposed was only 7 years.

from the different mixes of cases. For example, the southern district of Georgia reported many more minor traffic offenses committed on military reservations than did the northern district of Florida.

Differences among districts become more evident when the percentage of offenders imprisoned for specific violations is compared. The chart on page 7 illustrates these differences. For example, in the northern district of Florida, 97 percent of the offenders convicted of drug abuse violations were imprisoned, while in the southern district of Mississippi only 22 percent of these types of offenders were imprisoned. These are raw figures, however, and represent reflections of differences in the case mix and even in methods of counting the cases. For example, it is possible that the drug abuse violations in the northern district of Florida have to do with large drug importers, while the southern district of Mississippi has many more cases of individuals arrested in possession of small amounts. As discussed in chapter 3, the lack of adequate sentencing data prohibits identifying the extent of undesirable disparity. As a result, the data on average sentences should be considered only as a tentative indicator of the existence of disparity and not proof of undesirable disparity.

A comparison of actual court cases, however, demonstrates more fully the disparities in incarceration decisions. For example, two defendants in different districts pleaded guilty to possession of narcotics with intent to distribute. One defendant (case A, app. II), a 26-year-old heroin addict with no prior record, was sentenced to 3 years probation on the condition that the defendant receive drug treatment. In another district, a 26-year-old defendant (case B, app. II) with a record of one minor offense received 4 years imprisonment plus 5 years special parole. 1/

In selecting these and other case examples of disparity, we attempted to find defendants with similar characteristics who were convicted of similar offenses. We

1/Federal judges are permitted to impose a term of special parole on defendants convicted of drug-related offenses specified under 21 U.S.C. 841. The special parole term provided for in these sections is in addition to, not in lieu of, any other parole term provided for by law.

DISPARITY IN THE FEDERAL PROCESS

Discretionary decisions made in each segment of the criminal justice system influence the manner in which criminal defendants are treated and, ultimately, the effectiveness of the system itself. The type of treatment a particular defendant receives from the time of arrest and prosecution through court proceedings and parole is determined, in large part, by how Federal officials throughout the process exercise their discretionary powers. Consequently, a great deal of latitude is allowed for different treatment of defendants as to whether they are prosecuted and, if so, the sentence they will receive if convicted.

Concern about disparity in these discretionary decisions is evident by the numerous studies which have been made. (See app. VI.) One of these--a simulated sentencing study--issued by the Federal Judicial Center in 1974, found glaring disparities in the way 50 Federal judges in the Second Circuit Court imposed sentences in each of 20 representative cases drawn from actual presentence reports. The disparity in sentences was so great that of the 20 cases, 16 differed even on the basic appropriateness of a prison sentence. In one case, the recommended sentences ranged from a 3-year prison sentence to 20 years in prison and a $65,000 fine. In addition, the recommended sentences showed substantial disparity, even if the extremes of the distribution were ignored, leading the study group to conclude that, in sentences, "absence of consensus is the norm."

Federal judges are responsible for determining the sentences of convicted defendants. They decide whether offenders will be placed on probation, fined, sentenced to prison, or any combination of these. The judges also decide the severity of a sentence and determine the time defendants must serve before they can be considered for parole by the U.S. Parole Commission. As of June 30, 1978, there were 398 Federal district court judges.

The discretion of a judge to decide on a sentence is subject to one important limitation, namely that the sentence imposed cannot exceed the maximum sentence authorized for the offense by the Federal criminal code. With rare exceptions, the Federal criminal code does not require a judge to impose a mandatory minimum period of incarceration or other santions.

The chart on page 3 shows the various segments of the Federal criminal justice system and some of the decisions made in each segment. At each of these decision points, criminal justice officials have sufficient discretion to provide individualized treatment of criminal defendants.

--establish a reporting and review mechanism to collect sentencing data and to periodically study the adequacy of sentencing decisions; and

--request from the Congress any legislative, statutory, or rule changes needed to improve the sentencing process and to provide assurance that sentencing of criminals is consistent and fair among and within districts.

RECOMMENDATIONS TO THE ATTORNEY GENERAL

To the extent possible, the Attorney General should use the results of the ongoing assessments of prosecutive disparities as a basis for

--establishing uniform guidelines and procedures for all U.S. attorneys to use in deciding what violations of the criminal statutes to prosecute,

--providing 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

--establishing a reporting and review mechanism to collect data on prosecutive decisions and to periodically study the adequacy of these decisions. (See ch. 5.)

The Administrative Office of the U.S. Courts generally agreed with the report's findings, conclusions, and recommendations. The U.S. Parole Commission, except for minor changes, did not take issue with any of the report's contents. The Department of Justice, while sharing the goals sought by the recommendations, voiced concerns over the

criteria for those officials to use when exercising discretion. All areas of the criminal justice system lack such guidance.

--Prosecutors do not have uniform policies and guidelines to decide what violations of criminal statutes to prosecute. (See p. 15.)

--Prosecutors do not have systematic procedures and controls to insure that plea bargaining is practiced in a consistent manner. (See p. 15.)

--Judges have substantial latitude in deciding whether to incarcerate offenders. (See p. 13.)

--Judges have limited systemwide criteria or standards to determine the proper severity of a sentence within the wide sentencing ranges. (See p. 13.)

--Judges have limited systemwide criteria to insure consistent use of parole eligibility statutes that affect the earliest time an offender can be considered for parole. (See p. 10.)

Numerous proposals have been made for solving the disparity problem, including legislation proposed in the 95th Congress (S. 1437 and H.R. 6869). These proposals, however, have been directed only at reducing disparity in sentencing decisions and parole. In general, these legislative initiatives have not addressed the problem in other parts of the Federal criminal justice process, such as in the exercise of prosecutive discretion. If disparities are to be effectively reduced, a comprehensive approach needs to be adopted to guide discretion throughout the process, from arrest through parole. Data should be collected and analyzed to identify undesirable