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Sentencing Guidelines: What is
Their Potential Impact on Federal
Prisons and Should Their Implementation
be Delayed?

Statement of
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Before the
Subcommittee on Criminal Justice
Committee on the Judiciary
House of Representatives



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Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today. As you requested, our testimony will present the results of our review work to date, which focuses on (1) the potential impact of the United States Sentencing Commission's proposed sentencing guidelines on federal prisons and (2) the Commission's request for a 9-month delay in implementation of the sentencing guidelines--from November 1, 1987, to August 1, 1988.

BACKGROUND

The Comprehensive Crime Control Act of 1984 (Public Law 98-473) established the United States Sentencing Commission as an independent agency within the judicial branch. The Commission is composed of seven voting and two nonvoting members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system, including detailed guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes. The guidelines are intended to reduce unwarranted sentencing disparities among offenders with similar criminal backgrounds who commit similar crimes. Under the guidelines system, parole will be abolished and sentenced offenders will serve their entire sentences, less any good time credit--time reductions from their sentences for good behavior.

As required by the law, the Commission submitted its proposed guidelines to Congress on April 13, 1987. The guidelines were

approved by six of the commissioners, with one commissioner dissenting. The guidelines will go into effect on November 1, 1987, unless Congress passes a law to delay or stop their implementation. In submitting the guidelines, the Commission unanimously recommended that Congress delay their implementation for 9 months, or until August 1, 1988. The Commission wants this additional time for field testing the guidelines, training court officials, and proposing any necessary amendments to the guidelines before they go into effect.

Section 235 of Public Law 98-473 requires GAO to report to Congress within 150 days after the Commission submits its guidelines (by September 10, 1987) on the potential impact of the sentencing guidelines on the federal criminal justice system. In response to that requirement, we have been monitoring the Commission's activities and reviewing drafts of the guidelines. In April 1987, we met with Subcommittee representatives and agreed to testify on the impact of the guidelines on federal prisons and the Commission's rationale for delaying implementation of the guidelines.

To address the prison impact issue, we reviewed (1) the Commission's June 18, 1987, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, which contains a summary of the Commission's prison impact study; and (2) a draft of its technical report being prepared to further explain the methodology for its study. We also interviewed Commission

officials responsible for preparing the impact study and Federal Prison System (FPS) officials responsible for estimating future federal prison populations and preparing building plans for federal prisons.

To address the delay issue, we interviewed knowledgeable officials who will be most affected by the guidelines--that is, court officials, defense attorneys, prosecutors, as well as one academic expert. These officials are not representative of groups nor were they selected using procedures that would ensure against bias. We interviewed all seven voting and two nonvoting members of the Sentencing Commission and key staff. We also interviewed officials representing sentencing guidelines agencies from four states (Florida, Minnesota, Pennsylvania, and Washington) concerning their experiences in implementing guidelines' systems. Finally, we reviewed the Sentencing Commission's plans for field testing the guidelines and the Federal Judicial Center's plans for training court personnel in the use of sentencing guidelines.

SUMMARY

The Commission believes that its sentencing guidelines will have a minimal effect on future prison populations. However, the Commission expects there will be significant growth in the federal prison population over the next 10 to 15 years primarily because of the mandatory minimum penalties required by the Anti-

Drug Abuse Act of 1986, increases in federal prosecutions and convictions, and increased sentences required by the career offender provisions of the Comprehensive Crime Control Act of 1984. If the Commission's estimates prove to be accurate, it could cost several billion dollars over the next decade to build prisons for the additional inmates. Also, the increased prison population would, by 1997, add as much as \$1.1 billion a year to the cost of inmate custody, care, and rehabilitation programs.

Delaying implementation of the guidelines has both advantages and disadvantages. The major argument for a delay is that it would provide additional time for more comprehensive field testing and training. In addition, a delay would provide more time for the judiciary to develop and test revised presentence investigation reports required by the sentencing guidelines system. Further, additional time would be available to the Commission to develop and implement a monitoring and evaluation system. Assuming that the guidelines implementation is not delayed, the Commission plans to test the guidelines, train users, and be ready to monitor their implementation by November 1, 1987.

A major argument against delay is that it would require legislation that some of the officials we interviewed speculated could result in undesirable changes to, or possible abolition of, the proposed guidelines. These officials believe the current sentencing and parole release system needs to be replaced and that problems with the new system can be fixed over time.

Although a delay would allow time for more comprehensive testing and training, we have no way of knowing to what extent, if any, this would prevent potential implementation problems from occurring. Also, we have no objective way of comparing the arguments for and against delay. It basically comes down to a judgment call, which Congress will ultimately have to make.

PRISON IMPACT

Between 1970 and 1986, the federal prison population increased about 85.7 percent, with periods of sharp increases occurring from 1975 to 1978 and 1980 to 1986. From 1978 to 1980, a decrease in prosecutions contributed to a sharp decline in the federal prison population.

-- In fiscal year 1970 the average daily population was about 21,000.

-- In 1975 the population was about 23,000 and grew to about 30,000 in 1978, a 30.4 percent increase over 3 years.

-- The population dropped from 30,000 in 1978 to about 24,000 in 1980, a 20.0 percent drop in 2 years.

-- The population grew from about 24,000 in 1980 to about 39,000 in 1986, a 62.5 percent increase over 6 years.

-- FPS estimates that the average daily population for 1987 will be 42,000, a 7.7 percent increase in 1 year.

As of July 2, 1987, FPS reported that 43,507 inmates were in federal prisons. This was 15,581 (about 56 percent) more than the system's rated capacity of 27,926. An additional 5,031 prisoners were housed in contract facilities.

FPS officials said that overcrowding is the principal issue facing federal prisons. Prison overcrowding increases the likelihood of violence and puts the staff in greater danger. It also results in inmates being housed in less than generally acceptable conditions and makes providing efficient and effective operations and programs more difficult. To address the overcrowding problem, FPS plans to build more prisons and expand the capacities of some existing facilities.

Section 994(g) of Public Law 98-473 directs the Sentencing Commission to estimate the impact of its sentencing guidelines on the federal prison population. This section of the law also requires that the Commission make recommendations to Congress concerning any change or expansion in the nature or capacity of federal correctional facilities and services as a result of the guidelines. On June 18, 1987, the Commission provided a supplementary report to Congress that contained a prison impact study estimating dramatic increases in the future federal prison population. However, the Commission has not yet determined the

number or types of facilities that would be needed to house the projected increased prison population, although it plans to do so.

The Commission's study pointed out problems in forecasting prison populations, including the absence of reliable methods for predicting future crime rates and changes in the level of federal prosecutions and enforcement priorities. The study also noted that uncertainties about sentencing under the guidelines made forecasting the effects of the guidelines on prison populations especially difficult. For example, the study pointed out that the proportion of convicted defendants who plead guilty (about 86 percent) could change under the guidelines, which could affect the sentences they receive. Similarly, the authority of judges to depart from the guidelines (even though they must provide a written explanation) creates uncertainty about the ultimate impact of the guidelines.

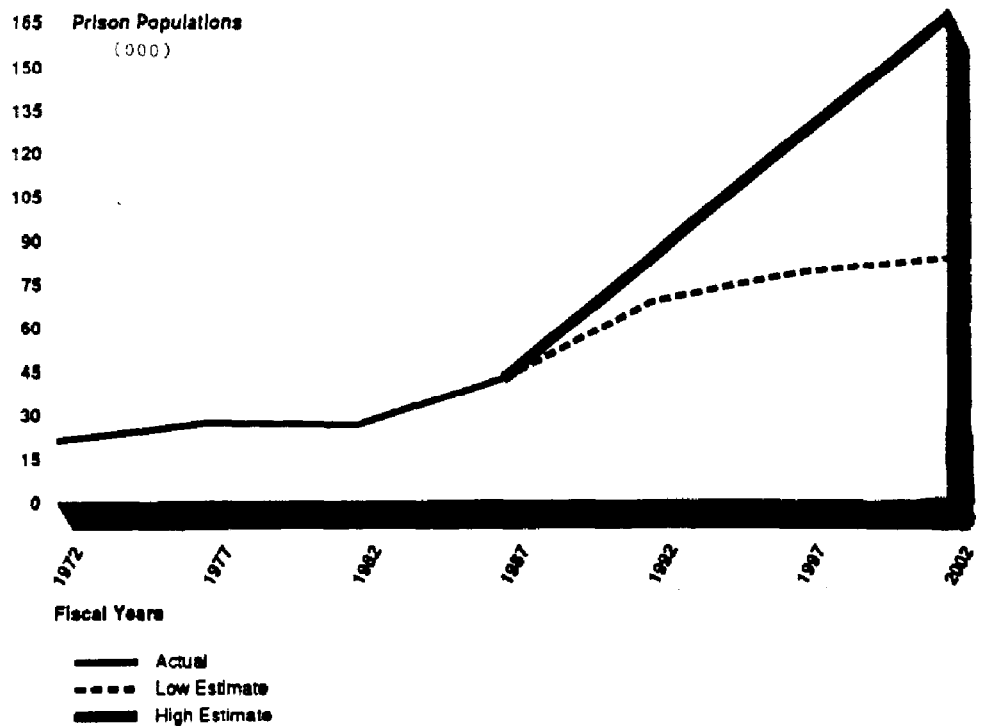
After pointing out the unknowns concerning the guidelines' effect on future prison populations, the study explains how the Commission estimated this impact. Generally, the Commission analyzed sentencing practices for a sample of about 10,500 offenders who were convicted during fiscal year 1985. Then, working with FPS, the Commission developed a computer simulation model to project future prison populations on the basis of a variety of factors, including: (1) current practice; (2) anticipated prosecution trends; (3) the Anti-Drug Abuse Act of 1986 (which requires, among other things, mandatory minimum

sentences for certain drug offenders); (4) the career offender provisions of the Comprehensive Crime Control Act of 1984 (which require, among other things, substantial prison terms or terms at or near the maximum prescribed by law for certain repeat offenders); and (5) the guidelines.

Because future prosecution policy cannot be anticipated, the Commission projected prison impact for 1992, 1997, and 2002 using alternative assumptions concerning prosecution/conviction rates, plea negotiation practices, and the extent that judges would depart from the guidelines' sentences. The Commission's prison population estimates range from 67,000 to 83,000 for 1992, 78,000 to 125,000 for 1997, and 83,000 to 165,000 for 2002.¹ Compared to the 42,000 inmates estimated for 1987, these estimates translate into increases that range from about 60 to 98 percent for 1992, 86 to 198 percent for 1997, and 98 to 293 percent for 2002. Figure 1 illustrates the Commission's estimated prison population growth.

¹The Commission believes its 1992 estimates are the most accurate, its 1997 estimates are somewhat less accurate, and its 2002 estimates are very speculative.

Figure 1: Growth in Prison Population
From 1972 to 2002



Source: Federal Prison System and U.S. Sentencing Commission.

All figures for 1987 and beyond are estimates based on the U.S. Sentencing Commission prison population projections.

The Commission's estimates indicate that the population of federal prisons will increase dramatically primarily because convictions will increase; sentences that do not include confinement (probationary sentences) will be reduced significantly; and the average time served for drug related, violent, and repeated offenses will increase substantially. According to the Commission's study, the use of probation without any confinement will decrease under the guidelines for all nine offense types that it analyzed. In addition, the use of some type of confinement combined with probation will increase under

the guidelines for six of the nine offense types analyzed. The Commission also estimates that the average imprisonment time will increase under the guidelines for seven of the nine offense types analyzed.

The Commission believes that the most significant factors contributing to future prison population increases will be growth in the number of prosecutions and the mandatory minimum sentences required by the new anti-drug law. The Commission attributes some of the growth to the longer sentences required under the career offender provisions of the Comprehensive Crime Control Act. It attributes a relatively modest amount of the increased prison population to the guidelines themselves. Table 1 shows the extent that the Commission believes each of these factors will contribute to growth in the federal prison system from 1987 to 1997 under two of its scenarios.²

²We used these two scenarios because they contain estimates that fall between the Commission's lowest and highest estimates for 1997. Also, these are the two basic scenarios that the Commission discusses extensively in its study.

Table 1: Factors Contributing to
Growth in Prison Populations 1987 to 1997

<u>Factor</u>	<u>Scenario # 1</u>		<u>Scenario # 2</u>	
	<u>Estimated number</u>	<u>(Percent)</u>	<u>Estimated number</u>	<u>(Percent)</u>
Growth due to increased prosecutions	+ 19,000	(38.0)	+ 36,000	(47.4)
Growth due to anti-drug law	+ 24,000	(48.0)	+ 30,000	(39.5)
Growth due to career offender law	+ 4,000	(8.0)	+ 6,000	(7.9)
Growth due to guidelines	+ <u>3,000</u>	(<u>6.0</u>)	+ <u>4,000</u>	(<u>5.3</u>)
Total growth	+ 50,000	(100.0)	+ 76,000	(100.0) ^a
Plus 1987 population	<u>42,000</u>		<u>42,000</u>	
Total 1997 population	<u>92,000</u>		<u>118,000</u>	

^aDoes not add to 100 due to rounding.

We are still in the process of reviewing the Commission's methodology for estimating prison impact. On the basis of our preliminary analysis of the Commission's assumptions and approach, its methodology appears reasonable. The Assistant Director for Administration of FPS told us that FPS staff worked closely with the Sentencing Commission in developing the Commission's prison population projection model. While recognizing the inherent difficulties of all prison population projection methodologies, this official said that the Commission's range of estimates and their underlying assumptions are reasonable. He added that it is highly probable that FPS will eventually use the Commission's model, with possible modifications, to estimate future prison populations.

ESTIMATED COST OF INCREASED

PRISON SPACE

Before the Commission submitted its proposed guidelines and prison impact estimates to Congress, FPS had planned to add 16 new prisons and expand the capacity of 38 (about 81 percent) of the existing 47 correctional facilities at a cost of about \$900 million. FPS estimated that its prison population would be 55,200 by fiscal year 1993, and that it would have an overcrowding rate of about 20 percent (which calculates to a base capacity of 46,000). However, that estimate did not include the additional prison space that will be needed because of the Anti-Drug Abuse Act of 1986, the career offender provisions of the Comprehensive Crime Control Act of 1984, or the sentencing guidelines.

FPS' April 1987 cost estimates for new minimum/medium security correctional facilities indicate an average cost per bed of about \$66,000. Applying that cost figure to the difference between the Sentencing Commission's estimated population and the approximate 34,500 bed capacity that has been funded by Congress (current capacity of about 28,000 beds plus about 6,500 beds in process) would provide a rough estimate of the cost to build new facilities for the additional prisoners.

Using the Commission's previously discussed 1997 estimates of 92,000 and 118,000, FPS would need space for 57,500 to 83,500

additional prisoners at a cost of about \$3.8 to \$5.5 billion to totally eliminate overcrowding. To achieve a 20 percent overcrowding rate, which is FPS' goal, FPS would need 42,200 to 63,800 more spaces at a cost of about \$2.8 to \$4.2 billion. Using the Commission's lowest and highest population estimates for 1997 of 78,000 and 125,000 to achieve a 20 percent overcrowding rate, FPS would need 30,500 to 69,700 more spaces at a cost of about \$2.0 to \$4.6 billion.

These estimates do not reflect the higher costs likely because of future inflation. Also, the costs could be higher if FPS has to build proportionately more maximum security facilities, which are more expensive than medium or minimum security facilities. Similarly, costs would be lower if proportionately more minimum security facilities were built. Further, the costs could be reduced to the extent that FPS can avoid constructing new prisons by using lesser cost alternatives, such as (1) expanding the capacity of existing federal prisons, (2) placing more offenders in state and local correctional facilities, (3) making greater use of halfway houses, or (4) acquiring facilities no longer needed for their original purpose. FPS officials believe the first two alternatives will not provide much relief because they are already expanding existing facilities to the maximum extent possible and because state and local facilities are currently overcrowded. Any need not met by these four alternatives would most likely have to be satisfied by new construction.

Besides the money needed to provide additional prison space, a greatly expanded prison population would substantially increase the funds needed by FPS to operate and maintain its prisons and to provide for inmate custody, care, and rehabilitation programs. For fiscal year 1986, FPS' operating costs were about \$13,100 per inmate. Using that figure and ignoring any inflation or productivity improvements, FPS could need additional operating funds of as much as \$650 million to \$1 billion annually to house the additional prisoners that the Sentencing Commission estimates for 1997 under its two basic scenarios. For the Commission's lowest and highest population estimates, FPS' additional operating funds needed for 1997 would range from about \$470 million to \$1.1 billion.

COMMISSION'S BASES FOR
DELAYING GUIDELINES IMPLEMENTATION

In an April 13, 1987, letter transmitting the guidelines to Congress, the Commission's Chairman said the limited time for preparing the guidelines did not permit the Commission to field test them to the degree the Commission would have desired. The Chairman added that delaying implementation would provide additional time for the Commission, in conjunction with the Federal Judicial Center, the Department of Justice, and the Probation Division of the Administrative Office of the United States Courts, to conduct extensive training programs for judges,

probation officers, prosecution and defense attorneys, and others.

The Chairman's letter further explained that the Commission would use the information received during the field testing and educational period to prepare any necessary technical and substantive amendments to the guidelines. By February 1, 1988, the Commission would submit needed amendments to Congress so they could take effect with the initial guidelines on August 1, 1988. Under section 994(p) of the law, amendments to the guidelines submitted by the Commission take effect in 180 days unless action is taken by Congress to disapprove or modify them.

In case Congress does not approve an extension, the Commission is proceeding with its testing and training plans on the basis of a November 1, 1987, guidelines' implementation date. In addition, the Commission is developing a guidelines' monitoring and evaluation system for implementation by November 1, 1987. Information on the status of these efforts is included as an appendix to this statement.

ADVANTAGES AND DISADVANTAGES TO DELAY

The persons we interviewed identified advantages and disadvantages to delaying implementation of the guidelines. Those respondents that favored delaying implementation of the guidelines differed in their views on the length of the delay,

with suggested delays ranging from 6 to 22 months. They said a delay is warranted in order to

- finish testing the guidelines to eliminate ambiguities and to assure consistency of application;
- educate and train district and appellate court judges, probation officers, and attorneys in the use of the guidelines; and
- design and put in place a data collection system for monitoring guidelines implementation.

The Chairman of the Federal Judicial Center's Committee on Sentencing Guidelines Education said the 9-month delay in implementation of the guidelines requested by the Sentencing Commission is warranted because they are such a dramatic change in the federal criminal justice system. He said that the delay in implementation would enable the judiciary to better identify the type and scope of training needed by court personnel. He also said the more comprehensive the training the more it would minimize potential problems, such as errors in application of the guidelines and unnecessary appellate review of sentences to correct these errors.

The Chairman of the U.S. Parole Commission and its Director of Research and Program Development said that on the basis of their experience in implementing the parole guidelines, the Sentencing

Commission's request for a 9-month delay to conduct field testing and training of personnel on the sentencing guidelines did not seem unreasonable. They also said that more than 9 months might be needed due to the complexity of the sentencing guidelines and the large number of personnel who would require training. For example, prior to the initial implementation of its parole guidelines, the United States Board of Parole³ began a pilot project in 1972 that included, for the first time, the use of guidelines to aid in the parole decision. On the basis of experience with the pilot project, the Board modified its guidelines and adopted them in 1974 for use in making all federal parole decisions. The parole guidelines are less complex than the sentencing guidelines and are used by a much smaller number of people.

Experience in implementing guidelines in the four states we reviewed also emphasizes the importance of training. For example, in Minnesota only limited training was provided. Although the guidelines were less complex than the proposed federal guidelines, the state experienced a 50 percent error rate during the initial implementation period.

Reasons cited by those we interviewed who were not in favor of delaying implementation of the guidelines past November 1, 1987, included the following:

³Public Law 94-233, March 15, 1976, retitled the United States Board of Parole as the U.S. Parole Commission.

-- It is possible that legislation required to permit delay could also change or abolish the guidelines.

-- The guidelines are superior to the present system since they provide for fixed sentences with no parole and increased sentences, especially for white-collar crimes. Problems with the guidelines can be fixed over time.

-- The necessary training can be provided within the current time frame. The guidelines only apply to offenses committed after November 1, 1987. Because there is a delay between when a crime is committed and when the offender is sentenced, there will be sufficient time for training practitioners.

(According to the Federal Judicial Center, the Sentencing Commission staff estimates that within 2 months of the guidelines' implementation date, over 2,000 cases would be ready for sentencing.)

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This concludes my prepared statement. We hope this information will assist the Subcommittee in its deliberations. We would be pleased to respond to any questions.

STATUS OF COMMISSION'S FIELD TESTING,
TRAINING, AND MONITORING AND
EVALUATION EFFORTS

FIELD TESTING

The Commission plans to have probation officers field test the guidelines. It plans to include judges, prosecutors, and federal defenders in its field tests but has not finalized its plans. If the effective date of the guidelines is extended, Commission officials said they would conduct more extensive field tests.

The Commission has developed work sheets, instructions, and test cases for field testing the guidelines. The first phase of the test is to be conducted in four locations. A total of 36 probation officers representing 10 judicial districts and the headquarters office will apply the guidelines to test cases developed by the Commission. The Commission is also having some of its staff apply the guidelines to the test cases. The Commission plans to complete the last test on August 7, 1987.

In the second phase of the test, 34 of the 36 probation officers involved in the first phase will apply the guidelines using actual cases in their respective districts rather than test cases. Probation officers are supposed to send the results of these tests to the Commission for evaluation by the end of August 1987.

TRAINING

The Federal Judicial Center, which is the research, development, and training arm of the federal judicial branch, will receive approximately \$870,000 from the Sentencing Commission to provide training on using the guidelines to about 3,600 court personnel, including district and circuit court judges, full-time magistrates, probation officers, and defense attorneys. According to a Department of Justice official, Justice plans to conduct its own training program for over 2,500 prosecutors.

On May 6, 1987, the Federal Judicial Center's Committee on Sentencing Guidelines Education approved a guidelines' training plan. The plan has also been approved by the Sentencing Commission. It covers basically four approaches to training: (1) between June and October 1987, the Federal Judicial Center plans to add presentations and discussions of the guidelines to regularly scheduled Center seminars and workshops; (2) from May 1987 to January 1988, the Center plans to provide special instructional materials, mainly for probation officers, on specific skills that the guidelines will require; (3) from October through November 1987, the Center plans to provide each district court with a self-contained training package that includes video materials on the application of the guidelines, discussion questions, and detailed written instructions and

exercises; and (4) the Center will conduct follow-up training programs as necessary.

The training plan is subject to change on the basis of new developments and needs that come to the attention of the Federal Judicial Center's Committee on Sentencing Guidelines Education. The committee plans to work closely with the Sentencing Commission and with federal judges and other judicial system personnel during the development and implementation of the guidelines' education program.

Judiciary is revising presentence
investigation reports and plans
to train probation officers in
using new reports

Under the sentencing guidelines' system, the presentence investigation report prepared by probation officers will continue to be the principal document that court officials use to determine the appropriate sentences for convicted federal offenders. The Probation Division of the Administrative Office of the United States Courts is modifying the current presentence investigation report form and its preparation instructions. The objective is to incorporate the information necessary for sentencing under the guidelines' system.

Probation Division officials told us that current plans call for the revised form and instructions to be completed, including pre-testing, by the end of August 1987. The Judicial Center has developed a plan that incorporates a training program for probation officers on how to use the new form and instructions. The Federal Judicial Center's training coordinator told us that this training will take place by the time the first offenders are sentenced under the guidelines.

Probation Division officials responsible for modifying the presentence investigation reports told us that certain variables emphasized in the current system will not be that important under the proposed guidelines. For example, there will be less emphasis on marital and family matters in presentence investigation reports. However, the reports will require new and/or more specific information under the guidelines. The officials said that new information requirements will include the probation officer's own account of the offense committed, whereas in the current system the probation officer only records the versions of the offense described by the prosecutors and defense attorneys. Officials said that under the guidelines, the presentence investigation report will have to be very specific in terms of the dollar amounts stolen in theft cases. In addition, they said that in drug cases, the reports will have to be more specific in terms of the victim's age, whether the drug was sold

to juveniles near a school, and whether juveniles were used to transport the drugs.

The presentence investigation reports may require additional revisions after August 1987, depending on the results of the Commission's field tests of the guidelines.

MONITORING AND EVALUATION SYSTEM

The Commission has said the guidelines will continue to evolve over time. To enable the Commission to modify the guidelines and to make sure that judicial and prosecutorial practices do not circumvent them, the Commission will need to monitor and evaluate their implementation.

The Commission has only recently begun to develop a monitoring and evaluation system to capture information on judicial and prosecutorial practices under the guidelines. The Commission is currently determining what kind of monitoring and evaluation system it will need and the degree of sophistication required. For example, it is considering whether to look at every case in detail or only a sample of cases. Part of this system will involve capturing information to be collected under sections 994 and 995 of Public Law 98-473. Section 994(w) directs the Commission to submit a report to Congress at least annually on the results of sentencing information received from the courts.

Section 995 allows the Commission to monitor the performance of probation officers regarding sentencing recommendations and systematically collect and disseminate information concerning sentences imposed.

A key area that the Commission will need to monitor and evaluate is the use of plea agreements. Plea agreements have become a common tool of U.S. attorneys for disposing of criminal cases. They generally consist of an agreement between the prosecutor and the defendant or defense counsel whereby in return for a defendant's guilty plea to a lesser charge, the prosecutor agrees not to press a more serious charge that he/she asserts could be proven in a trial. According to the Administrative Office, during the 12-month period ending June 30, 1986, about 86 percent of the convicted defendants in federal criminal cases entered guilty pleas. Because plea agreements have an impact on the ultimate sentence imposed on the defendant, the consistency of their application directly influences the treatment of defendants, and inconsistent application can result in disparate treatment. The Commission's guidelines state that it intends to study plea agreement practices under the guidelines and seek to further regulate the plea agreement process as appropriate.