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July 7, 1986

597-3805

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

Dear Mr. Wilkins:

Recently, Thomas Maher of our office gave me a copy of your letter dated June 17, 1986, so that I might review it, and if appropriate, make a response for your consideration. After reviewing the headings, I have decided that I prefer to deal with specific areas of the letter rather than the entire matter.

As basic background on myself, I provide the following:

I presently hold the position of U.S. Probation Officer in Philadelphia, PA, and have held this position for over ten years. Prior to that, I was a research associate with the program for the Study of Crime and Delinquency at Ohio State University doing research in the mental health field, as well as the comprehensive study on community treatment centers for the federal Buruea of Prisons. I hold a masters degree in public administration, have authored numerous articles and publications, and am a member of the adjunct faculty at Temple University, Department of Criminal Justice.

The first area I would like to address is your major heading called Probation Dealing With the Issue of Intensive Services in Probation and Parole for Federal Offenders.

During my years of working in this field, it has become apparent to me that intensive services is a double-edged sword. It provides quick burn-out for the officers who must deal with offenders in this setting, and it is difficult in many instances to define exactly what types of supervision are to be provided. Basically, supervision in this form falls into two categories surveillance and intensive servies (i.e., psychiatric, alcohol, drug), which are either provided by the probation officer or by contract agencies under the auspice of the probation office. As shown in the revised California model, the Wisconsin model and what has been done in the State of Ohio, it is obvious that intensive services is a difficult approach to probation and parole supervision, particularly, in the area of service needs.

Most officers are, at best, trained as master level psychologists or social workers who, given the time constraints and other duties involved in fulfilling the job of a federal probation officer, have little time to truly do the type of intensive long-term supervision required. It is important to remember that by statute, a person may only be on federal probation for five years and on parole for a like amount, unless a review is held to determine why a person should be maintained under parole supervision for an additional period. Studies have shown that officer "burn-out" is extensive, sometimes as frequent as six months for an officer to reach a point of diminishing returns in these types of settings. I believe that the intensive supervision concept dealing with service needs is not workable, nor undesirable in the federal probation system. It is always important to remember that we are torn between the conflict of our quasi law-enforcement and protection of society functions versus the more traditional helping functions. I prefer to think of our roles as "facilitators", that is, being there to assist our clients whenever necessary with emergency needs, not long-term treatment needs.

If there is a role for intensive services in the federal probation and parole system, it is in the area of surveillance of those who are prone to continuing criminal activity by choice. By this, I mean the sophisticated white collar offender who continues to make up an increasing portion of our client population, as well as, the more traditional alleged organized crime individuals and corporate offenders. In these roles our function is clear, to observe as best as possible for continuing criminal activity by monitoring as closely as possible associations, travel, etc. I think in the future for federal probation officers to fulfill this role, there needs to be an enlargement of our authority and appropriate resources made available to facilitate this type of activity. Certainly, the step of creating the position of senior probation officer for special offenders is a step in the right direction. I personally believe that this role should be increased.

As it relates to what role the Commission, the Court and the probation officer should have in determining intensive services, I think that a consensus should be formed by polling the entire federal probation system, from the chief probation officers on down, as well as the Judges and related others to determine what their concepts are of intensive supervision. Certainly, an equal role, if possible, between the three major components, the Commission, the Court, and the probation officers should have equal input in determining what the future roles of the service will be concerning this area. This is a very difficult question with no easy answer. Lastly, I suggest that a separation of the "investigative functions" of the probation officer versus the "supervision functions", be they regular or intensive, should be made at this time to facilitate a more workable solution to this problem. One thing the California

reorganization showed was that clients were categorized as either supervision or surveillance only, with the focus supervision in that area. I would suggest that in the federal system in the future an overlap or certainly a conduit be available to move clients who may have been inappropriately classified in this regard. Lastly, a recent study by the state of Georgia of their Department of Corrections in association with Professor Todd Clear at Rutgers University showed that where there is a split between supervision and more law-enforcement or surveillance oriented functions, that over time there is a measurable lessening of these rigid separation of duties. Offenders or clients, if you will, began looking for services from both officers fulfilling different roles. Again, I think this strengthens my concept of the "facilitator" approach to what we do in the actual implication of our duties.

Lastly, what type of conditions not expressly listed by statute should the Commission consider in drafting guidelines for this should include probation officer input on separation of duties, i.e., supervision versus surveillance or more traditional law-enforcement orientation, as well as conditions strengthening association, travel, financial disclosure, (a very important area) and stronger verification of all areas involving these types of individuals to be classified as in need of some type of intensive services.

In defense of what we have done traditionally, there has always been an intensive service, usually not stated, but it is the officers' duty to be there in times of crisis or times of concern for continued criminal activity or other types of activity for the probation/parolee to devote the additional time on a need-be basis. I think the flavor of the need-be basis for assistance should be maintained regardless of how we perceive. Types of offenders which should be considered are those with traceable organized crime connections, sophisticated white-collar offenders, not exclusively confined to the top level operators, companies who consistently violate Sherman Act laws or other types of federal statues for purely financial gain and certainly, drug offenders, particularly those involved in the importation, and manufacture of illegal controlled substances.

The next major heading I would like to address is that of fines. I am very interested in this area because I have spent a great deal of time dealing with the financial portions of the presentence investigation, as well as the supervision process. The need to have a good definitive financial history will be paramount in future presentence investigations and the supervision process, both for probationers and parolees.

Naturally, there are certain crimes for which fines should be prefered sanctions. Corporations, which by statute, may refuse a probation where no individuals are involved, is obviously an easy category to identify. Interestingly, it has been my experience that many companies who have violated various federal laws for price-fixing, tax evasion, bribes, payoffs, etc., must be dealt with by the use of fines. Unfortunately, at this time, companies who are in bankruptcy and reorganization under Chapter 11 can avoid million dollar fines levied at the present time by the Court through these procedures. Fines become no more than another debt to be listed at the bottom of their creditors list in these reorganizations and bankruptcy proceedings. I think this has to be changed to make the Government fine imposed in criminal matters payable to all else if possible. Additionally, that time contraints should be placed upon corporate offenders whereby fines are paid in a timely fashion so that the money may be regrouped. Lastly, instead of having the fines go to the Government for prosecution costs, etc., I think it is time for us to move ahead into new areas, whereby fines would be used for the betterment of the community which has suffered by these illegal activities committed by these organizations. This could be accomplished by allowing the fines to be used for work training situations, for the hard core probation/parolee, cleaning up destruction of the land through waste via toxic or otherwise, committed by these companies, or used in some other appropriate manner to be determined later. This concept becomes even more critical during this time of diminishing of public and private resources. Fines should also be levied on the high-level drug dealer, either importer or manufacturer. These fines, I believe, should be committed fines, whereby the individual may not be released from the incarceration portion of his sentence until the fine is resolved. Presently, a committed fine must be dealt with by the individual either paying the fine or facing a court again attempting to take a "paupers oath" that he is unable to pay. Here is an area where good surveillance-type supervision work with appropriate training for officers in financial matters may be of great assistance to the Courts, the Commission, and appropriate others in making a determination of the offenders ability to pay. A complete financial update prior to these hearings should be ordered to be sure that there are no assets known which could be liquidated to pay the fine prior to release. Lastly, if an individual has a fine to pay and cannot be released from custody, then regardless of the parole guidelines concerning release, should be waived until the fine is taken care of. Obviously, this will not be an easy task to formulate or enforce, but it is my opinion, that it is time to deal more realistically and hopefully effectively in this area.

Lastly, I think that it is time that we stop imposing fines on the "lesser offenders" who survive on public assistance or have nominal incomes and assets. Often, we literally take the food from the mouths of individuals in order to pay court-imposed fines under the fear of incarceration. In my tour

of duty as a federal probation officer, I have literally seen Judges state to those being sentenced that I am placing you on probation and ordering you to pay a fine. If you miss a single payment, you will go to jail. This may create future criminal activity for the individual.

In calculating the amount of fine, it has been my experience that it is extremely important to have a complete and thorough financial interrogatory on the offender to help assist in determining an appropriate fine. I believe that fines should be based on the severity of the offense and the offenders ability to pay. Placing a small or large fine on an individual who is without the means to pay, only creates undue paperwork for the system in trying to rectify the problem. My practical experience has been that officers near the termination time find themself writing petitions and memorandums asking that the Court remit fines because of a persons' inability to pay. Sometimes, this necessitates a Court hearing, which requires a judge, attorneys, and the probation officer. Lastly, it does not seem particularly appropriate to have a person face incarceration for their inability to pay a fine when their supervision has shown that they have done the best of their ability to complete their supervision satisfactorily, except for this area. Ability to pay is paramount in making a determination. Also, fines should be based on the actual amount that the offender received.

As an example, recently I completed a presentence investigation on a young woman of limited education and background from the Baltimore, MD, area, who did no more than sign a few U.S. Treasury checks that her boyfriend forced her to do. He was a known trafficker in stolen checks and made considerable amounts of money by this criminal activity. Unfortunatley, she was prosecuted and ordered to pay a sizeable fine, even though she received no financial gain. This does not negate her responsibility, but now we are confronted with a young woman with several children on public assistance whose potential for changing her situation is very poor, confronted with paying a fine of approximately $1,000 which to her would be the same as levying a fine of $100,000. There is little or no chance of colleting this fine.

On the topic of what sanctions should be imposed if an individual fails to pay a fine, where appropriate, I believe that a revocation hearing should be sought, again, with a thorough financial background on the individual available to the Court, and, if appropriate, a period of incarceration be imposed based on the person's unwillingness to pay a fine where the money was available. On the other side of this coin, a person who could not pay as noted in my example above, should not be incarcerated for their inability to pay a fine. On organizational offenders (companies, corporations), I think, again, the use of Chapter 11 bankruptcy proceedings and reorganization proceedings should not negate our ability to collect a fine. If necessary, we should have the authority to sell off goods, machinery, etc., to collect fines for this organized structures. It has been my experience that many of

these offenders do not particularly takes fines seriously, believing that they will be able to get around them through manipulations of other portions of our judiciary.

One of the most common ploys used to do this is by signing over property to other individuals or by closing a company and then opening one and doing the same business with a new name and new charter with the same offenders involved. We should be able to collect fines on these types of individuals where it can be shown that the same individuals are involved doing the same types of businesses, even though they have changed their guise.

On the topic of restitution, there are basically three types of victims who may be entitled to restitution. The individual or individuals, companies, and Government agencies (local, state, or federal). Hopefully, the victim had been identified during the investigative process, culminating in the prosecution of the case by the investigating agency and the U.S. Attorney's Office. If it has not been done during the sentencing process, the probation officer filling his or her role as presentence investigator should make every effort to attempt to determine the victims through interviewing those involved, attempting to determine what they believe their losses are, and, again, through good financial investigative techniques. A structured hearing on restition prior to sentencing may be useful. The agencies involved in the investigation, the victim, and the probation office should meet in an effort to determine an appropriate restitution if possible. Further, this would alleviate much of the ambiguity of what the defendant states he or she received versus what the companies or individuals state that their losses are. Again, I believe restitution should be based on how much the individual received from the criminal activity. The concept of having defendants responsible for restitution "individually and severally" may be resolved at this type of hearing. Also, at this hearing, the possiblity of paying restitution through "community service," could be discussed for the individual who is without the necessary funds to pay restitution. This could be accomplished regardless of who the identified victim is. By this, I mean that a person would be credited so much per hour for every hour performed or service to the victim to be taken off the restitution. This would be very appropriate in the area of highly structered offenders and company or corporate offenders. This is not a new concept and has been used on a limited basis in the past. In our Court at the present time, it is the position of some judges that restitution cannot be fulfilled through community service except where the U.S. Government is the victim.

The entire concept of paying fines and more importantly restitutions becomes more difficult when you consider the extra man power that is needed to monitor these types of activities given the number of individuals on federal probation and parole. I know in our own district we have a full-time U.S. probation officer, probation officer assisant and secretary who just monitor community service cases.

I applaud the Sentencing Commission's interest in updating our approach to all of these areas. By working on these topics, it will hopefully make my job of a field officer aan easier one in the future. I would also like to point out that in all the areas I have addressed, there is a growing belief that ongoing supervision is not necessary in many instances to accomplish some of these tasks. I would ask the commission to think seriously about looking at what types of offenders need ongoing supervision and what types can be handled "administratively." I encourage the Commission to review the article in Federal Probation Quarterly September, 1983, dealing with the formulation and implementation of the administrative caseload project here in Philadelphia, PA, which focused on the concept of nonintervention supervision. Hopefully, my comments will be of assistance to you in your important work.

If I can be of any further assistance, please feel free to call on me at any time. I look forward to discussing my views with the Commission members personally.

Thank you again for the opportunity to have input~~ into this valuable.~~

Yours truly,

Franklin H. Marshall
U.S. Probation Officer

American Bar Association

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July 10, 1986

FEDERAL EXPRESS

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1800
Washington, D.C. 20004

Dear Chairman Wilkins:

Your letter of June 17, 1986 to Robert McNew, Chairman of the Criminal Practice and Procedure Committee of the Antitrust Section of the American Bar Association, has been referred to me as Chairman-Elect of the Section. As you will recall, I testified on June 10, 1986 on behalf of myself and nine other lawyers with experience in criminal antitrust cases who have been active in the leadership of the Antitrust Section.

In reviewing the questions posed in your letter of June 17 concerning sentences for individual offenders, I noticed that I had commented on several of these questions in my testimony on June 10 concerning sentences for organizations. My testimony dealt in part with individual sentences because of our view that jail sentences for individuals are central to the punishment and deterrence of organizations that commit offenses in the antitrust area. I would like to supplement that testimony briefly in this letter but I do not believe that we have enough to add for me to appear and testify on July 15, 1986.

My earlier testimony made two principal points which are applicable to the sentencing of individuals. First, in the ordinary case, individuals convicted of antitrust offenses should spend some time in jail. See pages 2 to 4 of my June 10 testimony. Incarceration, which need not be lengthy, is necessary to convince such individuals and their co-workers that price-fixing is criminal conduct. Probation, community service and house

arrest do not carry the same message. We do not view any of them as alternatives to jail.

The second point of our earlier testimony was that the nature of antitrust damages makes it inappropriate to use the criminal case as a vehicle for restitution or to relate the fine directly to the injury. See pages 6 to 8 of my June 10 testimony. While that discussion was related to fines imposed on organizations, many of the same considerations apply to fines imposed on individual antitrust violators. For the reasons stated in that testimony, we do not regard antitrust offenses as appropriate for restitution as part of the sentence or for fines which bear a particular relationship to the offender's gain or the victim's loss. These functions are already amply performed by treble damage actions.

There are several additional questions raised in your letter of June 17 on which we did not directly comment in my earlier testimony. I would like to comment on them briefly here.

Probation should be imposed on antitrust offenders after the end of their jail term, but it is doubtful that intensive supervision would be necessary. In general, the process of trial, conviction and imprisonment should be sufficient to convince the convicted antitrust violator not to repeat his mistake. Moreover, executives who commit these offenses are not likely to commit other types of criminal conduct except in those few cases where other crimes (such as extortion) are committed as part of the offense. Therefore, limited supervision, such as a monthly meeting with the probation officer to remind the convicted violator that he is on probation, would ordinarily be sufficient.

More important are the other conditions of probation such as the prohibition on price setting or sales activities or a requirement that the convicted violator perform community service. If community service is to be ordered, it would be preferable that it be related to the

area of the offense, such as service in a pantry if the price fixing involved food or at a hospital if it involved medical supplies. Since antitrust violators generally have ties to the community and do not commit other crimes, supervising this community service should not be difficult and the community would probably benefit by it. However, in no instance should it be regarded as a substitute for jail.

Even though a fine bearing a relationship to gain or loss is inappropriate in antitrust cases, a fine measured on some other basis should be imposed. The maximum fine for antitrust offenses committed by individuals is presently $100,000, which is a substantial deterrent in most cases. The fine imposed in a given case should be based upon the usual elements that go into determining a defendant's ability to pay - his or her income, savings, debts, and responsibility to support family members. If the individual offender fails to pay the fine, a suspended portion of the jail term should be served.

House arrest would be easy to administer for antitrust violators. It would have the advantage of extending a period of restricted activity during which the violator could reflect on the nature of his criminal conduct without having him spend an extended time in jail. However, it would not be a substitute on the psychological impact on him of going to jail nor would it have the same dramatic effect on his co-workers and on persons in other companies. Therefore, it should not be a substitute for jail, except in those cases where no safe jail was available or where crowded jails made a jail term impossible. I wish to stress again, however, that a short stay in jail would be more effective than a longer period of house arrest.

I would be glad to amplify these views if any members of the Commission have questions. Since the time to respond has been short, I have not circulated this letter to the other lawyers signing my earlier testimony. Therefore, to the extent that this letter goes beyond that testimony, the views expressed are mine alone. Of course, none of the positions in this letter or my earlier testimony represent

the views of the American Bar Association or its Antitrust Section.

Sincerely,

Mark Crane

Mark Crane

MC:bnk

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July 3, 1986

Hon. William Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., N.W., Ste. 1400
Washington, DC 20004

Dear Judge Wilkins:

In response to your letter requesting our views for the fourth hearing, we submit the following:

1. Probation

   a. We believe that intensive supervised probation is preferrable to incarceration in many instances of non-violent behavior. The likelihood of rehabilitation is much greater in a non-prison setting.

   b. We believe that the Court alone should determine which offenders are placed on intensive supervised probation.

2. Fines

   a. We believe that the "offenders gain" should be the paramount consideration in calculating a fine. The offender's ability to pay should be determined by his assets, pure and simple.

   b. If an individual offender fails to pay the fine timely because he or she is indigent, then the period of payment should be extended. No one should be imprisoned because he or she is without funds/assets to pay the fine.

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3. Restitution

When restitution is ordered, it should be tailored to the ability of the defendant to pay. Restitution can be combined with community service. It would be difficult to combine restitution with imprisonment unless the defendant is wealthy.

4. Community Service

An effective community service program should be tailored realistically to the skills of the defendant.

Addicts are generally not candidates for community service programs.

4. House Arrest

House arrest is most definitely a viable alternative to incarceration. In many circumstances of non-violent behavior, when the real issue is whether the defendant can conform his/her behavior to society's standards, house arrest would be the ideal sentence.

Sincerely,

Paul D. Borman
Chief Federal Defender
for the Detroit
Federal Defender Office

PDB:pmd

July 15

FEDERAL DEFENDER PROGRAM

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July 7, 1986

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004

RE: Available sentencing options

Dear Chairman Wilkins:

Again, I appreciate being asked for my views on the Commission's ongoing work and am pleased to provide them to you. On the topic of sentencing options discussed in your letter of June 17, 1986, my thoughts, together with those of my staff, are as follows:

I. PROBATION

QUESTION 1: Should some form of "intensive supervised probation be imposed on certain types of federal offenders?"

A. It is not clear to us why the Commission would wish to limit probation to "intensive supervised probation." Our experience has been that different types of offenders require different types of probation, i.e., some persons who are first offenders with full-time jobs and families, whose offense was situational (for example, needed additional money because of some family or health crisis) need only minimal supervision. They do not need career counseling or help getting a job, nor do they need substance abuse counseling or treatment. To require the probation office to intensively supervise such people is a waste of resources and will inevitably result in a resource crisis as probation officers today are over-extended even though they have the flexibility to determine who needs more intensive supervision. Moreover, to require intensive supervision in all probation cases takes away almost all discretion not only from

sentencing judges, but also from the probation officers who are ultimately the people who can best determine what kind of supervision is needed in a particular case.

B. If the question is interpreted as a query as to whether probation should be an available sentencing option, our answer is unequivocally yes. In our experience, probation is not a gift. First, the defendant must live the rest of his/her life branded as a convicted felon (or misdemeanant as the case may be).

Second, probation can create severe hardships on defendants, and, in some cases is more difficult for defendants than is incarceration. For most defendants, although incarceration is a difficult experience psychologically, it is not a difficult experience to physically live through. When, however, someone is on probation, that person is required to live "clean" immediately. They must make every effort to obtain employment or return to school, they must report on their efforts to a probation officer who is unlikely to be put off by excuses, they must find the money to come down to the probation office and they must be dependable enough to remember to come down. Although these may seem like easy tasks, to many of our clients they are not. Carfare alone is often difficult to obtain. If someone is required to report twice a week in person, that person must spend $4.00 per week ($16-$20 per month) and a similar number of hours, to meet their reporting requirements.

Moreover, probation officers have the right to probe into a probationer's personal life. This right is given to them because the person has been convicted of a crime. Nevertheless, this right significantly intrudes upon a person's right of privacy.

On the positive side, probation provides opportunities which are otherwise unavailable. It provides defendants help in finding a job and the incentive to find one. It provides defendants with someone to talk to about family crises. Since most defendants are poor and badly educated, it probably would not occur to them to seek out someone to talk to about crises, nor would they know where to find someone even if they wanted to. Probation also permits defendants to submit to out-patient drug treatment under close supervision. And, on the theory that for many their first brush with federal court is enough to scare them off from committing other crimes (which has often been our experience), probation is the only appropriate sentence.

QUESTION 2: What types of offenders should be placed on probation and what forms of control and supervision should be imposed?

It is difficult to state in the abstract what kind of offenders should be placed on probation. To answer this question we must refer to the previous memo we wrote setting out our theory of incarceration. In that memo we said we believed incarceration was only appropriate in those cases where a defendant posed a danger to the community. Thus, theoretically probation would be appropriate in all other situations.

It seems to us, however, that there are some cases where probation is simply an exercise of form over substance. For example, probation may be inappropriate in many white collar cases where the defendant is well-educated and has employment and where the crime occurred through a corporation. In those cases, there is almost no liklihood that the defendant will repeat the crime and there does not appear to be any role for a probation officer to play. If the defendant has financial resources, a fine seems to be a more appropriate sentence in these types of cases.

In other situations, community service may be a more appropriate sentence, in which case probation would be necessary, with community service as a condition thereof. Where community service is seen as an appropriate condition of probation, it appears to us that other conditions of probation may be less onerous since the community service supervisor will be in weekly contact with the probationer and will be able to report on the reliability of the probationer.

There will, of course, be cases which do call for intensive probation. These would include cases where the crime was economically motivated or drug related and the defendant does not have employment and must return to the same neighborhood. In these situations, defendants may need much more intensive guidance and supervision. In such cases, drug treatment may be necessary, either in-patient or out-patient. We do not believe that defendants in need of drug treatment should be sent to prison unless all available community options have first been exhausted. We say this because prisons are generally ill-equipped to deal intensively with drug addiction, one of the most intransigent and difficult problems facing society today.

Employment is one of the most critical issues facing criminal defendants in federal court. Often, they have been fired as a result of their criminal activity and must then seek new employment as convicted felons. Others committed their crimes in the first place because they were unemployed and needed

effect, house detention is the equivalent of a work-release sentence, except that the defendant is permitted to go home after work instead of to the community treatment center. We believe that this type of sentence is an attractive and cost-effective alternative for defendants who are reasonably responsible. It would permit defendants who have family obligations to fulfill these obligations. Although it would certainly feel like punishment, to say you cannot leave the house for 6 months because you are under "house detention" would undoubtedly stigmatize one, it would save the Bureau of Prisons a significant amount of money. Included in the Appendix to United States v. Murphy, 108 F.R.D. 437, 441 (E.D.N.Y. 1985), is a section written by the Probation Department for the Eastern District of New York, delineating the social cost effectiveness of "house detention." It notes the following advantages of such a program:

1. It would permit the family breadwinner to remain working, preventing family members from going on unemployment.

2. It would increase the potential to make restitution or to pay a fine.

3. It would lessen the psychological damage to the family and prevent family break-ups.

4. It would prevent psychological damage to defendants caused by incarceration.

5. It would stave off the significant re-entry problems faced by those released from prison.

We agree with these points.

Thank you again for soliciting my views. I am following the Commission's progress with great interest.

Very truly yours,

Terence F. MacCarthy

Terence F. MacCarthy

TFM/qh

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Office of the
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RICHARD J. ARCARA
DISTRICT ATTORNEY

July 9, 1986

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Washington, D.C. 20004

Dear Judge Wilkins:

In response to your letter of June 17, 1986, on behalf of the National District Attorneys Association, I am pleased to provide you with our views regarding the sentencing options available and appropriate for an individual convicted of a federal offense.

It is our belief that there must be serious punishment for serious crimes and for habitual offenders. Furthermore, it is our belief that substantial terms of imprisonment are required for all crimes of violence that result in serious bodily injury or which involve use of a deadly weapon or dangerous instrument. We also believe that substantial terms of imprisonment are appropriate for offenders who exhibit a pattern of criminal conduct from which they derive a substantial portion of their income or who are engaged in a conspiracy to engage in a pattern of racketeering activity.

We believe that a term of imprisonment should be the norm with respect to felony convictions and that all other sentencing options should be viewed as alternatives to incarceration, if they are appropriate, given the particular facts and circumstances of the crime and the history and characteristics of the defendant. We suggest that each sentencing judge be required to state on the record the specific reasons why an alternative, non-incarceratory sentence is being imposed. The statement should contain the reasons why imprisonment in the particular instance is not appropriate to reflect the seriousness of the offense and why it does not provide just punishment for the offense committed. Additionally, the statement should address why imprisonment is not necessary to promote respect for the law and to protect the public from further crimes of the defendant.

We recognize that in certain instances alternative, non-incarceratory sentencing would be appropriate to render substantial justice, especially in cases of lesser magnitude or involving non-violent or first-time offenders. Thus, a thorough review of these alternatives is clearly appropriate to the Commission's task. This letter will seek to address such alternatives in turn. We will review each as an isolated sentencing category without regard to aggravating or mitigating circumstances which inevitably will be present, and we will make no recommendations herein with respect to which particular options should be imposed for any particular crime or defendant category.

PROBATION:

Questions Presented:

*Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?

*What roles should the Commission, the court and the probation office have in determining which offenders are placed on intensive supervised probation?

*What type of probation conditions not expressly listed in 18 U.S.C. 3563(b)(1-19) should the Commission consider in drafting the guidelines?

We believe that there should be implemented an intensified form of supervised probation which must be imposed by the sentencing judge, pursuant to guidelines enacted by the Sentencing Commission and when deemed appropriate in the pre-sentence report of the probation officer.

Quite frankly, while we object to the notion of applying sentencing alternatives simply because of a lack of prison space, given the realities of prison overcrowding and the sense, at least as enacted by the Senate in Section 239 of Pub.L98-473, "that available federal prison space must be treated as a scarce resource in the sentencing of criminal defendants," certain

offenders whom we believe should be imprisoned will be placed on probation. Such offenders, having received such a "break" should be subject to a more intensified, supervised probation. Naturally, all recidivists and all offenders who have displayed any propensity for violence, including child or sexual abuse should be automatically included in this category. This category should also include those offenders with mental or developmental disabilities who could benefit by intense supervision and counselling and those addicted to drugs or alcohol who should undergo rehabilitation counselling.

Control and supervision within this more intense form of probation must require more frequent reporting and contacts with probation officers; more frequent counselling and greater restrictions on the offender's activities. Mandatory residential counselling and treatment should be required where appropriate. Violations of probation must be met with a swift response and resentencing to require incarceration should be mandatory for those violating the terms of intensified probation.

Probation will remain the principal alternative to incarceration and the type of probation conditions listed in 18 USC §3563(b)(1-19), while not all-inclusive, are quite detailed. Moreover, the catch-all provision of 18 USC §3563(b)(20) allows for any specific probationary term called for under the particular facts and circumstances of each case and each defendant.

FINES:

Questions Presented:

*Are there certain crimes for which fines should be preferred sanction? If so, list the offenses.

*What elements should be considered in calculating the actual amount of a fine? Should the amount of the fine bear a particular relationship to the offender's gain or the victim's loss? How should the offender's "ability to pay" be determined?

*What sanctions should be imposed if an individual offender fails to pay the fine? An organizational offender?

We believe that fines should supplement sentences of incarceration and may be an appropriate sentencing alternative to some non-violent crimes. Fines may be appropriate in offenses involving monetary loss to victims, illegally made profits, breach of fiduciary duties, embezzlement and other so-called "white-collar" crimes. However, what must be avoided is the appearance that one can buy oneself out of a prison sentence simply because one has the ability to pay a fine. We recommend that the Sentencing Commission's guidelines clearly specify those crimes in which fines would be an appropriate sentencing alternative and specifically restrict this alternative for specific crimes where the wealth of the defendant should not affect the issue of incarceration.

In determining whether a fine should be imposed and in calculating the actual amount of a fine, the following elements should be considered:

(a) The nature and circumstances of the offense.

(b) Any pecuniary loss inflicted upon the victim.

(c) The need to punish the defendant by assessing a fine set in an amount sufficient to make the punishment an effective sentencing tool.

(d) The defendant's income, earning capacity and financial resources.

(e) The defendant's ability to pay and the burden that the fine will impose upon the defendant and on any person who is financially dependent upon the defendant or government agency required to help support such dependents.

(f) If a corporate defendant, the size of the corporation.

(g) The amount of restitution ordered as direct reimbursement to the victim in addition to any fine.

(h) The need to deprive the defendant of all illegally obtained gains.

(i) To create a deterrent effect for criminal conduct.

(j) Any other pertinent equitable considerations.

As part of the preparation for the pre-sentence report, there should be a complete disclosure by the defendant of all assets, access to assets and tax returns filed. Any apparent effort to evade disclosure or to insulate assets from consideration should result in a recommendation that a fine should not be assessed as an alternative to incarceration.

With respect to sanctions to be imposed upon a failure to pay the fine, the mechanism set forth in 18 USC §3572 to declare the fine or payment due thereon to be delinquent and thereafter in default should be followed. A fine should thereafter be reduced to a judgment and enforceable against the property of the defendant. If the court, upon a default proceeding, makes a finding that the defendant has the present ability to pay the fine, a judgment should direct imprisonment until the fine is paid.

Sanctions against organizational offenders present additional considerations. After attempting to collect a civil money judgment on the fine, the most effective way to insure payment of the fine would be to expand sanctions so as to reach the extent of the officers' or directors' assets in the company and to ultimately include the imprisonment of the president and/or chief executive officer of the defendant corporation pending payment of the fine.

RESTITUTION:

Questions Presented:

*Under what conditions should restitution be ordered? How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? Are there ways in which restitution could be effectively combined with imprisonment or community service?

We believe that restitution should be ordered in all instances where there is an identifiable, recognizable, out-of-pocket pecuniary loss to a victim of crime and where the defendant has a demonstrated ability to pay. The defendant's ability to pay should be measured in the same manner as in the assessment of a fine. If an order of restitution is made, payment by the defendant of the restitution should have priority over payment of any fine which may also be assessed. An order of restitution should not preclude any subsequent civil suit for damages, including pain and suffering, which may be brought by the victim against the defendant.

The calculation of the amount of restitution should be a two-step process. Initially, the pre-sentence report of the probation officer should include a determination of the actual pecuniary loss suffered by the victim. If the defendant objects to the calculation, a hearing should be conducted limited solely to a computation of the actual out-of-pocket expenses incurred by the victim. The hearing should be structured as a summary proceeding, with a standard of proof being simply by a preponderance of the evidence. Paid bills and receipts for payment should be admissible into evidence. Repair estimates and a survey of present replacement costs for damage or destroyed property should be accepted. A prompt resolution of the issues should be mandated and sentencing should not be delayed.

COMMUNITY SERVICE:

Questions Presented:

*How should an effective community service program be structured?

*What types of offenders will benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals of sentencing?

We believe that community service is properly a condition of probation and should be utilized in situations where a pressing need of the community may be serviced by a particular defendant's skills or abilities. Accordingly, a businessman with financial expertise might be assigned to perform service for local not-for-profit corporations, charities or government agencies.

Community service may also be appropriate as an educational tool for defendants notably by having them witness firsthand the consequences of their criminal activity. For example, those defendants convicted of driving while intoxicated who are not to be incarcerated should be required to perform service in hospital emergency rooms administering to automobile accident victims.

However, simply to use a requirement for community service as punishment, that is, to in some manner require a defendant to simply spend time doing busy work as an infringement on his free time seems to be an ineffective sentencing strategy. It is better to jail such a defendant intermittently, on weekends, for a much shorter duration of time to make the same point.

HOUSE ARREST:

Questions Presented:

*Is this a viable alternative to incarceration? If so, under what circumstances?

We do not believe that house arrest is a viable independent alternative to incarceration. It is a device which makes headlines every time it is used as a sentencing alternative and it gives the appearance of being farcical in its execution. It simply does not serve any deterrent purpose and may even be counterproductive in that it gives the public the appearance that it is unenforceable. It is believed to be far better to utilize the conditions of probation to make great restrictions on a defendant's behavior, travel or movement than to create a wholly separate sentencing alternative.

Home detention may be a valid sentencing alternative for non-detained juvenile offenders when it can be adequately monitored.

We hope that the views we have expressed herein are helpful to the work of the Commission. If you require any additional information, please do not hesitate to contact the National District Attorneys Association.

Very truly yours,

Richard J. Arcara

RICHARD J. ARCARA
DISTRICT ATTORNEY
CHAIRMAN, NDAA COMMITTEE
ON SENTENCING STANDARDS

RJA/kjv

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROBATION OFFICE

DORIS HALLIDAY-CANNATA
CHIEF PROBATION OFFICER

U.S. COURT HOUSE
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June 25, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

Thank you for your letter of June 17, 1986 on the subject of sentencing options. I am pleased to be able to forward to you the following thoughts and observations.

Integration of Available Sentencing Options.

Some probation officers in the Federal system consider their sentencing recommendations in the framework of what would be the least restrictive sentence available to achieve the ends sought by court and society in a particular case. If the goals of punishment, deterrence and, sometimes, rehabilitation are met through a fine and/or probation, such sentence will seem appropriate to many. If, in a more serious crime or an act of a more dangerous offender, priority goals of deterrence and punishment can only be met through imprisonment, such a sentence will be suggested.

In general, defendants with whom I am familiar do seem to share a traditional view of monetary sanctions (in amounts proportionate to ability to pay) as the least severe sanction currently imposed by our courts. Next in line in the lenient-severe spectrum of current sanctions is probation, with the moderate limitations on personal liberty which its conditions may impose. My experience and intuition tell me that combinations of monetary (fine, restitution) and probation sanctions probably aren't viewed as any more severe than any other probation sentence, but certainly as more severe than a purely monetary sanction. Combinations of incarceration and probation ("split sentences" and "Public Law" cases) are next most severe; and straight custody cases (with or without monetary sanctions) are most severe. In cases of custody with monetary sanctions, my view is that frequently the offender's family and not the offender suffers the additional burden imposed by the monetary sanction. The offender's loss of liberty often is devastating to

him or her, and deterrent, punitive and rehabilitative goals may all be realized simply with the imposition of custody. The loss of the wage earning offender, coupled with disgorgement of family financial resources, may break the back of some families as the courts order the offenders to use their assets to repay their victims or to pay substantial fines. Thus, while the financial sanction may have real value to victims, it may have little additional punitive value to anyone but the offender's family. Situations like this frequently arise with Mail Fraud ("con man") cases in our district. In such cases, custody plus monetary sanction sentences are certainly considered the most stringent sentences of all.

My assumption in the above discussion is that our new sentencing laws will continue to be directed toward punishment, deterrence and rehabilitation to some extent. I may assume too much. In any event, I believe that a less to more severe continuum of sanctions has proved to have some deterrent value to those offenders with whom I have worked over the years.

Probation.

Intensive supervised probation might be defined as a probation period marked by frequent personal contacts between offender and probation officer and by close and structured supervision of offenders' activities in the community. It may also include special conditions which further limit probationers' freedoms within the community. To one degree or another, every officer in the Federal system has practiced some form of intensive supervised probation on particular probationers. Often, the probationer's risk of reoffending is the criterion that determines suitability for intensive supervision.*

Others for whom intensive supervision may be seen as appropriate are persons who are having special problems at some point during their supervision. They may demonstrate dependence on drugs or alcohol, they may suddenly become unemployed, they may become embroiled in family problems or they may experience an arrest or other conflict with law enforcement officials. Such incidents can be red flags for the probation officer, who may decide to intervene in the probationer's life with surveillance, supervision, counseling, referral to community resources, or simply with more frequent reminders of the tenuous liberty which probation represents to those who do not adhere to its conditions. In this sense, intensive supervised probation is a weapon in the probation officer's arsenal, the use of which is discretionary and the effects of which are less devastating than revocation and incarceration. Sometimes, it is impossible at the time of sentencing to predict who will experience these problems; so intensive supervised probation should be available as an enhancement to regular probation (with the court's concurrence) at any time during a probation period.

* Currently, our caseloads are divided into high activity and low activity supervision schemes determined by criteria said to reflect recidivistic potential.

There are certain types of cases which may be particularly well-suited for intensive supervised probation from the day of sentencing. These cases will include highly recidivistic financial offenses (bank embezzlement and mail frauds, in my experience) or unstable, yet not terribly dangerous actors in some other offenses. Such individuals might include drug addicts who steal checks from mailboxes, alcoholics with a substantial record of DUI convictions, young people whose instant offenses portend futures of escalating criminal activity, or mentally or emotionally unstable persons who have engaged in minor offenses on Federal land. The common thread running through these cases, in my view, is the need to find an effective method of intervention in what has been, or promises to become, a well-entrenched pattern of deviance. There are indigent "characters" in certain tourist-rich areas of my city who chronically badger visitors for handouts, thereby incurring the wrath of Park Police. Those "disturbers-of-the-peace" with whom we work are often in need of a multitude of services and sanctions: mental health or alcoholism services, housing, work or welfare benefits and firm controls on their interactions with strangers. An intensive period of probation supervision may address those needs and reduce the likelihood that our courts will have chronic future contacts.

On the other hand, there are young men and women from certain high crime areas of our district who become involved in serious crimes like drug dealing or bank robbery (often tangentially) because many of their community's most visibly successful citizens are openly engaged in those crimes. In selected cases of that nature, an intensive probation period might open the offender's eyes to educational or vocational options never encountered in the community (and not likely to be encouraged in prison), while the probationer's activities are closely monitored. The intensive probation option may be the best available sanction to reduce the number of future contacts this offender is likely to have with us as his or her adult life unfolds.

I believe that the circumstances militating toward intensive supervised probation would be difficult to codify, as they may represent subtle shadings of criminal orientation, neighborhood, future aspirations, demonstrated educational/career potential and manifest need for community services of the offender on the one hand, and the seriousness of the offense on the other. Perhaps it would be appropriate to leave the option of intensive supervised probation open to the court in any case where probation is not expressly prohibited by law.

The conditions of probation listed in Title 18 USC §3563(b) seem to cover the range of those likely to be needed in most intensive probation cases. A court could vary the intensity of the effect of probation in the number of conditions it attaches to the individual grant of probation. I would only suggest that condition number 10 explicitly include urine testing to detect drug or alcohol use.

Besides the number and type of probation conditions imposed, the frequency and quality of contacts between probationer and probation officer also would

distinguish intensive from routine supervised probation. Officers who practice both types of supervision now often use their increased contacts in these cases to monitor the client's community, family and employment behavior. They may spend more time in the field talking with neighbors, family, bosses and other community sources. Their contacts with the offender will almost certainly be more in depth and may encompass concerted efforts to help the probationer learn to solve problems without resorting to crime.

I hope that these thoughts have been helpful. I look forward to hearing from you if you want any clarification or amplification. Thank you for the opportunity to address you on this topic.

Respectfully submitted,

DORIS HALLIDAY-CANNATA
Chief U. S. Probation Officer

DHC:sg

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PROBATION OFFICE

DORIS HALLIDAY-CANNATA
CHIEF PROBATION OFFICER

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June 26, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

In reference to my letter dated yesterday, I would like to suggest that the Commission consider an additional condition of probation under 18 USC §3563(b) be imposed in appropriate routine or intensive supervised probation cases:

> The probationer will submit to reasonable searches of person, premises and vehicle by the probation officer.

This condition has been invaluable to us in maintaining effective surveillance of problem probationers. Thank you.

Very truly yours,

DORIS HALLIDAY-CANNATA
Chief U. S. Probation Officer

DHC:sg

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

ALVIN B. RUBIN
CIRCUIT JUDGE
SUITE 2440 ONE AMERICAN PLACE
BATON ROUGE, LOUISIANA 70825

June 23, 1986

Judge William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

In response to your letter of June 17, 1986:

Probation. In my opinion, intensive supervised probation, particularly for persons convicted of federal offenses, has been a failure. It requires more work than the results warrant. My intuitive judgments are the same as those reflected in a recent article in the Federal Probation Journal.

Fines. Fines should be the preferred sanctions for petty offenses and minor offenses. In addition, fines should be the preferred sanction for those offenses that do not require a mens rea.

In considering the actual amount of fine, the amount should not bear any necessary relationship to either the victim's loss, but it should be proportionate in some way to the offender's gain, taking into account not only the immediate offense but other similar offenses indicated by the pre-sentence report.

The offender's ability to pay might be determined by requiring the offender to file copies of income tax returns and by having the probation officer make some investigation of the offender's financial situation. In doing so, the probation officer should check such customary local sources as credit bureaus and banks.

If an individual offender fails to pay the fine, without reasonable cause, the sanction should be imprisonment. If an organizational offender fails to pay a fine, without reasonable

cause, there should be some provision for a "jeopardy assessment" of the kind permitted by the Internal Revenue laws.

Restitution. Restitution should always be permitted, and should generally be ordered, in situations where there is a direct monetary loss and in which the offender is in a position to make restitution. Restitution can, of course, be imposed in addition to imprisonment or community service--dependent upon the financial position of the offender and his earning power. The hearing to determine the appropriate amount of restitution should be conducted in the same fashion as a summary judgment procedure.

Community Service. Community service will not be effective without a supervisory staff that is motivated to achieve the results of the community service program. The question, "what types of offenders will benefit most from this type of sanction?" asks the wrong question. This is the way probation officers frequently frame their recommendations, but we do not impose sentences to benefit offenders. Whatever the objectives of the criminal law may be, this does not appear to me to be one. Instead, it seems to me the Commission ought to be asking, "when can the community benefit most from imposing a requirement of community service as an alternative to some other type of penalty?"

House Arrest. House arrest is a viable alternative to incarceration for persons who are the sole supporters of the family, non-violent, non-recidivists, and whose absence from the community would create a great hardship to their family. House arrest should not be imposed if it is not an adequate deterrent for the type of offense involved.

Very truly yours,



ABR/mr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PROBATION OFFICE

MICHAEL J. LUCIANO
CHIEF PROBATION OFFICER

207 U.S. COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007
(212) 791-0088

June 18, 1986

The U.S. Sentencing Commission
1331 Pennsylvania Avenue N.W.
Suite 1400
Washington, D.C. 20004

Dear Sir:

We are providing the following information for the Sentencing Commission's use, as it sees fit, in establishing sentencing guidelines. The suggestions that follow have been given by several U.S. Probation Officers in the Southern District of New York. I have also added some thoughts of my own.

CONDITIONS OF PROBATION:

Conditions of Probation in present form do not have a section listing various special conditions such as drug aftercare, alcohol treatment, gambling treatment or placement in a Community Treatment Center. The Probation Department could alleviate much of the paper work between the Judge and the officer if such an option was included on the Conditions of Probation, and the probationer willingly signed a "waiver form", the Judge only getting involved when the probationer refuses to agree to the special condition. At that point the Court would be notified and the sentencing Judge would make the determination as to whether he agreed or disagreed with the special condition of probation being requested by the Probation Officer.

VIOLATIONS OF PROBATION:

Technical violations of probation, particularly in failure to follow through with drug, alcohol, gambling or mental health treatment may not seem that serious when compared to new criminal behavior. However, failure to involve oneself in resolving some of these issues many times has led the person to commit crime in the first place. Continued avoidance of treatment does suggest that criminal behavior, if not actually occurring at the moment will more than likely occur in the not too distant future. The community in which the client lives, and may be the object of his/her criminal activity, feels the effects of these problems gone untreated.

Recommendation:

One Judge in each Court who would be assigned to hear Violations of Probation. The Judge should be thoroughly

familiar with current research on the causes of the addictions, and understand how the setting of parameters to aid the client in overcoming his compulsive behavior, need to be enforced if the individual is ever to confront his behavior.

COMMUNITY TREATMENT CENTERS:

It is suggested that Community Treatment Centers might have several functions performed by separate autonomous sections. The traditional Community Treatment Center (CTC) would continue to operate as a halfway house but would not accept the professional criminal and/or the white collar offender with ample community resources. The halfway house would be for those individuals who have little in the way of job prospects because of reduced educational level or drug/alcohol addiction. This division would be staffed by prison personnel. The clients referred to this part of the CTC would be held to Bureau of Prisons rules and regulations and violation of same would return them to the institution.

Another division within the CTC would be staffed by Probation Officers and entitled the Community Service Unit. It would deal with requests from non-profit institutions, hospitals, schools etc. for community service workers. The individuals referred for this unit would not need intensive counseling and community services but would be functioning well enough on their own to respond to requests from the outside community for their services. Accordingly, their time would be fixed and their success measured by the quantity and quality of services rendered to the community.

The third component of the CTC would be for those sentenced to probation; and the determination as to how long they were to spend in the CTC would be solely up to the Probation Officer, with the outside limit being set by the sentencing Judge. The program plan might include any or all of the following, depending upon the individuals needs: securing stable employment, remaining free from substance abuse of any kind and accepting marital counseling and medical treatment as needed. Failure to comply with the plan drawn up by the Probation Officer would result in a return to Court.

COMMUNITY SERVICE:

Community Service is a viable alternative to incarceration. It benefits the community in a number of ways:

1. Tax dollars are not used to feed, clothe and house an inmate.

2. Reduces jail overcrowding.

3. Specialized skills of offenders are put to good use in the community which is a repayment of sorts to the community wronged by the offender's actions.

4. Allows the offender to continue his employment and therefore avoid having to seek public assistance to maintain his family while he is incarcerated and allows him to continue to pay his taxes.

Attention should be paid to the number of hours given as part of a probation sentence. Unrealistically high hours might so interfere with his ability to maintain a regular job that the sentence would be counterproductive.

The Probation Officer should approve all community service activities and not allow the defendant to pick his work site independently of input from the Probation Officer.

Thank you for giving us the opportunity to share our thoughts with you.

Very truly yours,

MICHAEL J. LUCIANO
Chief U.S. Probation Officer

Victor P. Tyne

VICTOR P. TYNE, Supervising
U.S. Probation Officer

VPT:ms

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURTHOUSE
SEATTLE, WASHINGTON 98104

JOHN C. COUGHENOUR
JUDGE

June 24, 1986

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

Dear Billy:

This is in response to your letter of June 17, 1986. My comments on your questions are as follows:

PROBATION

I do believe that intensive, supervised probation is a worthwhile tool which should remain available to sentencing judges. Your second question regarding the type of offenders and forms of supervision is more difficult to answer. In most instances, violent offenders should not be eligible for this treatment, and it should probably be used only in those instances where there is a reasonable chance of success. Prior record (whether the person has violated an earlier probation), family support, perceived remorse, and the existence of dependents are some factors that might be considered.

In my view, these decisions are best made by the sentencing judge at the time of sentencing, with input from the Probation Office. The sentencing judge, with his or her exposure to the facts of a trial or sentencing allocution, is able to deal most effectively with these issues.

FINES

Whether a fine is a preferred sanction depends upon the nature of the offender, as well as the nature of the offense. While a particular offense may sometimes be well-suited for a fine (for example, a commercial fishing violation), a particular offender may be deserving of incarceration due to the blatant nature of the offense, or the prior record of offenses.

The factors relevant to calculating the amount of the fine should include the nature of the offense, amount of offender's gain or victim's loss, and the offender's ability to pay. I fail to see how any one of these can be singled out for particular emphasis without knowledge of the facts surrounding the particular case.

RESTITUTION

A general response to your questions regarding restitution is difficult. I do believe that restitution should always be considered where there has been a loss suffered by a victim. Beyond this generalization, more specific answers depend upon the individual situation encountered by the sentencing judge. The current approach to determining the amount of restitution has not been an undue burden on the courts, and seems to satisfy the offender's entitlement to due process. In all but a very small number of cases, the amount of restitution is easily calculated or not in dispute.

Restitution and imprisonment seem to be mutually exclusive, unless a period of probation can follow institutionalization. Restitution and community service can be accomplished at the same time if the amount and schedule of community service are designed to permit employment, or if the offender's assets permit restitution regardless of employment.

COMMUNITY SERVICE

An effective community service program is best structured through the Probation Office. Essential to such a program is familiarity on the part of the Probation Office with agencies which are willing to supervise community service, and a clear understanding on the part of the offender that the obligation of community service is not to be taken lightly. I prefer to have written, independent confirmation on a monthly or quarterly basis that the service is being performed as scheduled. This avoids a last minute appeal that the service cannot be performed in the remaining period of probation. I also make it clear that community service is an alternative to incarceration, and I do not hesitate to revoke probation in the event the community service is not performed.

HOUSE ARREST

I have reservations whether house arrest is an effective sentencing tool in any but the most unusual cases. For many defendants it would result in a period of time filled with no meaningful occupation beyond TV and Bon Bons.

I hope these comments are of assistance to you. I must say I find many of the questions are hard to deal with in the abstract. I am sure you are having the same problem with this awesome responsibility, Billy.

Very truly yours,

John C. Coughenour
United States District Judge

JUSTICE FELLOWSHIP
Post Office Box 17181
Washington, D.C. 20041
703-759-9400

June 26, 1986

The Honorable William Wilkins
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Judge Wilkins:

We have been following with great interest news reports concerning the progress of the U.S. Sentencing Commission, particularly as it has explored community service and other alternative sentencing approaches.

Let me renew our offer to assist you and your staff in any way possible as you continue to work.

I have recently written a book, Crime and Its Victims: What We Can Do, which makes a case for using restitution, community service and reconciliation programs for first-time and nonviolent offenders. This will be released this month by InterVarsity Press. I would be happy to send you a copy if that would be helpful to you.

I look forward to working with you and your staff in the coming months.

In His service,

Daniel W. Van Ness
President

DWV:jhs

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE
PROBATION OFFICE

BARRY W. POLSKY
CHIEF PROBATION OFFICER

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June 27, 1986

Mr. William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue
Suite 1400
Washington, D. C. 20004

Dear Chairman Wilkins:

Thank you for your letter of June 17, 1986. The following are my thoughts, feelings, opinions about the complex issues to be discussed by the Commission at the hearing on July 15th, 1986.

Probation

*I don't feel intensive supervised probation satisfies the requirements of T. 18, USC., Section 3553(a)(2)(A)(B)(C). More specifically if a defendant is considered to be so unstable, impulsive or anti-social that they require intensive community supervision I feel the risk they pose cannot be sufficiently controlled/diminished by intensive probation supervision. If on the other hand, the defendant does not pose a significant risk but the criminal act is considered to be so substantial that in the absence of intensive probation supervision they would be incarcerated; I do not believe the impositions of such a form of punishment would be perceived by the community as sufficient punishment to promote respect for the law or afford adequate deterremce to criminal conduct.

*If intensive probation supervision is an available sentence option I feel the Court within guidelines established by the Commission and based on the information developed by the probation office during the presentence investigation should have the final authority to impose such a sentence.

*It seems to me that the conditions listed in 3563(b)(1-19) are more than adequate.

Fines

*I can not think of any particular offense for which a fine would be as described in your letter, the preferred sanction. There are undoubtedly offenses which can be disposed of with simply a fine, such as organizational offenses or regulatory violations, but I hesitate to say that a fine is the preferred sanction.

*I believe a fine should reflect the offender's gain, and a victim's loss, if this can be determined with any accuracy or guantifield. In instances of violation of trust where the monetary gain and/or loss is not great the fine should take into consideration the extent to which the public's trust or confidence in the "system" has been adversely effected.

In regard to ability to pay I feel liquidation of tangible financial assets which a defendant obtained, as a result of the offense, should be considered as well as current and probable future income. However, I do not feel a defendant's fine should be so great as to jeopardize their ability to support themselves or their families

In regard to the question of how the determination should be made, if the defendant objects to the fine imposed on the ground that they lack the financial resources to pay it a hearing could be held, with the burden on the defendant to show that the fine exceeds their financial capability to pay it.

*The current sanctions: extension of probation; incarceration or; allowing the criminal fine to be converted to a civil obligation.

Restitution

*Restitution should be ordered when there is an identifiable victim(s) as described in T. 18, USC., Section 3579. To facilitate the imposition of a restituion order the issue of restitution should be addressed whenever possible in the plea bargain. If an agreement cannot be reached at this stage then the Court, based on the information contained in the presentence report should order restitution as prescribed in 3579. If the defendant objects to the restitution order they should be afforded an opportunity to file a motion for reduction of sentence. A hearing could then be scheduled with the burden on the defendant to show that the order is excessive, unfair, unreasonable, etc. If the restitution issue is complex, depositions could be taken prior to the hearing.

In regard to combining restitution with imprisonment, if this question refers to a prisoner making regular, substantial payments while incarcerated I feel this is generally not possible. More specifically, I am not aware of any work release programs within the Bureau of Prisons and the income potential within the prison industries system is too small for a prisoner to make significant restitution payments while incarcerated. However, provisions could be established that provide a prisoner will be required to pay a fixed percent of whatever income they do earn while incarcerated.

In regard to community service I assume this means a defendnt would perform some type of service for a victim in lieu of money or property. I feel the circumstances which would make this desirable or feasible are so unusual and rare that this issue does not warrant consideration by the Commission.

Community Service

* In large offices one officer should be responsible for developing and supervising community service programs. Probationers should be required to submit written verification of the hours they have performed, signed by the person who is responsible for the supervision of their community service. The probation officer responsible for the supervision of the probation should make certain that the probationer has fully disclosed his/her record to the organization under whose auspice the community service will be performed.

* First offenders; non-violent offenders; those offenders who have a strong feeling of guilt or remorse about their offense and conversely those who, while acknowledging their guilt, assume an attitude of arrogance towards their community supervision; white-collar offenders.

I do not believe community service should be imposed in lieu of incarceration and therefore, those offenders who would have been incarcerated, "if not for community service," should be incarcerated. In addition, I believe community service is not appropriate for: chronic offenders; violent offenders; chronic drug abusers and; offenders who have a social/personal history which indicates a poorly developed sense of personal resposnibility (i.e. sporadic employment history; limited education; rarely, if ever maintained personal residence; not supporting legal dependents).

House Arrest

*I have had no experience with this sanction and have read very little about its implementation. I feel it has a place in the criminal justice system but should not be used as an alternative to incarceration except in cases involving exceptional case circumstances (i.e. extremely poor health of the defendant; defendant's offense does not demand incarceration and while the defendant appears to be a suitable candidate for probation, the Court feels a degree of punishment is indicated).

Conclusion

While I believe a range of sentencing options is desirable my experience has taught me that as the number of options increase the opportunity for disparity in sentencing increases proportionately. In addition, and perhaps more importantly, the public's attitude, as well as the feeling among those who have been sentenced becomes increasingly cynical about "justice." (i.e. it's who you know).

Sincerely,

E. A. Mayhew

Eugene A. Mayhew
U. S. Probation Officer

EAM:ams

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PROBATION OFFICE

FRANK S. GILBERT
CHIEF PROBATION OFFICER

U.S. COURTHOUSE
620 S.W. MAIN, RM 433
PORTLAND, OREGON 97205-3088
503-221-2117

June 24, 1986

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

Dear Judge Wilkins:

Thank you for your letter of June 17 and the corresponding opportunity to express my views concerning the appropriateness and availability of various sentencing options. Before responding to your specific questions, I take the liberty of espousing a proposed sentencing philosophy--utilitarian in nature--which I hope will assist you to understand and on which I base my responses to those questions. It is as follows:

> Title 18 USC 3553(a) sets forth the statutory purposes to be achieved in sentencing a criminal offender. These include reflecting the seriousness of the offense, affording adequate deterrence to criminal conduct, protecting the public from further crimes of the defendant, and providing correctional treatment.
>
> Thus, the foremost responsibility in selecting an appropriate sanction is to determine if the concepts of crime severity, deterrence and/or community protection apply in a given case to the extent that incarceration is required. If these concepts (e.g.--the needs of the community) are not applicable, have otherwise been satisfied, or if substantive mitigating factors exist, attention may then be appropriately directed to the other statutory purpose of sentencing--correctional treatment. In the latter instance, probation is the most appropriate disposition.

Turning now to your specific questions:

Probation

. The concept of "intensive supervised probation" must be evaluated in the context of what probation can or cannot be expected to achieve. Probation is clearly not a sanction intended to reflect the severity of a crime; the general public's perception of probation is such that it will probably not achieve general deterrence; specific deterrence is possible to some limited degree, primarily via the underlying threat of revocation and/or by imposing a jail term as a special condition; probation will not protect the public from the dangerous offender, but may afford some degree of protection from the property offender by imposing special conditions relating to employment, associations, requiring fiscal records, etc. In my view, the primary purpose of probation is clearly correctional

treatment, and this is achievable via eliciting the offender's compliance with varying degrees of external controls imposed by the Court and the probation officer while, concurrently, affording him/her opportunity to mature and achieve self-improvement via officer services and/or referrals to appropriate social service agencies.

If one tends to agree with the foregoing, there appears little purpose to be achieved via "intensive supervision" except perhaps as an effort to accelerate the correctional treatment processes. I respectfully suggest that recent trends toward intensive supervision (and "house arrest") are motivated to reduce prison overcrowding and/or by other fiscal constraints rather than being based upon sound correctional practices. (Needless to say, there are others who hold a much different view.)

Also, "intensive supervision" tends to suggest an element of specific deterrence and, theoretically, the concept of probation could be altered to include sufficiently onerous and punitive conditions as to achieve that purpose (although probably at the expense of correctional treatment). But, is there presently any real reason to do so? Perhaps at such time as Congress decides it has become too costly to incarcerate offenders for deterrent purposes we should consider such a proposal. As matters now stand, however, I believe that a relatively brief jail term for offenders who have the capacity to associate cause-and-effect is the best method of achieving both specific and general deterrence.

. Because the Comprehensive Crime Control Act does authorize the Court to impose a period of post release supervision, perhaps these are the kinds of cases (if any) in which "intensive supervision" might be appropriate, at least during the initial stages of that supervision. In such instances, special conditions designed by the Sentencing Commission should probably emphasize surveillance and control measures as, indeed, these individuals will constitute the high risk category of our clientele.

. The probation conditions contained in 18 USC 3563(b)(1-19) appear to sufficiently address any perceived problems or needs during the supervision regime. I would further suggest, however, that the Commission seriously consider adopting conditions #15 through #20 as standard conditions for any individual who is placed under supervision. To do otherwise will surely diminish the probation officer's ability to carry out his/her statutory and professional responsibilities.

Fines

. I respectfully suggest that fines are the most appropriate sanctions in criminal matters involving organizations and corporations. Indeed, their very existence is designed to achieve financial gain and therefore, when deterrence is the predominant sentencing purpose to be achieved, diminishing that gain or profit is both a meaningful and appropriate sanction. This same rationale, of course, applies in those cases in which the defendant has been identified as a member of any organized crime group, although the fine in these instances must be in addition to other appropriate sanctions.

. In sentencing organizations or corporations, I believe the amount of the fine should be commensurate with the organization's gain as the result of its criminal

activity. Further, it should be commensurate with the victim's loss in those cases in which the victim is the government, in which the victims cannot be identified and/or to attempt to determine victims' restitution would unduly complicate or prolong the sentencing process. (See 18 USC 3663(4)(d).)

As to individual defendants, the actual amount of the fine will necessarily depend upon those factors set forth in 18 USC 3572(a) which include his/her income, earning capacity, financial resources, the burden of such a fine on his/her dependents, restitution arrangements, etc. Frankly, this is a particularly troublesome area for probation officers. In many instances, government agents have unsuccessfully worked for many months in an effort to identify hidden or concealed assets. Concurrently, the defendant has worked just as long and hard to conceal his/her ill-gotten gains. Probation officers cannot and should not be expected to provide a thorough and accurate financial picture of the defendant in the short time allocated to prepare a presentence report. We simply do not have the resources or expertise to do so. Instead, I believe you will find that the financial sections of many presentence reports will, in fact, reflect simply what the defendant has chosen to report. In my view, this problem renders this particular section of the law to be ineffective, at best.

. There are civil remedies set forth for satisfaction of an unpaid fine contained in 18 USC 3613. In cases in which a fine is the only sanction imposed, perhaps these provisions are sufficient to deal with the issue at hand.

When fines are imposed as a condition of probation, however, any flagrant disregard toward fulfilling that obligation may well require resentencing as provided in 18 USC 3614. Individual circumstances will determine the alternate sanction to be imposed. In my view, failure to pay the fine should be treated as any other probation violation matter.

Restitution

. Except for those considerations set forth in 18 USC 3664(a), the spirit and intent of 18 USC 3579 appears to require that restitution be ordered in every instance in which an identifiable victim sustained a loss. Indeed, the Court is required under subsection (a)(2) to state on the record the reasons why if no or only partial restitution is ordered.

. As you are aware, a victim impact statement is required as part of the presentence investigation report. Under proposed revisions of Rule 32 (presently under consideration), attorneys for the defendant and the government would be required to meet with the probation officer prior to the sentencing hearing in an effort to resolve any disputes concerning the factual content of the presentence report. Presumably, this would include discussions concerning disputes regarding the victims' claims as to loss or harm sustained as the result of the criminal act. If a Court hearing is deemed necessary thereafter, the burden of demonstrating the victim's loss rests with the Government (18 USC 3580(d)).

. Again, 18 USC 3579 appears to require restitution in addition to a period of imprisonment unless certain factors exist to preclude such an order. Similarly, 18 USC 3563(a)(2) mandates community service in any felony case in which neither

restitution nor a fine is required. Thus, some combinations of these sanctions are required regardless of the desirability thereof.

Theoretically, I do not perceive restitution as being intended to achieve any of the purposes of sentencing previously described herein. Instead, it is intended to address the fundamental concept of compensating the victim for his/her losses (although the inherent element of reparation may well compliment correctional treatment in individual instances). Therefore, I suggest that restitution be required when applicable in addition to whatever sanction is necessary to achieve the predominant sentencing purpose.

Community Service

Once again, I would respectfully defer to a monograph entitled "Community Service: A Guide for Sentencing and Implementation" which has or will soon be promulgated by the Probation Division, Administrative Office of U. S. Courts. The expertise of the individuals involved in preparing this monograph far exceed any contribution I can offer in this area.

House Arrest

I do not believe that house arrest is a viable alternative to incarceration for reasons previously described herein. If house arrest has any meaningful role to play in the criminal justice system, I suggest that it be imposed as a condition of the defendant's pretrial release when applicable.

I hope at least some portion of the foregoing will be useful for your purposes and, again, I appreciate this opportunity to express my views.

Sincerely,

Frank S. Gilbert

United States District Court
DISTRICT OF ARIZONA
UNITED STATES COURTHOUSE
PHOENIX, ARIZONA 85025

CHARLES L. HARDY
Judge

June 20, 1986

The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

In response to your letter of June 17, 1986, soliciting views on the sentencing options available and appropriate for a person convicted of a federal offense, I have the following suggestions:

Probation

Some form of intensive supervised probation should be available to a sentencing judge. A person who in all likelihood would be placed on probation anyway should not be placed on intensive supervised probation. It should be reserved for persons who probably should be sent to prison but there are compelling reasons why incarceration may be inappropriate. Those reasons might include the offender's health, the offender's responsibility for the support of a family, the necessity of restitution, the offender's key role in a business or other organization, and the offender's age. These designated reasons are not meant to be inclusive.

A person on intensive supervised probation obviously requires more supervision than the normal probationer. In many cases it may be necessary for the probation officer to meet with the probationer on an almost daily basis. It may be necessary to enlist the cooperation of employers so that the probation officer can be informed as to whether the probationer is regularly reporting for work. It might be appropriate to limit the number of persons with whom he associates. (It is a common condition of probation to forbid a probationer to associate with persons whom he knows have criminal records or engage in any type of criminal conduct, but an intensively supervised probationer might also be required to not have contact with persons who are not necessarily criminals.)

An intensive supervised probation will be more expensive than the normal probation services. The program will not succeed if it is funded on the same basis as a normal probation program. However, the additional costs

will be greatly offset by the savings in costs of incarcerating persons in a penal institution.

The concept of intensive supervised probation is really in its infancy. The Commission should simply recommend to Congress that it be authorized. The sentencing judges and the probation officers should be given broad discretion in determining who is to be placed on supervised probation and the nature and extent of the supervision.

Fines

A fine as a preferred sanction might be appropriate in any case where a victim has not suffered physical injury and the offender is capable of paying both full restitution and a fine.

I cannot think of any elements that should be considered in calculating the actual amount of a fine in addition to the factors set forth in 18 U.S.C. § 3572(a).

In order that an offender's ability to pay be determined, he should be required to submit copies of his latest income tax returns, financial statements, and bank statements. He should also be required to sign necessary authorizations to permit the probation officer to make inquiries of financial institutions, motor vehicle divisions and other institutions that might have records of property owned by the offender.

I believe that the only sanction that can be imposed against either an individual or organizational offender for failure to pay a fine is to follow the procedures set forth in Chapter 229B of Title 18 of the United States Code.

Restitution

To the extent that an offender is reasonably capable of making restitution, he should be required to do so in every case where there is a victim.

I think the provisions of 18 U.S.C. § 3553(d), providing a presentence procedure for an order of restitution, are unfortunate. The procedure is unnecessarily cumbersome. Ordering restitution is not a new concept. Judges have entered such orders for years. Usually, in the course of his presentence investigation, the probation officer determine the nature and extent of the injuries to the victim and the offender's ability to make restitution. At the time of sentencing, counsel for both parties have the opportunity to comment on the accuracy of those provisions of the presentence report that might relate to restitution.

Section 3561(b)(1) authorizes a probation term for a felony of no more than five years. Section 3579(f)(2) requires that any restitution shall be paid not later than (A) the end of the period of probation, if

probation is ordered; and (B) five years after the end of the term of imprisonment imposed, if the court does not order probation. The effect of these statutes is to limit the sentencing judge's discretion as to how much restitution he would require. In many cases, it is unreasonable to expect the offender to make full restitution within five years. However, if an offender were to continue making restitution payments after the five years had expired, further restitution would be accomplished. I submit that a recommendation should be sent to Congress to modify the statute to permit longer terms of restitution.

Community Service

I know of no way that a community service program can be "structured." There are countless ways that a community service program can be effected. Whenever I have required community service, I have always left it to the probation officer to set up an appropriate program for the offender.

I think that community service should always be considered as a possible condition of probation.

House Arrest

House arrest should be a part of an intensive probation supervision program. A probation officer supervising the usual types of probation cases simply does not have the time to verify that an offender is complying with house arrest requirements.

Yours very truly,

Charles L. Hardy

CLH/js

746 U. S. POST OFFICE
AND COURT HOUSE
5TH AND MAIN STREET
CINCINNATI 45202

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

June 26, 1986

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

RE: AVAILABLE SENTENCING OPTIONS

Dear Chairman Wilkins:

I am writing to respond to your letter of June 17, 1986, in which you requested input on the sentencing options available and appropriate for the individual convicted of a federal offense.

Possibly, the most important philisophical decision the Sentencing Commission faces is that of arriving at an overall sentencing strategy. For sure, the Guidelines developed must be done specifically and with great objectivity so that the closest of scrutiny will render them consistent and fair. However, the question of an overall sentencing strategy seems to me to be a broader issue and one of much greater significance. For it is in this area where the discretion of the Judicial Officer at the sentencing process is defined. Will the Court have absolute discretion checked only by statutory limitations of the offense or will it simply input facts to a computer about the offense and the offender, which results in an electronically derived sentence?

In my opinion, the task of you commissioners is analogous to the walking of a tightrope. The Guidelines must be objective but must allow discretion of the sentencing Judge. Sentencing in my view cannot be an exact science because of the variables of human behavior and the circumstances and situations of people who come before the court are endless. Therefore, I would like

to see the sentencing Judge with the discretion, where allowed by law, to impose a sentence of probation or commitment within specified ranges based on the severity of the offense and the circumstances of the offender. The court should also have the option of utilizing restitution, fines, community service, curfew programs, house arrests, or other tactics as it sees fit and depending on the circumstances described in the presentence investigation report. I realize that the law precludes the use of probation in certain types of offenses but unless specifically precluded by statute it should be an option available to the sentencing court, especially in property offenses.

It is not pragmatic to think the Commission can rank all offenses where probation is allowable by law and then make a determination that persons convicted of less serious crimes can receive probation, while those involved in the higher severity rated crimes cannot. In the same vein, simply because a defendant has a perfect offender characteristics score should not mean that he automatically receives a probation sentence. Not only must one consider both the offense and the offender but numerous other varied sentencing purposes as outlined in Title 18, Section 3553(a)(2).

Generally, I think the Probation Officer should control the type of supervision rendered to a client. The Probation Service has developed a Risk Prediction Scale which is utilized to determine the activity level of supervision. They have also defined what high and low activity supervision levels mean. Discretion has been built in so that the Probation Officer can override the activity level called for by the predictive scale. Unless "intensive supervised probation" can be defined in a similar manner with research done to justify that type of supervision and research done to provide a predictor for the need for that supervision I would be in favor of leaving the decision of the intensity of supervision to the Probation Officer. At times the court may wish to order that a certain type of supervision be rendered by the Probation Office and at other times the Probation Officer may go back to the court when his or her efforts are resisted by the client to modify the conditions of probation to include a specific type of reporting regimen. Some methods

utilized in performing high activity control type supervision might include the use of a curfew; physical surveillance of the individual; daily reporting to the Probation Office; regular unscheduled visits to the probationer's home, employment, or other locations; regular or unscheduled visits to collateral sources about the defendant, including family members, friends, coworkers, local police, etc.; advance verification of all travel outside of the judicial district; verification of all sources of income through obtaining paystubs, wage statements, and tax returns from the defendant or employers; regular urine surveillance of a probationer to determine the use of alcohol or drugs and others.

I have reviewed Title 18, Section 3563(b) and have come up with six additional conditions which a court may consider placing on a probationer.

1) **Permit confiscation of contraband observed by the Probation Officer in plain view and under the apparent control of the probationer.**

2) **Submit to an examination of the body to detect signs of substance abuse.**

3) **Supply the Probation Officer with certain records such as tax returns, business books and records for examination by the Probation Officer.**

4) **Disclose his or her conviction to a third party where a risk to that party is caused by the probationer's relationship with that person.**

5) **Serve a curfew at the direction of the Probation Officer or the court.**

6) **Be released to the supervision of a third party who would be responsible to report apparent probation violations or infringements to the Probation Officer.**

Fines as a sentence are meant to be punishment and I believe that the sentencing Judge should have the

discretion based on the circumstances available to him at sentencing in determining whether to utilize this sentencing option. The use of the fine should not be limited to a certain type of crime but as indicated should be discretionary. The ability of an offender to pay can be determined through the presentence investigation and it is apparent to me that the role of the Probation Officer in conducting financial investigations will become increasingly important with the implementation of the Guidelines. I cannot say specifically that the amount of the fine should bear a particular relationship to the offender's gain or the victim's loss but the amount of the fine should not inhibit the ability of the offender to pay restitution to the aggrieved parties. If a defendant fails to pay a fine and it can be determined that he has the ability to pay, then he should be jailed. Also, the court should have the power to foreclose on assets that he possesses or place liens on property to insure that its fine will be collected.

I believe that restitution should be ordered in all cases where there is a victim and where there is any hope that the defendant can make the victim whole. An order of restitution should be treated in the same way as a fine order even to the extent that a person could be made to stand committed until such time as a restitution order is satisfied. The Victim and Witness Protection Act sets out the obligations of the various parties in a disputed restitution matter. The presentence report should be utilized by the Court in the sentencing hearing with the defendant briefing his position relative to restitution and the government theirs prior to the sentencing hearing. The court would then order restitution utilizing its sound discretion and the facts developed through the presentence investigation process. As mentioned previously, restitution can be combined with imprisonment when there are assets available and the defendant is unwilling to pay by having the court require the defendant to stand committed until such time as the restitution is paid. Restitution and community service can be combined in a way where the completion of community service can go to diminish the amount of restitution owed, especially in the cases where the government is the victim.

I think the Probation Service has the experience, expertise, and ability to structure an effective community service program for the courts. Offenders with skills to offer community service organizations and with time to complete community service are the most viable candidates. One must also give consideration to the third party risk issue and insure that the placement of an offender in a particular agency does not pose an undue risk. Certainly offenders without skills to offer or where the sentence of community service will burden their ability to fulfill other more pressing aspects of the sentence, such as a fine or restitution, should not be ordered into this type of sentence.

House arrests, curfew programs, and electronic surveillance programs are currently in vogue and in my estimation can be used effectively for property offenders. Those offenders who have employment and the ability to pay restitution but yet need close monitoring and structure are perfect examples of the types of cases who would benefit from this alternative to incarceration.

If there are any questions about the contents of this letter or if I can be of further assistance, please advise.

Thank you.

Sincerely,

David E. Miller

David E. Miller, Supervising
U. S. Probation Officer

DM:np

United States District Court
Eastern and Western District
of Kentucky

Eugene E. Siler, Jr.
Chief Judge, Eastern District
Room 207, U.S. Courthouse
London, Kentucky 40741

Phone: (606) 878-6822

June 25, 1986

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

RE: Fourth Hearing Scheduled for
July 15, 1986

Dear Judge Wilkins:

In response to your letter of June 17, 1986, I have tried to respond to your questions raised, as best I can. In many instances, I feel that these options are not appropriate, but they should be available for the unusual case.

1. Probation

Intensive supervised probation should be an option, but there are few instances when I feel that it is appropriate. If the person needs intensive supervised probation, it may be that he should be incarcerated. Exceptions would be persons who may have cooperated with authorities and have backgrounds of drug or alcohol abuse, or extensive criminal records. If the Court wishes to release these persons, so that they would not be endangered by others in custody, they probably would be the appropriate candidates for such a program. I feel that the control and supervision that should be imposed would be to report as often as once a week, or more often, if necessary, to the probation officer and to go through drug and alcohol testing, if appropriate to the background of the offender.

I do not feel that the Commission should be involved in selecting which offenders are placed on intensive supervised probation, but that it should be left open as an option available to the Courts and the probation office. I have no suggestions for any further types of probation conditions not expressly listed in 18 U.S.C. § 3563(b)(1-19).

2. Fines

There are no crimes for which fines should be the preferred sanction, unless the Commission is considering minor

offenses. In that event, fines should be the preferred sanction, although incarceration is occasionally appropriate.

In calculating the amount of a fine, the Court should consider the aggravation of the offense, the amount of time to be served, the ability of the offender to pay and the gain to the offender or the loss to the victim. The offender's ability to pay can be determined either by the offender's net worth at the time of sentencing or his earning potential, if the Court feels that he has or is concealing assets.

If an individual offender fails to pay the fine, he can be incarcerated if the Court feels that he has been financially able to pay. If he is struggling with his ability to pay, the Court should consider extending a period of probation, if appropriate, with a condition that the offender pay the fine during that period. In the case of an organizational offender, if it fails to pay a fine, I frankly do not have any good suggestions on what sanctions may be taken against it. If it has the ability to pay, it usually does pay, and the only sanction is to fine it further.

3. Restitution

The standards for restitution are already set out in 18 U.S.C. §§ 3579-3580. Restitution should be ordered where the loss to the victim can be ascertained without unduly prolonging the sentencing, but that has been a problem on several occasions in my Court. Restitution can be effectively combined with community service, by requiring the offender to perform community service and to pay over any compensation he might receive in the community service to the victim. I do not know how it could be effectively combined with imprisonment, unless there was some way whereby the compensation received by a prisoner for prison industries could be paid in part to the victim. That might require additional legislation, but is a suggestion which might be appropriate to implement.

4. Community Service

An effective community service program can best be handled by the Probation Office working with public agencies. They must find out what is available and how often these agencies will take voluntary workers. The types of offenders who will benefit most from this type of sanction are those with better skills and who are first offenders. I do not think that community service is appropriate where the person has committed a violent crime or a crime involving drugs, as they are not trustworthy enough to be placed on community service.

5. House Arrest

We have not experimented with house arrest, although it has been used by the state courts in Kentucky. If there were

means of policing it, such as using some type of bracelet on the offender, it might be appropriate in cases where the offender has a history of alcohol abuse and the Court wants him or her to stay at home except when working.

Sincerely,

Gene

Eugene E. siler, Jr.

United States District Court

Southern District of Texas

Filemon B. Vela
Judge
P. O. Box 1072
Brownsville, Texas 78520

June 26, 1986

Hon. William W. Wilkins, Jr.,
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1200-A
Washington, D. C. 20004

Dear Judge Wilkins:

Herewith are my responses to your inquiry of June 17, 1986. Please continue to assess them as submissions which simply reflect some of my opinions.

Probation

Intensive supervised probation should be imposed on certain types of federal offenders. Numerous situations come to mind. No Judge fails to face cases which in normal course call for confinement but there exist such demanding circumstances that justice requires a reluctant granting of probation. It may entail a medical or family setting that would cause undue hardship. Further, there are Defendants who suffer from personal, emotional and other problems such as drug or alcohol abuse, relationships or general inclinations which make for very close monitoring. In addition, there do arise those cases where interests would best be served by a very regimented plan of supervision. Forms of control and supervision can include a constant communication and verified reporting of conduct. Employers, family members, clergypersons, or friends who take an interest can be utilized.

The Commission in establishing guidelines should consider the aforewritten and always lend the Court discretion to make a determination as the final, full particulars regarding the individual come only before the sentencing Judge. Probation officers should be acknowledged as a source that can give information and serve as potential "contactees" with the probationer. They are invaluable and by taking a position known by the person being sentenced may create an instant trust which can be employed in accomplishing these objectives.

Although the recommendation on additional conditions of probation may entail the necessity for legislation, these could have positive impact from all standpoints. We currently have no provisions by which an offender can be taxed for probation costs, reimbursement for his court appointed attorney or court costs. These are all effective tools which can be used to cause the offender to pay the system for some of the expenses that he created but perhaps more importantly, have proven valuable in the discharge of their probationary commitments in other jurisdictions.

Fines

I suggest that crimes are not what should necessarily dictate the fine sanction but moreso, the defendant. There is always the individual who would be more appropriately punished by the imposition of a fine than alternatively. The profile of the individual, in general terms, is difficult to construct. One thing a Judge learns is that sometimes causing an individual to pay a fine was the greatest choice made whereas, with other individuals it served no purpose. Relative ability to pay is a factor. Reasonable restraints that may be caused is a factor. The effort that must be made by the individual to pay should be considered. In effect, the requirement to pay a fine can be a valuable tool in structuring the sentence with countless factors to be considered.

The actual amount of a fine should relate to objectives that are sought to be accomplished in the first place. If among factors a fine is appropriate, then likewise the amount of the fine should conform to those factors. Proper inquiries should be made such as, what will the fine do to the individual as far as our objectives in sentencing are concerned? How much should the fine be to serve the purposes of the sentence?

Most certainly with many other considerations, a fine should bear a particular relationship to the offender's gain and the victim's loss but fine sanctions should not be confined to cases where there were gains or losses.

It seems that an unfortunate problem has been created in that to revoke because of non-payment of a fine now may be a doubtful reality. One Judge intimates that in some cases the Court should not couch his sentence on expectations which he cannot do anything about and simply disregard any imposition of a fine that

the defendant will not be able to pay without a sacrifice. Present limitations reduce the "bite" to a "bark". In my Division, because of economic depression, imposing a fine is nearly an exercise in futility.

In assessing an offender's ability to pay a fine, it is submitted that similar to practices pursued to determine an accused's eligibility for free counsel, we have effectively rendered the system helpless. Often an individual who earns high monies is proportionately more obligated than one who earns less. When a State Judge, one of our County employees qualified for appointed counsel by any standard. The legal notion that individuals should suffer no more than any other because of financial circumstances introduces a most interesting legal and moral question when addressing the subject of fines.

If an offender fails to pay a fine the failure should be sanctionized the same as any other non-compliance with conditions of probation. Assuming that legal implications may preclude incarceration such additional conditions as extensions of the probationary period or the imposition of community service that could equate to the payment of a fine might be considered. If presently there are no legal mechanisms Congress might well arm the Government with the same faculties as it does taxing agencies so that the Payee can seek avenues to recover property in lieu of fines. This would hold true, likewise, for the organizational offender.

Restitution

As a rule of thumb restitution should be considered (ordered) in every case in which damages resulted to persons or property. The hearing contemplated by present law to ascertain the appropriate amount of restitution has not unduly complicated or prolonged sentencing but a procedure should under any circumstances be provided out of fundamental fairness. Time consumed should not be a factor.

If it is determined that a person who is incarcerated is able to make restitution, additional-conditional confinement is an approach to effectively produce recovery of damages.

In lieu of incarceration, in a proper case, an offender's inability to pay may be replaced with community service. The victim could assist in designating the plan of service for this process would translate to restitution.

Community Service

An effective community service program should be structured to benefit society. The offender is in effect being punished. He is in effect, perhaps moreso than while confined, giving society something in return. Community service has served our interests for it has been used to train the defendant and to shape and reshape his work ethic. Thus, the program can be designed to accomplish sentencing objectives if in being formed it adopts and does not lose sight of what we are attempting to effect. It should include a scheme in which the offender's problems can be addressed and coincide with good coming to a worthwhile institution. If it is a viable alternative then enumerating the reasons why it is a valid approach would result in the desired structure of the program.

Community service is of benefit to defendants who are otherwise unable to pay fines or restitutions. It certainly benefits offenders who need to preoccupy themselves. It can be used as a source of punishment. Further, it is a way in which close, supervised probation can be a fact.

In short, if there is a certain type of offender who cannot benefit from community service, for whatever reason, we should look to other alternatives. I would suggest that there are cases in which the safety of the community is in question. There are cases in which the history of individuals is one of defiance to all authority. There may also be mental or emotional factors which simply call for other possibilities.

House Arrest

This Judge has used house arrest with younger offenders but colleagues make use of it in other cases and it seems to fit a setting in which there are compelling reasons to allow the individual to remain free but still confined, in a sense. Perhaps, it would be well to define what "compelling reasons" might be considered by examples. Where a Judge does not feel that he wishes to subject an individual to jail for counter-productive results, this procedure lends itself depending on who controls the house. Younger, developing offenders would usually fall into this catagory. We have situations in which an older offender is necessary to provide for his family or there is an undue hardship

existent such as terminal or serious illness of the offender or his family members. There might be other profiles that would make a person deserving of this substitution for incarceration.

Very truly yours,

Filemon B. Vela

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30 June 1986

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

Re: Alternative to Confinement

Dear Judge Wilkins:

Thank you for your letter dated 17 June 1986 concerning the various options for the federal trial judge in determining the appropriate sentence for any individual offender. Although a structure which will provide uniform sentencing is desirable, it must also recognize the goal of individualizing the sentence. To this end, I strongly urge that you provide federal trial judges with reasonable discretion within the statutory frame work.

Our experience in the California state courts has been difficult: one of the few saving features of the 1976 Determinate Sentence Law was that it continued discretion to judges in the grant of probation. The federal approach would now seem to adopt the California approach. Given that orientation, I hope the U.S. Sentencing Commission will focus on a structured approach on commitments to prison (i.e., in excess of one year) and provide judges the maximum range of discretion on those offenses for which probation would be available.

Probation

Probation should be provided on the basis now available. It would be horrendous if the new "reform" system provided a "back-handed" approach to accelerated and increased confinement. The Senate consensus was that there should be consideration of the existing rates of probation now, so that there would be no radical change in the denial of probation causing an increase in our over-taxed prison facilities.

To adapt a phrase from the U.S. Supreme Court, I would suggest that there be a "cost-benefit" analysis of the use of intensive supervised probation. An argument could be made that

the alcoholic who passes bad checks or the shoplifter on a military reservation could be subjected to intensive probation supervision, but in many cases this would be a waste of federal funds.

Rather than create an intensive supervision unit that would Balkanize the already divided resources of local probation offices, the scheme of probation supervision should be adaptable to the individual. Monthly reports seem to be the standard technique now with occasional visits in many cases. Perhaps this is appropriate in the majority of instances.

Something more should be required for those who have committed a very serious or violent offense. In addition to "supervision" there should be some official assistance so that the individual will not be propelled back into the circumstances in which he committed the offense.

In a borderline case where the court has reservations about the grant of probation, the court should have the discretion to structure more intensive requirements (i.e., weekly contacts with the probation officer, daily phone calls, weekly visits by the probation officer to place of residence or work, drug tests, etc.). The intensive probation program should not be for those who are on parole,as we often have this in "mixed sentences" where the court imposes a term of confinement on one count and followed by a term of probation. This means the prisoner will be on parole and probation at the same time. That is an unnecessary use of probation (in California it is illegal to impose probation after a term of confinement because it is inconsistent with the purposes of probation and parole). It is a clear duplication of federal services.

The probation conditions now listed are so extensive, I would not see the advantage of listing other novel conditions. More importantly, the program should be structured to carry out the existing conditions in an effective and efficient fashion. Many of the probation offices are overloaded with cases and too ill-funded to provide even the simplest types of control. If the defendant needs psychiatric counseling, for example, the local probation officer should be funded to provide psychiatric care for those who cannot afford it (this is probably very prevalent among those convicted of the offense of threatening the President).

Before structuring regulations, I would urge a survey and evaluation of the resources available within the federal

probation system. Also, I cannot emphasize and repeat often enough that you should survey the type of federal offenses and gear your techniques of probation to that category of offense.

Fines

Fines have traditionally been imposed where there is little or no incarceration. The fine option should be maintained, but the U.S. Sentencing Commission has a serious responsibility to see that the enormous fine maximums are tailored to the wrongs done. There should be some type of review to insure proportionality of any fine to a particular offense. Approximately 70 percent of those charged with federal crimes are financially unable to employ counsel, and they receive the services of a federal defender or appointed attorney under the Criminal Justice Act (18 U.S.C. 3006A).

For those without funds, it would be a useless gesture to impose a fine, and it could be very counter-productive in seeing the individual become financially self-sufficient. Again I would suggest a survey of the fines now imposed as a general guideline of information for the imposition of such fines. I would be slow to recommend regulations which would interfere with the trial judge's discretion in this matter. However, I have some ideas as guidelines.

If the offender has counsel appointed under the Criminal Justice Act there should be a regulatory presumption that the individual does not "have the ability to pay." If the defendant has the funds for counsel, the court may direct such payment by the defendant. (18 U.S.C. 3006A(f).) The court now has to imposed the mandatory penalty assessment which, at $50, is too much for the poor Mexican charged with an immigration violation.

The machinery on fines has not yet been fully refined, but I think a great deal of relief could be provided if a certain category of cases were excluded presumptively from fines. This might ease the administrative burden of collecting fines in those cases where they are appropriate.

Many of those who are now subject to fines would have to litigate their "ability to pay" in either civil or criminal proceedings, which is a counter-productive use of our limited judicial resources. I would urge an administrative mechanism similar to that used by the Bureau of Prisons for those charged with fines that would permit offenders to establish their inabil-

ity to pay and thereby offset the mandatory statutory enforcement or in the alternative be a basis for asking the court to re-evaluate the imposition of the fine. This may cause a problem after the 120 days runs on Rule 35.

Restitution

Restitution should have priority over any fine. In addition to a determination of a specific loss related to the offense there should be some general guidance that if the cause of the loss or the amount of the loss is beyond efficient determination, then the limited resources of the court should not be exhausted in satisfying what might otherwise be the basis for civil litigation. If the loss is easily recognized, then the court can make it a requirement to be combined with probation and short terms of confinement. Protracted confinement usually precludes effective restitution enforcement.

If the individual has no assets or they are limited to support his or her family, then community service should be preferred if it would permit the individual to maintain or obtain employment. Restitution should be highly favored by the regulations, and should even take priority over the need for confinement save in serious and violent offenses.

Community Service

For the U.S. Sentencing Commission to devise regulations on community service is a classic example of putting the cart before the horse. You should sit down and talk to the Bureau of Prisons to determine the type of facilities that are now used and the available appropriations. The Gramm-Rudman legislation has seriously curtailed the use of community services by the Bureau of Prisons. Many contractors have lost their contracts with the Government to operate these essential and vital alternatives to confinement.

As a goal, 50 percent of all federal inmates should be in community treatment facilities. This is not an unreasonable expectation given the number that are already in federal prison camps (Level 1 security -- lowest level). The principle resistance has been from communities which do not want these facilities.

Again, I would strongly urge that a survey be done of the facilities operated by the Bureau of Prisons to get some insight as to those which are effective. Community Service

needs to be substantially expanded, but not at the cost of taking those who would otherwise receive probation and placing them into "token confinement." It provides effective supervision and in a sense is a form of "intensive probation supervision."

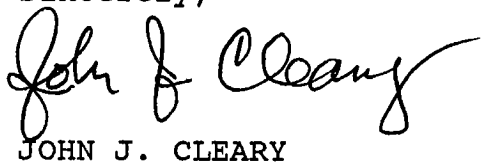
House Arrest

This alternative to incarceration is being explored by many local and state jurisdictions. The federal government could learn much from the experiment, and some innovative federal judges have already used it. It is very applicable in the case of mothers with children, invalids, those with serious medical problems, the elderly and others. The difficulty is in insuring that there is a form of "deterrence" attached to this "loss of liberty." The public would not take lightly the advantage of a corporate official living in a palatial estate while under "house arrest." The military has used this mechanism for many years, and much could be learned from their use of it.

The U.S. Sentencing Commission is in a unique position to reformulate the direction of our federal correctional system. Before it can go forward, it has to know what exists today and what was previously tried. It is also very important to identify the class of federal offenders in determining the rules and regulations that you will propose.

Thank you for the opportunity to comment.

Sincerely,



JOHN J. CLEARY
Attorney at Law

JJC:dd

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June 30, 1986

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

Dear Mr. Wilkins:

The following is in response to your letter of June 17, 1986:

PROBATION

There should be intensive supervision for those who commit violent crimes, involved in selling drugs, sex offenders, drug and alcohol abusers, and second offenders who are involved in fraud. This supervision in many cases would follow a period of custody.

The intensive supervision should be in the form of frequent personal contacts, but equally important is collateral contacts with significant others. Special conditions limiting activities also should be imposed to fit the crime or the conduct that is to be prevented.

The Commission should establish some basic guidelines for offenses that should have intensive supervision with the court imposing special conditions on the recommendation of the probation officer.

The special condition of submitting to reasonable search by the probation officer should be included. The imposition of this condition should be based on the offense or background information contained in the presentence report.

FINES

Fines should be the sentence of choice in first offense misdemeanors and in embezzlement cases of less than $5000.00 where restitution has been made. The alternative fines (18 USC 3623) and factors relating to imposition of fines (18 USC 3622) sets out adequately the things to be considered in imposing fines.

The sanctions in 18 USC 3621 is appropriate for failure to pay.

RESTITUTION

Restitution should be considered in all cases where there is a financial loss to any individual, group, business, organization, or agency. Also, restitution for compensation for physical and emotional harm and death should be considered.

The probation officer should, to the extent possible, resolve any disputes relative restitution prior to final sentencing. If there are unresolved elements, the probation officer should report to the court the areas of dispute and the attempts that have been made to resolve the controversy. The court should make a final determination through an appropriate hearing prior to sentencing so defendant can be aware of the maximum limits of punishment.

The making of the victim whole should be of primary concern in any sentencing. If the defendant is void of financial resources, in some cases services provided to the victim might be imposed to help compensate the victim. Also, moneys received from prison industries, during work release, or government checks received by the inmate might be payed to the victim.

COMMUNITY SERVICE

For community service to be effective the probation department will have to establish a list of basic agency resources. The agency and specific hours needs to be spelled out in the Judgment and Commitment. If possible, the service should be related to the crime. However, before this can be truly successful the issue of liability needs to be settled.

This type of special condition would have more impact on a white collar offender. It should not be used on violent and sex

offenders. Third party risk should always be a consideration. Also, present occupation can interfere with scheduling. For example a long distance truck driver who is away 60 to 80 hours a week.

HOUSE ARREST

House arrest may be appropriate in some unique situation. However, this type of sanction is very difficult to monitor and is subject to abuse. Nevertheless, this could be very cost effective when someone requires extensive medical treatment and the individual keeps the responsibility for their care.

Sincerely,

Jerone A. Savage
Chief U.S. Probation Officer

JAS/jd

Rand
SANTA MONICA, CA

24 June 1986

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

I appreciate your invitation to testify before the United States Sentencing Commission on the subject of sentencing alternatives. Unfortunately, I will not be in the D.C. area at that time.

I have enclosed a recent article I wrote on the subject of house arrests. I hope it will be of some use to you and your Commission.

Sincerely,

Joan Petersilia
Criminal Justice Program

JP:ar

Enclosure: Reprint, "Exploring the Option of House Arrest."

Exploring the Option of House Arrest

BY JOAN PETERSILIA

Senior Researcher, the Rand Corporation, Santa Monica, California

Introduction

IN DECEMBER 1985, Maureen Murphy was sentenced by a Federal judge in New York to house arrest. The rarity of this sentence in U.S. criminal justice is suggested by the judge's remarks:

> The sentencing of Maureen Murphy requires, in the court's opinion, a sentence not heretofore used in this District and almost never used in the country in the federal court. It is used elsewhere in the world and is considered by some to be highly objectionable. The difference, however, is that in other countries it is used to repress political dissent and before trial. Here it will be used after a full trial where the defendant has been found guilty of a serious offense. The penalty is house arrest.[1]

With that pronouncement, Judge Weinstein ordered Ms. Murphy to remain in her apartment for the next 2 years. She is allowed to leave her apartment only for medical reasons, employment, religious services, or to conduct essential food shopping. If she violates these conditions, the probation department is ordered to commit her to prison, where she will be required to serve out her suspended (not cancelled) prison term.

Ms. Murphy was not a minor offender. She was convicted of a large insurance fraud and faced a maximum 50 years in prison and $50,000 fine for her crimes. In most instances, the Federal court would have imposed at least a year in custody.

What motivated Judge Weinstein to make such an important departure from traditional sentencing practice? Judge Weinstein says he was trying to balance the competing aims of public safety, humaneness, and accountability—against a backdrop of seriously crowded prisons. Probation didn't seem like "enough" for this 35-year old woman who willfully committed a major theft. On the other hand, prison for this relatively young person with no prior criminal record seemed "too severe" and "would help destroy her." Given those conditions, he felt an alternative punishment was "essential."

Judge Weinstein and a growing number of his colleagues are searching for reasonable middle-range sentencing options—programs tougher than probation but less harsh (and less expensive) than prison. Variations on the theme include intensive probation supervision, shock incarceration, community diversion centers, police-probation surveillance teams, community sponsors, and, increasingly, house arrest.

Florida has the most ambitious house arrest program in the country, with more than 4,750 inmates "locked up" in their residence. As one Florida judge put it: "If the State can't afford to provide constitutionally acceptable prison space for all those who deserve it, why not utilize the offender's home instead? It may well be that the best place for a convicted offender, given current prison conditions, may be confined to his own home."

[1] From Judge Jack Weinstein's Sentencing Memorandum in the Maureen Murphy case (United States District Court, Eastern District of New York, December 1985).

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Many in the judiciary are echoing similar thoughts, and house arrest programs are beginning to spread not only in the Federal system but in state and local corrections as well. A recent survey of "Innovations in Probation" shows that several states—including Oklahoma, Alabama, Connecticut, Delaware, Indiana, Georgia, Texas, and South Carolina—currently operate state-run home detention programs. Similar programs exist at the county level in several others. In total, 30 states are implementing some form of house arrest program, and a dozen more are planning programs to be implemented in the next year.[2]

This article summarizes the characteristics of house arrest programs and discusses their advantages and several important unresolved issues. It concludes by noting that probation's long-term survival may well depend on whether it succeeds in implementing house arrest and other intensive surveillance programs. If it can adapt its methods of supervision and service to deal with higher risk offenders in the community, probation may well find itself back in favor with the public and again the center of modern corrections policy.

Characteristics of House Arrest

While the goal of "house arrest" is easily understood—to restrict freedom—the mechanisms used to confine an offender to his home vary considerably. In some instances, curfews are simply added on to the offender's court-ordered parole or probation conditions.[3] Typically, offenders participating in an intensive probation supervision program are required to be in their residence during the evening hours and on weekends. For example, evening curfews are mandatory for participants in Georgia's intensive probation program. While curfews permit individual freedom in the community except for particular hours, more direct home incarceration programs totally restrict the offenders freedom *in all but* court approved limited activities. The latter is much more intrusive than the former.

But even with the latter type of house arrest program, stringency varies considerably. House arrest programs without electronic equipment to monitor compliance tend to be less severe. These programs rely, for the most part, on probation officers' telephone calls and random home visits.[4]

[2] Rand conducted a mail survey entitled "Innovations in Probation" which was completed by 120 chief probation officers in fall, 1985. These particular individuals were selected to represent a nationwide sample of chiefs from large counties. Followup telephone interviews were conducted with about 50 of these persons who reported operating particular innovative surveillance-oriented programs, including house arrest. In addition, the chiefs recommended others in parole or the private sector who operated similar programs. Complete results of this survey, sponsored by the Edna McConnell Clark Foundation, will be published in fall, 1986.

[3] While house arrest could be used pretrial, our discussion is limited to its use for convicted felons, either as a condition of probation or parole, a direct sentence, or a condition of release after some period of incarceration (e.g., on work-release from jail).

[4] Some counties are using nonprobation employees to monitor offenders. In Tulsa, Oklahoma, for example, the police are given weekly lists of all parolees on house arrest, their addresses, and curfew conditions. In addition, pictures of house arrestees are posted at the local police station. Police are encouraged to make random visits to the parolee's home and survey the offender's neighborhood to make certain offenders are in their residences. Other counties have used neighbors and community volunteers as "informants."

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Some house arrest programs have begun to use computers to help monitor compliance. In New Jersey, for example, the telephone numbers of house arrest participants are programmed into an automatic telephone call-back system. The computer continues to call the offender until contact is made. Some telephonic systems even ask the offender a prerecorded question. If the individual is not there to answer the computer generated phone call, or fails to provide the correct answer to the question (verified by a probation officer), then a violation is recorded.

The most stringent of the house arrest programs are those using electronic monitoring devices. One form of the technology—popularly referred to as "active" monitoring—requires the probationer to wear a small transmitter. The transmitter emits a radio signal which is picked up by a receiver attached to the probationer's telephone. During curfew hours, the computer automatically dials the offender's phone at random intervals to determine whether the receiver is receiving a signal from the transmitter. If so, the computer assumes the probationer is at home. If not, the computer registers a potential curfew violation.

Another version of the technology uses a passive wrist band instead of a transmitter. In this case, a computer dials the probationer's home during curfew hours, the probationer then inserts an identification bracelet worn on the wrist into a receiver attached to the phone, and the receiver sends a signal back to the computer. If the telephone is not answered, or the bracelet is not inserted into the receiver, the computer notes a potential violation.[5]

Who is Doing What?

The Rand "Innovations In Probation" survey revealed that about 28 states are operating formal intensive probation supervision (IPS) programs, of which house arrest is generally considered the most stringent type.[6] Georgia's IPS program is the oldest, begun in 1982, and our survey revealed that over half of the IPS programs nationwide report modeling themselves after Georgia's program. Intensive supervision in Georgia mandates curfews and offender employment, community service, routine alcohol and drug testing, and two to five weekly staff/probationer contacts.[7]

[5] For a more detailed discussion of electronic monitoring, see Charles Friel and Joseph Vaughn, "A Consumer's Guide to the Electronic Surveillance of Probationers," forthcoming, National Institute of Justice, U.S. Department of Justice, 1986; and "Monitoring Offenders at Work and at Home Through Electronics," *NIJ Reports*, November 1985.

[6] Nearly all states reported having intensive (or maximum) probation caseloads. We distinguish here between operating a formal IPS program and simply placing select offenders in reduced caseloads. The latter has been routine probation practice historically.

[7] For a description of Georgia's IPS, see Billie Erwin's article in this issue of *Federal Probation*, entitled "Turning Up the Heat On Probationers in Georgia."

As of this writing, several agencies are using active electronic monitoring. These include correctional agencies and private service corporations in Florida, Idaho, Kentucky, Michigan, New Jersey, Oregon, Utah, and Indiana. California and Virginia are planning to implement programs in summer, 1986.

All house arrest programs attempt to identify "low risk" prison-bound candidates. Some use formal screening devices (e.g., New York, Florida, New Jersey); others simply exclude defendants convicted of particular (usually violent) crimes. Some actively solicit the involvement of the community, whereas others hesitate about publicity for fear of community resistance. In most instances, offenders are charged a fee to cover some of the added expenses of house arrest, usually ranging from $15 to $200 a month, although in Oklahoma, no fee is collected. Most of these programs have been set up without formal legislation, although several states are attempting to develop a legal basis for house arrest (e.g., Kentucky, California, Maine). All house arrest programs stress surveillance and employment, and most require community service and victim restitution.

While these programs have received a great deal of media publicity, in actuality, house arrest has probably been used with less than 10,000 adult offenders nationwide. A large proportion of those participants have resided in Georgia, Florida, and Texas. Most of the participants have been property offenders, although Florida and Oklahoma admit offenders convicted of personal crimes. Persons convicted of "driving under the influence" are particularly favored house arrest targets, since keeping them at home, away from their cars, seems effective in forestalling their future crimes.

The Advantages of House Arrest

House Arrest is Potentially Cost Effective

While no definitive cost studies have been done of house arrest, it is thought to be highly cost effective. If the offender were truly prison bound, then the state would save not only the yearly cost of housing the offender (about $10-15,000 per year), but also the pressure to construct new prison facilities (at about $50,000 per bed).

If electronic monitoring equipment is used, house arrest is not as immediately cost effective. Because companies are trying to recoup some of the development costs, purchasing the initial equipment is currently quite expensive. For instance, Kentucky spent about $30,000 to purchase 12 electronic monitors. A cost evaluation of the program after 6 months concluded that the electronic monitoring had cost the county $10,000-$20,000 *more* than it would have spent if the 23 persons monitored had been sent to jail instead. However, if the system is used for 12 persons for an entire year, the cost comparisons reverse, and the county would save about $65,000.[8] Most agree with the manufacturers that in the long run home incarceration will be less expensive than institutional incarceration.

[8] "Home Incarceration with Electronic Monitoring in Kenton County, Kentucky: A Preliminary Report," by Robert Lilly and Jennifer Wright, unpublished draft, 1986.

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Using cost figures provided by some of those who completed our survey, we computed a rough comparison of costs per program type (see table 1).

TABLE 1.—ANNUAL COST OF HOUSE ARREST VS. ALTERNATIVE SENTENCES

Routine Probation	$300—$2,000
Intensive Probation	$2,000—$7,000
House Arrest (w/o electronics)	$2,000—$7,000
With Telephonic Call Back System	$2,500—$5,500
With Passive Electronic Monitoring	$2,500—$6,500
With Active Electronic Monitoring	$4,500—$8,500
Local Jail	$8,000—$12,000
Local Detention Center	$5,000—$15,000
State Prison	$9,000—$20,000

Not only are operating costs lower for house arrest than for jail or prison, but there are indirect cost savings as well. Offenders with families can contribute to their support, thus saving the state welfare costs the offender's family may have required. Most house arrest programs require the offender to be employed. Consequently, he continues to pay taxes and may be required to pay victim restitution and probation supervision fees as well. Georgia probationers paid $650,000 in probation fees last year, which was enough to totally offset the cost of the intensive probation program. Florida reported collecting $9.2 million in fees from its home detainees, although this was not enough to cover the costs of supervising them.

However, the figures in table 1 ignore an important cost component: the cost of reprocessing any recidivists. If house arrest participants are being rearrested and retried, then the system bears those reprocessing costs.[9] Recent estimates show that it costs an average of $2,500 to dispose of an arrest (Haynes and Larsen, 1984).

In short, we really don't have information to compute the full costs of various probation programs. At this point, all we know is that the costs of administering house arrest is less than confinement in either state or local facilities. But particularly with electronic monitoring, we must be skeptical of the claims supporting house arrest on the grounds that it is *much* less expensive.

A house arrest program in Contra Costa, California was cancelled, despite glowing reviews from all concerned, primarily because of expenses. After a 1-year trial, the house arrest program (without electronics) was deemed too expensive. "It turned out that it costs more to keep them in home detention than in jail," said Cecil Lendrum of the probation department. Jail overcrowding was not seriously relieved, and the sheriff's department was unable to reduce its staff. According to Rudy Webb, the program coordinator, the net cost to the county for 1 year of the program was $95,000.

[9] These operating costs also ignore the victim's cost, e.g., hospitalization, unemployment.

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House Arrest Can Be Tailored to Meet Local Needs

One attraction of house arrest is its flexibility. It can be used as a sole sanction or part of a package of sentencing conditions. It can also be used at almost any point in the criminal justice process. It can also be used as a diversion before an offender experiences any jail time, after a short term in jail, after a prison term (usually joined with work release), or as a condition for probation or parole revocations. It can be used to cover particular times of the day or particular offender types. Because the offender is usually on some type of suspended sentence, he can be quickly revoked and sentenced to prison if he fails to meet the conditions of his participation. House arrest programs, for the most part, do not require legislative changes and can be set up with administrative memoranda. They usually include rather easy to communicate conditions, enhancing implementation ease.

House arrest also has potential applications for offenders with special needs, e.g., the terminally ill, mentally retarded, those with AIDS. Connecticut is exploring its use for pregnant women. Currently, when women come to jail or prison pregnant, the facilities must have special arrangements to assure the physical well-being of both mother and child. Depending on the level of risk involvement, such a woman might be released to her home or the home of a relative during pregnancy. This would likely result in cost savings, as well as provide a healthier atmosphere for mother and child.

House Arrest Minimizes the Social and Psychological Costs of Incarceration

Most believe that house arrest programs are "socially cost effective." House arrest can prevent the breakup of the offender's family and family networks, with its consequent psychological and physical disruption that may traumatize the offender's family as well as himself. And if the defendant had a job, he could keep it.

Furthermore, any "criminogenic effects" associated with prison would be avoided. This benefit is particularly attractive, especially for first offenders who may not have committed themselves to a life of crime. They would not learn from career criminals in prison, nor would they be physically assaulted. Most of those operating house arrest programs view this as an important advantage. While prisons are not designed to scar inmates psychologically, that is an unfortunate concomitant effect of most prisons today. As the New York house arrest guidelines noted:

> Imprisonment returns a man to society with a scarred psyche, unpaid debts and financial losses, a highly disruptive if not irreparably broken family, children who lose respect for their parent, no job, and a gap in his life history that is hard to explain when he seeks a new job.

If we could devise a sentence *that would not compromise public safety*, and at the same time avoid such devastation, surely it would be preferable on this and other grounds as well. For example, prisons today are unable to provide extensive social and rehabilitative services. Offenders who remain in the community can be ordered (as a condition of their release) to undergo particular types of community based treatments. It is also probably true that rehabilitation taking place in the offender's own community has a higher probability of long-term success.

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Unresolved Issues

Most people believe that house arrest is less intrusive and less expensive than prison and thus worth trying. Yet, there are concerns about this trend. Victims' advocates argue that placing convicted offenders back in the community, however stringent the conditions, trivializes the nature of their crimes. MADD—Mothers Against Drunk Driving—has been particularly critical of house arrest and sees such sentencing as a step backward in efforts to stiffen penalties for drunk drivers. (Drunk drivers are frequent house arrest participants.)

Probation officers are often critical because such programs focus on guarding people instead of helping them. Civil rights groups fear that the technology will be abused and that the private sector will begin selling the equipment to extend surveillance not only to convicted criminals, but to undesirables (e.g., persons with AIDS). And nearly everyone is concerned with the public safety issue—will offenders simply escape or use their homes as the base for criminal operations?

These and related issues discussed below are becoming important, as counties begin to consider the pros and cons of implementing house arrest programs.

Widening the Net of Social Control

Nonviolent and low risk offenders are prime candidates for house arrest and are least likely to have been sentenced to prison in the first place. As judges become more familiar with house arrest, they may well use it for defendants who would normally have been sentenced to routine probation. Hence, a sentence originally intended to reduce prison crowding might instead "widen the net" of social control without reducing prison and jail populations appreciably.

Alvin Bronstein, head of the American Civil Liberties Union's National Prison Project said: "We should be looking for ways to place fewer controls on minor offenders, not more. If these devices are used as alternatives to jail, then maybe there's no problem with them. If you're sending the same people to jail and putting people who otherwise would be on probation on them, it's a misuse. We're cautiously concerned."[10]

Alternatively, house arrest may be used as an "add on" to the sentence the judge would normally have imposed, thus lengthening the total time the offender is under criminal sanction. According to a probation officer who operates a house arrest program in Rock County, Illinois,

> Probation could not convince the judges that home detention is a good program. It is being done, but it seems that judges are doubling the length of jail sentences imposed in order for offenders to put in the actual time the judge had wanted served in the first place.

[10] As quoted in Krajick, Kevin, "The Computer Age" in *Corrections Compendium*, September 1985.

In the long run, "widening of the net" with house arrest programs is a realistic possibility. Research has shown that prison capacity drives prison commitments, as well as vice versa.[11] In other words, judges will sentence offenders to prison as long as capacity exists, and as capacity expands, so may prison commitments. If we begin to regard homes as potential prisons, capacity is, for all practical purposes, unlimited. Such possibilities have widespread social implications: who is to say how wide the "social net" would stretch.

But while we certainly don't want to "widen the net" irresponsibly, more intensive interventions may be necessary to curb the high recidivism rate of some felony probationers. In tracking 1,700 adults granted probation in California, Petersilia et al. (1985) found that two-thirds were rearrested in the 3 years following sentencing. Moreover, 75 percent of the official charges filed against those sampled involved burglary/theft, robbery, and other violent crimes—the crimes most threatening to public safety.[12] In searching for solutions to what is widely regarded as a serious problem—crimes committed by felons on probation—we recommended intensive supervision probation programs. House arrest is regarded as a form of intensive supervision.

Focusing Primarily on Offender Surveillance

Some worry that house arrest, particularly if coupled with electronics, will be the final blow to the "rehabilitation ideal." As probation officers focus more heavily on surveillance, rehabilitation-type activities are diminished. Most probation officers monitoring house arrest participants admit they have little time for counseling.

While it is true that counseling is reduced in most house arrest programs, employment or enrollment in school is often required. And, to my way of thinking, having a job or a high school diploma may do more to increase chances for a law abiding life.

Intrusiveness and Possible Illegality

Some people object outright to the state's presence in individuals' homes, long regarded as the one place where privacy is guaranteed and government intrusion severely restricted by law. If electronic devices are used, some fear we may be headed towards the type of society Orwell described in *1984*. In *1984*, citizens' conversations and movement were strictly monitored and used as a tool of government oppression. However, house arrest, with or without electronics, is quite different from the *1984* scenario. House arrest is used as a criminal sentence and only imposed on offenders after they have been legally convicted. It is imposed with full consent of the participant. It is intended to be used as an *alternative* to incarceration; and surely a prison call is more intrusive to the individual's privacy than even strict confinement to one's home.

[11] Carlson, Kenneth (ed.), *American Prisons and Jails*, Vol. II, National Institute of Justice, Washington, D.C., 1980.
[12] Joan Petersilia et al., *Granting Felons Probation: Public Risks and Alternatives*, The Rand Corporation, January 1985.

Turning Up the Heat on Probationers in Georgia

BY BILLIE S. ERWIN*

INTENSIVE IS a relative term. Intensive probation supervision (IPS) applies the term in varying degrees. The basic idea behind intensive probation supervision, which is sweeping the country, is to increase the heat on probationers in order to satisfy the public demand for just punishment. Can prison-bound offenders be diverted into IPS without posing serious threat to public safety? That is the pivotal question. If the answer is yes, IPS can be said to satisfy two goals that have long appeared mutually contradictory: restraining the growth of prison populations (and budgets) through diversion, while satisfying the public's demand that criminals be punished for their misdeeds. Not surprisingly, in these budget-conscious times, the IPS concept is gaining popularity. This article describes Georgia's IPS program and summarizes preliminary research that suggests that IPS is both safe and cost-effective.

Background of IPS in Georgia

Like other states, Georgia experienced explosive growth in prison admissions and sentence lengths during the 1970's. Despite massive funding for new facilities, prison population continued to outstrip capacity, resulting in gross overcrowding, huge backlogs of state inmates in local jails, Federal lawsuits, and terrible budgetary overruns. All three governors during this period (Lester Maddox, Jimmy Carter, and George Busbee) described the chronic prison crises as the worst problem of their administrations, one that sapped their energy and soaked up money desperately needed for other worthy projects.

The judges tended to be very conservative: the per-capita incarceration rate in Georgia was then the highest in the country, higher even than in the Soviet Union or South Africa. Some judges expressed the feeling that it was their responsibility to impose sentences reflecting just punishment for crime, while overcrowding was the responsibility of the corrections department (which in Georgia oversees both prison and probation). As the crisis deepened, however, the judiciary became more sympathetic and began using regular probation for more serious offenders. In spite of the fact that more serious offenders were being placed on regular caseloads, the crisis in prison overcrowding continued unabated. An alternative was needed that could be used for a still more serious category of offender—that was as "punishing" as prison without being costly and without the undesirable side effects of forcing innocent families onto welfare or plunging lesser offenders into prisons full of hardened criminals. Georgia's Intensive Probation Supervision program emerged from this decade of crisis and frustration, conceived and formulated by probation staff with direct input from judges.

*Billie S. Erwin is on the staff of the Office of Research and Evaluation for the Georgia Department of Corrections and served as principal evaluator for the intensive probation supervision pilot. She was assisted in data analysis by Dr. Edward M. Buckner, assistant professor at Georgia State University.

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Who Should Fund: State Reimbursement to Counties?

If offenders who would normally be serving time in state prisons are diverted to local communities to serve intensified probation sentences, who should bear the cost? The state saved a prison or jail bed and operating costs, which at a minimum are $10,000 per year, per offender. But probation picked up an additional client who requires intensive, costly community supervision.

In states with centralized probation departments, reallocating a portion of the overall corrections budget to correct this imbalance is rather straightforward (although not necessarily easy to accomplish). But in many states, prisons are state funded and probation is county funded. Hence, a savings in the state level prison budget does not necessarily translate into an "add on" to the county level probation budget.

Shouldn't the state reimburse the county to offset some of the additional costs incurred? This is a central question, and if they don't address it, probation officials are likely to find themselves again in a no-win situation: responsible for supervising high risk felons with too few resources to do the job adequately. Recidivism rates will likely rise, and probation will again come under fire for its ineffectiveness.

Can Probation Itself Adapt?

In my opinion, the most important "unresolved issue" concerns whether probation itself can adapt to house arrest and other intensive surveillance programs. In moving from primarily rehabilitative to restrictive supervision, structural and organizational changes must inevitably follow.

Most dramatically, probation departments may need to shift from 8 a.m. to 5 p.m. organizations, closed on weekends, to 24-hour, 7-days-a-week services. Donald Cochran, Commissioner of Probation in Massachusetts, says 24-hour probation is just around the corner:

> It is naive to assume that the more serious probationers can be effectively supervised on a 9-5 basis. Criminals don't work bankers' hours. Ironically, probation is the only component in the criminal justice system that has historically thought of itself as immune from 24-hour availability. The police, correctional officials, and recently judges are called upon for around-the-clock service... Why not probation? Essentially, the argument is that the activities and schedules of probation officers ought to more closely reflect the activities and schedules of those they presume to service and deter. (*APPA Perspectives*, fall 1986)

Furthermore, probation as an organization will need to staff and monitor surveillance programs differently. It will need new screening criteria, perhaps recruiting and training different types of personnel, devising guidelines for length of stay, and determining what response will be made to violators. In house arrest, the first violations will be with respect to curfew. How will probation choose to respond? These issues are not minor, and probation officials need to give them considerable forethought.

The next few years are critical for the survival of probation. With virtually every state facing severe prison crowding, probation continues to dominate contemporary corrections policy. Departments that can reorient their services to handling serious offenders outside of prison are likely to find themselves back in favor with the public and those who provide their funding. House arrest programs show promise in this regard.

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There have been no formal challenges to date concerning the legality of house arrest. But legal opinions written by officials in Utah and Florida argue that house arrest, with or without electronic monitoring, will withstand constitutional challenge as long as it was imposed to protect society and/or rehabilitate the offender and the conditions set forth are clear, reasonable, and constitutional.[13]

These officials believe it can be reasonably argued that house arrest is both protective of society and rehabilitating to the offender. And since offenders sign consent forms, it makes it difficult to argue that the conditions were not clear. "Reasonable" generally implies that the conditions are fair. If prison was the alternative, given that house arrest is less intrusive, it can therefore be justified as being fair. Further, house arrest as currently implemented does not appear to violate any constitutional guarantee.

Experts agree that the most plausible constitutional challenges pertain to the 4th and 14th amendments. The 4th amendment prohibits unreasonable search and seizures, and some question whether installation and subsequent monitoring by electronic transmitters constitutes an unreasonable "search." The 14th amendment guarantees equal protection under the law. If offenders are being required to pay a fee in order to be eligible for the program, and those who can't afford to pay are being denied probation or parole, house arrest may be liable to 14th amendment constitutional challenges.

Thus, while house arrest does not seem overly intrusive or threatening to constitutional rights, the situation needs to be closely monitored as the technology grows more sophisticated. Manufactures of the electronic transmitters are already considering the potential of including home video and audio surveillance and remote-control testing of blood alcohol content. If these possibilities ever become reality, our assessment might change.

Race and Class Bias in Selecting Participants

Because house arrest programs are in the experimental stage, administrators are being extremely cautious in selecting participants. Most programs limit participation to offenders convicted of property crimes, with minor criminal records and no history of drug abuse. Such strict screening makes locating eligible offenders difficult, and those who are eligible tend to be disproportionately white collar offenders.

American Civil Liberties Union officials say the programs may discriminate against young, poor, and black people because to qualify for most house arrest programs, a person must be able to pay a "supervision fee," which runs about $15 to $50 a month. If electronic monitors are used, the fee is higher (about $200 a month), and the offender must have a home and a telephone. Persons without these resources may have no alternative but prison.

[13] For a complete review of legal issues, see Roland V. del Carmen and Joseph Vaughn, "Legal Issues in the Use of Electronic Surveillance in Probation," National Institute of Corrections, Washington, D.C., 1985 and "Legal Issues in the Use of Effective Surveillance in Probation," *Federal Probation*, this issue.

As noted above, this situation raises possible "equal protection" issues as well as overall fairness concerns. Some programs have begun instituting sliding scale fee schedules, and a few others are providing telephones for offenders who don't now have them.

Compromising Public Safety

Some people seriously question whether house arrest programs adequately protect the public. Regardless of stringency, most admit that house arrest cannot guarantee that offenders will go "straight" and that it relies for the most part on the offender's willingness to comply. Can a *criminal* really be trusted to refrain from further crime if allowed to remain in his home? What is to stop him from simply using his home as a base of criminal operations, for example, drug deals, fraud, and prostitution?

To date, both the recidivism and escape rate for house arrest participants is quite low. Florida's Community Control Program reports a revocation rate of about 15 percent and an escape rate of less than 1 percent.[14] While current statistics on recidivism and escapes don't cause particular alarm, the low rates are due in part to the fact that programs select the best risks. As house arrest becomes more widespread and incorporates other offender types, the public safety question might resurface.

Another caution bears mentioning. It is true that every house arrest program now operating attempts to select individuals with a low probability of recidivating. While that is reasonable in theory, predicting individual recidivism is difficult in practice. Research has shown time and again that the system's ability to successfully predict recidivism hovers around 70 percent accuracy—meaning that predictions for one in four offenders will be incorrect.[15] While predictions are more accurate for low risk offenders, some of those predicted to succeed will undoubtedly fail. House arrest programs should not promise absolute success; they will undoubtedly fail to deliver.

Are We Guaranteeing Failures?

Some believe that despite good intentions, successfully completing a house arrest sentence may actually be tougher than serving a prison term. As Cecil Steppe, chief probation officer in San Diego, California noted: "In some ways house arrest can be tougher than being in jail. You come home and your kids beg you to go to the park or get some ice cream. You're not free to do that."

Everyone agrees that it takes a very disciplined person to act as his own warden. Given the impulsiveness of many offenders, expecting house arrest compliance over a long period of time may be unrealistic. While there have been some lengthy house arrest sentences, most have been for 6 months or less. Generally, offenders are trading 3 to 5 days at home for 1 in jail.

Setting expectations that offenders can reasonably meet seems important. Unrealistic conditions simply guarantee failure. The system will then have to reprocess and (perhaps) reincarcerate the recidivists, negating the cost savings associated with house arrest.

[14] "Community Control Update," Florida Department of Corrections, May 1985.
[15] Petersilia et al., 1985.

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U.S. Courts(67-68)

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July 3, 1986

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W. - Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

In response to your June 17, 1986, letter soliciting views on certain topics, I have had a chance to briefly state some concerns as noted below.

Probation

The type of offender requiring intensive probation would include those who have a documented problem that was a factor in their prosecution and conviction. These problems could be drug or alcohol abuse, unstable marriage or family situation, chronic unemployment, psychiatric or psychological problems, mental retardation or limitations, membership in an organized group perpetrating law violations to further their cause, or any other behavioral problem.

An offender with a history of convictions and tendency toward violence is an unlikely candidate for probation, but should that situation occur, he or she would also be intensely supervised.

Presumably, intensive supervision would take the form of frequent contact with the probationer, both in the office and in the community, scheduled and unannounced, as well as contact with collateral agencies involved in treatment of the offender. The amount of contact could be adjusted to the severity of the problem and its amenability to treatment. The single most important condition is the offender's responsibility to make known his or her whereabouts at all times until supervision is reduced to a less intense level.

The officer would also need to control the offender's participation in a collateral program - meaning that the offender's failure to participate could in itself be grounds for a rehearing. Similarly, the offender would be required to engage in programs within the probation office if they exist, whether it is employment counselling, cogitative behavior, therapy, urine surveillance, etc.

The Courts, the Sentencing Commission and the Probation Office are really the only people who should determine the appropriate candidates for intensive supervision. Such cases are likely to be marginal candidates, perhaps more closely suited for structured programs. Therefore, defense counsel would always argue for intensive probation for a client who is a close call. The government would like to demonstrate its concern for public safety by putting certain people under intensive supervision some of whom might be inappropriate. Obviously, in our adversary system, the Court must consider arguments that only the Court should have the authority to order intensive supervision within the parameters set by the Sentencing Commission.

It appears that the Court can set almost any kind of probation condition as long as it is germane to the issues of rehabilitation or protection of the public.

Fines

It would appear that fines are the preferred sanction for what are traditionally seen as economic offenses by corporations and individuals. Income Tax Evasion and fraud against the government are typical. Mail fraud can also fall into this category when it involves deceit by a solvent company rather than a pure scam by career criminals. Fines might also be appropriate in more notorious drug convictions since drug dealing is an economic as well as a moral offense. Related money laundering schemes are also proper cases for fines. Violations of Labor Statutes (shake-downs) might warrant substantial fines. Traffickers in prohibited pornography and distributors of fake copy-written materials also come to mind.

As the Commission knows, for years statutory fines were low enough so as not to be a deterrent factor in some cases but viewed more as a cost of doing business. With the new enhanced fines, the Courts have the capability to selectively incapacitate those offenders that have committed the more egregious economic crimes. Fines could probably be based on both the pecuniary gain and collective loss. The latter is more significant in determination of restitution.

Supposedly, if an offender gained a certain amount of money from an offense, a victim somewhere lost that amount. In those cases where there is a difference (extra gains made by re-investment), one can see the importance of categorization by gain rather than by victim loss.

The issue of "ability to pay" and who or how it is determined, is dependent upon the type of offender. Corporations or entities have probably undergone audits by government investigators which should give probation officers a good idea of how much and by what method an offender can satisfy a fine.

In the case of individuals where no corroborating audit has been done, it might be a good idea to have them submit to the financial section of the presentence report under oath.

Wilful failure of a corporation to pay a fine where ability to pay has been carefully determined, should result in revocation proceedings and enforcement against any assets to recover the amount owing. Any company or group who has been convicted of a crime and then refuses to accept the penalties, couldn't be of much value to society. The same failure by an individual should also be cause for reopening a case to hear all the reasons for lack of compliance. If there is some valid understandable compelling reason, the terms of payment or even the amounts could be reviewed. Ultimately, the government retains the ability to enforce the fine as a judgment against any offender.

Restitution

The current provisions for restitution regarding issues of loss to victims and the defendant's ability to pay are well defined. As a practical matter, it appears the best way to determine an appropriate amount of restitution is to have the parties reach an agreement in a plea bargain. In those cases where that is impossible, about the only way to structure a hearing for an efficient determination is to limit the number of spokespersons concerning the issue. I would guess that the United States Attorney may be that spokesperson for the victim and the defense counsel would argue for his client. It is so easy for these kinds of issues to expand into time-consuming arguments. Frankly, the Court might also consider imposing a time limit for argument. It appears from the restitution provisions that the Court can do almost anything to prevent unnecessary delay or complications.

I don't believe there are any ways in which restitution can be effectively combined with imprisonment unless there is an institution - specific program designed for such cases. The other possibility is to incorporate restitution into a defendant's status as a work releasee in those cases of short-term imprisonment.

Community Service

Offenders who have salable skills and enough assets to pay fines and support their own families make the best candidates for community service. Typically, these are white-collar offenders.

Those defendants were are besieged by personal problems related to their offense, have limited occupation skills and difficulty supporting their dependents would not seem to benefit from a community service-type sentence. Whether one wants to admit it or not, providing a service to society as a form of compensation for a criminal offense is a concept that is directly related to intellect, socioeconomic status and non-violent crimes.

House Arrest

House Arrest is a form of punishment that looks like it was born out of the necessity to have alternatives due to the rising costs and limited space in conventional correctional institutions. In some ways it almost has the appearance of being a fad as it is dependent upon electronic gadgetry and other technology now available in the marketplace. House Arrest as an adjunct to intensive probation supervision would seem to be very useful. The future of this form of correctional practice seems totally dependent upon the economics of the Criminal Justice System which has been in a bad state of affairs recently and will probably continue to have trouble. Again, those types of offenders that qualify for house arrest are somewhere in between the serious street offender and white-collar types. Confinement to a certain area when one is not working is good for controlling a person's whereabouts and keeping them off the streets but without some other form of reenforcement for crime-free living, behavior is likely to remain unchanged.

Thank you for this opportunity to respond on these topics. I am only sorry that I do not have more time to research and reflect on some of these issues but my position is one as a working Chief Probation Officer, often in the field, and it is difficult to go into these topics in greater detail.

Sincerely,

Michael Ebinger
Chief, U. S. Probation Officer

ME:dvs

UNITED STATES DISTRICT COURT

OFFICE OF THE PROBATION OFFICER

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June 24, 1986

PLEASE REPLY TO:
Shreveport

The Honorable William W. Wilkins, Jr.
United States District Judge
Chairman, United States Sentencing Commission
Washington, D.C. 20004

Dear Judge Wilkins:

As per your request, attached please find my response to the information contained in your letter of June 17, 1986.

Sincerely,

Billy D. Maples
Supervising Probation Officer

BDM:lsb

Enclosures

I. PROBATION

A. Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?

No, because the probation service now has the capability to intensify supervision of any client as needed. With respect to how a client is to be supervised, the probation service presently classifies all clients either as high activity or low activity. The low activity or high activity classification is derived through a formal written classification process with the option of increasing supervision activity if needed in a particular case. This classification process is set forth in the Administrative Office of the United States Courts publication entitled "The Supervision Process-Publication 106". Therefore, probation officers now have the latitude to supervise clients as intensively as needed.

B. What roles should the Commission, the court and the probation office have in determining which offenders are placed on intensive supervised probation?

The only role the Commission and courts should have in determining any intensive supervision determination is in relation to the type of crime committed and the defendant's criminal history. However, as stated above, the probation service now has the capability to increase supervision intensively as needed.

C. What type of probation conditions not expressly listed in 18 U.S.C. 3563(b)(1-19) should the Commission consider in drafting the guidelines?

Under 18 U.S.C. 3563(b)(1-19), the Congress reflected a great deal of insight in listing descretionary conditions that can be imposed by the court and wisely left other options available by stating in number 20 "satisfy such other conditions as the court may impose". Number 20 will allow the courts the needed flexability to impose any other supervision sanction on a defendant as needed.

II. FINES

A. Are there certain crimes for which fines should be the preferred sanction? If so, list the offenses.

There are certain crimes that in some cases only a fine should be the preferred sanction, however, this depends on the defendant and his/her history. If the court determines one particular defendant should only be fined, that sanction can now be imposed with the defendant being placed on unsupervised probation. But another defendant convicted of the same offense may have a history that calls for a fine as well as being placed on supervised probation or possibily incarcerated. The court should have those options.

B. What elements should be considered in calculating the actual amount of a fine? Should the amount of the fine bear a particular relationship to the offender's gain or the victim's loss? How should the offender's ability to pay be determined?

The amount of a fine should be in direct proportion to the defendant's ability to pay it. As the Commission knows, the court has the option to impose other conditions which would offset a defendant's inability to pay a fine.

C. What sanctions should be imposed if an individual offender fails to pay the fine? An organizational offender?

For both the individual and organizational offender, revocation should occur if, after a hearing, it is determined there was ability to pay and there had been failure to do so.

III. RESTITUTION

A. Under what conditions should restitution be ordered? How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? Are there ways in which restitution could be effectively combined with imprisonment or community service?

Restitution should be ordered only if the defendant has the ability to pay. The court should be able to determine that ability and the appropriate amount through the presentence report. If that information is properly outlined in said report, there should be no prolonged delay in sentencing. With regards to combining restitution with imprisonment or community service, there would be isolated cases where a defendant could be incarcerated and have resources enough to make restitution. I foresee no difficulity in combining community service and restitution if the defendant has the ability to make restitution.

IV. COMMUNITY SERVICE

A. How should an effective community service program be structured?

Community service resources in the different districts will vary. In my opinion, the probation service should be charged with the responsibility of setting up a community resources program in each of the districts.

B. What types of offenders will benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals the sentencing?

Those offenders with no or less serious prior criminal records and those whose instant offense is not serious enough to call for a period of incarceration. Some offenders could be physicially unable to perform community service and possibily there would be those with the mental incapability to perform community service.

V. HOUSE ARREST

A. Is this a viable alternative to incarceration? If so, under what circumstances?

I feel the only workable alternative to incarceration is probation with attached special conditions as the court deems necessary and appropriate.

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

WARREN K. URBOM
UNITED STATES DISTRICT JUDGE
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LINCOLN, NEBRASKA 68508

June 30, 1986

The Honorable Willaim W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I respond to your letter of June 17.

Probation

*Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?

I am in favor of intensive supervised probation. I have not had the opportunity to use it, because of the heavy caseload of the probation officers, but I think under appropriate circumstances it would be excellent. I should think it would be limited to fairly serious, non-violent offenders, some repeat non-violent offenders, and some drug offenders. The forms of control could be by personal surveillance, if the probation officer's load was sharply limited to, say, 20, or to personal surveillance supplemented with electronic surveillance.

*What roles should the Commission, the court, and the probation office have in determining which offenders are placed on intensive supervised probation?

I think the Commission should formulate some guidelines, including the classes of offenders that are candidates for intensive supervised probation and the court should make the determination of specific people to be placed on it after consulting with the probation officer.

*What type of probation conditions not expressly listed in 18 U.S.C. 3563(b)(1-19) should the Commission consider in drafting the guidelines?

It was held in U.S. vs. Missouri Valley, 704 F.2d 1026 (8th Cir. 1983) that §3563(b) did not include allowing the payment in lieu of a fine of money to the University of

Nebraska Foundation by a bidrigger defendant for the purpose of establishing a Chair in ethics. I think the Commission should consider permitting payment in lieu of a fine to a governmental or charitable organization. Guidelines may be needed, such as limiting the option to cases in which the payment would be for a purpose related to the type of offense for which the offender has been convicted or perhaps one in which the judge specifically finds that such a payment would have or tend to have some rehabilitative or deterrent effect.

I also think there should be a provision for allowing the court to require the probationer to pay the expenses of the discretionary conditions--such as residing at a community corrections facility or residing at some "specified place or area" (the Y.M.C.A., a boys' camp, a halfway house, a nursing facility) where the probationer is ordered to be confined in connection with house arrest or community service. I am sentencing people to live at a place where they will be giving service, but requiring them to live there as if they were in jail, and requiring them to pay for their meals and lodging. I think judges also should be permitted to require the probationer to pay the reasonable cost of a nongovernmental monitor of the probationer while he is under house arrest or intensive supervision.

Fines

*Are there certain crimes for which fines should be the preferred sanction? If so, list the offenses.

I think of none, except misdemeanors.

*What elements should be considered in calculating the actual amount of a fine? Should the amount of the fine bear a particular relationship to the offender's gain or the victim's loss? How should the offender's "ability to pay" be determined?

The ability of the offender to pay, the offender's gain, the victim's loss. The ability to pay should be determined in large measure by the amount regularly earned by the offender. A month's pay, two month's pay, or some larger number of months' pay is realistic. The offender's gain should be a factor, but the victim's loss is of less importance. Restitution should substantially take care of the factor of the victim's loss.

*What sanctions should be imposed if an individual offender fails to pay the fine? An organizational offender?

The government should be able to enforce it as a judgment; if the failure is wilful, a penalty should be attached.

Restitution

*Under what conditions should restitution be ordered? How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? Are there ways in which restitution could be effectively combined with imprisonment or community service?

Restitution should be ordered if there is any realistic likelihood of its being paid within a reasonable time. I think a hearing can be had, limited to testimony or an affidavit by the victim, testimony or affidavit by the offender, and input by the prosecutor and probation officer without unduly complicating or prolonging the sentencing. The rules of evidence do not need to apply. I see no reason why restitution cannot effectively be combined with imprisonment or community service and I have frequently done it, usually by allowing restitution to be made substantially after the imprisonment ends or after the community service ends.

Community Service

*How should an effective community service program be structured?

I have found it the most useful to require the defendant to prepare the plan in conjunction with the agency to be served. It should be tailored to fit the specific abilities of the offender and the needs of the recipient of the service. It should involve monitoring by the probation officer or someone else and may involve confinement at the place where the service is being performed. This type of "confined community service" is sometimes an excellent substitute for incarceration at a jail or prison.

*What types of offenders will benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals the sentencing?

Nonviolent offenders are the best candidates, of course, but beyond that I think most any type of offender is a candidate, particularly if incarceration in a jail or prison is the alternative. I doubt that anyone should be required

to perform community service who does not want it--that is why the defendant should be the one to ask for it with a specific plan. Anyone who is a genuine danger to the community or is a risk of flight should not be put on community service.

I am inclined to hope that community service would be permitted to be structured under some name other than "probation". The term "probation" has the connotation of ease, whereas community service can be very difficult. Publicity about community service in the context of probation tends to lose its deterrent effect. Violations of the conditions of the community service could be treated in the same manner that violations of probation are treated, but eliminating public's association with probation would strengthen the alternative.

House Arrest

*Is this a viable alternative to incarceration? If so, under what circumstances?

Yes, it is a viable alternative. I have begun using it in the last several months for relatively serious drug offenders, where they had cooperated or were cooperating with the government. It is a tighter, stricter arrangement than ordinary probation and tighter than community service or confined community service. It needs monitoring, and I think that electronic monitoring supplementing personal monitoring by a probation officer or by a nongovernmental employee required to be paid by the offender can be usefully utilized.

I am inclined to the view that we can find a better term than "house arrest". Perhaps "house incarceration" or "house detention" would be more accurate and carry a stronger message.

Thank you for the opportunity to express my views.

Very truly yours,

Karen K. Gibson

UNITED STATES DISTRICT COURT
PROBATION OFFICE
DISTRICT OF NEW JERSEY

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July 7, 1986

United States Sentencing Commission
1331 Pennsylvania Avenue
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Washington, D.C. 20004

Attention: Mr. William W. Wilkins, Jr.
Chairman

Dear Mr. Wilkins:

I am responding to your letter of June 17, 1986, in which you solicit views concerning sentencing options available for an individual convicted of a Federal offense. I am happy to offer my comments regarding the below listed topics for scheduled hearings on July 15, 1986. Please excuse my abbreviated comments on these topics as I begin vacation on June 25 through July 10, 1986. Given your response time of July 8, 1986, my research has been brief, but I hope sufficient.

PROBATION

There is certainly a need for intensive supervision caseloads which can be categorized in two major approaches, 1) caseloads involving special offenders, and 2) caseloads involving aftercare offenders. In each instance, there is a sufficient number of offenders under supervision who would benefit as well as the community from an intensive approach by the Probation Office.

Given the complex make-up of caseload personalities and the increasing variety of criminal intake prompted in part by the Comprehensive Crime Act, intensive supervision of both types of special offenders is a viable, effective, probation service. In the area of special offenders, this is increasingly identified by the degree of criminal sophistication, financial security, and seemingly "legitimate" individuals who now find themselves as defendants in the Federal system. The purpose of a so called Special Offender Unit would be to deal uniformly with a certain class of criminals as a whole. Intensive supervision would be necessary in terms of special offenders who are presumed to be career oriented and relatively successful in their criminal endeavors. Furthermore, special offenders as such are presumed to ply their criminal trade within and as part of a larger cohesive criminal group. Hence, a major supervision problem

of the special offender would be his deviant group affiliation and commitment to a life of crime. A special offender may be classified in terms of who he is (reputational aspects) or what he did (racketeering offenses or offenses in support of racketeering enterprises). Generally, for identification purposes, these classifications are made on the basis of information contained in the presentence report, that is, the instant offense, co-defendants, prior record, government allegation of organized crime affiliation, and economic ties to known or suspected organized crime businesses. Also, certainly for purposes of the Commission, public corruption cases involving a high degree of notoriety may also be considered. More specifically, candidates for an intensive supervision caseload of special offenders would be "made members" or significant associates of traditional "organized crime families," white collar offenders whose offenses cause substantial financial harm, members of non-traditional organized crime groups (e.g., outlaw motorcycle clubs, drug trafficking cartels), members of terrorist or radical groups, and offenders whose crimes generate grave public concern (e.g., national security and public corruption cases).

Equally important is the need for intensive supervision for substance abuse aftercare purposes, that is, those individuals on our caseloads who find themselves in need of drug, alcohol or mental health aftercare. Certainly not only to maximize our efforts in supervision, however, but to provide in an accountable way various treatment modalities for these clients. I believe drug aftercare units in several of our district Probation Offices and in particular here in New Jersey can serve as a model in which intensive supervision efforts in dealing with various debilitating addictions.

SUPERVISION/CONTROLS: AFTERCARE OFFENDERS

It would appear that weekly reporting to the Probation Office is a must. Certainly a regular pattern related to weekly reporting and urine monitoring in the case of drug/alcohol cases is essential. Quick follow up on violations, that is, a standard of discipline emphasizing quick notification to the Court of any aftercare failure is essential. In this area, the Probation Office can only do so much; for that reason, contracting on an administrative level with various drug and alcohol treatment programs and modalities is important.

SUPERVISION/CONTROLS: SPECIAL OFFENDERS

The need again for close accountability in supervising special offenders is essential. All cases should be classified as high activity with major emphasis on criminal associations, inter-district travel, third person liability and very close scrutiny of the offender's source of income and employment. I think

experience has shown that very often, organized criminal activities must rely on communication through association and travel in order to breathe life into their enterprise. For this reason, strict guidelines and in-depth assessment of all travel and the reasons behind same as well as specific listings of prohibited associations should be mandated for this type of offender.

As to the role of the Commission and Court, I believe both agencies should rely very heavily on the accurate identification of the offender by the Probation Service during the presentence investigation stage. Hand in hand with this identification is the Commission's and Court's commitment to endorsing the recommendations of the Probation Service as they apply to benefitting special and aftercare offenders and by additionally endorsing the various treatment plans and guidelines offered by the service.

The conditions of probation as listed in 18 U.S.C. 3563 provide much latitude yet also underscore accountability on the part of the offender. I see no specific need for amendments unless in individual cases by particular needs. Certainly in that area, specific limitations or prohibition of travel in given areas as well as associations would be addressed accordingly.

FINES

Fines are undoubtedly a viable sanction in many sentences, particularly those involving a white-collar, corporate defendant who has realized profit by illegal enterprise. Such illegal enterprise would touch upon monopolies, bribery, environmental violations and, of course, as previously discussed, corporations involved in racketeering or influence peddling crimes. I believe the presently revised maximum penalty for violations of the Sherman Act provides a good example where significant fine penalties are available to Courts and have been utilized in "sending a message" to corporate defendants and their particular industry.

Elements in calculating the amount of fine should rely heavily on the corporate defendant's profit, whether already gained or assumed over a long range period of time, as well as the economic effect on society and the community. Equally important would be the degree of calculation and the time frame of the illegal behavior embracing any aggravating factors reflected in the presentence report relative to previous convictions.

RESTITUTION

Based on the mandates of the Victim and Witness Protection Act of 1982, the need to identify victims places a greater burden on the judicial system to assure that the victim receives his day in Court. As to those counts or complaints in which the defendant pleads guilty, there should be no question that restitution should be ordered without benefit of a hearing based solely on his plea of guilty to the criminal actions. However, close interpretation of the act strongly suggests that the defendant is also responsible for other unadjudicated acts and the applicable restitution therein. It would appear that in such instances, a hearing should be conducted to determine as indicated the appropriate amount of restitution balanced against the defendant's ability to pay restitution.

With respect to imprisonment and community service, certainly under the present system, the split sanction aspects allow for a period of brief confinement up to six months and a period of probation up to five years which would allow for specific conditions to insure restitution.

COMMUNITY SERVICE/HOUSE ARREST

I have combined these two topics together as I am not quite sure in my own mind how successful they have been. The greatest disappointment with community service seems to be that it is very often used as the offshoot in sentencing when a Court is torn between imprisonment or probation. At times, community service seems the most viable way to proceed. However, at that point, the plan may be ill-conceived and submitted by the defendant without any real input from the Probation Office. Within the Federal system, community service seems to be closely related to white collar offenders and very often is proposed in a portfolio by defense counsel in an attempt to offset the Court's intent to incarcerate that type offender. I personally would like to see community service programs offered to less sophisticated and limited defendants, for example, one who steals a treasury check of less than $100. A sentence to community service involving general maintenance work, affiliation with a local department of public works, etc., would, I believe, be a realistic and productive alternative.

As to my concerns regarding house arrest, I really do not view this remedy as a viable alternative to incarceration as it seems that the judicial system must commit Probation Office resources to assure the defendant's adherence to house arrest conditions. This may well become a burden more than a viable sentencing sanction.

I hope my comments will be helpful to you. Should you require any additional information, please let me know.

Very truly yours,

William P. Carroll

William P. Carroll
Supervising U.S. Probation Officer

WPC:md

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

FRANK A. KAUFMAN
United States District Judge
Baltimore, Maryland 21201

July 3, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N. W.
Washington, D. C. 20004

Dear Billy:

I have your letter of June 17, 1986. I will try to answer as best I can the questions set forth therein. In general, while I understand that Congress has mandated as specific guidelines as possible, I think it may well be that in most of the areas which are the subject of your June 17, 1986 letter, it will continue to be necessary to permit many determinations to be made in terms of the individual and the individual problem at hand.

Probation

The discretionary conditions outlined in 18 U.S.C. § 3563(b) themselves provide, I would think, the framework for determination of how intensive and how supervised the probation should be in given cases. For example, if the probationer has had any association with the drug culture and the conditions set forth in (b)(7) with relationship to frequenting places and/or associating with specified persons or types of persons are imposed, it may well be that in most instances, at least at the beginning of a probationary period, the probation should be quite intensive. That would mean that the Probation Officer might want to require the probationer to have almost daily contact with him or the Probation Office, at least by telephone. If the condition provided in (b)(5) with regard to employment is imposed, frequent checks not only with the probationer but perhaps with his employer may be needed. If the provisions of (b)(10) with regard to treatment for drug or alcohol dependency are utilized, careful checks not only with the probationer but with the institution providing the treatment would seemingly be needed on a very frequent basis. In sum, the determination with regard to the degree or intensity of supervised probation and the forms for control and supervision will need to be tailored in almost every individual case, utilizing the guidelines which are almost inherent in the discretionary conditions themselves as set forth in 18 U.S.C. § 3563. I imagine that, as I continue to think about the subject, I will probably be able to come up with some

additional probation conditions not expressly listed in section 3563, but at the moment I have no additional suggestions to offer except the one disucssed in this letter in connection with "House Arrest."

Fines

I would think that crimes which have been committed almost extensively in order to gain monetary benefit should require the imposition of fines, and yet the imposition of fines themselves may not be sufficient to contain and deter certain offenses of such nature unless the fines are very heavy in relationship to the monetary benefit which the offender has sought to obtain. For example, while we know it is very difficult to prove, there would seem to be a rather valid assumption that a certain type of individual will cheat on his income tax and, in effect, spin the roulette wheel, i.e., try to get away with the cheating and hope that he will not be caught, if he thinks that he will end up only with monetary penalties. Some persons who are willing to take that type of gamble are unwilling to gamble if they think that they are going to end up with confinement.

That same line of thinking, it seems to me, applies to almost any kind of crime for which a fine might facially be the preferred sanction. Nevertheless, I would think that fines should be the preferred sanction for at least first offenders and perhaps for second offenders where the type of crime is a nonviolent one performed out of greed and where the type of crime is not too prevalent in society.

In calculating the amount of the fine, I would suggest that the type of crime, the amount of gain achieved or sought to be obtained by the offender, the amount of the loss of the victim and the potential loss to which the victim was subjected should, along with the ability to pay of the offender, all be kept in mind. The only way in which I know the offender's ability to pay can be determined will be to utilize in each given case the financial capital worth of the offender, his earning capabilities and the minimum economic needs of himself and his family.

If an individual offender or an organizational offender fails to pay a fine or to live up to any condition of probation, including the making of restitution or the performance of community service, I would think that the sentencing court should consider carefully its sentencing the defendant to the maximum sentence which could have been imposed originally for the commission of the original crime. In that way, a very broad range of sanctions would be available to the Court. The Court's choice of sentencing

alternatives should, in such instances, be subject not only to the sentencing guidelines applicable to the underlying offense, but also to the failure of the defendant to pay a fine, etc. and to the need to apply sanctions.

Restitution

Any time that there is a victim, I would think that restitution is appropriate, provided of course that it makes common sense to order the same in terms of the ability and capacity of the offender. There would seem to be little to be gained by society in imposing any fine, requirement of restitution, performance of community service or any other condition of probation if the imposition of the same will affect adversely, in a substantial way, the chances that the offender will be able to stay free of crime in the future. Yet even that observation, it seems to me, has to be considered very carefully with relationship to what is fairly required to be done in order to make the victim as whole as possible. I know of no way to structure a restitution hearing, where there are controverted facts with regard to the amount of liability, without providing the equivalent of a civil trial, but, as a practical matter, despite the worries of so many of us when the Victim Impact legislation was passed a few years ago, I have found that when a defendant really wants to plead guilty within the ballpark area that is acceptable to the prosecutor, compromise positions and arrangements are being arrived at with regard to restitution. In fact, I have yet to have a case in which it has been necessary for me to take live testimony in connection with a restitution matter within the context of a criminal case.

I would think that restitution can be effectively combined with imprisonment and/or community service. However, unless the offender has independent financial resources, he is going to have to have the ability to earn money, usually by working within the walls of the confinement institution or on some kind of work release. If he is out in the community and is employed, he can be required to make restitution and also to perform community service, except that there are situations in which, in order to make restitution and to have reasonably enough left for the offender and his family to live on, the offender needs to moonlight, or work long hours at his single job, in which event, there may not be enough time for him to engage in community service.

Community Service

In order for a community service program really to work, the resources of the community need to be canvassed and harnessed and well known to the Probation Office of the

Court. In the District of Maryland, our Probation Office does a very good job in that regard. But I am convinced from my own community contacts, that there are many additional hospitals, schools, day-care centers and any number of organizations, both within and without Government, and located in Maryland, which could effectively be aided by community service performed by probationers and/or parolees and which could help to provide guidance and structure for probationers and parolees. The accomplishment of such an objective requires trained, skilled persons who are able to devote considerable time to making the initial arrangements with such organizations and thereafter providing administration and supervision. Perhaps, in the light of budgetary restrictions, approaches should be made to organizations such as the United Fund, the Catholic charities, the Jewish charities, etc. to sponsor such organizational efforts. Offenders who, I would think, will benefit most from community service are those who will obtain inner gratification from their own knowledge of the contributions they are performing through community service and from the effect upon them of the appreciation of persons whose lives are benefited by such community service. There are certain types of offenders, however, whose makeups do not permit them to relate to others in such a way that they will benefit others. Requiring such persons to perform community service will probably produce adverse reactions to community service without seemingly being of much help to the offender.

In my own chambers, my test for taking on a student law clerk is that he or she has to provide more benefit than the extra work imposed upon me, my law clerks and secretary in working with such student clerk, i.e., a 50% plus standard. I would think the same type of approach will, for the most part, dominate the thinking over any lengthy period of any school, hospital or other organization, which agrees to accept probationers or parolees for the performance of community service.

House Arrest

I think house arrest is a viable alternative to incarceration in certain instances. For example, if a defendant is one who needs to be kept away from certain persons and places, particularly on nights and weekends, and who has parents, a spouse or children or even close friends who are able to exert sufficient influence upon him, such a person might well be required to work in the daytime and to stay at home on other occasions except when engaging in certain specific acts required or permitted by his Probation Officer, such as visitng a drug clinic, attending school, etc. I have utilized house arrest on a pretrial detention basis and I believe I have done so once or twice during

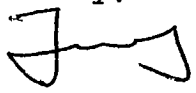
periods of post-trial probation. During the pretrial period, it is often possible to require members of the family and/or friends to post security which will be forfeited if the detainee violates the conditions of his house arrest and other conditions affecting his pretrial status. The threat of the loss which will be caused to such persons, along with the structure of house arrest, has apparently, in some instances, done the trick insofar as pretrial detention is concerned. Perhaps, the same approach could be used in connection with certain post-trial probation-house-arrest technique. If so, then one added condition of probation (see 18 U.S.C. § 3563(b)(20)) might be the use of security posted to guarantee performance by the offender of certain specified conditions of probation.

* * *

Frankly, the thoughts expressed in this letter are all thoughts about which I would like to have more time to ponder myself. I have set them forth in this letter for whatever value they may have.

Best regards.

Sincerely,



Frank A. Kaufman

United States District Court
Eastern District of Washington
949 United States Courthouse
P. O. Box 1432
Spokane, Washington 99210
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Justin L. Quackenbush
Judge

July 2, 1986

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Re: July 15, 1986 Sentencing Commission Hearing

Dear Judge Wilkins:

I have the following observations concerning the questions raised in your letter of June 17, 1986.

Probation

In certain cases, intensive supervised probation is appropriate. Where there has been alcohol or drug abuse, I often require the defendant to refrain from the use thereof and to submit to testing as specified by the probation officer.

In other appropriate cases such as individuals who have been convicted of illegally possessing drugs or firearms, I include as a condition of probation the following:

> That the defendant submit to the search of his person or property including but not limited to real property, residence and automobile conducted in a reasonable manner with or without probable cause, and at a reasonable time by a probation officer.

I do not feel it is necessary to add such conditions to the "shopping list" of 18 U.S.C. § 3563 since I feel the court has the inherent authority to include such conditions. I likewise do not feel the Sentencing Commission should attempt

to specify which cases should have intensive supervision since that is a matter which is primarily determined by the characteristics of the individual offender and only secondarily by the nature of the offense.

Fines

I do not feel that the amount of a fine should be statutorily tied to the offender's gain or the victim's loss. Obviously, these factors should be considered by the court in determining the fine along with other factors such as the offender's ability to pay. I require a sworn financial statement to be completed by each offender which is of great assistance in determining the defendant's ability to pay.

With regard to sanctions on offenders who fail to pay fines, I would suggest that a "wilful" test be established. If a probationer wilfully fails to pay a fine, that should be made the basis of revocation. If an offender who has been sentenced to prison wilfully fails to pay a fine, he should be precluded from receiving any good time credit. The Parole Commission should make the "wilful" determination. It appears to me that the only recourse to an organization not paying a fine would be th usual collection procedures.

Restitution

I would suggest that the court be given statutory authority to appoint the probation officer as a master to assist in resolving questions as to the amount of restitution. The ultimate question could then be resolved by the court. I believe the existing statutes requiring restitution are adequate.

Community Service

I am concerned that attempting to statutorily "structure" community service programs may preclude appropriate options. I am concerned that specifying community service for non-violent "white-collar" offenses would create an impression among many citizens that disparate sentences are imposed based upon community or economic status or standing.

House Arrest

The only knowledge I have on this program is what I have seen on "60 Minutes". I think it is an appealing option which could probably be used in lieu of incarceration for offenders who are not a danger to society, but who would ordinarily be incarcerated due to prior record or the nature and extent of the offense. I think this option should be fully explored and considered.

Very truly yours,

JUSTIN L. QUACKENBUSH
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
PROBATION OFFICE

GERALD J. BONNAFFONS
CHIEF PROBATION OFFICER

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July 1, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

This is in response to your June 17, 1986 correspondence.

Probation

*I am not certain of your definition of "intensive supervised probation" since, for example, at least one study has suggested the ratio of one officer for each "intensive" supervision case. I assume you mean something in the area of weekly contact since anything more than that will most likely never be fiscally feasible. Certainly, there are offenders that require such intensive supervision.

As to the type of offender requiring intensive supervision, I believe that we can delineate two broad categories. The first group are those where close surveillance is needed for the protection of the community's physical or financial welfare. This category would include, for example, those offenders with a history (or propensity) for violence, as well as those with an established pattern of financial manipulation and fraud (i.e., "con men"). Constant verification of the activities of such individuals is necessary and would include frequent checks on employment and residence; developing "informants" among friends and relatives; urinalysis if appropriate; special services, such as mental health counseling; unannounced visits and random telephone contacts; additional special conditions of supervision as might fit the particular case; close cooperation with law enforcement personnel; and, for the latter group, restrictions on travel and monitoring all financial activities including bank accounts, credit card accounts, business associates, etc. Finally, before completing the discussion of this category of offenders, the point should be made that offenders such as we are describing here ordinarily are not placed on probation.

The second category of offenders that might require intensive supervision, although ordinarily for a limited period, are those individuals with pressing needs at the time of sentencing where close supervision is needed in order to deal with the presenting problem until it is either resolved or the appropriate resource obtained, which problem might be familial, financial, substance abuse, employment, etc.

*Except in rare instances, I believe that the classification of a case, as to the type of supervision necessary, should be left up to the probation officer, for the following reasons:

a. Ideally, probation officers, as behavioral specialists, can better determine the needs of a particular offender.

b. The degree or level of supervision will fluctuate, because of the need of the offender, throughout the course of his probation and there is ordinarily no need for court involvement in such decision making.

c. Unfortunately, manpower and workload may impact on the number of cases that can be so classified and, certainly, the probation officer and the administrator are in a better position to monitor this than the sentencing judge.

d. It is sad but true that, in today's climate, correctional employees must concern themselves with civil liability. By making such supervision part of a court order, it becomes ministerial, rather than discretionary, and any deviation from this order by a probation officer, for whatever reason, may place him in a liable posture, should any harm befall a third party.

*I believe the conditions of probation outlined in Title 18, U. S. Code, Section 3563 are quite comprehensive. I would like to see the statute provide for restitution for total offense behavior (as case law now allows under certain circumstances) rather than simply for the convicted count(s). Also, the statute should permit more imaginative reparative or restitution orders by corporate defendants, now prohibited in some circuits.

Fines

*I don't believe one can single out those offenses where a fine is the "preferred sanction". There is simply too much possible variance in offense behavior in most federal statutes, particularly those dealing with fraud, to allow for such a definitive statement. Offenses against the environment, particularly involving corporate defendants, ordinarily are punished by fines.

*Title 18, U. S. Code, Section 3622 adequately outlines the factors to be considered when imposing a fine. I can think of no additional elements. Certainly the amount of the fine should relate to the offender's profit. I don't believe that a fine should ever pre-empt victim restitution. As to the offender's "ability to pay", the presentence report should provide adequate information in this area.

*The Fine Enforcement Act of 1984 introduced a new offense for willful failure to pay a fine, and this would appear to be adequate incentive. Obviously there always will be a problem in imposing a fine on a corporation since the threat of imprisonment for non-payment is absent. Perhaps the statute should include, if it does not now, sanctions against corporate officers or board members when a corporation fails to comply with a court order.

Restitution

*Monetary restitution should be ordered whenever there is a financial loss to a victim and the offender is capable of making restitution. The Victim Witness Protection Act now allows for restitution even when no probation is ordered. The U. S. Bureau of Prisons has begun a program whereby individuals incarcerated can be held accountable for making restitution with money earned in prison industries. Restitution has also become a condition of parole. Both of these should be mandatory to assure collection. Moreover, the Crime Control Act of 1984, in effect, instructs the court to consider restitution in every case.

I believe many of us anticipated serious complications in determining the amount of restitution following the implementation of the Victim and Witness Protection Act. In actual fact, this has not occurred. Accordingly, I don't think we need to rigidly structure sentencing hearings as to restitution. The presentence report should adequately cover the losses to the victims and the defendant's ability to pay, and the offender has the opportunity to contest this information at sentencing. As I have stated earlier, I do believe that we should take steps to insure that restitution for the total offense behavior is ordered, rather than simply for the convicted count(s), and this can be accomplished through the plea agreement.

Combining imprisonment, community service and restitution in one sentencing order is a complex matter because, ordinarily, the imposition of one of these sanctions impacts seriously on the defendant's ability to comply with the other. As stated previously, imprisonment and restitution (even if only partial restitution) can be accomplished, but adding community service upon the defendant's release, in most cases, would probably be overly punitive.

Community Service

*Community Service is ordinarily referred to as an alternative to imprisonment. My own philosophy is that community service should not be utilized in lieu of, or instead of, imprisonment. If an offense is serious enough to require imprisonment, or if a defendant is a threat to the community and therefore should be in prison, the sentence should be imprisonment. I don't feel that we should utilize community service to avoid sending a defendant to prison. Rather, this condition should be imposed so that a defendant can make adequate restitution and reparation to the individual victim or to the community or as additional punishment.

I am a strong supporter of community service, although I do believe that courts sometimes impose an excessive amount of hours to be served, usually because the program is being utilized in lieu of imprisonment. The community service should be meaningful and closely monitored by the probation officer. There are significant issues that must be dealt with in any such program, including liability insurance, publicity, protection of the public, etc.

*I have already mentioned my position as to the type of offenders that should not be ordered to perform community service. I would add that this condition is frequently utilized in cases of notoriety, but I believe we should be cautious in doing so as the public tends to interpret this as

preferential treatment. Again, I emphasize that, if the offense and/or the offender calls for imprisonment, then imprisonment should be imposed.

House Arrest

*I am simply not familiar enough with this program to comment. My initial reaction is that, while "House Arrest" may be effective for bond cases, I question its appropriateness, at this time, as a sentencing alternative.

I hope these comments are of some use to the Commission and its deliberations.

Sincerely,

Gerald J. Bonnaffons

GJB:db

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July 3, 1986

REPLY TO: Springfield

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

RE: **Sentencing Options**

Dear Chairman Wilkins:

The following is submitted in response to your letter of June 17, 1986, for consideration prior to the hearing scheduled for July 15, 1986.

Probation

1. Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?

   1A. Yes, some form of intensive supervised probation should be imposed on certain types of federal offenders based upon the offender's characteristics and the type of offense committed. Intensive supervised probation should be imposed on offenders who are drug or alcohol dependent, those who have a mental disorder requiring regular use of prescribed anti-psychotic medication to keep the disorder in remission, and those who have a history of drug-related and/or violent crimes.

   Some forms of control and supervision should include requiring the probationer to have weekly personal contact with the probation officer, participation in drug or alcohol abuse treatment programs as directed by the probation officer, and participation in mental health treatment, including taking anti-psychotic medication as prescribed by a physician. All probationer's who are drug dependent persons or who have committed drug related crimes should be required to submit to urinalysis as directed by the probation officer.

2. What roles should the Commission, the Court and the probation office have in determining which offenders are placed on intensive supervised probation?

   2A. The Commission's role should consist of providing the Courts with a definition of intensive supervised probation and suggestions as to what types of offenders should be considered for same. Whether or not an offender will be required to participate in a program of intensive supervised probation should be left to the Court's discretion. The role of the probation office should be to carry out the program as defined by the Commission and as ordered by the Court.

3. What type of probation conditions not expressly listed in 18 U.S.C. 3563(b)(1-19) should the Commission consider in drafting the guidelines?

   3A. An important condition of probation which is not listed in the new statute is "follow the instructions of the probation officer." This should be considered in the guidelines.

   Another type of probation condition which may be implied but is not expressly listed in 18:3563(b)(10) should be to require the probationer who is undergoing psychiatric treatment to take antipsychotic medication as prescribed by a licensed medical practitioner. In many cases, defendants whose mental disorders have been placed in remission on medication, will cease taking their medication as prescribed, and their mental disorders will be remanifested and new criminal behavior will be committed. This is especially characteristic of persons with bipolar affective disorders or paranoid schizophrenia.

Fines

1. Are there certain crimes for which fines should be the preferred sanction? If so, list the offenses.

   1A. Yes. Fines should be the preferred sanction for all infractions, Class B and C misdemeanors, and for organizational or corporate offenses.

2. What elements should be considered in calculating the actual amount of a fine? Should the amount of the fine bear a particular relationship to the offender's gain or the victim's loss? How should the offender's "ability to pay" be determined?

   2A. The elements which should be considered in calculating the amount of a fine according to 18:3572(a) are the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources; the nature of the burden the payment of the fine will impose on the defendant and his dependents; and any restitution or reparation made by the defendant to the victim. If the defendant is an organization, the elements to be considered should include the size of the organization and any measure taken by the organization to discipline the persons responsible for the offense or to insure against a recurrence of such an offense. Therefore, the amount of the fine should be related to the offender's gain and the victim's loss.

   The offender's "ability to pay" should be determined by a financial statement submitted by the defendant under oath and penalty of law in the same manner as in application for appointment of counsel under the Criminal Justice Act. This might include submission of IRS returns to assist in verification. In any event, the Court should make a finding regarding defendants' ability to pay.

3. What sanctions should be imposed if an individual offender fails to pay the fine? An organizational offender?

   3A. If the individual offender is on probation and has the ability to pay the fine but has demonstrated a willful failure to do so, the Court should revoke the sentence of probation and impose any other sentence that was available at the time of the initial sentencing.

   If an organization shows a willful failure to pay a fine, then the U. S. Attorney's Office should take the steps necessary to place liens or other claims on organizational assets to recover the amount of the fine.

Restitution

1. Under what conditions should restitution be ordered? How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? Are there ways in which restitution could be effectively combined with imprisonment or community service?

   1A. Restitution should be ordered in every case where the defendant has the present ability or reasonable likelihood of future ability to pay restitution and there is an identifiable victim and the amount of financial loss to the victim can be ascertained without unnecessarily prolonging sentencing.

   The amount of restitution should actually be determined and agreed upon by the government and defendant prior to the Court's accepting a plea of guilty in the case. It becomes part of the maximum penalty for the offense committed and should be known by the defendant prior to entering a guilty plea. The federal investigative agents (FBI, etc.) have not to date devoted much attention to the matter of restitution. They and the government attorney usually leave the matter up to the probation officer to develop. The probation officer has three to four weeks to obtain restitution information in cases which the federal investigative agency and government's attorney have usually had months to determine restitution amounts.

   If there is a disagreement regarding restitution, it should be worked out in a pretrial conference type of hearing, not after the defendant has already pled guilty to the charge.

   Restitution and/or community service could be combined effectively with imprisonment by making it a special condition of supervised release, which would provide for close monitoring by the probation officer. Other ways would be to apply UNICOR wages of the defendant toward restitution.

Community Service

1. How should an effective community service program be structured?

   1A. See the attached description of the Western District of Missouri program.

2. What types of offenders will benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals of sentencing?

   2A. White collar first offenders benefit the most from this type of sanction. Offenders who are fairly stable financially, vocationally, residentially, emotionally, and physically and have something to offer community agencies make the most of this sentencing adjunct.

   Offenders who cannot meet their own needs are inappropriate candidates for community service. Reasonably foreseeable third party risk is also a factor in determining which offenders should not be placed in community service situations. The goals of sentencing could not be achieved for offenders who are determined to be potentially violent or dangerous.

House Arrest

1. Is this a viable alternative to incarceration? If so, under what circumstances?

   1A. House arrest is a limited form of incarceration, similar to commitment to a residential treatment center or halfway house. It should be used as a condition of probation or supervised release depending upon the offender and offense characteristics. This would allow for monitoring by the probation officer.

I hope this input will be helpful to you in developing the guidelines.

Sincerely,

Charles L. Clark

Charles L. Clark, Ph.D.
Senior U. S. Probation Officer

CLC:csd
(Typed 07/03/86)
Enclosure

cc: Lewis D. Frazier, Chief U. S. Probation Officer, Kansas City, Missouri

5.4 COMMUNITY SERVICE PROGRAM

Recognizing that traditional Court-imposed criminal sanctions may not always be compatible with sentencing goals, offenses, and offender circumstances, the United States Probation Office for the Western District of Missouri has developed a program which utilizes gratuitous community service as a viable sentencing option in probation cases. This program of gratuitous community service provides a means of supplementing more traditional probationary sentences and provides the offender with a means to repay the community while involving the community in the offender's rehabilitation. Required gratuitous community service further serves as a vehicle for constructive punishment of the offender in a life-enhancing, rather than life-threatening, manner.

Community service is defined as nonsalaried service by an offender for a set period of time through nonprofit organizations and agencies. The General Counsel's Office of the Administrative Office has concluded that the imposition of a special condition of work without pay does not violate the constitutional or statutory rights of a probationer, provided the condition is reasonably related to the rehabilitation of the offender and the protection of the public and that the offender has reasonable notice of what is expected of him.

A. Program Operation.

(1) Client Selection. The Court may, of course, order gratuitous community service for any defendant. Such recommendations, however, come from the Dispositions Committee of the Probation Office after the case has been investigated and screened. A presentence investigation is normally conducted as a prerequisite to consideration for this program in order to properly determine client suitability and qualifications.

In those cases where probation is recommended, the Dispositions Committee, after considering all relevant case-related factors, recommends an appropriate number of gratuitous community service hours to be completed by the defendant within a specified time period as a special condition of probation. The Dispositions Committee considers each case on its own merits and recommends voluntary community service only if it is considered appropriate for the particular defendant under consideration. It is recognized that certain defendants, although suitable candidates for probation, may not be suitable candidates for involvement in community service due to the necessity for community protection, program credibility, and accountability. Patterns of behavior noted in the presentence report, such as violent tendencies or antisocial behavior, physical or mental illness, or serious drug/alcohol involvement, may tend to disqualify the defendant.

The Dispositions Committee recommendation for an appropriate number of hours to be completed in a specified time period is placed in the confidential sentencing memorandum. If community service is not recommended, an appropriate rationale is utilized. The Dispositions Committee makes no recommendation regarding the specific type or form of community service to be utilized.

August 5, 1981
BGD:mrs

When recommending community service as a special condition of probation, the officer specifies the number of hours of service to be performed and the time frame during which the service is to be completed. For example, "It is recommended that as a special condition of probation the defendant perform 150 hours of gratuitous community service within one year as directed by the Probation Officer."

(2) Implementation of Program.

A United States Probation Officer is designated as Referral Officer (see Section 1.1 P) and is utilized to serve as a liaison between the Probation Office and the community. This officer is responsible for developing referral resources within the community and works in conjunction with those officers assigned territories in developing resources. The Referral Officer maintains a current listing of suitable agencies and a Master Placement Log (Appendix E-9) in order to monitor the various placements for statistical and record keeping purposes.

Within five working days following sentencing and the imposition of the special condition requiring gratuitous community service, the assigned officer meets with the Referral Officer regarding a placement. A mutual decision is made regarding the specific placement. In the event that mutual agreement on a satisfactory placement cannot be reached, the matter will be resolved at the next regularly scheduled unit meeting of the Dispositions Committee of which the Referral Officer will be the third member with the assigned officer and that person's Supervising Officer.

To the extent possible and practical, the unique ability of the subject is tailored to the gratuitous service. Placements are effected in such a manner as to avoid subjecting both the Probation Office and the referral source to unnecessary criticism or liability. All referral agencies or sources are required by the Referral Officer to execute the Agency Agreement to Participate (Appendix E-10). A copy of this form is provided to the referral agency or source, a copy is retained by the Referral Officer, and a copy is retained in the supervision case file.

After agreement is reached regarding a specific placement, the Referral Officer arranges for an initial appointment with the referral source. The assigned officer assures that the probationer executes the Client Agreement to Perform (Appendix E-11), copies of which are provided to the probationer, the referral source, the Referral Officer, and the supervision case file. The assigned officer provides notice to the probationer regarding the initial placement appointment. During the initial appointment, a work schedule is developed by the probationer, referral source, and the assigned officer, if possible. Following the initial appointment, the Referral Officer verifies that the placement is satisfactory. If the placement is unsatisfactory for any reason, the Referral Officer arranges for another placement.

August 5, 1981
BGD:mrs

On a monthly basis, the Referral Officer notifies the respective Courts by memorandum of those satisfactory placements which occurred during the previous month. In this memorandum, the Referral Officer notes the exact placement location and the nature of the gratuitous service to be performed.

(3) Supervision of Placement.

After the placement is satisfactorily effected, the assigned officer is responsible for monitoring the probationer's progress and performance regarding the community service. The Referral Officer assures that the referral source receives a supply of Verification of Community Service Hours forms (Appendix E-12) which are returned to the assigned officer through the Referral Officer by the 10th day of each month by the referral source.

Routine contact is made by the assigned officer with the referral source as appropriate. All contacts, of course, are documented in the chronological file. The assigned officer maintains a current Record of Voluntary Community Service Hours (Appendix E-13) in the case file.

(4) Modification.

Should compliance with the community service condition no longer appear reasonable or possible or when an extension is required to assure compliance, the matter will be referred by the assigned officer to the Dispositions Committee for an appropriate recommendation to the Court.

(5) Termination.

Termination of the placement normally occurs by successful completion of the required number of hours. Should the placement be terminated prior to the completion of the required hours, the assigned officer notifies the Referral Officer who locates another placement.

Should the placement be terminated through the fault of the client, the matter is referred to the Dispositions Committee, and an appropriate recommendation is made to the Court. Following any termination, the Referral Officer will be notified by brief inter-office memorandum.

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July 3, 1986

Mr. William W. Wilkins, Jr.
Chairman
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1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

The following is my response to your request of June 17, 1986. As usual, I will follow the order of the topics listed in your letter and will hopefully be brief, but insightful.

Probation

Yes, intensive supervised probation should be imposed on certain types of federal offenders. I was pleased to see that you said certain types of federal offenders rather than federal offenses. We have all seen simple mail theft cases committed by individuals who are heavy heroin users and misdemeanor cases which had severe character disorders. Even when characterizing the offenders, this becomes a difficult question. I would state that individuals with long prior records, drugs and or alcohol problems will always need what we describe today as high activity supervision. In general, I believe that we should continue with our present system of staffing and classification. Other areas such as training and awareness are needed but are beyond the purview of these guidelines.

It is felt that the commission should set very broad guidelines, dealing with the most serious offenders and offenses. The court and the probation office should be allowed to continue with their professionalism in determining who will be placed under this intensive program. I do believe that there should be better communications between the Bureau Of Prisons, who take care of the individual while they are incarcerated and the probation staff, who works with them in the community.

In the past there has been considerable training in regards to our classifying defendants by the Risk Predictions Scale 80 and the Salient Factor Scores. I feel that they have merit in setting guidelines, but have also appreciated the availability of an override. These scores do not cover the area of prevention. That is, when an officer receives an individual who initially, is not a serious case and then events develope or they are uncovered. There is an opportunity to step in with assistance that will prevent that client from becoming more seriously involved in the criminal world.

A probation condition that would be of great assistance to the probation officer, would be easier access and payment for psychological testing and counseling. This would be in addition to the chosen few that are under the drug aftercare program today.

There is also a need for more specific conditions dealing with an individual's financial and employment status. I am fully aware of many of the resources we have today, but also feel that a condition could be more specific to assist us in this area. For example, conditions could specify that new employers or a business associate must be aware of the defendant's status. This would increase the enforcement of the third party risk problem. However, emphasizing the word guidelines, an override should be allowed.

Overall, I feel that the existing conditions of probation are adequate except in complex and new areas of crime. I am not trying to sidestep your request or complain, but I would state that the officers in the field simply need more time to work in the field and not in the office.

Fines

I do not feel that fines should be set only for special crimes. I would prefer to leave the fine as a descretionary form of punishment by the court on all cases. Fines are not a deterrent, but only act as punishment by itself or in conjunction with other sanctions.

I would like to see the large amount of fines collected turned back over to the criminal justice system.

The sole consideration of setting a fine should be in the individual's present financial status or his future potential for earnings. Once again the present system has never caused this officer serious difficulties. There has always been the opportunity to modify conditions of probation and no one, due to case law, has been sent to jail for not paying a fine they could not afford. The penalties have been reviewed and updated occasionally to establish the maximum amount of fines. This area should continue to be looked at, so that the maximum is not totally out of balance to the offense itself.

The U.S. Attorneys Office has had difficulty in collecting fines that exist after supervision. A five (5) year limit after supervision could be placed on the collection of such a fine.

For the individuals or organizations that could pay, a violation of probation or parole could occur. For those who prove that they cannot pay, community service is a definite alternative. While it could be very complicated, there could also be a system set up through the Internal Revenue Service for the collection of this government debt by both individuals and companies.

Restitution

When there is an identifiable victim, who has suffered a loss that can have a monitary attachment to it, then restitution should be ordered. This topic alone could take pages to discuss, in fact it has been discussed quite extensively after the Victim Witness Act of 1982.

It is felt that rather than an additional hearing, the U.S. Attorneys Office could become more involved with the maximum amount of restitution owed on a given case during the investigative and plea agreement stage.

If the case goes to trial, then there should be a section in that trial that would determine the amount of loss.

I feel that basically restitution is a separate issue from imprisonment or the order of community service. Once again, this is especially true when there is an identifiable victim to which the monitary loss can be established. I do believe that restitution, imprisonment and community service can all be separate sanctions on the same individual.

Community Service.

Before community service is set, the court should be reasonably sure that it can be performed. For example, we have several rural areas, where the resources are not available we have had defendant's with a variety of problems that would not allow them to perform such a service. Any guidelines set by the commission, should again have room for an override. In our district alone, there are some areas in which volunteer work is abundant and while the performing of community service sounds good, making it mandatory creates a new set of problems. This is especially true with the defendant, who does not have some basic work ethics and causes considerable disruption on the community service site.

I have used community service to be of great benefit to the community and to the individuals under supervision. For some it has given them the opportunity to develop a work habit and many have obtained full-time employment afterwards. For others, who were once in a life time offenders, it also provided, for lack of a better term, a means to make "penance" for their wrong doing in their community.

I would also place a ceiling of no more than 250 hours service for individuals and allow for an override in exceptional cases. Organizational community service could be monitored best by the completion of a task which may or may not involve specific hours.

House Arrest

I do not see the value in attaching a new name, "house arrest", to what can still be described as intensive or high activity supervision. This would allow the officer to set curfew times and exceptions for the individual to leave his residence. To call it house arrest is misleading.

Time is always too short to go into extensive discussions, but it is hoped that my comments will be of some value to your very important task.

Sincerely,

Joseph L. Wiley
Supervising U.S. Probation Officer

JLW/sh

U.S. Department of Justice

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July 7, 1986

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004

Dear Judge Wilkins:

This is in response to your letter of June 17, 1986 (copy attached) which solicited comments regarding sentencing options in anticipation of your fourth hearing on July 15, 1986. Please consider these as my personal comments, since I assume that other U.S. Attorneys and the Department of Justice will be making separate responses. I will try to respond in the same general format as your letter.

PROBATION

-Should some form of intensive supervised probation be imposed on certain types of federal offenders?

The magnitude of most federal offenses is such that outright probation, without some sentence of incarceration, should be the exception rather than the rule. The losses caused by defendants are frequently measured in hundreds of thousands of dollars, a serious breach of fiduciary or governmental duty, or a risk of serious physical consequences such as crimes involving violence, arson or drug sales. Minor cases rarely are prosecuted in federal district court, and the factors to be considered in imposing sentences under 18 U.S.C. § 3553 should militate toward the imposition of an executed sentence in most cases.

The rare cases that should be considered for probation arise when the following circumstances are present:

1. The defendant has had no prior contact with the criminal justice system. This should include only persons convicted for the first time. Prior convictions in state court or adjudications of delinquency should be taken into account. I cannot think of any good reason to place an individual on probation on his second or subsequent trip through the criminal justice system. The previous experience should be sufficient notice to the defendant of the seriousness of his conduct.

2. The crime involved should not be a crime of violence. I would extend the term "violence" to include crimes of potential physical harm such as arson, drug dealing, and other conduct that poses a risk to the public.

3. The defendant should not be a public official, accountant, lawyer, doctor, stockbroker or other fiduciary in whom the public are encouraged to place a general or specific trust. Our society places in certain people the ability to control the financial, legal and medical well being of others, and consequently the public is nearly obligated to place great trust in these individuals. When that trust is breached, the penalty of incarceration should follow.

4. Realistic restitution to the victim is attainable only if the defendant is permitted to begin working immediately to compensate the defendant. If another source of reimbursement for the victim is available to the defendant, probation should be discouraged.

5. The defendant should have displayed sincere remorse soon after the detection of the crime, if not before. He should have commenced his rehabilitation and efforts to reimburse the victim prior to sentencing.

6. The defendant's criminal conduct should be peculiar to his normal conduct, and he should show a history of being able to earn a living without criminal conduct.

These limitations should also describe the type of offenders that could be placed on probation.

-What forms of control and supervision should be imposed?

Certainly, the conditions listed in 18 U.S.C. § 3563 are most appropriate. Frequent probation reporting over an extended period of time is the best way to measure an individual's progress. Since the defendant on probation is spared the constant reminder of his wrongdoing (i.e. the prison walls), he should be frequently reminded that he is at liberty only through the grace of the Court and only during his continued progress.

-What roles should the Commission, the Court and the probation office have in determining which offenders are placed on probation?

The Commission should establish guidelines limiting the types of defendants and the types of crimes that would permit consideration of probation. The probation office should gather information about the defendant's individual characteristics. It should also assess the likelihood of how well the individual defendant could be supervised under the various types of probation for which he might be eligible. The Court should act on the information provided by the probation office and the parties to determine whether the defendant fits the categories of eligibility for probation imposed by the Commission. If so, then the Court should determine whether this particular defendant should be placed on probation, and design an appropriate probation program, subject to future modification.

The Commission should evaluate data on all probation cases to determine if the limitations are being followed, and further whether probation is successful in those areas where allowed. The Commission should be permitted to recommend to the Court modification or revocation of probation in particular cases or classes of cases.

-What types of probation conditions (in addition to those listed in 18 U.S.C. § 3563(b)) should be considered?

Several additional conditions might be considered. First, the imposition of a requirement that the defendant cooperate with law enforcement in completing the investigation of co-defendants or related conduct of the defendant should be considered. There are many instances where stolen monies are not recovered, accomplices are not identified, and so on. Probation should appropriately be used to purge the defendant of his prior involvement, assuming that he could be protected from additional prosecution. In some instances, law enforcement would prefer to retain the ability to prosecute the defendant on the other matters, and a balance would have to be struck in individual cases.

Secondly, there are some instances when the victim should be able to obtain very direct information about the defendant's conduct while on probation. In some instances, the victim should be able directly, or through counsel or the probation officer to learn of the defendant's business activities while on probation. An example of this would be when the victim's restitution is dependent on the success of the defendant's business operation. Some conditions should be considered that allow the victim some access to information about the defendant.

Finally, consideration should be given to imposing conditions such as an implied consent to search of the defendant or his place of business or home. While regard should be given to privacy rights of the defendant, there are situations such as drug dealing defendants where periodic searches can disclose information about violations that is otherwise unobtainable. I am not suggesting that consitutional protections be abandoned, rather that existing case law limiting a probationer's protections be applied in certain instances as probation conditions.

FINES

-Are fines the preferred sanction for some crimes?

Yes, in limited instances. The only area that come quickly to mind is non-scienter regulatory offenses.

-What elements should be considered in calculating the actual amount of a fine?

Apart from the factors delineated in 18 U.S.C. § 3572, the most important element should be whether the fine would interfere with restitution. Restitution should come first.

Next, the profit made by the defendant should be considered. The defendant should be left with no profit, and suffer a punitive loss.

Third, the message to be sent to the defendant and the public by the fine should be determined.

Finally, the defendant's ability to pay should be assessed by his capability of earning a living after conviction, and perhaps should be subject to reevaluation after a significant period of time. Of course, all defendants look hopeless at the time of sentencing. A defendant who recovers his earning ability should be able to pay an appropriate fine. Likewise, defendants should not be permitted to intentionally keep their earning power limited so that they can avoid payment of an appropriate fine. A healthy, able bodied and adequately educated defendant should be required to attempt to locate employment that will enable the payment of a fine.

-Sanctions for non-payment?

I favor incarceration for the intentional non-payment of a fine if the defendant was capable of earning sufficient money to pay the fine. Consideration should be given to adding a substantial non-payment penalty to the fine, much like an IRS assessment. I believe that interest is now available.

Likewise, an extension of the probationary period and a reconsideration of the terms should be a response to non-payment.

One of the most important factors of all should be imposition of a minimum schedule of payment. We have had several defendants in this district state publicly that they weren't going to make any payments whatsoever until the last day of probation. Generally, they don't have enough money left at that point to make a complete payment.

Restitution

Restitution should be ordered whenever an identifiable victim (including the government) suffered a loss because of the defendant's misconduct.

The probation officer should marshall the facts related to the loss, which should be included in the presentence report. Any objections by the defendant should be done in writing, well prior to the sentencing, so that the victim and the government can contest the objection. If disputes still remain, the sentencing judge can delegate the particular dispute to a magistrate for a factual determination. The victim should be entitled to direct participation in the evaluation of restitution, including any fact finding proceedings.

Earnings from prison work or community service projects could be utilized to fund restitution. The type of community service or work in prison permitted should create a benefit that flows most directly to the victim. For example, if the defendant is permitted to perform community service, it should be done in a manner that directly benefits the community in which the victim resides.

Perhaps the victim should even be permitted to direct (or suggest) the charity to be benefited by the defendant's work.

Community Service

-How should an effective community service program be structured?

A community service program should be based on:

a) The appropriate punishment for the conduct;

b) The damage to the community at large caused by the conduct;

c) The needs of the community;

d) The skills of the defendant, and the likelihood that the community service can teach the defendant new skills;

e) The ability of the probation office to monitor the service; and

f) The ability of the service organization to monitor the work of the defendant.

Too often the defendant is permitted to choose the particular community service he performs. Consequently, he chooses work that he would have performed anyway. In many instances, he chooses work that is not adequately monitored, and which provides no benefit to the community he wronged. The Court and the probation office should play a very active role in selecting the form of work.

The program should be designed so that it is a constant reminder to the defendant that he is at liberty only through the grace of the Court. The defendant should be required to perform the service frequently over the entire period of the probation, not just in large blocks of time at certain parts of the probation.

It should also be apparent to the victim and the public that the defendant is performing the service work as a requirement of his sentence. In some instances, if the defendant is permitted to choose his own type of program, it may appear that he is being rewarded rather than punished.

-What types of offenders will (or will not) benefit from community service?

I believe that any defendant who would seriously be considered for probation could benefit from a community service requirement. Some would benefit from such a program after incarceration.

House Arrest

This may be useful in very limited situations where the age or health of the defendant makes incarceration life threatening or cost prohibited. I am not referring to the feigned illnesses or imfirmities that so frequently begin silmultaneously with the commencement of the grand jury investigations. This should be limited to the legitimately ill (such as an AIDS victim) or the very elderly. Those considered for house arrest should be very close in background to those who would be considered eligible for probation. Violent criminals should be ineligible.

Conclusion

Thank you for the opportunity to send these remarks. Many of these comments have been made in a "stream of consciousness" fashion due to time constraints. I would be happy to try to develop any of these ideas if requested.

Sincerely yours,

JOHN DANIEL TINDER
United States Attorney

JDT/je

cc: Bob Ulrich
United States Attorney
District of Kansas

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

ROBERT M. LATTA
CHIEF PROBATION OFFICER

600 U.S. COURT HOUSE
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July 7, 1986

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
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Dear Mr. Wilkins:

The following is in response to your letter of June 17, 1986, regarding available sentencing options. After reviewing and discussing with colleagues the questions posed in your letter, and the more general issue of parity in sentencing, I find a prevailing concern for the diminishment of sentencing options. In such a plural society, rarely does any one approach to the disposition of a case meet different sentencing goals. Although I, and nearly all of the probation officers with whom I spoke, recognize the need for parity, we also see benefit in the use of more than one option for an individual defendant. The Comprehensive Crime Control Act will place limits on such an approach, such as prohibiting the imposition of a mixed sentence, but another recent statute, the Victim Witness Protection Act, has also extended sentencing alternatives by allowing for restitution on a count where incarceration is imposed, rather than having restitution be contingent upon a grant of probation. Ideally, the sentencing strategy developed by the Commission will find a balance between increased egalitarian sentencing practices and broader sentencing options.

Our nation is presently increasing the number of offenders incarcerated, but this is a costly sentencing option, particularly open to review at a time where Gramm-Rudman is a prevalent topic of conversation. Reserving lengthy custodial sanctions for those chronic violators who pose the most threat to the community or for those offenders who commit such egregious crimes that other alternatives are untenable would seem both responsive to society's demands for safety and need for responsible Government spending. I believe that alternatives to incarceration can also satisfy sentencing goals, such as deterrence, punishment and rehabilitation. With this in mind, I will now briefly address the specific questions posed in your letter.

Probation

Intensive supervised probation is advocated for the offender, such as the chronic drug abuser, who poses a threat or significant risk to the community and/or himself, as evidenced by prior and present behavior, including the present offense. The Commission's role in this regard should be in the form of a policy statement, rather than the establishment of guidelines prescribing which offenders or offenses are suitable for intensive supervision. The Court and Probation Office should have the authority to use the policies promulgated by the Sentencing Commission in developing the selection criteria and specific practices defining intensive supervision. These practices might include increased surveillance, detection of drug use, and house arrest. 18 USC 3563(b)(1-19) covers all of the conditions seen as relevant for the majority of cases, and Condition 20 allows for specific conditions tailored to the special case.

Fines

A fine is obviously the preferred sanction for a corporate offender, but fines are best suited for regulatory offenses and petty offenses, as well. The victim's loss, offender's gain and ability to pay are all factors to consider when imposing fines. Economic crimes strongly warrant a financial sanction to ensure that illicit profits are not retained. Should a defendant claim an inability to pay, the burden of proof should be his, but if inability to pay is established for an individual, possibly community service could be considered in the alternative (assuming this would not be prohibited by the Comprehensive Crime Control Act). Incarceration is seen as appropriate for those who willfully fail to pay the imposed fine. As for the failure of the organizational offender to pay a fine, consequences could include contempt charges against corporate officers, appointment of a special master to oversee the corporation, or an increased fine if the maximum fine was not initially imposed.

Restitution

Whenever there is a loss to any victim, restitution should be paid, but the specific amount and manner in which it is paid needs to be contoured to the individual defendant. Otherwise, an unrealistic expectation is established to no one's avail. Should there be no present financial resources and only a limited anticipated improvement in financial status, services rendered to the victim as discussed in the Victim Witness Protection Act could be considered. With respect to structuring a hearing

regarding restitution, the Government and defense counsel should attempt to come to an agreement about restitution prior to sentencing, preferably by the time a plea of guilty is made or in the case of a trial within a specified period after the guilty verdict. If not resolved within a specified time frame, the issues of contention could be reflected in the Presentence Report, giving the Court sufficient time to consider the matter prior to sentencing (in view of the Comprehensive Crime Control Act's mandate that the Presentence Report be submitted to the Court 10 days prior to sentencing).

18 USC 3579 allows for restitution on a count where imprisonment is imposed. However, to effectively combine restitution with imprisonment, the sentencing guidelines need to incorporate incentives by proportionately reducing the time actually served for restitution that is paid only from earnings while working in the institution. Funds available to the defendant apart from these earnings and used for restitution purposes should not be credited, since this would obviously create an economic bias.

Community Service

The structure of a community service program needs to include: 1) An orientation for the participants; 2) Selection criteria; 3) Placement appropriate for the participant; 4) Follow up; 5) Evaluation. Although a broad spectrum of individuals can be considered for community service, there are some who should be excluded: 1) Chronic drug abuser; 2) Violent offender with history of assault or sexual offenses; 3) Emotionally unstable offender; 4) Offender with serious physical limitations; 5) Sophisticated sociopath; 6) Those who need to work greater than normal hours in order to meet basic needs for subsistence. A public or nonprofit agency used as a clearing house for community service placements and as a means of administering special community service projects is preferable.

House Arrest

House arrest used as a sentencing option can often lead to disparity in sentencing; for this reason, it is not seen as a viable alternative to incarceration, except for a selective or unusual case. Rather, it is primarily viewed as an intensive supervision tool, assuming resources are available to implement the necessary components of such a program, such as electronic equipment.

Final Comments

As a presentence investigator, I look to a multitude of resources and sentencing options to best ensure protection of the community and the development or enhancement of an offender's prosocial aspirations. No one route or method seems to be the answer. The focus of corrections seems to fluctuate according to the prevailing mood of our nation. Probation officers are constantly attempting to balance the goals of both rehabilitation and punishment. Hopefully, in search of sentencing parity, we will not lose the ability to address complex problems with innovation.

Very truly yours,

Nancy Reims

NANCY REIMS
U. S. Probation Officer

NR:alt

U.S. Sentencing Commission
1331 Pennsylvania Av. N.W.
Washington, D.C. 20004

June 26, 1986

Chairman:

Dear Mr. Wilkins:

Again I write from Chillicothe, Ohio in response to a request from Charles & Pauline Sullivan and CURE. This to your letter to them of June 17th.

At the outset I wish to comment that I appreciate the privilege of giving some input, however small. Also I add that I think the Federal Government should try to keep in tune with the larger thinking evident in the Seventh United Nations Congress of the Prevention of Crime and the Treatment of Offenders, specifically the resolution #16, "Reduction of the prison population alternatives to imprisonment, and social reintigration of offenders." The idea that prison should be a measure of LAST RESORT seems the best of routes.

In any overall sentencing strategy I think the first thing to be looked at is "What are all the suitable and reasonable alternatives to incarceration?" Only after these have been investigated should prison be given any consideration, and then for the shortest time consistent with legitimate goals, ie. rehabilitation and protection of the public. Keeping in mind that no reliable study has shown that longer sentences reduce recidivism and the contrary may be the rule.

PROBATION should be one of the primary sanctions used especially in first offences (non-violent). Even some violent offences are a product of extenuating circumstances and could be properly delt with via probation.

It may be wise to use a gradually reducing intensity of probation. This would give those supervising the offender an oportunity to know their offender and settle his living environment. Once "settled in", job, home, income etc, the level of intensity could be reduced with time. The overall case loads would become easier to manage and the cost factor improved at once. There is no reason the offender could not be required to pay for his own supervision!

FINES should be tailored to ability to pay. Perhaps a graduated fine could be levied. As ability increases, so does the fine up to a certain limit of course. It would serve no purpose to levy an unpayable fine. With non-payers being sent to jail it would amount to a debtors prison.

The same fine of 100,000 dollars levied on a millionair would not have the devistating effect as would even an amount of $1,000 on a penniless man. It will make more sence to fit the fime to the purse than to the crime.

Which offence to be fined? Fines could be attached to probation so there may be no limit to which offences. What good is a fine if the offender is incarcerated and is not earning money? If he is rich that is one thing but most men and women who wind up in prison are poor.

Failure to pay? If the offender has no means, use some sort of public service job for payment. He may have no cash but his labor can have some value and may better serve society than the cash. It may also better serve the rehabilitation prospects. (The idle mind thing.)

In the case of an organizational offender? Attachment of assetts or bank accounts? What about a recievership arrangements until accounts are squared? As long as the governments desire to punish does not result in the loss of jobs for the innocent employees of the organization. That would result in unemployment and the resultant loss of revenue in welfare, unemployment benifits and loss of income taxes. You could lose rather than gain.

House arrest would be good for many offenders. With the new technology to assure an offenders presence at his home durring specified hours this would be a cheap and effective way to control and confine. This would be a sanction paid for by the offender himself as in the case of his paying for his probation supervision. The equipment is on the shelf to monitor this compliance without otherwise restricting his/her ability to provide for family and personal needs while serving a sentence.

I have noted an absence of comment re. the possible future of capitol punishment in federal cases. To that I say that I can never consider any government that sanctions killing as truly civilized. I will personally lose much respect for this country if and when a death penalty is re-instituted. It does not detere, is irreversable, and certainly cannot rehabilitate an offender. It is pure vengence and not in keeping with the ideals this country trys to export to the world.

Thanks again for this oportunity to comment. Have a nice day.

Respectfully yours

Paul K Kruger

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July 8, 1986

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
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Dear Judge Wilkins,

Enclosed are responses that I feel should be forwarded to you. The other responses from our people across the country were largely repetitive of the enclosed.

However, these people and the papers enclosed make one point that I would like to reiterate.

The overriding problem of intensive probation, community service and restitution will not be solved by a bureaucratic elaboration of the appropriate circumstances or offenders for their employment.

The current use of these sanctions typically end in enlarging the net with costs both to the criminal justice system and to the offender.

Proposed originally as alternatives to jail or prison they have, unfortunately become routine add-ons to probation. So long as these options are available to judges in this way, the result will be an enlargement of the net. How to avoid this is the main problem!

Again, hope to see you on the 15th.

Sincerely,
Charlie Sullivan
Charles Sullivan

Maygene Giari
1015 Nithsdale Road
Pasadena, California 91105

June 27, 1986

Dear Pauline and Charlie:

Yes, the trip was both enjoyable and informative, thanks. I wish I had more time to digest my notes and the materials we received before writing this. However, I'll do the best I can, drawing on some of the information we acquired. Unfortunately, the French and German hand-outs were mostly in those languages; and I missed an important session (with translator) in Paris. I had to spend that morning applying for a new passport--my purse was ripped off from under my feet while I was sitting with half a dozen other delegates in the hotel lobby. Nothing like experiencing all the aspects of the criminal justice system! Well, here goes:

In preparing guidelines, the Sentencing Commission will naturally want to consider policies that have already been tried and found successful. The comments that follow, therefore, are based both on options that have been tried in various states and on the findings of a recent People to People Alternatives to Prison Crowding Delegation to Europe.

Intensively supervised probation has to a limited extent been used successfully in some of the states, even for rather serious felony offenders. Thus there is good reason to believe these sanctions would be useful as sentencing options for federal offenders. The Rand study on probation recommended such intensive supervision for the more serious offenders, specifying that the caseloads should be small enough to provide adequate supervision.

What forms of control and supervision should be imposed? Rather than law enforcement officers whose role is primarily surveillance, probation officers in Britain and Sweden are social workers. Their aim is to work with offenders to improve their behavior and to help them overcome problems which led to their offenses. In Britain, the role of the probation officer is to "advise, assist and befriend" the offender, both through their own services and through help of other agencies in the community. Such services may include "help for difficulties over money, accommodation or employment." --From The Sentence of the Court; a Handbook for Courts on the Treatment of Offenders, prepared by the Home Office, which is responsible for criminal justice policy-making. Unless otherwise specified, subsequent comments on British practices are also derived from this source,,or from meetings with officials.

In Sweden, to make probation a more effective sanction, legislation in 1983 made the normal period of supervision a year; emphasized the control aspect; and called for swift and sure reaction to misbehavior. The Swedish system, however, emphasizes the importance of dealing with offenders without deprivation of liberty. In Sweden, many of the clients under supervision are unemployed, lack basic educational skills, and often are dependent on drugs or alcohol. For such clients, "day groups" provide educational improvement and training in social skills, as well as providing informal social control through the group. "The general experience with this kind of work has been markedly positive," according to the Swedish National Prison and Probation Administration.

Both countries rely heavily on community services, volunteer workers, and very small caseloads. The British Home Office reports that "Overall more than 80% of probation orders are completed satisfactorily: that is, they run their full course, are terminated early for good progress, or are replaced by conditional discharge."

If the experience of Britain and Sweden with probation as a helping service has proved so satisfactory, then such services are worthy of serious consideration for federal offenders.

What kind of offenders should be placed on intensive supervised probation?

Probation is not limited to first-time offenders in Britain. Nearly a third of the men placed on probation in 1983 had previously served a prison term; only 17% of the men and 34% of the women had no previous convictions. The London Probation Service has a residential program for serious or persistent youthful offenders between the ages of sixteen and twenty who would otherwise be considered for detention; clients in this program average six previous court appearances. The ten-week program emphasizes "confronting and modifying anti-social attitudes and behaviour through constant feedback to the individual together with the reinforcement and development of positive attitudes and skills... It is a demanding full-time programme which requires commitment from often alienated and un-motivated people." Preliminary research findings show a recidivism rate that is almost half that of custodial sentences. --From a leaflet on Sherbourne House providing information for the courts.

Probation hostels (comparable to American halfway houses), managed by the probation service or voluntary organizations provide a period of close supervision for "offenders who have a number of previous convictions, including some who have served periods in custody." Hostel placements, however, are not likely to be suitable "for the most serious offenders or those who by reason of their personal and emotional disturbance or of their addiction to alcohol or drugs need a degree of care or containment which it is impossible to provide in a hostel."

Another option for probationers in Britain is a requirement that an offender attend a day center. "The purpose of day centres is to divert people on probation from a pattern of re-offending by involvement in practical and positive tasks under the supervision of probation staff." Some of these day centers offer organized classes and courses to help their clients improve basic skills.

Infractions of probation orders are of two kinds in Britain: a failure to comply with a requirement of the order or commission of a new crime during the probation period. Courts have a number of alternative courses of action in a failure to comply with a requirement of the order. The court may allow the probation order to continue and impose either a fine or a community service order. Or the court may terminate the order and impose a custodial sentence, or make a new probation order for a further period of up to three years.

If the offender is convicted of an offense committed while on probation, the court may impose a custodial sentence for the original offense, or make a further probation order for an additional period of up to three years.

When a probation order has been completed satisfactorily, the offender is treated as if he had not been convicted of the offense, provided he has not been brought back to court after breaking the order or committing another

offense. A sentence to probation, however, disqualifies the probationer for jury service for five years.

The main offense categories for people placed on probation in Britain in 1983 were theft and handling, burglary, violence against the person, and fraud and forgery. Acknowledging that certain offenses such as rape and trafficking in heroin or cocaine are so serious that custody is "virtually inevitable," the Home Office nevertheless advises that "Most imprisonable offenses, however, will only merit the use of custody for the more serious instances," adding that "the court should always satisfy itself before imposing custody that there is a positive justification in those circumstances for doing so." Probation "may be an appropriate sanction in some cases where the offense is a serious one and custody would have been justified."

What roles should the Commission, the court and probation office have?

An important role of the Commission could be to provide guidelines for specific requirements for offenders placed on probation. As Britain's Home Office points out, probation is not "designed to provide a framework for the imposition of predominantly coercive requirements: its primary aim is to develop an individual's capacity for self-control." Since enforcement of probation requirements is "a crucial matter," imposing unenforceable or unrealistic demands on the probationer "is undermining the authority of courts, harmful to offenders and does not protect society."

Another important role for the Commission would be to make provisions for keeping the courts fully informed of the range of facilities available to support probation supervision.

Provided that three conditions are met, the court seems the logical choice for determining which offenders should be placed on intensive supervised probation. The first condition is that adequate services and facilities are developed for intensive supervision and that an effective, ongoing effort is being made to keep the courts advised of the options available for intensive supervision. The second is that the guidelines include the admonition that sentences to custody are suitable only for the most serious cases. Finally, comprehensive presentence reports, including recommendations for the appropriate disposition of each case should be the basis for determining who should be placed on intensive supervision.

Such reports need not necessarily be made only by the probation office. In this country, a number of private agencies such as the National Center on Institutions and Alternatives are well qualified to prepare such reports and recommendations. Using the services of such agencies benefits the probation office, since it reduces the workload of the office.

Appropriate information to be included in the presentence report not only includes the defendant's previous convictions and sentences, if any, but also the defendant's background and circumstances, including information about his character, personality, and social and domestic background; educational record; and employment or employment prospects. Recommendations for disposition of the case include an opinion on the likely response of the offender to probation, and the type of supervision suggested.

Appropriate considerations for the court in determining sentence are the degree of premeditation; injury caused or value of property involved; the

offender's record and attitude toward the offense; use of or carrying a weapon; and aggravating and mitigating circumstances. Instances in which it would be desirable for the court to give reasons for its sentence include cases where the sentence makes specific requirements of the offender; where the sentence does not fall within statutory requirements; or where a sanction might appear excessively lenient but is nonetheless suitable to the defendant's situation.

House arrest is a viable alternative to incarceration that has also been tested in some of the states. In Oklahoma, house arrest has been used as a form of pre-release. Under legislative guidelines, as much as 15% of the prison population could be released to house arrest. Nonviolent criminals are eligible if they have served 15% of their sentence; violent criminals within six months of discharge are also eligible, provided they have not previously been out on parole. Sex offenders are not eligible for house arrest. Prisoners on this program must report regularly for testing for drugs and alcohol; and they are subject to unscheduled visits and calls. Counseling sessions provide assistance in obtaining jobs. Those who are working pay the state $45 a month to defray part of the supervision costs of $700 a year.

Other house arrest programs, such as one in Contra Costa County in California, have been imposed on serious felony offenders, including robbers and drug offenders. Requirements for house arrest in such programs include the same provisions as those in Oklahoma's program, with additional restrictions. Clients' movements are limited to going to work (if employed) or attending only to essential matters. Probation officers with a caseload of only 7 or 8 clients call on their clients daily and are in telephone contact even more frequently. This form of house arrest is equivalent to intensive probation supervision, and could well be considered as one of the options for such intensive supervision.

Fines are widely used as an alternative to incarceration in Western Europe. In Britain, fines can be imposed for any criminal offense except murder or treason. Moreover, fines are the most frequently used sanction: in 1983, 43% of the offenders sentenced for indictable offenses in that country were fined.

Sweden, Germany, and Austria all have "day fine" systems. According to a study made in 1980, these countries use fines extensively for a wide range of offenses, including many that would be considered moderately serious to serious in nature. The widespread use of fines in these countries has neither resulted in higher crime rates nor for imprisonment for fine default; but it has contributed to a more humanitarian and less costly system of punishment. -- From R. W. Gillespie, "Fines as an Alternative to Incarceration: The German Experience." Federal Probation, V 44, N 4, December 1980.

Elements to be considered in calculating the amount of a fine.

The first consideration, obviously, would be the seriousness of the offense, along with aggravating and mitigating factors, the financial gain to the offender, and the extent of the loss to the victim. In Britain, upper limits are fixed on the amount of the fines that can be imposed, but the courts have considerable discretion within those limits.

Before deciding on the appropriate fine, the court is supposed to consider the defendant's ability to pay and may order payment in installments. The Court of Appeal has suggested the amount of the fine should not exceed a

sum that can be paid over a period not to exceed twelve months. If the defendant's means are very limited, it is appropriate to impose only a small fine, but to stress that the size of the fine does not indicate the offense is regarded as trivial. In such cases, the fine is instead recognized as a substantial penalty for that particular person.

The procedures used to determine an appropriate "day fine" involve two decisions: the assignment of a number reflecting the degree of guilt and the seriousness of the offense; and the determination of a sum that varies according to the offender's ability to pay. The two numbers are multiplied to arrive at the number of days to be fined. This system appears to be more satisfactory than establishing a scale of maximum fines for various offenses, primarily because it leads to fewer problems with failure to pay.

What sanctions should be imposed if an individual offender fails to pay? Both the British and the day fine system provide options that can be used if the offender defaults on payment of a fine. The time allowed for payment may be extended; the size and/or frequency of installment payments may be changed; the fine may be remitted because of changed circumstances such as loss of employment or serious accident or illness; or a community service order may be substituted for the fine. The British courts are also authorized to ensure payment by placing the offender under supervision until payment is completed.

British courts have additional options available when the court is satisfied the defaulter has enough resources to pay the fine but has failed to pay it. The defaulter's goods may be seized by court order; or the wages of an employed defaulter may be attached, with the employer required to make regular payments from the earnings of the offender. The Home Office advises that imprisonment should be "a sanction of last resort in fine enforcement." Before sentencing a defaulter to imprisonment, the court should "be satisfied that the failure to pay is due to 'wilful refusal or culpable neglect'" and "have considered or tried all other methods of enforcing the payment and either thought them inappropriate or found them unsuccessful."

Nevertheless, in 1984, a fourth of all the offenders imprisoned in Britain were fine defaulters. Both the Parliamentary All-Party Penal Affairs Group and the National Association for the Care and Resettlement of Offenders (a charitable organization devoted to developing more effective ways of dealing with crime) have protested the courts' failure to consider every other enforcement method before imprisoning defaulters. The Parliamentary Group recommended that the court should be required to give its reasons for rejecting each of the other enforcement options. The Sentence of the Court;A Handbook for Courts on the Treatment of Offenders prepared by the Home Office is only advisory, not mandatory. Thus it would appear that as well as providing sanctions for fine defaulters, the Commission would be well advised to make the use of sanctions short of imprisonment mandatory as far as possible.

What sanctions for an organizational offender who fails to pay the fine?

First, it should be noted that the fines levied against corporations often seem excessively lenient, considering the seriousness of the offenses. Recent examples are the E. F. Hutton and Eli Lilly cases. To avoid a double standard of justice, fines against corporations should be directly related to the extent of the harm done. In the even of failure to pay, provisions for confiscation similar to those in RICO could be made.

Other possibilities for fines. A precedent for determining the amount of fines to be levied for serious corporate offenses has been suggested by Judge Lois Forer: the triple damages awarded in civil suits, based on the extent of the harm that has been done.

In his book Punishing Criminals, Ernest van den Haag proposed that, combined with a short term in prison, even major crimes such as assault, robbery, or some kinds of homicide could appropriately be punished by fines. The fines would need to be serious penalties. As an example, van den Haag suggested that a defendant who might otherwise have been sentenced to life might instead spend fourteen months in prison. On release, the offender would be required to pay a fine of perhaps seven years' earnings, paid over as long a period of time as needed to achieve that total.

Such a fine, van den Haag pointed out, could be just as punitive as a prison sentence. While not suitable in cases where incapacitation is required, many offenders do not need to be incapacitated. Imprisonment seldom reforms, and too often makes the prisoner worse. Thus, limiting the term of imprisonment while still providing adequate penalties would be beneficial.

Restitution programs in the states have been used primarily for misdemeanors and for felony property crimes such as burglary and theft. Some community-based programs, however, have used restitution for such violent offenses as assault, armed robbery, and negligent homicide, and report that crime victims have been satisfied with the results. Restitution thus could be an appropriate sanction for many federal offenders as well.

Precedents exist in Britain's restitution program, which can be applied to any offense that causes loss, damage, or personal injury (with the exception of restitution awards to dependents of a victim who has been killed). The British Home Office advises that a two-year period for making restitution payments seems an acceptable upper limit. On the other hand, the application of van den Haag's proposal of fines for serious offenders, if restitution were used instead, would be beneficial both to the victims of crime and to the taxpayers who support penal institutions.

The offender's ability to pay is an important consideration in imposing a sentence to restitution. The opportunity to make restitution need not be denied to offenders of limited means, however, if a satisfactory arrangement to make restitution through personal services to the victim can be made.

Combining restitution with imprisonment or community service. For especially serious offenses, the immediate payment of restitution might be appropriate if the offender sentenced to custody has the means to pay. Requiring a restitution order to be paid after completion of a prison term, on the other hand, is likely to impose such a burden on the offender as to make new crimes to raise the money to pay the order probable. If, as suggested above, restitution were substituted for long prison terms for serious offenders, provisions should be made for job training and placement as needed.

For less serious offenses, when the offender has only limited means or when the offense has been damaging to the community as a whole, community service might appropriately be combined with a limited amount of restitution, but without imprisonment.

Structuring a hearing to determine the appppropriate amount of restitution. In some cases, determination of an appropriate amount of restitution may be relatively simple. In many others, the determination of the value of stolen goods or the cost of repairing or replacing damaged property or the loss of wages following an assault could be immensely complicated, placing a time-consuming burden on the court. Yet either the victim or the offender or both may feel unfairly treated by the arbitrary assignment of a figure arrived at without such a time-consuming investigation. Moreover, restitution orders are most likely to be completed when both victim and offender are satisfied that the penalty is an equitable one.

Thus, when a restitution order is considered appropriate, provision should be made to refer the case to a victim/offender mediation service, permitting victim and offender, aided by a mediator, to agree on an appropriate form and amount of restitution. Many such services exist across the country. The Oklahoma Department of Corrections pioneered in setting up its own victim/offender mediation program in 1984. Some are an adjunct of the court; others are private agencies.

One such agency is VORP, the Victim Offender Reconciliation Program, first started in Indiana and now being developed in twenty states. Referrals received from the court and probation department, other criminal justice agencies or community agencies are reviewed by a staff member. Cases considered appropriate for mediation are assigned to a trained community volunteer who meets separately with victim and offender, explaining the program, discussing the offense, and determining whether both are willing to participate.

If both agree, the mediator arranges a meeting to discuss the case and negotiate restitution. When agreement is reached, a contract is signed, and both the contract and a written summary are sent to the referring agency for approval and enforcement. VORP keeps in touch with the victim until the contract has been fulfilled.

A prerequisite for restitution is an admission of guilt by the offender. Preferably, victim and offender agree to a face-to-face meeting; but where a meeting is undesirable or impossible, symbolic restitution can be made through unpaid community service work.

Victim/offender mediation has many advantages in addition to relieving the court of the time-consuming burden of determining an appropriate amount of restitution. Restitution ordered by the court and administered without face-to-face contact between victim and offender may not only be unsatisfactory to the victim, but is likely to be regarded by the offender as a fine rather than as making amends for the harm done by the crime. Imprisonment punishes, but unlike restitution, neither holds offenders accountable nor impresses on them the impact those crimes have had on their victims.

Mediation promotes reconciliation by enabling both victim and offender to see each other as people instead of as stereotypes. Mediation in the community where the crime has been committed helps to restore the harmony of the community disrupted by the crime. -- From Crime and Reconciliation, by Mark Umbreit.

Where the court considers both restitution and a fine appropriate, but the offender lacks the means to pay both in full, the court should give preference to the restitution order.

Community service: structure. British practices also provide a model for the structure of community service orders. Such orders can only be made with the offender's consent; suitable work must be available; the order must involve a minimum of 40 hours, up to a maximum of 240 hours; and the work must be completed within a 12-month period. Determination of which offenders are suitable for this sanction is based on reports by a probation officer or social worker indicating that the offender's living situation is stable enough to enable him to complete the order.

The unpaid work, of a kind normally performed by volunteers, is supervised by volunteer agencies, a public body, or the probation service, guided by a community service organizer within the probation service. The community service organizer--not the court--makes the decision as to placement. The type of work varies widely, and efforts are made to use special skills of the offenders where possible. Unemployed workers may be assigned several hours of work any day of the week; those employed usually work on weekends. If the order is revoked for any reason, the offender may be re-sentenced for the original offense.

Types of offenders suitable for this sanction. In Britain, community service orders are considered appropriate even for quite serious offenses that might otherwise call for a substantial prison term. In 1983, the major offense categories for which service orders were made included theft, handling stolen goods, and burglary; but a substantial number of offenders had also been convicted of violence or fraud. Community service orders are not limited to first offenders. In the first half of 1983, only 11% of the men and 21% of the women so sentenced were first offenders, while about 42% of the men and 19% of the women had previously served a custodial sentence.

Other comments about non-custodial sentences. Life sentences can be imposed in Britain for manslaughter, robbery, rape, sodomy, wounding with intent to do grievous bodily harm, aggravated burglary, and some firearm offenses. However, the court also has the options of imposing either determinate sentences of any length, or a non-custodial penalty. Unless the offender is so dangerously unstable that the public safety would be threatened, the Court of Appeal suggests that the lesser options are desirable.

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July 2, 1986

CURE
Charles & Pauline Sullivan
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Re: Sentencing Commission

Dear Charles:

Enclosed please find the latest research I have done for the Sentencing Commission. I am in the middle of three federal civil rights trials this week so I was only able to fully address the issue of intensive supervision probation.

For your information, the following case(s) deal with an offender's capacity to pay a fine or restitution:

United States v. Boswell, 605 F.2d 171 (5th Cir. 1979)
United States v. Wilson, 469 F.2d 368 (2nd Cir. 1972)
United States v. Taylor, 321 F.2d 339 (4th Cir. 1963)
United States v. Estrada de Castillo, 549 F.2d 583 (9th Cir. 1976)

These cases speak to the Commission's issue on fines/restitution and maybe you could ask one of the other CURE members to prepare something based on these cases which look down on court-imposed fines and restitution which exceed an offender's ability to pay.

Also, the following cases or treatises deal with community service for criminal offenders:

Brown, Community Service as a Condition of Probation, Fed. Probation, December, 1977.
Bergman, Community Service in England: An alternative to Custodial Sentence, Fed. Probation, March, 1975.

United States v. Arthur, 602 F.2d 660 (4th Cir. 1979)

These articles and cases will help point out good/bad uses of community service and as with the cases I have supplied on ability to pay fines, this material could point someone in the right direction on this problem.

If you don't have the time or ability to prepare an opinion based upon the raw material cited here, I might just suggest that you cite the Commission directly to this material for guidance. I'm sure they would appreciate knowing of this information and not to toot my own horn, but it's hard to find stuff that I just happen to be familiar with.

I'm sorry I could not do a more complete report this time but I really am swamped. I hope this little bit has helped and as usual, I will look forward to hearing how things are going.

Sincerely,

A. Scott Bourne
ISCI Law Library

CC: File
ENC.

SENTENCING COMMISSION

ISSUE: Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?

Intensive probation/parole is becoming fairly popular around the country. Use of such plans is designed to keep close watch on offenders. Since prisons are ever more and more overcrowded, Intensive Supervision Probation is a good alternative to incarceration. It is important to note however, that there is great potential for abuse of intensive systems. Intensive supervision should be limited to probation, not parole. The conditions of supervision should be strict but reasonable. Only the sentencing judge should have the authority to place an offender on an intensive supervision program. Allowing the probation/parole authorities to make the decisions as to intensive supervision is full of pitfalls. If the probation officials are allowed to make the placement on intensive supervision, there is a built in conflict of interest. Intensive supervision requires more manpower, hence more probation/parole employees. If probation officers are allowed to make the intensive placement decision, there is too great a danger that they might try to build in added job security by over-recommending intensive placement. Additionally, the types of conditions frequently imposed in intensive supervision cases are more like a sentence and only the judge should have power to pass sentence. Provided appropriate safeguards are instituted to ensure that intensive supervision does not hinder the rehabilitative process or violate the constitutional rights of the offender, it can be the best alternative to incarceration available to judges.

Intensive supervision probation is one method of addressing the mounting problem of of increasing caseloads which make it difficult for probation officers to develop close working relationships with their clients. Intensive supervision increases offender accountability and saves needed bed space at overcrowded prisons, all the while creating cost savings beneficial to the public.

Intensive supervision should be used in lieu of commitment to a prison facility or in lieu of placing a probation violator in custody. Judges should take into consideration a screening process which involves the following:

1) Review of the presentence report
2) The circumstances surrounding the present offense
3) Whether or not the offense involved actual violence

4) The offender's willingness to participate in an intensive program
5) (Optional) psychological evaluation
6) A risk/needs assessment

After reviewing the above-listed criteria, the sentencing judge can place those offenders who are borderline (between regular probation and prison) on intensive supervision, saving taxpayers several thousand dollars per year, as well as providing courts with another sentencing alternative.

Intensive supervision should be for a specific limited period of time. It is suggested that the minimum program participation time be 120 days with a maximum of 180 days. After satisfactory completion of the program, the offender can then be placed on regular supervision probation. The caseloads for intensive supervision should be small so that the intensive probation officer can spend more time in the field and with his clients. It is suggested that a limit of 25 clients be assigned to a two-man intensive probation unit.

The suggested standards of supervision under intensive supervision are as follows:

Phase I-60 days

1. Initial contact made with the client's family (if available) within the first ten (10) days of supervision to explain the program, staff expectations regarding the client's participation, and to elicit family cooperation.

2. Face to face contact with the client on a daily basis. The intensive unit should see the client once each day, varying the contact between home and work, day and night. Home visits should be limited to reasonable hours, i.e. prior to 9:00 PM and not before 7:00 AM.

3. Employment verification should take place once per week. This can be accomplished through phone calls and a review of the client's paycheck stubs. The probation officer should make monthly contact with the employer to see how the client is doing.

4. Verification of employment seeking by unemployed probationers. Unemployed offenders, if not enrolled full time in school, should be required to provide verification of attempts to obtain employment. Probation officers can require clients to fill out job applications in duplicate or utilize other

other methods to verify attempts by the client to obtain employment. The client must obtain employment or be enrolled in school within a 45 day period or be dropped from the program.

5. The client should have a curfew between the hours of 11:00 PM and 6:00 AM (Unless such curfew conflicts with work hours).

6. A list of intensive supervision clients should be given to all local law enforcement agencies on a monthly basis in order to solicit additional surveillance by such agencies of the client.

7. Probation officers will make a check of arrest records every two weeks to make sure the client has not been arrested.

8. During this phase, each client should be required to perform (20) hours of meaningful community service.

9. The client shall be required to contribute 5% of his income (if employed) to help pay the cost of his supervision.

10. All clients shall submit to drug or alcohol tests on a monthly basis if their crime was in any way drug or alcohol related.

Phase II

1. If the client has sucessfully completed Phase I, he should be moved to Phase II, if not, he should repeat Phase I.

2. Phase II is identical to Phase I with the following exceptions:

   A. Face to face contact reduced to (4) times per week.
   B. Curfew eliminated.
   C. Community service reduced to (10) hours during this phase.
   D. Records checks conducted monthly instead of bi-weekly.

If the client can sucessfully complete Phase II, he should be released to regular supervision. If the client violates the intensive rules, he can be subject to a disciplinary hearing and loss of privileges. For major violations, probation revocation proceedings can be instituted. In every case, the decision to place a probationer on intensive supervision or to release him therefrom, should be left to the sentencing court.

It is very important to note that the primary purpose of probation is to rehabilitate the offender. See: Higdon v. United States, 627 F.2d 893 (9th Cir. 1980). Punishment of the offender may not be the primary purpose of a judge's imposition of probation. United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir 1975) (en banc). The reasonableness of probation conditions is a very important point to consider. While intensive supervision can be a very useful tool for courts, the rights of the offender must also be considered. Any abuse of intensive supervision programs could have a counterproductive effect on the offender. The reasonable relationship test (Higdon and Consuelo-Gonzales) must be applied to intensive type programs.

June 27, 1986

Charles Sullivan
C.U.R.E.
11 15th Street, NE #6
Washington, D. C. 20002

Dear Charlie:

I received the letter-copy of June 17, 1986 by the U. S. Sentencing Commission, along with the note that your wrote. I have thought about the topics on which the Commission is soliciting input as contained in the letter, and have commented on those that I feel competent to do so. I think we have covered some of the topics in former papers. Hope some of my comments and observations will be helpful in some way. It will be a challenge to get the proper authorities to recognize what some of the real problems are and to take affirmative action in terms of sentencing of offenders. Everybody always wants to punish the result and not treat the cause.

When I was writing the enclosed paper I was reminded of two or three individuals I know who were formerly imprisoned in the TDC. Well, the third still is, but not for long now. Each of these persons were inmates constantly in trouble during their incarcerations, incurring many disciplinaries, serving solitary or segregation time, on cell restrictions and the like. I got to know each of these three individuals either through living on wings with them or, in the case of a woman at Mountainview, by assisting her with legal matters. Each of these persons, like others here I'm sure, felt that no one gave a hoot about them and they didn't have much of a future - just couldn't cope with prison life and had no support from the outside. Each were lonely people, but in my view each had potential in their own ways. I struck up a correspondence with each of them, or visited with those that were here at Ellis with me over a period of time. I suggested goals to each of them, challenged them to accomplish certain things while imprisoned and tried to show each of them that people do care and want to help for the sake of helping and seeing people grow even in here. Two of them commented to me that no one had really cared what happened to them during the course of their lives. That may have been true. But each one took hold of the goals or objectives they agreed on and pursued those personal goals while imprisoned. All three transformed themselves from troublesome inmates to practical, rule-obeying inmates over a period of weeks and they remained that way. Their goals became important to them and I continually encouraged them in this way.

One of the ex-inmates is now living in Austin and operating a successful painting business. The woman who was at Mountainview was released on parole and now lives in Dallas. The other man is still at Ellis, but has adjusted to prison life and will be going home at the end of this year. All of them got out, or will get out in the time that they did because they set goals for themselves and those goals changed their lives in here and maybe helped them readjust when they were released. I have had some very nice correspondence from them since their release. Charlie the point is that most all incarcerated persons can be rehabilitated once they affirm of positive view of themselves, establish goals that are meaningful and work toward those goals that are set by themselves with some encouragement from people who care. At both the state and federal levels we need sentencing alternatives based on the individual and his needs, with goals and incentives that the offender can relate to, and reach for. One reason why the TDC is in such bad shape is because it is a system without incentives for the inmates. You may be aware that Judge Justice is holding contempt hearings, for non-compliance of Ruiz orders, this week and next. I'm just afraid that if attitudes toward incarcerated individuals do not change for the positive, and meaningful sentencing and parole/community service programs instituted, that there will not be enough concrete and steel in this country to build the necessary prisons.

Give my best to Pauline. Keep the faith and keep up the good work in Washington. We have our goals and we shall be faithful to them.

Your friend,

Dan

Daniel Johnson, #274157
Ellis Unit
Huntsville, TX 77343

DJ

SENTENCING OPTIONS

1. Community Service.

With the possible exception of such crimes as treason, assassinations and attempts, and certain forms of espionage practically every individual convicted of a felony or misdemeanor can benefit from some sort of community service activity either initially (depending on the nature of the offense) or as a form of rehabilitation following a term of imprisonment given or assuming progress and good conduct while imprisoned.

The nature of the community service activity would depend upon several factors, important among these being the needs of the individual and what he can either contribute, gain, or benefit from the particular service program or function to which he or she is assigned. This is because the causes of criminal activity are several. However, it appears from experience and observation, as well as from statistics, that major causes of criminal activity in the individual stem from (1) use of alcohol or drugs, (2) a mental or emotional disorder in the individual which is probably treatable, (3) lack of social involvment in the community, lack of worthwhile goals and peer pressures of the positive kinds, (4) personal insecurity which manifests in offenses designed to obtain monetary gain, and (5) family or business pressures or dramatic, traumatic events which manifest in criminal activity. These causes are not exhaustive but perhaps they are controlling.

Before assigning any offender to community service of any sort, either upon conviction or after a term of imprisonment, it is most critical to identify (through psychological examination or counselling) what probably caused the individual to engage in criminal activity. For example, an embezzler may be an alcoholic who gained courage to engage in the activity only while under that influence. Or, he or she may be affected by an emotional disorder which is treatable. The person may have been under intense family or business pressures, or felt alienated by society or his own family. It is important to ascertain what the practical needs of the individual are. Assignment to certain forms of community service based on the type of offense, for example, would not be most effective. One could not assign all embezzlers to do outreach at county jails, for example.

In keeping with this concept, then, the individual found to suffer from alcoholism would be assigned to a local AA program in the community. He or she would also, depending upon their business/education background, be assigned to speak at certain community functions or before groups (juveniles with alcoholic problems, jails, families with alcoholism problems) concerning the dangers of the problem and perhaps share their personal experiences in this regard. This same offender could have committed most any crime, but the cause in this case was alcohol. Depending on the nature and seriousness of the crime he or she would be assigned to this sort of community service initially, or after a term of imprisonment. Likewise, an offender may have been affected by an emotional or psycholigcal disorder which manifested in a crime of burglary, robbery, rape, assault (street crimes). This disorder may very well be treatable. This individual may serve a term of imprisonment during which he or she receives treatment, and subsequently become involved in community service. Many street crimes are committed due to alcohol, drugs, insecurity, and especially due to the lack of peer or social pressures on the individual. These individuals, at some point during the 'totality' of the sentence (including community service) need to experience that sense of goal setting and achievement, cooperation with others in worthwhile activities, that will create new patterns of behavior and morals that were not present when the offense was committed and which they may have never experienced in their lives at all, due to family background, ghetto experiences, etc. In larger cities it may be that new service programs will need to be established to allow for interaction groups (of these sorts of offenders), who can then plan and coordinate legitimate activities to work with schools (delinquents), churches, young people's groups, in poverty areas, with the objectives of counselling others who may be potentials for criminal activity. This program could be coordinated and overseen by parole directors, or persons employed by the parole commission. It could be funded by fines imposed as sanctions for criminal activity against certain individuals and corporations.

This writer is stressing the appropriateness of community service for a wide variety of offenders, with or without a term of imprisonment depending on the seriousness of the crime. There are concrete reasons for this. First, ex-offenders have a grasp of the problems involved that is sometimes underestimated. They can sometimes better identify with those younger individuals from like backgrounds and who appear to be destined for crime in the future (or have committed some crime). They can often relate to such persons more effectively and deter future misconduct through counselling and personal persuasion. These ex-offenders whould be utilized in community service for this purpose. It would also give the ex-offender interaction he or she needs, goals to accomplish and some feeling of accomplishment in performing worthwhile activities. Also, any human being reaches a point during actual imprisonment when the detrimental effects of the imprisonment experience become long-lasting and firmly entrenched. He or she loses the ability to think and act independently to an extent, and simply reaches a point where he or she cannot effectively function without a highly structured envirnoment in their lives. A sentence should include, if appropriate, a length of imprisonment consistent with treatment of the individual together with a program of community service activities as a follow-up to the in-prison treatment/rehabilitative programs. Even if new patterns of behavior can be formed while in prison, there must be follow-up in the community in order to reduce recidivism. A flat period of imprisonment, for 'X' number of years (for those who must be imprisoned), brings with it the dangers of recidivism if the individual is imprisoned too long and without meaningful reintegration into society by means of some service program in which he or she has goals, incentives, and an opportunity to benefit and contribute meaningfully. Community service programs can provide such incentives and goals for those offenders who have been imprisoned, as well as those who are not imprisoned.

Those assigned to specific work or service in the community could be under the auspicies of an independent program, and/or coordinated with existing agencies and organizations in the community such as outreach programs, churches, schools, drug and alcohol abuse programs, local media, and with state, county and city officials. Crime affects everyone. Everyone benefits from a meaningful community service program.

Certain types of offenders could be placed in the mode of community service upon conviction and without a period of imprisonment. This would include those convicted of misdemeanor offenses (unless habitially repetitive for same offense), and certain felony offenders for non-violent offenses particularly. Again, this would depend upon the prior criminal conviction record of the offender and what determined cause for the crime is established or determined by evaluation and counseling.

An important goal of sentencing is to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effect manner. 18 U.S.C. § 3553(D). This being the case, community service, either initially upon conviction or after a reasonable term of imprisonment, should be appropriate for any type of offender at some point with the exceptions of those few crimes mentioned in paragraph one under this topic, at page 1. In community service work, whatever the forum or mode, only a former prisoner can relate prison life and its effects in a meaningful way to the community and to those who should receive this information for deterrence effect; and before it is too late to help individuals in the community who would engage in criminal activity. What has the greater deterrent effect? Reading about someone convicted of an offense who has been imprisoned (with the public misunderstandings about prison life generally, parole, etc.), or sharing with the formerly imprisoned person about his prison experience? In a lot of cases deterrence has less value because it is not made personal to persons who could benefit by such information from someone who really has been there.

The community service aspect of any sentence should be monitored by the regional or local director of the program and by the Parole Commission. Should the offender not abide by his community service obligation, with established goals in terms of hours/weeks/months and objectives, he or she would be subject to a hearing on the matter and possible imprisonment or reimprisonment.

2. Probation.

In determining the levels of supervision and control of those offenders placed on probation several factors should be considered. Among these are (1) the stability of the offender and his immediate family in the community. Is the offender from the community? Does he or she have family who are permanent residents of the community? (2) the age of the offender and if he is employable or already employed in the community. (3) Any community service programs he or she will be required to participate in. (4) the determined cause of the crime based on psychological evaluation and counselling of the offender. By way of illustration, and generally irrespective of the type of crime committed (for which probation is authorized and approved in the case), an offender with ties in the community, who is employed gainfully or who can be employed within a reasonable time, and who may be assigned to community service work should require less supervision than an offender who is placed on bare 'probation' without further service required and has no ties in the community. If the offender must be supervised to closely then he or she probably should not even be on probation anyway. Probation terms should probably include a provision for some type of community service work, as is presently provided for and as explained in this paper. As an alternative the probation terms could include provisions for restitution, gauged by the offender's financial condition, earnings, and the victim's actual losses. The amount of restitution should not destroy the offender's ability to sustain himself or his family adequately, or he may turn to crime again in order to pay it. This has happened. Most offenders would perhaps work additional hours at some employment, without pay (with the wages going to restitution), rather than see substantial deductions taken from their paychecks which would or could unreasonably impair their family's livelihood and economic well-being. Either restitution or community service could be imposed as a condition of probation. In those cases where the offender appears to earn his livelihood by criminal activity it would be appropriate to closely supervise such an offender on probation through frequent reporting, employment checks, and perhaps initial activity reports prepared by the offender, with spot verification by the probation officer.

C O N C L U S I O N

As with any problem that confronts our society the commission of crimes have causes. These causes that manifest in criminal activity in the individual are often identifiable and treatable. Before an offender is sentenced it should be determined, if at all possible, what factors or maladies within or influencing the individual probably caused the criminal activity. If sentencing is not individualized according to the needs of the individual (as opposed to a cold record only) then a sentencing Judge can only impose a sentence based on standard criteria of sentencing for a particular type of crime. The effects of imprisonment on any individual is very dramatic. A point of diminishing returns is reached during which imprisonment of a continuing nature becomes ineffective, ingrains bitterness in the most disciplined of individuals, and is most counterproductive to rehabilitation and reintegration into society. If the individual is not intrinsically rehabilitated (or well on his or her way) after five years of imprisonment than it well may be that that person will be difficult to rehabilitate. Whether one wishes to recognize this fact or not, it appears to be a fact based on years of observations, personal discussions with many incarcerated persons, and personal observations of recidivism. Many years of imprisonment destroy family relationships, the individual's ability to compete in the marketplace in a reasonable manner, and severely impair his or her ability to think and act independently with a semblence of self-confidence in society. An individual released after extended years of imprisonment sees little hope and less opportunity. His or her mental attitude is depressed. A prime candidate for a recidivist. In sentencing, the total sentence should include (for those who must be imprisoned) a reasonable term of imprisonment and community service activity geared to the individual as much as practical. This activity should be structured. In this way deterrence can be more effective in the long run, the ex-imprisoned has goals in his or her life that are meaningful, and new modes of behavior are affirmed in the individual. The pressures of peers then become positive and the individual has a real, legitimate chance to feel a contributing member of society who can make a difference. He then has too many positives to risk to become involved in criminal activity again.

FEDERAL PROBATION OFFICERS ASSOCIATION

National Officers 1986

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June 19, 1986

William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W. #1400
Washington, D. C. 20004

Dear Judge Wilkins:

As requested in your letter of June 17, 1986, the Federal Probation Officers Association will provide comment on the critical topic, Alternatives to Incarceration.

A committee, headed by Susan Smith, is in place and working on FPOA's response. Sentencing alternatives is an area of probation officer expertise, and this knowledge can be of value in assisting the Commission.

Although your letter did not so request, Susan has agreed to appear before the Commission, present testimony and answer questions.

If I can be of further service, please advise.

R. L. THOMAS, PRESIDENT

cc: Susan Smith

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July 7, 1986

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, Northwest
Washington, DC 20004

Dear Judge Wilkins:

On behalf of the Federal Probation Officers Association, the following papers are being submitted to the Sentencing Commission for inclusion in the forthcoming hearing on **sentencing options**.

It was our initial intention to consolidate the papers into one position statement from FPOA. However, in reviewing my committee's responses, I feel each paper deserves full consideration by the Commission.

Although the respondents have varied approaches to the topic of sentencing options, there is one thought which flows consistently through each of the papers - community-based options supervised by U.S. Probation Officers are and will continue to be viable alternatives to incarceration and will be able to be meaningful to both the community and the offenders.

The community-based supervision needs, however, continued and conscientious forethought and planning during the presentence report process, as well as an expeditious and significant handling by the Courts of offenders' non-compliance.

The papers I am submitting to you have been prepared by Charles L. Stearns, Vice President of FPOA and a Supervising U.S. Probation Officer in the Central District of California; Rory J. McMahon, Secretary of FPOA and a U.S. Probation Officer in the Southern District of Florida; and Gregory A. Hunt, Legislative Committee Assistant for FPOA and a U.S. Probation Officer in the District of Columbia.

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I will attend the hearing on July 15, 1986 and look forward once again to witnessing the Commission's thorough and thoughtful consideration of the varied and complex issues brought forth by both written and oral arguments and testimony.

Sincerely,

Susan I. Smith, Chairperson
Legislative Committee, FPOA

SISpeh
Enclosures

FEDERAL PROBATION OFFICERS ASSOCIATION

National Officers 1986

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SENTENCING OPTIONS

Position Paper Submitted By

Charles L. Stearns
Vice President, FPOA

Regional Officers

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June 26, 1986

SENTENCING OPTIONS

Having been a Probation Officer more than a quarter century, I have seen the emphasis of the criminal justice system shift from one orientation to another, insatiable faddists that we are. I have lived through the medical model wherein offenders were viewed as "sick" and in need of treatment. I have seen society blamed for failing to provide adequate access to the underprivileged with resultant training and educational programs so characteristic of the 1970's. Then, I saw a transition to concern for the "victim" with the plethora of activity surrounding making whole the victim of crimes. The 1980's thus far have been characterized by a thrust toward an "equity" model with determinate sentencing and increased financial sanctions. Through it all, there has been one system constant .....crime has continued unabated. Yet, through it all, I have maintained the belief that people have the capacity to change and that the the promise of change is best realized not through the artificial existence in a custodial setting, but through appropriate interventions in the open community.

A recent corrections compendium news release reported that the correctional system plans to spend more than $3,000,000,000 in 1986 for 59,000 new prison beds. Each new prison cell ranges in cost from $15,200 to $157,000, depending on the security level and whether land must be purchased. It seems to me that a national strategy needs to be developed wherein custodial

Regional Officers

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sanctions are reserved for those individuals that pose a serious threat to the well-being of others or have demonstrated by their persistent behavior that selective incapacitation will reduce the career costs of maintaining them.

If there is one common trait I have found in people who commit crime, it is that they are egocentric, self-centered, selfish individuals who care little for significant others in their lives. The thrust then should become developing in them the capacity for being other directed. The concerns of sentencing enunciated in 18 USC 3553 can be met in ways not demanding substantial custodial sanctions. Instead, financial sanctions made possible by the Fine Enforcement Act and enhanced victim compensation provisions of the Crime Control Act are more appropriate to bring about change in concert with community service or such other conditions as will impact on an individual case. At a time when we are trying to get a handle on the national deficit and maximizing the benefits of expenditures, it is imperative that we select alternatives less costly than incarceration providing that the risks of such alternatives are not exorbitant.

Let me turn now to the specific questions of the Commission regarding sentencing options.

PROBATION

As a national strategy, we have adopted a position that the quantity and quality of supervision is based principally on the level of risk the client poses. Although this focus might well mean that we are devoting the bulk of our resources to "losers", it is unlikely that this orientation will change. The classification systems already in place set forth expectations of "contact" that will meet what might be considered "intensive" supervision. Rather than attempting to prescribe the types of offenders to be considered for intensive supervision, it is believed that the local District Court and Probation Office should be delegated the responsibility of establishing both the criteria for selection and defining the elements of intensive supervision. This would allow for the introduction of local values and such other unique differences as may repose in particular districts. The role of the Commission should be more in the realm of a monitor to ensure the equitable administration of justice and the Commission should not be a programmer of what constitutes intensive supervised probation. Certainly, the conditions set forth in 18 USC 3563 are sufficient to establish a meaningful supervision program. Additional conditions appear unnecessary particularly since Condition 20 provides for such other conditions that the Court may impose. Instead, we need to look more carefully at how conditions are utilized.

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For example, we misuse the community treatment center condition. Those facilities should be reserved not for punishment purposes such as split sentences but for those cases that are absent resources in the community. Similarly, I see no need to routinely place inmates in community treatment centers prior to parole unless their circumstances are such that they are without sufficient residence and employment resources. Additionally, we should pursue more vigorously the concept of work furlough which allows for the punishment of incarceration while at the same time permitting an offender to provide for family support, maintain steady employment and retain a measure of dignity.

FINES

Since this is a society of economic determinism, financial sanctions have a significant role to play. The Fine Enforcement Act enhanced substantially monetary sanctions with the net result that Courts more readily can take out the profit from criminal enterprise. A gut level feeling is that fines should be the preferred sanction for offenses of an economic nature. In calculating the actual amount of a fine, factors to take into consideration include the offender's gain, the victim's loss and the reasonable expectation that the offender has the resources or the potential to earn sufficient to meet the financial obligations. In no event should an offender be allowed to "profit" from his crime. In place already are sanctions for willful failure to pay a fine. If the reasons for failure to pay are legitimate, modification to impose community service in lieu of the fine could be considered. Incarceration should be a final resort only after other interventions are attempted without success. I see no problem with pursuing more vigorously Court direction to dispose of ill-gotten assets to meet financial obligations.

RESTITUTION

Restitution should be considered in every case involving loss to any victim and should be ordered in an amount and manner so that there is a reasonable expectation that it can be paid. If there appears little likelihood of payment, consideration could be given to performing certain tasks that might prove beneficial to the victim. In terms of structuring a hearing to efficiently determine the appropriate amount of restitution, it is suggested that the responsibility should be placed on the government counsel and defense counsel to work out an agreement which then would be reported in the Presentence Investigation Report. Disagreement should be presented to the Court for resolution. Where the victim is the United States, community service might be a viable alternative to restitution. Finally, in multiple count cases, the United States Attorney needs to be more assertive in negotiating pleas that encompass agreements to pay restitution to cover counts for which conviction is not had.

COMMUNITY SERVICES

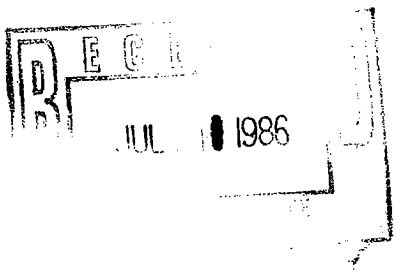
As touched on earlier, if my view that offenders essentially are selfish is an accurate one, community service provides the best opportunity for developing a conscience that is other directed. An effective community service program should include not only a provision for hours of service, but provide also for completion of projects. An organizational conduit should be created to administer community service programs for a particular district. This entity could examine the individual's abilities, interests and community needs so that a program could be developed to maximize the benefits to the individual, the community and the Court. I don't believe that there are certain types of offenders for whom community service will not serve the goals of sentencing.

HOUSE ARREST

House arrest with intensive supervision might prove to be a viable alternative to incarceration. However, to be effective, funds need to be made available to obtain necessary electronic hardware to ensure that the individual is compliant with the requirements. It should be used in lieu of cases that otherwise would be incarcerated. The program requires both close supervision and ready access to the Court in order to handle speedily violations that occur. A research component should be built in to monitor the effectiveness of the program and to aid in discerning the types of individuals that would benefit from this alternative.

CONCLUSION

Considering the implementation of the Crime Control Act and the Fine Enforcement Act, there are adequate tools available to take a significant "bite" out of crime. As a national strategy we need to consider alternatives to incarceration whenever possible. Split sentences, providing the feel and smell of jail, might prove to be sufficient in most cases in terms of punishment and deterrence, followed by an appropriate assortment of terms and conditions of supervision to bring about improvement in conduct. We can ill-afford the costs of expensive prisons and the utter waste of human resources. The 1980's should hallmark a new beginning. Let it be a decade of achievement both for the criminal justice system and the population of offenders. Through meaningful intervention and performance oriented standards, we have the best chance to improve the quality of life and the protection of all our citizens.



Very truly yours,

Charles L. Stearns

CHARLES L. STEARNS

FEDERAL PROBATION OFFICERS ASSOCIATION

National Officers 1986

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HOUSE ARREST AS A SENTENCING OPTION

Position Paper Submitted By

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HOUSE ARREST: IS IT A VIABLE ALTERNATIVE TO INCARCERATION

In the development of alternatives to Incarceration and other traditional sentences, or more significantly, cost effective alternatives to incarceration, house arrest has become increasingly more popular. Presently, official policies of home incarceration programs are in effect in California, Florida, Illinois, New Mexico, New Jersey, New York, Oklahoma and Utah. Although the practice is variuosly termed; house arrest, home detention, home confinement, domicile restriction, etc. it has in common the fact that the offender is restricted to the home, for specified periods of time, as a means of punishment.

House arrest offers certain advantages over other sentencing alternatives. One of the problems of imposition of a straight term of probation supervision, even probation with special conditions (i.e. drug testing, required psychological testing, alcohol treatment, etc), is that they often fail to satisfy the public's sense of Justice. The tradition of retribution is very powerful, and the Court which violates the prevalent sense of Justice by going lightly on the offender, is likely to provoke public backlash. An alternative such as house arrest may provide the public with a " symbolic value of an official finding of offender accountability." [1] Home incarceration may provide a more restricted form of social reprobation, which will guarantee the public protection against those who continue to endanger it, without exacerbating the already overcrowded jails.[2] Home incarceration may provide a sense of appropriate retribution, while at the same time serving a utilitarian goal of protecting the public.[3]

Perhaps the principal reason for the recent tendency toward stiffer penalties for many offenses is the sense that Justice is not being done.[4] The perception that many of the lighter sentences; fines,suspended sentences, or relatively unsupervised probation have not had a significant impact upon the offender, have failed to teach him a lesson that he won't forget.House arrest, on the other hand, can be administered in such a way that the offender will be impressed with the public's defination of the offense as serious without being subjected to the harsh sanctions, which are sometimes held to be necessary " to get their attention."[5]

Home incarceration also offers the virtue of reversibility. Should unforseen problems arise in any particular case, or should the offender fail to abide by the conditions required, revocation proccedings could be initiated very easily. The Court would agree to this sentencing alternative with the written understanding that the offender agrees to abide by certain conditions, spelled out very explicitly in the written contractual agreement. Violations of any of those conditions should

result in prompt return to the Sentencing Court for revocation of the house arrest term and imposition of a sentence of imprisonment.

Turning from the theoritical examinination of the merits of house arrest as an alternative to incarceration, who should be eligible and under what circumstances? In my opinion, house arrest should be used for the non-violent middle gange offenders, and the first or second time white collar offender, assuming the magnitude of the offense is not that significant. Certain offenders should be precluded from consideration for this sentence. Those offenses that should be excluded would include narcotics offenses, bank robberies or crimes committed with a weapon, certain ATF violations, and persons who otherwise are considered not amenable to Probation supervision. I would not preclude probation and/or parole violators from consideration. On the contrary, I think it would be appropriate as a sanction for certain technical violations of the conditions of supervision.

The Court at the time of sentencing, having had prior input from the Probation Officer, should determine the restrictions of the house arrest. At its most stringent, house arrest could mean no movement outside the residence. However, as the programs have developed and evolved the usual limitations include provisions that allow the offender to work, at an approved job, and allows the assigned Probation Officer to set the paramaters and timetable during which the offender is restricted to the residence. And this compliance would be strictly monitored.

The responsibility for checking compliance with the Court's order should be given to Probation Officers with specialized caseloads, usually they are referred to as " surveillance officers," who have reduced caseloads and flexible 24 hour shift rotations. There should be random daily cheks both by phone and in person to monitor offender compliance. Such a truly random system would uncover scofflaws very quickly. A violation of the Court order, following supervisory approval, should result in the issuance of a warrant by the sentencing court, and imposition of a sentence of imprisonment, following a hearing.

I have had the opportunity to read an abstract of the legal ramifications of the use of electronic surveillance in Probation, and the authors concluded that although there are constitutional issues that could be raised, the constitutionality of electronic devices to monitor compliance with Court imposed conditions of supervision, such as house arrest, would most likely be upheld by the Courts. I have not provided a detailing of the different electronic devices and their application, primarily because of the financial ramifications of Gramm-Rudman. However, I

believe that the use of those devices is cost effective, and will result in more productive use of Probation personnel. I will be happy to provide my comments and suggerstion on this matter if the Commission feels that it will be beneficial.

Conclusion. Foremost among the advantages of the House Arrest Programs would be cost savings, and alleviating an already overflowing Prison System.Assuming that the Surveillance Officer had a caseload of 25 or less which is the maximum number that he could effectively supervise, the cost per offender on an annual basis might well be $2,500, as compared to a minimum of 10 times that for the cost of incarceration.

There is also an indirect savings. Offenders would remain at home supporting their families, and paying taxes, therby saving the state welfare costs and providing additional revenue to the government.

However, ther are limitations to the program as well. Public protection cannot be guaranteed. The offender is not locked behind bars. He can leave his home and commit crime. Some offenders will try to beat the System, con the Probation Officer, and some will succeed. However, if the Probatin System is staffed adequately, and provided with the necessary resources and equipment, it is a risk worth taking. Furthermore, I don't believe that there is any other means to avoid prison overcrowdind under the guidelines that will be formulated.

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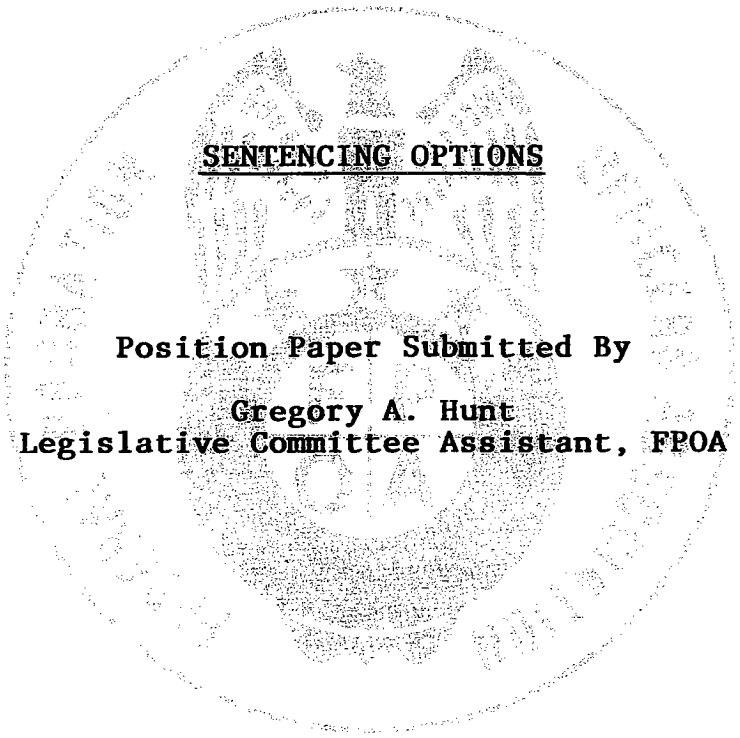
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SENTENCING OPTIONS

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SENTENCING OPTIONS

Introduction

This paper was solicited from the Federal Probation Officers Association by the United States Sentencing Commission to discuss the topic of the various alternatives available to the Court at the time of sentencing and how they should be applied. Although the request was fairly explicit in terms of the kind of input the Commission wanted from the Association, it is felt that besides a discussion of the application of such options there are some critical issues that should be brought forth related to their organizational impact. These issues are especially important to the line probation officer since he/she will be involved in their implementation. Moreover, since these issues, essentially, are organizational, they have policy implications for the entire federal probation system. For the guidelines to be most effective it is felt that some of these issues will have to be addressed.

Organizational Issues

One of the traditional and long standing problems in corrections is that we tend to try and use a sparse set of responses as solutions to the vast panoply of behaviors and individuals that are subject to our intervention. It is well documented throughout history that criminal behavior is the result of a variety of environmental, biological, psychological, sociological, and political factors. As far back as the mid-nineteenth century, one of the first criminologists, Enrico Ferri, put forth the hypothesis that criminal behavior is the net result of the "interrelatedness" of such factors (Ferri, La sociologia criminale, 1884). Despite the passage of time, the belief that crime is produced by a variety of factors has continued to be reasserted by criminologists. James Q. Wilson recently wrote that "...an understanding of crime requires an understanding of some of the most fundamental and intimate features of the human condition" (Wilson, 1983). Much of the research in the field has consisted of identifying many of the variables related to criminal behavior. Although several variables have been found to be significantly related to certain kinds of illegal behavior, the evidence so far seems to demonstrate that the causes of criminal behavior are quite multitudinous.

Since available evidence seems to demonstrate that criminal bahavior is the result of numerous and varied factors, then it would also seem that the responses to such behavior should also be varied. At this time, in federal probation system, the sentencing options are quite limited, albeit expanding. We do have probation, restitution, fines, community service, halfway houses, community correctional centers, substance abuse rehabilitation programs, and various forms of imprisonment. These options, of course, are not discreet units but can be found in various combinations. Notwithstanding these possibilities, there are still an abundant number of circumstances for which there are no suitable options. For instance, the only options in cases in which the person is emotionally and/or mentally disturbed are incarceration in a federal institution or a special condition for mental health service. Unfortunately, generally, the system has to rely on community resources and they are usually quite limited. This means that when it has been determined that a person has an emotional or mental disturbance, and their crime is not sufficiently serious to warrant prison, that the system has no correspondent disposition. Moreover, the options that are available are only available in certain jurisdictions; they are not universal to the probation system. Since it appears that the sentencing guidelines will include several alternatives to incarceration, their inclusion should be in conjunction with the further development of additional alternatives and the universalizing of available current programs.

Another antecedent concern is with program management. Where such programs do exist, they are often misapplied and/or ineffective. There is a tendency in the correctinal setting, when an alternative is available, for one of two things to occur. The first is not to recommend the program because it's in conflict with the individual's or organizational's belief system. As it now stands, it is up to the individual probation officer, within the organizational context, to make a recommendation to the Court for a particular option. Since, as is well documented in the literature, the Court concurs with the probation officer's recommendation in 90% of the cases, this recommendation is particularly important. The second possible outcome is for the probation officer to over-utilize a particular program by attemtping to place everyone in it in spite of the fact that they are not likely to succeed. For example, ordering community service for an individual who has demonstrated throughout his life that he is irresponsible. A related example concerns the recent U.S. General Accounting Office report criticizing the federal probation officers for not collecting enough financial information in the presentence reports to support their recommendations in regard to fines. This is one of the reasons, this report suggests, that fines are never collected (GAO, 1985). In essence, we do not do enough screening for such programs to insure the appropriate people are placed into the most "beneficial" programs. Deciding who is appropriate for each type of option is very important because it will determine the success or failure of each alternative.

The first problem will be partially resolved, hopefully, with the implimentation of the guidelines. If a particular outcome is mandated by the guidelines, the various offices thoughout the country will have to institute programs in their districts. As we all know, however, the actual enforcement of the program guidelines will be left up to the District Courts. Unless there is some monitoring of the system, there still could be considerable disparity between the districts as to implementation. This is the same disparity that the guidelines are attempting to eradicate. In regard to inappropriate use of a particular option, there will have to be more clear cut criteria establishing who should be placed in each program. This, of course, is one of the questions the Commission wants our Association to address, and will be discussed in this paper. It would appear, however, that any such criteria should be based on offender characteristics and environmental factors. As long as special conditions of probation are not based on the individuals ability to abide by them, there will be consistent failure to comply with such options. Moreover, the individual will have to be brought back to Court for violation of probation which causes increase case load pressures on the Court and the probation officer. If the options are carefully considered and there is a reasonable chance that the specific defendant can abide by them, then the number of cases brought back to Court should only be the ones in which the person is actually trying to avoid compliance. Although this writer has no particular quantitative evidence that some conditions of probation are unreasonable, he has observed many such cases in his own Court. In fact, one District Court Judge for the District of Columbia complained to this writer that probation officers for this district often recommended restitution in cases where there was no possibility of repayment. It is, therefore, recommended that a persons ability to comply with the options be given a high priority in the guidelines.

More importantly, besides the issue of a persons ability to comply, there is the issue of enforcement of the options. Two areas where enforcement is a problem is in restitution and fine payment. As already cited, the GAO report on fine collection indicated that from 1979 to 1982 that "...many offenders did not pay their fines and that others who did pay did not pay on time". A consequence of this report was the passage of Public Law 98-596,

which moves the responsibillity for the collection of fines from the U.S. Courts to the U.S. Justice Department. This change, however, does not remedy one of the essential problems of the system of collection. This problem lies in the fact that the probation officers are still the monitoring officials of fine and restitution collection and that their positions are ill suited for such tasks. Specifically, it is the probation officers responsibility to set up a payment plan (based on the probationer's ability to pay), supervise the collection of the payments, follow-up on non-payment, and report violations to the Court. Although superficially this appears to be a satisfactory system, it is not as is evidenced by the fact that these amounts are not being collected at anywhere near a satisfactory rate. The break down in the system is having the probation officer assume total responsibility for the collection of funds. It would be more appropriate if the actual collection of funds was assumed by the Justice Department, who could bill the defendants and monitor their payments. The probation officer's role should be to assist in the development of a payment schedule and cooperate with the Justice Department when there is a situation of non-payment. In other words, the Justice Department should assume their legal responsibilities for collection, since they have the resources for such activities. If there is a problem, the probation officer could interevene.

Another organizational point to be solved is the questions concerning probation effectiveness, which is not unrelated to the Commission's question concerning intensive supervision and house arrest. In the last few years there has been considerable erosion in support for probation supervision by the public, the courts, academia, and by probation officers themselves (Rosecrance, 1986). There have been many reasons for this erosion, which are beyond the scope of this paper. One of the ways to cope with this problem was suggested by Petersilia et al. in their study of probation supervision for the Rand Corporation. They recommended a punitive community-based alternative to prison (Petersilia, 1985), or more commonly known as intense probation supervision (IPS). T his has caused many states to develop "intense" probation techniques. Although several federal probation offices are instituting such programs, this approach is far from universal. One of the principle problems is the additional cost in manpower. Caseloads in IPS programs usually range from 25 to 40 cases per officer, and in many of the state programs there are additional resource personnel in the IPS unit. In fact, the State of Georgia had to include a probation assessment to pay for the additional cost of the program. Any consideration of this option would also have to include additional resources for the Probation Division. Furthermore, those individuals selected for the program should be people who would have otherwise gone to prison. Otherwise, there would be no savings to the government for avoiding incarceration, and this is one of the primary reasons behind the IPS program.

Obviously, the consideration of alternatives to incarceration would also have to include some organizational changes in the federal system to insure that the alternatives are effective. Otherwise, there would be no reason to include them in a system of penalities.

Integration

The two most important criteria in determining an appropriate sentence are the seriousness of the offense and the characteristics of the offender. Logically, these same two criteria should also be considered when determining a disposition which includes an alternative to imprisonment. Once this criteria has been determined, the question then becomes for which offenses and for which offenders should alternatives be mandated. There are several issues to be considered in relation to these two questions. One of those issues concerns

the rationale for using alternatives. Mostly, the reasons cited are the cost effectiveness of community based programs and the adverse affect of imprisonment on certain individuals. As is well documented, imprisonment is much more expensive and should be avoided if alternatives are available. Moreover, alternatives will allow the offender to pay restitution, pay fines, contribute taxes, support their families, maintain employment without the accompanying detrimental effects of imprisonment. With these considerations in mind, it would seem that the less punitive options should be designated for the least serious offenses and the more punitive for the more serious offenses. Moreover, the defendant, who can make the most of the opportunities provided by the alternatives, should be selected for these options.

Probation

In contrast to the prevailing view, probation is a punishment. It does not take a probation officer very long to come to the understanding that those people whom they supervise are not entirely pleased with their predicament. Mostly, the clients on probation supervision want to get off of supervision as soon as possible and they generally dislike reporting to the probation office. Since those people on supervision view it as an adverse consequence of their criminal activities, then is should be viewed as a punishment. As a punishment, probation should be understood, similar to other penalties, in terms of severity. For example, should a person who has committed a serious property offense, who will probably receive probation, receive the same penalty as a minor property offender. In essence, the current system does not treat these two individuals differently. If, however, the probation system instituted levels of severity in probation supervision we would be treating these people in accordance with their illegal behavior. Intense supervision is one of the methods currently available to address the concerns of severity.

It is recommended that intense supervision be part of the sentencing guidelines. It is further recommended that strict guidelines be placed on such a program. It would seem that for intense supervision to be effective that the individual should meet with his or her probation officer at least three times a week, perform some form of community service, and be made to pay restitution or a fine. Most important, there would have to be immediate consequences for non-compliance. If a person is allowed to violate these conditions and no action is taken against them then the integrity of the program would dissipate. We feel most strongly that if intense supervision is to work properly that there needs to be stringent guidelines as to Court action once a person violates the conditions.

In regard to the kinds of offenders that should be placed in such programs, it is felt that no one should be placed in these programs who is a danger to the community. On the other hand, people should be placed in the program who have committed rather serious offenses but are not a danger to the community. At this time, these individuals are usually incarcerated because there are no alternatives to straight probation. Generally, intense supervision would be the appropriate alternative. The determination as to exactly whom will be placed in the program should be left up to the Court and the probation office with guidelines set up by the Commission. This would allow the Court and the probation officer to examine each case in terms of ability to abide by the stingent conditions of intense supervision, the community's protection, and the impact incarceration will have on both the defendant and his or her family. These issues are currently considered in sentencing decisions and could be further utilized in determining who was placed on intense supervision.

We further suggest, besides the inclusion of intense supervision in the sentencing guidelines, that there should be changes in our current system of high and low intensity supervision to reflect various degrees of offense seriousness. This system is currently based on our RPS-80 risk score which does not consider offense seriousness. Which means that a person who has committed a relatively minor offense, who also has a low score on their RPS-80, will be treated more harshly - that is, placed in a higher intensity supervision - than someone who has committed a more serious offense. According to the scale, a person with a high school diploma could receive a higher score and a lesser penalty than someone without a high school diploma. This does not make sense in terms of a system that is based on the belief that more serious offenses should be treated more harshly. Moreover, the RPS-80 risk scale has not been revised to reflect current trends in behavior in years. For instance, opiate addiction is one of the criteria for being placed in a higher intensity category, but phencyclidine use is not. Those of us who have supervised phencyclidine abusers know that they have a higher rate of violations than other individuals. It is recommended that the Commission suggest to the Probation Division that the scale should be periodically, perhaps every five years, revised to insure that they accurately reflect our current population of offenders. We also believe that it should contain a scale of seriousness of offense. This would allow us to use the scale to determine who should be placed in various levels of probation supervision.

Most importantly, in relation to our above statement, it is believed that probation should be regarded as a penalty and this should be reflected in the overall sentencing guidelines. With the above-described risk scale, which would include seriousness of offense, the guidelines could outline which types of crimes should be placed in various levels of probation supervision intensity. Of course, the guidelines would also have to include offender characteristics, such as prior arrests, use of drugs (especially phencyclidine, heroin, and cocaine) and the level of cooperation with the Probation Office. We believe further that these various levels of supervision should contain requirements that the probationer participate in programs and/or learning situations that are related to their offense. For example, a person who has become involved in a property offense due to mismanagement of their finances, would be required to participate in a class on how to manage their finances. We believe that the Commission is in the position to recommend to the Probation Division that such programs be developed to insure compliance with the guidelines. It is felt that this is the only way to restore some credibility to probation supervision.

This does not mean that we would neglect our role in rehabilitation of the offender. It does mean, however, that a person's rehabilitation would not be tied to the punitive measures incurred by their offense behavior and prior record. We certainly believe that it is a probation officer's responsibility to assist the individuals under their authority with problems that occurred while on supervision. Although these services should be given more emphasis than they now receive in the system, they should not be specified as a criterion in the sentencing guidelines. Rehabilitation services should be a secondary role in relation to our responsibilities to the Court, the community and the legislative mandate.

This writer understands that this response is not exactly what the Commission requested; however, it is believed that the issues covered in this paper need to be expressed. Alternatives to imprisonment are necessary in this era because of the high cost of incarceration and the deleterious affects caused by imprisonment. We, therefore, believe that alternative options should be given more emphasis by the Courts and by the Probation Division and that such options should be effective alternatives to incarceration. For them to be effective, we believe that there need to be some changes in policy to insure that these alternatives are viable.

United States Circuit Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Chambers of
William J. Bauer
Circuit Judge

July 17, 1986

Ms. Suzanne Conlon
The United States Sentencing Commission
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Dear Suzanne:

On June 17th, Judge Wilkins sent me a letter (which, God knows, I have neglected!) asking certain very specific questions as to my personal feelings on some areas of sentencing. I shall now try to respond (and then make some personal general remarks for you or whomever you wish to share them with):

Probation: I have never known probation to be effective (except as a method of assisting an offender by counseling) in rehabilitation or crime prevention. My very personal belief is that only voluntary participation in a "probation" program has any effect at all.

Fines: I certainly feel that fines should be the preferred sanction in certain cases. In those white collar crimes (where the motive is greed, not need) a truly significant fine -- far beyond the amount realized by the crime -- would be appropriate, effective and would reduce the cost of penitentiary maintenance. While I tend to consider the probationary requirement of "public service" as a return to involuntary servitude, working to pay off a huge fine seems to be most appropriate.

Restitution: I really have no feel for this because it is effective only when the crime is purely financial. In that case, restitution combined with the fine, as noted heretofore, strikes me as sensible if not particularly effective. That is to say, it reads well and that might add to public confidence in the system - a worthwhile endeavor.

Community service: I have grave reservations about this one. As an alternative to military service during draft periods, it was fine. As a general thing, I'd rather see a whacking fine, appropriately used. That's a form of public service that really does some good.

House Arrest: A splendid solution for offenders that are non-violent and too ill to be confined to a jail without imposing a greater burden on society than they have already caused, or whose presence is needed at home to care for a truly dependant relation.

As to my general feelings about sentencing guidelines, I impose upon you the following mental wonderings:

Sentencing: One of the problems facing any group seeking to establish sentencing guidelines is the fact that the criminal laws themselves are simply guidelines. They are, in theory, the legislative establishment of the minimum restrictions on human behavior. These restrictions are designed to prevent individual members of society from preventing the rest of us from enjoying "life, liberty and the pursuit of happiness" -- or whatever the stated objectives of government might be at a particular time and place.

Generally speaking, the criminal laws define unacceptable human behavior and set penalties for the breach of the law. The penalties may be written in absolute or optional terms; that is to say, when the fact of the violation has been established, the enforcement mechanism imposes a penalty that is either not subject to discussion -- a flat, binding sentence -- or can be more or less severe depending on circumstances. Sometimes the circumstances themselves are described in the definition of the crime, more often they are not.

In addition to the fact that the legislative adoption of criminal codes usually includes some guidelines, it is important to remember that there are many, many guidelines affecting the proceeding on the executive level. The "officers of the law" have themselves wide discretion (in a real sense) as to whom to arrest and what charges to bring. Sometimes the "guidelines" used by the officers are spelled out; usually they are designed so that the officer is compelled to use his own (or his departmental "policy") guidelines.

At any rate, what is important is that, by a decision of an executive officer, some people are charged with crime and some are

not, and, frequently, the behavior or act of the non-charged person is the same as the act of the one charged. What is different is the variation in the application of guidelines by the charger (or the variation in the preception of the guidelines by the charger).

As to those persons charged, another set of guidelines becomes important: the guidelines of the executive officer responsible for the prosecution of crime -- the district attorney, the state's attorney or what have you. The power of the prosecutorial office is enormous. The decision not to prosecute is virtually unreviewable. Here also, written or unwritten policy guidelines are extremely significant. (What resources might be available to the prosecutor is also significant). What the "office" considers worthy of its prosecutorial efforts is bound on the outer limits by the legislative code but the inner limits are generally much more discriminating and more subject to a bit of personal attention -- a case-to-case evaluation of the human behavior problem and its impact on society. It goes without saying, of course, that the prosecutor is generally very aware of what his constitutient members of society consider unacceptable behavior; what laws they insist be enforced with vigor and which violations of the adopted code they prefer to see ignored or, at least, used sparingly. In this sense, the "will of the governed" is extremely important; even an all-out effort to enforce an unpopular law is generally ineffective. Prohibition may have been a noble experiment but whatever guidelines were espoused or tried to be put in effect to enforce the law were stymied by the fact that most adults were violating the law. Full and effective enforcement would have ended American society, not protected it. It is quite true that society as a whole sets guidelines in sentencing by granting or withholding its collective approval of enforcement and/or submission to the law.

Of course, the guidelines the commission seeks to establish have to do with guidelines for the judicial branch of government; I simply wanted to belabor the rather obvious point that whatever guidelines the commission adopts or the judiciary accepts, a lot of guideline applications have already gone into the process and the judicial decision is on the tail end. It is, considering the prisoner review boards or the like, not even the ultimate decision, accepting, for this purpose, the finality of the judicial decision.

From the viewpoint of those being subjected to imposition of sentence (and probably from the viewpoint of many potential victim members of society) the judicial disposition in terms of

effectiveness as well as severity is the most important of all of the guideline applications.

Which says, I suppose, that every sentence being pronounced is already the result of the application of judicial guidelines, written and acknowledged, or unwritten and unadmitted, institutional or personal. No judge sentences in vacuum. He (or she) may honestly believe that he has shed himself of all bias and prejudice, and divorced himself from his past experiences that produced his attitude towards various kinds of human behavior, but if that were really so, the judge would have removed himself from the human race. And, since past experiences are usually different judge-to-judge, it stands to reason that different subjective guidelines go into each case. Some judges are more tolerant of sex offenders, some look with less reflective horror at crimes against property; it really depends on what the judge consciously or subconsciously believes to be the greatest threat to society. Indeed, a good deal of what goes into the sentencing has to do with the judge's knowledge and understanding of society itself.

It is my personal opinion that enacted guidelines will be only reminders to the sentencing judge of what factors the commission (and whatever group or groups applaud and ratify those factors) believes should be considered by the judge. The guidelines can never be conclusive, if only because their application will of necessity be subjective. Judges today meet the judicially imposed guidelines in many cases simply by saying, "I have not taken into consideration any past conduct of the defendant, including his confession which was suppressed before trial." And this, of course, must stand as true, because there is simply no way of knowing otherwise.

Mind you, I know that there are guidelines now, and I welcome guidelines in the future. At certain times, human beings need all the help they can get and the determination of the future of a fellow human being is certainly one of those times. In 1892, Maeterlinck said: "I have never for one instant seen clearly within myself; how then would you have me judge the deeds of others?" I echo that thought.

Carried to its logical conclusion, this would eliminate human judging. Experience tells us that to eliminate human judging (a representative of society deciding what should be done with an erring brother) would result in both anarchy and the death of society by paralysis. Somebody has to do it and the best approach is to acknowledge that the job is imperfect and that no judge is ready or prepared for it. All he can do is attempt to do a better job than most other people he has encountered. And to do the job

better he must make consistant and daily attempts to understand why people commit crime, that is -- if it is possible to ascertain -- why this defendant committed this crime and why society cannot condone this action, and why it is necessary to impose some particular sanction and then, the final deadly question, what sanction best serves society. For if the sanction imposed really does assist society by protection of its goals, satisfaction of its ethics, and adherence to its stated standards, then in some real sense, the best justice we have available will have been delivered.

Imposing sanctions or sentences can bring no joy; even in those few cases where a deep need to revenge society brings some satisfaction, the very fact that such measures are necessary is enough to bring pain to judge. (If sentencing brings joy to the imposer, I am convinced that the system has destroyed a human being or the judicial selection process has found a non-human candidate.)

Learning to be a good judge in terms of conducting a trial is not difficult; a strong working knowledge of the laws of evidence and long trial experience can produce good trial judges. But there is nothing available to teach a human how to be a good God. At best we stumble along, watching our goals, fearing our inadequacies, looking for help and hoping for inspiration and wisdom, knowing that we, imperfect as we are, are required by the profession we undertook, to pass imperfect judgments upon our imperfect fellow creatures.

Maybe some good will come of all of this search for a road to tolerable human behavior but even if no good at all comes of it, we cannot abandon the search. It would be abandoning humanity and that, of course, is unthinkable.

Very truly yours,

WILLIAM J. BAUER

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

July 16, 1986

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Dear Mr. Wilkins:

Thank you once again for the opportunity to express our views on the topic of sentencing options. I would like to address this question in light of the distinctions between dangerous offenses (i.e., violent crimes against persons, and others, like burglary, dangerous because of the imminent possibility of violence) and regulatory offenses.

The two categories, regulatory and dangerous, have also been referred to as "sumptuary crimes" and "common-law crimes." In the modern era, we have seen a substantial growth in the criminalization of many activities or actions that were previously not considered crimes against the individual. In some respects, this is symptomatic of a larger question: the relationship between the individual and the state. Many regulatory laws have been passed in an attempt at standardization or restriction in the name of the "common good." No matter what the intention of those who passed such laws, and in many cases the intention is praiseworthy, the net effect of these sumptuary laws is to infringe on personal freedom.

In that classic of criminal justice literature, The American Jury, Kalven and Zeisel pointed out that many average citizens, as represented by the juries they studied, were hostile to sumptuary crimes. These citizens saw "an inconsistent line between legal and illegal conduct, be it between betting at the race track and betting in town, or between selling liquor on one side of the Mississippi or the other."

Members of the National Rifle Association could add to these examples many of the provisions of the now-reformed Gun Control Act of 1968. Countless law-abiding citizens were lured across that "inconsistent line" during the 1970s, caught up in the confusing web of regulations and proscriptions that made up GCA '68 as enforced by the BATF.

Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary in the Senate (1980) documented a pattern of abuse within the agency charged with enforcing GCA '68. This pattern of abuse highlights the dire need for sentencing options to incarceration when dealing with non-dangerous offenders of regulatory laws.

Most of the abuses centered around the lack of precision in the law. Although the purpose of GCA '68 was to establish a regulated licensing system for individuals "engaged

in the business" of dealing in firearms, no definition of that crucial term was written into law. This omission created a vacuum in which law enforcement abuse all too often occurred.

Of the many cases of overzealous "enforcement" on the part of BATF, two in particular sum up the problems of nebulous regulatory laws and point up the need for alternatives to incarceration in such cases.

Robert Best, President of the Northern Indiana Gun Collectors Association, was told by a BATF agent in the mid-'70s to let his license expire and not renew it. A short time later, Mr. Best was arrested for violations of GCA '68 and was told "this would have never happened" if he had had a federal firearms license. All charges were dropped, after much effort, money, and public humiliation endured by Mr. Best.

One collector from Virginia was arrested and his entire firearms collection confiscated on no specific charges. He was then offered a deal, whereby he would give up certain of his firearms in return for BATF "dropping everything." Under the law at that time, most violations were punishable by a five year prison sentence and a $5,000 fine. The collector was eventually persuaded to give up four firearms of his choice in return for the cessation of all legal action.

One circuit court judge expressed his distaste for the orientation of BATF and GCA '68 against harmless collectors and dealers in a letter to the U.S. Attorney General in 1979. The judge suggested that federal prosecution should be pursued in criminal cases which also involved violations of federal firearms laws. That is also the position of the National Rifle Association in this matter.

Any violent crime related to firearms laws should be punishable by a prison sentence not including probation, suspended sentences, plea bargains, etc. Where the violation of federal firearms laws is directly related to and conjoined with the violent crime for which the offender is being prosecuted (e.g., knowingly and willingly transfering a firearm to a convicted felon or other proscribed person (18 U.S.C. 922 (d) (1-4)) for the purpose or with knowledge of use in a felony) prosecution on federal firearm law violations should be swift and vigorous.

While many problems will be obviated by PL 99-308, there are areas where abuse still could occur. These include the by now infamous "straw man" strategy, where a dealer (and now a private citizen as well) is duped into selling a firearm under circumstances that can be construed to involve non-residents of the seller's state, ambiguity over the definition of "conversion kits" for the manfacture of fully-automatic firearms, possession of a fully-automatic firearm unknowingly, sale to a proscribed person without mens rea, selling to a BATF agent or informant without a license, sale to an ostensible "terrorist" -- which could include various Jewish or Irish or other ethnically-based clubs -- or any other technical violation of this exceptionally complex set of regulations.

The Firearm Owners' Protection Act, now PL 99-308, was drafted in recognition that technical violations of regulatory laws should be treated as misdemeanors. In keeping with that philosophy, the use of altenatives to incarceration for such offenses is a moral imperative.

Thank you once again for the opportunity to have input into your deliberations. Let me close with a quote from perhaps the most influential thinker on criminal justice issues, Mr. James Q. Wilson: ". . . . every conviction for a non-trivial offense would

entail (in the ideal world of criminal justice) a penalty that involved a deprivation of liberty . . . whether it would involve confinement at night and on weekends, while allowing a person to work during the day; enrollment in a closely supervised community-based treatment program; or confinement in a well-guarded prison." It is the Commission's task to determine which classes of offenses, such as mere regulatory violations, are trivial and suitable for alternatives to incarceration while accomplishing the dual goals of protecting the public and punishing the offender.

Best wishes.

Sincerely,

Wayne L. Pierre

Wayne R. LaPierre, Jr.
Executive Director
Institute for Legislative Action

WRL:dwc

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
PROBATION OFFICE
ATLANTA, GEORGIA

DANIEL D. RECTOR
CHIEF PROBATION OFFICER
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July 3, 1986

Mr. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W. Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

Enclosed are views on the topic of your fourth hearing.

Sincerely,

Fredrick Rogers,
Supervising U. S. Probation Officer

FR:gdc

Enclosures

Probation

*** Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?**

Intensive supervision should be imposed on those persons who are classified as career criminals, those with drug/alcohol problems or extensive histories of abuse and those with mental/emotional problems. Also those persons who are convicted of violent crimes against persons and are considered guarded individuals.

Drug/Alcohol offenders should undergo regular drug/alcohol screening on a minimum of one time perweek and should be seen by the probation officer or community agency a minimum of one time per week. Unscheduled home visits should be made a minimum of one time per week. Career and violent crime offenders should be under close surveillance and a minimum of one contact weekly by the Probation Officer.

*** What roles should the Commission, the court and the probation office have in determining which offenders are placed on intensive supervised probation?**

The Probation Office should first, by way of investigation, establish that an offender's background is such that intensive supervision should be required and the Court should then impose a condition requiring same. The Commission should serve as the "Watch Dog" and set sanctions and guidelines that will assist the field officers in supervising the intensive supervision offenders.

*** What type of probation conditions not expressly listed in 18 U.S.C. 3563(b)(1-19) should the Commission consider in drafting the guidelines?**

Expanding the search and seizure requirement on persons under supervision to contraband not necessarily in full view.

Fines

*** Are there certain crimes for which fines should be the preferred sanction? If so, list the offenses.**

Yes, Environmental offenses, Regulatory Offenses, Traffic offenses on governmental installations, many corporate violations, many antitrust violations, etc.

*** What elements should be considered in calculating the actual amount of a fine? Should the amount of the fine bear a particular relationship to the offender's gain or the victim's loss? How should the offender's "ability to pay" be determined?**

Elements considered in calculating actual amounts of fine: current financial status of defendant and future potential earning ability based on past financial progression.

Yes, the amount of fine should bear a particular relationship to the offender's gain or the victim's loss.

Offender's ability to pay should be determined by their assets and liabilities and other accessible financial options available to him such as inheritance, money in trust, etc.

*** What sanctions should be imposed if an individual offender fails to pay the fine? An organizational offender?**

After it has been determined that an individual has the ability to pay but fails to do so, the Court should either go after assets or incarcerate until such time the fine is paid. With organizational offenders, the Court can go after assets or place additional operational restraints on the organization or key figures of the organization. It may also consider incarceration of responsible individuals of the organization.

Restitution

*** Under what conditions should restitution be ordered? How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? Are there ways in which restitution could be effectively combined with imprisonment or community service?**

When there is an identifiable victim and the defendant has the ability to pay. At this time, the Government is providing information on victims and probation officers are interviewing victims and assessing losses. Yes, there are ways restitution could be combined with imprisonment or community service. Where the defendant is working in prison, monies earned should be used to pay victims. If defendant does not have the ability to pay the community service may be utilized as retribution to victim.

Community Service

* How should an effective community service program be structured?
* What types of offenders will benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals the sentencing?

See enclosed package...

House Arrest

* Is this a viable alternative to incarceration? If so, under what circumstances?

Yes, house arrest could be a viable alternative to incarceration. If this is to be used at initial sentencing, it should be applied to certain first time offenders and offenders who are not viewed as a threat. It could also be applied to persons already under supervision who violate a technical condition of supervision. If to be used effectively, some form of electronic surveillance could be utilized.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA
UNITED STATES COURTHOUSE
110 EAST PARK AVENUE
TALLAHASSEE, FLORIDA 32301

WILLIAM STAFFORD
CHIEF JUDGE

JUL 16 REC'D

July 10, 1986

Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

Dear Chairman Wilkins:

Please find this a response to your letter of June 17, 1986, in which you solicited views on the sentencing options available and appropriate for convicted offenders.

Probation

Generally, some form of intensive supervised probation should be imposed on certain types of federal offenders. Appropriate cases would include those who are considered to be a danger to the community but who would otherwise not be considered an appropriate candidate for commitment. Also, those who have intensive court-ordered obligations to complete and those who are considered to have more personal problems that would interfere in adjustment, appear to be the kind of offenders who should be supervised intensively.

It is felt that the Commission and the Court should continue to let the probation office determine which offenders are placed on intensive supervised probation. Currently, the probation office utilizes a classification procedure found in their Publication 106. This method of classifying the offenders takes into account several areas as they relate to an offender, and the offender is then placed into the appropriate category. The level of supervision corresponds to the category in which the offender is then placed. In many cases, offenders who are placed on intensive supervision make an exceptional adjustment, and intensive supervision is no longer needed. Also, since the probation office will be aware of the offender's background and will monitor the response to supervision, the probation office should then be fully capable of revising the level of supervision as well.

The type of probation conditions expressly listed in 18 USC 3563(b)(1 through 19) appear to cover most areas. Between those conditions and the discretional instructions given an offender by the supervising probation officer, no other conditions appear needed.

Fines

There are certain crimes for which fines should be the preferred sanction. "Preferred" and not "only" is important. For petty and simple misdemeanors, fines should be preferred.

The elements that should be considered in calculating the actual amount of a fine include the seriousness of the violation and the offender's ability to pay. The amount of the fine should have a relationship to the offender's gain, but not necessarily the victim's loss, since the victim's loss should be addressed by the Victim and Witness Protection Act of 1982. The offender's "ability to pay" should be determined by considering the assets, liabilities, and as important, the potential earning ability.

Sanctions should definitely be imposed if an individual offender fails to pay a fine. Those sanctions should include harsher penalties in the event the offender deliberately refuses to pay the fine. An organizational offender should, likewise, face the same consequences if a fine goes deliberately unpaid. In the event an offender attempts to complete a fine but is somehow unable to do so by no fault of his own, discretion should be used in imposing alternative sanctions.

Restitution

Restitution should be ordered under the provisions addressed in the Victim and Witness Protection Act of 1982. That Act clearly defines when and how restitution should be ordered. Hearings should be structured in accordance with the normal rules of judicial procedure with the intention and spirit of the Victim and Witness Act being used as guidance.

There are ways in which restitution could be effectively combined with imprisonment or community service work. The possibilities are virtually unlimited, and they are now in effect.

Community Service

Community Service Programs should be structured as they relate to the needs of the community and the needs of the offender. Offenders who benefit the most from this type of sanction are those who are able to provide services to the community that would otherwise be unobtainable by the community. Also, offenders who are restricted financially may be able to provide services to the community that are just as important as money. Offenders who would not be considered appropriate to devote community service work include those who may jeopardize the safety of the community or those needing a harsher sentence.

House Arrest

House arrest is a viable alternative to incarceration in certain cases. Those cases where a single parent is involved, where dependents need to be supported, and when the usual structure of a prison setting is not needed are examples. Many house arrest programs have been enacted by states, and it is important to realize that while house arrest may be an important alternative to incarceration, it also demands much manpower and resources.

It is hopeful that some of these suggestions are beneficial in the above-listed areas. Through hearings and discussions as well as through correspondence such as this, many of the important topics are being addressed. We have before us a major transition that will demand much research and dedication, ingredients that our court continues to offer.

Sincerely,

William Stafford

William Stafford, Chief
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA
PROBATION OFFICE

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July 3, 1986

REPLY TO Muskogee

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Judge Wilkins:

The following is my response to your most recent correspondence dated June 17, 1986:

Probation

There are certain types of federal offenders that do require intensive supervision. These would include all drug offenders, that is producers, dealers, users; also, alcoholics, organized crime participants ("leaders and followers"), white collar criminals (including 'financial manipulators'). The forms of control and supervision should be tailored to assure that the offender avoids any activity, environment, or individual that would not be conducive to a law-abiding lifestyle. No less than biweekly personal contacts, in the office, and in the field, for at least the initial six months of probation; in addition, drug and alcohol aftercare, maintaining or seeking employment or educational programs, and routine reporting requirements should all be integral parts of the supervision plan.

The Commission and the Court should rely on the source of information that has investigated all aspects of the defendant's character, background, etc. to the extent possible (i.e., the probation officer, with the Court having the final discretion as to the type of intensive supervision needed).

We would have no additions to the various type of probation conditions not already listed in 18 USC 3563(b)(1-19).

Fines

Yes, there are certain crimes for which fines should be the preferred sanction. In particular, corporation convictions, where the individual officers have been exonerated, would be a prime example.

The elements that should be considered in calculating the actual amount of a fine should include the maximum allowable by statute; the financial resources of the defendant; the financial needs of the defendant and his family; the earning ability of the defendant; and any other factors that the Court deems appropriate. The amount should have a direct bearing on the offender's gain, or the victim's loss. In addition to the aforementioned characteristics of the defendant, the defendant's overall net worth should be taken into consideration.

Appropriate sanction for either an individual or organizational offender would be a contempt of court citation.

Restitution

Restitution should be ordered in each case where there is a proven loss pertaining to physical injury, mental/emotional injury, or financial loss to a victim. Individuals should be given a priority for compensation, followed by consideration for organizations (i.e., insurance companies, corporations, banks, etc.). A hearing should include the victim's proof of loss and needs, especially if the loss were disputed by either the victim or the defendant. Availability of court discretion is imperative in this particular issue. Restitution can be effectively combined with imprisonment, probation or community service, as has been done in this district routinely.

Community Service

An effective community service program should carefully consider the availability of reliability protection for all parties involved. Again, the Court should have a complete discretion in order community service program after considering all defendant and victim characteristics and previously imposed sanctions.

Professional offenders, such as physicians, lawyers, tradesmen (carpenters, plumbers), etc., would benefit most from this type sanction. Offenders who are unskilled, uneducated, and pose a third party risk would not be good candidates for community service sanction.

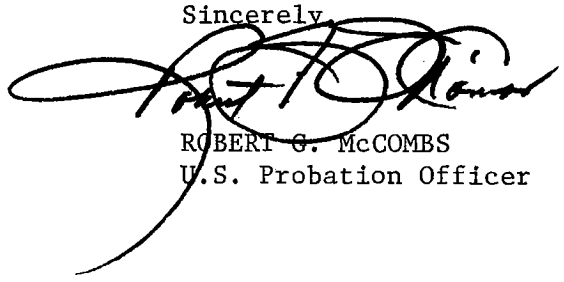
House Arrest

The house arrest program is, in our opinion, not a viable alternative to incarceration. In this particular district, it does not appear to be cost effective for either the Bureau of Prisons, the Court, or the Probation Office, as in many cases, a 24 hour surveillance of the inmate would be necessary. In addition, the questions of liability for health care, additional prime activity, etc. makes this particular alternative unfeasible.

We have found that neither the community service program or the house arrest program have been very feasible or easily executed for rural caseloads where onsight, in person surveillance is absolutely necessary.

I sincerely appreciate, once again, the opportunity to offer our office comments on subjects presented by the Commission.

Sincerely,



ROBERT G. McCOMBS
U.S. Probation Officer

lsa

NNVSA

NATIONAL NETWORK FOR VICTIMS OF SEXUAL ASSAULT

July 7, 1986

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Chairman:

In response to your letter of June 17, 1986, the following comments are offered for consideration pending the July 18th hearing. They should be taken in reference to sentencing only as it applies to convicted sex offenders.

Probation.

Because of the violent and chronic nature of sexual offenses, we believe that probation is not an appropriate sentencing alternative to incarceration for convicted sex offenders. Sexual assault is an extremely serious offense resulting in long-term personal trauma; rape is the next most-serious crime after murder. As a matter of justice to the victim, persons convicted of this type of crime should not have the option of release, even under strict conditions.

Moreover, because sex offenders' behavior is chronic and is uncurable, according to our nation's experts, the community's safety must also be taken into account, making probation not an alternative to incarceration.

Fines.

Federal law currently addresses only a narrow scope of sex offenses, mainly involving penetration offenses. Because of this, and because of the reasons discussed in "Probation", fines are not an acceptable alternative to incarceration.

Restitution.

Restitution may be acceptable in addition to, but not as an alternative to, incarceration. Because some victims may not be able to tolerate any further dealings with their assailant, restitution should be considered on a case by case basis.

Financial loss for victims of sexual assault is often in the form of lost income after the attack. The after-math of the assault can cause the victim to lose several days of work or to not be able to return to her place of employment or type of employment. Time is also lost when the victim cooperates with law enforcement and court procedures. Financial loss may come further from medical and/or therapy expenses.

A number of states have Workman Compensation laws and Crime Victim Compensation Funds which reimburse victims, and this may factor into restitution being made by the offender.

c/o Virginians Aligned Against Sexual Assault P.O. Box 2401, Arlington, Virginia 22202

The main injury from sexual assault, however, is psychological, and restoration of financial loss is not the main issue. Because of this plus the consideration of community safety again, restitution should not be considered an alternative to incarceration.

If the victim agrees to financial restitution as part of the defendant's sentence, the financial losses could be discussed in the Victim Impact Statement presented to the court before sentencing. Because the victim's needs for therapy may not become known until some time after the sentencing, a provision could be added to the sentencing to see that such expenses are taken care of when they arise.

Community service.

For the reasons of justice to victims and of community safety, community service should not be an alternative to incarceration for convicted sex offenders.

House arrest.

While a convicted sex offender would still be confined under house arrest, such an alternative is greatly less severe than incarceration in a prison. We do not believe this would be justice to victims. In addition, it would be a signal to society that sex offenses are not serious crimes. For these reasons, house arrest should not be an alternative to incarceration.

Transfer from prison to a mental institution.

I would like to call to the Commission's attention the practice in some states of permitting convicted sex offenders to be transferred from prison to a mental institution where, upon being declared "rehabilitated", are released without having to serve the remainder of their sentence. Patuxent Institute in Maryland has had such a policy.

Our objection is not that rehabilitation be attempted, but that the offender be permitted to, in effect, escape his sentence which was handed down by the court system. Sexual assault is a larger issue than a mental health issue. Sex offenders are more than "patients" needing therapy. The criminal justice aspect cannot be overlooked or discarded. If an offender is judged to be "rehabilitated" through treatment at a mental institution, he should then continue his sentence in prison.

We hope that the Commission will investigate this type of alternative, and consider whether it reflects the need for justice to victims and for community safety.

To summarize, we do not support sentencing alternatives to incarceration for convicted sex offenders. The serious effect of the assault on the victim and the chronic behavior of the offender require a type of sentence perceived by the offender and by society to be extremely serious.

We thank you very much for your attention to these views, and are looking forward to conclusions made by Commission members.

Very truly,

Anne Dawson

Anne Dawson
Coordinator
(703) 892-0200x201

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
PROBATION OFFICER

ROBERT K. SIBILLE
CHIEF PROBATION OFFICER

July 3, 1986

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AREA CODE 504 389-0494
FTS: 687-0494

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

Dear Judge Wilkins:

I am responding to your letter of June 17, 1986 requesting my views on possible sentencing options for individuals convicted of federal offenses.

Concerning intensive supervision probation I believe such programs may be useful in holding down the increase in our prison populations by providing an alternative. I do not believe such programs could be any more effective than standard probation supervision in preventing the probationer from committing new crimes. If the criminal wants to violate the law, he will simply alter his style to suit the type of contacts he has with his probation officer. I do not know what type of offender would best be handled in an intensive probation supervision program. These programs appear to be totally surveillance oriented. They cannot control the individual as well as an institution, and the environment seems wrong for rehabilitation. The programs remind me of other dual purpose items: they do several things, but not very well.

If intensive supervision becomes a viable alternative for our district judges, I see no real role for the Sentencing Commission. The probation division of the Administrative Office can develop and promote the program with our judges and make sure the resources are allocated to the field offices. Who is placed on intensive supervision should be done through special conditions of probation ordered by the sentencing judge on recommendation of the probation office. In my opinion, the supervising probation officers already have the authority through the standard conditions of probation to run small scale intensive supervision programs with selective probationers.

I can think of no probation conditions not listed in Title 18 USC 3563(B), one through nineteen, that needs to be considered by the commission in drafting guidelines. That list is worded so any reasonable condition could be ordered by the sentencing judge or through instructions by the supervising probation officer.

In considering the matter of fines, I believe fines are more appropriate for the non-violent, economic gain offenses where specific victims or

restitution cannot be determined. The fines should be related to removing the economic gain of the offense but should not be so heavy that it totally destroys the individuals ability to maintain financial stability. That amount and the offenders ability to pay will have to remain a judgment call by the judge and his probation staff. If the offender fails to pay the fine and in the opinion of the court, he was financially able to do so, then I believe the court should continue to have the option to revoke probation or to be given the power to seize assets. When dealing with an organizational offender, seizing assets seems to be the only real alternative.

Restitution should be ordered in all cases where a victim can be identified and a reasonable amount of restitution can be determined. In those cases where the amount of restitution is contested, the sentencing judge can set an amount based on his best judgment. If that is not accepted by the victims and/or the U.S. Attorney's Office, they may turn to the civil court. When imprisonment is called for, restitution should not be ruled out. In some cases community service might be provided in lieu of actual monetary restitution.

Effective community service programs are managed by constant involvement by the probation administrators. A large pool of community service opportunities must be developed in order to fit the individual offenders with an appropriate situation. Such a situation would involve benefits for the community agency involved and some rehabilitative experience for the offender. Constant follow up and evaluation is essential. This usually means someone in the probation office is given the responsibility to watch over the program. It must be done on the local community level. Community service would be most effective for those offenders who are already able to function on a fairly high level and who are motivated to rectify a wrong. Community agencies do not need offenders who totally lack social or occupational skills or who are completely unremorseful. There are few agencies that can use or want such offenders.

The use of house arrest strikes me as being a variation of the intensive supervision program. House arrest could possibly be more effective at surveillance than intensive supervision, but again not as effective as an institution. I would like to stress I do not rule out any of the alternatives, including house arrest, as listed in your June 16, 1986 letter. Each may be appropriate in various combinations with individual offenders, but the programs should not be sold as the true solution to crime in America and the last word in rehabilitation. I would like to see such programs as house arrest and intensive supervision be portrayed by the criminal justice system as cheaper alternatives to incarceration, though not as effective at controlling the offender. Given the resources these program can be effective.

Sincerely,



John Powers
U.S. Probation Officer

JDP:kc

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
PROBATION OFFICE

JOHN W. SISSON, JR.
CHIEF PROBATION OFFICER

July 7, 1986

846 U. S. COURTHOUSE
POST OFFICE BOX 25790
RALEIGH 27611

The Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, NW - Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

Enclosed are responses to questions raised in your most recent letter regarding fines, community service, restitution, and related sanctions.

Again, I am pleased to have been invited to share my thoughts with you.

Sincerely yours,

John R. Aman

JOHN R. AMAN
SUPERVISING PROBATION OFFICER

JRA:alw
Encl.

Probation

* Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?

Offenders with criminal histories, limited skills, poor work habits, drug and alcohol abuse histories, violent backgrounds, and with weak family, community and friendship ties should be required to report weekly to a probation officer. The officer should be required to document all rehabilitative efforts and make at least monthly face-to-face contact with family members, employers, and non-related references who see the probationer regularly.

* What roles should the Commission, the court and the probation office have in determining which offenders are placed on intensive supervised probation?

The Commission should decide what types of offenders should receive intensive probation and require the Court to impose that restriction absent a finding that such is not needed.

The Probation Office should evaluate each offender, taking both offender and offense characteristics into account, and identify, in the Presentence Report, each defendant requiring intensive supervision.

* What type of probation conditions not expressly listed in 18 U.S.C. 3563(b)(1-19) should the Commission consider in drafting the guidelines?

Warrantless searches of person, premises, and vehicles of certain offenders, including drug dealers and abusers, those with convictions involving contraband of any kind, and gun traffickers.

Alcoholics Anonymous participation for alcohol abusers.

Urine surveillance and treatment for drug abusers.

John Ahman

Fines

* Are there certain crimes for which fines should be the preferred sanction? If so, list the offenses.

Gambling.

* What elements should be considered in calculating the actual amount of a fine? Should the amount of the fine bear a particular relationship to the offender's gain or the victim's loss? How should the offender's "ability to pay" be determined?

Amount of damage or loss.
Amount of gain or profit.
Culpability.
Prior offenses.
(see below)

* What sanctions should be imposed if an individual offender fails to pay the fine? An organizational offender?

If evidence indicates that all or part of a fine could have been paid from available income, or if by more diligent efforts the income could have been enhanced, even via an extra job, then probation should be revoked for non-payment. Spending habits of the probationer (or offender) should be examined to determine presence of income that could have been applied toward a fine. In cases involving community service in lieu of a fine, hours of credit should be related to the federal minimum wage. Where a fine could not be paid fully, but a good faith effort is made, appropriate community service should be assigned as a penalty or in lieu of the unpaid balance.

John Ammon

Restitution

*** Under what conditions should restitution be ordered? How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? Are there ways in which restitution could be effectively combined with imprisonment or community service?**

Restitution should be required in every case involving an identifiable victim. The inability of a defendant to immediately make restitution should not result in a finding that restitution should not be ordered, since the ability to pay may change dramatically. Of far more concern is potential ability. Obviously an unemployed 20-year-old defendant with no assets is unable to pay immediately, but over the subsequent five years, a healthy individual can raise and pay a substantial sum. All victims should be accounted for, even those not included in the count, or counts, to which pleas were entered.

The Court should be provided a detailed report by the United States Attorney and United States Probation Office which should be examined and responded to by the defense prior to sentencing.

Community Service

* How should an effective community service program be structured?
* What types of offenders will benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals the sentencing?

Defendants who cannot pay fines and restitution should be assigned appropriate community service instead.

Defendants who commit offenses involving damage to public property, or injurious to the welfare of society in general, should, in addition to large fines, be required to perform community service.

Defendants who will not feel the impact of large fines because of substantial resources should be required to personally perform community service on an installment basis.

Community service should always be done on an installment basis unless the sole purpose is restitution, in which case it should be completed as early as possible.

House Arrest

* Is this a viable alternative to incarceration? If so, under what circumstances?

Jail and prison time assure that recidivists do not do so during their confinement. House arrest and CTC placement cannot guarantee such.

For those who have always "gotten off" with probation or suspended sentences, a taste of confinement often gets their attention. House arrest would be ineffective for those who spend a lot of time at home or who have family structures that encourage or tolerate their behavior.

When house arrest is used, especially for young defendants with strong, honest family groups, violations must result in revocation.

John Amaro

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHAMBERS OF
HUGH H. BOWNES
JUDGE

FEDERAL BUILDING
55 PLEASANT STREET
CONCORD, N. H. 03301

June 30, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am writing in reply to your letter of June 17.

Your probing questions deserve a lot more consideration and research than I have had the time to give them. With this caveat, I respond as follows.

Probation

I do not think a form of intensive supervised probation should be imposed on certain types of federal offenders. If a defendant is put on probation, I think that he ought to receive the type of supervision that is necessary based on his background, the type of crime, and the type of individual he is. I do not see how meaningful guidelines can be drafted to cover "intensive supervised probation." It seems to me that 18 U.S.C. § 3563(b) pretty well covers the entire gamut of probationary conditions. Instead of writing additional guidelines, I would suggest that more discretion be given to the sentencing judge.

Fines

I am sure there are certain crimes for which fines should be the preferred sanction, but I am not prepared to list them at this time. As a general rule, however, I think that fines should be restricted to corporate defendants. I do not consider a fine to be the same as restitution, which is an entirely different matter. My opinion is that, as far as deterrence and punishment is concerned, a fine is not nearly as effective as putting an individual behind bars.

Restitution

I think restitution should be seriously considered in crimes involving mail fraud, larceny, stock fraud, etc. - those types of crimes in which the victim has suffered an ascertainable loss of money. If the amount is ascertainable, then the amount of restitution can be determined without unduly complicating or prolonging sentence. Restitution could be effectively combined with imprisonment or community service if the defendant is wealthy enough to make the restitution. If he is not or the sum is so large that restitution is not possible, then I do not see how there can be any combination.

Community Service

I think the best approach to community service is to leave it largely to the discretion of the sentencing judge. I think that the type of offenders sentenced to community service should be restricted to those who act on firmly held beliefs of conscience. During the Vietnam War when I was sentencing draft evaders, if I felt that such a person had acted out of conscientiously held beliefs rather than an attempt to avoid serving in the Army, I gave him a choice of working in a hospital for two or three years or imprisonment. Most, of course, took the hospital service option. The types of offenders for whom community service will not serve the goals of such sentencing are those who have committed crimes of violence, greed, and passion - most of the criminal offenders.

House Arrest

This may in certain restricted cases be a viable alternative to incarceration. I think house arrest could well be combined with a community service sentence. This should be an option within the discretion of the district court.

Sincerely,

HUGH H. BOWNES
United States Circuit Judge

WILLIAM D. GRAVES
CHIEF PROBATION OFFICER

UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

PROBATION DEPARTMENT

June 24, 1986

PLEASE REPLY TO:
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The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Pursuant to your request of June 17, 1986, the following information is submitted:

Probation and Intensive Supervision:

Yes, I believe some form of intensive supervised probation should be imposed on certain types of federal offenders. Those who score out as representing the most serious risks for recidivism, using a reliable risk prediction device, ought to be the kind of offenders placed on intensive supervised probation.

With any discussion of "intensive" supervision is the thought that perhaps this could be used as an alternative for some who might otherwise be imprisoned. Truly intensive supervised probation might be a viable alternative for some offenders whose crime would not be depreciated by probation, but who are presently incarcerated because their problems are beyond the capability of probation supervision. But probation cannot continue absorbing additional programs and responsibilites without a corresponding increase in resources. Without knowing whether these resources can or would be committed makes it difficult to realistically respond to the question.

Even without increasing the number of people on probation, there are already a number who need and could benefit from some form of intensive supervision not currently available. The screening device should include some consideration regarding the nature of the offense, but even a crime of violence should not necessarily place that offender on intensive supervision in those cases where the offense was situational and all other factors suggest a minimal risk of recidivism. Likewise, there ought to be a provision for override when that device suggests that intensive supervision is not necessary, but in the opinion of the court, Commission or probation office, intensive classification is indicated. However, a written justification should be required.

Additionally, there should be a requirement for periodic review of those on intensive supervision to see if there has been sufficient change in their situation to justify reduction in that level of supervision and placement on a regular caseload; otherwise, we run the risk of large numbers undermining the probation officer's ability to deliver intensive supervision.

There should be no restriction on the imposition of special probation conditions except that they continue to be reasonably related to the offense and/or needs of the individual offender and community.

Fines:

Fines should be the preferred sanction whenever imprisonment is not indicated and probation supervision is not needed. Fines are, in my opinion, presently underutilized, both in terms of the number of defendants fined, and also in the size of the fines that are levied. Frequently, defendants, and even their attorneys, argue that the ability to pay a fine is severely limited; yet in many of these cases defendants pay legal fees that dwarf the fines that are imposed.

Fines are punitive whereas restitution may have a therapeutic aspect. Fines need not be tied so much to the offender's gain or the victim's loss as to the offender's "ability to pay." That ability to pay ought to be determined by having him complete a thorough financial statement with a stern warning about the consequences for being less than complete and truthful in his responses. Evidence of willful failure to make complete disclosure should be aggressively pursued if the system is to maintain integrity.

The fine, if it is to have any deterrent or punitive value, must be more than a mere token amount relative to the offender's ability to pay, yet should not cause severe financial hardship by impacting on basic needs of the offender and his family in terms of food, shelter, etc. This would mean, for example, that an offender who had significant investments but little cash might reasonably be forced to liquidate some of his holdings to pay a fine. Even if an offender had no investments but appeared to have the ability to liquidate something of value that would not relate to his basic survival, that offender ought to be held accountable.

In short, a fine should inconvenience and deprive, but not unduly so. Sometimes, an offender draws his final conclusions about the seriousness of his violation based upon the severity of the sanction imposed. So it would seem particularly important for crimes where only a fine is imposed, that the fine be significant, yet within the offender's ability to pay, and, of course, within the prescribed legal range for that particular violation.

If an individual or organizational offender fails to pay a fine, they should be summoned to appear for a hearing to show cause why they should not be held in contempt. If the evidence indicates willful lack of compliance with an ability to pay, then that individual offender (or, in the case of an organization, the corporate head) ought to be found in contempt and incarcerated. If evidence is established to indicate that the fine exceeds

the individual's or organization's ability to pay, then the fine ought to be adjusted accordingly or community service ordered in its place.

Whatever the situation, it is important that the system be serious in substance and appearance about the matter of fines if it wants the violator to be serious. The grapevine will quickly establish whether the system is serious, and that in turn will establish the level of compliance.

Restitution:

There ought to be a presumption that restitution will be ordered whenever a loss has been sustained by a victim or a third party such as an insurance carrier. If restitution is not ordered, the court ought to be required to state why on the record. A defendant's inability to make resitution at the present time should not be sufficient reason to deny restitution since his financial condition could change. If restitution cannot be agreed to by all parties concerned prior to sentencing, then an evidentiary hearing should be held after sentencing to avoid prolonging or postponing sentencing. If it appears to the sentencing court that the defendant's request for a hearing was frivolous, the sentencing court ought to have the power to order the defendant to pay the cost incurred as a result of that hearing in addition to the restitution, based on the offender's ability to pay.

Creative alternatives to financial compensation to the victim should also be explored where, for example, the offender is without the financial resources to make restitution but could perform community service directly for the victim, providing the victim was receptive to same, and then only as a condition of probation, to provide not only for monitoring of the community service but also supervision of the offender in the event of an altercation or other problem between him and the victim.

Community Service:

I would refer the Sentencing Commission to the community service monograph recently completed by the Administrative Office. Community service and/or fines ought to be imposed as a special condition on most people who are placed on probation, unless good cause is found not to do so. There are, however, certain types of offenders for whom community service would not serve the goals of sentencing. And these would include--but not be limited to--offenders who, because of their attitude or other psychological makeup, mental or emotional problems, background, etc. are likely to pose an unreasonable risk or disruption to the agency for whom community service is performed. Like fines and resitution, community service must be monitored closely and the offender held fully accountable for compliance.

Community service must be more than a token sanction; it should create some inconvenience to the defendant, but without requiring so much time that

it causes significant disruption to his family relationships or jeopardy to his employment. Community service orders that are excessively short--say, less than 30 hours--may depreciate the seriousness of the violation, while also making the individual difficult to place with a community service agency, most of whom require at least an orientation. Placing an offender in an appropriate agency to perform community service takes approximately the same amount of time for the probation officer whether it is for 50 hours or 500 hours. Orders requiring community service for a short duration may not even justify the time it takes the probation officer to make the necessary arrangements or the receiving agency's time for orientation, etc.; in fact, excessively short community service orders could actually take more of the probation officer's time just trying to find an agency that would take the offender.

House Arrest:

This could be a viable alternative to incarceration with select offenders, but only under circumstances where resources are available to ensure proper selection and supervision. Again, these alternatives to incarceration can be absorbed by probation, but only with a corresponding increase in resources, which for house arrest might require additional manpower and/or electronic surveillance equipment. While it is commendable to look for alternatives to incarceration, we must be alert to the risk of promoting disrespect in the criminal justice system. And if these are indeed alternatives to incarceration, then we must be forever mindful of the fact that we are dealing with offenders who are not necessarily going to do something just because there is a rule requiring it. Indeed, rules to them, as a group, represent a challenge to outsmart the system.

For example, the new Curfew Parole has been implemented to save the government significant amounts of money. Although the Probation Service was the logical agency to absorb the program, no corresponding increase was made in resources, either with manpower or electronic surveillance. Instead, offenders are told that there is a rule they must be home by curfew time and must not have call-forwarding because the probation officer is to call them periodically to ensure their compliance. We have been told that this will require only a small amount of time for the probation officer, who need not make home visits, since telephonic verification will suffice, and that the offender can be required to produce telephone records to prove that he does not have call-forwarding. However, there are telephones for sale which have programmable call-forwarding, which would eliminate any record of call-forwarding on the offender's telephone bill.

Whether a program is a viable alternative to incarceration will depend in part on whether it is adequately funded; if not, the criminal justice system will appear to be pedaling paper tigers.

Thank you for the opportunity of having this input in preparation for your fourth hearing. Thus far, I think we have all been favorably impressed by the in-depth and systematic way that the Commission is going about developing sentencing strategy that hopefully will prove meaningful and effective.

Respectfully submitted,

Gary R. Crooks
Senior U.S. Probation Officer

GRC/mlp

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE, BOSTON 02108

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

July 23, 1986

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

Dear Mr. Wilkins:

I am responding to your recent letter soliciting the views of Attorneys General on certain policy issues the Commission must consider. For some time I have thought that greater emphasis should be placed on restitution and community service as sentencing options and accordingly I offer the following perspectives for the Commission to consider.

Restitution should be ordered whenever possible as to individual, uninsured victims of crime. Offenders should be made to repair at least the economic damage their crimes cause. Restitution for victims not only serves the practical purpose of restoring lost property but it reinforces time-honored and fair notions of right and wrong. This gives the victim both monetary and psychological compensation, and enhances the public's view of the justice system as fair and appropriate. Restitution would serve only a purely economic function where losses were borne by the government, business or other institutional entities, so it is not as compelling as a sentencing option in these cases. There may be instances where restitution is appropriate and feasible in this context, but that is not an area on which I wish to comment.

The typical restitution order will reduce a sentence in relation to the amounts actually paid back. Before a restitution-based sentence reduction is approved though, the court should hear the victim. The victim may have strong feelings about reducing time served in consideration of restitution which, in effect, "purchases" a reduction in sentence. Where the victim would prefer to see the offender punished rather than recover his losses, restitution would not be appropriate, because its economic objective would not be desired and therefore its psychological component would not apply.

Victims who prefer retribution to restitution illustrate the criticism of restitution-conditioned sentence reduction; that it allows offenders with money to buy shorter sentences. One approach to this problem is to use only the proceeds of crime to make restitution. For example, forfeited assets may be liquidated to pay back crime victims. Of course, in these cases fortune may have as much to do with sentence reduction as would wealth otherwise. However, like everything else in our society, the ability to repair at least some of the damage done mitigates the offense, at least in practical terms.

Restitution-based sentence reduction is justified on much the same basis as similar reductions for community service. Community service is in fact a non-specific form of restitution, and is much more rehabilitative than time served in jail. As an alternative to the single focus of retribution, community service programs should strive to benefit both the offender and the community. Accordingly, as much as it is possible, a community service program should be structured to take advantage of an offender's abilities. A banker convicted of stock fraud would better serve the community advising people how to invest than planting trees in neighborhood parks.

Generally, the more skilled the offender, the more likely it is that he can contribute to the community through performing a particular service. Like purchasing a reduction in sentence with the forfeited proceeds of the crime, the skilled offender's abilities allow him the opportunity to "pay his debt to society" in a way that only partially involves serving a typical jail sentence. This may not seem fair in a comprehensive sentencing scheme, because some offenders have nothing to offer, whether money or skills, in return for a reduced or alternative sentence. Being skill or money poor, they serve time instead of the community. There is a certain unfairness in this, but an ideal alternative service program doesn't exist.

On the whole, though, the value of restitution and community service programs far outweigh the detrimental effects of their unfairnesses. Whenever it is appropriate, I believe that retribution should be at least partially balanced by the payback of restitution or community service. I favor both sentencing alternatives and urge the Commission to incorporate restitution and community service programs into its guidelines.

Sincerely,

Francis X. Bellotti
Attorney General

United States District Court
Western District of Wisconsin
P. O. Box 1724
Madison, Wisconsin 53701

July 28, 1986

Chambers of
Barbara B. Crabb
Judge

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

I regret that I was unable to respond to your request for information prior to July 8, 1986. I received the request while I was on vacation and have not had an opportunity until now to respond. I hope that the lateness of the response will not preclude consideration of the views of this court.

In preparing this response, I have solicited the views of all of the probation officers in our court; however, the views I am expressing are entirely my own.

Probation

It is my view that intensive supervised probation is both desirable and necessary for certain types of federal offenders. These offenders include individuals who have shown a past pattern of criminal behavior, who have a history of violence or assaultiveness, who are sex offenders, or who have a history of alcohol or drug abuse clearly related to their criminal behavior.

The intense supervision should take the form of increased contact by probation officers at least once a month with the offender him or herself and regularly with the offender's family and affected social service agencies. In addition, the probation officers should be able to require that high risk offenders are registered with the local police and sheriff's department, with a provision for notifying the probation officer in the event there is any criminal activity or need to question the offender about criminal activity.

The courts should have the option of requiring participation in alcohol or drug counselling programs, including urine surveillance, of offenders whose offenses are directly related to a history of abuse of alcohol or drugs. Additionally, these high risk offenders should have the

opportunity for placement in a structured facility, such as a half-way house or community treatment center, for integration into the community prior to total release from incarceration, providing an opportunity for the offender to adjust to the community.

With respect to the roles of the court and sentencing commission and probation officer, it is the court or sentencing commission that should be the ultimate authority for ordering intensive supervision and the nature and types of specific controls. The probation officer should have an opportunity to make recommendations in this regard.

With respect to the types of probation conditions, it is my view that all conditions, even those not expressly listed in 18 U.S.C. §3563(b), should be available to the sentencing court, provided that the "condition is specifically related to the instant federal offense and meets the criterion of enhancing the offender's rehabilitation or further ensuring the public's protection."

Fines

The court should have available to it the option of imposing fines on all offenses that result in financial gain to the defendant. Also it should have the authority to utilize "community service," in certain limited situations, such as those where the offender has no apparent ability to pay a fine. Where an offender does have an ability to pay, the court should have the authority to approve wage assignments upon the recommendation of the probation officer and should have the authority to provide for the remission of the fine upon complete payment of restitution so as to give an offender an incentive to pay full restitution in a timely fashion.

Restitution

Payment of restitution is an important sentencing option. It has a beneficial impact upon the offender, the victim, and the community. It is something that should be ordered in every case where there is a loss to the victim and the offender has any realistic ability to make restitution. Obviously, in those cases in which the offender will be sentenced to prison for the rest of his life or where he is completely bereft of employment skills, restitution is not a viable option. However, even in those cases where restitution will be extremely difficult and full restitution impossible, it should be ordered with minimal monthly payment requirements if for no other reason than to impress upon the offender the significance of the offense and to give the victim the knowledge that his loss has been taken seriously.

Obviously, the amount of restitution that can be properly ordered may be a complicated question. In the absence of a plea agreement or an admission by the defendant on the record to all of the alleged loss, restitution should be confined to those counts for which the defendant pleads guilty and for which the amount of restitution is precisely fixed. It should be the obligation of the United States Attorney to work with defense counsel to establish the amount of restitution. Where disputes cannot be worked out prior to sentencing, a hearing on the matter of restitution should be scheduled sometime following sentence with the matter of restitution left open at the time of sentencing so as not to prolong sentencing unduly.

It is often important to allow an individual to maintain his livelihood if he is to make restitution and pay fines and continue to support his family and dependents. In those instances, it is extremely helpful to have available the option of utilizing a half-way house placement under very restrictive conditions so that employment can be maintained. Those offenders who have the financial ability should be required to pay the full costs of their daily per diem at the community treatment center or half-way house. In my experience, this has proven to be an effective deterrent, while keeping the offender productive, self-supporting, and able to pay his fines and make restitution.

House Arrest

In my opinion, this is not a viable alternative to incarceration. Placement in a well-run community treatment center or half-way house is much more effective and practical. The size of most federal districts makes it extremely unlikely that federal probation officers would be able to maintain realistic accountability over persons who have been sentenced to house arrest.

Community Service

I have a very high degree of scepticism about the usefulness of community service as a sentencing option. In my view, community service opportunities are too often used for white collar offenders. Many of these offenders have already had the benefit of more advantages than the average offender. To give such an advantaged person another advantage in the form of a sentence conveys a message of basic unfairness that is detrimental to the administration of the criminal justice system. However, there are some offenders who have no financial resources, who have committed crimes for which restitution would be an appropriate penalty, and who are not dangerous in any respect. In those cases community service may be an effective alternative, if an effective community service program exists that can

be utilized by the court. All too often community service programs are not well managed and are easy prey for manipulative offenders.

Additional topics

It is my view that a maximum period of three years of community supervision is not sufficient for high-risk offenders. I would strongly advocate some provision for establishing the option of longer supervision in those instances in which the supervising probation officer can establish that the offender still has a strong propensity to commit crime and presents a continuing danger to the community. Also, I believe it is important that the available period of community supervision should not include those periods of time when the offender is in absconder status or is failing to comply with conditions of his supervision.

There seems to be some possibility that the sentencing commission will not take age or health into consideration in determining sentencing guidelines. This may present serious problems for courts faced with offenders whose age or health is a serious consideration. I tend to view very differently the purposes of sentencing when I have a 21 year old bank embezzler before me than when I have a 40 year old bank embezzler. In my view, the 40 year old has had more life experience and maturity and may very well be held to a higher standard of accountability than the 21 year old. In the case of the 21 year old, I would probably be looking at sentencing in terms of the prospects of rehabilitation and specific deterrence. In the case of the 40 year old, I would be looking at accountability and general deterrence. I would hope that the commission guidelines will provide courts with the latitude to take age into consideration when it is relevant and also to provide well latitude in sentencing persons who are seriously or chronically ill.

Thank you for this opportunity to submit my views to the commission. I look forward to participating in the judicial review process in early September.

Very truly yours,

Barbara B. Crabb

Barbara B. Crabb
Chief Judge

BBC:jmd

cc: Jack Verhagen, Chief Probation Officer

U.S. Department of Justice

United States Attorney

District of Columbia

Judiciary Center Operations
555 Fourth St. N.W.
Washington, D.C. 20001

July 10, 1986

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1200 - A
Washington, D.C. 20004

Dear Chairman Wilkins:

I very much appreciate your soliciting my views in preparation for the fourth hearing of the U.S. Sentencing Commission concerning available sentencing options. As you mentioned in your letter of June 17, 1986, "the Commission must decide how to integrate the available options into an overall sentencing strategy." This is both an important and difficult matter, and I am happy to be of whatever assistance I can.

I will respond below to some of the questions you have raised.

First Question

> "Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be on intensive supervised probation and what forms of control and supervision should be imposed?"

We are now learning, according to a number of studies, that probation is very often a failure, unless supervision has been intensive. Many defendants placed on probation are simply unable to abide by their conditions of probation. I therefore am very much in favor of the extensive use of intensive supervised probation.

As the Commission constructs the sentencing guidelines grid, I assume that there will be certain offenders who, because of the nature of their crime and of their criminal history, will fall in a border area between presumptive probation and a presumptive

prison sentence. If the Court ultimately decides to place them on probation, such defendants would be good candidates for intensive probation. Second, there will be a large number of defendants whose crimes and criminal history score would suggest that probation be imposed, but whose personal characteristics, e.g., drug dependency, would make success on ordinary probation unlikely. Those defendants, in my view, would also make excellent candidates for intensive supervision.

With respect to forms of control, I should mention one lesson we have learned here in the District of Columbia. If there is any indication whatsoever of drug use, it is extremely important to have regular and thorough drug testing. Studies done by our local Pre-Trial Services Agency have shown that defendants with drug problems are less likely to show up in court and more likely to be re-arrested for new offenses when in a pre-trial status. And I am certain that many of the same concerns will hold true for those on probation. Yet, those studies have also shown that frequent drug testing will substantially lower that failure rate. I therefore urge the Commission to consider the use of frequent drug testing for anyone placed on probation who has shown any sign of illicit drug use.

Second Question

> "What roles should the Commission, the Court and the Probation Office have in determining which offenders are placed upon intensive supervised probation?"

The Commission must determine which defendants are in theory eligible for intensive probation by virtue of the nature of the crime of conviction as well as their criminal history score, i.e., what the guideline sentence should be. If the guidelines call for probation, the Court and the Probation Office must then work together with the Government and the defense in reviewing the defendant's particular background and current situation in assessing whether intensive, supervised probation would be appropriate.

With respect to the remaining questions concerning fines, restitution, community service programs and house arrest, let me briefly make a few comments. In my view, a fine alone is rarely adequate as a sentence. Similarly, restitution usually does not

afford the necessary deterrence to crime. Finally, house arrest might be appropriate only for very minor misdemeanor offenses.

Again, thank you for seeking my views on these matters. If I can be of further assistance in the future, I will be more than happy to do so.

Sincerely,

Joseph E. diGenova

JOSEPH E. diGENOVA
United States Attorney

UNITED STATES GOVERNMENT

memorandum

DATE: July 10, 1986

REPLY TO ATTN OF: Jack R. Verhagen
Chief U.S. Probation Officer
W-wi-Madison

SUBJECT: **Views Regarding Options Available To U.S. Sentencing Commission**

TO: Chief Judge Barbara B. Crabb

Judge, in response to your request for comments regarding Sentencing Commission options, I have the following input. I have not yet received responses from the other P.O.'s, but will forward them to you if they are received timely.

Probation.

Intensive supervised probation should be imposed on certain types of federal offenders. These offenders should include individuals who have shown a past pattern of criminal behavior, individuals who have a history of violence or assaultiveness, sexual offenders although we have very few of them in this district, and individuals with histories of alcohol/drug abuse which are clearly related to their criminal behavior. The intent supervision should take the form of increased contact with probation officers, not less than one per month in addition to collateral contacts with family, social service agencies, etc. "High risk" offenders as is generally the case with individuals sentenced to imprisonment (excluding white collar offenders) should be required to be registered by mail with the local police and sheriff's department in terms of providing them the individual's name, address, offense, and a request that the probation officer be notified in the event there is any criminal activity or a need to question the offender. This will protect the community in terms of police surveillance while, hopefully, keeping the offender from being contacted at work by means of having the probation officer arrange meetings and act as the advocate when necessary. Individuals that appear to have no chance of successful adjustment on supervision in the community, should be fingerprinted and photographed with the local police or sheriff's department as a means of protecting the community.

Those offenders whose offenses are directly related to a history of abuse of alcohol or drugs, should be required to participate in alcohol or drug counseling including urine surveillance and antibuse intake when the protection of the community is of great concern. No offender who is lacking community resources and/or has any of the problems or patterns of behavior noted above, should be released to the community without placement in a structured facility for integration into the community, i.e. a halfway house or CTC. This could either be in a form of pre-release or post-release (as a condition of supervision) for a period up to 120 days.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

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(REV. 7-76)
GSA FPMR (41 CFR) 101-11.6
5010-112

★ GPO : 1978 O - 261-647 (3523)

The Court or Sentencing Commission should be the ultimate authority for ordering intensive supervision and the types of specific controls after taking into account the input and recommendations of the probation officer at the time of the presentence report and/or prior to release to community supervision.

Any type of probation conditions not expressly listed in 18 U.S.C. §3563 (b)(1-19) should be available to the sentencing court "if the condition is specifically related to the instant federal offense and meets the criteria of enhancing the offender's rehabilitation or further ensuring the public's protection." For example, it would be entirely reasonable to require that an individual who made threats to another party through the mail to be required as a condition of probation to not have contact with the victim party, or for an individual who failed to file or evaded his income taxes, to provide the supervising probation officer copies of tax returns and verification that taxes had been filed.

Fines.

All white collar offenses that result in financial gain to the defendant should include provision for imposition of a fine. The court should, however, have authority to utilize "community service" based on the offender's skills and ability to repay either the victim or the community when there is no apparent "ability to pay" as determined by the probation officer's and/or others' independent investigations. The fine imposed should always take into account both the offender's "ability to pay" and the "offender's gain or the victim's loss." If significant restitution is to be ordered as a result of significant victim loss and there is at least some ability to pay, there should be provision for "remitting" a fine upon complete payment of restitution to give the defendant an incentive to pay full restitution in a timely fashion.

When individual offenders fail to pay either fines or restitution as ordered by the court and have at least some ability to pay, the court should have the authority to approve wage assignments upon the recommendation of the probation officer. The court should also have authority, upon petition of the probation officer, to allow the probation officer to utilize the U.S. Attorney's resources to look into and confirm whether an offender has the ability to pay restitution or fines as ordered by the court.

Restitution.

Restitution should be ordered in every case where there is a loss to the victim and the victim is not a government agency, unless the ordering of restitution is totally unrealistic due to a combination of: length of sentence (Fountain-Granger), lack of financial funds or resources, and lack of employment skills. Where an individual has some ability

to pay, restitution should be ordered in its entirety with some minimal monthly payment required even when it is not likely the individual will make payment in full. When it is a condition of supervision, the court will still have the option of remitting the restitution if the offender has made a genuine effort based on their ability to pay. This still provides for the U.S. Attorney to file a civil judgment following supervision and it covers the court and society in the event the individual might win a lottery, receive an inheritance, win a large law suit, or purposefully attempt to divert assets (unknown to court officials) until after the period of supervision. In those instances where an individual has limited or no ability to pay, a minimal amount of restitution should be ordered with some provision for the individual to work off part of the restitution through meaningful community service based on the offender's ability and skills, the recommendations of the probation officer, and the needs of the community. Unless there is a plea agreement or if a defendant admits to the overall offense behavior, restitution should be ordered and confined to the counts of conviction on the federal offenses. The U.S. Attorney should have the burden of working with defense counsel to establish restitution and inform the probation officer prior to sentencing. Where disputes cannot be worked out between defense and prosecution prior to sentencing, a hearing on the matter of restitution should be scheduled for making a determination within 30 days following sentencing with the matter of restitution left open rather than prolonging sentence. There appears no reason why restitution could not be utilized in combination with imprisonment or with community service. Community service can be performed during the period of supervision. The fine or restitution can be paid both during supervision and before, if financial resources are available that could be liquidated.

Sometimes allowing an individual to maintain his livelihood is important to both the collection of restitution and/or fines and the offender's continued support of his family and dependents. In these instances, the commission should consider utilizing a halfway house placement under very restrictive conditions so that employment can be maintained in lieu of imprisonment or as an alternative to lengthy imprisonment (Carlo Krause). When this is considered and utilized, the offender should have restrictive conditions as to the time in the community with work release, i.e. 5 or 6 days per week, not more than 10 hours per day. The offender, if he has the financial ability, should also be required to pay the full cost of his daily per diem at the CTC or halfway house. In the case of white collar offenders who earn significant amounts of money and whose presence at the place of employment is critical to the company or employment surviving, are instances where this could be utilized (Krause, Jaycot). Charging the offender his daily per diem provides as much deterrent as imprisonment while keeping the offender productive, self supporting, dependent supporting, and paying restitution or fines. (It

makes much more sense utilizing this over house arrest which is quite impractical in terms of maintaining accountability in the absence of 24 hour electronic surveillance.)

Community Service

Community Service is extremely difficult to implement in large rural districts like this one. However, in the larger communities within this district, Beloit, LaCrosse, Eau Claire and Madison, implementation of an effective community service program is possible and should be explored and utilized, particularly in the case where an individual can do community service as an alternative to restitution when there is no ability to pay. Where there is an ability to pay, it seems practical to allow the offender to pursue his own economic interests and pay more in the way of restitution or fines as opposed to community service. Only when the needs of the community can be best served by community service, should community service be utilized with white collar offenders and other offenders who have the ability to pay. Allowing the defendant to remain in the community in a jail or CTC with work release privileges under restricted conditions as noted above while paying the cost of the daily per diem, does more to deter and provide a message to the community than community service might, particularly since it quickly becomes known to others that the individual has to return to the facility on a daily basis and is following strict regulations. Community service does serve a function for society with poor, non-dangerous offenders who are unable to pay restitution should be utilized as much as possible in these instances. Community service seems to serve no significant function in terms of the goals of sentencing, (personal-general deterrence, rehabilitation) for individuals who have the ability to pay restitution or who could make more money doing what they are best trained to do. An exception to this would be a community that needs the services for which the offender is trained. It makes no sense for a trained physician or dentist to do volunteer work at the YMCA, etc., when poor, non-dangerous offenders could better be served by this community service. The community could very well interpret this type of community service as a sham and cause the courts to lose credibility in terms of the goals of sentencing. In summary, community service should be used with great discretion with the primary determinate of its use being needs of the community and inability of the offender to pay restitution.

House Arrest

House arrest is the most recent "fashionable approach" being utilized as an alternative to incarceration. It is not workable or feasible in a large rural district. It might be workable in large metropolitan districts where it is augmented by 24 hour electronic surveillance. It makes more sense to place individuals in CTC's or halfway houses with

work release privileges under restrictive conditions and requiring them to pay all or part of their daily per diem than to use house arrest given the time and man power it requires and the various ways an individual can "beat the system" (call fowarding, etc.) in the absence of electronic surveillance which is very expensive. House arrest, like community service, is a recent and fashionable approach to corrections which can be effective on a very limited basis, but diminishes the goals of sentencing (general-personal deterrence and promoting the respect for the law) when utilized across the board indiscriminately.

In addition to the above topics, I am concerned about the new criminal codes provision for incarceration of not more than 6 months on a basis of contempt of court when an individual fails to follow the rules of his community supervision. I am also concerned that with serious, high risk offenders that a maximum period of three years community supervision is inadequate. There should be some provision for establishing the option for supervision beyond three years through due process (court hearing) when a probation officer can establish through his records and testimony that the offender still has a strong propensity to continue a life of crime and presents a risk to the community. Periods of time when an offender is in absconder status or is failing to comply with conditions of supervision, should also be periods of time that are added to the original supervision time if these are confirmed through due process or admitted to by the defendant and the additional supervision seems necessary.

I am also under the impression that the sentencing commission is not going to take age or health into consideration in determining sentencing guidelines. There should be some provision for the court circumventing the guidelines when age or health is a serious consideration. Certainly, a 21 year old bank embezzler should be sentenced more for the purpose of rehabilitation rather than accountability and punishment than a 30-50 year old offender who should have more life experience and maturity. Likewise, a 65-80 year offender who commits a serious offense that calls for incarceration, should be given some latitude on the issues of accountability and deterrence if his general health is a factor to be considered. Likewise, a woman who might otherwise be required to serve a short period of incarceration for certain offenses, should be given some consideration for other alternatives such as community service or delay of sentence to be served locally in a halfway house when pregnancy or very young children are to be considered when determining sentencing options.

Thank you for the opportunity for input into these matters.

JRV

JRV/rm

UNITED STATES GOVERNMENT

memorandum

DATE: July 10, 1986

REPLY TO ATTN OF: Raymond R. Herje
U.S. Probation Officer

SUBJECT: **U.S. Sentencing Commission Options.**

TO: Jack R. Verhagen
Chief U.S. Probation Officer

Probation

I think that the level of supervision in any and all cases should continued to be determined by the probation officer. They know the case, changes in case situations, and other relevant factors (i.e. distance from office) that bear on such a decision.

I think number 20 (18, USC, 3563 b) would cover most other conditions which may be needed, as it reads ...satisfy such other conditions as the court may impose.

Fines/Restitution

Defendants "ability to pay" should be considered in setting the amount of fine and/or restitution. "Ability to pay" should be determined by the defendant's present and past (3 years) earning pattern. There also should be a "full payment clause" which would "kick in" in the event the defendant should receive unexpected monies (inheritance, etc.)

Community Service

Again this would relate to philosophy of the particular court-the "service" possibilities in the particular community. All these particular situations and programs should be delegated to the probation service of that district.

House Arrest

Could be considered as a condition of probation. With the rapidly decreasing space in prisons/jails/halfway houses, this could be a valuable alternative in selected cases. The particular circumstance for this alternative could be developed by the court and probation of a particular district.

RH

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

☆U.S.GPO:1984-0-421-526/178

UNITED STATES GOVERNMENT

memorandum

DATE: July 11, 1986

REPLY TO ATTN OF: Leslyn Amthor Spinelli
U.S. Probation Officer

SUBJECT: Sentencing Commission Options

TO: Jack R. Verhagen
Chief U.S. Probation Officer

The following are some of my thoughts on the sentencing options and questions raised in the Sentencing Commission's letter to Judge Crabb.

Probation.

Some offenders might warrant intensive supervision. For example, those persons with serious mental or emotional difficulties or chemical dependencies often pose a significant threat to themselves or the community. Nonetheless, with the relevant types of outpatient therapy and frequent contacts with the supervising U.S. Probation Officer, these individuals might be appropriate candidates for probation. The probation officer would be best able to determine which offenders require intensive supervision via RPS-80 or salient factor-type instruments. The conditions listed in 18 U.S.C §3563(b) appear sufficient to cover all contingencies.

Fines.

In my opinion, the actual amount of the fine imposed by the court should have some correlation to the severity of the offense (just as length of incarceration should) although offenses resulting in fines need not be limited to those involving monetary loss. The probation officer would probably be in the best position to determine ability to pay a fine, via financial questionnaires, credit checks, tax returns, etc. The U.S. Attorney's Office might also provide some investigative assistance when financial information is difficult to obtain and/or questionable. There certainly needs to be a distinction between unwillingness and inability to pay a fine. When an offender fails to comply with a court order due to unwillingness, revocation of the period of supervision should be an option.

Restitution.

Monetary restitution should be ordered in any case where there is a discernable loss to a victim or victims. One suggestion for determining the appropriate amount of restitution without complicating the sentencing process might be a pre-sentencing conference involving U.S.P.O, defense counsel and assistant U.S. attorney. On those points to which agreement could be reached prior to the sentencing, those agreements could be stipulated to at the sentencing hearing. In the event of disputes, witnesses and/or further documentary information could be presented at the sentencing hearing for determination by the court. When an offender is unable to make monetary restitution due to his or her own financial

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circumstances, community service might very well be ordered to "work off the debt". The Commission might want to set some financial equivalence, e.g. one hour of community service equals $5 worth of restitution.

Community Service.

When community service is ordered, a specific, reasonable number of hours should be required with a time limit for completion. The U.S. Probation Office should have the discretion to approve a specific community service plan. In my opinion, almost all types of offenders could benefit from this type of sanction, and it can be used as a learning experience. For example, requiring a white collar offender to work with disadvantaged youth for a significant number of hours might be more appropriate than a monetary fine which he or she could pay without blinking an eye. Obviously offenders who are in ill health (either physically or mentally) might not be appropriate for community service.

House Arrest.

I am not particularly in favor of house arrest as an alternative to incarceration, because of the difficulties in supervising such a program. An individual who would be amenable to house arrest could probably be handled just as effectively via probation with community service or other special conditions. The rationale for sentencing an offender to house arrest needs to be closely examined.

UNITED STATES GOVERNMENT

memorandum

DATE: July 11, 1986 PGB

REPLY TO ATTN OF: Paul G. Billmeyer
U.S. Probation Officer

SUBJECT: U.S. Sentencing Commission

TO: Honorable Barbara B. Crabb

Pursuant to your request, I've noted a few brief ideas regarding your 6-22-86 letter from William W. Wilkens, Jr., Chairman of the U.S. Sentencing Commission.

I'm strongly supportive of an intensive supervision program for federal offenders, for those who warrant such action. Any offender who is viewed as a danger to the public, either through assaultive acts or new criminal behavior, would need to be supervised closely. This would provide for quick reaction to a criminal act or hopefully preclude criminal behavior. The primary person who could react quickly in placing a person in such a program would be the probation officer.

Obviously, fines are a strong deterrant if used appropriately. However, I feel the fine must be as painful as a jail sentence would be for an indigent offender. If the fine can't be paid, allow the offender to convert the fine into community service work at a specified money amount per hour. Once worked off, the fine could be remitted.

Restitution should be ordered for all offenders, regardless of their financial status. Allow each district to structure their restitution hearings per the district needs.

Based upon my experience, I'm of the opinion community service work can be an effective correctional tool for non-assaultive indigent offenders. However, caution is needed because in the public's eye, the offender will either make the court look good or bad. Thus, the offender needs to be screened closely.

House arrest is an unenforceable sentence which generates more ~~of~~ a penalty for the probation staff than the offender.

Thank you for allowing me to express my opinions. Please call if you wish greater detail on any of the subjects.

PGB/sm

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

☆ U.S.GPO:1984-0-421-528/178

THE PRINCE GEORGE'S COUNTY GOVERNMENT

Department of Corrections
County Detention Center
5310 Douglass Street
Upper Marlboro, Maryland 20772

July 23, 1986

Mr. William W. Wilkins, Jr.
Chairman, United States
Sentencing Commission
1331 Pennsylvania Ave., NW
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

I recently had the opportunity to testify before your Commission on the topic of Home Detention. As is very often the case, however, our time together was brief and I did not have the opportunity to share with you some observations that I feel are critical vis a vis the Commission's mission. I make these observations because I feel very strongly that your findings will influence sentencing patterns in this county for many years to come.

The thoughts that follow are not based on exhaustive research. They are simply observations based on my experience over the past several years. I do feel, however, that they deserve consideration by the Commission.

Should you have any questions, please do not hesitate to contact me. I would be happy to testify personally if you feel it necessary.

Sincerely,

Samuel F. Saxton
Director

SFS/jh

THE PRINCE GEORGE'S COUNTY GOVERNMENT

TO: The United States Sentencing Commission

FROM: Samuel F. Saxton, Director
Prince George's County, Maryland
Department of Corrections

SUBJ: Local Jails - A Sentencing Strategy

Gilbert and Sullivan wrote in the Savoy Operas in the 19th Century:

My Object all sublime

I shall achieve in time -

To make the punishment fit the crime.

The courtroom is packed with spectators. The defendant is sitting at the defense table accompanied by his attorney. The prosecutor glares from the next table knowing that in a few short minutes "justice" will be done. The families of the defendant and the victim appear uneasy wondering what the judge will do. The press is in attendance, pencils poised, checking their watches and anguishing over whether the sentencing will end before their deadline. Suddenly, the bailiff announces the opening of the session and the judge mounts the bench. Within the next thirty minutes, the defendant is given an opportunity to speak, the attorney to file motions, and the sentence pronounced.

Although apapearing to be routine, the disposition is one of the most difficult decisions we ask our judges to make. From information supplied to the judge by the Probation Department, usually in the form of a Pre-Sentence Investigation, we somehow expect to emerge a sentence of which King Solomon would have been

proud.

Over the past several years, there has been some effort toward uniform sentencing in Maryland. Sentencing guidelines have been established to encourage this. However, those guidelines are concerned basically with specifics of the crime and the offender's criminal background. They do not deal with treatment strategies, nor do they take into account what should happen after sentencing. That decision has been delegated to correctional officials.

What follows is not the result of years of exhaustive, painstaking research. It simply represents what I feel are valid observations that I have made over time.

Let me first say that these observations relate to inmates who occupy our nation's correctional facilities. I am bringing this to your attention because local and state facilities are at times asked to house federal inmates.

The matrix that I have attached should hold true for most facilities, unless they specialize in the maintenance of a special management population, such as the maximum security facility in Marion, Illinois. I am offering this matrix because I believe it is crucial that criminal justice practitioners, such as judges, probation agents, corrections persosnnel, prosecution, defense lawyers, etc, understand that if we expect to make positive strides vis a vis sentencing practices that we must develop an accurate offender profile. Hopefully, once we know the kinds of offenders we are dealing with, realistic, goal oriented, and

individualized sentencing can emerge. Sentencing guidelines could be expanded not only to encompass the length of sentence but also what type(s) of treatment programming would be most effective. The court would also have the ability to follow the progress of the offender and, where appropriate, make modifications in the sentence. Additionally, restitution to the victim, for example, could be made a cornerstone of the program. That alone should enhance the court's public image.

The chart that follows notes the characteristics and the recommended treatment strategy for the five basic groups of offenders found in correctional facilities.

Group A (5%) is comprised of the resident who has had very limited exposure to the criminal justice system. He is the individual for whom the system has done all it can. He will learn from his experience and probably not return. The major thrust on behalf of this individual should be parole with some community supervision.

Group B (10%) is comprised of those who could be sentenced to a short term. Many systems tend to place these individuals in counselling programs while forgetting those in Group C. The principal strategy here should be intermittent community supervision along with work or educational release.

Group C (60%) represents the greatest challenge to corrections today. This is a pivotal group because heretofore, as with the middle child, they have been ignored in favor of Groups

A, B and D. We tend to service the A & B groups because they are comprised of inmates who are relatively problem free and easy to work with. We service the D group out of necessity because their negative behavior demands our attention. The C group unfortunately gets lost in the overcrowded system and seldom has the treatment opportunities enjoyed by the A & B groups.

The D group, comprising up to about 15% of the inmate population, forms the core of the hardened criminal element of the institution. Because of their propensity toward violence and the control they can exercise over the remaining population, a disproportionate amount of resources must be devoted to them. This group, comprised of the repeat offender/career criminal, is frequently the target of established Repeat Offender Programs. As these programs become more effective, the D group could grow.

Finally, Group E (10%) is comprised of that portion of the population which requires psychiatric/psychological intervention. Correctional facilities for the most part, are ill equipped to provide the specialized treatment these individuals require. They should be transferred to an appropriate mental facility for the necessary treatment.

Later on this year, we will be opening a 596 bed New Generation Jail. The New Generation philosophy born in the 1970's features the direct supervision model. Unlike the greater majority of facilities in this country, this model posts the officer inside the inmate living area. The New Generation environment stresses strict adherence to rules and regulations.

Residents are assigned to their own rooms, thereby enhancing both privacy and the security of personal property. The officer maintains a close vigil within each housing area and is required to circulate frequently. Treatment programming will take place within the housing unit and will be supplemented with video tapes covering appropriate subjects. Also, in order to prepare those in Group A and B for community release, we have a Life Skills and Assessment Center in the facility. Residents will be classified into the center for depressurization and training before being granted community release.

Despite all of our good intentions, we realize that there will be a core of offenders (D Group) that will shun any treatment opportunity offered to them. For those whose behavior requires segregation, we have built a maximum security area. Inmates housed in this area will be placed on deadlock for 23 hours per day. They will eat in their cells and lose many of the privileges afforded those in general population.

The final group, (E) comprised of those requiring psychological/psychiatric treatment, will be housed in appropriate quarters under the care of our mental health personnel. Although our facilities will be quite a bit better than we have now, there will be times when hospitalization will be indicated. Despite the fact that jails are seldom adequately equipped to handle inmates

with mental problems, many are called upon to deal with them out of necessity. Just as with the D group, this group places a disproportionate demand on institutional resources.

In summary, I am advocating the establishment of sentencing guidelines which would feature a specific sentencing strategy for each group described above. For example, the offender sentenced for a non-violent offense could be in group A or B. Once classified as such, he would go through the prescribed program. The use of work release and restitution, half way houses, parole, and Home Detention would be encouraged for the appropriate inmates. Construction of facilities around the New Generation philosophy, combined with extensive individualized treatment programming, could also make a significant difference in the hopes of encouraging upward mobility for those in the C group. I believe if we adopt this approach that within the next five to ten years we will begin to see our institutions populated with inmates who require incarceration rather than those who could have benefitted from appropriate treatment programming but got lost in the shuffle.

GROUP	PERCENT OF POPULATION	CHARACTERISTICS	TREATMENT STRATEGY
A	5%	Various offenses, (non-violent) amenable to treatment - have done all we could do - comprised of those in and out. Will probably never see them again.	Thrust should be Parole/ Community Supervision Home Detention (short sentencing up to 6 mos.)
B	10%	Various offenses (non-violent) requires intermittent community supervision many in this group are placed in programs occupying time that could be devoted to Group C.	Principal strategy should be work/educational release and eventually parole (Group A) (short sentence up to 18 mos.)
C	60%	Various offenses - represents forgotten group attention required by disciplinary group precludes the time given to this group - programs address only peripherally - real challenge to corrections - group can go either way - potentially upwardly mobile	Top 30% amenable to treatment could be upwardly mobile to A and B group. Those who are not would either remain in C group or drift into D group. (Short-medium sentence unless drop to Group D)
D	15%	Disciplinary problems Disproportionate amount of staff time at root of institutional problems - hardened criminal element violent/non-violent offenders	Group must be segregated from remaining population - their influence must be neutralized - these are often repeat offenders - at core of major problems/disturbances - medium long sentences indicated.
E	10%	Significant mental problems - various offenses	Appropriate mental hospital for treatment. Correctional institutions do not have proper facilities to handle this population for sustained period

THE PRINCE GEORGE'S COUNTY GOVERNMENT

Department of Corrections
County Detention Center
5310 Douglass Street
Upper Marlboro, Maryland 20772

July 8, 1986

Mr. William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Mr. Wilkins:

Enclosed is a copy of the policy statment of the Prince George's County Department of Corrections. My testimony will be in accordance with this policy statement.

In addition, I will speak on our specific implementation and provide a demonstration of the equipment used by our organization.

Sincerely,

S.F. Saxton

Samuel F. Saxton
Director

SFS/jh
enclosure

PRINCE GEORGE'S COUNTY

DEPARTMENT OF CORRECTIONS

HOME DETENTION PROGRAM

I. INTRODUCTION

Within the past several years, overcrowding in jails and prisons has become a nationwide problem. Many jurisdictions, including our own have been or are under court order or consent decree to reduce their inmate population. To alleviate the problem of overcrowding and to promote public safety, many jurisdictions have implemented a Home Detention Program for adult offenders.

Home Detention is a program which allows the offender to remain at home at prescribed times under close supervision. Offenders may hold a regular job but must be at home during their leisure hours unless excused by responsible authority for good cause.

The original idea of Home Detention was first used by the military several years ago. They used the concept, known as House Arrest, as a form of punishment following an infraction of regulations. The idea later evolved into Home Detention and was initially used by several judges sitting in juvenile court to restrict the freedom of youthful offenders.

If we examine the four basic goals of corrections, (a) incarceration/incapacitation,, (b) rehabilitation, (c) deterrence and (d) punishment/retribution, we see that they can easily be applied to the Home Detention Program. For example, our Home

Detention Program will place strict controls on the individual's freedom. Having come to take our freedom of movement for granted, this alone constitutes a major form of punishment.

As a participant in Home Detention, the offender will be required to be at his home at all times unless granted permission to leave. These approved absences have been closely scrutinized and are usually limited to going to and from work, seeking medical treatment or attending religious programs.

In addition to the above described restrictions, there are others which involve a loss of freedom in one's own home. The offender, for example, is prohibited from using alcohol or drugs. Also, visitors are not allowed to come to the home unless permission has been granted. The individual must also agree to the use of electronic monitoring devices which are used as both a positive form of identification and to ensure that the offender remains at home during prescribed hours. Such controls over a person's liberty and freedom of movement alone represents a significant form of punishment.

Incapacitation of the offender, perhaps the major goal of corrections is a key component of the Home Detention concept. In complying with the requirements of the Home Detention Program, the individuals are accountable for their time both inside and outside of the home. They also know that if they violate the rules that they will be returned to jail immediately.

By allowing participants to remain employed, the Home Detention Program fulfills the need to punish while recognizing the importance of allowing the offender to maintain family ties. Also

by limiting the participant's movement, it makes it more difficult to maintain contacts with significant others who may have exercised a negative influence on them.

A long held belief by law enforcement experts is that the most effective long range deterrent to crime is sure, swift, decisive action on the part of the Criminal Justice System. In that regard, the Home Detention Program accomplishes that end in two ways: (a) it is a swift, meaningful form of punishment; and (b) a violation of the rules of the program will result in immediate incarceration. Home Detention has been utilized as an effective population management tool in several states, such as California, New York, Florida, Utah and Washington State. Although the programs in these jurisdictions may vary in methodology and program criteria, all have experienced the same positive outcome. The available information indicates that over 85% of those placed on Home Detention Programs have not re-entered the prison system. Of course, we must realize that this concept is new and that many other variables come into play. However, it is extremely unlikely that the 75-85% recidivist rates attributable to most prison or jail systems will ever be reached.

The Home Detention concept gives individuals desiring a new lifestyle an opportunity to change. As in any new program, there will be those who volunteer to participate in hopes of gaining an early release. However effective screening by trained investigators coupled with the expeditious handling by the courts of those who fail to conform to the rules will reinforce the message

that only those truly committed to the Home Detention concept need apply.

II. BENEFITS OF PROGRAM

The public must be aware that most persons who enter a jail or prison will someday leave the facility to re-enter society. All of the information available shows that those who leave prison will return to prison in 75-85% of the cases. If the offender leaves the confinement setting without a positive behavioral change having taken place, it is very likely that the individual will again come in contact with the law. On the other hand, Home Detention allows the individual to re-enter society in an atmosphere where family unity and positive support systems have not been interrupted.

Currently, the cost of maintaining a person in the County Detention Center is $44.00 per day. Under a closely monitored home detention program, the total cost of maintaining an individual could be reduced to as low as $10 to $15 per day. This cost could be reduced even more if we began a process of levying a fee on each individual to cover the cost of supervision. This fee could be based on the offender's ability to pay and made a part of the program agreement. The alternative would be the construction of additional beds and hiring of a greater complement of personnel.

In addition to the deferral of supervisory costs, the Home Detention Program provides the following ancillary benefits:

1. The individual can maintain employment and continue to provide support for his family. This is obviously more desirable

than having to place the family on public assistance.

2. The family unit remains together.

3. The Program is designed to assist the unemployed offender obtain employment.

4. The number of inmates sent to State Penal Institutions is reduced.

5. The negative impact of confinement is reduced because the offender is not subjected to the negative peer group pressures present in penal institutions. The individual has voluntarily chosen the Home Detention Program and should therefore be motivated to succeed. They are well aware of the consequences of failure.

6. The individual is free to focus on home and family matters, since he is confined to that location.

7. The offender can be held accountable for making restitution to their victims.

8. The burden on the Public Defender's Office could be lessened. That individual is responsible for obtaining their own attorney.

Eligibility

It is the expressed opinion of those who have experimented with the Home Detention Program that the prognosis for persons with alcohol or drug dependencies is not favorable. The overwhelming evidence seems to support the premise that these individuals lack the restraint needed to succeed in such a controlled environment. Mandatory screening for drugs and/or alcohol will be a program requirement. Additionally, another group which

should be excluded at least from initial participation are those who have committed violent crimes against persons. They may, following careful evaluation and intensive supervision, be proper candidates for early release into the program. Exposure to the program at this time would place the individual in an atmosphere where his personal and family support systems could be re-established as the offender is slowly accomplishing community reintegration.

The first-time sentenced offender would be an excellent candidate for the program. He could be sentenced to the Department of Corrections for an initial period of time, then with Judicial approval be removed from the facility and placed in Home Detention until expiration of his sentence. For example, certain Ohio jurisdictions have used a system of "shock incarceration" followed by removal and probation. The individual is sentenced to one (1) year, brought into jail staying 5-30 days and is brought back to Court and placed on probation. This type individual would be an excellent candidate for Home Detention because he will have "tasted the medicine," but not yet built an immunity to it. In other words, the first offender was not incarcerated long enough to be negatively affected by his experience and if returned to a supportive, caring atmosphere, the prognosis for rehabilitation remained good.

For the Pre-Trial status individual, the Home Detention Program has its greatest potential for providing an alternative to incarceration while at the same time providing for the safety and security of the public. The offender in Pre-Trial status presents

a different situation from the sentenced individual. That individual, though not yet convicted of crime would be a part of the program which would affect certain freedoms which we all take for granted. For example, the Judge could release him with the condition that he not leave his home during certain hours. In order to avoid a possible legal issue concerning punishment prior to conviction, the Program should be made available to those on Pre-Trial status on a voluntarily basis only. A person who volunteers for such a program will be made fully aware that a violation will return him to the institution. Therefore, through informed consent, the individual will be aware that an immediate loss of freedom will occur if he violated his release conditions. This differs significantly from the individual who takes a chance on committing a crime in the following ways: (a) before a offender can be sent to jail the crime must be reported, some are not; (b) they must have probable cause to believe that the offender committed the crime; (c) the offender must be brought to Court, stand trial, and be found guilty. Even if he is found guilty, he could get probation or some diversion program. It is easy to see why some offenders play the probability game when they contemplate committing a crime. On the other hand, in a Pre-Trial situation the individual is made to understand that if he violates a condition of release, immediate incarceration occurs until at least the time of trial. The Home Detention Program because of the voluntary nature of the program offers a great deal more flexibility than the unstructured bond release featuring no follow up supervision.

In some cases, the Judge may consider Pre-Trial compliance of an individual as evidence that the Home Detention would be a viable alternative to incarceration in conjunction with a suspended jail sentence.

From a legal and Corrections viewpoint, an individual should not be placed on Home Detention unless the normal disposition would be incarceration. For example, if a person would have been sentenced to probation under previous standards, the same should home true. If, on the other hand, the sentence would have been jail, Home Detention may be an appropriate sentence. It should be recalled that this is a very severe form of punishment. Home Detention involves both the loss of personal freedom and the need on the part of the offender to avoid temptations not associated with jail. A person in jail, for example, does not have the opportunity to choose between walking off or having a drink of alcohol. The individual in Home Detention faces those choices every day.

We realize that Home Detention is not a panacea which will work for everyone or solve all of our problems. It can, however, be an effective tool which gives the motivated individual an opportunity to modify his behavior. If properly used, Home Detention can be an effective, viable tool of significant value in population management efforts. Furthermore, offender rehabilitation as well as reimbursement to the victim of property crimes are also possibly by-products of this Program.

Supervision

There are several Home Detention Programs throughout the

country. The type of controls and equipment are varied, however, for a program to be effective both in the rehabilitation aspect and cost effectiveness, graduated levels of supervision must be built in.

The Department of Corrections currently has an effective program for persons awaiting trial in the District Court. This program, which represents the first level of supervision, involves an initial interview, extensive criminal background checks and verification of community ties. For example, if a candidate has community ties and is likely to appear in Court, the Department's Pre-Trial Release Unit supervises the individual to ensure that Court imposed special conditions are being honored. As part of the community supervision efforts, the Department maintains continuous communication with the individual reminding the client of upcoming court dates and reinforcing the consequence of failing to appear.

The second level would include closer supervision of the individual. On this level, the individual would be required per the Court to stay at home during specified hours of the day or night. The Court Liaison Division of the Department would then, in addition to interviewing and verifying information about the individual, fit him with a specially designed wristlet. The wristlet along with the accompanying verifier box is utilized in the following manner: When an individual is fitted with the wristlet, his telephone number and hours of Home Detention are programmed into a computer terminal. A member of the Court Liaison Division will transport the individual and the verifier

box to the subject's home. Division personnel will attach the verifier to the subject's telephone and test the equipment by notifying the Division's computer. Once the equipment is properly installed and tested, the computer randomly calls the individual's home to verify his presence at the prescribed times. The individual's voice is placed on tape while the wristlet, which must be put into the verifier, completes the verification/identification process. The information in reference to the call is recorded in the memory of the computer and printed for review by staff personnel. The hardcopy printout will chronologically list all client information. The hardcopy immediately documents for immediate staff follow up if: (a) the individual does not answer, (b) the line is busy, (c) the subject does not put the wristlet in the verifier or (d) the telephone is malfunctioning.

The third level of supervision will require random visits by specially trained staff investigators to the person's home or to any permitted outside activity. These visits will be made without notice. The visits to places other than home will be conducted when the Court imposed restrictions only allow for home absences to attend certain activities. For example, if a person was supposed to be at home unless he was working, he could verify that he was at work.

The fourth level of supervision involves more sophisticated electronic equipment. For example, the person would be fitted with an ankle or bracelet transmitter. A receiver would be attached to his home telephone. Next, a distance from the tele-

phone would be programmed into the receiver, usually 50-200 feet. The office computer would be programmed to call the receiver and obtain information from it. The receiver in this system would call the office computer if the individual tampered with, unplugged or left at an unscheduled time. If a violation occurs, a special investigator could immediately be dispatched to the scene to investigate. Random personal home and excused absence visits could also be made on this level.

These four levels of supervision will give judges a viable tool to utilize in both Pre-Trial and convicted status cases. For the convicted offender, it would be used as a punishment for those requiring punishment but who do not fit the criteria for probation or a lengthy imprisonment.

In summary, these levels provide a means of punishing those who commit crime by restricting their movement while at the same time relieving the public of the cost of incarceration and in many cases public assistance for the offender's family. Finally, the closer the scrutiny of the offender's movement within the community the less likely they will commit other offenses.

movement of these materials by eliminating or reducing customs charges, tariffs and other barriers. The Agency needs information regarding the effectiveness of the certificates so that it can take appropriate steps as necessary. Further, the European Economic Community has proposed bilateral duty free exchange of videotapes and recordings. The information obtained in the survey will facilitate formulation of the appropriate U.S. response.

Dated: July 1, 1986.

Charles N. Canestro,

Federal Register Liaison.

[FR Doc. 86-15284 Filed 7-7-86; 8:45 am]

BILLING CODE 6230-01-M

UNITED STATES SENTENCING COMMISSION

Hearing

July 2, 1986

AGENCY: United States Sentencing Commission.

ACTION: Notice of Hearing.

SUMMARY: This notice announces that a hearing on the topic of Sentencing Options is scheduled by the U.S. Sentencing Commission for Tuesday, July 15, 1986.

Date: July 15, 1986.

Time: 10 a.m.

Location: U.S. Sentencing Commission Hearing Room, 14th Floor of the North Office Tower at National Place, 1331 Pennsylvania Avenue, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Paul K. Martin, Communications Director, 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, D.C. 20004, (202) 662-8800.

SUPPLEMENTARY INFORMATION: The U.S. Sentencing Commission was established under the Comprehensive Crime Control Act of 1984 and is an independent Commission in the Judicial Branch. The Commission is charged with developing a national sentencing policy for the federal courts, and pursuant to that, mandatory sentencing guidelines. The July 15, 1986 hearing, the Commission's fourth, will focus on the sanctions—in addition to incarceration—that are available for the individual convicted of a federal crime. Witnesses will testify on the use of fines, restitution, community services, house arrest, electronic monitoring, intensive probation and other options.

Written statement on this topic may be submitted to the U.S. Sentencing Commission, 1331 Pennsylvania Avenue, NW., Suite 1400, Washington, DC 20004. the hearing record will remain open for thirty days after the hearing for additional written submissions. All are invited to attend the hearing.

William W. Wilkins, Jr.,

Chairman.

[FR Doc. 86-15279 Filed 7-7-86; 8:45 am]

BILLING CODE 2210-01-M

VETERANS ADMINISTRATION

Agency Form Under OMB Review

AGENCY: Veterans Administration.

ACTION: Notice.

The Veterans Administration has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document contains a revision and lists the following information: (1) The department or staff office issuing the form, (2) the title of the form, (3) the agency form number, if applicable, (4) how often the form must be filled out, (5) who will be required or asked to report, (6) an estimate of the number of responses, (7) an estimate of the total number of hours needed to fill out the form, and (8) an indication of whether section 3504(h) of Public Law 96-511 applies.

ADDRESSES: Copies of the form and supporting documents may be obtained from Jill Cottine, Agency Clearance Officer (732), Veterans Administration, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 389-2146. Comments and questions about the items on the list should be directed to the VA's OMB Desk Officer, Dick Eisinger, Office of Management and Budget, 726 Jackson Place, NW, Washington, DC 20503, (202) 395-7316.

DATES: Comments on the information collection should be directed to the OMB Desk Officer within 60 days of this notice.

Dated: June 30, 1986.

By direction of the Administrator:

David A. Cox,

Associated Deputy Administrator for Management.

Revision

1. Department of Veterans Benefits.
2. Application for Dependency and Indemnity Compensation or Death Pension by a Surviving Spouse or Child (Including Accrued Benefits and Death Compensation, Where Applicable).
3. VA Form 21-534.
4. On occasion.
5. Individuals or households.
6. 162,720 responses.
7. 203,400 hours.
8. Not applicable.

[FR Doc. 86-15306 Filed 7-7-86; 8:45 am]

BILLING CODE 8320-01-M

Privacy Act of 1974; Amendment of Systems Notice—Additions to Routine Uses

Notice is hereby given that the Veterans Administration is considering adding new routine use statements to the following systems of records:

55 VA 26—Loan Guaranty Home, Condominium and Manufactured Home Loan Applicant Records, Specially Adapted Housing Applicant Records, and Vendee Home Loan Applicant Records-VA; (Privacy Act Issuances, 1984 Comp., Volume V, pages 734-736)

58 VA 21/22/28—"Compensation, Pension, Education and Rehabilitation Records-VA (Privacy Act Issuances, 1984 Comp., Volume V, as amended at 50 FR 26875 (June 28, 1985) and at 50 FR 31453 (August 2, 1985))

Pub. L. 98-369, 98 Stat. 1153, the Deficit Reduction Act of 1984, requires that this Agency report delinquent debts, which meet specific criteria, to the Treasury Department, Internal Revenue Service, for Federal income tax refund offset.

In order to participate in this program, this Agency must provide the full name, social security number, and any other information as is reasonably necessary to identify such debtor, to the Internal Revenue Service for each delinquent debt in order to initiate offset of an individual's Federal income tax refund.

To release this information from the two systems of records, the VA must add a new routine use statement to both systems. The new routine uses will permit the disclosure of identifying information to the Internal Revenue Service in order to make a claim against all or a portion of an individual's Federal income tax refund. The purpose of this disclosure is to assist the VA in the collection of Title 38, U.S.C. benefit overpayments, overdue indebtedness, and/or costs of services provided to an individual not entitled to such services.

The VA has determined that the release of this information for this purpose is a necessary and proper use of information in both systems of records, and that a specific routine use for the transfer of this information is appropriate.

ADDRESSES: Interested individuals are invited to submit written comments, suggestions or objections regarding this

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

JULY 14TH, 1986

MEMORANDUM:

TO: Commissioners and Interested Staff

From: Paul K. Martin

Subject: Washington Post story

The attached news story appeared in the Sunday, July 13th edition of the POST and was brought to my attention in light of the Commission's Tuesday hearing on Sentencing Options. The Prince George's County corrections official quoted in the story, Samuel Saxton, will testify on house arrest and electronic monitoring at Tuesday's hearing.

House Arrest Off to a Rough Start in P.G.

Felon, First in Program for Nonviolent Offenders, Back in Jail

By Matthew Daly
Washington Post Staff Writer

Prince George's County's house arrest program—introduced by officials in April as a possible solution to crowding in the county jail for nonviolent, minor offenses such as shoplifting and nonpayment of child support—is off to a rough start.

The first of five people assigned to house arrest was a convicted felon who was found to be away from home without authorization, a violation of the program. The four others were placed in the new program while they awaited trial and included a man charged with assault and two men who were denied bond because of previous arrests on theft or drug charges.

That record has raised concerns among prosecutors and the judge who helped establish the program.

Circuit Judge Howard S. Chasanow, who worked with corrections department officials to develop the plan for house arrest and is a strong supporter of the program, said he was concerned about the way in which the program has been implemented so far, especially involving the prisoners who had not yet been convicted.

"The primary intent is as a tool of corrections in lieu of incarceration," he said, "not as a form of pretrial release."

Assistant State's Attorney Robert H. Harvey Jr., who won the felony conviction against Kevin Anthony Clayborne—the first house arrest participant, who two weeks ago was returned to jail after allegedly

See HOUSE ARREST, C5, Col. 1

Program for Nonviolent Offenders Off to Rough Start in P.G.

HOUSE ARREST, From C1

breaking the rules—said that Clayborne was not the right person to inaugurate the program.

"I told [the judge] in court that if he [Clayborne] was the first one in the program, I could almost guarantee he'd be the first one to flunk out," Harvey said. "I thought he had an attitude problem."

Corrections Director Samuel Saxton, however, said he did not see any reason to revamp the system. "The criteria are solid," he said, adding that "misdemeanor or low-grade felony thefts are not inappropriate for the program."

Prince George's County, which has a court-ordered cap on the number of prisoners in the detention center in Upper Marlboro, is the first area jurisdiction seeking to alleviate crowding problems with house arrests. The relatively new concept, law enforcement officials say, is also being used by more than a dozen jurisdictions across the country, including Norfolk. Fairfax County has a similar program that is awaiting its first participant.

Clayborne, of Glenarden, pleaded guilty in April to stealing more than $300 worth of tennis shoes, athletic equipment and jewelry from two Hyattsville teen-agers last August. Police said that four men were involved in the robbery and that at least one of the assailants had a gun. But investigators could not determine who had the gun, and weapons charges against Clayborne and another defendant were dropped.

Circuit Judge Audrey E. Melbourne sentenced Clayborne, now 19, to five years in prison, but suspended all but 90 days, which she ordered him to serve in the new house arrest program.

Clayborne is scheduled to appear Monday before Melbourne for a hearing to determine if he should be expelled from the house arrest program and jailed for up to five years.

Melbourne said in an interview last week that she placed Clayborne in the program because corrections department officials had recommended it and because "his crime was not a violent crime. More importantly, he was very young and was living at home with his mother."

"It was obvious from his background that he was not used to following any rules," Melbourne said, citing reports of frequent fights and truancy from school. "I thought [the program] would be a mechanism of teaching him responsibility. He needed some real supervision—to have somebody always on him."

She said the program was "almost like a guardian angel on his shoulder, watching [his] every move."

Placing restrictions on a person's liberty while not confining him to jail is precisely the idea behind the house arrest program, Saxton said.

In Prince George's, participants must wear an unremovable bracelet that they insert into equipment hooked to their telephones whenever they are called by the corrections department computer to verify that they are home, said Al Hall, director of the house arrest program. Also, corrections officials make random visits to the houses, he said.

A fringe benefit of the program, Hall said, is that it saves the county money. It costs about $44 a day to keep a prisoner in the County Detention Center, he said. When the program reaches its goal of 25 participants, they will be charged a fee, he said. Hall said he expected the fee to be about $7 a day—what it costs the county for each person.

"If we can control [a criminal offender] and have him pay for it, society is better off and the individual is better served," Hall said.

Prosecutor Harvey, who said he did not believe that convicted felons should be placed in the program, said Clayborne "has made it awfully difficult for a judge to put faith in the program. He is the first one, he is in it for two months, and he fouls up."

Melbourne, however, said the incident has not shaken her confidence in the house arrest concept. "I still think it is an excellent program," she said. "I'm just sorry my kid didn't learn his lesson quick enough."

WILLIAM D. GRAVES
CHIEF PROBATION OFFICER

UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

PROBATION DEPARTMENT

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July 3, 1986

The Honorable William W. Wilkins, Jr.
Chairman, U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1200-A
Washington, D. C. 20004

Dear Judge Wilkins:

Thank you for the continued opportunity to be able to contribute to the Sentencing Commission's work on sentencing guidelines and now, sentencing alternatives. The openness of the Commission to the comments of practitioners is very much appreciated, particularly as regards to those policy issues that will frame the eventual sentencing guidelines to be used in Federal Courts across the country. It is to those policy issues that I would like to address my opening comments, with specific thoughts on the various sentencing alternatives to follow. The contents of this correspondence will form the basis for my testimony before the Committee on July 15, 1986.

First, I think it important to note that the Federal Courts work with a different type of offender than do the state courts. Unfortunately much of the research on sentencing, sentencing disparity, and alternatives to confinement have been based on sentencing in the state courts. Most violent crimes are left to local and state governments for prosecution and Federal prosecutions are for crimes that are nonviolent in nature, except for Bank Robbery, Kidnap and Assimilated Crimes Act cases. In fact, for the year ending June 30, 1983, only 6.4% of all criminal cases filed in U. S. District Courts were for Homicide, Robbery, Assault and Burglary. Some 39.6% of cases filed could be categorized as white collar offenses, with another 14.5% being drug cases. (1984 Sourcebook of Criminal Justice Statistics).

Secondly, I think it important to review the Congressional intent in the creation of the Sentencing Commission. My understanding of that is that the Commission was created to reduce disparity in sentencing. I think it important to note here that, while sentencing judges are criticized for disparity, much of the actual disparate treatment of offenders results from the action/inaction of law enforcement agencies and prosecutors. Most of the disparity occurs long before the sentencing function. Most prosecutions come from investigations that are initiated pursuant to policies which will vary from time to time and from one part of the country to another. Investigations and prosecutions are performed by

political branches of government and their policies will change as elected officials attempt to perceive the public will. The prosecution makes the decisions on which cases to file and which cases to plea bargain. The prosecution can even present a stipulation for a specific sentence [Rule 11(e)(1)(c) of Federal Rules of Criminal Procedure].

It is interesting to note that much of the concern and debate on disparity comes from inmates. There is a need for concern about inmates' perception of fairness in the System, but there are also legitimate reasons for differences in sentences for what appear to be basically the same offense. We are a unified system because of our acceptance of the basic and fundamental principles of fairness reflected in the Constitution. The United States is also a diverse and complex society that has legitimate divergence in thought based on geography, religion, culture, mores and life-styles. The communities that judges work in hold those judges accountable for sentencing decisions. There are going to be legitimate community concerns about particular offenses and their punishment in different parts of the country. For example, the possession of cocaine is viewed differently in Aspen, Colorado, than it is in Middlebury, Connecticut.

The Sentencing Commission's role in all this should be to provide a basis for the articulation of a national philosophy towards sentencing and the establishment of general goals in pursuit of a fair and just sentencing process. The Commission's adoption of a clear policy on sentencing goals, strategies and programs for achieving those will be a major contribution to the Federal Judiciary's task.

Thirdly, it is my firm belief, based on many years experience working with a group of very dedicated jurists, that judges work extremely hard at formulating a just sentence. They agonize over their decisions, both before and after a sentence is imposed. The sentencing judge is in a very unique position to weigh all of the factors relevant to a sentencing decision. In your development of guidelines there must be a wide enough range to permit sentencing judges to function in their traditional role of balancing the collective interest of the public against the private interest of the defendant. That is necessary to reach a just result that is case specific and which can be perceived by the public and the defendant as both just and human. My recommendation, then, is that the Commission allow as much sentencing flexibility as possible to allow the court to respond to the variables that are inevitable with individual defendants who commit a multitude of diverse crimes in a multitude of ways.

Fourthly, I would recommend that the Commission adopt a philosophic framework for development of a national strategy that recognizes

that crimes are knowingly and willingly committed by persons who, for whatever reason, chose to abandon the societal mores by taking, through force or guile, what is not earned through their own labor. That position recognizes that individuals are responsible for their behavior and are accountable to the society when they step outside what is acceptable. The establishment of a philosophic position that recognizes that individuals are responsible for their behavior, and accountable to the society, provides a vehicle for the establishment of position statements on how to sentence offenders.

The Comprehensive Crime Control Act, in the section addressing the imposition of sentence [18 USC 3553(a)], quite properly lists the defendant's treatment as last in priority in what is to be achieved with any particular sentence. The law recognizes that offenders that inflict or threaten physical harm to victims must be incapacitated, both for the safety of the society and as a message of deterrence for other would-be violent offenders. Maximum periods of community supervision should follow their incarceration. Individuals who commit isolated, nonviolent property crimes can then be sentenced to allow for reparation to the victim and society and for their own rehabilitation. It is important to note here that rehabilitation is the defendant's responsibility and not the courts or the Probation Service. Probation is meant to provide the opportunity for rehabilitation and it is in this area that alternative sentences such as restitution, fines, community service, etc. are better utilized.

Finally, philosophically, it is my perception that despite the important gains in the Victim Witness Protection Act of 1982, the victim is still a neglected part of the Criminal Justice System. It is my feeling that we have a good ways to go in providing a continuity of information and services to the victim so that they feel more a part of the System. The feelings we get from our interviews of victims is that they are on the outside looking in, with little or no impact on sentencing. Philosophically, I would suggest the adoption of a position that the Sentencing Commission will make every effort, through its policies, to: 1) protect the community; 2) punish, swiftly and surely, the criminal; and 3) involve the victim in the process.

The balance of my comments will address those specific sentencing options requested by the Commission, including incarceration and the probation based alternatives.

It is my belief that **imprisonment** is a legitimate societal sanction for lawbreaking. That sanction should not be limited to only those violent and serious criminal offenders that pose the most dangerous physical threat. The sense of the Senate resolution (October 12, 1984) on "nonviolent and non-serious offenders" makes

little practical sense when it fails to recognize that the victim of a nonviolent white collar offender might well have been as traumatized as the victim of an armed robbery. The white collar offender, the drug trafficker or the individual who compromises our nation's secrets are as deservant of confinement as is the violent offender. All of the sentencing options must be available to the sentencing judge, with the degree of punishment based on the offense and the offender's characteristics.

Let me clarify an important issue, and that is that **probation**, in addition to treatment, is punishment. Living under the threat of incarceration is difficult -- our clients constantly reaffirm that to us. Probation conditions require that the individual offender work, support his dependents and stay away from other law violations. Probation supervision works because it monitors that behavior, confronts the client who chooses to live outside acceptable norms and forces his accountability or removal.

The Commission has asked for specific comments on **intensive probation supervision**. My review of the available literature leads me to conclude that intensive supervised probation was created at the state level in response to prison overcrowding problems or the need to "toughen" the image of probation and parole in the community. Prison overcrowding is a problem at the Federal level, but it is not the severe problem that the states are attempting to cope with. Additionally, as I noted earlier, the Federal Courts deal with a different type of client than do the state courts. The Federal Probation Service currently has a very workable method of classifying cases based on risk to the community and the needs of the individual offender. The Federal Probation Service, although not adequately staffed due to budgetary constraints, is in a much better position, personnel-wise, to properly supervise those persons who are "high activity". We are capable of, and currently provide, a quality supervision product to the Court. That supervision includes the monitoring of defendant's employment, family life, associates, attitude, etc. to either prevent or detect early any violative conduct. It is, therefore, my perception that there appears little purpose to be achieved with development of an "intensive supervised probation" category.

The Comprehensive Crime Control Act (18 USC 3583) does provide for a period of post-release supervision. If there were to be a need for more intensive supervision of any group of clients, it would be with this group. The Court, as an alternative to establishment of a separate supervision category, could order that the first six months or first year of that supervised release be "high activity" and could even mandate the number of personal contacts that the Probation Officer is to have with that particular defendant.

The Commission has also asked if we feel a need for **additional probation conditions**. The mandatory and discretionary conditions provided for by 18 USC 3563(a) and (b) do include those conditions that are most commonly ordered as special conditions to a probation sentence. We would suggest the addition of two other alternatives for special conditions to supervision. Those would include: 1) a condition for financial disclosure. This condition is used infrequently but can be of major assistance to the Court in the supervision of white collar offenders (for example, mail fraud cases, securities and tax cases, etc.) where information on the individual or corporate defendant's financial condition is essential to the Court to discourage continuing criminal violation. The condition could include, where reasonably related to the offense and the rehabilitation of the offender, the requirement that defendant disclose his tax returns, business and/or personal financial records, etc. to the Court's Probation Department for review. 2) A special condition that provides for disclosure to third parties where the defendant poses a reasonably foreseeable risk to them through employment or otherwise. This could include; e.g., those individuals convicted of embezzlement who seek to continue work in positions of fiduciary responsibility. Probation Officers are coming under closer scrutiny on liability issues and a formal Court order, after due consideration and possibly hearings, would resolve liability issues for the Probation Officer and would clarify the expectations of the Court for that defendant's future conduct.

I would also suggest that some conditions of probation and/or supervised post-release be standard. Those would include the following conditions under 18 USC 3563(b):

1. Support dependents and meet family responsibilities.
5. Work at suitable employment or pursue training.
7. Refrain from frequenting specified places or associating with specified persons.
8. Refrain from excessive use of alcohol or any use of narcotic drugs without prescription.
9. Refrain from possessing firearm, destructive device or dangerous weapons.
15. Remain within the jurisdiction of the Court.
16. Report to the Probation Officer as directed.
17. Permit home visits or visits elsewhere as specified.
18. Answer questions by the Probation Officer and notify him of any change in address or employment.
19. Notify the Probation Officer if arrested or questioned by law enforcement.
20. Satisfy other conditions as the Court may impose.

FINES

I feel that fines should be considered in virtually every case, but suggest that it be a preferred sanction in the following types of cases:

1. Traffic and driving offenses
2. Restraint of trade (15 USC 1) cases involving individuals or corporations
3. Organized crime cases involving illegal gambling, bookmaking or racketeering
4. Drug cases, where the primary motivation is financial gain. Fines imposed in these cases must be punitive to ensure they are not absorbed as merely a cost of doing business.
5. Crimes resulting in financial loss to the Government, for example, income tax violations, false statements and claims, etc.

Fines would be particularly appropriate where individuals victims can't be identified or where attempts to determine restitution would legitimately overcomplicate the sentencing process (per the Victim Witness Protection Act).

DETERMINING THE AMOUNT OF FINE

I believe it appropriate to base the amount of fine on the financial gain to the defendant, loss to the victim(s), and the ability to pay a fine on defendant's part. Again, the Comprehensive Crime Control Act at 18 USC 3572 and Victim Witness Protection Act at 18 USC 3579 provides the Court sufficient latitude to take into account relevant factors in determining the amount of a fine. The essential element here, again, is that the Court must have sufficient latitude to consider relevant factors before arriving at a decision on whether to fine and how large a fine to impose.

The Victim Witness Protection Act, as regards restitution, is well written on this point when it requires the defendant to carry the burden of establishing ability to pay. The Court, after appropriate hearings, can make judgements based on projections for defendant's future earning ability. Those decisions can be based on age, education, intelligence, past employment history, etc. I doubt there is a formula devised yet that can take into account the various factors that the Court can consider in arriving at the amount of fine to impose. However, there is interesting research available from the National Institute of Justice. I have enclosed a copy of that research, should the Commission wish to peruse it. There is some interesting information there on a "day-fine" system used in Sweden and West Germany that involves

determining "units of punishment." Those determinations are based on offense severity, offender characteristics and the offender's ability to pay.

A final note on imposing fines needs to be addressed. The caution with fines is that, once imposed, they must be collected. Fines imposed as a condition of probation make the Court the collector and provide for sanctions if there is a wilful failure to pay. Fines not a condition of probation, at least under current law, become the responsibility of the Department of Justice through the U. S. Attorneys Office. It is my observation that there are wide variations among the different districts in collecting fines. It seems to me that without a uniform and aggressive policy in pursuing payment, fines are meaningless.

RESTITUTION

Financial reparation through restitution is a very important element in sentencing, even more so than fines, and should be considered in all cases where there is an identifiable victim who has suffered loss. My perception is that restitution must be a higher priority than either a fine or community service. The Victim Witness Protection Act, currently 18 USC 3579, mandates that the Court consider restitution for victims of the offense regardless of any other sentencing sanctions. The law, and I believe it is well written, requires a combination of sanctions. The Comprehensive Crime Control Act mandates that persons convicted of a felony abide by <u>at least one condition</u> set forth at 18 USC 3563(b)(2) -- fine, (b)(3) -- restitution, or (b)(13) -community service. The best approach, and the one that seems to be mandated by the statutes, is that all the alternatives be considered by the Court in virtually all cases.

COMMUNITY SERVICE

The Administrative Office Monograph, <u>Community Service: A Guide for Sentencing and Implementation</u>, is close to completion and is a well thought out document that will provide adequate direction to the Court and its Probation Department. I do feel that community service is a criminal sanction for the defendant's wrongdoing and because of that the defendant, not the Probation Officer, must be responsible for the development of the community service proposal. The Probation Officer, for the Court, must approve and monitor the approved community service project closely to ensure that the sentencing objectives of the Court are met. I also feel that the cooperating community service agency is going to need to know what the Court's objectives are with a particular sentence and must also know what that individual defendant was convicted of, primarily to avoid third party risk issues.

The community service alternative to both fine and imprisonment has gained increasing acceptance by the Courts. There are obvious advantages to the community of having a pool of manpower available to use in worthwhile projects. There are also advantages for criminal defendants to be involved in the community. For the person that lacks basic job skills, community service can provide an opportunity for a work-type experience. For the overachieving "yuppie", convicted of securities violation, it can provide an opportunity to work in projects for the handicapped where they can see that daily living is a struggle for survival for many.

HOUSE ARREST

The research materials that I have been able to review suggest that house arrest is used predominately by the states as an alternative to alleviate overcrowding in the prisons for a fairly select group of nonviolent offenders who are motivated to make it work. This sanction would seem appropriate for persons convicted of driving while intoxicated or other similar offenses. We do have a number of those cases, however, have been able to adequately curtail/monitor their activities through use of residential community treatment centers, alcohol treatment programs, etc. We also think it possible to place such persons on the National Crime Information Center computer tracking program so that we could learn immediately of any law enforcement contact. In summary, I believe there are adequate resources already employed in the Federal System without having to utilize house arrest or electronic surveillance.

The opportunity to address the Commission is appreciated, as is the openness of the Commission in seeking input from the field. That communication process will be critical in the future as sentencing guidelines are implemented. As a final recommendation, I would suggest that the Commission continue to utilize the expertise available in the Administrative Office of the U. S. Courts (including the Probation Committee and the Probation Division), selective probation representatives from the field, the Federal Bureau of Prisons and the U. S. Parole Commission so that feedback on the guidelines on all parties can be periodically reviewed and evaluated.

I do hope that the Commission will find some part of this communication helpful. It has been most gratifying to be able to participate. Thank you for this opportunity.

Sincerely,

William D. Graves
Chief U. S. Probation Officer

Enclosure
WDG:RWJ:bg

State of South Carolina

Office of the Governor

RICHARD W. RILEY
GOVERNOR

OFFICE OF EXECUTIVE
POLICY AND PROGRAMS

July 10, 1986

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

Thank you for your letter of June 17 soliciting our input on available and appropriate sentencing options for federal offenders. I am happy to offer my thoughts on this subject.

As you may know, the S. C. General Assembly recently passed a bill entitled "The Omnibus Criminal Justice Improvements Act of 1986." This Act was primarily designed to help relieve the state's prison overcrowding problem by offering judges a variety of alternative sentencing options other than incarceration for certain types of non-violent offenders. Ironically, types of alternative sentences chosen for implementation as a result of this Act include many of the same sentencing options that you have addressed in your recent letter, namely, intensive supervision, house arrest, restitution and community service programs.

Although my involvement with regard to the Omnibus Crime Act was primarily in the area of policy decisions concerning the feasibility of such alternative sentencing schemes as they relate to state/local offenders, I feel many of the same principles can be applied to federal offenders, as follows:

Intensive Supervision Probation

The state of South Carolina has had an intensive supervision program in operation since 1984 within the Department of Parole and Community Corrections. The state's program has been primarily used for the supervision of inmates being released from prison via parole, via early release programs established within the state to relieve prison overcrowding, and for offenders who are eligible for probation but who require more frequent supervision within the community. Overall, our program is very effective and I consider it to be a worthwhile venture and an effective sentencing alternative to incarceration.

Intensive supervision probation should, however, only be considered for use for certain types of federal offenders, namely offenders convicted of non-violent, non-serious federal crimes. Repeat, habitual, violent or serious offenders should not be considered for initial intensive supervision probation, nor should individuals convicted of extremely infamous crimes. Such offenders may, however, require this type of supervision upon eventual release from prison. Additionally, in order for an intensive supervision probation program to function properly, it is important that such a program be coupled with an extensive system of evaluation in order to determine offender eligibility for participation. Traditionally, offender risk assessments which seek to determine an offender's risk to the community and pre-sentence investigations/evaluations which enable probation officials to assess an offender's ability to successfully complete his/her probationary term have been effective tools for such evaluative purposes. Possibly, the Sentencing Commission could play a significant role in the development of standardized evaluative forms which take into account offender characteristics which seem suited to intensive probation programs.

In addition to the above, one should not ignore the importance of policies and procedures when considering the implementation of such a probationary program. Policies and procedures which provide guidelines as to how such a program should operate, what type of offenders should be eligible for participation, etc., are absolutely necessary if the program is to successfully function. Again, the Sentencing Commission could play a significant role in soliciting input from officials in other states that already have intensive supervision programs in place.

The list of probationary terms described in 18 U.S.C. 3563(b)(1-19) appears to be quite adequate and extensive; however, for purposes of intensive supervision two additional conditions may need to be considered: (1) submit to house arrest; and, (2) submit to urinalysis and/or drug screening. Because house arrest will be discussed in a separate section below, I will refrain from any lengthy discussion here. Urinalysis and drug screening, however, may be appropriate conditions for offenders sentenced to terms of intensive supervision whose crimes in some way are linked to their use of alcohol or controlled substances. Of course, such screening would need to be done at unannounced times throughout the offender's probationary period in order for such screening to be effective. Alcohol and some forms of drug screening could easily be performed by probation officers or by other federal officials specially trained in such techniques.

Fines

In an earlier letter to you regarding effective criminal sanctions for organizational offenders, I expressed my dissatisfaction with the use of fines solely as a form of offender sanction. Again, I feel that fines, in general,

do not promote the effective attainment of the overall aims of sentencing inasmuch as they do not effectively deter certain offenders from committing crime (i.e., some offenders are able to pay fines without suffering any financial loss); they do not rehabilitate certain offenders (i.e., some researchers have noted that the imposition of fines on certain offenders may inherently cause them to commit future crimes in order to pay the fine); and, they do not provide for effective restitution as most fines are used for purposes of state/federal procurement. Additionally, because most fines are imposed by judges without much regard to the offender's ability to pay (after all, most fines are prescribed for certain crimes), the use of fines promotes an uneven or disproportionate distribution of punishment.

Possibly, if fines were (1) structured on a sliding-scale basis with regard to the offender's income and his/her ability to pay; (2) coupled with other forms of sentence, i.e., probation, restitution; and, (3) involved some form of community service which required the offender to devote time to his sentence, then fines may become more effective in achieving the goals of sentencing. However, where possible, the use of fines as a sole form of punishment should be avoided.

Restitution

Under the Omnibus Criminal Justice Improvements Act mentioned earlier, restitution plays an important role in the "continuum of sentencing sanctions" made available for use by judges. Restitution is a rather unique sentence in that it is relatively easy to administer and it can be combined with other forms of sentencing, i.e., probation, community service and incarceration.

Where possible, restitution should be ordered in all types of criminal cases. After all, all crimes involve some victim, whether it be another individual(s), organization or even, in some cases, the environment. Under legislation implemented in our state, all offenders will be required to pay a small cost-of-court fee ($7.75) that will be used by the state to support alternative sentencing programs created in the Omnibus Act. Additionally, South Carolina law now mandates that offenders participating in work release programs within the state prison system contribute 5% of their gross salary to a special fund to support victims' programs. Thus, restitution in both these cases is easily achieved.

The Omnibus Crime Act also calls for the development and implementation of six "Restitution Centers" throughout the state. Such centers will be used to house non-violent offenders when they are not working or seeking employment. Offenders housed in restitution centers will also be required to make restitution to their victim(s) or to an account set up to support various victim assistance programs throughout the state. Implementation of a similar program for federal offenders may not be too difficult inasmuch as 18 U.S.C. 3563(b)(12) already sets forth provisions which enable offenders to work in

the community and return to the Bureau of Prisons in the evening and on weekends. Possibly a percentage of each offender's salary could be taken by the Bureau of Prisons to supplement funds under the Victims of Crime Act of 1984, Public Law 98-473.

Community Service

Again, South Carolina's Omnibus Crime Act sets forth provisions for community service work for certain non-violent, non-serious offenders as a condition of an offender's probation/parole. Under the Act, such offenders may be required to devote a certain number of hours to "public-service employment." The Public Service Employment Program is also administered by the Department of Parole and Community Corrections and requires offenders to perform work at various private and non-profit organizations throughout the state. Special public service probation and parole agents are charged with the responsibility of soliciting agency/organization involvement in the program, placement of offenders within the program, and with supervising and monitoring offender performance.

To date, the program has been very successful and offender/agency participation in the program has surpassed original expectations. The key to this program, however, has been strict organization. The program is very structured, and all service providers are screened, and all offenders are placed, where possible, in programs which relate to their offense.

Of course, all offenders are not suited for participation in such a program. Again, community service should be reserved for the non-violent, non-serious offender and, as I noted in a previous letter, the organizational offender. Additionally, as with all types of programs which require the offender to be placed in the community, screening of offenders, whether in the form of a risk assessment or pre-sentence investigation should also be conducted to assess the offender's ability to successfully complete his/her community-service sentence.

House Arrest

House arrest, the newest alternative to incarceration, from what information is available, appears to be a viable concept. Under the Omnibus Act, in South Carolina house arrest can be used as a condition of probation for certain non-violent offenders. Like intensive supervision, house arrest requires a strong probationary staff whose caseloads are limited to a small number of offenders in order to allow for successful monitoring and supervision. Additionally, offender screening should be performed to assess the likelihood of an offender's ability to successfully complete his/her sentence.

The house arrest program being implemented in our state does not include electronic monitoring, which appears, from what literature is available, to

enhance a probation official's ability to account for his/her client. Inconspicuous anklets and wristbands worn by offenders, and which are inter-related to various telephone devices, appear to be tamperproof and allow for effective and useful computer documentation of offender compliance with the conditions of house arrest. However, research has indicated that programs should not be implemented which call for the use of electronic monitoring equipment only. Electronic equipment should be used only to complement probation agent/offender contact in order for a house arrest program to be successful.

Again, as with any program which affords offenders the ability to serve their sentence in the community, evaluative forms need to be developed in order to screen potential applicants whose characteristics fit the needs of the program and the community. Violent, high-risk offenders should, again, not be considered for house arrest, nor should repeat or habitual offenders because of their risk to the community and their likelihood of committing future crimes. House arrest is typically more suited for offenders who have committed non-violent, less serious offenses. For example, the state of Florida typically uses house arrest for minor drug offenders, shoplifters, fraudulent check writers, and the like. Possibly the Sentencing Commission would benefit from providing various state officials with a list of federal offenses so that they could rank crimes which are felt to be suitable for such alternative sentencing plans.

I hope I have adequately expressed our input with regard to the various community-based sentencing alternatives presented in your letter. If we may be of any further assistance, please do not hesitate to contact me.

Sincerely,

Ritchie P. Tidwell

Ritchie P. Tidwell
Director

RPT:loa

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REPLY TO: DETROIT

July 9, 1986

Mr. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

RE: QUESTIONNAIRES OF MAY 12, 1986 AND JUNE 17, 1986

Dear Mr. Wilkins:

I apologize for not responding to the May 12th questionnaire in a timely manner. The press of work here along with my participation as a presenter in our recent regional probation officers training program really took my time.

The presence of Probation Officer Rusty Burress at our training seminar was indeed motivating as well as enlightening. Thank you for freeing him up to be present.

The May 12, 1986 letter focused on Organizational Sanctions. My experience in handling presentences for this type offender is limited. As a result, my answer will be more generalized.

To the extent that organizations have great impact on our society, through their financial position, to control outcomes of various activities, it is imperative that they also are held accountable. Unless a specific corporate officer is included on the indictment, the only way an organization could suffer punitively is in a financial manner. Thus sizeable fines, donations of work (for instance, a printing company in our area was required to produce $2,500.00 worth of printed material within one year for a nonprofit organization) are effective.

Shareholders may suffer economically when fines are imposed but it seems reasonable that they have anticipated that potential when they acquired stock.

On the other hand, if the fine were so substantial as to cause the company to collapse with a large number of people losing their jobs, then it would seem that the overall good to the community would dictate a lesser fine and/or a longer time to pay it.

Placing an organization on probation, in my mind, serves little good. Barring them from participation in specific activities can be effective if the firm can be monitored realistically to ascertain that the prohibition is carried out.

Crimes committed by organizations should have an increased scale of severity. What I mean is there should be the basic ranking for individuals applied to organizations but the addition of a certain point average which would raise it above the individual.

Now on to the letter dated June 17, 1986, regarding sentencing options for individuals.

Probation.

Intensified supervision should be required of the following individuals: individuals convicted of crimes defined in the Organized Crime Act of 1970, major figures in sophisticated crimes, individuals associated with national security cases such as individuals who have threatened public officials, international gun runners or large scale explosives dealers, members of certain radical groups such as Ku Klux Klan, Rastafarians, etc. Supervision of these people may serve as a further deterrent to their activities.

Control of freedom to travel should be utilized and association with others of the type described should be rigidly enforced.

The role of the Commission, court and probation officer in determining what offenders receive intensive supervision should be defined. There should be a classification of individuals who would automatically incur intensive supervision as a condition of probation. There should also be a method open to probation officers whereby they can submit to the

court a petition to ADD the requirement on if the situation justifies it. To preclude abuse, a system similar to what is presently used when one modifies parole conditions (copy to the person and chance to respond affirmatively or not prior to implementation of the new condition) should be part of the process.

On the other hand, if the Commission will allow for any type of "rehabilitative work" under supervision, I believe those individuals who at sentencing had a recognized substance abuse problem really need some supervision which would include participation in drug treatment and urine testing. This participation should be closely monitored by the officer to the extent that urine test results and the keeping or failure to keep counseling appointments should be documented by the officer.

With regard to conditions set forth in 18 USC 365 3(b) (1 - 19), I believe there should be a mandate to the court that on the record the judge and/or magistrate must state his acceptance or rejection of additional conditions beyond simply not commiting a new crime [see 18 USC 3563(a)(1)] for those convicted of a misdemeanor. There are a number of misdemeanor offenses which should require supervision obligations on the part of the offender.

Fines.

There are certain crimes where a fine should be the preferred sanction such as some crimes on federal reservations where there was minor theft or destruction and some environmental offenses.

Some offender categories would include first offenders of isolated low misdemeanor type offenses, as well as individuals where the penalty of the offense (less than a year) would be entirely absorbed by the fact that they are already incarcerated in a state/county or local jail for another matter.

As to amounts of fines, there should be defined amounts for each offense. The victim's loss should be calculated for restitution purposes and not be an issue in the calculation of a fine.

The offender's ability to pay should be realistically calculated by a review of their financial condition up to this time. For instance, if the person is an unskilled individual who has subsisted on government subsidies, the potential of them paying a fine is not realistic. Even if they through unusual circumstances suddenly have a lucrative job, the "catching up" process that individual goes through to try to get his life on a better level would seriously impede him and impair his motivation to change.

Failure to pay fines in some cases where unforeseen circumstances have wiped out the person's ability to pay should result in the obligation being excused. Organizations should not be allowed to list this debt on any bankruptcy proceedings.

Restitution.

Restitution should be ordered where there is a definable victim whose documented loss can be paid in some manner by the offender. However, if the offender's recognized documented financial structure precludes it, it is an unrealistic burden on the officer to try to get the offender to pay. It is unfair to the offender too if the only source of income they have happens to be a government subsidy check and they must strain their budget to make a restitution payment.

Community Service.

An effective community service program should be structured in such a manner as to be monitored and basically controlled through one chosen to coordiante such services in each probation office. The coordinator's obligations would include finding places for individuals to perform this work, making sure that legal liabilities and other pertinent matters are settled and obtaining necessary documentation to validate the hours offenders actually work.

Offenders who lack either money or a means of transportaion to get to the locations should not have to perform community service unless they can be provided with costs of transportaion. Since the likelihood of the government financing this is remote, these persons should be excused.

House Arrest.

House arrest can be a viable alternative to incarceration provided it can be monitored via electronic methods. It can save costs to the government for housing of the offender, allow the offender to continue support of his family (so the government doesn't have to take on this expense too) and could also represent the method wherein the offender would be able to more readily pay restitution and/or a fine.

House arrest should be used for minor offenders only.

Although this is submitted late, I hope it will offer some help.

Sincerely,

Joan Medl

Joan M. Medl
U.S. Probation Officer

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CHAMBERS OF
MICHAEL M. MIHM
DISTRICT JUDGE

July 8, 1986

Room 216, Federal Bldg.
100 N.E. Monroe Street
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Phone 309-671-7113
Phone FTS 360-7113

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Thank you for your June 17 letter inviting me to respond to certain questions relating to sentencing options which will be considered by the Sentencing Commission at your hearing on July 15, 1986. I regret that I was unable to respond to your letter prior to this time. I was delayed because of other duties and a death in the family. I hope that the response is of small benefit to you and that it is timely enough to assist you in your deliberations.

A. Probation

Query:

* Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?

* What roles should the Commission, the court and the probation office have in determining which offenders are placed on intensive supervised probation?

* What type of probation conditions not expressly listed in 18 U.S.C. 3563(b)(1-19) should the Commission consider in drafting the guidelines?

Response:

Intensive supervision would be a useful tool in dealing with the repeat non-violent offender as well as certain offenders who have drug, alcohol and/or mental health problems. Ordinarily, violent offenders should be incarcerated as should those convicted

of organized crime activity, large scale financial fraud, drug distribution, and public corruption.

The probation office should be responsible for investigating and evaluating the applicability of intensive probation and making a recommendation with supporting rationale to the Court. The Commission should establish the parameters for such consideration.

The conditions of supervision should include frequent (at least one to three per week) face to face contacts with the probation officer. Unannounced home and community visits would be a crucial component of intensive probation, as well as evening and weekend contacts.

The major concern that I have concerning the growth of intensive supervision as a viable sentencing alternative is the work load that it would place on present probation resources. Having come to the federal bench after several years of working in the criminal justice system at the State level, I am extremely hesitant to create a federal probation situation where there are too few probation officers to effectively perform their sworn duties. One of the things which has traditionally distinguished federal probation from state probation has been the effective manner in which federal probation officers have been able to conduct supervision. To the extent to which intensive supervision is used, allowance must be made in terms of manpower allocation to protect against overextended work loads by probation officers.

The conditions listed in 18 U.S.C. 3563(b)(1-20) are adequate.

B. Fines

Query:

* Are there certain crimes for which fines should be the preferred sanction? If so, list the offenses.

* What elements should be considered in calculating the actual amount of a fine? Should the amount of the fine bear a particular relationship to the offender's gain or the victim's loss? How should the offender's "ability to pay" be determined?

* What sanctions should be imposed if an individual offender fails to pay the fine? An organizational offender?

Response:

Fines should ordinarily be imposed as the sole sanction in petty offense cases only. Otherwise, they should be utilized to supplement probation and/or incarceration.

Ability to pay should be a consideration and should be investigated and evaluated by the probation office. In many cases the amount of the fine should bear a particular relationship to the offender's gain or the victim's loss. But, depending on the circumstances, the court may be faced with a situation where the money loss to a specific victim is small (and the consequent gain to the offender is small in terms of money) but the nature of the offense is such that a much more significant fine is called for, especially in cases where an offender has the ability to pay a larger fine.

Failure to pay a fine imposed by the court should be dealt with via contempt of court or probation revocation proceedings.

C. Restitution

Query:

* Under what conditions should restitution be ordered? How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? Are there ways in which restitution could be effectively combined with imprisonment or community service?

Response:

Restitution should be ordered in any case where a victim suffers a monetary loss. In a case where the amount of loss is disputed, a sensible procedure needs to be established for the resolution of such disputes. It would seem sensible to suggest that at the time a plea of guilty is tendered or at the time the court orders a presentence report following a finding of guilt that the court establish a certain specific mechanism for the identification of said disputes and their resolution. For example, if the amount of restitution is not part of the plea agreement, or upon a finding of guilt, the court could require that the United States Attorney's Office provide to the defendant within a certain number of days a document in the nature of a bill

of restitution which would include the specific items of restitution adding up to a certain total. The defense counsel could then be given a certain specific period of time to respond to the government's bill of restitution. Once those two pleadings have been filed it could be readily determined whether or not an evidentiary hearing would be necessary to resolve any such dispute.

It would make sense to me that if there is a need for an evidentiary hearing on the question of restitution that hearing should be held prior to the completion of the presentence report by the probation office. It might be that if there is a dispute, once the pleadings have been filed by the respective sides, the matter could be scheduled for an evidentiary hearing in front of a United States Magistrate who could then make recommendations to the District Court concerning the question of the amount of restitution.

There may or may not be problems in terms of utilizing a Magistrate for such purpose. To the extent that a Magistrate could be used for said purpose, the use of the Magistrate would lighten the load on the District Court. To simply schedule a matter for a sentencing hearing without knowing whether there are any disputes as to the amount of restitution and what those disputes might be creates a situation where the setting for purposes of sentencing may be totally wasted (because the parties and the court may not be at all prepared to deal with the resolution of any such disputes on the date that the matter is set for sentencing hearing).

Existing statutes already provide for effectively combining restitution with both incarceration and community service.

D. Community Service

Query:

* How should an effective community service program be structured?

* What types of offenders will benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals of sentencing?

Response:

Ordinarily, community service should only be utilized in connection with probation and/or incarceration or work release. It should not ordinarily be used as a substitute for restitution. It should be approved and coordinated by the probation office under a highly structured format. The primary responsibility should be placed on the offender to submit a practical and verifiable community service plan that is beneficial to the community without being self-serving.

Experience around the country has shown that many community service programs are ineffective and overly burdensome. Another legitimate criticism of many such programs has been that community service as been disproportionately applied to individual white collar/middle to upper middle class offenders and has thereby resulted in a dual standard of justice being employed in sentencing. Because this type of offender is generally better educated and entrenched in a higher socio-economic class than other offenders, community service opportunities are more readily available and for the most part tend to be self-serving. This tends to deprecate the seriousness of the offense and promote public disrespect for the criminal justice system. Accordingly, any community service program utilized should be used sparingly and with full recognition of the problems cited above. Further, it should only be used in conjunction with other sanctions.

This is not to say an effective community service sentencing alternative cannot be developed in any particular court. I would suggest that in courts such as mine where the volume of criminal cases is not overwhelming it may well be possible to formulate an effective community service program. But, in the larger urban areas, I have serious concerns about the extent to which the development of this type of program could act as a burden on the present staffing levels which exist within the probation system. If those concerns are not met at the front end, then the quality of probation supervision generally will decrease.

E. House Arrest

Query:

* Is this a viable alternative to incarceration? If so, under what circumstances.

Response:

House arrest should have very limited applicability and should only be utilized when the subject is non-violent and the cost of incarceration becomes prohibitive or when some other truly extraordinary situation exists. Such circumstances might arise, for example, when the offender has very serious health problems and could effectively be confined to his or her home. Another example might be when the defendant is solely responsible for the care of an immediate family member who is dying of cancer.

Again, I apologize for the lateness of this submission. I am sure that my responses do not contain any information which you have not considered before, but nonetheless it is hoped that it may be of some minor assistance to you. If there is anything further I can do to assist you in your important efforts please do not hesitate to contact me.

Sincerely,

Michael M. Mihm

Michael M. Mihm

FEDERAL PROBATION OFFICERS ASSOCIATION

National Officers 1986

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July 8, 1986

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

Dear Chairman Wilkins:

In response to your letter dated June 17,1986, I offer the following recommendations:

PROBATION

In response to your questions in this area, I believe that some form of intensive supervision must be used in every district in the United States. At the present time there are a number of districts that have some form of intensive programs. Although the names of the Units vary from district to district (i.e., Special Offender Unit, Intensive Supervision Unit, etc.) the main purpose and focus are similar. The types of offenders supervised are the career criminals, sophisticated white collar criminals and fraud artists, major drug traffickers, and organized crime members and associates. The emphasis of the supervision is protection of the community as opposed to the more traditional focus of supervision, that of rehabilitation of the offender through problem identification and referrals.

The individuals under supervision in these units do not have the identified problems and needs of traditional probationers and parolees. They are not the drug addicts, and alcoholics in need of help and treatment, these are the individuals who are involved in crime as a career, and crime for profit. These offenders need stricter supervision to monitor compliance with the conditions of supervision to ensure that

Regional Officers

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they do not return to illicit activities. With this type of offender, the emphasis should be on monitoring the offenders compliance with the supervision conditions, as a means of ensuring that they do not return to illegal behavior. This monitoring should include close scrutiny of his employment and finances to ensure that the offender has a legitimate job, and that the money he is receiving is coming from that employment, and not from illicit sources. Additionally, when the probationer is suspected of reporting a bogus employment, or " cover job ", or has ties to organized crime the Probation Officer should conduct surveillance, either in conjunction with law enforcement agencies, or with another Probation Officer. In the Southern District of Florida, this intensified supervision approach has resulted in identification and revocation of numerous offenders who have continued to remain involved in illegal activity despite their supervision status. As a result of their closer scrutiny, the offenders were identified as violators, thereby providing protection for the community, and bolstering the public confidence in community corrections.

The Court should recommend to the Probation Office those offenders placed under supervision that should receive intensive supervision. However, the Probation Office should maintain the discretion as to those offenders that are placed into Intensive Supervision Units, so that the resources allocated to those units are capable of effectively working with these extremely difficult cases. Reduced caseloads are a necessity. One officer should not have responsibility for more than 30 cases.

FINES

White Collar criminals, drug traffickers and those offenders convicted of large scale offenses, involving substantial sums of money should have imposed substantial fines. The amount of fine should be determined by the profit received in the offense, and the offenders ability to pay. Fines should not be imposed on indigent offenders. The offenders ability to pay should be determined by the U.S. Probation Office at the time the Presentence Investigation is conducted.

If the individual or organization fails to pay court imposed fines, a hearing should be held to determine if the offender has the wherewithal to pay such fine, and if they do, supervision should be revoked and a period of incarceration imposed.

Restitution

As with fines restitution should be ordered based on the offenders ability to pay. The restitution should be oredered in all cases where there is an identified victim that has suffered financial loss. Restitution can and should be imposed in conjunction with both imprisonment and community service.

COMMUNITY SERVICE

Community service programs should be structured by Court determination as to the the number of hours that the Court deems appropriate, divided into weekly hours.

Community Service should not be imposed in ceses where the offense is above a moderate severity. In those instances where it is so imposed it should be imposed in conjunction with a program such as house arrest, so that the publics confidence in the criminal justice system is not negatively impacted.

HOUSE ARREST

See attached report, House Arrest: Is it a Viable Alternative.

I hope that this information is helpful to you and the members of the Commission. If you have any questions or comments, please feel free to contact me.

Sincerely.

Rory J. McMahon

Rory J. McMahon
Secretary, FPOA

HOUSE ARREST: IS IT A VIABLE ALTERNATIVE TO INCARCERATION

In the development of alternatives to Incarceration and other traditional sentences, or more significantly, cost effective alternatives to incarceration, house arrest has become increasingly more popular. Presently, official policies of home incarceration programs are in effect in California, Florida, Illinois, New Mexico, New Jersey, New York, Oklahoma and Utah. Although the practice is variuosly termed; house arrest, home detention, home confinement, domicile restriction, etc. it has in common the fact that the offender is restricted to the home, for specified periods of time, as a means of punishment.

House arrest offers certain advantages over other sentencing alternatives. One of the problems of imposition of a straight term of probation supervision, even probation with special conditions (i.e. drug testing, required psychological testing, alcohol treatment, etc), is that they often fail to satisfy the public's sense of Justice. The tradition of retribution is very powerful, and the Court which violates the prevalent sense of Justice by going lightly on the offender, is likely to provoke public backlash. An alternative such as house arrest may provide the public with a " symbolic value of an official finding of offender accountability." [1] Home incarceration may provide a more restricted form of social reprobation, which will guarantee the public protection against those who continue to endanger it, without exacerbating the already overcrowded jails. [2] Home incarceration may provide a sense of appropriate retribution, while at the same time serving a utilitarian goal of protecting the public. [3]

Perhaps the principal reason for the recent tendency toward stiffer penalties for many offenses is the sense that Justice is not being done. [4] The perception that many of the lighter sentences; fines,suspended sentences, or relatively unsupervised probation have not had a significant impact upon the offender, have failed to teach him a lesson that he won't forget.House arrest, on the other hand, can be administered in such a way that the offender will be impressed with the public's defination of the offense as serious without being subjected to the harsh sanctions, which are sometimes held to be necessary " to get their attention." [5]

Home incarceration also offers the virtue of reversibility. Should unforseen problems arise in any particular case, or should the offender fail to abide by the conditions required, revocation proccedings could be initiated very easily. The Court would agree to this sentencing alternative with the written understanding that the offender agrees to abide by certain conditions, spelled out very explicitly in the written contractual agreement. Violations of any of those conditions should

result in prompt return to the Sentencing Court for revocation of the house arrest term and imposition of a sentence of imprisonment.

Turning from the theoritical examinination of the merits of house arrest as an alternative to incarceration, who should be eligible and under what circumstances? In my opinion, house arrest should be used for the non-violent middle gange offenders, and the first or second time white collar offender, assuming the magnitude of the offense is not that significant. Certain offenders should be precluded from consideration for this sentence. Those offenses that should be excluded would include narcotics offenses, bank robberies or crimes committed with a weapon, certain ATF violations, and persons who otherwise are considered not amenable to Probation supervision. I would not preclude probation and/or parole violators from consideration. On the contrary, I think it would be appropriate as a sanction for certain technical violations of the conditions of supervision.

The Court at the time of sentencing, having had prior input from the Probation Officer, should determine the restrictions of the house arrest. At its most stringent, house arrest could mean no movement outside the residence. However, as the programs have developed and evolved the usual limitations include provisions that allow the offender to work, at an approved job, and allows the assigned Probation Officer to set the paramaters and timetable during which the offender is restricted to the residence. And this compliance would be strictly monitored.

The responsibility for checking compliance with the Court's order should be given to Probation Officers with specialized caseloads, usually they are referred to as " surveillance officers," who have reduced caseloads and flexible 24 hour shift rotations. There should be random daily cheks both by phone and in person to monitor offender compliance. Such a truly random system would uncover scofflaws very quickly. A violation of the Court order, following supervisory approval, should result in the issuance of a warrant by the sentencing court, and imposition of a sentence of imprisonment, following a hearing.

I have had the opportunity to read an abstract of the legal ramifications of the use of electronic surveillance in Probation, and the authors concluded that although there are constitutional issues that could be raised, the constitutionality of electronic devices to monitor compliance with Court imposed conditions of supervision, such as house arrest, would most likely be upheld by the Courts. I have not provided a detailing of the different electronic devices and their application, primarily because of the financial ramifications of Gramm-Rudman. However, I

believe that the use of those devices is cost effective, and will result in more productive use of Probation personnel. I will be happy to provide my comments and suggerstion on this matter if the Commission feels that it will be beneficial.

Conclusion. Foremost among the advantages of the House Arrest Programs would be cost savings, and alleviating an already overflowing Prison System.Assuming that the Surveillance Officer had a caseload of 25 or less which is the maximum number that he could effectively supervise, the cost per offender on an annual basis might well be $2,500, as compared to a minimum of 10 times that for the cost of incarceration.

There is also an indirect savings. Offenders would remain at home supporting their families, and paying taxes, therby saving the state welfare costs and providing additional revenue to the government.

However, ther are limitations to the program as well. Public protection cannot be guaranteed. The offender is not locked behind bars. He can leave his home and commit crime. Some offenders will try to beat the System, con the Probation Officer, and some will succeed. However, if the Probatin System is staffed adequately, and provided with the necessary resources and equipment, it is a risk worth taking. Furthermore, I don't believe that there is any other means to avoid prison overcrowdind under the guidelines that will be formulated.

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5) Ball, Richard A., and Lilly, J. Robert; see footnote 3.

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July 7, 1986

Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
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Washington, D. C. 20004

Dear Judge Wilkins:

I write in response to your letter of June 17, 1986, wherein you requested response to questions regarding certain sentencing alternatives.

PROBATION

I preface my comments regarding the probation alternative with a statement of my general belief that, for a variety of reasons, traditional probation programs are not effective as a general deterrent and have little credibility with potential offenders, law enforcement agencies, and some courts as a significant sanction for criminal behavior. There is some basis in fact for the belief that probation is the decision not to punish the offender. A probationer has a list of things he must not do but, for the most part, those prohibitions apply to everyone. There are very few significant requirements for affirmative action by a probationer to successfully complete the term of supervision. Fines or restitution may be ordered but, for the most part, they are paid at a rate convenient to the offender based on examination of his disposable income. With the exception of community service orders which are coming into vogue, it has generally been possible for a probationer to successfully complete a term of supervision imposed as a result of a serious felony crime by doing just about what my next-door neighbor does anyway.

I enthusiastically support the concept of intensive-supervised probation. I believe a program of intensive supervision should be different in kind from traditional probation rather than merely more of the same things we have been doing in the past. I suggest

intensive probation in appearance and in fact should be a sentence served in the community, the least restrictive of our correctional settings.

I believe elements of the intensive-supervision should include curfew and house arrest (or more appropriately house-work furlough). It should focus on requirements for immediate restoration of victim losses even when the victim may be the government. Also, there should be aggressive efforts to ensure that the offender is deprived of illicit profits from his crimes. The offender's leisure time should be severely restricted until such time as the goals of the program, including restoration of victims and retribution, have been satisfied. Accordingly, community service orders in addition to orders of restitution should be fairly routine in cases of intensive-supervised probation.

Control of the offender's activities, associations, and travel should be aggressively exercised during the term of intensive supervision. It may be of assistance to such program if statutory authority existed for conditions including house arrest, curfew, and warrantless search, for cause, by the probation officer or any law enforcement officer under the immediate and personal supervision of the probation officer.

Regarding the roles of the Commission, the court, and the probation officer, I believe the Commission should recognize, by policy statements rather than specific guideline sentences, the appropriateness of a well-structured, strict and aggressively-enforced program of intensive supervision as an alternative to incarceration of non-violent offenders when incarceration is specifically called for by the guidelines. I am convinced strict enforcement of the conditions of intensive-supervised probation and the certainty of revocation for violations are essential to the effectiveness of such a program. I would not rule out consideration of the Department of Defense Parole System wherein the releasee is ordered to return to custody on a date certain unless the probation officer specifically recommends that the term of conditional release be extended.

I firmly believe that for far too long, we have allowed the criminal offender and the defense counsel to focus attention exclusively on the prevention of convictions and the reduction of the severity of punishment. I think once there is a conviction,

before an order of probation is considered, the offender should indicate some degree of commitment to such a program. I believe any offender who is capable of planning the victimization of the community or of individuals is also capable of planning to restore the victim and make amends to the community. Accordingly, I suggest the role of the probation officer should be to suggest to the offender and his counsel that intensive-supervised probation may be considered if the offender makes application for such a program and submits a specific proposal for restoration of the victim, performance of volunteer community service, serving a term of house arrest, or such other conditions as may be appropriate. The probation officer should comment to the court on the offender's application and proposed plan, and the court should then determine if the plan offered constitutes sufficient cause to place the offender on intensive-supervised probation in lieu of the guideline sentence of incarceration established by the Commission.

I believe intensive-supervised probation programs should be limited to offenders who would otherwise, by guideline sentencing, receive relatively short jail terms. Violent offenders, career criminals, and offenders who have seriously violated public trust should not be considered for such a program. Major narcotics offenders should be excluded due to the probability that the guidelines sentence will be relatively long.

FINES

A fine, in my opinion, is most appropriate as a means of depriving the offender of ill-gotten gains. In drug cases and other cases in which monetary gain is derived without specific loss to an identified victim, the fine should be imposed to ensure that crime in fact does not pay. Further, in some cases an offender may gain access to very large sums of money for a long period of time. Thereafter, he is convicted and allowed to pay the money back, interest free, over a term of several years. Fines are appropriate to deprive this offender of the unfair advantage of interest-free use of the victim's money. I believe that in profit-motivated crimes, if the criminal justice system does nothing else, it should strive to return both the victim and the offender to the financial status they occupied prior to the crime. Use of a combination of fines and restitution is effective in achieving the goal.

Because of the inherent disparity in treatment of offenders according to their financial status, I believe fines should not

be imposed as an alternative to incarceration. Fines are the appropriate sole sanction for certain minor offenses and in the case of corporate defendants. However, I do not believe it is fair that any offender be given the choice of paying a fine or going to jail. The purposes of sentencing should be served by the jail term, not the desires of the defendant. Accordingly, I believe it should be an exceptionally rare case when an offender is allowed to serve time in custody because he refuses to pay a fine or make restitution. Jail is appropriate for other reasons but not as a means to allow the offender to keep his stolen money. The collection provisions of the Fine Enforcement Act are a move in the right direction. I believe the Department of Justice needs increased resources to aggressively enforce collection of fines by liens on property and seizure of assets. It does not seem appropriate that the taxpayer who may have been the original victim of the crime be required to pay the costs of incarceration for a defendant who has assets and refuses to pay the fine.

RESTITUTION

I have always been very uncomfortable with the means by which we enforce restitution orders. I admit that I have been part of the problem, but I believe the Sentencing Commission, by way of policy statements, has an opportunity to re-emphasize the importance of this issue in the sentencing process. Traditionally, the amount of restitution is determined, the offender's financial statement is reviewed to determine his disposable income, and a restitution schedule is established based on the defendant's ability to pay. We have not been very aggressive in requiring defendants to dispose of assets in order to pay restitution. In some cases, the victim must wait years for restitution at a monthly rate convenient to the offender while the offender enjoys a standard of living far beyond that the victim could ever hope for or achieve in a law-abiding manner. If we commit the offender to prison, his family may have to move to a smaller residence, sell their luxury automobile, and transfer the children from private schools to public schools. Due to the loss of income the offender may be unable to make restitution when he is released from custody. So we place the offender on probation and the victim, who may live in a small home, drive an economy car, and send his children to public schools, receives $200 per month for four or five years without interest. I believe there is something wrong with that system. I believe restoration of the victim should be one of the immediate goals of any probation program. The restitution order should be aggressively enforced

through requirements that the offender liquidate assets and reduce his standard of living in order that the victim is made whole. As in the case of enforcement of fine orders, I do not believe incarceration is the appropriate sanction for failing to make restitution. Such a sanction does not assist the victim, and it allows the offender too much control over the decision to trade jail-time for money. The Victim/Witness Protection Act indicates orders of restitution are enforceable as civil judgments, and I believe attaching wages and placing liens on property are the most effective ways of enforcing restitution orders.

To the extent possible, I believe the amount of restitution should be determined prior to plea or conviction. Since close to 90% of the cases are disposed of by guilty pleas, the often complex problem of determining restitution falls to the probation officer and the court. I believe the U. S. Attorney should be required to advise the court at the time of plea of the exact amount of restitution required in a particular case. If litigation is required, the matter should be litigated before the plea is accepted. Under the present system, the defendant is required to enter a plea and wait until the probation officer completes his investigation to find out what the severity of the offense to which he pled really is. Since the amount of loss to the victim is a primary factor in determining not only offense severity but, in many cases, the maximum penalty provided by law, I believe it should be required that the government in negotiation with victims and the defendant resolve the issue of restitution before a plea is entered.

COMMUNITY SERVICE

I believe community service is a very valuable sentencing alternative. It provides a means by which the offender repays the community against which he has offended, and it provides the offender with what may be a rare experience of productive work in association with law-abiding members of his community. I do not consider community service to be the equivalent of an order of restitution or a fine, and I feel it is appropriate to sanction refusal to perform community service with a term of incarceration. There has been wide disparity in the number of hours ordered as part of a community service program, and I believe the Commission should, either by guidelines or policy statements, attempt to reduce that disparity. Community service orders of two to four thousand hours are extremely difficult to implement and to enforce. I suggest, as a practical matter, approximately five hundred hours should be the maximum community service ordered in all but the most rare and exceptional cases.

I realize drug abusers, sex offenders, violent offenders, and offenders with mental health problems are generally excluded from community service programs, but I am not sure that is appropriate. If the offender's problems are such that he can be safely released to the community on probation, there should be some means of structuring a community service program for that offender. Naturally, the offender's potential for committing certain types of crimes must be considered in selecting the type of service to be performed. Finally, I believe community service must be viewed as a community custody sentence and strict enforcement of that program is required if it is to have any credibility with the offender, the court, or the community.

HOUSE ARREST

As I indicated above, I believe house arrest and the somewhat less-restrictive condition of curfew are viable elements of an intensive-supervision program as an alternative to incarceration. Such a program requires a firm commitment from the offender to abide by the conditions, and violation of house arrest or curfew should be viewed as essentially the same as an escape from custody. I am not suggesting that all violations be sanctioned by revocation and commitment to prison, but some action must be taken if the program is to have any credibility. Violation of a house arrest condition may appropriately result in an extension of the term of house arrest depending on the severity of the violation. As in the case of community service, I believe there is diminishing returns on the value of house arrest if that condition is continued over a very long period of time. As a general policy, I believe that termination of house arrest or reduction of curfew conditions should be tied directly to some positive accomplishment by the probationer as set forth in the initial intensive-supervision plan.

We appreciate the Commission's solicitation of our views.

Sincerely,

Charlie E. Varnon

CHARLIE E. VARNON
Chief U. S. Probation Officer

CEV:je

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Chambers of
Judge Gerard L. Goettel

July 8, 1986

Hon. William W. Wilkins, Jr.
Chairman, United States
Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Dear Judge Wilkins:

Your letter of June 17, 1986 asks for my thoughts on sentencing options and how to integrate them into the overall sentencing strategy. The basic sentencing options are, of course, probation, incarceration, and fines and it is possible to make a combination sentence with these. There are other options which are sometimes spoken of as alternative sentences. The alternative sentences, however, are often adjuncts or appendages to the basic sentences. For example, restitution and community service are often directed as part of a probationary sentence. Directions as to when parole may be granted and particular types of commitment such as to a treatment center are adjuncts of incarceration. There are also appendages to incarceration such as special parole terms, and committed fines. I see no way of specifically integrating these types of options into a specified sentence. They are normally added to the particular basic sentence administered.

There are a limited number of sentencing alternatives which exist as options to either probation or incarceration. These include such things as weekend sentences and house arrests. They are truly options to the more basic sentence but the number of instances in which they are appropriate are extremely limited. They are useful only when probation, even with restitution and community service, is not enough, but when a sentence of incarceration appears unnecessary.

The following are my responses to your specific questions.

Probation

I am skeptical as to the effectiveness of intensive supervised probation. The only instances in which I think it serves any particular purpose is in monitoring former drug users to make sure they have not returned to the habit. I do not see any role for the Commission in that regard. I believe the Court and the Probation Department are best capable of determining when that is appropriate. I cannot quickly think of any additional probation conditions needed besides the nineteen listed in the Code of Criminal Procedure.

Fines

Fines are, of course, most appropriate to commercial and white collar offenses. However, the practicability of levying fines depends upon the ability of the defendant to pay. The ability to pay is usually determinable from the presentence report and investigation made by the Probation Department. The amount of the fine should not be related to the victim's loss since that can be covered by a restitution order. The amount of the fine should vary according to the severity of the offense. Committed fines should be used when it is apparent that the defendant can pay the fine and he should be imprisoned if he refuses to do so.

Restitution

Restitution should always be ordered when there is an identifiable victim with a calculable monetary loss. A problem does arise concerning the defendant's ability to pay restitution and efforts to determine that can complicate and prolong sentencing. In a rare case, it might be possible to combine restitution and community service by making the defendant work for the victim. The effect of a sentence of imprisonment, however, is often to diminish or eliminate the possibility of restitution being made.

Community Service

Community service is, in my view, only worthwhile when the probationer is capable of rendering some valuable service to the community. Some offenders are so lacking in skills as to make their services worthless. Offenders benefit mostly from community service when it involves serving those who are harmed by the offense committed.

House Arrest

I have had no experience with house arrest. I doubt that it is an effective punishment except to a person who does not have to work and who would normally be travelling widely were they not being subject to house arrest. It does not seem to me to be in society's interest to impose a house arrest preventing a person from being employed who would otherwise work. On the other hand, to allow a person who is subject to house arrest to leave to go to work means that, in most instances, house arrest is little or no punishment.

I hope that the foregoing thoughts are of some assistance.

Very truly yours,

Gerard L. Goettel

GLG:ekd

CHAMBERS OF
T. F. GILROY DALY
CHIEF JUDGE

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July 8, 1986

Dear Judge Wilkins:

I hope the following comments in response to your letter of June 17, 1986 are helpful to you in the upcoming hearing on sentencing options for individuals convicted of federal offenses.

PROBATION

Intensive supervision should be and is being imposed primarily on drug offenders, organized crime offenders, and on certain mental health offenders. In drug cases, intensive supervision and enhanced control entail: (a) increased personal contacts at home, in the office, and at the place of the employment and/or treatment program; (b) urinalysis; (c) inpatient treatment; and (d) Drug Enforcement Administration involvement.

In organized crime cases, control is accomplished through increased personal contacts and, with the assistance of Federal investigative agencies, surveillance. In some Districts, U.S. Probation Officers do their own stake-out and surveillance without the assistance of investigative agencies. Control in mental health cases takes the form of increased personal contacts and inpatient treatment.

The present classification system should remain intact as it aids the Probation Officer in determining what form of control and supervision should be imposed on the individual.

In response to your question pertaining to 18 U.S.C. §3563(b)(1-19), the conditions of probation listed therein appear to be sufficient.

FINES

While there are no particular crimes I would list for which fines should be the preferred sanction, the sentencing Judge should have discretion to assess a fine in any case, taking into consideration all of the circumstances involved. The elements to be considered in calculating the actual amount of a fine are those set forth in 18 U.S.C. §3572 and the amendments thereto.

RESTITUTION

Restitution should be ordered in any instance where an identifiable victim has suffered an injury or a loss. Combining restitution and imprisonment can present problems unless the inmate has sufficient resources to make restitution. The alternative is to have restitution follow imprisonment. Combining restitution with community service generally presents fewer problems.

COMMUNITY SERVICE

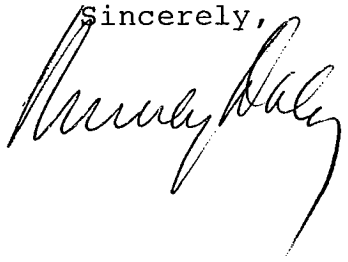
Effective community service programs should be structured so as to provide benefits to the community and a positive rehabilitative impact on the offender. Community service generally will not serve the goals of sentencing where the offenders are drug addicts, certain organized crime figures, or offenders who may be functioning with a diminished mental capacity.

HOUSE ARREST

This may be a viable alternative to incarceration providing adequate guidelines are established for monitoring compliance with the Court's order and adequate funds are provided.

If I can be of any further assistance, please let me know.

Sincerely,



TFGD:efm

The Honorable William W. Wilkins, Jr.
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Commission
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UNITED STATES DISTRICT COURT
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MELVIN C. SMITH
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July 7, 1986

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The Honorable William W. Wilkins, Jr.
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The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
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Dear Judge Wilkins:

In response to your letter of June 17, 1986, my responses are as follows:

Probation

In North Carolina, the State Adult Probation Department has an intensive supervised probation. To date, the overall results have been favorable. I can see the need and benefit of such a program in the Federal system. Only felons should be considered for the program and crimes of violence should be excluded from consideration. The attitude and motivation of the offender should also be considered. Community attitudes in reference to the crime and offender should be considered. Of great importance is prior record. I would strongly suggest that this program primarily be used for first offenders who, for some reason, need more supervision than the supervision afforded by regular probation.

As always, the availability of community resources in reference to drug and alcohol treatment and vocational services should be considered. Family ties of the offender as well as their employment and educational status should be considered. No one should be considered if they have a history of violence or escape. You might want to consider moving someone up to intensive supervised probation if they have violated regular probation because of technical violations or minor criminal violations in lieu of a more restrictive sanction. I would discourage considering people who have a history of emotional instability, suicide attempts, and absconding from probation.

With regards to someone on intensive supervised probation that has a drug problem, routine urinalysis surveillance should be maintained. In the event of a positive urine, I think it would be important for the intensive supervising probation officer to have the option of placing the person in jail for a week to twelve days in lieu of revocation. This "taking off the street" form of "shock therapy" might be of benefit in working with a drug client. This would give the officer an alternative of an "all or nothing approach" to treatment.

In North Carolina, there are two phases in the intensive supervised probation system. The offender is placed in Phase I initially. In Phase I, which is for a minimum of three months, there are five face-to-face contacts with the offender per week. There is a counseling officer and a surveillance officer. Two of the contacts are with the counseling officer during this period and three are with the surveillance officer. The surveillance officer would be monitoring a curfew, community service, and employment. During the first three months, there are thirty-two hours of community service required. The curfew is from 8:00 p.m. to 6:00 a.m. There is also a requirement that the offender must visit a prison. I would strongly argue that the offender should spend anywhere from a weekend to a week in jail as a condition of starting the program, so they will know where they are going if they violate the conditions of intensive probation.

In Phase II of the North Carolina program, which lasts from three months to nine months to indefinitely, there is a requirement of two personal contacts per week. One contact is by the counseling officer and one is by the surveillance officer. Curfew remains in effect although it can be modified and the person is still required to do community service. There is a minimum of seventy-two hours community service requirement in their program. It is also noted that community service could be increased for curfew violations.

In reference to the above statement concerning court terms of incarceration, this is also an alternative sanction within the program guidelines that are used by the State officer. I agree that any type of program should require a curfew, community service, employment, treatment, and surveillance.

Fines (If appropriate)

I, personally, am opposed to fines in lieu of some other sanction. I am also opposed to unsupervised probation. In the case of a felony, I believe there should be some fine and there should be some period of supervision. In cases where fines are appropriate, I believe that the fine should be made in relationship to the offender's gain and/or the victim's loss. The offenders "ability to pay" is a tough factor to determine. I have seen offenders who did not work up to their ability or obviously lived beyond the means they should be living if they were paying proper retribution. How one would control this, I really don't know but I think that the victim should at least be compensated dollar for dollar. If an offender fails to pay a fine, then proceedings should be taken to seize property or the offender should be incarcerated. With reference to an organization being an offender, assets from the company should be sold in the event the company fails to pay the fine.

Restitution

In cases where there is a monetary or property loss, restitution should be ordered. Restitution should be determined at the time of sentencing. Briefs could be prepared by the defendant and for the victim by the United States Attorney from which the sentencing authority could make a decision. Input from the Probation Office may also be beneficial.

Restitution should be in addition to imprisonment and/or community service. In the case of a property offense where there is a clear-cut amount and an identifiable victim, the offender should not be given consideration for the amount of time that they are in prison or the amount of community service that they do. If an offender is only going to have to replace or repay for what they have taken (if they get caught and are convicted) and not suffer any other consequences, then I don't think our system is one of deterrence.

Community Service

As a Probation Officer, I have not been a strong supporter of community service. If we are going to adopt a system of intensive supervision, more restitution, fine collection, community service, etc., then I think we need more Probation Officers and more specialized officers.

Depending on the geographic location and the quality of the program, most offenders could benefit from being placed on community service. With the exception of violent offenders or offenders who have serious drug or alcohol problems that are not under control, I believe all offenders could benefit from being placed under community service. I would argue that the majority of offenders, even with the above-mentioned problems, could be brought into a structured community service program. Again, I think this would have to be a structured, specialized program that had adequate funding and adequate staff positions. This program should be run outside of the realm of the duties of a regular Probation Officer or at least the program would have to be coordinated by a specialized officer in each particular office who would monitor the progress and compliance of the offenders with regards to the community service requirement.

House Arrest

I do not see house arrest being a viable alternative to incarceration. Either the person goes to prison or they don't go to prison. That is if house arrest means not going to work, not going for drug treatment, etc. I am more in favor of an intensive supervised probation program as opposed to a house arrest program. Again, either you go to prison or you don't.

If I may be of any further assistance in this matter, please let me know.

Sincerely,

Stephen F. Conrad

STEPHEN F. CONRAD
U. S. Probation Officer/
Officer In Charge

SFC/pg

cc: CUSPO, Greensboro, NC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
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CHIEF PROBATION OFFICER
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Marietta, Georgia
June 30, 1986

Mr.William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D. C. 20004

Dear Mr. Wilkins:

U. S. Probation Officer Fred Rogers asked that I respond to your recent letter on the question of Community Service. As the coordinator of our program in the Northern District of Georgia, I am a strong advocate of community service. I believe most offenders should be required to do some work. In many cases, either along or in combination with other special probation conditions, community service can be used as an alternative to incarceration. For many offenders the community service Order can meet all the purposes of sentencing while providing valuable service to the community.

Eligible Offenders: Not all offenders are candidates for community service. An offender should not be set-up for failure. In order to succeed one must be reasonably self-motivated and responsible. Some will require more supervision at the community service work place than others, and assignments should be made accordingly.

Those who are a clear risk to the community should be excluded. For example, offenders with lengthy arrest records, offenses involving violence, or those with active drug/alcohol problems.

Structure: The Northern District of Georgia has experimented with the structure of community service for sometime. The current structure appears to be working well. A program specialist gives direction to all phases of the program. Offenders may be placed on community service for a number of reasons including loss of free time, to make restitution, or in lieu of incarceration. The particular placements are made in consideration of the Courts intent, the offenders abilities, and programs available. When possible the selection and placement process begins during the presentence report stage of the sentencing process.

Once placed the community service specialist, recepient agency representative, case probation officer, and offender become part of a team. However, the case probation officer is free of responsibility in keeping in frequent contact with the placement agency, tracking hours, and dealing with minor problems relating to the offenders performance. These functions are handled by the specialist and the probation officer is consulted as needed. The case probation officer is given an accounting of hours served and quality of work done on a monthly basis by the community service specialist. If serious problems arise the case probation officer is advised immediately, and the probation officer and specialist work together in bringing the appropriate action.

There is no limit to the hours which may be given an offender. The experiment of giving sentences which involve up to 40 hours work per week has done unexpectedly well. As of this writing several offenders have completed 40 hour work weeks for up to six months, and one is in the ninth month of an 18 month order. Given this experience, it is felt orders involving up to 40 hours a week are not unreasonable, particularly when the alternative is incarceration. However, such orders should rarely exceed 12 months and placements must be made at well supervised agencies.

There is a paper and a tape recording enclosed which together articulate the history, philosophy and success of the community service program as being carried out in the Northern District of Georgia. The tape has unsolicited comments on it from offenders and staff at one of our projects. The two offenders speaking on the tape each served prison time before being granted Rule 35's. Subsequently, they were given sentences involving 40 hours community service obligations for 1½ and 1 year respectively. Both also served six-months in a half-way house. This tape is part of an audio and slide presentation which demonstrates only one of our several group projects. This and other projects have delivered much needed service and enhanced respect for our Court in the community.

I hope these comments and the enclosed materials are helpful to the Commission.

Sincerely,

Richard J. Maher
U. S. Probation Officer

RJM:mt

cc: Daniel D. Rector
Chief U. S. Probation Officer, ND/GA

Enclosures

Experimenting with Community Service:

A Punitive Alternative to Imprisonment

Introduction

The notion that work, community service or otherwise, is good for the spirit is well-founded in Judeo-Christian teaching. With a well-established belief in the therapeutic value of hard work and the giving of self to others, it is no wonder that the concept of community service as an alternative to imprisonment has gained broad acceptance. It is routinely used throughout the United States, England, and other English speaking countries.

Many veterans of WW II recount the wisdom of judges who punished their youthful infractions by offering them a choice between jail or induction into the Army. Those who have lived this experience often attribute their term of "community service" as a turning point, a time when they prioritized their values and began a productive life. No doubt the first court that ordered community service was inspired to do so long before WW II's manpower need.

For the past two decades, criminal justice professionals have experimented with community service orders. They have been used in lieu of fines or cash restitution to punish the offender by restricting his leisure, and sometimes as alternatives to imprisonment. The experience of community service orders as an alternative to imprisonment will be our concern.

Background

During the past quarter century, major changes have occurred in the American Correctional System. In spite of the dollars that have been spent and the programs that have been conceptualized and put into place, there is still a great deal of scepticism about the system and its ability to deal with criminals. As a matter of fact, some writers claim that the system might best be described as a non-system becasue of the widespread feeling that nothing seems to work. Crime is a real threat to many and they are frightened by the thefts and acts of violence that touch their lives and those of their loved ones. Rates of recidivism appear to be as high as ever and the public seems disenchanted, frustrated and frightened.

These attitudes about the system are longstanding and were clearly identified and addressed by The President's Commission of Law Enforcement and the Administration of Justice in 1966. They noted that "a major goal of corrections is to make the community safer by preventing the offenders return to crime upon his release."[1] There are probably very few individuals who would disagree with that statement but the question has always been how can this aim be best accomplished?

The concept of institutional treatment was once seen as the answer to this question but it now seems apparent that other avenues must be explored because of public and professional questions about the pragmatism of such an approach.

Some of these questions were brought into sharp focus by Robert Martinson in the spring of 1974. At that time, he published an article in The Public Interest titled "What Works? Questions and Answers About Prison Reform" His conclusions had a sobering impact on the advocates of treatment, for he found very few programs that were successful in the rehabilitation of offenders.

> ... It is just possible that some of our treatment programs are working to some extent, but that our research is so bad that it is incapable of telling.
>
> Having entered this very serious caveat, I am bound to say that these data, involving over two hundred studies and hundreds of thousands of individuals as they do, are the best available and give us little reason to hope that we have in fact found a sure way of reducing recividism through rehabilitation.[2]

The general public is usually not aware of academic publications of this type so their concerns about crime and the prison system must arise from other sources, such as TV, newspapers and personal experiences. It appears to this writer that these sources have dissiminated sufficient information throughout our society to bring about a recognition of the failure of corrections and to produce a sense of frustration in the man in the street. Warren Young attributes this "widespread disillusion with imprisonment as a penal sanction to four main themes in penal policy: the influence of humanitarianism; scepticism about the effectiveness of imprisonment as an instrument of treatment or a means of deterrence; prison overcrowding; and economic stringencies."[3]

These statements represent a set of social, cultural and economic realities of the 1980's that must be dealt with by the correctional manager. None of these themes can be dealt with by the quick fix route and all of them seem likely to be with use for some time. With these thoughts in mind, it seems that currently the best alternative is the strengthening of current community based programs and the development of additional options to prison, such as community service orders.

A publication of the National Institute of Mental Health summarizes the arguments made in 1971 in favor of community based programs.

> Until alternatives to institutionalization are demonstrated to be more effective than imprisonment in preventing further crime, a major rationale for the use of community programs will be that correctional costs can be considerably reduced by handling in the community setting a large number

> of those offenders normally institutionalized. Experimental/demonstration projects in intensive intervention have shown that for a large number of institution candidates incarceration is clearly unnecessary. Thus, if society is still determined, in the light of this evidence, to keep those offenders in prisons and training schools, it must be willing to pay the price. The central question becomes: Are the goals of punishment and custodial control worth the high costs of constructing institutions, and maintaining the inmate in the institution, as well as the observed and the still unknown personal and social costs incurred through exposing individuals to the institutional experience?[4]

Since we cannot afford to pay the price, it seems that community service orders must be explored for a limited number of carefully selected individuals. Such a program satisfies those of a liberal political persuasion by keeping the offender out of prison and providing the best opportunity for treatment and/or positive change take place. On the other hand, the conservative who believes in punishment should be somewhat mollified because of the fact that the client must provide the required service and earn a living afterward. In some regards, this may be more demanding than the typical prison experience.

Discussion

The merits of community service as a sentencing alternative have been demonstrated throughout the United States and elsewhere. Approximately one third of the states have passed legislation giving sanction to community service as an alternative to imprisonment. The United States Congress has been slow to sanction and define appropriate community service, but by terms of the Civil Control and Fine Enforcement Act of 1984, it is mandated that any convicted felon who receives a sentence (not a Class A or B felony) must be ordered to pay a fine, make resitution and/or work in community service.[5] Since the early 1960's, U.S. Federal Courts have often chosen to suspend sentences and impose a special condition of probation directing offenders to perform community service work for public or charitable organizations.

The British Parliment granted the first legislative authority for community service orders. Under the Criminal Act of 1972 (Sections 14-18), such orders were sanctioned as an experiment. In 1973 legislative authority was consolidated under the Powers of the Criminal Courts Act. British law defined the Community Service Order as a distinct alternative to imprisonment. However, these orders are limited in their application by virtue of the statutory guidelines imposed by Parliament. The law set a minimum of forty and a maximum of two hundred and forty hours work to which an offender may be sentenced. These limits are believed to be motivated by genuine social and economic concerns. With the high unemployment

experience in Britain over the past years, there was a need to assure protection of free labor. With this in mind, probation departments have been selective in choosing work projects for offenders.

It is also generally recognized that there are practical parameters to what may be expected from offenders assigned to community service. The order should not be so strigent that it might be regarded as unfair or as forced servitude; however, if community service is to be accepted as a credible alternative to imprisonment in the United States, its parameters must not be set too narrowly.

Experience in the United States has clearly demonstrated the benefits of community service orders. When properly administered, community service has enhanced respect for the probation service and the Court in the community with non-offenders and offenders alike. These orders alone, or combined with other special probation conditions, offer the Court a broad range of sanctions, sanctions which can be tailored to the seriousness of the offense and to the individual offender's needs.

Community service, when used as an alternative to imprisonment, is also a deterrent. It punishes, provides for reparation, and assists in resocializing the offender. United States District Judge Joseph L. Tauro expounded the benefits of such orders in 1983 when he said:

> In the appropriate case, a public service order can be a progressive, productive alternative to jail. It provides the chronically wounded tax payer with a rare double barrelled break. Hard earned tax dollars are not wasted on housing and feeding the offender, and the offender's public service assignment is something of a dividend to the taxpayer in terms of expanded manpower service. Moreover, a meaningful, closely supervised public service sentence can provide a daily reminder to the offender that he has in fact committed serious anti-social behavior. [6]

Community service orders should focus on the offender's need for resocialization and on the protection of the community. United States Federal Courts have recognized that conditions of probation must be reasonably related to the treatment of the offender and the protection of the public from future crime.[7] This recognition carries with it the presumption that offenders with a history of violence or those who otherwise represent a serious risk to the community will be precluded from consideration. Determining who is an appropriate candidate is best addressed at the presentence report stage of the sentencing process.

At sentencing, an offender must be made to understand that serious anti-social behavior has resulted in his conviction and that the consequence may be

imprisonment. Therefore, the community service alternative, possibly accompanied by other special conditions, may be severe. Such an order is more than a stringent form of probation. It must be harsh enough to be viewed by the public and the offender as a serious alternative, a sentence as credible as incarceration.

The probation office, offender, and recipient of community service must work together closely to attain the maximum benefit. An offender's success on community service depends on the tailoring of the court order to his circumstances and on his ability to accept his obligation. He must be self-disciplined and punctual. In addition to his work assignment, he must abide by all other conditions of probation. It is essential that communication be good between the probation officer, offender, and work project supervisor. Even when good communication exists, myriad problems may arise which often involve the probation officer. Unlike an offender in custody, the community service offender is not removed absolutely from family, social relationships, and other commitments. The imposition of a stringent public service order may create a set of stresses and problems to which the probation officer must be sensitive and able to assist in.

If the court determines an individual is to be given a community service order, the probation department should have a suitable work program in place and a specific task tentatively arranged. The intricacies of developing programs, screening candidates, and supervising community service orders offer a challenge to probation services. To meet this challenge, probation departments should allocate adequate personnel and material resources. The Administrative Office of the U. S.Courts has created specialist positions for probation officers charged with developing and administering community service programs. As the use of such orders grows, the need may develop for a community service division of probation. As noted, Britain developed such a division because of the preponderance of such orders and out of the recognition of the unique skills required to address public service needs.

As the experiment continues, so do the experiences. In the summer of 1985 the United States Probation Office, Northern District of Georgia, was alerted that an unusually large number of nonviolent first offenders would be entering guilty pleas. Most were involved in major frauds and other serious offenses. Others were involved on the periphery of cocaine sales. Many of these individuals were local residents. It was certain that some would receive community service orders. In anticipation, the Probation Department set up two group work programs. These programs could offer a wide range of work experiences to suit the Court's purpose and also match the abilities of various individuals who would be sentenced.

But the probation staff did not anticipate that the court would order such extensive community service work in lieu of incarceration. The lengthy hours demanded, coupled with other special conditions of probation, would test the known practical limits of community service orders.

As indicated, two group programs were established by the probation staff. Each agency offered the advantage of experience working with community volunteers. The agencies were familiar with liability issues and were willing to meet their obligation as it related to the court order. One agency offered an added advantage in that it had previously engaged in a federal public service project with the court. That experience had been very successful. Also, both agencies had extensive enough labor needs to absorb the hours demanded of the probationers.

The first program agency served is a non-profit historical association. The association was founded to raise funds and to restore the Wren's Nest, the Atlanta home of Joel Chandler Harris. Harris, a renowned southern author, is best known for the creation of the Uncle Remus tales. Since 1913, his house has been a museum. In spite of its deteriorating condition and location in a blighted neighborhood, approximately ten thousand visitors were drawn to it last year. In accepting the Wren's Nest as a suitable site, it was believed that work provided by assigned offenders would accelerate the restoration efforts, thus bringing improvement to a depressed area. Tourist visitation is expected to increase substantially and to produce needed revenue for the community.

Having learned of the offender community service program, the Wren's Nest director made an inquiry to the probation office. While officials there entertained the idea of using community service offenders, they expressed reluctance over the employment of criminals. There were many points of mutual concern, and a meeting was scheduled at the Wren's Nest between agency staff and a probation officer.

During the meeting, the probation officer found the Wren's Nest staff very professional. The agency and its work need appeared suitable for community service assignments. This meeting and subsequent ones proved to be productive, and groups of offenders were assigned. The offenders worked on Saturdays, and because of reservations on the part of the Wren's Nest staff, a probation officer came on site and worked with and supervised the crew.

After a few weeks, the supervision of the offenders was left to a Wren's Nest staff member. The probation officer came by at the end of the day to inquire about and to observe the quality of work done. The Wren's Nest staff grew comfortable dealing with offenders and demonstrated they could meet their obligation

to the court order. As an example, on one occasion an offender attempted to claim an hour and a half he did not earn. He was called to task by the agency supervisor, the probation officer was notified, and the problem was resolved.

With the weekend crew producing tangible results and the magnitude of the project's labor need becoming apparent, the probation department assigned a weekday work crew. Three offenders were selected to work sixteen hours each week. These three would be joined by a fourth on one of the weekdays. The task was physically strenuous and none of the four was accustomed to hard labor. Nonetheless, their efforts soon impressed the staff and the project architect. Accordingly, a staff member commented with pleasure that in a short time the offenders "did a mountain of work." Often the offenders rented tools at their own expense, donating the expenditures to the effort.

However, from these positive efforts and attitudes, an unanticipated problem resulted. The offenders heard the Director discuss the price estimate for taking down a diseased oak tree. In spite of liability issues discussed previously and without the Director's knowledge, the offenders purchased a chain saw and removed the diseased tree. Afterward, they split the wood and rented a machine to grind the stump below ground level. An excellent job was done. However, because of the liability concerns, the incident brought the staff, offenders, and the probation officer together, effecting closer communication.

This strengthened communication also sensitized the Wren's Nest staff to the offenders' circumstances. In addition to their community service, two of the offenders were under house arrest, and three were confronted with revocation of professional and business licenses. Although there was little hope of these licenses being retained, the Wren's Nest Director got involved to the extent of offering to be a character witness at state hearings and by drafting a supportive letter. The offenders who previously felt some distance from the staff began to feel they were an integral part of the Wren's Nest effort. Their self-esteem was bolstered. Thus, the improved relationship enhanced the probation department's objectives.

The second group project was also a bonus to probation department efforts. This project was established at the Atlanta Cerebral Palsy Center. The center is a school and day center which primarily services children but also has a number of adult clients.

The Cerebral Palsy Center is funded by United Way and relies on community volunteers to supplement the paid staff. Further, they are experienced with using well-screened offenders. A few years ago, the center employed nineteen offenders

on community service orders. All but one of these offenders performed extremely well, and a few stayed and continued working even after completion of their obligation.

Unlike the first group assigned to the center, this immediate group of offenders, it was decided, would be under a very restrictive order. Three of the offenders were assigned forty public service hours per week for six months, twelve months, and eighteen months respectively. These same three were also placed in a half-way house for six months and received the maximum fine relative to their offense. The Court left no doubt that it viewed the offenses as serious and intended a punishment as severe as imprisonment. These orders were experimental and tested the practical limits of community service orders.

The Cerebral Palsy Center's structure and experience offered an ideal testing ground for the intense orders. The center could use assistance in a wide variety of tasks. Each offender at the center was targeted during the sentencing process, and the center was consulted on each prospective assignment prior to sentencing. Thus, the probation orders were tailored to both the center's requirements and the offender's needs and talents.

In each instance, the community service order and other special conditions took into account the individual's ability to comply with the order. The financial resources of each were carefully reviewed. Four of the five assigned offenders would continue full or part-time paid employment.

The offender who received the most severe community service order nearly managed to maintain his personal standard of living. His wife went to work and he took thirty-hour per week employment. Through this joint effort and the sale of his business, the offender preserved his home and other assets. His child enjoyed some continued stability, and Sunday was reserved for leisure and family outings. The offender highly valued these Sundays, reporting them to be the major benefit of community service in lieu of imprisonment.

Few problems occurred at the Cerebral Palsy Center which required the probation officer's attention. As at the Wren's Nest, the Cerebral Palsy Center staff took an active interest in the offenders and the resocialization effort. One offender was offered a part-time position at the center which could be done continuous to his eight hour public service. On another occasion, the center director approached a probation officer with a complimentary "problem." An offender was sent on an errand usually done by the paid maintenance crew, and he returned in thirty minutes with the job done. In good humor, it was pointed out that the same job had never been done in less than an hour and a half by the paid staff.

In each of the Cerebral Palsy Center placements, the work was done with enthusiasm, and the center staff demonstrated their appreciation. The probation oficers involved stayed in close communications with the center staff and the offenders. All had a favorable experience.

It appears the merits of public service orders as tested proved practical. The purposes of punishment were met, and sufficient measures were taken to assure public safety. The work programs were structured and supervised, thus providing compensation to the community. The severity of the orders was a sufficient deterrent, and at the same time, provided positive experiences for the offenders.

Conclusion

The community service experiment will continue. Faced with crowded prisons and limited tax dollars, the Government must find practical and cost-effective means of punishing crime. It is not necessary to imprison many nonviolent offenders. Many such offenders have traditionally been imprisoned because the courts and the public have not recognized that there are credible and effective alternatives. Motivated by apparent benefits, many jurisdictions have successfully achieved legislation giving sanction to community service orders. Needed direction and support have been gained. However, in many cases, legislation has inapprorpiately limited the hours which may be ordered. Such legislation has served to restrict the use of community service as a credible alternative to imprisonment.

The community service alternative is in its infancy. Programs, guidelines and the practical limits of its use demand more experimentation and refinement. The courts and their probation departments are in a unique position to experiment with and to give direction to community service. A concerted effort is owed our society.

UNITED STATES DISTRICT COURT

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July 9, 1986

Honorable William Wikins, Jr.
Chairman, U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 14000
Washington, D. C. 20004

Dear Judge Wilkins:

This is in reply to your letter dated June 17, 1986, requesting our input on probation, fines, restitution, community service and house arrest.

Probation

All individuals placed on probation should initially be placed on intensive supervision for at least the first six months. This will allow the probation officer sufficient opportunity to obtain any information not available to the Court at the time of sentencing, and to objectively assess the individual's needs and problem areas. At that point, the probation officer, with this information, and the aid of the U. S. Probation Risk Predictor Scale and the U. S. Parole Commission Salient Factor Score can place the individual in the appropriate supervision category. Those individuals who do not score as intensive supervision, but have any of the following problem areas should be included as intensive supervision: 1) Substance abuse; 2) Unstable employment history; 3) Mental health problems; 4) Marital problems; and 5) Established antisocial lifestyle.

Intensive supervision should include the number of contacts described in Probation Publication 106 for high activity supervision which is at least one personal contact per month and unlimited collateral contacts.

The current conditions of probation are inadequate. The conditions that are vague or unenforceable should be removed. These would include No. 2 "You shall associate only with law abiding persons and maintain

reasonable hours"; No. 6 "You shall follow the probation officer's instructions"; and No. 7 "You shall report to the probation officer as directed".

The U. S. Parole Commission's conditions of release are most specific and should be incorporated into the conditions of probation. For example, probation condition No. 2 could be replaced by parole condition No. 10 "You shall not associate with persons who have a criminal record unless you have permission of your probation officer". Probation condition No. 7 could be replaced with parole condition No. 5 "You shall make a complete and truthful written report (on a form provided for that purpose) to your probation officer between the first and third of each month and on the final day of probation. You shall also report to your probation officer at other times as your probation officer directs providing complete and truthful information".

Other conditions that could be considered for probation would be, 1. "You shall not enter into any agreement to act as an 'informer' or special agent for any law enforcement agency". 2. "You shall not drink alcoholic beverages to excess. You shall not purchase, possess, use, or administer marijuana or narcotic or other habit forming or dangerous drugs unless prescribed or advised by a physician. You shall not frequent places where such drugs are illegally sold, dispensed, used or given away". 3. "You shall not possess a firearm or other dangerous weapons". 4. "You shall make a deligent effort to satisfy any fine, retitution order, court costs, or assessment and/or court ordered child support or alimony payment that has been or may be imposed and shall provide such financial information as may be requested by your probation officer relevant to the payment of the obligation. If unable to pay the obligation in one sum, will cooperate with your probation officer in establishing an installment payment schedule".

Fines

The crimes for which a fine should be the preferred sanction are primarily economic crimes which would include violation of securities or investment regulations and antitrust offenses, internal revenue offenses and offenses involving privacy. In determining the amount of a fine, the Court should consider the defendant's gain and the victim's loss, but more importantly the financial resources of the defendant and his financial needs and earning abilities. A fine which is beyond the means of the individual only sets him up for future failure. Too small of a fine loses the punishment and deterrence aspects of sentencing.

If an individual offender or organization offender fails to pay the fine, they should be brought into Court to show cause why they are unable to pay the fine and should be required to submit detailed financial statements. If it is determined at that time that the defendant had the capabilities, but was unwilling to pay the fine, the defendant should

be ordered to pay the fine and should be penalized with either incarceration or community service for his noncompliance. If it is determined that the defendant does not have the capabilities of paying the fine or only a portion of the time, the Court should look closely at possibly suspending a portion or all of the fine and substituting community service. This could apply either to individual defendants or organizational defendants.

Restitution

The Victim and Witness Protection Act of 1982 covers this area very well. It authorizes the Court to sentence a defendant to pay restitution in addition to, or in lieu, of any other penalty permitted by law. It directs the Court to explain on the record the reasons either for declining to order restitution or for ordering only partial restitution. It allows the Court to order the defendant to pay the victim the value of the property at the time of its loss or at the time of sentencing, whichever is greater, but it also instructs the Court to determine what the financial needs and earning ability of the defendant and defendant's dependents.

A detailed financial investigation should be done by the probation office prior to sentencing so that the Court will have all pertinent information necessary to determine if the defendant's financial situation indicates his ability to pay restitution.

Restitution could effectively be combined with imprisonment by having the inmate pay a portion of the money earned from prison industries toward the restitution. Those individuals who have not paid the restitution would not be given furloughs to the community.

Community Service. Community service works best for first offenders who have stable employment and a stable home situation. Efforts should be made to make the community service experience a meaningful and even challenging endeavor. Attempts should be made to match the defendant's abilities and skills with the community service task. The amount of community service should not be overwhelming where it significantly takes away from the offender's family or employment.

The agency should be a nonprofit organization who is willing to provide monthly detailed accounts of the offender's community service hours and tasks. On occasions, it may even be appropriate for the offender to do community service for the victim.

House Arrest

House arrest is a viable alternative to incarceration. Offenders that would be appropriate for this type of penalty would be first offenders who need to be restricted as a result of drug or alcohol abuse or the beginnings of an antisocial type of lifestyle.

I hope that my response to your inquiries are helpful. If you need any further information, please do not hesitate to contact me.

Sincerely,

ANTHONY P. BACA
U. S. Probation Officer

/mlm

THE LEGAL AID SOCIETY

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July 11, 1986

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington DC 20004

Re: Sentencing Options for Individual Offenders

Dear Mr. Martin:

Enclosed you will find a memorandum which has been prepared by the Federal Defenders Legislative Committee in response to Judge Wilkins' letter of June 17, 1986. I hope that this memorandum will be of assistance to the Commission.

Sincerely yours,

Jack Lipson

Jack Lipson
Tel.: (212) 577-3412

JL/mmp

Enclosure

cc w/enc.: Edward F. Marek, Esq.
Chairman
Federal Defenders Legislative Committee
75 Public Square, Suite 410
Cleveland OH 44113

The purpose of the Society is to render legal aid in the City of New York to persons who are without adequate means to employ other counsel.—By-laws of The Legal Aid Society.

July 11, 1986

M E M O R A N D U M

TO: United States Sentencing Commission

FROM: Federal Defender Legislative Committee

RE: Sentencing Options for Individual Offenders

INTRODUCTION

This memorandum is submitted on behalf of the Federal Defenders by their Legislative Committee in response to Judge Wilkins' letter of June 17, 1986 soliciting our views regarding sentencing options for individual offenders and the role of the Sentencing Commission in integrating the available options into an overall sentencing strategy. In Part I, we review the relevant provisions of the Sentencing Reform Act of 1984 and propose a general approach which the Commission should follow in formulating guidelines and policy statements regarding the use of sentencing options other than imprisonment. In Part II, we present our response to some of the specific inquiries in Judge Wilkins' letter.

I.

While 28 U.S.C. 994(a)(1)(A) and (B) confer upon the Sentencing Commission general authority to promulgate guidelines regarding the appropriate use of fines and probation as sentencing options, several other provisions of the Sentencing Reform Act of 1984 provide legislative guidance as to how this authority should be exercised.

In some limited respects, these provisions explicitly restrict the circumstances under which these sentencing options should be utilized instead of incarceration. Thus, 18 U.S.C. 3561 explicitly forbids the imposition of a sentence of probation in cases of individual offenders convicted of either a Class A or Class B felony.[1/] 28 U.S.C. 994(h) and (i) direct the Commission to promulgate guidelines providing for substantial or close-to-maximum terms of incarceration for specific types of offenders who commit certain enumerated offenses deemed particularly dangerous to the community, and 28 U.S.C. 994(j) mandates that the guidelines reflect the "general appropriateness" of imposing a term of imprisonment for offenders who commit crimes of violence that result in serious bodily injury.

With respect to those offenses and offenders who do not fall within the ambit of the above-noted provisions, however, the Sentencing Reform Act manifests a legislative intent that non-custodial sentencing options be favorably considered by both the Commission and sentencing courts. Thus, for example, 28 U.S.C.

1/ See our discussion regarding this prohibition at pp. 5-7, infra.

994(j) explicitly directs that in cases involving first offenders who are not involved in crimes of violence or otherwise serious offenses, the Sentencing Commission "shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment". 28 U.S.C. 994(k), furthermore, directs that "the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating [defendants] or providing [them] with needed educational or vocational training, medical care or other correctional treatment". As these purposes are listed in 18 U.S.C. 3553(a)(2) among the factors to be considered in sentencing decisions, presumably when these factors are deemed, in a given case, to be most important, the statute points to a non-custodial disposition.

More generally, 18 U.S.C. 3553(a) directs that sentencing courts impose a sentence "sufficient but not greater than necessary" (underlining supplied) to comply with the purposes set forth in 18 U.S.C. 3553(a)(2). Also, 28 U.S.C. 994(g) directs the Commission to formulate guidelines which will minimize the likelihood that the prison population will exceed the capacity of federal prisons. Finally, the Senate Resolution incorporated in Section 239 of the Sentencing Reform Act (98 Stat. 2039-2040) expresses the Senate's concern with overcrowding in federal prisons, the need to insure that scarce prison resouces are reserved for violent and serious criminal offenders who pose the most dangerous threat to society, and the view of the Senate that "in cases of non-violent and non-serious offenders the interests of society as a whole as well as

individual victims can continue to be served through the imposition of alternative sentences such as restitution and community service".

The Federal Defenders submit that these various sections of the Sentencing Reform Act, when read together, reflect a congressional intent that the guidelines promulgated by the Sentencing Commission incorporate a philosophy favoring the use of non-custodial sentencing options in cases involving offenders who have not committed Class A or Class B felonies or violent crimes and whose circumstances do not bring them within the ambit of 28 U.S.C. 994(h) or (i). We believe, furthermore, that the Commission's guidelines should provide for the utilization of sentencing options which result in the least restrictive imposition on an offender's freedom that is consistent with achieving the purposes for which sentence is imposed. Only where the need to protect society from an offender, or the retributive and deterrent objectives of sentence, cannot adequately be served through utilization of a non-custodial sentencing option should incarceration be prescribed. In this regard, we urge the Commission to recognize that sentencing options which do not involve incarceration nonetheless do impose restrictions upon the freedom of individuals and are a form of punishment. In many cases, the impositions upon individual liberty which flow from the necessity of submitting to probation supervision, performing community service, making full restitution to a victim or paying a substantial fine are indeed forms of punishment which can sufficiently reflect society's view of the seriousness of the offense and deter future criminal conduct by both the individual offender and

others. In such cases, the guidelines should call for a sentencing disposition other than incarceration.

Before turning to the specific questions raised in Judge Wilkins' letter, we wish to focus the Commission's attention on a problem posed by the provision of 18 U.S.C. 3561(a) which prohibits a sentence of probation for any offender who is convicted of a Class A or Class B felony. Under the terms of 18 U.S.C. 3559, any offense which under the existing law carries a maximum possible term of twenty years or more is classified as a B felony. Included within this classification are offenses such as unarmed bank robbery (18 U.S.C. 2113(a)), Hobbs Act violations (18 U.S.C. 1951), and RICO conspiracy (18 U.S.C. 1961 et seq.). In our experience, convictions for these offenses frequently are returned against individuals with respect to whom the unavailability of probation as a sentencing option would cause a grave injustice. For example, Federal Defenders frequently represent individuals with no prior criminal records, who, as a result of emotional stress or other personal crises, foolishly enter banks with "demand" notes, which conduct brings them within the ambit of 18 U.S.C. 2113(a). In many of these cases, the primary need of the offender is psychiatric counseling or some other form of supervision of the kind which is made available pursuant to a sentence of probation. More significant, many of these cases involve offenders who, with the benefit of such counseling and supervision, do not pose a threat to the community of the kind that requires incarceration. Hobbs Act convictions are often secured in some federal districts in cases involving lower echelon

public employees who have taken small bribes from persons doing business with their agencies. Also, as a result of the expansive use of the RICO statutes in many districts, it is not uncommon for RICO conspiracy convictions to be secured against defendants in cases involving mail frauds. Often, these defendants have no prior criminal record and do not pose such a danger to the community as to require incarceration. Under the provisions of the Sentencing Reform Act noted above, however, probation is not an available sentencing option for these defendants.

The Federal Defenders submit that the prohibition against sentences of probation in cases such as those cited above unduly limits the authority of the Sentencing Commission and individual judges to fashion guidelines and sentences which reflect the circumstances of the offense and offender, and results in a potential for grave injustices. The Senate Report which accompanied the draft of the Comprehensive Crime Act acknowledged that the general classification of offenses which is set forth in 18 U.S.C. 3559 might give rise to such problems and invited the Sentencing Commission to make such recommendations for change as it deemed appropriate "before sentencing guidelines are in place". Senate Report No. 98-225, p. 87 (1983). The Federal Defenders urge the Commission to take such action and to propose such changes in 18 U.S.C. 3559 and 18 U.S.C. 3561 as are necessary to permit the imposition of probationary sentences in cases such as those cited.*

* The commentary on §3651's prohibition of probation which appears at page 89 of the Senate Report indicates that Congress may well have intended the prohibition to apply only to Class A and Class B offenses as defined in 18 U.S.C. §3581 (offenses with maximum terms of 25 years or more). At the very least, 18 U.S.C. §3559 should therefore be amended to eliminate the disparity between its provisions and those of 18 U.S.C. §3581.

Moreover, until such amendments are in fact adopted, we urge the Commission to fashion guidelines which, in cases such as those cited, will provide for nominal periods of incarceration to be followed by appropriate terms of supervised release. We believe that the use of this alternative combining a short period of incarceration with supervision is a realistic way of minimizing the potential injustices in the statute as presently drafted. Of course, in cases involving Class B felonies in which neither incarceration nor probation supervision is found to be appropriate, the guidelines might provide for the imposition of a fine.

II.

1. Probation - In response to Judge Wilkins' inquiry concerning conditions of probation, we note at the outset that in connection with the appropriate use of particular conditions of probation, the Sentencing Reform Act assigns to the Commission the authority merely to issue general policy statements rather than guidelines. 28 U.S.C. 994(a)(2). In view of this limitation on the authority granted to the Commission, the Federal Defenders believe that the Commission should not attempt to prescribe the use of particular conditions in individual cases, but rather should issue policy statements setting forth general principles for the guidance of individual sentencing judges. It should be left to the individual judge to make determinations of the particular combination of conditions which is appropriate in a given case in light of the circumstances of the offense and the individual offender.

In issuing these general policy statements, we urge the Commission to adopt an approach which gives effect to 18 U.S.C. 3563(b). That section provides that any conditons of probation beyond those mandated for felony offenders in 18 U.S.C. 3563(a) should be imposed only "to the extent that such conditions are reasonably related to the factors set forth in §3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty and property as are reasonably necessary for the purposes indicated in §3553(a)(2)". The Federal Defenders believe that the policy statements should identify which of the various probation conditions enumerated in 18 U.S.C. 3563(b) are appropriately used for rehabilitative purposes and those that are appropriately used for purposes of punishment, deterrence and protection of the public. The policy statements should encourage sentencing judges to articulate the reasons which motivate their choice of conditions and should caution against the arbitrary accumulation of conditions which do not serve the purposes of sentence as stated in the particular case. Thus, for example, where a sentence of probation is imposed principally for rehabilitative purposes, judges should be cautioned against imposing onerous non-rehabilitation related conditions which might make it more difficult for the defendant to achieve the sentence's rehabilitative goals. Where probation is imposed with the intention of fulfilling the purpose of retribution or deterrence, the policy statements should emphasize a need to avoid conditions which place burdens and restraints on the probationer's freedom which exceed that warranted by the seriousness of the offense.

With respect to the inquiry concerning intensive probation supervision, we believe that this may be appropriate in three types of cases. First, in cases involving individuals who have committed serious offenses but who, by virtue of their past history and other circumstances, are not deemed to pose such a threat to society as to require incarceration for the protection of the public, intensive probation supervision may be an appropriate means of imposing punishment without unnecessarily utilizing scarce prison resources. Second, in cases in which an offender has committed an offense which does not pose a great danger to the physical safety of the public but in which there is a risk of recurrence unless the offender is closely monitored, intensive probation supervision might serve as an appropriate alternative to incarceration. Third, in cases involving individuals whose offense behavior is found to be related to a condition such as alcoholism, drug abuse or emotional instability which is amenable to treatment through a program of close supervision, the imposition of a sentence requiring intensive probation supervision would be appropriate. While the Sentencing Commission should promulgate policy statements indicating in general fashion circumstances such as those noted above in which intensive probation supervision is appropriate, the decision to require such supervision should be left to the judgment of the court after consulting with the Probation Department in individual cases.

2. Fines - The questions posed by Judge Wilkins with respect to the appropriate use of fines are difficult to answer

because of the fact that such a substantial percentage of offenders convicted in federal court lack the financial resources to pay any meaningful fine. In formulating guidelines and policy statements with respect to the use of fines, the Commission must, therefore, take care to insure that they do not have the effect of resulting in sentences in which the poor must serve custodial sentences while the wealthy must merely pay fines.

As a preliminary matter, we note that fines may be appropriately imposed for retributive and deterrent purposes and that their utilization is particularly appropriate in cases in which the offender has committed the offense out of a pecuniary motive. In cases involving serious offenses which do not give rise to such concern for the safety of the community as to require incarceration, we believe that the imposition of fines is an effective form of retribution.

The determination of the amount of the fine should be governed by the financial resources of the offender after taking into account what we believe is a primary responsibility to make restitution to any victims of the offense. Implementation of this policy will result in more substantial fines being imposed upon wealthier offenders. However, since the purpose of the fine is to exact punishment and that purpose is served only to the extent that the fine is of such magnitude as to cause some degree of financial burden upon the defendant, we believe that it is appropriate that less wealthy defendants be saddled with less substantial fines, so long as the proportional impact on all groups of defendants is equal. Of

course, as noted above, a substantial percentage of offenders lack any resources from which to pay a fine. In cases involving such defendants, where the court would otherwise impose a fine, we urge that community service be employed as the alternative. We strongly urge the court not to resort to imprisonment in cases in which a fine would otherwise be appropriate but the offender lacks resources with which to pay such a fine.

We recognize that fines may also be appropriately used in addition to a sentence of incarceration as an added form of retribution and deterrence. Here, again, we believe that the determination of the appropriate amount of a fine should look to the offender's resources. In those cases in which a imprisoned offender is indigent and, therefore, unable to pay a fine, the court should not increase the term of incarceration. Rather, the court should look to post-release supervision involving community service as the alternative in such cases.

3. Restitution - The Federal Defenders believe that restitution is an appropriate sanction in all cases in which there is an identifiable victim who has suffered a loss as a consequence of criminal behavior. We believe, furthermore, that the imposition of a restitution requirement should take precedence over the imposition of fines. Restitution should not be imposed to such an extent as to jeopardize an offender's ability to meet the basic financial needs of himself and his family. In those frequent cases in which an offender lacks the resources to make meaningful restitution, we urge the court to look to community service as a suitable alternative.

4. Community Service - The Federal Defenders believe that community service can be effectively used as a conditon of probation provided that it is not imposed arbitrarily and to such an extent as to interfere with an offender's ability to maintain his livelihood. We believe it should be imposed only where it is found by a sentencing court to be necessary to meet one of the purposes of sentencing as set forth in 18 U.S.C. 3553(a). Among the circumstances in which we believe community service is an appropriate condition of probation are the following:

First, community service may be employed as a form of retribution for offenders who have committed offenses which are deemed serious enough to require something more demanding than probation but which do not pose such danger to the community as to require incarceration. Second, as noted above, community service may be appropriately employed as a substitution for the payment of a fine or restitution in cases involving defendants who lack the financial resources to make such payment. Third, community service may be appropriately used as a form of rehabilitation for defendants whose offenses have shown a particular disregard for the consequences of their offenses upon the general public. Finally, community service may also be usefully employed as a rehabilitative tool for unemployed offenders who are placed in community work programs in which they are given the opportunity to acquire skills which might assist them in securing employment.

It has been the experience of some Federal Defenders that judges in districts where community service programs have been

in operation automatically impose community service requirements when placing a defendant on probation. We believe that such use of community service should be discouraged.

CONCLUSION

We hope that the observations and suggestions made above will be of assistance to the Sentencing Commission in developing guidelines and policy statements relating to the use of sentencing options other than incarceration. We look forward to the opportunity to review the proposals put forward by the Commission and will be prepared to submit specific comments on such proposals.

U.S. Department of Justice

Office of Justice Programs

Office for Victims of Crime

July 14, 1986

William W. Wilkens, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave, N.W.
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkens:

This is in response to your letter of June 17, 1986, in which you requested views on topics to be considered in your hearing of July 15, 1986.

When considering sentencing options, especially those that may be alternatives to incarceration, we beg the Commission to consider:

- any prior criminal record of the defendant;
- a statement of the circumstances affecting the defendant's behavior;
- information concerning any harm including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and
- any other information that may aid the courts in sentencing, including the restitution needs of any victim of the offense.

We encourage you to stress to your Commission members the provisions of the Victim and Witness Protection Act of 1982 (Public Law 97-291) and the Victims of Crime Act of 1984 (Chapter XIV, the Comprehensive Crime Control Act of 1984, Public Law 98-473).

We feel the imposition of fines and penalty assessments are very important and should apply to all federal convictions.

The principal provisions of the Victims of Crime Act are to establish a Crime Victims Fund in the Treasury for the purpose of funding annual grants to the states for victim compensation programs and other programs providing services to victims of crime.

Section 1402 creates the Crime Victims Fund and provides that the following payments are to be deposited in the fund:

(1) fines collected from persons convicted of offenses against the United States (with six exceptions);

(2) penalty assessments collected pursuant to 18 U.S.C. 3013;

(3) proceeds of forfeited appearance bonds, bail bonds, and collateral collected pursuant to 18 U.S.C. 3146; and

(4) "literary profits" of convicted federal criminals that are ordered paid into the fund by a federal court pursuant to new 18 U.S.C. 3671(c) (2).

Section 3013 to Title 18, United States Code, created by Section 1405 of the Victims of Crime Act, imposes a mandatory penalty assessment upon all convicted federal defendants in addition to any fine or other sentence that may be imposed by the court. The assessment is $25 on individual misdemeanants, $100 on other misdemeanants, $50 on individual felons, and $200 on other felons. Section 3013 mandates the collection of assessments in the same manner as criminal fines.

We believe this fund to be very important. We also believe it is important to fine all convicted defendants. Financial compensation for losses that victims sustain as a result of violent crime must be an integral part of both Federal and state governments' response to assisting these innocent citizens. No amount of money can erase the tragedy and trauma imposed on them; however, some financial redress can be an important first step in helping people begin the often lengthy process of recovery. For some, this modest financial assistance can be the lifeline that preserves not only some modicum of stability and dignity but also life itself.

The financial impact of crime can be severe. While some victims are made whole through adequate insurance coverage, many others are not. The poor and the elderly often have no insurance. Even those victims who have coverage discover that recovery is made difficult or impossible by high deductible clauses, problems with market value assessment for unique items, and limited or precluded payment for such expenses as lost wages and psychological counseling.

Ordering the offender to pay restitution is a laudable goal that should be actively pursued, but its limitations must be recognized. A restitution order cannot even be made unless the criminal is caught and successfully prosecuted. Even when such an order is imposed, it does not help the victim if the defendant is without resources or if the ordering court does not enforce its order. In addition, even if complete restitution is made, it may take years to be accomplished. In the interim, the victim is left to bear the cost as well as he is able.

The problem is not just one of payment; it may be an issue of feeding the family or not losing the house while waiting for payment to be made. A victim compensation fund has an obvious function in such cases.

The Crime Victim's Assistance Fund was created so that it relies in part on federal criminal fines, penalties, and forfeitures that were previously paid into the general

fund. Not only is it appropriate that these monies collected as a result of criminal activity be used to help victims, but this method of funding also ensures a program that is both administratively efficient and self-sufficient, requiring no funding from tax revenues.

Thank you for your consideration of our concerns.

Sincerely,

Verne L. Speirs

Verne L. Speirs, Administrator
Office for Victims of Crime

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July 9, 1986

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

Dear Chairman Wilkins:

In previous correspondence to the Commission, U. S. Probation Officer Connie M. Roehrich has responded to the questions raised by the Commission. Ms. Roehrich has resigned her position in order to take a position with the new Women's State Prison in Shakopee, Minnesota. Chief U. S. Probation Officer Glenn Baskfield has asked that I respond to any future inquiries by the Commission.

I was very pleased to be asked to participate in providing input to the Commission.

The following responses pertain to the questions raised in your correspondence dated June 17, 1986.

Probation

I believe that intensive supervised probation can be an appropriate method of dealing with offenders who can remain in the community, but who need to be held accountable more closely than other offenders. What comes to mind would be mental health cases, chronically chemical dependent individuals, and those probationers who are unemployed and who need to be watched more closely. Initially these probationers could be seen as often as three times weekly, with the schedule being reduced if they were to accomplish objectives such as full-time employment or involvement with chemical dependency treatment. Since the probation officer or the presentence investigator becomes most acquainted with the defendant's background, and issues such as mental health, chemical dependency, or unemployment patterns, it seems as though he may be the most appropriate person to recommend that intensive supervision be implemented by the court.

Fines

I believe that fines should be available for each offense, but not preferred for any. I believe the fine amount should correlate with the amount of money gained by the offender and the likelihood that he could pay it back over a certain period of time. Imposing a fine on an individual who realistically cannot pay it appears to make a mockery of the system. If such a fine were considered a lifetime debt, and could be obtained through tax withholdings or social security benefits, it might be more realistic to impose fines, knowing that the likelihood of collecting them is enhanced by the mechanisms set up by the system to collect them.

If the system is not set up to collect fines through tax withholdings or other methods, I believe that an individual who fails to pay a fine should be ordered to perform community work service. Some system would need to be set up that would calculate the hourly wage for the type of work that the individual would be performing.

Restitution

Whenever there is monetary loss to an identifiable victim, I believe that restitution should be ordered. Either a judge or a probation officer as authorized by the court, could be in a position to act as mediator between the victim and the offender. There are numerous programs at the county level where probation officers act as mediators between two parties in face-to-face encounters.

I believe there are ways in which restitution can be effectively combined with imprisonment and community service. A short period of imprisonment followed by a restitution payment plan and a schedule for community work service, seems to benefit the community, the victim, and the offender.

Community Service

I believe that a community service program should be structured soundly and have a probation officer in charge of supervising the work sites. These work sites, which could be recruited by the department, would serve as agencies for offenders to work in. In those areas of the country that are less populated, offenders could be responsible for finding their own work site and then have their probation officer monitor their placement. A series of forms which outline the schedule of hours as well as verify the actual work, could be provided to the work site. It might be advisable to set up a matrix that would determine the amount of community work service hours based on the seriousness of the offense. Consequences such as additional hours or a return to court could be used as sanctions if there are problems at the work site.

It seems as though the offenders that would benefit most from this type of sanction would be those that do not have a history of violent behavior. Work sites should not be expected to take on individuals convicted of violent offenses.

One area of concern that work sites have expressed in the past is the liability that they might be exposed to if they accept offenders. There are several possibilities to address this concern. There is an insurance company based in Washington, D.C. that handles liability insurance policies for work sites. Offenders could be expected to pay the premium, which at one time cost approximately $5.00 per offender. A statute might also be enacted which addresses the liability issue with community agencies that accept the offenders.

House Arrest

I believe that house arrests could be a viable alternative to incarceration if it were closely monitored by either a law enforcement agency or the probation office.

Although these above responses may be arriving later than what you had desired, I am hoping that they will be of some use to the Commission. If I can provide any additional information in the future, please do not hesitate to contact me.

Sincerely,

Jay F. Meyer

Jay F. Meyer
U. S. Probation Officer

JFM/lew

UNITED STATES DISTRICT COURT
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July 3, 1986

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

Dear Judge Wilkins:

In response to your letter of June 17, 1986, regarding the sentencing options available to the court under the Commission's Sentencing Guidelines, I solicited the opinions of selected U. S. Probation Officers and Community Service Specialists. Based on the established community service program in the Northern District of Illinois and the detailed response received from the community service specialists, their report is attached for the commission's review.

We have attempted to discuss the issues within the framework of probation as a sentence in its own right, which reflects a criminal sanction for a non-serious offense committed by offenders with positive personal characteristics. We do not perceive probation as an act of leniency per se, but as a sanction which is commensurate with the seriousness of the offense. As a sentence in its own right, we believe probation is capable of satisfying the explicit goals of the justice system through the various ranges, beginning with probation with minimal conditions to probation with more stringent conditions. Based on this conceptualization, we view most of the stop-gap mechanisms that have been created recently to deal with specific deficiencies in the system (i.e., jail overcrowding), as amplifications of programs already in place, notwithstanding the current limited available resources. For example, offenders with drug history which is associated with greater risk are placed in specialized drug units under the supervision of a drug specialist and are subject to urine screening twice per week (surveillance) and counseling sessions are available to them (rehabilitation). Similar arrangements are made for other offenders with high risk to the public as well as to themselves; for example: mental health, employment deficiencies, or career criminals. These specialized caseloads allow for close supervision, resembling what is being developed as intensive supervision.

In summary, we believe probation can effectively satisfy the goals of the system with respect to the punishment, deterrence, and rehabilitation needs, but probation supervision may not generally be appropriate for offenders who present a serious threat to public safety.

Probation: Intensive Supervision

As stated above, the current probation system supports intensive supervision for special offenders within the context of current resources. Based on the classification system

as well as the probation officer's evaluation and assessment, a supervision program is developed to respond to the needs of the offender and the community. Under the provisions of Section 3603, the probation officer has discretionary powers to develop suitable methods and guidelines for the probationer which would maximize the probationer's positive adjustment. If more stringent conditions are required, Section 3603 also provides that the probation officer may request the aid of the court in adding additional conditions that may be necessary.

In general, we believe that to properly assess and monitor the probationer, a minimum frequency of contact is necessary. This view has been expressed by Chief Judge Frank McGarr (Remarks at the Joint Sentencing Conference - Oakland, California - 1981), that the probation officer's attitude should be a strict one as well as an helper, that probation is not supposed to be easy and that monthly or quarterly face to face contact may not be sufficient.

We believe there is the need to define clearly what is intensive supervision. There is some discomfort in supporting intensive supervision which involves intensive community surveillance as an alternative to incapacitative sentences such as being currently tried in North Carolina, Texas, Florida, California, Georgia, New York, and Ohio. These programs usually involve face to face contact with the probation officer several times per week and may involve "house arrest", restrictions and mandatory employment or community service participation. These programs focus more on surveillance and control than on rehabilitation. Yet, our experience with these types of arrangements is that sometimes these offenders do not present any real risk that would justify the surveillance function, and when these risks are clearly indicated, we question whether intensive supervision can adequately protect the public. We also question whether these programs can significantly reduce the probability of future criminal activity.

It appears that these programs are attractive because they provide the judiciary with an intermediate-level sanction to reduce the perception of the court being soft. Although, in reality, the court often faces difficult choices with offenders whose crime demand a sanction other than probation but not serious enough to warrant incarceration, thus the perceived need for an alternative sanction. However, in our view, this is merely indicative of an issue in sentencing that has never been resolved: the complex philosophical question relating the role of punishment in society and how punishment should be applied to individual offenders.

In summary, we believe there is a need for refinement in the definition of intensive supervision, a statement of goals, and a procedure must be developed. Other issues to be addressed include, participant selective process, the length of intensive supervision, and program evaluations.

Suitability for Intensive Supervision:

We support the use of intensive supervision as an alternative to incarceration as a temporary measure to deal with prison overcrowding. Intensive supervision offers a quick method of responding to a crisis situation especially when compared to the time and cost and building new facilities. As an alternative, however, we see the need for caution to guard against these programs drifting towards a policy of middle-range sanction.

Some of the successful programs by contrast selected sentenced offenders to participate in intensive supervision programs. This guarantees that the goal of reducing prison space is being met. In this case, offenders apply to the program, demonstrate a commitment to intensive supervision and are properly screened before released to the community.

To summarize, we support intensive supervision as a stop-gap measure for premature release of incarcerated offenders. This measure deals with prison overcrowding; however, we do not support intensive supervision as an additional option or middle-range sentence, but prefer the existing arrangement whereupon the probation officer may design an appropriate supervision program which may include stringent conditions on offenders that present a risk to the community. In this regard, with the available resources to the probation department, the probation officer would have access to a wide range of intensive supervision mechanisms.

Forms and Control of Intensive Supervision:

In principal, we do not support intensive supervision as an appropriate method of punishing serious offenders. These offenders who present control problems should not be released in the community, particularly since probation departments rarely have received adequate funds to support programs that handle serious offenders. We believe the law should be expanded to include a wide range of available conditions of probation which would include limitations on the probationer's activities, and the requirements that the probationer spend some time in a custodial environment that can be monitored or where his behavior can be accounted for.

THE ROLE OF THE COMMISSION, THE COURT, AND THE PROBATION OFFICE:

The Role of the Commission.

The commission should create broad provisions for various conditions of probation. We are concerned that Section 3563 limits the mandatory conditions to violation of federal, state or local laws. We believe that by default, some of the existing mandatory conditions which have been proven to be useful in controlling and making probationers accountable, be retained as mandatory conditions. Some of these useful mandatory conditions are travel restrictions, notification of change of residence, possession of drugs and firearms

and the general condition that the probationer adhere to the instructions of the probation officer. If These conditions are by default made mandatory, then this guarantee that all supervised offenders would have the minimum conditions attached to their supervision that will satisfy the stated goal of the criminal justice system. For example, in the case of travel restriction, although most probationers are given permission to travel freely, particularly for the purposes of employment and recreation, the fact that permission is needed provides the probation officer and the court with the opportunity to monitor the activities of the probationer beyond the scope of mere travel.

The Role of the Court:

We believe that at the time of sentencing or following the post-sentence request of a probation officer, the court should impose any special condition that can reasonably be expected to satisfy the goals of sentencing. It should be the responsibility of the probation officer to include relevant information in the presentence report that will assist the court in developing these special conditions. Information developed after sentencing, which was not available during the presentence stage, can be submitted to the court so that the conditions of probation can be modified to create or delete conditions as appropriate.

The Role of the Probation Officer:

The probation officer should use his diagnostic skills to evaluate the offender and to recommend what special conditions, if any, that may be needed to satisfy the goals of sentencing. As stated above, they should also have the responsibility to identify any special problems that may arise during the period of supervision and request that appropriate conditions be added.

We believe that it should be at the probation officer's level that the issue of intensive supervision should be handled. In doing so, the probation officer, through his evaluation, initiates any control mechanism which was previously ordered by the court or seeks such an order as it is needed.

The Condition Contained in Title 18 USC 3563(b)(1-19):

The only major concern we have with Section 3563 is the issue mentioned above, relating to the discretionary conditions which will not apply by default. We believe that: selected conditions, that have been found to be reliable in assisting the probation officer and the court in making the probationer accountable, should be retained as mandatory conditions; and, that the discretionary conditions should only be those conditions that are unique and that can reasonably be expected to apply only to selected offenders; for example, the condition that the offender refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons.

Fines:

We believe, in general, that a fine can be a valuable tool in sentencing for the following reasons: (1) Fines can relate to the profit or injury created by the offender to demonstrate the punitive cost of engaging in criminal activity. (2) It provides appropriate punitive sanction in a financial manner where restitution is not applicable. (3) In situations where incarcerative sentence is not possible (in the case of a corporation being the defendant), it provides the sentencing court with a monetary sanction.

A fine is particularly appropriate in the case of corporate crime where it is not feasible to prosecute individuals. Ideally, we believe the individuals in the corporation should be accountable, but if this is not possible, since it is not practical to jail a corporation, the best we can do is to take a portion of the corporation's blood - take some of its money via a fine. Although, in principle, we support using the least restrictive sanction to accomplish the goals of sentencing, yet we caution the systematic use of fines in lieu of incarceration. This has caused the criminal justice system to be perceived as being too lenient towards the rich while being harsher towards the poor. It gives the impression that if one has money, they can pay for their wrongdoings, and if you don't have money, one goes to jail. We refer again to the issue of punishment. We believe punishment is a conventional devise for expression of resentment and indignation and that incarceration, as a form of punishment, has a symbolic significance which is largely missing from other kinds of penalties, including a fine. Somehow, in practice, society perceives incarceration as the only true punishment for serious crimes. At times, regardless of the amount of fine leveled at a corporation or individual, if a jail sentence would normally be indicated, a fine is perceived as a "slap on the wrist."

Finally, we believe fines are appropriate for minor offenses, and that in general the crucial question in what the sentence should be, is what effect any given sentence will have on actual or potential offenders. With respect to fine, although limited sources have plagued the criminal justice system, we have, for the most part, failed to operate the system as a business, making the defendants pay for the prosecution services on a systematic basis via fines.

Elements for Consideration:

We believe the following elements should be considered when a fine is contemplated: (1) The amount gained by the defendant with consideration to the total victim loss. If the offender gained and the victim loss varies, the offender should take some or full responsibility for the victim's loss, depending on the circumstances. (2) Whether restitution will be applicable which should be given priority. (3) Enforceability and collectibility of the fine. We believe fines that are unrealistic based on a thorough and valid financial assessment should not be ordered. (4) Lump-sum payment or installment payment and why.

With respect to the offender's ability to pay, we believe that this is not a simple issue. Ability to pay should be determined by a thorough financial assessment, which would include any possible transfer of funds to others, whether any persons or other business activity holding funds in escrow or trust exist, and whether other individuals benefited significantly from the proceeds of the crime who can reasonably be expected to assist the offender in paying a fine. However, when it can be determined that the offender does not have the ability to pay and there are no resources available elsewhere, and the fine is therefore unrealistic, it should be waived. In waiving a fine under these conditions, however, the court has other options in making the offender pay; community service.

Failure to Pay Fine:

The response of the court towards the failure to pay a fine would normally be based on the reason for the failure. Where it can be shown that the offender deliberately refused to pay a fine or failed to make a reasonable effort to obtain the resources to pay a fine, we believe that the offender should then be subject to punitive sanction which could include additional conditions, extension of a probation period or incarceration. In the case of an organization, generally from a bookkeeping point of view, it may be easier to establish the ability to pay and the response again would be based on the reason for a non-payment.

Restitution:

We support the provisions of Section 3563, which provides for the payment of restitution where applicable for felons receiving probation. The neglect of victims of crime historically, in our judgment, has made this requirement a positive step in the justice system. We believe the probation officer will play a vital role in assisting the court in determining the appropriate amount of restitution without unduly complicating the process. We anticipate that the procedure involved in the preparation of the presentence, with respect to harm done to victims, through the victim impact statement and through our investigation of the defendant's financial status, will be a valuable assistance to the court. In this respect, our experience is that the defense attorney and U. S. Attorney tend to have different interpretations of "facts" and, wherein, the defense attorney may tend to minimize victim loss and prosecuting attorney will attempt to maximize victim loss, the probation officer may play a vital role in providing unbiased information in resolving conflicts prior to the sentencing hearing.

Combining Restitution With Imprisonment or Community Service:

As stated earlier, we believe that in deciding what a good sentence is, we should consider the effect a given sentence would have on the offender and potential offenders, and whether this sentence is an appropriate expression to our moral concern over the particular offense, which is consistent with our standards of acceptable human conduct. From this framework, we believe that a restitution order can be effectively combined with imprisonment or community service in certain conditions. However, in general, we believe that the goals of sentence can be more effectively realized if the sanction

is focused and directed towards a specific goal: imprisonment for punishment/incapacitation, community service in lieu of incarceration or fine/restitution, or restitution only for minor minor crimes.

Community Service:

As stated earlier, the response from our community service specialists in the Northern District of Illinois is attached in its entirety for the Commission's review. The Northern District of Illinois has shown commitment to the concept of community service and we have developed and established a program of community service and are currently conducting a community service research entitled, **Perceptions of Community Service Orders as a Condition of Probation: Views from the Offenders and Host Agencies.** A copy of our concept paper is attached. The research is scheduled to be completed in September 1986, and we will be happy to send the Commission a copy of our findings. Our research is unique in that while other assessments of community service utilize outcome statistics, our evaluation will be pursuing other aspects, such as the impact on the offender, the community, and the court as received via information from the probationers and recipients of these services.

House Arrest:

We are not in support of house arrest as a viable alternative to incarceration, but only as a temporary measure to deal with a specific problem of the system, particularly prison overcrowding. It is our impression that house arrest has, so far, been successful in many jurisdictions on the local level in dealing with minor crimes, such as drunk driving. In the case of the drunk driver, there has been much concern expressed by the public of the potential harm, and the public wants these drivers off the streets. A sanction of house arrest in this case can effectively accomplish the stated goal while allowing the offender to continue participation in other desirable activities: going to work and taking care of other domestic activities.

Our concern stems from the fact that the public will perceive house arrest for federal offenders as a "gimmick" and that the reduced cost in supervising these offenders in their homes, compared to the cost of imprisonment, is illusionary since we believe there will be a tremendous loss in public confidence and creditability in the system's ability to protect society.

I hope the above information will assist the commission.

Sincerely,

G. Frederick Allen, Ph.D
U. S. Probation Officer
FTS: 387-5726

GFA:vlcj

Enclosures: Report from Community Service Specialists
Concept Paper on Community Service Research

UNITED STATES GOVERNMENT

memorandum

DATE: June 26, 1986

REPLY TO ATTN OF: Greg Lane
Community Service Specialist

SUBJECT: Sentencing Commission Guidelines

TO: William T. Foster
Chief U. S. Probation Officer

This is in response to your request for imput concerning the issue of community service.

1. How should an effective community service program be structured?

An effective community service program has an established procedure for screening probationers, a formalized placement process, an established system for monitoring service performed, and a policy of encouraging community service program officials to become involved in organizations and activities which contribute to the spirit of voluntarism. The Community Service Program of the U. S. District Court for the Northern District of Illinois is an example of an effective program which contains these elements. Listed below are elaborations on these key components of an effective community service program.

A. Screening - The defendants should be screened prior to sentencing to eliminate from consideration habitual, assaultive or career criminals, those with ongoing drug or alcohol addiction and those with a history of sexual deviance or emotional instability. Offenders who demonstrate little remorse, having been found guilty by the court or a jury, might also be eliminated from consideration. Written policies should be established suggesting to the judges an optimum number of hours of service to be imposed (usually 200 to 500 hours.) Sentences of this length allow probationers to develop a sense of commitment to an agency while not being so lengthy as to be overwhelming and self-defeating.

B. Placement - The probation office should have a policy of actively referring probationers to a network of agencies serving the community which, preferably, are not-for-profit. Each agency should be visited by a community service officer periodically to insure that the working relationship is continuing smoothly and to assure the agency that the court is interested in the placement process and is accessible should problems arise. Placements should be individualized; the community and offender typically benefit the most if the offender's skills are utilized to the maximum degree. To accomplish productive placements, sometimes several referrals and interviews must take place before the right match is found.

The placement should be formalized by the probationer signing a written contract in which the terms and conditions of the service are spelled out. The probationer should also be given a written statement clearly explaining what is expected of court-directed volunteers. During the referral process, the probationer should also sign an

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
☆ GPO : 1985 O - 461-275 (413)

authorization to release information to the agencies which will be considering the probationer for service; information disclosed usually pertains to education, work experience, health, prior conviction record or obvious third party risk factors.

C. Monitoring - Each agency receiving the service of a court-directed volunteer should provide written feedback to the probation office on a monthly basis concerning the number of hours served and the quality of service. Pre-prepared forms and self-addressed envelopes can faciliate this process. If reports are not received when expected, reminder notices should be sent. Accurate and up-to-date logs of all hours of service performed by each probationer should be maintained in the probation office.

Clear policies should be established concerning unsatisfactory performance of community service. Patterns of inconsistent attendance or unreliable performance should not be allowed to continue indefinitely. Rather, placements should be terminated if they are not fully acceptable to participating agencies and, if a pattern of more than one failed placement should develop, the matter should be returned to the sentencing judge as an alleged violation of the probation conditions.

D. Centralization - It appears to be in the best interest of the community and the court if the placement and monitoring processes are centrally administered in the probation office. One or more officers can be designated as having responsibility for maintaining liason with the network of community agencies, making placements and following them. Such specialization avoids duplication of effort by the entire probation staff, allows for the specialists involved to develop consistent and effective working relationships with the agencies in their territory and allows the specialist to develop a knowledge of and sensitivity to the community's need for volunteer assistance.

Centralization also facilitates accurate record keeping and production of statisical reports. Feedback to staff and judges is also faciliated by centralization.

E. Court/Community Involvement - The court should encourage community service officers to become involved in the spirit of voluntarism of the community. Such involvement can take the form of service on various community boards, membership in professional associations of volunteer administrators or support and involvement in United Way volunteer recognition activites. Such involvement by court personnel promotions a positive public relations image, adds to the sense that the court is not merely using community agencies to solve the administrative problems of the criminal justice system but that the court, itself, is a member of the community. Also, such involvement can serve to keep the community service staff aware of changes in patterns of voluntarism and personnel changes in community agencies. The court may also choose to extend appreciation to cooperating community agencies by periodically offering space for meetings or special events.

2. What types of offenders will benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals of sentencing?

The types of offenders who seem to benefit the most from community service orders are those who display a sense of remorse, whose lives are basically stable and who, with time, develop a genuine sense of commitment to the agencies which they are serving. Usually the probationers and agencies do not benefit from this process if community service is perceived as "punishment" and resistant attitudes or behaviors develop which sabotage the placement. Educational level, skill level, and socio-economic status do not seem to be factors effecting the success or failure of community service placements. Rather, the psychological factors of the probationer having a sense of reparation and the capacity to manage his or her life in a responsible and stable manner seem to correlate most closely with successful community service placements.

Publication 106, The Supervision Process, indicates that:

> "Sentencing is in large part concerned with avoiding future crimes by helping the defendant learn to live productively in the community which he has offended against."

Although the probation officer and a variety of community resources may assist offenders in learning to live productively in a community, agencies participating in community service programs typically expect offenders providing service to be providers, not receivers, of services. The court-referred volunteer is needed to provide services to the handicapped, the infirm, the elderly or troubled youth. Agencies do not expect or need the probationer to become another case on their rosters. Thus, a probationer whose life is out of control or who is experiencing a variety of stresses and conflicts will likely not be emotionally or financially prepared to take on additional responsibilities expected of competent volunteers. For these reasons, probationers who demonstrate significant degrees of instability in their own personal lives usually do not perform service in an exemplary manner and neither the community nor the probationer derive much benefit from a community service condition. As is mentioned above, offenders who are manipulative, hardened criminals, who lack remorse or who are recalcitrant are likely to perform service in an unsatisfactory manner.

I hope that these thoughts are useful to the Sentencing Commission. I believe that the specific documents and policies developed here in the Northern District of Illinois are representative of a smoothly-functioning and effective Community Service Program. If you would like any sample documents or additional information, please let me know.

GL:jc
6/26/86

PERCEPTIONS OF COMMUNITY SERVICE ORDERS AS A CONDITION OF PROBATION: VIEWS FROM THE OFFENDERS AND HOST AGENCIES

Community Service Research

CONCEPT PAPER

September, 1985

G. Frederick Allen,
U.S. Probation Officer, ND/Illinois

Harvey Treger,
Professor, University of Illinois at Chicago

We are proposing a descriptive and exploratory study of community service orders in the Northern District of Illinois. Community Service Orders are penal sanctions in which convicted offenders are placed in unpaid positions with non-profit or governmental agencies. The concept of community service in the justice system in the U.S. dates back to a 1913 Wisconsin law. In recent years, community service orders have gained popularity, particularly as an alternative to incarceration, in response to prison overcrowding and the negative aspects of incarceration. In the U.S. District Court for Northern Illinois, this sanction is gaining popularity among the judges and the community service specialists in the probation office who have developed a program of community service supervision and referral.

As community service orders become widespread, some have expressed caution that programs are not being evaluated and that there have been few efforts to assess the impact of the

suspect that there is much more to an effective program operation than the mere completion statistics. Other aspects, such as, the impact on the offender, the community and the court, as well as the official effort involved in the actual completion, and the process involved in the total operation, are all important elements. In contrast to other studies on community service programs this project will seek data from the probationers themselves pertaining to their experiences on community service, as well as the recipient of these services. In summary, this study will provide an opportunity for the offender population and the agencies receiving services to have some input in the design and development of the community service program in our district. These experiences will be studied to determine the offender perceptions on a variety of items pertaining to the community service experience. These items will include the following: How they perceive the purpose of community service, the positive or negative experience in community service, whether the experience was helpful, and suggestions they may have of improving the community service operation. The need for this type of feedback information is apparent when we consider that for the most part public policy-makers and practitioners have largely operated without much knowledge of the reaction and input from the offender population. The practical as well as the theoretical implication of such input from probationers is significant.

interview schedule will be used to conduct the interview. This schedule will consist of three parts: Part I will consist of biographical data which will be obtained from the probationers' file. Part II will consist of the interview data, and part III, will consist of data to be obtained from the host organization where the community service was conducted, pertaining to the organization experience with the probationer.

The research sample will involve probationers with community service orders in this district who are scheduled to complete their court ordered community service between October 1, 1985 and May 31, 1986. Based on the anticipated completion rate for these dates we estimate that approximately 80 probationers will be eligible to be included in our sample.

The usual research ethics in dealing with human subjects will be adhered to. All involvements on the part of the probationers and host agencies will be voluntary and confidential, with the agencies' and clients' rights fully protected.

It is hoped that the findings and recommendations of this study will make an input into future policy decisions regarding the program. The goal is to create a community service program which will be a credit to the agencies that are served; the offenders involved in the service, as well as the community.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
PROBATION OFFICE

DAN W. STOWERS
CHIEF PROBATION OFFICER

517 E. WISCONSIN AVE.
620 FEDERAL BUILDING
MILWAUKEE, WI 53202
PHONE: 414-291-1425
FTS: 362-1425

July 3, 1986

The Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

Once again, I am delighted to have the opportunity to assist the Commission in preparing for the July 15 hearing. The topics outlined in your letter of June 17 are areas where we have had extensive experience that will provide a realistic basis on which to respond to your questions. Furthermore, I have been privileged to have assisted the Federal Judicial Center as the primary instructor of sentencing alternatives to new probation officers for the last ten years.

Sentencing Options:

Having studied sentencing in several states and the federal system for the last decade, I can without reservation inform you the sentencing options presently available to federal judges far exceed those in any other jurisdiction of which I am aware. There seems to exist a Catch-22 between sentencing options and disparity in sentencing in federal courts. Options must be preserved lest the sentencing process loses the very important quality of personalized sentencing.

It is the practice in our district to maintain records on sentences imposed and to review that history each time a sentencing recommendation is made to the court. It is rare, given the limited detail of the data on which we rely, for us to find two offender or offense circumstances that are exactly alike. It is only through the wide range of sentencing options that we are able to aid the court, through sentence recommendations, in maintaining some balance and principle of equal treatment in administering justice through the sentencing process. To narrow the options available to sentencing judges is to unreasonably confine the court to a course of disparity in sentencing.

Probation:

Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?

I am convinced that intensive supervision is an essential component of systematic and effective classification of persons under supervision. Through an efficient classification system, individual defendants can be identified to be subjects of more restrictive conditions of supervision. Generally speaking, intensive supervision translates as surveillance. Although the role of the probation officer is not universally clear in terms of the law enforcement or surveillance function, some offices see persons under supervision once a month and call that intensive supervision; others have intensive supervision cases who are seen as often as daily.

I feel intensive supervision and surveillance are fundamental to supervising offenders in the community and that the process would be more uniformly applied throughout the system if your Commission were to promulgate specific, concrete, detailed standards to be met by individuals identified for the intensive supervision level. Although I suspect it would be highly controversial, I would urge you to issue standards for intensive levels of supervision to aid the communication between the court and the probation office.

How to arrive at who goes into the intensive supervision caseload is, of course, the heart of the issue. The present systems, (i.e. risk prediction scale 1980 and salient factor score) which are being used by the probation system have served their purpose very well. Neither instrument provides, I believe, an adequate basis on which to rank the highest risk client which is that person who belongs in this type of a caseload. I feel certain that the data is available to assist in adapting either instrument to meet this requirement. I urge you to order research to aid in the classification of the highest risk clients.

As to what forms of control and supervision should be imposed? There are only a few methods by which you could promulgate standards. The frequency and nature of contacts is an area that needs further discussion. It is not acceptable, I think, for probationers of this category to be permitted to simply report to the probation officer. The probation officer must have contacts at the home and at the place of employment. Restrictions on the nature and type of employment would be appropriate. The Parole Commission has recently experimented, albeit unsuccessfully in terms of the expected numbers, with curfew parole. I would suspect that a curfew during the early phases of intensive supervision would be very useful for this type client. Administrative policies will have to be developed to structure the authority of the probation officer to clarify any ambiguity regarding his authority to monitor the day-to-day activities of the person under supervision, i.e. financial records, employment verification, contact with collateral sources for verification, family, etc.

As to the role the various figures should play in determining which offenders are placed in the intensive supervision program, I feel the Commission, as previously suggested, must promulgate standards that will serve as a model to the unfamiliar judicial officer and probation office as to the expectation of intensive supervision. The court, of course, may allow the probation office to have full responsibility to carry out the order of the court. I do not feel it should be an automatic requirement in your standards for the court to be active in the monitoring of the intensive supervision case. I do not feel that the court should automatically require periodic progress on this high risk client.

Fines:

Two of the best things to come along in a long time have been the Victim and Witness Protection Act and Fine Enforcement Act. This new legislation brought a renewed appreciation and sensitivity to the cost of crime. We have been diligent in providing the court with as much available detail as to the financial losses to individuals and government as a result of the offense behavior. In a related vein, we have become, I feel, more cognizant of the financial aspects of investigation, prosecution and supervision of defendants. This probation office has systematically and routinely reviewed available fines in all cases when formulating recommendations to the court. Admittedly, ability to pay is frequently a determining factor in recommending fines. The standard we often apply in this decision process is: "Who else is being penalized by imposing an obligation on the defendant to pay a fine?" Quite often, the family is directly affected by the defendant's financial obligation. As is pointed out in the Fine Enforcement Act of 1984, the profit the defendant made from the crime or the loss experienced by his victims is appropriately an important factor in arriving at an available fine.

I urge you not to interfere with the fine structure of existing law. The enhanced fines and the previously mentioned provision for profits and losses have been well received and useful, I feel, in carrying out this important aspect of sentencing.

Restitution:

Again, there has been substantial change in the last few years with regard to restitution. We like the present system which emphasizes the importance of restitution and requires the probation officer to provide the court with as much detail as is available regarding those who have suffered as a result of the offense. The Victim and Witness Protection Act provided badly needed remedies to the long-ignored question of restitution. I feel restitution should be ordered in all cases. Restitution is a responsibility that defendants should carry with them throughout their lives, if not paid during the course of the sentence. This, of course, is precisely what is provided for in existing law. One's inability to pay does not excuse him from the moral obligation to repay his victims. We have many indigent persons under supervision who are faced with thousands of dollars of restituion that we frankly realize will never be paid. Nevertheless, a payment plan is incorporated into their supervision and they are expected to make a reasonable effort to repay this debt. It is rare that we would seek revocation against one who has failed to pay restitution if we feel he cannot reasonably do so. However, it is our standard practice to instruct the defendant of his obligation to pay for the rest of his life and to assist in setting up a payment plan prior to the expiration of supervision.

Community Service:

You are, of course, aware the Administrative Office, U. S. Courts, has done substantial research in this area and is preparing to issue a monograph. I yield to their better experience and urge you to follow their guidance. Having said that, we make frequent and regular use of community service order of recommendations and have found them to be universally useful in both a practical and philosophical sense.

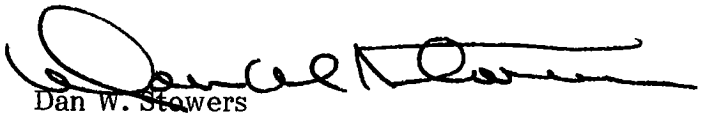
House Arrest:

Is this a viable alternative to incarceration? If so, under what circumstances?

The Eastern District of Wisconsin is one of three federal districts who, as far as I know, has used house arrest. My impression is that we have gained more experience on this subject than anyone else in the federal system in a very short period. Although the program is in its embryonic stages, we have the greatest confidence that it will eventually serve as an appropriate and viable sentencing alternative available to the judges in this district. The probation office has made a substantial commitment in terms of man hours and resources to the program. I have enclosed several documents that may be useful to you in understanding the kind of structure we have brought to the program. These documents are the product of a special committee in this office who spent extensive time in discussions, research and drafting of guidelines to govern the policy in this district. I trust you will find them useful.

Thank you again for the opportunity to assist as you continue the ambitious task of developing guidelines for sentencing in U. S. District Courts.

Sincerely yours,



Dan W. Stowers
Chief U. S. Probation Officer

DWS/vlh

(ED/WI)

Policy Statement: June 1986
(Chapter 3, Probation Manual)

HOME DETENTION: Phase II

Program Guidelines:

The Home Detention Program in the Eastern District of Wisconsin will be divided into two phases. Phase I is the most restrictive. The guidelines which have been adopted by the probation office and published in Chapter III of the Probation Manual are generally applicable to Phase I and II of the Home Detention Program except where otherwise stated. Phase II of the program is a less restrictive stage wherein the detainee is permitted freedom to come and go at will except during a curfew period prescribed in these guidelines.

It is anticipated home detainees will progress through the stages to ultimately being released by court order from the home detention restrictions and placed on normal probation supervision. The progression through the stages will be constructed around the six-month case review process and staffed and documented accordingly.

Progressive reduction from Phase I to II is not automatic. The client must first meet all conditions of the program. The six-month period triggers an automatic review process but does not guarantee or suggest that any change will be made.

Phase II: Defined:

The guidelines for Phase II have been developed to apply to curfew parole as well as direct court and Parole Commission commitments to Phase II. Hereafter, the term Phase II applies to all categories of detainees within the scope of this program.

Phase II is an extension of Phase I except that the client is restricted to an approved place of residence between the hours of 9:00 p.m. and 6:00 a.m., or if the client is working an alternate shift, he may be restricted to an approved place of residence at such other times as approved by the USPO. The restrictions and prohibition against having parties or receiving visitors which applies to Phase I is lifted for Phase II.

Criterion for Phase II Candidates:

A. Complete Phase I without violation.

B. Complete Phase I by gaining and maintaining approved employment, or full-time academics, or child care, and meeting all other conditions.

C. Except where ordered as a special condition of probation or parole.

Frequency of contacts:

All participants in the Phase II portion of home detention will be contacted not less than three days a week; one of these contacts will be made on the weekend. The home detainee will be subject to contact seven days a week, between the hours of 9:00 p.m. and 6:00 a.m. Contact times and days will be staggered to avoid appearance of a pattern.

Nature of contacts:

Not less than three contacts per week must be with the detainee, either in person or by telephone. It is understood that most contacts with detainees in Phase II will be telephonic given the non-working hours involved. Officers are encouraged to make home visits when schedules and opportunity permit.

Period of Supervision:

Early release from Phase II home detention will be rare. If the detainee makes satisfactory adjustment to Phase II for six months, the USPO may petition the court to reduce the offender to regular probation supervision by using the standard Probation Form 12. The matter will first be staffed with the CUSPO; then referred to the court for a final decision. The probation office may not on its own remove a probationer from home detention.

ADDING HOME DETENTION WHILE ON ACTIVE SUPERVISION

Home detention may be considered by the probation officer as a treatment alternative in and of itself for probationers and parolees during the course of active supervision. In either case, placement on the program will be through the use of a special condition. Home detention may be considered as an alternative to prison when, during the course of supervision, a problem arises.

Parolees:

Until otherwise notified, parolees' participation in the program shall be limited to Phase II. Phase II may be considered by the USPO as an alternative to a warrant when a violation has occurred. All requests for special conditions of parole for Home Detention Phase II will be staffed with the CUSPO. The probation officer may then proceed in a manner similar to any other request for special condition or modification made to the Parole Commission. In addition thereto, the probation officer will submit to the Parole Commission copies of the office policy delineating the requirements for Home Detention Phase II. The probation officer will delineate with specificity his reasons for requesting this alternative. The parolee shall be advised of the voluntary nature of the program.

Probation:

Home Detention Phase II may be used by the courts as a special condition of probation at the onset of probation or it may be imposed anytime thereafter. When, in the judgment of the USPO, a violation of probation occurs or the need for home detention otherwise arises during the course of supervision, the PO may consider home detention as an alternative to incarceration. Upon a decision to proceed in this fashion, the probation officer will prepare a memo and petition to the court (Form 12) requesting the new special condition of probation. Failure of a probationer to consent to the condition through a waiver of his court appearance will be staffed with the CUSPO before further action is taken.

In any case where Home Detention Phase II is imposed as a special condition, the probation officer will be responsible for insuring, as soon thereafter as possible, the client executes the Rules of Home Detention Phase II Form.

(ED/WI)
(June 1986)

RULES OF PHASE II HOME DETENTION AND CURFEW PAROLE

_____, you have been placed on Home Detention Phase II/Curfew Parole for _____ months as a condition of probation/parole. The period of these restrictions is from _____ to _____. It is the order of the Court/Parole Commission that you should comply with the probation department's rules and regulations during the period of home detention.

GENERAL:

The residence to which you shall be confined is (define precise boundaries or other limitations):_____

_____.

You shall remain within the confines of your residence between the hours of _____ to _____, seven days a week except when excused by your USPO.

SPECIFIC CONDITIONS AND ADDITIONAL RESTRICTIONS:

1. You must have a telephone at your residence and provide the USPO with a copy of your phone bill each month. You may not have call forwarding service or a mobile phone.

2. You must allow the USPO to visit you at your residence at any time and you shall respond to all phone calls during the curfew hours.

3. You may leave your residence during curfew hours for genuine emergencies. You should report any emergency to your USPO at the first available opportunity. You will be expected to provide documented proof of the emergency.

4. You must provide the USPO with copies of paycheck stubs, medical and dental appointment verfication slips and such other documentation as may be required.

ADDITIONAL INSTRUCTIONS:

_____

_____

_____

_____

_____

_____

_____

_____

I have read or had read to me the above and have been given an opportunity to request clarification from the probation officer and discussed with him the procedures I am to follow. I understand that if I should violate any of these terms, such shall be deemed a violation of my probation/parole and I could be arrested and returned to court/confinement as a violator. I fully understand these rules and I will abide by them.

(Signed) _____ _____
Probationer/Parolee Date

(Signed) _____ _____
U. S. Probation Officer Date

(ED/WI) Policy Statement: November 1985
(Chapter 3, Probation Manual)

HOME DETENTION: Program Guidelines.

Purpose: Home Detention is a sentencing alternative available to all defendants who are otherwise eligible for a sentence of probation. Home Detention may be imposed by any judicial officer as a condition of probation.

This alternative is designed primarily for the non-violent middle-range of offenders who fall somewhere between those who would normally receive short terms of imprisonment and those who would receive long terms of probation. The primary purpose of the program is to assure that the offender commit no further offenses against the public safety. The program will emphasize protection to the community through monitoring and surveillance of all cases.

Home Detention will provide a correctional alternative to federal judicial officers which will meet the sentencing objectives on a small and unique group of offenders.

Scope: The probation officer who supervises the home detainee shall have sole and ultimate responsibility for enforcement of the conditions of Home Detention. All suspected or verified infractions of the conditions will be staffed with the Chief Probation Officer as soon as possible to arrive at a decision as to whether or not the matter should be reported to the court.

Place of residence shall be construed to include the offender's abode (home, apartment, house trailer, etc.). In the case of a single family dwelling, he shall not leave the boundaries of the property. The USPO will expressly outline the limitations in the space provided on the original Home Detention agreement.

Role of the Probation Officer:

1. To provide surveillance to Home Detainees by visiting the offender's residence to observe confinement to his residence, curfew, or other conditions.

2. To make sure the offender is reporting to work or other approved places when not confined to his residence.

3. To cultivate and check with collateral field contacts including law enforcement officers and other sources of intelligence who could provide information on the behavior of the offender in areas relating to the conditions of his home detention.

4. To provide frequent contacts with the offenders seven days a week to include weekends, evenings and holidays.

5. To keep informed concerning the conduct, habits, associates, employment, recreational activities, and whereabouts of the detainee.

Frequency of Contacts: All participants will be contacted not less than five days a week for an average of not less than seven times a week. The Home Detainee will be subject to contact seven days a week, morning, afternoon and nights. Contact times and days will be staggered to avoid a pattern. All contacts will be unannounced and random.

Nature of Contacts: Seven contacts per week must be with the detainee either in person or by telephone. Not less than two of the seven contacts per week will be eyeball contacts in the community. Personal office visits will not count toward meeting this minimum standard.

Most of the contacts will be by telephone. All telephone contacts initiated by the detainee will be returned to the given number. Collateral contacts will be made not less than twice per month with a "significant person" (i.e. spouse, roommate, employer, etc.)

Off-Duty and Weekend Contacts: To assure a meaningful exercise of the surveillance and enforcement duties which have been delegated to the probation officer, occasional contacts must be made during off-duty hours, weekends and holidays. When the primary USPO is not available for duty such as annual or sick leave, it will be his responsibility to arrange for contacts to be made in his absence. The USPO should coordinate with the CUSPO for reassignment during any period of absence.

The probation officer may use a variety of techniques to meet the requirement for off-duty contacts. Calls and home visits will be made during reasonable hours. Reasonable hours are all those hours of the day other than those hours when the defendant routinely rests to prepare for the workday.

Period of Supervision: Home Detainees will normally serve the entire period of detention which has been set by the court. Recommendations for participation in the program will be limited to two years.

Early release from Home Detention will be rare. If an offender makes a satisfactory adjustment and completes the conditions imposed by the court prior to the expiration of the full term, the USPO may petition the court to reduce the offender to regular probation supervision by using the standard Probation Form 12.

Required Verifications: The USPO will require the detainee to submit the following verifications each month and add copies to the file:

1. **Employment:** All home detainees will be required to work or actively seek work. The USPO will require check stubs at the end of each month. In the event the home detainee is unemployed, he may be permitted to be away from the residence at specific times with advance approval to seek a job and make applications for employment. In such case, the home detainee will submit verification of his job seeking activity to the USPO.

2. **Residence:** Rent receipts or mortgage payment receipts.

3. **Communication:** Telephone bills showing the address where the phone is located. The phone bill will be reviewed for call forwarding and mobile telephone service.

4. **Religious Affiliation:** Documentation proving membership in any religious organization in which he intends to participate in services.

5. **Medical Needs (either physical or psychological):** Medical bills and proof of appointments made and kept.

6. **Transportation Needs:** Wisconsin Driver's License, automobile registration certificate and verification of auto insurance coverage.

Sign-Up Procedure: The rules of Home Detention will be reviewed during the initial processing immediately after the sentencing hearing. The additional notes section of the form may be used for any clarification the USPO feels is appropriate. Careful attention should be given to the hours of employment section and the specific definition of the boundaries.

Should the probationer refuse to sign the Rules of Home Detention Form, the CPO or SUSPO should be brought into the room to witness that the contact rules form was read aloud to the probationer. The home detainee should be notified the court will be informed of his refusal and that the probation officer will recommend immediate revocation of their probation and incarceration.

Reporting Violations: Should the detainee fail to respond to a telephone call or community or home visit, the probation officer will (within ½ hour or as soon as possible thereafter) investigate the potential violation through means which are appropriate to the situation (i.e. follow-up phone call, home or community visit, collateral contact with family or neighbor, etc.).

When the probation officer has exhausted the investigative resources and has assured himself that there is reasonable cause to believe that a violation has occurred, he will report the violation to the CUSPO. After the violation has been staffed with the CUSPO (and upon a decision that the violation report should be filed with the court), the probation officer shall prepare a violation report and Probation Form 12 in a manner similar to any other probation violation.

CLASSIFICATION PROCEDURES:

The Case Classification and Initial Supervision Plan (Form 42) will be completed within five working days of sentencing and a case review (Form 43) will be completed in six-month intervals thereafter. Forms 42 and 43 should include any special court-ordered restrictions or conditions imposed on the home detainee. The supervision plan will indicate the nature and frequency of contacts as well as any community resources which are going to be utilized in meeting the surveillance requirements. The SUSPO will conduct regular reviews of the home detention cases to ensure compliance with the minimum contact standards.

All home detention cases will be classified as **HIGH ACTIVITY - INTENSIVE SUPERVISION** to distinguish them from other high activity cases. **Intensive Supervision** will be added next to the high activity classification on Probation Forms 42 and 43 and on the RPS-80's for all home detention cases.

RECORD KEEPING:

All contacts with the home detainee and others will be recorded immediately after they occur on the home detention contact sheet found on the right-hand side of the case file. The comments section of this sheet should be used to indicate the name of the person contacted and his relationship to the detainee. Significant changes in the individual's situation or status should be transcribed in the chronological log located on the left side of the file. Case openings and closings, as well as violations and supervisor conferences should be included in this chronological record.

Travel vouchers (Prob. Form 17) will be completed for any out-of-office travel related to the surveillance and supervision of the detainee. The letters **H.D.** should be placed under the supervision code as well as the symbols **HV** or **CV** to indicate the nature of the contact.

SPECIFIC RULES:

1. Unless specifically authorized and approved by the probation officer, you are to remain in your place of residence during your entire period of home detention.

2. If authorized to be away from your place of residence by the probation officer, you are to only go to those places and at the times authorized by him/her.

3. You are specifically directed not to engage in, participate in, or attend any parties, celebrations or social gatherings at your place of residence.

4. You must have prior approval from the probation officer to have visitors in your place of residence. This approval will specify the hours you may have visitors.

5. You must allow the probation officer into your place of residence upon his/her demand, at any time of the day or night.

GENERAL REMINDER:

A violation of any condition of your probation, including the home detention, rules may result in your arrest and/or your being taken back to court for further action, which may include your serving the remainder of your jail sentence in the county jail.

Authority to be away from your place of residence:

You are hereby authorized to be away from your place of residence on the days and at the times authorized below. A violation of this authorization may result in the immediate suspension of this authorization, and also may result in your being arrested and/or returned to court for further action.

Days: (Number) _____

Hours: (from when to when) _____

From: _____

To: _____

Purpose: (school/work) _____

_____
U. S. Probation Officer

(ED/WI Form)
(11/85)

RULES OF HOME DETENTION

_____, you have been placed on Home Detention for _____ years as a condition of probation. The period of confinement is _____ to _____. It is the order of the court that you should comply with the Probation Department's rules and regulations during the period of home detention.

GENERAL:

The residence to which you shall be confined is _____

_____

_____.

You shall remain within the confines of your residence at all times except:

1. To maintain gainful employment and a reasonable time to travel to and from work.
2. To participate in religious services of your choice with the advance approval of the USPO.
3. To receive psychological treatment, drug/alcohol treatment, medical and/or dental care with advance approval of the USPO.
4. For such other purposes as the USPO may deem essential.

You will be allowed to be absent from your residence between the hours _____ to _____ for employment on the following days _____.

SPECIFIC CONDITIONS & ADDITIONAL RESTRICTIONS:

1. You must have a telephone at your residence and provide the USPO with a copy of your phone bill each month. You may not have call forwarding service or a mobile telephone.
2. You must allow the USPO to visit you at your residence at any time.
3. You may not engage in, participate in, or otherwise attend parties, celebrations or social gatherings at your residence without advance approval of your USPO.

4. You may leave your residence for genuine emergencies. You should report any emergency to your USPO at the first available opportunity. You will be expected to provide documented proof of the emergency.

5. You will not use alcohol in excess; nor will you visit places where alcohol is served.

6. You must provide the USPO with copies of paycheck stubs, medical and dental appointment verification slips and such other documentation as may be requested.

ADDITIONAL INSTRUCTIONS:

_____

_____

_____

_____

_____

_____

_____

I have read or had read to me the above terms of my sentence of home detention. I have been given an opportunity to request clarification from the probation officer and discuss with him the procedures I am to follow. I understand that if I should violate any of the terms of my home detention, such shall be deemed a violation of the conditions of home detention and I could be arrested and returned to court as a probation violator. I fully understand these rules of home detention and I will abide by them.

(Signed) _____ _____
Probationer Date

(Signed) _____ _____
U. S. Probation Officer Date

(ED/WI Form)
(Nov. 1985)

HOME DETENTION CONTACT SHEET

Name: _____
Phone: _____(Home) _____(Work)
Work Hours _____

Type of Contact

Month: _____

Date	Time	T/P	T/C	OV/P	OV/C	HV/P	HV/C	CV/P	CV/C	U/A Taken	Comments (Names of People Contacted)
1											
2											
3											
4											
5											
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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF GEORGIA
PROBATION OFFICE

July 2, 1986

U.S. Post Office & Court House
P.O. Box 1766, ALBANY 31702
912-439-9741

U.S. Post Office & Court House
P.O. Box 703, ATHENS 30603
404-546-2159

U.S. Post Office & Court House
P.O. Box 494, COLUMBUS 31902
404-322-6212

U.S. Post Office & Court House
P.O. Box 456, VALDOSTA 31601
912-247-0631

Daniel C. Lanford, Jr.
Chief U.S. Probation Officer

Robert C. Hughes, Jr.
Supervising Probation Officer

U.S. Post Office & Court House
P.O. Box 13, MACON 31202
912-743-6376

REPLY TO Macon

Honorable William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

This is to address your letter of June 17, 1986, regarding the Sentencing Commission's fourth hearing concerning "sentencing options available and appropriate for the individual convicted of a federal offense." Each of the topics as listed in your letter is a rather broad area, and if treated properly, perhaps solicits a lengthy response. I have attempted in this letter however to remain somewhat general and address each topic in some manner.

Efforts to make a sentence of probation a "tough" sentence and the continuous search for ways to punish offenders outside the confines of institutions have led to a new focus on intensive supervision in many areas to include the State of Georgia. Some have argued that intensive supervision is what the average probation sentence should be. I am in agreement with the theory behind intensive probation supervision and feel that this sentencing alternative should be considered in the future for use in U. S. District Court sentencing. Certainly, potential participants for a program of this nature must be properly screened, and it is here that I think the United States Sentencing Commission could assist in formulating policy, guidelines, and boundaries for a program of this nature. It is recommended that only non-violent felons or misdemeanants be considered for a program of this nature, and these offenders should be identified through the presentence process. It is also recommended that the nature of the instant offense, the defendant's prior criminal record and employment record, marital and family situation at present time, and health to include physical and mental condition are factors which must be analyzed.

Supervision and control of the offender in a program of intensive supervision must be of a close nature. Regular, multiple personal contacts at home, on the job and throughout the offender's daily routine must be conducted unannounced. Any deviation from the established program regulations must be dealt with in a swift and punitive manner. It is also suggested that house arrest may be considered a viable alternative to a prison sentence and possibly may be combined with a period of intensive probation supervision to accomplish a specific sentencing objective. The alternatives for special conditions of

probation as listed in Title 18, United States Code, Section 3563 offer the Court a wide latitude in crafting special conditions which would serve to enhance an intensive supervision period. It is suggested however that a program of this nature would require additional funding which possibly may be passed to the offender through a special condition of the intensive supervision program. The recent establishment of a system for collection of mandatory assessments in the Federal Court system appears to have been accomplished rather smoothly, and it is suggested that a special condition affording the sentencing court the latitude to institute a special condition requiring the defendant to pay a supervision fee may offer a solution to the funding problem of a program of this type.

The State Probation system in Georgia has acted somewhat as a pioneer in the intensive supervision arena. I have had numerous discussions with state probation authorities concerning their intensive supervision program, and these officials have indicated that overall they feel that this program is a success in the area. I have attached several magazine articles dealing with these programs in the State of Georgia. It is suggested that the article, "Tough new program puts teeth into probation" which was printed in the Georgia Peace Officer magazine in October, 1982, provides a brief, clear overview of Georgia's three-phased intensive supervision program.

Another viable sentencing alternative in use today in many federal judicial districts is community service. Certainly there are many advantages to the use of this alternative. Initially there is the value of the probationer's services to the agency. Second, performing work of this nature may have some "atoning" effect on the client, and third, community service work provides the United States probation officer another alternative for contact with the probationer to allow the officer to monitor the client's activities. In this district we have found that community service may be used as a leverage to encourage an individual to look for a job. For example, special conditions requiring an individual to work full-time and when out of a job, perform community service many times encourages the defendant to return to a "paying job".

As with a program of intensive probation supervision, participants in community service work must be well screened through the United States Probation Office and United States District Court. Again, it is suggested that the presentence investigation serves to highlight characteristics necessary to make decisions concerning acceptability for participation in such a program. Career criminals and persons of a violent nature cannot be placed in community agencies as we must remain cognizant of agency goals and agency personnel when formulating decisions concerning placing offenders in an agency. Based on experience with community service in this district, it is suggested that white collar offenders, female offenders, first time offenders and those offenders with little in the way of prior criminal record tend to adjust satisfactorily in programs of community service. In many instances in this district those placed in agencies have continued to perform service following termination of probation supervision. Quite interestingly, we have found that on many occasions white collar offenders have experienced some degree of embarrassment having to perform menial tasks for community agencies which in the long run has served as a form of punishment in some cases.

A viable program of community service must be well structured and the program coordinated in a centralized manner within the probation agency. The program must remain dynamic, and it is recommended that a specific individual probation officer be identified to continuously work to develop a network of agencies within the community who will provide service alternatives. Furthermore, this officer must conduct liaison with agency heads to monitor service within the agency, answer questions, et cetera. Sentencing courts can be most helpful in developing alternative agencies within the community through liaison activities and recognition of those persons and agencies for their participation in such programs.

In some instances, fines offer a realistic sentencing alternative. It is suggested however that the imposition of a fine as a complete sentence in a case be retained for petty offenses or misdemeanor offenses only. It is our opinion that fines in connection with prison or probation may serve to enhance a felony sentence. The statutory guidance as provided in the Fine Enforcement Act of 1984 provides what we have found to be valid considerations in determining fines. Certainly the Court must examine an offender's gain as well as his "present ability to pay". This information should be well documented in the presentence report. Attention should also be focused on the defendant's present employment and his future ability to pay during a period of probation supervision. Allowance should be made for future ability as well as his present ability to pay.

It is recommended that persons as well as organizations who are fined be held accountable for failure to pay the appropriate fine. Should an individual offender fail to pay this fine, the Court should take punitive action if it can be established that the defendant was in fact malingering and/or had the financial resources to pay the fine and failed to do so. Repercussions of failure to pay a fine must include prison sentences.

The subject of restitution is closely related. It is suggested that two conditions be present before restitution is ordered by the sentencing court. First, a victim should be identified, and secondly, the defendant should have the present or future ability to pay this restitution. Unfortunately, in the past Courts have in some instances ordered restitution when it was not financially feasible, and of course this results in complications and sentence modification at a later date. In those cases where the defendant does not have the financial resources to make restitution, it is suggested that some "general" restitution be considered through the form of community service. It is also suggested that Courts should consider imposing restitution "to stand committed" if the Court finds "present ability to pay". This possibility may possibly facilitate collection of the restitution and timely submission of these funds to the victim.

In summary, intensive probation supervision, fines, restitution, community service and house arrest are viable sentencing alternatives for use in United States District Courts. It is suggested however that some consideration be given to the impact these alternatives have on supervision practices and methods within United States Probation Offices. Certainly an increased use of these alternatives demands an increased workload of probation officers and

reorientation in philosophy for some offices and officers. It is hypothesized however that the United States Probation system would experience a smooth transition and would welcome the opportunity to experience new work roles.

Sincerely,

Robert C. Hughes, Jr.
Supervising U. S. Probation Officer

RCHjr/tam

Attachments

10/82

A new approach to prison overcrowding

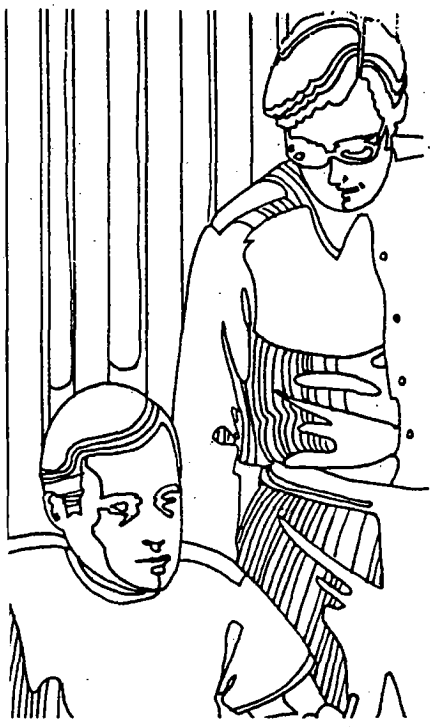
Tough new program puts teeth into probation

By JOHN T. TRUSSEL, President Georgia Probation Association and MITCHEL DAVIS, Probation Officer II, Houston Judicial Circuit

The Probation Division of the Department of Offender Rehabilitation has responded to the problem of overcrowded prisons in Georgia and at the same time implemented a probation program that puts more "teeth" into probation. Under this new program, offenders will have to earn the right to remain free.

With the overcrowded situation in the Georgia prisons and the constantly increasing crime rate, the Probation Division of the Department of Offender Rehabilitation is constantly trying to improve services and implement new ideas that will help to ease some of these problems. Another problem then arises because new programs usually mean more personnel and more personnel require more money. Faced with these dilemmas, the Probation Division came up with a new program to help ease prison overcrowding and at the same time devised a way to fund the project without adding to the burden of Georgia taxpayers. The project is an Intensive Probation Supervision Program and its source of funding comes from a probation fee collected from offenders on probation.

Actually, neither idea is new. The idea of an intensive supervision program has been used in Georgia and other states before, but never to this degree or with as tight controls as the present program. The probation fee is an idea adapted from programs in nine other states where fees have been assessed on misdemeanor cases, as in Michigan since 1929, and on a statewide basis, on both felony and misdemeanor cases, in Colorado since 1949. Other states have just recently started to collect probation fees from probationers, two of these being our neighbors in Florida and Alabama. Some of these fees vary from $2 to $50 per month, while other states assess probationers on a



one-time flat rate of $50 to $100.

Earlier this year, a legal opinion was obtained from the Georgia State attorney general, who stated that an act of the legislature would not be necessary to implement the assessment of a probation fee. Through an agreement between the Georgia Probation Department and state and Superior Court judges, it was decided to start assessing probation fees on probationers sentenced on or after May 1, 1982. With the exception of just a few circuits, probation fees are now being assessed and collected statewide.

In most circuits, all persons placed on probation are assessed to pay a monthly probation fee ranging from $10 to $50 per month, depending on their financial status.

In certain circumstances, probationers can be totally exempted from the payment of fees or given a stay until their financial situation improves. A 60-month payment maximum has been placed on felony cases that run five years or longer. The fees are collected on a monthly basis and turned over to the Probation Division Central Office at the end of each month. These fees are then used to fund Intensive Probation Supervision teams throughout the state without any cost to the taxpayers of Georgia.

The Intensive Probation Supervision Program was designed with five main goals in mind:

1. To improve protection of the community through the use of enhanced surveillance techniques.

2. To increase by 5 percent the probation of offenders diverted from prison in those circuits having an Intensive Supervision Team within 18 months of the program start-up.

3. To increase the use of probation by the courts in targeted circuits (where a larger number of offenders have traditionally been sent to prison rather than being placed on probation).

4. To achieve a 50 percent successful completion rate in the Intensive Probation Supervision Program.

5. To identify the number of offenders suitable for diversion by using post-sentence screening.

The main rationale behind the program has been to provide an alternative to prison that would pro-

vide a just punishment for the criminal, while keeping the protection of the public as a primary focus. In a time when the cost of housing one prison inmate has risen to over $8,000 per year, an alternative was needed that would be just as effective as prison without placing a burden on taxpayers that building new prisons would.

The Intensive Probation Supervision Team itself consists of a Probation Officer II and a Probation Surveillance Officer responsible for a maximum of 25 marginal risk offenders. Marginal risk offenders would include non-violent felons or misdemeanants who have been sentenced to prison. To insure that these offenders are actually being diverted from prison, candidates for the program are chosen from offenders who have already been sentenced to prison terms. The sentencing judge is then asked to amend the sentence to probation for appropriate candidates.

Each offender in the program is under daily surveillance. The Probation Officer II has primary responsibility for the case and gives major emphasis to employment, continuing education, counseling, community resource referral, and collection of court-ordered fees. The Probation Surveillance Officer is primarily responsible for surveillance, including home visits on weekends and at night to insure that the offender is abiding by the terms of probation. This officer is also in charge of the community service work done by the offenders.

In addition to being supervisedby probation office staff, one or more community sponsors are identified for each offender. These community sponsors are persons who are carefully selected to help observe the offender in the community. Usually the community sponsor is a neighbor, who is carefully instructed not to become involved in the surveillance duties of the professional officer, but to help as a concerned person who is limited to observing the probationer.

A list of all probationers on Intensive Supervision is given to all local law enforcement agencies each month and a weekly record check is conducted to insure that the probationer has not been arrested. In addition, each probationer's name is entered into the statewide crime information computer to insure instant notification if the probationer is arrested or questioned anywhere in the state.

Under the Intensive Probation Supervision Program, there are three distinct phases which the probationer must complete. Probationers are rewarded for progress by gradually easing some of the restrictions on them. Under Phase I, the probationer's family members are contacted within the first ten days after sentencing to inform them of the probationer's participation in the program and to elicit their cooperation. Face-to-face contact with the probationer is required five days a week and consists of three day contacts and two night contacts. Typically this would include one office visit by the probationer, two visits in the probationer'-home at night, one on-the-job visit, and a Saturday morning contact while the probationer is performing community service. Periodic weekkend checks are also made. Verification of the probationer's employment is made twice a week and a curfew is set by the Probation Officer of no later than 10 p.m.

All Phase I probationers are required to complete eight hours of community service, and all unemployed intensive probationers are required to seek jobs in the morning and complete community service every afternoon until they obtain employment. This first phase lasts a minimum of three months.

If a positive response has been obtained in Phase I, a probationer may be moved into Phase II for an additional three to twelve months, where close contact is maintained, but some of the restrictions are relaxed.

In Phase III, each case is carefully reviewed and, if goals are being accomplished, a recommendation is made to the judge for transfer to regular probation. If the judge disapproves the transfer, or it is decided not to transfer the case to regular probation, then the probationer remains in Phase III under close supervision until it is felt he can be successfully supervised on a regular probation caseload.

Just as success is rewarded in a gradually progressive manner, punishment is also handed out in a progresive manner with each violation bringing more severe consequences. For a first offense, depending on the seriousness of the violation, an intensive probationer may receive a verbal reprimand for failing to report up to a complete revocation for a new criminal offense.



In addition to being supervised by probation office staff, one or more community sponsors are identified for each offender.

Community service is an important part of the Intensive Probation Supervision Program: Community service has been in use for years as a part of a restitution program instituted by the Probation Division in 1977. Community service is used as a rehabilitation tool for the probationer as well as a benefit to the com-

munity. This work, for which they are not paid, enables probationers to become personally involved with meaningful projects in their own area while the community becomes the recipient of constructive service. For both the probationer and the community, this use of community service may enhance the feeling of atonement for the probationer's criminal act.

Some examples of community service work performed by probationers in the past include a clean-up project for a small community cemetery, involvement with community action agencies, work in day care centers, sprucing up around an apartment complex for the elderly, and distribution of gifts and fruit baskets to the elderly at Christmas time. The work provides probationers with a sense of accomplishment and often helps them to feel the satisfaction of helping another person. At the same time, the community benefits, and local citizens get to see probationers doing something constructive for the community.

The Intensive Probation Supervision Program was instituted initially in 13 judicial circuits in the state. As more money is collected from probation fees, more teams will be established in circuits throughout the state. The eventual goal is for each judicial circuit in the state to have an Intensive Probation Supervision Team within the near future.

The Probation Division of the Department of Offender Rehabilitation has put a great deal of work into these programs and thinks they are among the more positive efforts being made to alleviate overcrowded conditions in our state's prison system today while maintaining maximum public safety. The close supervision and rehabilitative services will enable the probationers to return to their communities as more effective citizens, who are less likely to become involved in further criminal activity. Probably the most unique part of this whole effort is that all of this can be accomplished without adding to the already heavy burden of the taxpayer.

Every member should remember

That when our membership is sustained on a paid basis, with new members added month by month, WE ARE MAKING PROGRESS! Our goal is 100% membership throughout Georgia. Will YOU help?

First, and NOW, by renewing your own membership — then by helping get new members, so as to make YOUR local organization one of the 100% group.

Every member of the PENSION FUND should be a member of THE PEACE OFFICERS ASSOCIATION, the group that worked for years to make pensions a REALITY. It's worth MUCH MORE than the $10.00 dues to be associated with more than 10,000 other officers working for YOUR interests, and the welfare of ALL officers in Georgia. In addition, we know our MAGAZINE will be worth much to you also.

If you are not a member of the Pension Fund, WE URGE YOU to associate yourself with the group that is working so hard for widows and members now on pension, for in helping them you are insuring YOURSELF.

Please use the application form below — for yourself, if your membership is in arrears, or to get a NEW member.

USE THIS BLANK TO SIGN UP ANOTHER MEMBER TODAY

MEMBERSHIP APPLICATION

Last Name _____ First _____ Middle _____

Title _____ Police Agency or Department _____

In Enforcement Field? _____ (Yes-No) Do You Work Full Time? _____ (Yes-No)

And Paid? _____ (Yes-No) Retired? _____ (Yes-No)

Mailing Address _____ (Street or R.F.D.) City _____ (Zip Code)

Years Served as a Peace Officer _____ Age _____

If Pensioned, By Whom _____

Application for ☐ New ☐ Renewal Membership in the Peace Officers Association of Georgia. I enclose herewith my annual membership dues of $10.00 in THE PEACE OFFICERS ASSOCIATION OF GEORGIA for one year. $2.00 of the above amount which is for my subscription to "THE GEORGIA PEACE OFFICER" for one year.

Are you a member of Peace Officers Annuity and Benefit Fund?
Make all remittances payable to:
The Peace Officers Association of Georgia
P.O. Box 868, Americus, Georgia 31709

P.O.A.G. Dues ☐ $10.00
P.O.A.G. Rear Window Sticker ☐ $ 2.00
P.O.A.G. Lapel Badge ☐ $ 2.00
Front P.O.A.G. Tag ☐ $ 2.00
(For Voting Members Only)

(Do Not Fill In Below — For Secretary's Use Only)

Membership Card Number V_____ A_____

Corrections
MAG 4/83

INTENSIVE SUPERVISION
Can It Rehabilitate Probation?

by Stephen Gettinger

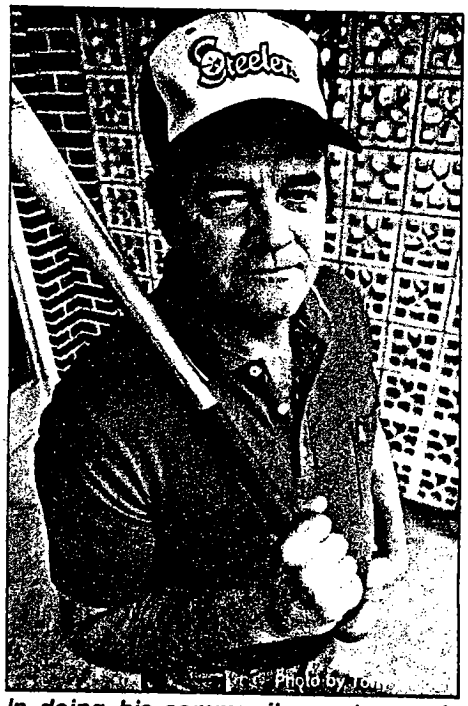
"HARRY Brock, AKA 'Turk' Brock, is a 41-year-old white male who, by his own admission, has been charged with or has served time for almost every crime known to man except child molestation and murder."

This is not an auspicious beginning to the presentence report of a man who wants to avoid imprisonment — especially in Georgia, which, according to a report by its own Department of Offender Rehabilitation, "imprisons more civilians per 100,000 population than any other political entity in the world." Harry Brock was already on probation for passing 11 bad checks, for driving while intoxicated and for being a "habitual violator," a charge which can carry five years' imprisonment. Then, last April, he was picked up again after walking out of a bar and trying to drive his girlfriend's car. Out on bail, he fled to Tennessee for more than a month. After he returned, the judge revoked his probation and sentenced him to three years and seven months in prison.

But Georgia corrections officials, who administer one of the most crowded systems in the country, have little room in their prisons, even for people like Harry Brock. Last summer, they inaugurated an "intensive probation" program to punish offenders without putting them behind bars.

Judge Charles Pannell, Jr., a former district attorney, was skeptical of the intensive probation program that the state set up in his county. So when probation officers Roger Pressley and Billy Bearden came looking for cases, he decided to give them a real challenge: Harry Brock. "He gave us a nasty laugh when he did it," Pressley recalls.

With his heavy prior record, Brock did not meet the guidelines for the program. And it seemed unlikely that Brock could live within the requirements of intensive supervision: that he get and keep a job, pay restitution, and a fine, do 132 hours — three full weeks — of community service,



In doing his community service work, Harry Brock turned his interest in softball into a paying job.

and meet a 7 p.m. curfew. Brock was the first to admit that for more than 20 years his major occupations had been drinking ("I wore them clubs out"), committing petty crimes, and playing softball ("That's my game; that's all I ever did in my life").

For an ordinary probation officer with 150 other cases, to supervise Brock under such rules would have been absurd. But Pressley and Bearden together share only 19 other cases. The first two weeks Brock was on probation, they visited him 12 times. Since then they have seen him five times a week, at all hours of the day and night. They turned his softball-playing into an asset; his community-service work at a recreation center became a paying job. They recruited his girlfriend (a no-nonsense nurse who had been his high-school sweetheart) and other acquaintances to help keep him in line. Except for one minor curfew violation, at this writing Brock had walked the straight and narrow for six months, and appeared to be making a strong effort to pull his life together.

Although Brock is by no means out of the woods, he is as close as he has ever been; he himself says it is his last chance to avoid an old age spent behind bars. "Look at what Roger Pressley has done for Harry," says his girlfriend. "He's proved that people can change."

The Georgia Intensive Probation Supervision (IPS) program is the strictest form of probation for adults in the United States. It is the most ambitious of several programs across the country that are attempting to make probation a tough sanction against crime. Officials hope these programs can control and punish many minor offenders who are now filling up the nation's prisons.

In Georgia's IPS, 13 teams across the state — each composed of a probation officer and a "surveillance officer" — watch over no more than 25 probationers. They see them at least five times a week, and often more. Everyone has a curfew, which is checked frequently. "Sometimes I'll hit them at 7 p.m. and Billy will come back at 11," says Pressley. With heavy surveillance and other features (substantial community service, restitution, fines, and community volunteers who act as

sponsors), the Georgia program adds up to a substantial penalty. But, as Harry Brock puts it, "anybody with any natural sense would rather do this than go to prison," and that is the alternative.

Georgia is trying to make sure its program is used only for offenders who otherwise would have gone to prison. In most counties, IPS officers screen only those who have already been sentenced to prison terms; sometimes they have gone to prisons to bring inmates back into the community on probation. The IPS teams are concentrated in the counties that send the most people to prison, and the program was designed to appeal to the state's most conservative judges.

New York, Texas, Washington State and New Jersey have developed their own intensive probation projects, although none is as stringent as Georgia's. In addition to these state programs, some large county probation offices have started similar projects. These programs center on reduced caseload size — 15 to 40 probationers per probation officer, compared with averages of 100 to 200 for "regular" officers.

The Texas Intensive Supervision Project (ISP) is aimed largely at providing an alternative to imprisonment for offenders who violate the terms of their probation; these people provide 43 percent of all Texas prison admissions. Texas Department of Corrections Director W.J. Estelle says there is a definite need for "a layer in-between" standard probation and full imprisonment, and he has high hopes that intensive probation will meet that need. "That hope is limited only by the amount of funds made available to the program," he said. As of January, there were 2,087 offenders on ISP.

In New York State, the division of probation has sponsored an intensive supervision program since 1978. Although it was not, until recently, a "diversion" project, since it was limited to those who were already on probation, studies show that hundreds of offenders are sent to prison each year in New York who are, in terms of offense and criminal history, indistinguishable from the high-risk offenders that the state's classification system assigns to intensive probation. Now the state is encouraging judges to use it as an alternative. In January, there were 2,500 people in the program.

In 1979, the Washington legislature expanded an existing intensive parole project to include intensive probation. In January, there were 288 probationers and 261 parolees in the program, in which one officer handles a maximum of 25 cases. In January of this year, the New Jersey legislature appropriated $1.2 million to the Administrative Office of the Courts to start an intensive probation program. Fred Fant, assistant director for probation, says that the program will screen new inmates as they are processed into the prison system and return those who meet eligibility standards to the courts for resentencing to intensive probation. He predicts caseloads of 15 to 20 probationers per officer.

These projects are being watched closely by probation and prison officials across the country, to see whether they can really divert offenders from prison. "I find the Georgia program very exciting," says Sidney Sullivan, a probation official in Chicago and an officer of the American Probation and Parole Association. Timothy Fitzharris, former head of the California Probation, Parole and Corrections Association, called the Georgia effort one of the most significant experiments in recent years. The National Institute of Corrections (NIC) is providing technical assistance to states trying to start their own programs. Blue-ribbon study commissions in Virginia and North Carolina have studied these intensive probation programs.

If intensive probation programs succeed in convincing judges to use probation as a punishment instead of prison, the financial savings could be substantial. In Georgia, those currently on intensive probation were originally sentenced to an average of almost six years in prison, of which they would actually have served more than two years. For 300 offenders in the program, the state has saved $5.4 million, or 86 percent of the cost of their imprisonment. New York projects a saving of $15 million per year even if only 15 percent of those on intensive probation are true diversions from prison. Texas officials say their program will have saved the state $8.3 million in operating costs by the end of the fiscal year, and will have eliminated the necessity for a new prison costing $50 to $75 million.

Most authorities agree that many states have a substantial number of minor offenders in prison who could be handled on probation. Douglas Thompson, assistant director of the Center for Research Into Law and Justice at the University of Illinois, Chicago Circle, says: "I think there is an enormous amount of room. If we took probation seriously as a sanction, we could put lots more on probation." Author and researcher John Conrad believes that, nationally, a third to half of those now in prison could be handled on probation; he says he is being more conservative than most reformers.

Even more may be at stake than prison beds and dollars. The future of probation itself, in the eyes of many observers, depends on its ability to regain the confidence of the public and the judiciary (page 12). To restore its credibility, they say, probation must amount to more than a suspended sentence or a probation officer reading monthly postcards from his hundreds of clients. Intensive probation programs, along with other developments such as classification systems for probationers, split sentences, and individualized sentencing plans such as those offered by the National Center for Institutions and Alternatives, are considered an important test. At least a dozen of the people interviewed for this article echoed the same phrase, almost word for word: "Intensive probation is what probation is *supposed* to be."

Ideally, of course, a state would never let its probation system become so overburdened that small caseloads seem a radical idea. Wisconsin, which was a pioneer in developing classification systems for probationers and which carefully monitors the workload of each officer, is one of several states that have low rates of incarceration, indicating that judges probably still have faith in the probation system.

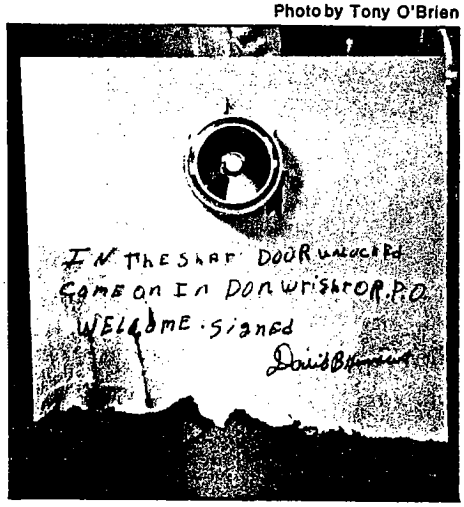
Some officials discount the significance of the Georgia and Texas programs, on the grounds that, in the words of Ralph Lauren, director of community corrections for the Colorado state courts, "they've so overincarcerated for so many years that it's a pretty distorted population." Others fear that even if they get off to a good start, these programs will be diluted by increasing caseloads, or will cease to be true diversion projects and instead become another way to "get tough" with people who would have gotten probation anyway. These problems have plagued other alternatives to prison (*Corrections Magazine*, October 1981; October 1982).

There is not even any agreement on what a probation caseload should be. Since the 1920s, various groups have advocated 35 to 50 as an ideal size, but without empirical evidence. The probation standards adopted by the American Correctional Association make no mention of caseload size, except that it should be determined by a formula. They require only that an officer "maintain personal contact with the offender." All authorities agree, however, that when the ratio between probationers and officers reaches a certain level, probation becomes virtually worthless. Many systems, caught in the pincers between rising court dockets and declining budgets, have reached that level.

Intensive probation is not a new idea. In the 1960s and '70s, dozens of attempts were made to see what happened when probation officers were given small caseloads. The principal impact was to increase the frequency of technical violations, without affecting the rate at which probationers committed new crimes. One of the best-known examples was the San Francisco Project, an experiment conducted by the University of California at Berkeley from 1964 to 1968, in which federal probationers were randomly assigned to caseloads ranging from 20 to several hundred. Those in smaller caseloads did see their probation officers more often, but this made little difference. Jerry Banks, a professor at the Georgia Institute of Technology, in a survey of all research on intensive probation projects, summed up the West Coast project this way: "The San Francisco project indicated that the number of contacts between probationer and staff appeared to have little relationship to success or failure on probation." As a means of reducing recidivism among probationers, intensive probation did not seem cost-effective. A 1981 report by the National Council on Crime and Delinquency stated: "For felonious property offenders, regular probation is less expensive than intensive probation and no less effective with regard to recidivism."

Recent events — principally the national crisis of prison overcrowding — has turned this research on its head. Advocates of de-

Photo by Tony O'Brien



Note left on the door by a Georgia probationer, in case an officer comes by to check his curfew.

carceration say that while those on intensive probation caseloads did no better than those on regular probation, at least they did no worse. If intensive probation can keep the most serious property offenders out of prison at the same rate regular probation keeps lesser offenders out, then it will be judged a success by most prison administrators. And even if the increased control, loss of freedom and extra cost of small caseloads do not dramatically change the lives of probationers, they may be cost-effective if they increase the punitiveness of probation and thereby convince judges to use it as an alternative sanction.

Georgia officials also point out that their program is much more intensive than earlier programs. Banks agrees that the new program is "radically different."

Georgia: 'Almost a Member of the Family'

"Kenny, you're not to miss another Parents' Anonymous meeting," Roger Pressley says in a stern voice. "Technically, you're in violation of your probation. And don't you want to get Sally back?"

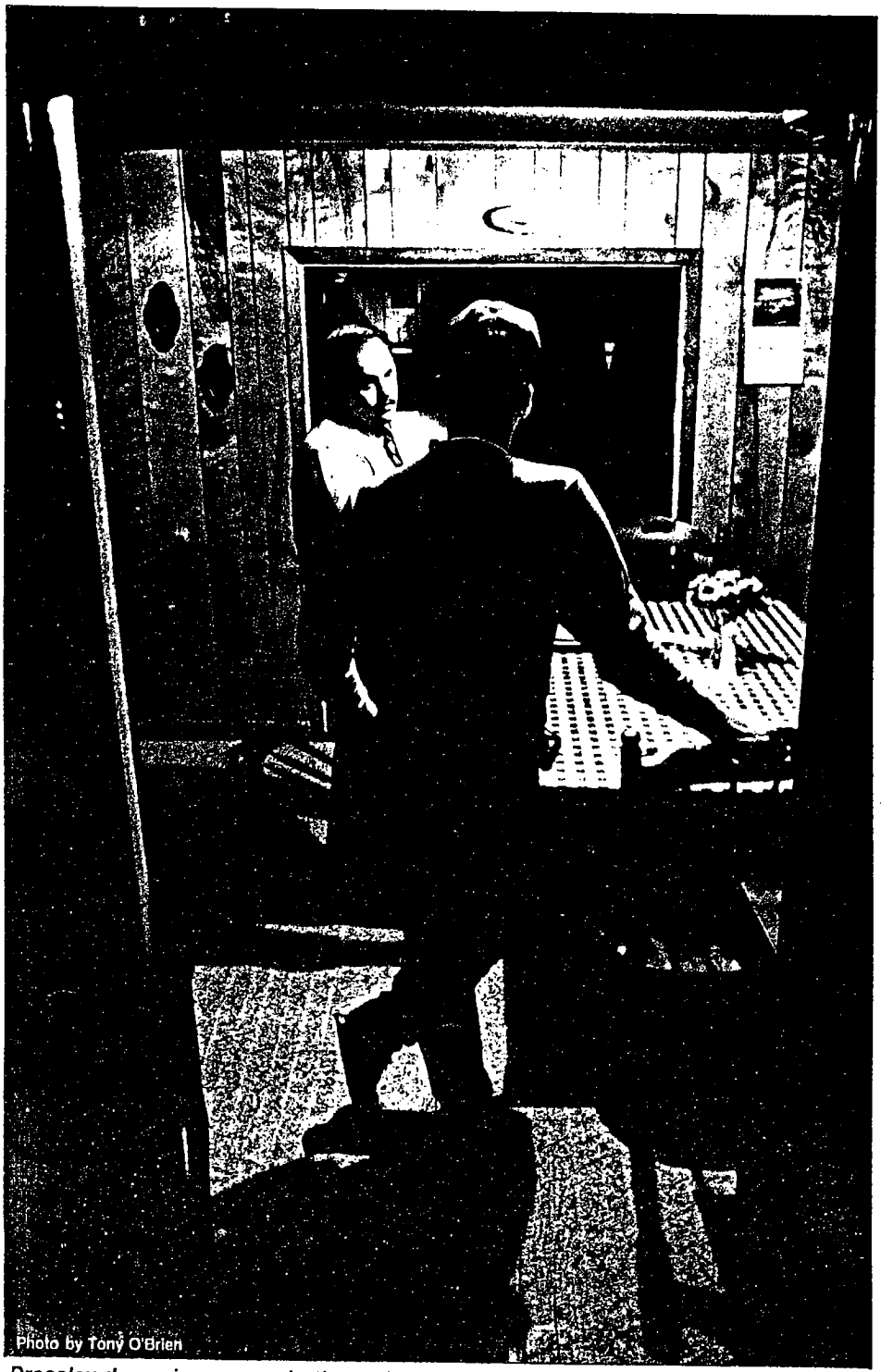
Kenny, a young man dressed in clothes that are dirty from a day's work, hangs his head and mumbles assent. Twice a week he comes after work to the office of his probation officers, Pressley and Billy Bearden; three times a week they come to see him, either at home or at work. Kenny was placed on probation for disciplining his daughter, Sally, by beating her severely with an electric cord; he had previously served time in prison for burglary. His daughter is in foster care, and one of the conditions of his probation is that he and his wife attend Parents' Anonymous meetings and training courses. Kenny says he simply slept through the last meeting because he was tired from work.

After badgering him for a few minutes in their office, located in an empty carpet warehouse in Dalton, Ga., Pressley and Bearden ask Kenny if he has been approved for a credit union loan he sought so he could buy Christmas presents for his family. "They shot me down," he says in discouragement. The reason, he says, is that he already owes money to a finance company; he recently calculated that he was paying 33 percent interest on that loan.

"It's ridiculous to pay that kind of interest," Bearden says. "That's loan-shark rates. You got any money put back to pay it off?"

For the first time in the meeting, Kenny laughs wholeheartedly. In Dalton, a carpet-mill town, the recession in the auto industry and the construction industry has reduced the mills to sporadic shifts.

Pressley and Bearden spend ten minutes discussing possible ways of paying off the debt to the finance company. Finally,



Pressley drops in on a probationer for a curfew check. During such visits, he tries to offer help to his clients.

Bearden says: "Kenny, I don't know what to tell you. Could you work a second shift?" "Oh, yes, sir," Kenny replies eagerly. "Well, we might be able to find some part-time work through the holidays," Bearden says. "Call us tomorrow about it." As Kenny gets up to leave, Pressley closes the conversation: "If I don't see you tonight, I'll see you tomorrow."

This is the heart of Georgia's Intensive Probation Supervision (IPS) program. With two officers handling a caseload of no more than 25, they are almost a daily part of their clients' lives. As Larry Anderson, state administrator of the program, says, "We're almost a member of the family."

The Georgia program was announced last July with the strong backing of Gov. Busbee. It is unusual [illegible] for a governor in these get-tough times, he personally backed the diversion program, and followed it up with a letter to the state's judges urging them to sentence fewer people to prison.

Busbee was not running for reelection, but he did not need to worry excessively about being identified with a wrist-slap probation program. The Georgia program was designed to appeal to the most conservative judges, and it has a heavy law-enforcement emphasis.

The first 13 IPS units were targeted for major jurisdictions that were most inclined to mete out prison sentences; some use probation as little as 30 percent of the time, compared with a statewide average of 67 percent. An analysis by the state Department of Offender Rehabilitation, which runs both the prison system and the probation department, showed more than 3,000 prison admissions in 1981 for property offenders with no previous record. Some judges bridled at these figures, saying that juvenile and out-of-state records, which were not available, should have been included. But most agree that there is plenty of room for alternatives in Georgia.

The IPS is part of a broader effort to use probation more efficiently. The state recently converted to a National Institute of Corrections model classification system, and the probation department runs 13 "diversion centers" that accommodate about 500 offenders at any one time. There are new specialized-caseload officers for women with special needs, and a female misdemeanant project to divert women. These efforts are made easier by the fact that probation has been a state function since 1956; the few counties, such as Atlanta, that did not originally join the state system are now doing so.

IPS is much tougher than regular probation. Those probationers classified "minimum" are part of a caseload of 200 to 300, with monthly mail and telephone contacts. "Maximum" cases are part of a caseload of 50; intensive probation cases get four times that attention. "I had a caseload of 200 and had to do presentence reports too." Pressley says, recalling his work before classification and IPS. "It would be

very hard for me to go back to regular probation."

Under Georgia law, a judge can revise his sentence during the term of court, and in most counties IPS clients are screened from those already sentenced to prison; they are then returned to court for resentencing. In a few counties, judges insisted that screening take place before initial sentencing; when they place an offender on IPS they must include a statement that otherwise he or she would have gone to prison.

IPS is designed to last from nine months to a year; after that, a probationer who is performing satisfactorily is transferred to regular probation. While the program costs $4.75 per day, compared to $.75 for regular probation, imprisonment costs $24.61. When capital construction costs and different sentence lengths are added in, the state estimates that intensive probation is less than a tenth as costly as imprisonment.

The IPS program is not even costing the Georgia legislature any money. It is funded by a new probation fee of $10 to $50 per month, which the department is asking judges to impose on all probationers as a condition of their release. This money is earmarked for special probation services; intensive probation is currently the only program on which it is spent. (If the fee were made mandatory through legislation, the funds would have to go into the general treasury, according to state law.) "At $10 a month, if it were imposed on all of our 50,000 probationers, it would raise more than $5 million per year," says Vincent Fallin, deputy probation administrator. The probation fee has so far exceeded expectations; with an 80 percent collection rate on cases in which it has been imposed, it will raise $144,000 more than the first-year goal of $684,000.

Georgia probation officials insist that IPS is not intended to hassle probationers. The time probation officers spend with their clients can be used productively, they say. The training program emphasizes service delivery rather than surveillance. "We don't see it as a cops-and-robbers thing," says Dr. Richard Longfellow, head of the probation division. "We don't go in with guns blazing and badges shining. We're interested in the probationer, in trying to help him."

In Dalton, a town of 20,000 located 100 miles north of Atlanta, the two IPS officers agree that a get-tough attitude won't work. "The key to this whole program is the surveillance officer," says Pressley. In Dal-

A Job for The Police?

"PROBATION has a default identity," says Douglas Thompson of the University of Illinois, Chicago Circle. "It's seen in terms of avoiding something else."

It's no secret that, across the country, probation has a serious image problem. Two years ago, Judge Lois Forer of the Philadelphia Criminal Court said: "Probation is a meaningless rite; it is a sop to the conscience of the court." Thomas Callanan, director of probation in New York State, puts the problem in the vernacular: "People think that probation is soft on crime."

Making probation tough on crime is the goal of intensive probation programs. Two nationally known authors have been thinking about other ways to do the same thing lately. One, David Fogel, former director of the Minnesota prison system and author of *"We Are the Living Proof": The Justice Model for Corrections,* recently spent a year examining European correctional systems. In a forthcoming book, he describes European probation programs as the most adaptable alternatives to incarceration. One form of probation he mentions is Sweden's intensive supervision, which requires a probationer to report in person to the police several times a week. The fact that this is an unpleasant intrusion into the life of the probationer is essential, he says, quoting a government report: "The disagreeable content of the sanction becomes absolute, something which must be accepted."

"We have to create a much tougher form of probation, with public safety as it's cardinal mission," Fogel said in an interview. "It's the only way we can save probation."

John Conrad, former head of research for the U.S. Bureau of Prisons and author of several books on corrections, goes even further in a paper recently prepared for the National Institute of Corrections. Conrad proposes taking the functions of surveillance and control away from probation officers entirely, and turning them over to the police. "It is one thing to accept an occasional home call from a harassed and over-worked probation officer, or to appear in his office on a Saturday morning," he writes. "It is quite another to make a regular trip to a police station for a report to a uniformed or juvenile officer, and to be subject to periodic visitation and investigation by the police."

In an interview, Conrad said: "This is not a welcome idea to probation officers. But something really has to be done to solve the control problem. We have to beef up surveillance."

As Conrad foresaw, these proposals are not eagerly greeted by probation officials. Callanan, who is president of the American Probation and Parole Association, called Conrad's call for turning surveillance over to the police "absolutely ridiculous. What he's looking for is a guardian angel. I would hate a society where someone was looking over people's shoulders 24 hours a day. They don't do that even in China or Russia. That's ludicrous."

To these comments, Conrad replied: "I don't see anything ludicrous or police-state about it. The police do surveillance all the time anyway."

– S.G.

ton's team, Pressley is designated as the "probation officer"; he supervises Billy Bearden, who is the "surveillance officer." "If [Billy] goes out with the attitude of 'trail 'em, nail 'em and jail 'em,' it's gonna ruin the whole program," says Pressley.

Bearden, who worked seven years as a sheriff's deputy, rising to captain, agrees. "It's easy to be hard as a deputy. But I was becoming burned out on law enforcement. You start to mellow out when you see where people are coming from. I've been on both sides, and I think this program helps."

To put together their caseload — 16 as of December — Bearden and Pressley have had to stretch the eligibility requirements in several cases. They screen all offenders sentenced to prison and keep records of all interviews. A list of 27 recently screened cases shows that most were found ineligible because their offenses were too violent or their terms were too long. In some cases, however, they went back to the circuit's two judges and argued that some offenders were not only too lightweight for prison, but also for intensive probation, and recommended diversion to regular probation.

One of their hard-core cases was Angela Cantrell. She had already done two terms at Hardwick, the women's prison, and was on probation for forgery when she was picked up again for shoplifting. At the time of her arrest, she gave police a false name. In recommending that her probation be revoked, her probation officer wrote: "In my opinion, Angela is a menace to this community, and apparently is an individual who has no intention of obeying the law." The judge gave Cantrell — 19 years old and very pregnant — several weeks to have her baby before sentencing her to two years at Hardwick. She was already at the prison when Bearden and Pressley convinced the judge to place her on IPS; they drove to the prison and picked her up.

Cantrell's community service part of her sentence consisted of filling out forms for the local welfare office; she did so well that they wanted to hire her, but could not come up with the money. She recently found a job at a local restaurant. Her curfew every night is 7 p.m. "That's fine with me," she says. "It's better than prison. It's not a hard program if you want to stay out of trouble. It's not as hard as I thought it would be. And this is the first time I ever had any probation officers I liked."

Photo by Tony O'Brien



Intensive probation gave Angela Cantrell a chance to raise her son.

Cantrell feels her life has changed in the three months she has been on intensive probation, and Pressley is inclined to agree with her. She is not, however, giving primary credit to IPS, except that it gave her a chance to keep up with the one big thing in her life: her new baby. Bouncing her boy on her lap, she says with moist eyes: "You would be amazed, how something like this can change your whole life around. I didn't used to care about anything. Now, my little boy comes before me."

These contacts send a message of control, but the probation officers are aware of their limitations. "You can't live with these people," Pressley says. But spending such a great amount of time with clients — many drop-in contacts at home stretch into an hour — means that the officers can find substantive topics to talk about, and the most substantive are often problems like money, alcohol or family problems. "A lot of them say this is the first time anybody in law enforcement ever wanted them to succeed," says Pressley.

Although Bearden, the surveillance officer, is ostensibly a control agent, in practice the distinctions blur. "One thing that surprised us, we didn't expect that Billy would do the amount of counseling he does," says Pressley. Sometimes, they say, their clients reverse their roles, seeing Bearden as their "helper" and Pressley as the agent of control.

The probation officers see one of their primary jobs as re-enlisting the confidence of the local police in probation. "Law enforcement has a bad attitude toward probation," says Bearden, the former deputy. "Police officers are natural gossips; if they like this program they'll spread the word." Local police are given a list of everyone on IPS, and they are entered on a statewide computer list. Jack Davis, the sheriff of Whitfield County, where Dalton is located, says he supports the program, and wishes there were more intensive probation officers available. "I think all probationers should have a curfew," he says. "They should forfeit some rights."

While the sheriff's attitude reflects the program's goal of providing a true sanction, the county's judges said they did not see anything punitive about it, except perhaps for the community service requirement. "I'm not being quite as punitive as I want to be, but with all this overcrowd-

ing I can't," says Judge Coy Temples. Judge Pannell says he feels constrained by the mandate to use IPS only for prison-diversion cases. "I'd like to use it for some others, but I'd have to certify that they would have gone to prison," he says.

The "punitive" community-service requirement is, in the view of probation officials, also the one with the most rehabilitative potential. Several officers in Dalton have found work through their community service contacts.

Every contact with a probationer is documented so local and state supervisors can monitor what is going on. This is one aspect of the job the officers find aggravating. "I saw 12 people last night and wrote for an hour and a half," moaned Bearden.

In the first five months of the program in Dalton, not one probationer had his or her probation revoked, although several were given extra sanctions (such as earlier curfews) for technical violations. The first curfew violator was Harry Brock, who missed his deadline by 20 minutes and immediately assumed he was bound for prison. "I said, 'This big bull bastard [Pressley] will probably revoke me,'" Brock recalls. "I didn't try to con him. I said, 'Let's go.'" But after consultation with the judge the probation officer let Brock go with a warning.

Marvin Hackney, supervisor for the seven officers in the judicial circuit, has been in probation for 17 years, and he says he has seen "intensive" programs come and go. This one is different, he says, because it is so much more intensive and is better organized. "It's a little frightening," he says. "It looks too good." Pressley expresses the same wariness: "It's scary. If a program is to be successful, you've got to have failures — or you're not doing your job."

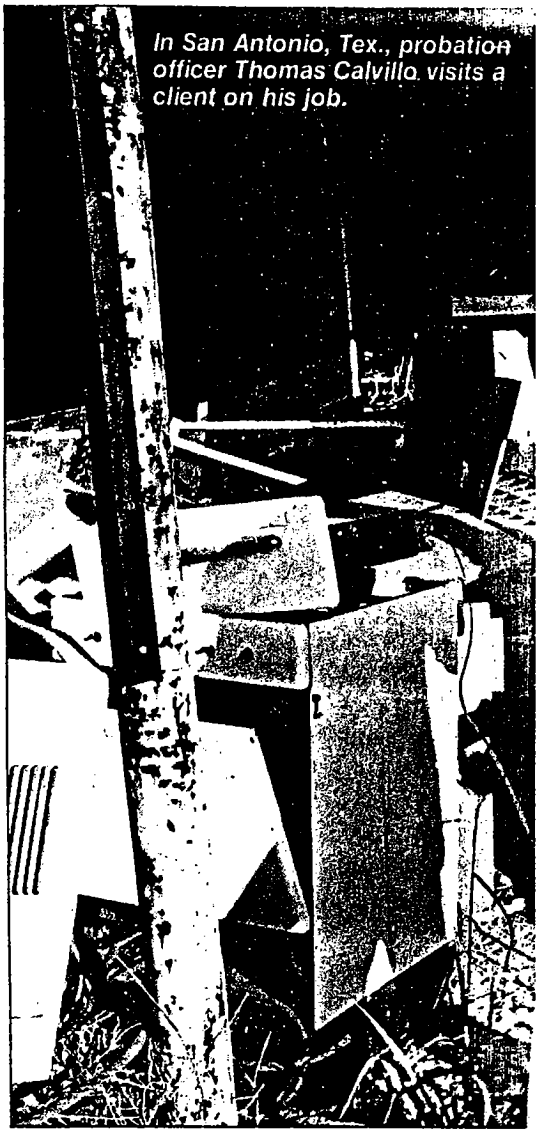
Texas: Coping With Overcrowding

1981 was the year the Texas legislature, after years of looking for ways of sending more people to prison and keeping them there longer, began to seek ways of reducing the prison population. This shift was inspired by federal Judge William Wayne Justice's massive court order in the *Ruiz vs. Estelle* case, issued in the spring, which ordered the Texas prison system to implement massive changes. A major portion of the order dealt with overcrowding: the year before, the prison population had grown by 13 percent.

In the 1981 session, the legislature began two diversion programs. One was a series of halfway houses, to open up space in the prisons. The other was an intensive probation program, to keep people out of prison in the first place. The halfway-house program has been slow getting off the ground, but the Intensive Supervision Project (ISP) has shown promise, and a special legislative session last year increased its funding. The ISP program now has $7 million for two years, and includes more than 2,000 probationers — enough to fill up a $50-million prison. It costs half as much per diem to keep someone on ISP as in prison, and terms are usually measured in months, not years.

A report for the current legislature notes that 55 percent of Texas inmates were sent to prison for property crimes, much higher than a national average of 43 percent. One primary target of the intensive probation project was the large number of probation violators sent to prison, many of them for technical infractions. "I guess the real question is what the potential total is," says Don Stiles, executive director of the Texas Adult Probation Commission. "Whether we can increase it [from 2,000] to 6,000 is unknown."

Judges sentence offenders directly to intensive probation, but it is up to local probation departments whether an offender remains in it. State guidelines direct the program at probation violators (38 percent of the total caseload), offenders who have served short "shock probation" terms (15 percent), and offenders with prior felony convictions or drug, alcohol or mental problems. State probation and prison officials worry that, with so much judicial discretion, it may become a "net-widening" program rather than a diversion effort. But computer tabulations show that the profile of those



In San Antonio, Tex., probation officer Thomas Calvillo visits a client on his job.

on intensive probation is similar to those in prison; most were sentenced for the same crimes: burglary (30 percent), drugs (15 percent) and theft (ten percent). "We audit the departments, and I'm satisfied that most of those cases would have gone to TDC had this program not existed," says Stiles.

Probation is a county function in Texas, although the state picks up a little more than half the cost. The state pays the entire cost for an intensive probation officer, who handles a caseload of no more than 40; the average is 38. The statewide average for regular probation is 142, and more than 200 in major metropolitan areas. The state also provides money for training the officers and for special treatment services. Several counties have used these funds to set up their own programs. Fort Worth has established a residential center for short-term placement; Austin has hired a


Photo by Bill Powers

therapist to treat sex offenders; McLennan County has set up new alcohol and drug-abuse programs.

The statewide standards provide only that the probationer will see or talk to his probation officer more often than under "maximum" supervision, which calls for two monthly contacts. But the counties are free to set their own conditions, and most require weekly meetings. Some, like Jefferson County, give curfews to many probationers.

During its first months of operation, the Texas intensive probation program experienced relatively high rates of violations, particularly for absconding. Dallas, for instance, had 201 terminations at the end of the year; most often, offenders committed new crimes or absconded, and there were only 287 still in the program. But as more and more probationers finish their year on intensive probation and transfer to regular probation, the picture is improving. In the last two months of 1982, the percentage of those who had successfully completed the program rose from seven percent to 11 percent, and the great majority were still in their first year. Texas officials also maintain that "failures" can be positive in establishing the program's credibility, by demonstrating that probation officers are keeping close tabs on their clients. "I would suspect that the courts are more inclined to revoke probation for someone on ISP than on regular probation," Stiles says.

New York: Restoring Judicial Confidence

New York began its intensive probation program slowly. For three years, from 1979 to 1982, it concentrated on providing close supervision of those who were already on probation. Only last summer did officials begin to advertise the program as a diversion program.

Their first task in 1979, probation officials say, was to demonstrate that they could make probation meaningful for misdemeanants and minor offenders. "The judiciary was losing confidence in probation," says state probation director Thomas Callanan. Caseloads had risen to more than 200 per officer in New York City, and above 100 upstate; on top of this, probation officers were snowed under by judges' demands for presentence reports. "There was a perception that probation was meaningless," says Marion Goldberg, who runs the intensive supervision program. "We wanted to demonstrate that probation could be a sentencing option — to judges, to district attorneys, even to members of our own profession."

The Intensive Supervision Program (ISP) was proposed by Gov. Hugh Carey in 1978 to supplement existing probation efforts, which were run by the counties. The state would pay the entire cost of the ISP teams; the counties would select the officers, but they were required to maintain their existing staff ratios for regular probation. The state is currently spending $3.5 million for 100 ISP officers, plus supporting staff. Training and supervision are also provided by the state.

ISP clients are drawn from the pool of probationers. They are identified by a classification system that gives points for factors like criminal history, family situation and attitude towards probation (but not, in contrast to informal procedures in Texas and Georgia, drug or alcohol abuse). Intensive probation is thus the highest of three levels of supervision. Those who score low on the classification scale may merely have to contact their probation officer by mail; those in the medium range typically will have to come to the office once a month. Judges cannot sentence someone directly to ISP. Callanan says that, interestingly enough, the judges did not want this option. "They felt everybody would be placed on it," he says.

Although the Texas and Georgia programs are limited to felons, New York includes misdemeanants. Currently, about

60 percent of the ISP cases are misdemeanants. Although at first glance this would seem to make it much less of a prison diversion program, New York officials say misdemeanants can be just as dangerous to the public. "Misdemeanants aged 20 to 24, they're the active ones," says William Bishop, a probation officer. "They're into the crime scene." Callanan says another reason for including misdemeanants is that "because of the plea-bargaining process, many of them really committed felonies but are sentenced for misdemeanors."

Last July, the state division of probation announced that it was ready to encourage the use of intensive probation as an alternative to prison. The goal was set modestly: to be able to show that 15 percent of the statewide caseload on ISP (currently 2,500) were those who otherwise would have gone to prison. If this goal is met, it would save the state $11.5 million over two years, compared with the cost of imprisonment. This does not include the capital costs of building new prisons. This estimate was based on a lengthy evaluation of ISP. After examining 1,528 ISP cases in 1978 and 1979, the researchers demonstrated that many of those in the state prison population were statistically identical to those handled on intensive probation. The major factor that separated minor offenders sent to prison from minor offenders put on probation was race; minorities comprise 72 percent of the prison population but only 44 percent of the probation population. The evaluation concluded that those on ISP, even though they were high-risk probation cases, were more likely to succeed than regular probationers; they were less likely to be arrested for new crimes, and when they were arrested their crimes were not as serious. About 40 percent of those on ISP for a year were transferred to regular probation, and after that 95 percent kept out of trouble. Another difference that should be appealing to judges was that those on ISP were half as likely to abscond from probation.

To convince judges to use intensive probation as an alternative to prison, the probation division held a series of meetings with judges across the state to promulgate the evaluation findings. It also instructed probation officers to recommend the program in their presentence reports when appropriate, and notified defense attorneys and prosecutors so they could use it in plea-bargaining, which settles 95 percent of all cases statewide. While judicial discretion has been curbed by the legislature in recent years — there are mandatory minimum prison terms for all violent crimes and all second felony convictions — the department of corrections says that one-third of the prison population was eligible for probation for nonviolent offenses; the cost of keeping these people in prison is $100 million per year. With 28,600 inmates as of January, the state prison system was at 123 percent of capacity, and projections show the size of the system will increase by another 7,000 inmates within three years.

Measuring whether true diversion from prison is taking place, says New York's Goldberg, "is the $64,000 question." All the administrators of intensive probation programs spoke with fear of "widening the net," meaning that social controls get heavier for probationers, but few people are diverted from prison.

There are different ways to ascertain whether this is occurring. In Georgia, since most offenders are placed on intensive probation only after their sentence is changed from a prison term, probation officials feel sure that true diversion is taking place. The fact that many of these property offenders would not have gone to prison in California or Minnesota does not make them any less of a diversion in Georgia, officials say.

New York is trying to measure whether diversion is occurring by comparing the cases identified by local probation departments as "alternatively sentenced" with both the prison population and the regular probation population. A preliminary study, which examined the seriousness of offense and prior criminal history of the first 155 "alternatively sentenced" cases, was favorable, Goldberg says. In that group, 79 percent had at least one prior conviction and 42 percent had at least three convictions, almost identical to the prison population and far more than those on regular probation. The two most frequent crimes were burglary and robbery, the same as in the prison population.

"That's really exciting," says Goldberg. "What it means is that we aren't widening the net." She was also pleased by several recent cases in which sentencing judges wrote to the state appeals court to get permission to waive mandatory minimum prison sentences in favor of intensive probation.

Some observers worry that intensive probation programs may start off in a blaze of glory, but then he undermined by rising caseloads or the pressures of judges who want to place lesser offenders in them. In Dalton, Ga., for instance, both of the local judges spoke wistfully of their desire to place less serious probationers on the intensive probation program. "I'm dead set against diluting the program," says Longfellow of Georgia. "We may see if the teams can eventually handle 27 or 30 cases instead of 25, but because we're paying for it ourselves with the probation fee, we don't have to give in to cost pressures."

In order to continue, however, these programs will have to prove that even if they don't fully "rehabilitate" their clients, they do help them make some meaningful changes in their lives. In an interview, Georgia Institute of Technology researcher Jerry Banks summed up the situation: "Can they divert? Yes, they can. Are they cost-effective, compared to prison? Yes, they are. But if you ask me if they can rehabilitate people from a life of crime, that's another matter."

Those who run the new generation of intensive probation programs believe they will do better in this regard than past programs. "We think we'll do better simply because of the control factor," says Georgia's Longfellow. "We structure these people's lives, and most of them need to have limits set."

Probation experts point out that managing caseload sizes and proving diversion do not insure a successful program. In his

survey of past efforts, Banks warned: "Probation officers accustomed to devoting most of their time to presentence investigations and routine paperwork on cases may find themselves completely unequipped to undertake intense personal contact with cases."

All of these new programs include specialized training for probation officers, and all except Texas prohibit their intensive probation officers from doing routine presentence investigations.

The probation officers themselves agree that they behave far differently towards their clients when they have a small caseload and some training. Probation officer Robert Watson of New York saw a big difference after only a few months of working on intensive cases. "With a caseload of 90, I'd be lucky if I was getting out into the field ten percent of the time — and I did a lot of home visits compared to some other officers," he says. "The priority was presentence reports. But I feel the main focus of the job is to be out in the streets; seeing a person on his own turf is important." Now, he says, he spends about half his time on the streets.

Thomas Callanan, head of New York's state probation division, says he could see the change in his probation officers after a recent training session. "People burned out because of a high caseload went out in the field with a whole new spirit, full of enthusiasm," he says. "It was amazing." In Dalton, Pressley and Bearden put in at least 70 hours apiece most weeks, in order to check up on their clients at night and on weekends. "You don't notice the hours," says Pressley. "You can really get into people's problems and try to help. We're so involved it's enjoyable." □

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July 1, 1986

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

Dear Chairman Wilkins:

Thank you for the opportunity to provide information to the Sentencing Commission in behalf of NADCL's Offense Characteristics Commission, Sentencing Commission liason.

Speaking to the issues of "House Arrest" or "Community Control" I respectfully submit the following information for your consideration.

The State of Florida, through the efforts of Leonard Flynn, Director of the Probation and Parole Program for the Department of Corrections, Community Control, has formalized and implemented a "House Arrest" system which, in my opinion is one of the leading programs in the United States utilizing this concept.

The federal courts for the past several years have utilized a similar concept under the provisions of conditions of probation.

The legality of a special condition for Community Control in the Federal system has been associated with the ability of the Federal trial court's discretion to impose other supplemental conditions of probation. It is noted, "When satisfied that the ends of justice and the best interest of the public, as well as the defendant's will be served thereby (may ...) place the defendant on probation for a period and upon such terms as the court deems best." (See, attached Exhibits demonstrating utility of Community Control Concept.)

The Florida concept of "house arrest" contains the following elements:

Community Control is a new concept in providing a safe diversionary alternative to imprisonment for use by the courts in select cases.

Punishment sanctions such as confinement to the residence,mandated public service, payment of restitution to victims of crime, payment of fines, mandated participation in self-improvement programs, required cost of supervision fees, and other restrictions and requirements are designed to provide reparation to society along with elements of rehabilitation.

Teams, composed of a surveillance officer and supervising officer, are to be utilized where practical to maximize protection to the community and assure compliance with the conditions of community control as set forth by the court. The program is structured to provide certainty of punishment in the community for offenders convicted of selected nonforcible crimes, such as property offenses or selected other crimes who could otherwise have been sentenced to short prison terms.

Community Control is a form of intensive supervised custody in the community on a daily basis. It also includes surveillance on weekends as well as evenings. It is administered by community control officers with restricted caseloads of 20 per officer. The individualized program restricts the freedom of the offenders within the community or home with specific sanctions imposed and enforced.

The goals and objectives of community control are:

1. To impose strict non-institutional sanctions in the local community for those convicted of crimes.

2. To provide a safe diversionary alternative to prison confinement for the courts.

3. To provide protection to the community through surveillance and control of cases.

4. To identify and involve appropriate community resources to accomodate supervisional objectives.

5. To enforce participation by cases in self-improvement programs which encourage non-criminal behavior.

6. To establish public service programs in the community and enforce participation.

7. To enforce confinement to residence, curfew and other restriction;

8. To develop team as well as individual supervision, and

9. To provide surveillance on weekends.

To protect society and to insure compliance with community control supervision regulations, community control officers have been authorized by County Sheriffs throughout the State of Florida to use their radio frequencies for monitoring and communications. Community Control Officers are equipped with portable radios, to enhance the safety, security, and coordination with local law enforcement through "check-in" and "check-out" procedures. Also a "telephone robot" has been tested to assist in surveillance and control. It helps to further enforce the confinement to residence provisions through telephone calls at various hours of the day and night.

The conditions of Community Control for purposes of community supervision are rigorous, restrictive, and punitive which include:

1. You will report to your Community Control Officer at least four (4) times a week, or, if unemployed full-time, daily.

2. You will perform ___ (at least 140 hours recommended) hours of public service work, without pay, as directed by your Community Control Officer.

3. You will remain confined to your approved residence except for approved employment, public service work, or other special activities approved by your Community Control Officer.

4. Make restitution to the victim(s) of crime, _____ in the amount of $ _____ at the rate of at least _____ per month.

5. You will submit to and pay for urinalysis, breathalyzer or blood specimen tests at any time requested by either your Community Control Officer or the professional staff of any treatment center where you are receiving treatment to determine possible use of alcohol, drugs, or controlled substances.

6. You will maintain an hourly accounting of all activities on a daily log which you will submit to your Community Control Officer upon request.

7. You will participate in self-improvement programs as determined by the court or the Commission, if on parole.

8. Not later than the fifth day of each month, you will make a full and truthful report to your Community Control Officer on the form provided for that purpose.

9. You will pay the State of Florida _____dollars ($) per month toward the cost of your supervision, unless otherwise waived in compliance with Florida statutes.

10. You will not change your residence or employment or leave the county of your residence without first securing the consent of your Community Control Officer.

11. You will neither possess, carry or own any weapons or firearms.

12. You will live and remain at liberty without violating the law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your community control.

13. You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.

14. You will work diligently at a lawful occupation and support any dependants to the best of your ability, as directed by your Community Control Officer.

15. You will promptly and truthfully answer all inquiries directed toyou by the Court, Commission or the Community Control Officer, and allow the Community Control Officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions he/she may give you.

16. Other conditions as ordered by the Court or Commission.

Leonard Flynn, Director of the Community Program in Florida states that the program includes variety of offenders including burglary, drug violators, larceny and assault.

Florida's experience would demonstrate that any type of offender who would ordinarily receive up to a sentence of three (3)years and meets other stated criteria, could be an eligible candidate for community control. Within the scheme of the proposed federal offense classification, and criminal code revision grade, we believe that, Class E, Felony, Class A, Misdemeanor, Class B, Misdemeanor, Class C, Misdemeanor and Infractions, would qualify for community control sanctions in lieu of incarceration. Perhaps even Class D, Felony, offenders under certain circumstances would be eligible when the court believed a sentence less than five (5) years was appropriate.

Restitution, community service, fines and probation in addition to community control may likewise be applicable to conditions of community control and/or probation.

A form of intensive supervised probation in our opinion would be appropriate where an offender has a serious drug problem and needs intensive supervision and surveillance as well as rehabilitation counseling. Intensive probation supervision may also be appropriate in federal cases where there is a strong likelihood that without intensive supervision an offender would recidivate due to certain personality characteristics or deficiencies that pose a strong likelihood for failure to meet certain conditions of probation.

Fines historically have demonstrated their value as an alternative to incarceration. Statistically, they appear to have the same equivalent impact to deter future criminality as incarceration.

Considering the imposition of a fine or restitution, it would appear obvious that the court must consider the ability of the offender to pay same. It would be inefficient for the court to set a fine and/or restitution amount that is unrealistic or unattainable.

In closing, I sincerely appreciate the opportunity to make these brief observations in behalf of NADCL.

Very truly yours,

J. Robert Cooper

JRC-mg
cc Alan Ellis, Esquire
Benson B. Weintraub, Esquire

AUGUST 22, 1983 Vol. 122 No. 8 TIME THE WEEKLY NEWSMAGAZINE

SENTENCED. Mary Hudson Vandegrift, 70, chairman of the board of Hudson Oil Co. and one of America's 400 wealthiest individuals, worth $100 million according to *Forbes* magazine; to 200 hours of public service in a retardation center and fined $5,000; for ordering her company's gasoline pumps readjusted so that customers got a small amount less than they paid for; in Olathe, Kans. Vandegrift pleaded no contest to the felony charge.

The CRIMINAL LAW REPORTER®

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May 18, 1983 | THE BUREAU OF NATIONAL AFFAIRS, INC. | Volume 33, No. 7

COURT EXPLAINS "COMMUNITY SERVICE" SENTENCE GIVEN TAX EVADER

Sentence combines part-time commitment to halfway house with teaching role. ▸*300.60* ▸*300.105*

An unusual combination of limited incarceration and community service is ordered by the U.S. District Court for the Northern District of California as punishment for a first-time offender convicted of tax evasion. The court decides that an alternative sentencing plan would better serve societal interests than would incarceration of the defendant in prison. The plan, suggested by the defendant himself, requires him to reside in a "halfway house" Monday through Friday for six months and to report each weekday to a federal probation office, where he will use his expertise in computer programming to teach other probationers and parolees to operate and program computers. Additionally, in lieu of a fine, he is

required to set up a $10,000 trust fund for the purpose of purchasing computer equipment in furtherance of this program.

The court says that for a well-educated, first-time offender like the defendant, such a program would be far more beneficial than more traditional forms of punishment. First, it notes, the defendant will be deterred from further illegality by this sentencing program; a person unfamiliar with any form of incarceration will certainly be affected by daily confinement in a "halfway house" situation. Also, the defendant poses little threat to the public, a consideration that obviates the need for full-time incarceration. The societal benefits inherent in having the defendant apply his education and talents to the task of improving the skills of less privileged wrongdoers greatly outweigh any good that could possibly result from his incarceration. Moreover, the court reasons, compelling the defendant to help others serves the interest of rehabilitation by instilling in him a "sense of social responsibility" and by integrating him into a "productive social role." (U.S. v. Carlston, 3/23/83)

Digest of Opinion: The defendant, a well-educated computer programmer with no prior criminal convictions, pleaded guilty to a charge of income tax evasion, an offense which carries a maximum sentence of five years imprisonment and a $10,000 fine. After considering legal authorities, presentence reports, the recommendation of the probation office, and various other information, the court sentenced the defendant as follows: He is sentenced to five years in the custody of the Attorney General, with all but six months suspended. This six months is to be spent in a federal community treatment center known as Ecclectic Communication, Inc. (ECI), a "halfway house." Each weekday the defendant must report to ECI at 8:00 a.m., and thereafter at 9:00 a.m. to the Probation Office. There he shall work from 9:00 a.m. to 5:00 p.m. on his community service program, which will involve teaching the operation and programming of computers to the clients of the program. After six months of his program of incarceration, the defendant will be placed on three years probation under these conditions: He shall devote ten hours per week to a continuation of the computer training program, and, in lieu of a $10,000 fine, he shall set up a $10,000 trust fund for the benefit of the Probation Office, to be used to purchase a computer and related materials.

[Text] The community service program defendant will be required to undertake and operate during his incarceration, and continue to supervise as a condition of probation, consists of establishing an educational program for probationers and parolees of the United States Probation Office, Oakland, California, achieved through the use of a computer. Defendant is expected to design programs and give instruction that will provide remedial training in English and mathematics, training in basic communication skills and word processing, and training in any other areas that would be useful to the clients of the Oakland Probation Office. Defendant will additionally be expected to teach the staff of the Probation Office as to the use of the educational programs he designs to insure continuity of the programs once defendant's incarceration and terms of probation are satisfied. * * *

In imposing the above sentence, the Court has carefully considered the four primary purposes of the criminal law in punishing acts deemed contrary to the interest of society: deterrence of the criminal from future unlawful conduct, restraint of the criminal, rehabilitation of the criminal, and deterrent effect upon society as a whole. LaFave and Scott, Criminal Law, §5, p. 21-24 (1977 Hornbook Series). The Court finds that each purpose has been served by the sentence imposed in this case. How each purpose has been served is discussed below.

Defendant's offense is a serious one. Defendant has engaged in acts of concealment of his income in order to prevent the IRS from discovering his true income. The Court feels that defendant's incarceration of six months at a halfway house, during weekday periods, will provide ample deterrence such that defendant will not again be tempted to evade the United States taxation laws. * * *

One cannot minimize the punishment value of what is commonly referred to as a halfway house. * * * Upon each return defendant will likely be reminded of the serious distinction between freedom and confinement, and the deterrent impact will be substantial. * * *

[T]he Court finds that the interest of deterring a criminal offender from future criminal conduct is met by the sentence the Court has rendered in this case. * * *

[T]he Court does not mean to imply that deterrence by such incarceration can be accomplished for all convicted criminals. The unique facts before the Court are that defendant has no prior criminal conviction, defendant is well educated, and defendant's crime is a victimless one. Defendant poses no threat of harm to the public, and in fact, the interest of the public will be better served by the Court's sentence than by defendant's incarceration in prison for a lengthy period of time.

Defendant is a bright man and has particular, unique skills in programming computers and providing instruction regarding computers. Many of the clients of the Probation Office in Oakland are in great need of basic remedial instruction and/or job training. Acquiring the above skills may well be the difference in the recidivism rate of the clients. * * *

[T]he interests of society will be better served by the sentence imposed by the Court than incarceration in prison. There is no need to physically restrain defendant from society beyond what the Court has ordered, and defendant can accomplish much good for probationers and parolees in the Northern District of California under the sentence imposed by the Court. Providing probationers and parolees with the skills necessary to become employed and make a living will decrease the risk of recidivism and do far more good for society as a whole than locking defendant up for a period of years.

The interest of rehabilitation of the criminal is served when the sentence causes the criminal to realize the wrongfulness of his conduct, instills the criminal with a sense of social responsibility, and integrates the criminal into a productive social role. Higdon v. U.S., 627 F.2d 893, 899, n. 14, 27 CrL 2335 (9th Cir. 1980). Requiring defendant to assist in the training and ultimate rehabilitation of other criminals will accomplish all of these purposes. Defendant will be constantly reminded that his conduct was legally and socially wrong. Defendant will acquire a greater sense of social responsibility because he will be working to help others become productive members of society and therefore will be integrated into a productive social role as a result. * * *

In light of the above, the Court finds that the rehabilitation of defendant will be well served by the Court's sentence. * * *

The deterrence-to-society purpose of the criminal law is based upon the theory that the suffering of a criminal for a crime committed deters others from committing crimes "lest they suffer the same unfortunate fate." LaFave & Scott, §5, p. 23. By publication of the trial, conviction and punishment, the public will be educated as to the proper distinction between good and bad. * * *

The sentence imposed by the Court does provide for the incarceration of defendant and imposes significant obligations upon defendant to work with the Probation Office during both the period of incarceration and during the period of probation. It is unlikely that the public will feel that defendant is not being seriously punished for what is in essence a victimless crime. Defendant was "caught," was subject to serious and embarrassing criminal proceedings and publicity, will in effect lose six months of his life to incarceration, and will suffer the stigma of a criminal conviction for the rest of his life. Such punishment serves the deterrent effect on society necessary to insure compliance with the tax laws.

For the above reasons, the Court finds that society will be deterred from violating the tax laws by the Court's sentence in this case. *[End Text]* — Aguilar, J.

(U.S. v. Carlston; USDC NCalif, 3/23/83)

2-Year House Arrest Instead of Jail Term Is Ordered for Fraud

By JESUS RANGEL

A Federal judge in Brooklyn, in an unusual ruling, yesterday sentenced a woman convicted of insurance fraud to "house arrest," saying she must be confined to her home for two years.

The judge, Jack B. Weinstein of Federal District Court, said he had imposed the sentence because he doubted that the defendant could be rehabilitated in jail. He also said he believed that controls other than imprisonment were needed to halt the expanding prison population.

The concept of probation under house arrest has been applied in state cases in California and Florida, probation officials said, but has rarely been used in Federal courts.

Judge Weinstein directed the Federal Probation and Parole Office to develop a set of standards to be used in this case and in future cases. House arrest is detention in one's own house, often under guard.

Under Judge Weinstein's sentence, the defendant, Maureen Murphy, a 35-year-old legal secretary, is to be confined to her home in Elmhurst, Queens, and may leave it only to go to work, or to shop for food, or for medical or religious reasons. She may not change her place of residence or her job except with permission from probation officials and she must go home directly from work.

James F. X. Haran, the chief

Continued on Page 14, Column 1

9/23/85 N.Y. Times

Judge Orders 2-Year House Arrest For Queens Woman in Fraud Case

Continued From Page 1

Federal probation officer for the Eastern District of New York, said that although no guard would be stationed at Miss Murphy's home, she would be subject to unannounced visits or telephone calls from probation officers seven days a week at any hour of the day or night.

"We still have to come up with written guidelines so she knows exactly what she is responsible for and the court knows exactly how we are approaching this," Mr. Haran said.

Miss Murphy and two lawyers, Jay Teitler of Brooklyn and Marc Shultz of Woodmere, L.I., were convicted Aug. 15 of racketeering and conspiracy. They were among nine defendants indicted in April on charges of defrauding 19 insurance companies over a 10-year period by filing inflated and bogus accident claims. Mr. Teitler and Mr. Shultz have not been sentenced yet.

Miss Murphy was also found guilty of obstruction of justice for encouraging two witnesses to lie to a grand jury.

A 'Close-Knit' Family

She had faced up to 50 years in prison and a $56,000 fine. Judge Weinstein noted that Miss Murphy had been "raised in a close-knit, harmonious and religious family setting by hard-working parents" and was "an excellent and bright worker who has always been steadily employed."

He said the maximum sentence was "too long to even be considered seriously for this relatively young person." He also said that the fine "could never be paid and would accomplish nothing except to make it impossible for the defendant to live and rehabilitate herself."

The judge placed her on five years' probation and ordered her to serve two of those years under house arrest.

"Putting her in prison for any substantial length of time will undoubtedly help to destroy her," Judge Weinstein said in a written statement that he released to explain his decision. "The conditions of imprisonment, even in the best prisons for women, are reprehensible."

Citing the nation's prison population, which he said was approaching half a million inmates, the judge said that longer imprisonment for more people could not be borne indefinitely and that other controls and social policies to curb crime, along with alternative punishments, were "essential."

He added that while jailing those who were considered dangerous must continue to be judicial policy, deterrence among nonprofessional criminals could be accomplished without long incarceration.

In another case on Sept. 10, a Federal judge in Los Angeles sentenced David A. Wayte to a similar confinement in his grandmother's home for six months for refusing to register for the draft.

Judge Weinstein said the house-arrest sentence was used elsewhere in the world and was considered by some to be highly objectionable. "The difference, however, is that in other countries it is used to repress political dissent and before trial," he said. "Here it will be used after a full trial where the defendant has been found guilty of a serious offense."

Steven Kimelman, Miss Murphy's lawyer, said the sentence was an innovative idea that someday might be widely used as an alternative to jail. But he said his client was being used as a "guinea pig" and should have been placed under regular probation.

Mr. Kimelman said he would appeal the sentence on the ground that the judge had no authority to impose it.

Praise for Sentence

Mr. Haran, the chief probation officer, applauded the sentence, saying it was more humane and economical than a prison term. "It doesn't break up a family or cost a loss of employment, which means a saving on social-service costs," he said.

He estimated that it would cost the Government about $3,000 a year to administer having one person under this type of probation, while it costs $30,000 a year to keep a person in jail. The Eastern District his officer is reponsible for covers Brooklyn, Queens, Staten Island and Nassau and Suffolk Counties.

The United States Attorney for the Eastern District, Raymond J. Dearie, had recommended that Miss Murphy be given a prison term and the maximum fine because she was a "long-time, trusted member of this criminal venture." He refused to comment yesterday on the house-arrest sentence.

Spiderman's Net

An electronic alternate to prison

Jeffrey Stafford had served eight months in Florida's Palm Beach County stockade for aggravated assault when a judge offered him a choice: he could continue to do time in jail or he could go home. The catch? He would have to spend the remaining months of his sentence under electronic house arrest, with a radio transmitter attached to his ankle and a computer monitoring his movements. For Stafford, 28, it was no contest. Says he: "I had been in the stockade long enough to know I didn't ever want to go back."

Within a week Stafford was strapped up and on his way, one of a small but growing number of prisoners, parolees and probationers who are serving their time at home. The idea has even been used most recently to quarantine an AIDS victim. An accused prostitute, she has been equipped with one of the new devices and was awaiting arraignment last week in the custody of her mother. "We needed to get her out of the jail because of real or imagined contagion," says Florida Judge Edward Garrison, who has championed use of the technology in his state.

The monitors were inspired by a 1977 *Spiderman* cartoon and introduced in New Mexico six years later. Now the contraptions are catching on. Oregon's Linn County is using ankle transmitters to enforce curfew restrictions on repeat drunk-driving offenders. Kenton County, Ky., employs the devices to monitor fathers under house arrest for not paying child support. Lake County, Ill., has ordered $51,350 worth of equipment in an effort to cut prison costs and relieve overcrowding.

There are several competing systems. Digital Product's On Guard is an electronic handcuff. The offender wears a wristwatch-like device that must be inserted into a verifier box in response to random telephone calls from a corrections computer. Control Data's Home Escort system and Controlled Activities' Supervisor attach at the ankle. The Supervisor system used in Florida keeps constant vigil by sending a radio signal every 35 seconds to a central computer. If the signal stops, it tells officials that the prisoner has strayed more than 150 ft. or so from his house. The computer can be programmed to allow travel to and from work, and authorities still perform occasional spot checks to watch for tampering and to verify with the employer that the parolee actually shows up. Says Garrison: "If there is anything wrong with this program, we have not found it."

Some experts are not so certain. "All it tells you is that a person is where you want him to be," says Minnesota Corrections Commissioner Orville Pung. "He could be running a stolen-goods ring out of his house." The concept also prompts philosophical opposition. Says Joseph Vitek, director of corrections for Douglas County, Neb.: "It smacks of police state." Most inmates, do not appear to be burdened by such considerations. Jeffrey Stafford, who is employed as a house painter, says he has every reason to make the idea work. "It would never enter my mind to tamper with the anklet," he claims. "This is a nice apartment. I hadn't had my own bed for a long time. I had Bunk 211-119. It wasn't my bed." ■

Stafford at home



GREENWOOD—GAMMA/LIAISON

Florida's Offenders Under House Arrest

In a 1983 effort to reduce prison overcrowding, Florida Department of Corrections' Probation and Parole Services field staff implemented Community Control, a new prison diversionary alternative. Two years later, not only did staff meet the challenge, but their efforts and dedication resulted in surpassing the program's initial goals and objectives, according to Leonard Flynn, Probation and Parole Services director.

Community Control is designed as a punishment-oriented program providing confinement to residence under house arrest as an alternative to imprisonment. The concept embraces punishment as an integral part of rehabilitation or habilitation and fosters responsibility and accountability.

The offenders, called "community controlees," are required as a means of restitution or reparation to have salaried jobs and participate in public service work. The paid employment allows controlees to support themselves and their dependents while paying monthly supervision fees from $20 to $50 to the state.

Electronic telephone robots that automatically call the controlees at various times along with surveillance techniques ensure controlees only leave their residences for employment, public service work, or other authorized periods. Community control officers, whose caseloads are restricted by state statute to 20 cases, must make 28 monthly contacts relating to each controlee. Because the greatest potential for violations occurs on weekends, officers are required to work Saturday, Sunday, and holidays. Officers are trained in surveillance techniques, legal liability, crisis intervention, self-defense, and a host of other areas.

As of March 31, 3,621 offenders are involved in the program. During its two-year operation there have been 521 revocations; 297 were for technical violations, the remainder for new offenses. However, no heinous crimes or crimes attracting public attention have been reported, Flynn says.

Cost of regular probation is about $1.51 a day, while Community Control is $3.20. These compare to prison operating costs of about $23 a day and prison construction costs of $50,000 a bed.

House Arrest—The Hot, New Sentence Option

by Stephen Blake

In August, 1985, U.S. District Judge Terry Hatter of the Central District of California (Los Angeles), sitting in the light of international media attention, sounded a Paul Revere-like alarm for all interested in the conditions of our prisons and searching for alternatives to incarceration. Sentencing one of the few convicted Selective Service violators (and thus a media darling), and doing so in a media center like Los Angeles, Judge Hatter's pronouncement was guaranteed to make news. And it did. But it was different. Not only was the sentencing newsworthy but, as it turned out, so was the sentence. The sentence was quite different from the "30 months" handed down by Judge Gordon Thompson of the Southern District of California when pronouncing judgment on the first of the Selective Service violators.

Judge Hatter imposed, as a condition of probation, a term of 6 months. What made the sentence newsworthy and of great import to the defense bar was Judge Hatter's order that the sentence be served at the home of the defendant's grandmother. The precedent of house arrest had been loudly established in the United States.

Meanwhile, across the country in the ultimate media center—the Southern District of New York, Judge Jack Weinstein (both Judges have apparent nicknames as their formal first names) was pondering the sentence of a less newsworthy but perhaps more perplexing defendant. Judgment was to be pronounced on a woman, a mother, a housewife who was also a convicted racketeer, involved in an auto insurance scam of 10 years duration. Within three weeks of Judge Hatter's West Coast precedent, Judge Weinstein did him several degrees better and set down a term of two years house arrest with a twist. Unlike the Selective Service violator, this defendant would be allowed to leave her home to go to work, to shop for necessities, and to go to church. That's house arrest work furlough in my book.

The two judges did not create these precedents out of whole cloth. House arrest is well known to the people of the Philippines, Eastern Europe, and the people at Amnesty International. But their contribution to the American criminal justice system remains a milestone and a signal to the defense bar that change is afoot. It would be a tragedy to allow their precedents to languish. It is up to the defense bar to build on them until every judge automatically considers house arrest as a sentence option; an establishment option in the same class as probation. It should be weighed, automatically, by the probation officer and the judge for every defendant. Experience tells us that such status will not be achieved without significant pulling and pushing by the defense bar.

It is suspected that the origin of these precedents can be found in an article in the March, 1985, edition of *Federal Probation* (Volume XLIX, Number 1), the magazine published by the Administrative Office of the United States Courts and distributed free to all federal judges and United States Probation Officers. The article, "Home as Prison: The Use of House Arrest," suggests "...house arrest may yet be found to be a humane, cost-effective way out of the looming and potentially castastrophic, prison overcrowding crisis" (pg. 17). The authors cite no specifics, give no examples of where it has been used, and make no reference to definitive research which proves or disproves the value of house arrest. The article assumes the truth of its obvious value: very low cost. The article is simply a suggestion, a suggestion, it appears, that Judges Hatter and Weinstein and their respective chief probation officers took to heart.

There have been other articles on house arrest in the past (see, for example, J.P. Manak, "Home Detention as an Alternative to Incarceration for Minor Offenses," *Prosecutor*, January 1980, 15, pp. 216-219; "Home Detention Gaining Support," *Criminal Justice Newsletter*, November 21, 1983; "Mom is this Thief's Warden," *Boston Globe*, January 27, 1982, p. 70), but none with the apparent impact of this one. Because of the "Federal Probation" article, within a span of three weeks, federal judges on both coasts used the national news media to, one can hope, set a trend. Now, with these highly publicized precedents, every sentencing judge can be asked to vote up or down on house arrest, and to do so without fear of being considered unique.

How do you put forth your argument? In California the Judicial Council has codified the sentencing judge's thought processes. When ruminating about a sentence, judges are to consider the following general objectives of sentencing: (1) protecting society, (2) punishing the defendant, (3) achieving uniformity in sentencing, (4) encouraging the defendant to lead a law-abiding life in the future and deterring him from future offenses, (5) deterring others from criminal conduct by demonstrating its consequences, (6) preventing the defendant from committing new crimes by isolating him for the period of incarceration, and (7) securing restitu-

Stephen Blake is director of Advocates Advisory Services, *a legal consulting firm in San Diego, California. He specializes in Sentencing and Corrections issues.*

tion for the victims of the crime. It is always good practice to justify your sentence position by arguing that the suggested sentence meets these objectives.

Protecting society

If your client's record, offense, and general attitude make him a patently dangerous offender to the physical safety of others, and protecting society is paramount to the DA and the Judge, not to mention the victim and the media, then house arrest is a foolish argument. But, there are many offenders who are portrayed by the government as dangerous, but that presumed threat is not necessarily to the physical safety of individuals or society, but also to their economic viability. House arrest is a workable alternative for those defendants. As an example, I have in mind the white collar offenders and the major narcotics traffickers. Generally, both these classes of offender have a proven history of peacefulness and some degree of obedience which would lead the court to believe that they will abide by court-ordered confinement to their homes. For most, such a confinement would successfully curtail their illegal activity and protect society.

There are others who are situationally dangerous. House arrest should be argued for them as well. The drunk driver, the alcoholic who becomes assaultive in a bar, the addict, all are candidates for a house arrest argument for protecting society, unless, of course, the other occupants of the house are victims. The key, obviously, is to show your client's ability and willingness to abide by such an order without a jailor sitting in a tower in his driveway.

Punishing the defendant

Nothing punishes like a jail cell, but the fact remains that all punishments lose their sting with time. Damn few prisoners do their time in a dungeon-like jail cell. I am leading to an unusual argument. To achieve a house arrest sentence we want to remind the judge of how *nice* prison is. People adapt, even to incarceration. What is the punitive value of incarceration in a minimum, or even medium security facility? Psychologically degrading it certainly is, no freedom to travel, an inability to control one's life. But, no sex? For some. No sex with the spouse? Conjugal visits are often a quiet reality as are weekend furloughs. Brutality? Not often. Check out the spirit and the atmosphere of the honor camps and less secure facilities. They are something to endure, like a stint in the military, but they are not chock full of daily punishments. Smart prison administrators want a happy, contented facility.

Thus, the apparent easy ride represented by house arrest is made less dramatically different from prison. But the problem with house arrest (and you have been thinking it since you began reading) is that it is perceived as not punishing at all, no matter how comfortable prisons are. "Tough duty!" the client mumbles with a choked laugh. "I'm going to do my time in my living room with nightly, if I can stand it, conjugal visits, home cooking, and all the comforts of home. Real damn punishing!"

But it is punishing. Ask the judge and the probation officer to remember the last time they stayed home, not leaving for a minute, for a 24-hour day? They had the flu and went stir crazy. How did they feel when they were sent to their room by their parents, or grounded for a month? House arrest is punishing, it is demeaning, it is degrading. The prisoner cannot travel. The prisoner does not have control over his life. The family supports the prisoner, runs his errands. And the probation officer may call at any time, checking on him because he doesn't trust him. That's the same type of degradation that the guard generates when he searches inmates as they walk from their cells to the chow hall.

It's important to remind the court that house arrest is a condition of probation and can be as long as the statutory term of probation (generally five years). House arrest can also mean, as Judge Hatter interpreted it, 24-hour, 7-days-a-week custody with the property line as the prison fence line.

Also, remind the judge that there is no "good time." Under federal law, a five-year confinement to the home without "time off for good behavior" is equivalent to an 8-year term at Leavenworth. Under California law it is equal to a 10-year stretch at San Quentin.

Achieving uniformity in sentencing

We have no precedent; therefore, we cannot plug in a house arrest argument for this objective. Fortunately, this objective takes a back seat to all the others.

Encouraging the defendant to lead a law-abiding life in the future and deterring him from future offenses

The first half of this objective is a euphemism for punishment unless one believes the old medical model of correc-

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tions, where prisons were training schools and prisoners received schooling, job training and psychological counseling. If that were still the case, which it isn't, the argument for house arrest should be buttressed with a showing that the "home-detainee" could be allowed by the court to leave the home for therapy and vocational training and that such would be at the prisoner's own expense.

House arrest will deter future crimes. The house is a minimum security prison. The enforcer is a probation officer or other law enforcement officer, and his weapon is the telephone. As long as the client is confined to his home he will be as unable to commit crimes as he would in a minimum security prison where he also has access to a phone and visits from family and friends. And, in fact, living with two or so people at home reduces the risk of within-the-walls crimes and conspiracies. Prison is a school for crime, the argument being that the more impressionable prisoner learns from the other two thousand or so inmates.

Deterring others from criminal conduct by demonstrating its consequences

A tough one, but only because this objective is, in my opinion, a socially acceptable excuse for vengeance. There is absolutely no proof that any sentence deters anyone, other than the sentencee, and our recidivism rates raise doubts about that. People simply do not choose to commit or not commit crimes because of the sentence imposed on Joe Blow yesterday. We, as human beings, are not that base. Internalized forces, not external rantings, control our behavior.

House arrest will not diminish the seriousness of the offense or encourage others to walk in the defendant's shoes. In fact, to most thinking people, house arrest does not sound like some pleasant experience. Actually, we all have endured house arrest when our parents sent us to our rooms. Therefore, we all can identify with the feeling. The same cannot be said for being sent to prison, or work furlough, or any other alternative.

Preventing the defendant from committing new crimes by isolating him for the period of incarceration

Incarceration where? House arrest achieves this objective, but the judge must be convinced that the defendant is a minimum security risk. How do you do that? Good record on bail. Minimal prior record. Family support system. Success on probation or parole. Stable work record. Stable marriage. Good credit record. No escapes. Trustee status. (Jailors make their livings deciding whom of their untrustworthy population they can trust.)

Securing restitution for the victims of the crime

Low cost is the allure of house arrest. Prisons cost American taxpayers (and we taxpayers are victims of crimes) an estimated $10 billion (with a capital B) a year, or about $16,000 per inmate. Construction costs run from $25,000 to $125,000 per cell. House arrest costs zip. Florida's program, called Community Control, has processed 3,600 offenders at a cost of $3.20 a day and Florida didn't spend a dime for cell construction.

If the choice for your client is prison or house arrest, and the direct victim is demanding restitution, then house arrest gives the victim some hope. A prisoner is not going to make restitution. And the working spouse has to pay child care. But a house arrest detainnee may be in a position to switch roles with the spouse and provide free child care, the saving to the family thus able to be directed to the victim.

In sum, house arrest is an anti-prison argument. It's low cost is its principal appeal. It is even cheaper than a commitment to a residential treatment center or work furlough. But house arrest can only work if the defendant is somewhat reliable and subservient, and has a house and a family with whom to live. In that sense, it discriminates against the poor and the lonely. But note, the house does not have to be the defendant's. Perhaps a network of foster wardens is on the horizon.

I can hear it now. The missing Judge Crater surfaces and (looking at the defense attorney) says:

> "Your house arrest suggestion is a very intriguing idea, counselor." (Judge swivels to right) "Mr. Probation Officer, how would it work?"

Mr. Probation Officer answers (without any more than a perfunctory hesitation):

> "We can't do it."

Defense attorney answers:

> "One, the client must have a phone and, as a condition of probation, must be ordered to maintain it and answer it whenever the probation officer calls, and, two, the probation officer must call."

That's it. Some jurisdictions are utilizing communication technology. Automatic dialing machines are used in Florida and radio transmitters strapped to wrists using a hospital-like wrist band have been used. The phone is a receiver and if the offender moves out of range of his transmitter the circuit will be broken and an alarm will sound in the office of the enforcer. But such an elaborate mechanism is not needed. A simple phone call, at random, by the enforcer will suffice. The client's failure to personally answer the phone will raise a difficult to rebut presumption of probation violation.

House arrest is cheap and effective. Every situational, non-violent offender should be considered for house arrest. All defendants who are now sent to jail or work furlough, as a condition of probation, can be effectively punished by house arrest. All defendants who are now sent to prison for any reason other than their potential dangerousness or their proven inability to abide by court orders are candidates for house arrest. Broadscale use of house arrest would have a revolutionary impact on our prisons and jails and, more importantly, on our prisoners. Argue for it. And don't forget its value as a bail condition.

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House Arrest

Florida's Alternative Eases Crowding and Tight Budgets



Community control officers contact local law enforcement agencies via portable radios.

About the Author: Leonard E. Flynn is director of the Probation and Parole Program for the Department of Corrections, Tallahassee, Florida.

In May 1983, a group of criminal justice officials met at a night session in Florida's state capitol to address prison overcrowding in the state. Participants included legislative leaders from both the House and Senate, department of corrections officials, representatives from the governor's office and the judiciary, and other officials. From this meeting, the concept of community control involving confinement to residence as an alternative to incarceration was born.

The program is designed to provide a safe, diversionary alternative to imprisonment and to help address the problem of increasing prison population and associated high costs. The idea of confinement to residence under the house arrest concept was formalized into legislation and incorporated into the Correctional Reform Act of 1983.

Florida's Program

Community control house arrest is not an intensive supervision program. Offenders are confined to their own homes—instead of prison—where they are allowed to serve their sentences. Community control is defined in Florida Statutes as follows: "Community control means a form of intensive supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced."

Close surveillance and control is provided to help ensure "community controlees" (offenders) stay in their homes, except while working at paid employment to support themselves and dependents, or while performing free public service work in the community or other specific activities approved by the community control officer. Community control officers work irregular hours including nights,

Continued on page 66

weekends, and holidays when there is the greatest potential for problems to develop.

Electronic telephone robots are used to supplement surveillance techniques of the officers whose caseloads are restricted by statute to 20 community controlees. The robots, used in south Florida on an experimental basis, automatically telephone offenders at various times of the day and night with a prerecorded message; this helps determine that an offender is home when he/she should be.

Effective Planning

The philosophy of community control house arrest seemed timely and filled the need for an intermediate punishment-oriented program between probation and prison. Although community control was popular almost from the outset, careful planning for implementation was a major contributing factor in the program's success and, therefore, should not be overlooked.

The program is designed to provide a safe, diversionary alternative to imprisonment and to help address the problem of increasing prison population and associated high costs.

A task force composed of cross-section representation of probation and parole field staff was established to assist in expanding the concept into working procedures for implementation. This action proved invaluable in getting field staff involved, cultivating their support, and providing assistance and training.

The Department of Corrections, in conjunction with the State Courts Administrators Office, formed a committee to review and provide input into the draft of the *Implementation Manual for Community Control.* The working draft, which addressed the concept as well as detailed procedures of implementation, was published and used for training and implementation. Ironically, after more than two years of operation, the original working draft has not been changed, but has now become the official community control manual. An addendum has been added to address more specific procedures and to strengthen uniformity on a statewide basis as recommended by the community control officers.

An important element of the program's success was appropriate training and selection of community control officers during the program's initial phases and in preparation for implementation. Experienced probation officers with law enforcement backgrounds and knowledge, as well as those in accord with philosophical concepts of the program, were initially selected as community control officers.

Officer training included: self-defense, surveillance, search, seizure and legal liability, identification of behavior disorders in mental illnesses, cross-cultural differences, and how to handle intensive relationships.

In the beginning, a decision was made to open the program to news media scrutiny. Reporters have been allowed to ride with community control officers in the field. This has been very productive in obtaining media support, and in turn, general public support. Community control has received considerable national attention including segments on ABC's "Good Morning America" show. ABC's "20/20" has also completed filming for a documentary on the concept. Some legislators and judges have also accompanied officers on field trips.

Punishment and Reward

Community control is a punishment-oriented program designed to develop the offender's accountability and responsibility, and no apologies are made for that. It is felt that punishment is an integral part of rehabilitation or habilitation. The punishment and reward system has been the backbone of democracy in development of American society. It is even applicable to the free enterprise system. Self-improvement results in better jobs, pay, and benefits. Failure results in lower profits and loss of jobs. The work ethic, along with cultivation of accountability and responsibility, is constructive enough to motivate people in the general society. The same principles should apply to offenders. These philosophical concepts are the basis of community control.

Community controlees are required to contribute 150 to 200 hours of free labor to public service projects. This helps offenders provide preparation or restitution to society for criminal activities. In several locations, offender advisory committees have been formed to help identify public and nonprofit corporations that have public service volunteer work that community controlees can do as required by courts. Community controlees currently perform about 10,000 hours of public service work each month. Public service jobs include unskilled labor, truck driving, mechanical work, painting, and a host of other jobs.

The philosophy of community control house arrest seemed timely and filled the need for an intermediate punishment-oriented program between probation and prison.

Also, controlees must make restitution payments to victims of crime, pay monthly fees of $30 to $50 to the state to help offset supervision costs, and provide support for themselves and dependents. They must also fill out daily logs accounting for their activities. Logs are reviewed by officers and compared with other information.

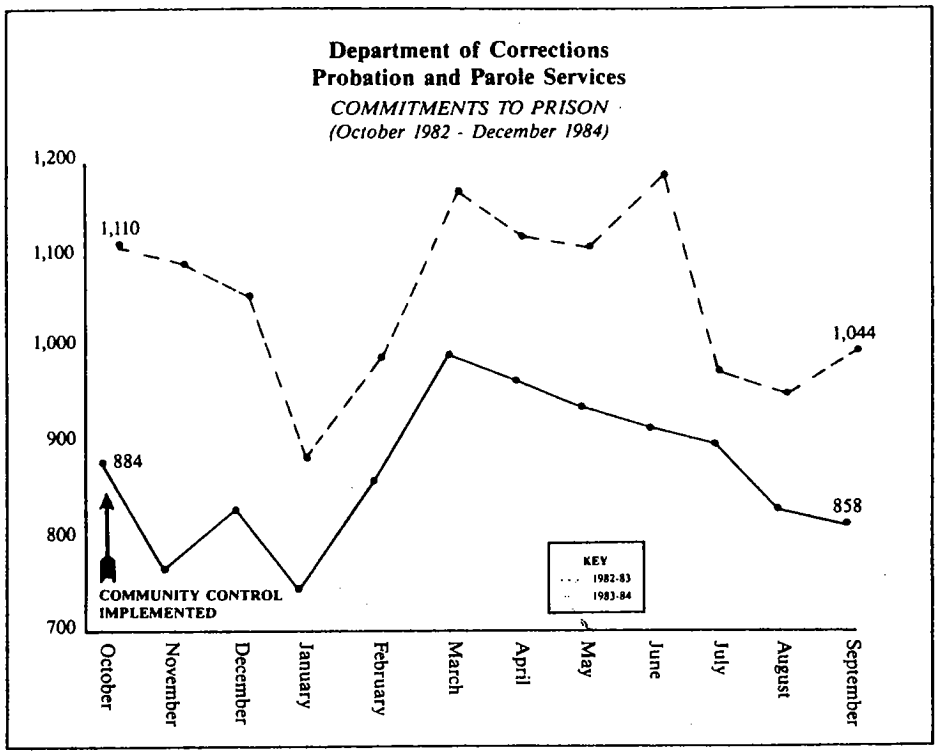
For each case, it is mandatory that community control officers maintain a minimum of 28 contacts per month. This provides the community with needed safety and helps maintain the program's credibility. Some required contacts include neighbors, friends, landlords, employers, spouses, teachers, police, and creditors. This also helps provide early detection of possible further criminal activity.

Community Control Officers

Community control officers carry portable radios tuned to local law enforcement agencies. They check in and

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Continued from page 66



check out with law enforcement dispatchers available for emergencies at all times. Thus, community control officers have assisted in reporting crimes in process, identifying suspicious persons, and preventing crimes from occurring. Instant access to regular law enforcement helps improve officer safety and cultivate assistance and support in surveillance of community controlees. Currently, community control officers do not carry firearms, although they have arrest authority with or without a warrant.

As of January 31, 1986, there were 5,066 community controlees under supervision. Since October 31, 1983, when the program began, 9,300 offenders have been placed in community control. Of these, 1,508 have been revoked resulting in imprisonment. The revocations included 889 offenders with technical violations and 619 who committed misdemeanor or felony offenses. When including those still under supervision, this reflects a failure rate of 16.2 percent, which is respectable. New monthly intakes average about 300.

A major objective of community control is to help reduce prison commitments and subsequent overcrowding in Florida's prisons. Based on the application of sentencing guidelines scoresheets, 70.3 percent of community controlees are bona fide prison diversions with an estimated 15 percent consisting of county jail diversions. The remaining 14.7 percent are probation cases judges felt needed tighter control.

During the first year of community control, the number of prison commitments dropped by an average of 180 per month when compared with the same months in previous years, according to the Preliminary Report on Community Control (August 1984).

Community control continues to be a viable alternative to imprisonment for felony offenders—and at a much lower cost. It costs $2.86 per day to supervise a community controlee under house arrest compared to $27.64 per day in operating costs for imprisonment. This does not take into account the $30-35 million construction costs for a 600-person prototype correctional institution. Even with the use of electronic bracelets or anklets providing constant 24-hour-a-day surveillance at an additional $6 or $7 per day, the cost would still be much lower than imprisonment.

Positive Results

Thus far, there have been no major problems with community control. The community controlees have not committed any heinous crimes such as murder or rape. Media support has been provided partly because news reporters have been allowed to ride with community control officers during field trips and to interview offenders. Judges and others in the criminal justice system including legislators have accompanied officers in the field to view the program.

Since the program was innovative, some problems occurred at the program's outset when there was no track experience from which the officers could draw. Therefore, officers were given considerable latitude in interpreting exactly what "confinement to residence" meant. Some officers took a hard-line approach, and others were very liberal. It became necessary to publish an addendum to the manual providing more uniformity concerning conditions allowing offenders to leave their residential confinement.

Experience reflected the need to conduct group and individual sessions with family members because of disruption caused by frequent, unannounced home visits. Family members sometimes felt they were actually under surveillance or supervision.

In addition, a few staff members, defense attorneys, and others interpreted community control as probation. This caused misconception by the offenders, which resulted in violations of confinement provisions.

Some judges and offenders viewed the program as unreasonably restrictive. A few judges claim it is so strict it has inherent guaranteed failures, and offenders have actually turned down community control in favor of going to prison.

The length of community control terms is somewhat controversial. Statutes limit the term to two years, which is not long enough according to some judges. Others feel two years is too long and that a very self-disciplined person could not abide by the term's conditions. However, the success rate does not seem to reflect that conditions are unreasonable. Fortunately, there are provisions for early sentence terminations, and some cases are also reduced to regular probation.

Community control is not a panacea for prison and jail overcrowding, but it is well entrenched in Florida as an effective diversionary alternative, and it does help relieve prison overcrowding.

ROBERT L. BRENT
CHIEF PROBATION OFFICER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
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July 8, 1986

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

Dear Judge Wilkins:

The following comments are submitted in response to your June 17, 1986, correspondence regarding sentencing options.

Probation

Although I am not sure what you have in mind by your reference to "intensive supervised probation," it would appear to be an option that is presently available within the discretion of the court and the probation office. The frequency and nature of contact with an individual on probation is adjusted so as to meet the needs of the individual and assure the protection of society. There does not appear to be a specific provision, however, for supervision which might involve house arrest and/or electronic surveillance. If Title 18, Section 3563(b)(20) does not adequately provide for this type of option, you may wish to address this option if it must be more specifically defined. Determining who should be placed in such a program should be based on the nature of the offense and the background of the offender. It appears that the court, after consultation with the probation office, might be in the best position to make this assessment.

Payment of a fine, restitution or community service is mandatory for felony offenders placed on probation. It seems that there should be some allowance for the reasonableness of one of these requirements based on the characteristics of the offender. A poor, physically or mentally disabled defendant might find it virtually impossible to fulfil any of these requirements.

Fines

Fines would appear to be preferred sanctions for crimes committed for the purpose of obtaining monetary gain. The actual amount of a fine should be structured to take all profit out of the crime and yet remain in compliance with the factors described in Section 3572 of Title 18. When an individual or an organization fails to pay a fine, sanctions should be imposed consistent with the provisions provided in Title 18. The wilfulness of nonpayment verses the inability to pay a fine must be carefully assessed in each case.

Restitution

Restitution should be ordered whenever there is an identifiable loss and the defendant can reasonably be expected to meet the obligation. If the financial obligation is unreasonable based on the situation of the defendant, or when the community at large appears to be the victim, community service would appear to be an appropriate means of obtaining social reparation. Each order must be tailored to meet the individual situation.

Community Service

Community Service should be tailored so as to provide mutual benefit to the defendant and the community. Both community needs and defendant needs should be considered and whenever possible the skills of the defendant and the nature of the offense committed should also be considered in making a community service assignment. Defendants who experience guilt as a result of their offense behavior are likely to benefit from community service. Their service, however, may or may not result in the greatest benefit to the community. Offenders who pose a serious risk of physical harm should not be placed in community service. Likewise, defendants should not be placed in community service which would invite them to engage in repetitious criminal behavior.

House Arrest

Earlier in this correspondence I referred to the concept of house arrest. This would appear to be a viable alternative for defendants who require greater control or a more severe sanction that the traditional form of probation but whose offense and individual needs are not so severe so as to warrant imprisonment. Non-violent offenders who are involved in serious property offenses might be appropriate candidates for this type of sentence. This option would provide yet another sentencing alternative and might be an appropriate measure for borderline cases.

The hearing on the matter of sentencing alternatives is of great interest to me and I look forward to hearing of the results. Developing the best possible sentence for each defendant is an exciting and challenging aspect of our work. I wish you the best as you prepare for the hearing.

Very truly yours,

Carol D. Erichsen

Carol D. Erichsen
Supervising U. S. Probation Officer

CDE/sb

United States District Court
Eastern District of Washington
950 United States Courthouse
Post Office Box 2136
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Robert J. McNichols
Chief Judge

July 7, 1986

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am responding to your inquiry of June 17, 1986 concerning the Commission's upcoming hearing in Washington.

It may be appropriate for me to preface my remarks with some overall views about criminal sentencing. First of all, I doubt that anyone is capable of structuring either legislation or guidelines for criminal sentencing that will meet anywhere near universal approval. Almost without exception district judges find criminal sentencing to be the most difficult and agonizing task required of them. There are of course, cases at opposite ends of the spectrum - the hardened professional criminal at one end and the mild first offender on the other. It is those who fall somewhere between that make the task so difficult.

Having said all that I will try to respond constructively to your inquiry. Under some existing federal criminal statutes and the sentencing structure of some of the states, the legislative branch has, to some degree, taken the discretion from the judiciary and placed it with the prosecution. I recognize that some such discretion is inherent in the system. However, when the prosecutor may utilize a mandatory sentence as a plea bargaining device it can create substantial problems. Except in the most egregious cases, I do not believe in mandatory sentences. Moreover, placing the discretion with the prosecutor by selective charging alternatives to force a mandatory sentence is unwise.

I am aware that there has been and probably always will be, some disparity in sentencing and something should be done to alleviate that problem. Unfortunately, I don't believe that I know what that "something" is. It is difficult, if not

impossible, to apply uniformity in sentencing. I will give you a couple examples of cases which we faced in our court. As you know, there is a mandatory 5-year sentence, with no possibility of parole, in certain cases in which a firearm is used. I will cite two cases which occurred in this district. One was a professional career bank robber who had been convicted several times before for armed bank robbery. That presented no problem. He was sentenced to the maximum term. Shortly thereafter, I had a case involving a woman in her late twenties, married to a scoundrel. The husband left this young woman with three small children in a small community in our district, took what little funds they had and the automobile, and left her totally destitute living in a hovel, with no food or money. She had no one to turn to. Over a period of two or three days she worked herself into such a state of frustration that she put on a ridiculous disguise, took an old unloaded 22 rifle under a cape and walked less than a block to a bank. She approached the teller trembling, showed a portion of the firearm and asked for money. The teller of course complied. The defendant then panicked, threw the money and the gun in a trash receptacle at the exit door and started for the police station across the street. She surrendered and entered a guilty plea. In that case, no one, the teller, the banker, the district attorney or anyone else would have wanted that woman to serve a long prison sentence. Fortunately, she did not, because the mandatory sentence provision was not then in effect.

Other examples arise in the area of drug enforcement. We have a number of indictments pending in this district under which couples are jointly charged. The indictment includes the charge of engaging in a continuing criminal enterprise which carries a mandatory ten-year sentence. Assume that a young wife is dominated by her husband who is engaged in illegal drug trafficking and becomes involved to some limited extent in the enterprise. She has no previous record of any kind, is caring for three small children. Assume that the court is satisfied that she will never again become involved in unlawful activity. What do we do?

I would hope that members of the Commission, and for that

matter, members of Congress, when addressing criminal sentencing, will make every effort to put themselves in the position of a trial judge and consider hypothetical cases along the lines mentioned above.

With respect to the specific items contemplated by your letter, I enclose a copy of a Memorandum from Mr. Robert Banta, our Chief Probation Officer, with which I basically concur (this memorandum was not a result of coaching from the court). I will comment briefly on the areas of community service, house arrest and similar innovative procedures. These alternatives in sentencing can in the appropriate case, be very helpful and very effective, particularly in the area of so-called white collar crime. For example, the present scandal on Wall Street may be a classic example where an innovative trial judge, with appropriate authorization, could combine punishment with substantial benefit to the community in any number of ways.

There are two other matters which I feel I must address:

1. Rule 35, Federal Rules of Criminal Procedure. I believe, and most trial judges to whom I have spoken, believe that they should have the authority to modify sentences. It is totally illogical for a trial judge to be in the position that having signed a judgment on a hectic day and later concluding that he or she was wrong, be foreclosed from modifying that judgment. This subject would require study in order to fit into the present statutory scheme relating to guidelines and appeal of sentences.

2. Expungement. Since the repeal of the Youth Corrections Act, a person convicted of a felony in the federal courts is locked into that conviction for life. Virtually every state has a procedure under which a conviction may be expunged for certain purposes upon the completion of a successful period of probation to enable that individual to get on with his life without the stigma of a conviction. I personally believe that expungement following a period of probation is a great carrot and probably does as much to induce a person to stay on the right track as anything. I seriously believe that some

entity, whether it be the Sentencing Commission, the Judicial Conference or the Congress should seriously look at such a program.

I recognize that the Commission's task is primarily to propose guidelines for sentencing - not to legislate. However, I assume Congress would give serious consideration to any recommendations the Commission may see fit to make.

I hope I have not engaged in too much rambling. I realize that you and your Commission have a very difficult task to perform and I hope my comments are helpful and not burdensome. Please feel free to call upon me for comments at any time, or make any other request which might be of assistance to you and the members of the Commission.

Sincerely,

Robert J. McNichols

enclosure

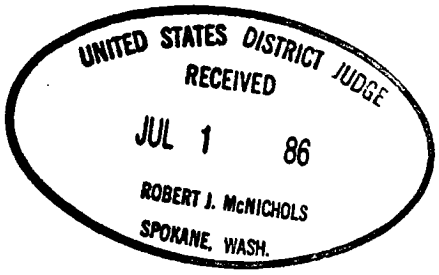
UNITED STATES GOVERNMENT

memorandum

DATE: June 30, 1986

REPLY TO ATTN OF: CUSPO Robert D. Banta

SUBJECT: **U. S. SENTENCING COMMISSION**



TO: The Honorable Robert J. McNichols
Chief U. S. District Court Judge
Eastern District of Washington

Judge,

Reference is made to Chairman Wilkins' June 17, 1986 correspondence to you and to your June 19, 1986 memorandum requesting a response to the topics contained in Chairman Wilkins' letter.

I asked each staff member to respond to the various topics and the general consensus of opinion, reflected by that response, is as follows:

PROBATION - INTENSIVE SUPERVISION

If the Sentencing Commission would mandate that certain cases be placed on intensive supervision (precluding common sense Court discretion) we can envision more bureaucratic and paperwork growth. The geographical distances between staff and client in this district could create unmanageable logistical problems. We presently have the flexibility to offer "intensive supervision" to those cases falling into our high activity category and when practical we can and sometimes do provide an unlimited number of personal contacts with that client.

It would seem that the Commission's role would be to simply authorize and/or suggest intensive supervision at the Court's discretion for those cases falling into a particular broad category and otherwise meet the necessary requirements.

The Court would make make the ultimate determination, at time of sentencing, and the role of the probation office would simply be to recommend for or against intensive supervision.

The Court now has broad discretion, as to imposing specific conditions of probation and the general printed conditions, that we provide to each probationer and ask them to endorse seemingly have stood the test of time.

FINES

We are not certain that any particular category of crime should trigger a fine only approach. The defendant's overall circumstances might, or might not, suggest a fine only approach to disposition.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

☆ U.S.GPO:1984-0-421-526/178

Many elements must be considered in calculating the amount of a fine and we would prefer that the Courts not be restricted in the various elements they could, or could not, consider. In our judgment it would be very difficult for the Commission to produce a type of "pay chart" that would accommodate all defendants.

Everything else being equal, there probably should be some type of a correlation between the offender's gain and the victim's loss in calculating a fine; however, that type of a correlation seems to be more apropos to restitution.

The offender's "ability to pay" has always been a consideration and should continue to be considered. It seems improper to order a fine incompatible with the offender's income and--in effect--perhaps setting him up to fail.

The defendant's "ability to pay" has thus far been determined by a common sense investigative approach utilizing the sum total of information available as gathered by the investigative agency, United States Attorney's staff, and our staff during the presentence investigation. One would also hope for a good faith and accurate assessment on the part of the defense counsel.

To maintain system credibility sanctions must be imposed when all of the above factors are utilized and when the offender then fails to pay the ordered fine, or fails to show good faith effort toward payment.

RESTITUTION

We feel that restitution to the victim, or victims, must be ordered in every case to maintain a type of credibility with the public. In those cases where reasonable people would agree, that the defendant's ability to pay is limited, restitution should be ordered, because the defendant's financial circumstances could conceivably change at some point in the future and, the condition of restitution can be modified by the Court when appropriate. If the amount of restitution is a disputable item the Courts have heretofore effectively ordered restitution--"in an amount to be determined later".

The Courts should be left with the discretion to effectively combine imprisonment, restitution, and/or community service particularly when a defendant is charged with multi-count offenses.

COMMUNITY SERVICE

Community service seems to be a viable adjunct and/or alternative to fines and restitution. The defendant's remorse and embarrassment

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

PROBATION OFFICE

DAVID E. JOHNSON
CHIEF U.S. PROBATION OFFICER
CEDRIC C. EASTER
DEPUTY CHIEF U.S. PROBATION OFFICER
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HYATTSVILLE 20782

PLEASE REPLY TO:
BALTIMORE
FTS: 922-4659

July 7, 1986

The Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Please accept my apology for the delay in responding to your letter dated June 17, 1986, but I have been on vacation in South America.

I agree there is a need to integrate the various sentencing options into an overall sentencing strategy. In my opinion such integration will be impossible unless the Commission develops a set of guidelines which address the offense behavior in relation to the particular offender. My responses to your specific questions are as follows:

Probation

"Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed?"

Intensive supervision should be imposed in cases involving organized crime, career criminality, violent offenses, and large scale drug trafficking. Offenders in these categories should be provided intensive supervision far exceeding the present standards for high activity cases (example: required weekly personal contact as opposed to monthly contact). Other forms of control include increased offender surveillance, financial monitoring, travel restriction, and contact with other law enforcement agencies.

"What roles should the Commission, the court and the probation office have in determining which offenders are placed on intensive supervised probation?"

The court should have responsibility for determining which offenders are placed on probation. The probation office should then be responsible for ascertaining if the offender should receive intensive supervision based on the guidelines provided by the Commission.

"What type of probation conditions not expressly listed in 18 U.S.C. 3563(b)(1-19) should the Commission consider in drafting the guidelines?"

In my opinion the Commission should consider a condition mandating the probationer to follow the instructions of the probation officer. It would also be helpful to have a specific condition mandating the probationer to regularly disclose any financial information requested by the probation officer.

Fines

"Are there certain crimes for which fines should be the preferred sanction? If so, list the offenses."

Fines should be the preferred sanction for crimes which have been committed for financial gain.

"What elements should be considered in calculating the actual amount of a fine? Should the amount of the fine bear a particular relationship to the offender's gain or the victim's loss? How should the offender's 'ability to pay' be determined?"

Factors to be considered in calculating the amount of a fine are provided in Title 18, U.S. Code, Section 3622. In my opinion "ability to pay" is an important factor. For a fine to have any deterrent effect, it must be in an amount which causes hardship as opposed to an amount construed as simply the cost of criminality. The fine amount may also bear a particular relationship with either the offender's gain or the victim's loss depending on the particular situation. "Ability to pay" can best be determined by the probation officer in the presentence report through much greater emphasis on financial investigation.

"What sanctions should be imposed if an individual offender fails to pay the fine? An organizational offender?"

Incarceration should be imposed for an individual offender who fails to pay a fine. If an organizational offender fails to pay, the most appropriate sanction would be to proceed criminally against the particular individuals within the organization who were responsible for the criminal behavior.

Restitution

"Under what conditions should restitution be ordered? How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? Are there ways in which restitution could be effectively combined with imprisonment or community service?"

Restitution must be considered in all cases, and should be ordered whenever possible. Restitution should also have statutory priority over fines. The amount of restitution can be determined by the probation officer in the Victim Impact Statement required by Rule 32(c)(2) of the Federal Rules of Criminal Procedure. Such a determination should enable the court to rule upon restitution without unduly complicating or prolonging sentencing. In selected cases restitution can effectively be combined with imprisonment and/or community service.

Community Service

"How should an effective community service program be structured?"

An effective community service program must be structured around the purpose of the court for imposing community service coupled with the particular skills and interests of the offender.

"What types of offenders will benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals of sentencing?"

Non-violent and first offenders are perhaps most amenable to community service when the goal of sentencing is rehabilitation. Community service, however, can also serve other goals of sentencing such as retribution and deterrence. Certain types of offenders such as violent and career criminals are inappropriate for community service.

House Arrest

"Is this a viable alternative to incarceration? If so, under what circumstances?

It is difficult at this early stage to determine if house arrest is a viable alternative to incarceration. House arrest will certainly require additional manpower and technical electronic equipment which may be unavailable because of budgetary constraints.

Thank you for again requesting my views. I anticipate attending the hearing on July 15, 1986.

Sincerely,

C. William VanScoy
U.S. Probation Officer

CWV:lnk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

PROBATION OFFICE

Philadelphia

H. RICHARD GOOCH
CHIEF U.S. PROBATION OFFICER
9000 U.S. COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA. 19106-1766
(215) 597-7950

SUITE 1106
EAST SHORE BUILDING
45 S. FRONT STREET
READING, PA. 19602

July 8, 1986

Mr. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Dear Mr. Wilkins:

In response to your letter of June 17, 1986, requesting comment on a host of issues before the Commission, I solicited input from several members of our staff. Each of these individuals prepared a letter or memorandum for your consideration which is enclosed.

Please understand that the opinions expressed in each document are those of the individual author and do not necessarily represent the views of this Court or this agency. Also, please forgive the quality of some of the narratives as the respondents had little time to prepare their reports.

Very truly yours,

H. Richard Gooch, Chief
U.S. Probation Officer

Thomas R. Maher
U.S. Probation Officer

TRM/ntc

Enclosures

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
PROBATION OFFICE
Philadelphia

H. RICHARD GOOCH
CHIEF U.S. PROBATION OFFICER
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(215) 597-7950

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READING, PA. 19602

July 2, 1986

Mr. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Dear Mr. Wilkins:

Mr. Maher has given me a copy of your letter dated June 17, 1986, so that I might make a response. Rather than respond to each point mentioned in your letter, I would prefer to share some thoughts I have had over the past 15 years while working in the field of probation and parole.

During that time, there has been the belief or implication that supervision can aid in rehabilitating and/or reintegrating an offender into society, thereby protecting society from further offenses. While being a parole/probation officer, I have observed that this is not the actual role or purpose of supervision in the majority of cases. More specifically, I do not feel that preventative supervision is appropriate or necessary except, perhaps, in drug, alcohol and psychiatric cases which make up less than 25 percent of our total client population. If one notes what is done by an officer and where the emphasis of supervision is placed by the Courts and other agencies, one will see that the proper role of a probation/parole officer is to provide accurate, complete, relevant and timely information to the Court and/or Parole Commission. The Courts, Parole Commission and other administrative and enforcement agencies are dependent on the above type of information to operate and to make appropriate decisions relating to offenders who are at a particular stage of the criminal justice system.

As a small example of the distinction I am making, I will only state that an officer cannot stop a person from using drugs. The officer can test for drugs and verify the type of drug used, the time, frequency, and quantity of use, and can verify any agency involvement. This should, in fact, be the focus of his job, and this type of information is of value to the Courts, etc. The implication of this type of focus would be to relieve officers of a responsibility they cannot perform, i.e., changing behavior, and one which, in truth, is not, in practice, expected of them. Intensity of supervision would be dependent on the type and timeliness of information needed by the Court or relevant agency, rather than the individual dynamics of the offender. Many traditional and

time-consuming duties could be eliminated. Many functions are performed in order to show and prove that an officer is making every effort to rehabilitate a client. If rehabilitation was taken away as an expectancy, then those efforts could be, without real loss, eliminated. In the federal system, many offenders are classified as "white collar" offenders. Most of these cases come from, and have, stable social situations and, in particular, are in no need of traditional supervision. Unfortunately, they are, initially at least, supervised under the rehabilitation/reintegration format. If sentences for these type of individuals involved no supervision (i.e., a fine or restitution to be paid forthwith or a fine, restitution or community service attached to a non-reporting probation that would expire automatically when the condition was met), then the existing probation/ parole resources could be devoted toward more profitable efforts. My experience has been that the main deterrent impact of parole and probation on the majority of clients is that, if convicted of a new crime, the offender can be sentenced for his new crime and also for the crime for which he was initially placed on probation or parole. This "back time" sanction can exist with or without supervision. If an officer is seen as a provider of information, then his only function relative to a violation is to verify and provide the necessary information relative to the new offense. He would no longer have to accumulate a file full of information to show that he did his best to prevent the new crime from occurring. Officers spend much of their time and effort accumulating this kind of information and participating in activities to demonstrate preventative efforts. In reality, Courts seldom call for, or need, this type of information or effort.

I encourage the Sentencing Commission to look at the possibility of viewing the probation/parole officer role as one of providing timely, accurate and necessary information to the agencies they support, rather than being responsible for the rehabilitation or reintegration of people under the authority of the justice system. I also encourage the Commission to consider sentencing options which do not involve supervision where supervision performs no real function.

Respectfully submitted,

Peter S. Rhodes
U.S. Probation Officer

PSR/ntc

UNITED STATES GOVERNMENT

memorandum

DATE: July 2, 1986

REPLY TO ATTN OF: Allan M. Siegel (AMS)
Supervising U.S. Probation Officer

SUBJECT: CHAIRMAN WILKINS' LETTER

TO: Thomas R. Maher
U.S. Probation Officer

With respect to Chairman Wilkins' letter, I offer the following comments:

1) Intensive supervision should be imposed on identified drug, alcohol, and psychiatric cases meeting established criteria. Intensive probation supervision ought to be distinguished from "high activity" supervision. Intensive supervision should require a minimum of one personal contact weekly for the initial six months of supervision.

2) Fines are the appropriate sanction for most cases falling in the petty offense category. In some districts, the U.S. Magistrate will order presentence investigations on such cases and then place them on probation. It seems to me these cases could be easily disposed of by merely imposing a fine for first time petty offenders. Perhaps, pretrial services could be used to screen out cases and make recommendations.

3) Suggest "conditional" fines be imposed at time of sentencing in certain cases. These fines could be modified, if necessary, after sentencing and after the completion of a debtors examination.

TRM/ntc

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

★U.S. GOVERNMENT PRINTING OFFICE : 1982 0 - 361-526 (7290)

UNITED STATES GOVERNMENT

memorandum

DATE: July 7, 1986

REPLY TO ATTN OF: David D. Fawkner, USPO

SUBJECT: U.S. Sentencing Commission/Community Service Questions

TO: Tom Maher

In our large district, we have a centralized system that consolidates all community service orders into a program that provides comprehensive services including: referral and intake, orientation, agency selection and recruitment, placement, monitoring of subject's work performance, and regular feedback to probation officers. We believe a centralized community service program will increase the compliance rates; reduce duplication of efforts; and provide better services in terms of efficiency, accountability, and fairness. An additional advantage to our centralized program is the workload reduction for line staff. Lastly, our program has the capacity to develop innovative or "tailor made" community service proposals for the court's review and consideration. Of course, these proposals are only developed upo request for individual judges or probation officers.

As you know, sentencing guidelines require all defendants who are recommended for probation to be considered for community service. However, care should be exercised with respect to those who exhibit the following characteristics:

1. Current opiate use;
2. Active alcoholism;
3. History of assaultive behavior or sexual deviance;
4. Serious emotional or psychological problems;
5. Poor health;
6. Financial conditions requiring the offender to work two or more salaried jobs;
7. Where numerous other special conditions are imposed.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

☆U.S. Government Printing Office: 1981—341-526/6410

The above program criteria was designed to provide the probation officer with a guideline to properly assess a person's eligibility for community service work. We want to exclude those individuals who would be incapable of performing community service work, who may present as danger to the community if placed in such a program, or whose participation may be reviewed as objectionable by community agencies.

DDF/ls

July 14, 1986

United States Sentencing Commission
1331 Pennsylvania Ave., N.W., Suite 1400
Washington, DC 20004

RE: Federal Register Notice of 7/8/86

Dear Commissioners:

In response to your topic under consideration regarding the use of fines, restitution, community services, house arrest, electronic monitoring, intensive probation and other options I would like to point out a couple of things to the Commission regarding restitution.

Besides receiving Life plus twenty-five years last year in federal court for violations of 18 USC §§§ 2113'a)(d) and (e), I was also ordered to repay the bank $50,000 taken in the robbery and to pay the Bank Manager I kidnapped $4,000.00 per year to compensate for a loss in salary she took as a result of a voluntary job change at the bank following the kidnap/bank robbery. This was done under newly enacted 18 USC Sections 3579 & 3580. However, the Judge did not take into consideration my future earnings abilities, nor the financial status of myself or my dependents.

I would suggest that before the Commission start considering the use of restitution that something be done to tighten up the existing statutes (18 USC 3579,3580, so they cannot be so loosely interpreted by Judges. The present statutes leave too much room for inconsistency, and that is one of the primary things the Commission is supposed to be remedying.

Thanking you for allowing me to put this matter before your consideration, I remain,

Respectfully yours,

Raymond E. James

Raymond E. James
#35259-136 (G-2)
United States Penitentiary
P. O. Box # 1000
Lewisburg, PA 17837

cc: file

The Heritage Foundation

A tax-exempt public policy research institute

June 19, 1986

William W. Wilkins
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

Thank you for your recent letter to Burt Pines, our vice-president for research, concerning sentencing options. We have not conducted extensive research into questions of criminal law, and thus are not in a position to provide specific recommendations to the Commission. If you have not already done so, however, I would suggest that you contact the following persons regarding this issue:

Dan Popeo
General Counsel
Washington Legal Foundation
1705 "N" Street, N.W.
Washington, D.C. 20036

Patrick McGuigan
Director
Judicial Reform Project
The Institute for Government and Politics
721 Second Street, N.E.
Washington, D.C. 20002

I wish you good luck on your important project, and look forward to seeing the report of your Commission.

Sincerely,

James L. Gattuso
Legal and Regulatory Policy Analyst

Herbert B. Berkowitz, *Vice President*
Gordon S. Jones, *Vice President*
Burton Yale Pines, *Vice President*

Edwin J. Feulner, Jr., *President*
Phil N. Truluck, *Executive Vice President*

Peter E. S. Pover, *Vice President*
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Arthur Spitzer
Jay Van Andel

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RICHARD L. LESHER
PRESIDENT

1615 H STREET, N.W.
WASHINGTON, D. C. 20062
202/463-5300

June 26, 1986

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing
Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Mr. Wilkins:

Thank you for your recent letter regarding sentencing policy and guidelines for the federal courts.

I appreciate your taking the time to write us on this important topic. Unfortunately, we again must decline to comment on this issue.

As you are aware, our membership is diverse, and opinions on these issues vary. We continue to applaud your efforts in this area and, if we can be of assistance in another manner, please do not hesitate to contact me.

Sincerely,

Richard L. Lesher

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PAUL H. RONEY
CIRCUIT JUDGE
FEDERAL OFFICE BUILDING
ST. PETERSBURG, FLORIDA 33701

July 7, 1986

Mr. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue N.W.
Suite 1400
Washington, DC 20004

Re: Views on Sentencing Options

Dear Mr. Wilkins:

Thank you very much for the invitation to express my views on a number of questions involving the sentencing options available and appropriate for the individuals convicted of a federal offense.

Since I am not involved in the sentencing of federal convicts, it would be inappropriate for me to comment on the questions before you under the guise of an expert. Because of the press of my other judicial duties, I do not have the time before your deadline to learn what I should know before making suggestions to your committee.

I appreciate very much, however, the comprehensive work the Commission is doing and the solicitation of my views.

Yours very truly,

Paul H. Roney

Paul H. Roney

PHR:ehs

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RICHARD L. BREAULT
GROUP VICE PRESIDENT, POLICY

1615 H STREET, N.W.
WASHINGTON, D. C. 20062
202/463-5417

May 8, 1986

Mr. William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

Thank you for your recent letter regarding sentencing policy and guidelines for the federal courts.

I appreciate your taking the time to write us on this important topic. Unfortunately, we again must decline to comment on this issue.

As you are aware, our membership is diverse, and opinions on this issue vary. We continue to applaud your efforts in this area and, if we can be of assistance in another manner, do not hesitate to contact me.

Sincerely,

Richard L. Breault