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Policies of the Parole Commission and the Bureau of Prisons as They Affect the Judge's Sentencing Options

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Policies of the Parole Commission and the Bureau of Prisons as They Affect the Judge's Sentencing Options

(An introductory paper)

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This paper has been prepared as an introduction to understanding the relationship between a judge's sentence of imprisonment and the actions of those agencies that have responsibility for an offender after sentencing. It deals principally with policies affecting the duration of an offender's incarceration, but it also includes some discussion of policies affecting the offender's experience while incarcerated.

Readers are cautioned that administrative policies discussed in this paper are subject to revision, and that revisions may apply to offenders sentenced currently. The paper is current as of October 17, 1978.

Under 18 U.S.C. § 4205, prisoners are eligible for release on parole only if serving sentences to imprisonment for more than one year. The paper therefore begins with a section limited to these sentences. Following that, there are sections on sentences to imprisonment for one year or less; special sentencing authorities such as the Youth Corrections Act; the use of observation and study procedures as an aid to the sentencing judge; and communications from the judge to the Bureau of Prisons and the Parole Commission.

I. SENTENCES TO IMPRISONMENT FOR A YEAR-AND-A-DAY OR MORE

A. Policies of the Parole Commission

Summary

Under current policies of the United States Parole Commission, most offenders have their initial parole hearings within four months of arrival at a Bureau of Prisons institution. Following the initial parole hearing, an offender is given a "presumptive" release date -- a date on which the offender will be released if his conduct is good and if he proposes an adequate release plan at the appointed time. The actual release date may subsequently be made earlier than the presumptive date, but the Commission's regulations state that this is to occur only under "clearly exceptional circumstances." The actual release date may be later than the presumptive date if the offender commits disciplinary infractions while in prison, or if the offender does not propose a satisfactory release plan.

In setting release dates, the Commission employs two principal criteria. These criteria reflect the Commission's interpretation of the Parole Commission and Reorganization Act of 1976,[1] which effected a major change in the statutory basis for parole. One criterion is the severity of the behavior that brought the offender into contact with the law. The other is a statistical prognosis of the likelihood that the offender would violate parole if released. The statistical prognosis, as well as the severity classification, is based on

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1. Pub. L. No. 94-233, 90 Stat. 219.

information available before the offender enters an institution. That is to say that the prediction about likely success on parole is not based on behavior while incarcerated, but is instead based on information developed about the offender's earlier life.

These policies are radically different from some commonly held notions about the parole process. In particular --

1. It is not the policy of the Commission to release offenders when they reach their parole eligibility dates, even assuming their conduct while imprisoned is exemplary. That probably never has been the policy.

2. It is not the policy of the Commission to release offenders upon a determination that they have reached the optimum time for release in terms of rehabilitative progress. That was once an important factor in release decisions, but no longer is. The lack of attention to this factor reflects a lack of confidence in the ability of parole authorities to make determinations of this nature.

Present policies are designed largely to reduce disparity in the treatment of inmates sentenced by different judges, in accordance with the Commission's understanding of Congressional intent in enacting the 1976 law.[2]

In the context of such a policy, the judge's sentence serves principally to place limits on the Parole Commission's exercise of

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2. See 42 Fed. Reg. 39,808 (1977) (discussion of purpose of amendments to Parole Commission regulations); H. Rept. No. 94-838, pp. 19-21 (1976) (Joint Explanatory Statement of the Committee of Conference), reproduced in the appendix.

the release authority. If the Commission's function is to compensate for disparity in judges' sentences, it is no doubt paradoxical that judges have the ability, through their sentences, to limit the Commission's ability to follow its own release criteria. This paradox is basically a product of changing notions about the appropriate role of the parole authorities, not accompanied by a thorough reappraisal of the relationship between the sentencing function and the parole function. In the absence of such a reappraisal, the paradox remains part of the environment in which judges make their sentencing decisions.

Parole Commission Procedures

Under current Parole Commission policy, the procedures for offenders sentenced to terms of less than seven years are distinguished from those for offenders sentenced to terms of seven years or more. An offender with a term of less than seven years receives his initial hearing within 120 days of arrival at a federal institution, and a presumptive date of release is established following that hearing.[3] An offender serving a term of seven years or more, however, does not receive his initial hearing until shortly before his parole eligibility date (generally when one-third of the sentence has been served); following the initial hearing for such an offender, the Commission either sets a presumptive release date that falls within four years after the

3. 28 C.F.R. §§ 2.12(a), (c)(1). Unless otherwise noted, citations to the Code of Federal Regulations are to the revision of 28 C.F.R., part 2, appearing at 42 Fed. Reg. 39,808-22 (1977).

initial hearing or continues the case to a "four-year reconsideration hearing." Following a four-year reconsideration hearing, the alternatives available after an initial hearing are again available -- either a presumptive date is established or another continuance is ordered.[4]

Under proposed regulations published in the Federal Register of September 18, 1978,[5] the standard for determining who gets an early initial hearing would be changed, and would depend on the offender's parole eligibility date rather than the sentence length. The initial hearing within 120 days would be provided to every offender who will become eligible for parole before serving ten years. For all practical purposes, that means every offender except those sentenced to life imprisonment or terms of thirty years or more; offenders serving these long sentences would still not receive their initial hearings until shortly before their eligibility dates. Under the proposed regulations, a presumptive release date would be established following an initial hearing if it was thought appropriate to set a release date that fell within ten years following the hearing. If a presumptive release date was not set, the case would be continued to a full-scale reconsideration hearing ten years away.

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4. 28 C.F.R. §§ 2.12(a)(1), (b), (c)(2), 2.14(c)(2).

5. 43 Fed. Reg. 41,411-12.

After the initial parole hearing, periodic "interim" hearings are provided, to consider any significant developments or changes in status that may have occurred after the initial hearing. Interim hearings come at eighteen-month intervals for offenders serving terms of less than seven years, and twenty-four month intervals for those serving terms of seven years or more.[6] However, the first interim hearing is not held until shortly before the parole eligibility date.[7] For offenders serving less than seven years, the first interim hearing may thus be more than eighteen months after the initial hearing; for offenders serving seven years or more, it usually will be more than twenty-four months following the initial hearing if, as proposed, that hearing is provided early.

The regulations provide that, following an interim hearing, the Commission may (1) order no change in the previous decision; (2) advance a presumptive release date or the date of a four-year reconsideration hearing; or (3) retard or rescind a presumptive parole date for reason of disciplinary infraction.[8] The regulations state that a presumptive release date or the date of a four-year reconsideration hearing shall not be advanced "except under clearly exceptional circumstances."[9] Thus, they appear to contemplate that

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6. 18 U.S.C. § 4208(h); 28 C.F.R. § 2.14(a)(1).

7. 28 C.F.R. § 2.14(a)(2).

8. 28 C.F.R. § 2.14(a)(3).

9. 28 C.F.R. § 2.14(a)(3)(ii).

an offender will only rarely be released earlier than the presumptive date established following the initial hearing. Since the policy of setting presumptive dates is relatively recent, there has been no experience as yet with interim hearings held to review presumptive dates in the light of subsequent developments.

The final procedural step is a review of the case on the record, shortly before the offender's presumptive release date. The record review occurs unless there has been an in-person hearing within six months of the release date. The record review is primarily to determine whether the offender has satisfied the condition of continued good conduct and offered a satisfactory release plan. If the record is not satisfactory on either score, the case is set down for a hearing to reconsider the release date.[10]

Putting the details aside, the importance of these procedures is that, for almost all offenders, a tentative parole date is set very early in the service of the sentence, and this tentative date will almost invariably be the actual date of release unless the prisoner does not satisfy the conditions of good conduct and the presentation of a satisfactory release plan. There is apparently very little that the offender can do within the institution to change the initially established parole date, other than violate the rules.

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10. 28 C.F.R. § 2.14(b).

As is noted below, however, other portions of the Commission's regulations seem to be in conflict with this conclusion.

The Salient Factor Score

We turn now to the standards for establishing the parole date for an adult offender. For purposes of illustration, we hypothesize a case in which, acting on a tip, Secret Service agents got a warrant to search the offender's apartment, and found there $15,000 in counterfeit Federal Reserve Notes. The offender has pleaded guilty to one count of possessing counterfeit money with intent to defraud, an offense that carries a maximum sentence of 15 years' imprisonment and/or a $5,000 fine under 18 U.S.C. § 472. The offender is twenty-eight years old, and has been unemployed for the last twenty months. He has no history of drug abuse. He has one prior conviction for larcency; he was sentenced to a term of probation, which was satisfactorily completed.

On page 9, we have reproduced the worksheet used by the Parole Commission for computing the offender's "salient factor" score, filled out for our illustrative offender.[11] The salient factor score is the index the Commission uses to express the likelihood that the offender will violate parole if released. The possible scores range from zero, representing the poorest prognosis, to eleven, representing the best.

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11. The worksheet computations are set forth at 28 C.F.R. § 2.20.

NOTICE OF ACTION - PART II - SALIENT FACTORS

Register Number _____ Name A. Counterfeiter

ITEM A _____ 2

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

ITEM B _____ 2

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

ITEM C _____ 2

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

*ITEM D _____ 1

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

*ITEM E _____ 1

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

ITEM F _____ 1

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

ITEM G _____ 0

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

TOTAL SCORE _____ 9

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

Examination of the worksheet indicates that the prediction of parole success is based entirely on information about the offender that antedates his incarceration on the present charge. The Commission has concluded, on the basis of empirical studies, that behavior while imprisoned on the present charge is not a good predictor of parole success.

Instructions for computing an offender's salient factor score are found in the Parole Commission's "Guideline Application Manual," dated November 1977.[12] All probation offices have copies.

Offense Severity Scale and Decision-Making Guidelines

Page 11 contains the Parole Commission's guidelines for determining release dates for adult offenders.[13] Across the top of the guideline table are four categories of parole prognosis, based on the offender's salient factor score. Our possessor of counterfeit money, with a salient factor score of nine, is seen to have a "very good" parole prognosis. Down the side of the guideline table are listed a number of reasonably common offenses; we find that possession of $1,000 to $19,999 of counterfeit currency is considered to be an offense of "moderate" severity. The resulting guideline for our offender is twelve to sixteen months. If the offender's institutional conduct is satisfactory, and if the judge's sentence permits, the Commission would therefore expect to release

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12. Pp. 4.18-4.26.

13. 28 C.F.R. § 2.20, as amended, 42 Fed. Reg. 52,398-99 (1977). Proposed amendments to the guidelines have been published at 43 Fed. Reg. 46,859-67 (1978).

Guidelines for Decision-Making

[Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time)]

OFFENSE CHARACTERISTICS: Severity of Offense Behavior (Examples)	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score)			
	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW Escape [open institution or program (e.g., CTC, work release) - absent less than 7 days] Marihuana or soft drugs, simple possession (small quantity for own use) Property offenses [theft or simple possession of stolen property] less than $1,000	6-10 months	8-12 months	10-14 months	12-18 months
LOW MODERATE Alcohol law violations Counterfeit currency (passing/possession less than $1,000) Immigration law violations Income tax evasion (less than $10,000) Property offenses [forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell] less than $1,000 Selective Service Act violations	8-12 months	12-16 months	16-20 months	20-28 months
MODERATE Bribery of a public official (offering or accepting) Counterfeit currency (passing/possession $1,000 to $19,999) Drugs: Marihuana, possession with intent to distribute/sale [small scale (e.g., less than 50 lbs.)] "Soft drugs", possession with intent to distribute/sale (less than $500) Escape [secure program or institution, or absent 7 days or more - no fear or threat used] Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun) Income tax evasion ($10,000 to $50,000) Mailing threatening communication(s) Misprison of felony Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $1,000 to $19,999 Smuggling/transporting of alien(s) Theft of motor vehicle (not multiple theft or for resale)	12-16 months	16-20 months	20-24 months	24-32 months
HIGH Counterfeit currency (passing/possession $20,000 to $100,000) Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/sale [medium scale (e.g., 50 to 1,599 lbs)] "Soft drugs", possession with intent to distribute/sale ($500 to $5,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons) Mann Act (no force - commercial purposes) Theft of motor vehicle for resale Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $20,000 to $100,000	16-20 months	20-26 months	26-34 months	34-44 months
VERY HIGH Robbery (weapon or threat) Breaking and entering [bank or post office-entry or attempted entry to vault] Drugs: Marihuana, possession with intent to distribute/sale [large scale (e.g., 2,000 lbs. or more)] "Soft drugs", possession with intent to distribute/sale (over $5,000) "Hard drugs", possession with intent to distribute/sale (not exceeding $100,000) Extortion Mann Act (force) Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] over $100,000 but not exceeding $500,000	26-36 months	36-48 months	48-60 months	60-72 months
GREATEST I Aggravated felony (e.g., robbery: Weapon fired - no serious injury) Explosive detonation (involving potential risk of physical injury to person(s) - no serious injury occurred) Robbery (multiple instances (2-3)) Hard drugs [possession with intent to distribute/sale-large scale(e.g., over $100,000)] Sexual act-force (e.g., forcible rape)	40-55 months	55-70 months	70-85 months	85-110 months
GREATEST II Aggravated felony-serious injury (e.g., injury involving substantial risk of death, or protracted disability, or disfigurement), Aircraft hijacking Espionage Kidnaping Homicide (intentional or committed during other crime)	Greater than above - however, specific ranges are not given due to the limited number of cases and the extreme variation possible within the category.			

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

the offender some time within twelve to sixteen months of the beginning of his sentence. If the judge's sentence does not permit release in that period -- either because parole eligibility comes some time after sixteen months or because the mandatory release date comes before twelve months -- the Commission would expect to release the offender as near to the guideline period as they legally could.

In determining the severity classification, the Commission refers to "offense behavior" -- that is, the conduct that brought the offender into contact with the law -- rather than to the offense of conviction. For example, if our offender, although pleading guilty to possession, had in fact been found with a printing press in his apartment, the Commission would probably classify the "offense behavior" as manufacturing, and the severity rating would be "high" instead of "moderate". The Guideline Application Manual states that information describing offense behavior more severe than that reflected by the offense of conviction may be relied upon only if such information is persuasive. It says that "The normal indicants of persuasiveness are (a) the report is specific as to the behavior alleged to have taken place; (b) the allegation is corroborated by established facts; and (c) the source of the allegation appears to be reliable."[14] Charges of which the offender was acquitted after trial are not used in determining offense behavior, but charges in

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14. P. 4.08.

dismissed counts are used.[15]

The Commission's predecessor, the U,S. Board of Parole, gave the following explanation in 1975 for rejecting a suggestion that severity ratings be based only on the offense of conviction:

> "Regarding the offense severity categories, one comment suggested that all ratings be based on offense of conviction only. A corollary suggestion was that all Federal statutory offense descriptions be listed on the severity scale. The Board presently considers the total circumstances of the offense committed (offense behavior) and exercises its best judgment as to the correct rating in each case. Rigidly codifying offenses by statutory section would preclude objective assessment of the actual offense behavior, and would place excessive reliance on convictions obtained more often by negotiation of pleas than by trial of the facts. Neither justice nor uniformity of treatment could be achieved with such a system, and the Board has, therefore, found the proposal unacceptable."[16]

There is some reason to think that probation officers, when preparing presentence reports, do not always give sufficient attention to the "offense behavior" standard. That sometimes causes them to underestimate the likely duration of incarceration. There is also some reason for concern that judges may accept plea agreements involving reduction of charges from defendants who are not aware of this policy.

Discretion in Applying or Departing from the Guidelines

As is reflected in footnote 1 to the adult guidelines, the Commission's regulations state that the use of the guidelines is

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15. Ibid.

16. 40 Fed. Reg. 41,330 (1975).

predicated upon good institutional conduct and program progress.[17] As noted earlier, however, the regulations also provide, once a presumptive date of release has been established, that the release date will be advanced only in "clearly exceptional circumstances" and postponed only for reason of disciplinary infractions. When they are read as a whole, therefore, the regulations are somewhat ambiguous about the role of institutional conduct and program progress occurring after the initial hearing. The portions of the regulations dealing with the procedure for review of presumptive parole dates were adopted later than the portions dealing with the applicability of the guidelines, and might therefore be viewed as a more definitive statement of Commission policy. However, particularly in the light of the changing membership of the Parole Commission, it would be hazardous to predict which way the ambiguity will be resolved.

There is no ambiguity, of course, about the discretion the Commission retains to hold the offender longer than the guideline period in the event of disciplinary problems. No written guidance is available on the length of the appropriate extension in such cases.

Even apart from the consideration of behavior while incarcerated, Commission regulations provide substantial areas for discretion in

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17. 28 C.F.R. § 2.20(b).

using the guidelines. In the first place, examiner panels exercise discretion in selecting a release date within the range established by the guidelines. In the second place, many offenses are not listed in the guidelines, and the examiners are enjoined (in footnote 2 to the guidelines) to find "the proper category . . . by comparing the severity of the offense behavior with those of similar offense behaviors listed." Third, examiners are authorized to depart from the severity ratings on the basis of aggravating or mitigating circumstances.[18] And fourth, examiners are authorized to depart from the parole prognosis established by the salient factor score if they make a contrary clinical judgment.[19] The Guideline Application Manual contains a more complete list of possible grounds for departing from the guidelines.[20]

The published guidelines are thus intended as expressions of policy for the guidance of Commission personnel and not as mechanical determinants of an offender's release date.

Policies Governing Termination of Parole Supervision

In addition to determining when an offender shall be released from an institution, the Parole Commission determines -- within the limits established by the judge's sentence -- the duration of parole

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18. 28 C.F.R. § 2.20(d).

19. 28 C.F.R. § 2.20(e)

20. Pp. 4.13-4.17.

supervision. The statute gives the Commission the power to terminate parole supervision early, and requires them to do so at the expiration of five years of supervision unless they determine, after a hearing, that the offender is likely to engage in criminal conduct.[21]

The Commission's Procedure Manual states that parolees with salient factor scores between nine and eleven (such as our possessor of counterfeit money) will normally be terminated after two years of supervision, and that those with other salient factor scores will normally be terminated after three years, assuming that the parolee has not engaged in new criminal behavior or committed a serious parole violation.[22]

When a "special parole term" under the Drug Abuse Prevention and Control Act has been added to the regular parole term, the special parole term is treated as a separate consecutive period of parole, independently subject to the rules governing termination of supervision.[23]

B. The Judge's Sentencing Alternatives

Assuming that the sentencing judge has decided to impose a sentence of a year-and-a-day or more, the fundamental choice available

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21. 18 U.S.C. §§ 4211(a), (c).

22. U.S. Parole Commission, Procedure Manual, App. 13 (1978).

23. Ibid., pp. 109-01 and -02.

is whether to permit the Parole Commission to follow its own policies or whether to restrict the options available to them.

A judge who decided to systematically maximize the latitude given to the Parole Commission would routinely impose sentences for the maximum terms authorized by law, but would do so under 18 U.S.C. § 4205(b)(2), thereby making parole eligibility immediate. There are probably no judges who would feel that they were fulfilling their duty by engaging in such a practice. In a technical sense, therefore, nearly every sentence will limit the flexibility of the Parole Commission. Nevertheless, it is believed that there is a serious choice to be made between imposing a sentence that seems likely to permit them to follow their policy and one that seems likely to prevent them from doing so.

The minimum duration of an offender's incarceration is determined, of course, by the parole eligibility date. Under a regular sentence, the offender will be eligible for parole upon expiration of one-third of the stated sentence or after serving ten years of a life sentence or a sentence of more than thirty years.[24] Under 18 U.S.C. § 4205(b)(1), however, a judge is authorized, at the time of sentencing, to establish an earlier parole eligibility date. Under § 4205(b)(2), the judge may make parole eligibility immediate. As observed previously, the effect of using one of these authorities is to enable the Parole Commission to release

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24. 18 U.S.C. § 4205(a).

the offender earlier if Commission policy calls for an earlier release. The use of such a sentence will not change the Commission's view of an appropriate release date.

The maximum time to be served in prison is determined by the stated sentence -- reduced, if the offender's behavior in prison is satisfactory, by "good time" earned. Good time is awarded by the Bureau of Prisons, not by the Parole Commission; it therefore serves to limit the latitude of the Parole Commission. Under 18 U.S.C. § 4161, a prisoner sentenced to a term of years in excess of one year, whose record of conduct shows that he has faithfully observed all the rules and not been subjected to punishment, is entitled to a deduction calculated as follows:

Sentence Length	Good Time Earned
More than 1 year, less than 3 years	6 days for each month of the stated sentence
At least 3 years, less than 5 years	7 days for each month of the stated sentence
At least 5 years, less than 10 years[25]	8 days for each month of the stated sentence
10 years or more	10 days for each month of the stated sentence

25. Under 18 U.S.C. § 4206(d), a prisoner serving a term of five years or more is to be released after serving two-thirds of the sentence, unless the Parole Commission determines that he has seriously or frequently violated institution rules or regulations or that there is a reasonable probability that he will commit a crime. For offenders serving sentences of five to ten years, this provision may mandate release before the date established by subtracting good time from the sentence.

In addition, prisoners may be awarded what the Bureau of Prisons refers to as "extra good time" under 18 U.S.C. § 4162. Extra good time is awarded, unless the warden disallows it for poor performance, to prisoners who work in prison industries and some with other work assignments, and to prisoners in work-study programs, community treatment centers, or Bureau of Prisons camps.[26] For the first twelve months of qualifying service, it is awarded at the rate of three days per month of service; thereafter, it is awarded at the rate of five days per month of service.[27] Bureau of Prisons regulations also provide for lump-sum awards to reward acts of heroism, voluntary acceptance of unusually hazardous assignments, etc.[28]

In summary, in fashioning a sentence of incarceration, the judge has the power to set the lower limit on the duration of incarceration. The judge also has some power to determine the upper limit, but the upper limit established by the stated sentence may be modified by both good time and extra good time. Moreover, since the judge is without authority to establish a parole eligibility date that comes later than one-third of the stated sentence, the upper and lower limits can never be the same; some discretion must always be left to the Parole Commission.

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26. U.S. Bureau of Prisons, Policy Statement 7600.50C, ¶¶ 4, 5, 6, 8, 9 (1977).

27. Ibid., ¶ 10b.

28. Ibid., ¶ 7.

In cases in which the judge's view of the appropriate period of incarceration differs from the view reflected in the Parole Commission's guidelines, judges may have a difficult problem determining whether to impose their own views or to accede to the Commission's policy. The problem can be especially troublesome when the judge believes the period of incarceration should be longer than the guideline. Judges who impose sentences with parole eligibility dates that are beyond the guideline range must anticipate that the offenders involved will soon learn that they must serve more time than other prisoners who, according to the Parole Commission's standards, are no more deserving of earlier release. When such a sentence is imposed, it may be appropriate to inform the offender of the reasons for it.

II. SENTENCES TO IMPRISONMENT FOR ONE YEAR OR LESS

If an offender is sentenced to imprisonment for one year or less, the Parole Commission does not determine the date of release. The date of release is determined by the sentencing judge, subject to the possibility that the offender will be awarded good time.

The table on page 21 displays the three authorities under which sentences to imprisonment of a year or less are imposed. The third of the authorities listed -- the sentence with release "as if on parole" -- is relatively new. It was enacted when the authority of the Parole Commission, which had previously extended to all

SENTENCES TO IMPRISONMENT OF A YEAR OR LESS

Formal Sentence	Actual Time in Confinement	Post-Release Supervision
"Regular" sentence: X months' imprisonment	Stated sentence less "good time"	None
"Split" sentence: X months' imprisonment, the defendant to be confined for Y months and the remainder of the term to be suspended, followed by Z years' probation. Unsuspended portion of prison term cannot exceed 6 months. (18 U.S.C. 3651)	The unsuspended portion of the prison term, less "good time"	Up to 5 years, as specified by court
Sentence with release "as if on parole": X months, provided that the offender shall be released as if on parole after Y months. Stated sentence must be at least 6 months; release date must be after at least one-third of stated sentence. (18 U.S.C. 4205(f))	Until specified release date (unless substracting "good time" from stated sentence requires earlier release)	Until expiration of stated sentence

NOTE ON "GOOD TIME"

Regular good time, under 18 U.S.C. 4161, is earned by observing the rules. It applies only if the stated sentence is six months or more. (In the case of a split sentence, it applies only if the unsuspended portion of the prison term is exactly six months.) When the stated sentence is a year or less, regular good time is at the rate of five days for each month of sentence.

Extra good time, under 18 U.S.C. 4162, is awarded by the Bureau pursuant to the policies set forth at page 19. When the sentence is a year or less, the maximum extra good time is three days for each month of service. There is no requirement that the sentence be six months or more.

sentences over six months, was changed to make the threshold one year. The new authority was designed, in broad terms, to give the judge the authority that the Parole Commission was giving up. The language of the statute is that the court may, at the time of sentencing, "provide for the prisoner's release as if on parole after service of one-third of" the sentence. There is some question whether that language requires that the parole date be <u>at</u> the one-third mark, or merely permits it to be at such time after the one-third mark as the judge specifies. The table on page 21 reflects the more flexible interpretation. That interpretation is consistent with the history of this subsection as representing a transfer of power from the parole authority to the sentencing judge. In addition, if the language were interpreted as requiring release at exactly the one-third mark, the maximum period of incarceration that could be accomplished under the new language would be four months, and nothing could be achieved that could not previously have been achieved with the "split" sentence. Even if the more flexible view of the new language is accepted, however, it offers relatively little new discretion to the sentencing judge. It permits the judge to provide for a period of post-release supervision following a term of incarceration for more than six months, which cannot be done under the split sentence. But the period of post-release supervision is necessarily quite short, since the duration

of the whole sentence -- incarceration plus supervision -- cannot be greater than a year.[29]

Under 18 U.S.C. § 3651, confinement under a split sentence is to be in a "jail-type institution or a treatment institution." Offenders sentenced under this authority are therefore generally confined in metropolitan correctional centers or local jails. Since there is no similar statutory language governing the place of confinement of offenders sentenced with release "as if on parole," these latter offenders may be sent to lower-security institutions of the Bureau of Prisons.

III. SPECIAL SENTENCING AUTHORITIES

A. Sentences to Community Treatment Centers

The Bureau of Prisons operates, either directly or under contract, a number of "community treatment centers." The principal purpose of these centers is to serve as half-way houses for offenders approaching the ends of their periods of incarceration. However, newly sentenced offenders may also be assigned to them. There are two ways in which this can be accomplished.

One way is to sentence the offender to a term of imprisonment and recommend to the Bureau of Prisons that he serve his time in a

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29. If a defendant is sentenced on more than one count, it is sometimes thought appropriate to sentence to imprisonment on one or more counts and to probation on one or more, with the imprisonment and probation to run consecutively. In such cases, it is possible for the judge to mandate incarceration for more than six months, followed by a substantial period of probation supervision. This is commonly called a "mixed sentence."

community treatment center. Such a recommendation is not binding, of course, but the Bureau is likely to follow it in most cases. The Bureau of Prisons will not send someone to a community treatment center as an initial matter in the absence of such a recommendation from the sentencing judge.

The second way is to place the offender on probation, subject to a condition requiring him to reside in a community treatment center. The Bureau of Prisons will accept probationers in community treatment centers to the extent that they have space available.[30] The availability of space can be ascertained in advance of sentencing through probation offices, which should also have information about the programs in community treatment centers within their districts.

The principal difference between these alternative methods seems to be in the locus of power once sentence has been imposed. If the sentence is to imprisonment, the offender is in the custody of the Attorney General; the Bureau of Prisons has the responsibility for handling disciplinary matters and the like, and the Parole Commission has the responsibility -- if the sentence is for more than a year -- for determining the release date. If the sentence is to probation with a condition requiring residence in a community treatment center, the Bureau of Prisons may terminate the probationer's

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30. See 18 U.S.C. § 3651.

residence in the center, but the basic authority over the offender remains with the court.

B. Special Authorities Applicable to Young Offenders

An offender who is under 26 years old at the time of conviction may be sentenced either under the Youth Corrections Act or under the authorities discussed in the preceding section.[31] If the offender is under 22 at the time of conviction, 18 U.S.C. § 5010(d) requires the court to sentence under the Youth Corrections Act unless it finds that the youth offender will not derive benefit from treatment under the Youth Corrections Act. If the offender is at least 22 but less than 26 at the time of conviction, 18 U.S.C. § 4216 permits the court to sentence under the Youth Corrections Act if the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the Act. The difference between the two formulations is less important than would appear from the statutory language, however, since the Supreme Court has held that the provision applicable to youth under 22 requires only that the judge consider the Youth Corrections Act alternative, and not that it be used in

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31. It is assumed that the offender has been criminally convicted. This paper does not deal with proceedings under the Federal Juvenile Delinquency Act.

every case in which it would benefit the offender.[32] As a practical matter, therefore, it is reasonable to consider the Youth Corrections Act as a discretionary authority available to the judge when sentencing offenders who were under 26 at the time of conviction.

The shortest sentence of imprisonment under the Youth Corrections Act is an "indeterminate" sentence under § 5010(b). In effect, this is a six-year sentence with immediate parole eligibility.[33] There is also a requirement that the offender be released conditionally under supervision on or before the expiration of four years from the date of conviction, regardless of his conduct while incarcerated;[34] offenders sentenced under the Youth Corrections Act do not earn good time.[35] In contrast to the general practice in counting sentence time, the expiration of the indeterminate sentence (as well as the four-year mandatory release date) is determined with reference to the date of conviction instead of the date of incarceration.

Under § 5010(c), the court may sentence for a longer term under the Youth Corrections Act, but not in excess of the maximum term

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32. Dorszynski v. United States, 418 U.S. 424, 441-43 (1974).

33. See 18 U.S.C. § 5017(a).

34. 18 U.S.C. § 5017(c).

35. See U.S. Bureau of Prisons, Policy Statement 7600.50C, ¶ 10m.

authorized by the statute under which the offender was convicted. Under such a sentence, the offender must be released conditionally under supervision not later than two years before the expiration of the term imposed by the court.[36]

The Youth Corrections Act was enacted in the belief that young offenders were more likely than older offenders to respond to efforts at rehabilitation. Youth were therefore to be sentenced "for treatment," defined at 18 U.S.C. § 5006(f) as "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders." The Bureau of Prisons was to provide such treatment, insofar as practical, in institutions used only for treatment of offenders committed under the act.[37] Parole authorities were to release the youth when the antisocial tendencies had been corrected.[38] The analogy to the treatment and the cure of illness is obvious.

In recent times there has been a turn away from the medical analogy. Few people in the corrections field believe it is possible to "prescribe" the appropriate treatment for a particular offender, and few believe that it is possible to identify the time at which rehabilitation has taken place. Hence, both the Bureau of Prisons and the Parole Commission treat the act largely as an anachronism.

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36. 18 U.S.C. § 5017(d).

37. 18 U.S.C. § 5011.

38. See testimony of James V. Bennett, Director, U.S. Bureau of Prisons, quoted in Durst v. United States, 434 U.S. 542, 546-47 n.7.

The Bureau of Prisons assigns offenders sentenced under the Youth Corrections Act to the same institutions to which they assign other offenders, both old and young. The same educational and vocational programs are made available. The Bureau does assign Youth Corrections Act inmates to separate residential units within the institution.[39] These units, which house only Youth Corrections Act inmates, have somewhat more assigned staff than other residential units, including more counseling staff. That increased staff is the sum total of "treatment under the Youth Corrections Act" today. It is emphasized, in particular, that the educational and vocational-training opportunities for YCA inmates do not differ from those offered to other inmates.

The Parole Commission employs basically the same system in determining the release dates of offenders sentenced under the Youth Corrections Act as the system used for those sentenced under adult authority. The guideline ranges are somewhat shorter for those sentenced under the Youth Corrections Act, but the factors that go into determining length of incarceration are the same. The youth guidelines are reproduced on page 29.[40] The authority under which the judge sentences determines whether the adult or youth guideline

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39. U.S. Bureau of Prisons, Policy Statement 7300.136 (1978). Until recently, Bureau practice was to maintain separate institutions for youth and adults. Current policy is to assign inmates to institutions without regard to age. Not all institutions have Youth Corrections Act units, however; offenders sentenced under the act are sent only to institutions that do.

40. 28 C.F.R. § 2.20, as amended, 42 Fed. Reg. 52,398-99 (1977). Proposed amendments to the guidelines have been published at 43 Fed. Reg. 46,859-67 (1978).

Guidelines for Decision-Making

[Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time)]

OFFENSE CHARACTERISTICS: Severity of Offense Behavior (Examples)	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score)			
	Very Good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW Escape [open institution or program (e.g., CTC, work release) - absent less than 7 days] Marihuana or soft drugs, simple possession (small quantity for own use) Property offenses [theft or simple possession of stolen property] less than $1,000	6-10 months	8-12 months	10-14 months	12-18 months
LOW MODERATE Alcohol law violations Counterfeit currency (passing/possession less than $1,000) Immigration law violations Income tax evasion (less than $10,000) Property offenses [forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell] less than $1,000 Selective Service Act violations	8-12 months	12-16 months	16-20 months	20-26 months
MODERATE Bribery of a public official (offering or accepting) Counterfeit currency (passing/possession $1,000 to $19,999) Drugs: Marihuana, possession with intent to distribute/sale [small scale (e.g., less than 50 lbs.)] "Soft drugs", possession with intent to distribute/sale (less than $500) Escape [secure program or institution, or absent 7 days or more - no fear or threat used] Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun) Income tax evasion ($10,000 to $50,000) Mailing threatening communication(s) Misprison of felony Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $1,000 to $19,999 Smuggling/transporting of alien(s) Theft of motor vehicle (not multiple theft or for resale)	9-13 months	13-17 months	17-21 months	21-28 months
HIGH Counterfeit currency (passing/possession $20,000 to $100,000) Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/sale [medium scale (e.g., 50 to 1,999 lbs)] "Soft drugs", possession with intent to distribute/sale ($500 to $5,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons) Mann Act (no force - commercial purposes) Theft of motor vehicle for resale Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $20,000 to $100,000	12-16 months	16-20 months	20-26 months	26-32 months
VERY HIGH Robbery (weapon or threat) Breaking and entering [bank or post office-entry or attempted entry to vault] Drugs: Marihuana, possession with intent to distribute/sale [large scale (e.g., 2,000 lbs. or more)] "Soft drugs", possession with intent to distribute/sale (over $5,000) "Hard drugs", possession with intent to distribute/sale (not exceeding $100,000) Extortion Mann Act (force) Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] over $100,000 but not exceeding $500,000	20-27 months	27-34 months	34-41 months	41-48 months
GREATEST I Aggravated felony (e.g., robbery; weapon fired - no serious injury) Explosive detonation (involving potential risk of physical injury to person(s) - no serious injury occurred) Robbery (multiple instances (2-3)) Hard drugs (possession with intent to distribute/sale-large scale(e.g., over $100,000)) Sexual act-force (e.g., forcible rape)	30-40 months	40-50 months	50-60 months	60-78 months
GREATEST II Aggravated felony-serious injury (e.g., injury involving substantial risk of death, or protracted disability, or disfigurement) Aircraft hijacking Espionage Kidnaping Homicide (intentional or committed during other crime)	Greater than above - however, specific ranges are not given due to the limited number of cases and the extreme variation possible within the category.			

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

is used; the offender's age does not.[41]

It should be noted that item C of the salient factor computation is based on the offender's age at the time of first commitment -- or, as elaborated in the Guideline Application Manual, his age at the time of committing the offense that resulted in the first commitment.[42] Thus, if an offender is about to be committed for the first time, the salient factor score will be lower if the defendant is under 26 than if he is older, possibly resulting in the use of a longer guideline. This difference in the treatment of younger offenders does not depend on which sentencing authority the judge employs.

Although the guidelines for those sentenced under the Youth Corrections Act are generally shorter and never longer than the guidelines for those sentenced as adults, there are circumstances in which the use of the Youth Corrections Act may result in a longer period of incarceration than the use of the adult authority. This can occur when a judge uses the Youth Corrections Act as an alternative to an adult sentence that would require release earlier than the date determined under the guidelines.

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41. U.S. Parole Commission, Guideline Application Manual, p. 4.07 (1977).

42. Ibid, p. 4.22.

A note should be added about 18 U.S.C. § 5021, which provides for setting aside the conviction of a person sentenced under the Youth Corrections Act who has been discharged unconditionally by the Parole Commission before the expiration of the maximum term, or who has been discharged unconditionally from probation before the expiration of the maximum term. There are some situations in which such a certificate may be of benefit to an offender. It has been held, for example, that a conviction set aside under this provision cannot be used as the basis for a prosecution under 18 U.S.C. §§ 922(h)(1) and 1202(a)(1), which prohibit receipt and possession of firearms by persons convicted of certain crimes.[43] But the provision is not widely regarded as an expunction provision, and it has some potential for creating difficulty. Offenders may feel free to omit the conviction when asked about their prior records, but prospective employers or other interested parties may consider the omission deceitful. The Parole Commission itself, when determining the number of prior convictions for purposes of computing the salient factor score, does take account of convictions that have been set aside

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43. United States v. Purgason, 565 F.2d 1279 (4th Cir. 1977).

under this provision.[44]

C. Special Authorities Applicable to Narcotic Addicts

Under 18 U.S.C. §§ 4251-55, added by title II of the Narcotic Addict Rehabilitation Act of 1966,[45] certain narcotic addicts convicted of criminal offenses may be sentenced for treatment.[46] Some addicts are excluded from the benefits of the Act because of the crimes they committed or because of their individual prior histories. If the offender is eligible, however, and the court believes that he is an addict, it may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. Following the examination, if the court determines that the eligible offender is an addict and likely to be rehabilitated through treatment, it must commit him for treatment for an indeterminate period. At any time after serving six months, the Bureau of Prisons is authorized to recommend to the Parole Commission that the offender be released under supervision. The Commission may in its discretion

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44. U.S. Parole Commission, Guideline Application Manual, p. 4.20.

45. Pub. L. No. 89-793, tit. II, 80 Stat. 1442.

46. Under 28 U.S.C. §§ 2901-2906, the judge may offer certain addicted defendants an opportunity for civil commitment to the custody of the Surgeon General on the understanding that the prosecution will be dropped upon successful completion of a treatment program. This authority is not, strictly speaking, a sentencing authority; it is therefore outside the scope of this paper.

order such release after receiving such a recommendation and certification from the Surgeon General that the offender has made sufficient progress to warrant his conditional release. Under the act, the indeterminate period of incarceration is limited to ten years, or to the maximum sentence that could otherwise have been imposed, whichever is shorter.

Once again, the statute is clearly based on the medical analogy. In this case, indeed, it may be thought to deal with a real medical problem. And once again, the impact of a sentence under this special authority is less than might be anticipated. This is true for several reasons:

> First, whether an offender is a likely candidate for rehabilitation through treatment is thought to depend heavily on the addict's motivation. Thus, the examination under 18 U.S.C. § 4252 is largely an effort to determine whether such motivation exists, and to screen out unmotivated addicts. Only addicts thought to be motivated, therefore, receive sentences under the Narcotic Addict Rehabilitation Act.
>
> Second, the Bureau of Prisons makes every effort to make narcotics treatment available to all motivated addicts in their custody, regardless of the authority under which the addicts were sentenced.

Third, the Parole Commission continues to use the guideline system, applying the same guidelines used for those sentenced under the Youth Corrections Act. Use of drugs in an institution is, of course, considered a disciplinary offense. In the absence of evidence of drug use in the institution, it is regarded as extremely difficult to measure the inmate's rehabilitative progress in the sense of predicting whether he will resume drug use if released. As a practical matter, the presumptive release date generally determines when the Bureau of Prisons makes its release recommendation, rather than vice versa. The Surgeon General's authority to certify sufficient rehabilitative progress has been delegated to the Bureau of Prisons, and therefore does not in practice provide a second opinion on the question of rehabilitative progress.

This is not to say that there are no consequences that result from a sentence under the Narcotic Addict Rehabilitation Act. It is merely to say that the differences are more limited than might have been anticipated. The consequences of this kind of sentence are as follows:

1. An offender sentenced under the Narcotic Addict Rehabilitation Act is always sent to an institution with a drug abuse program while an addict sentenced under another authority will not necessarily be.

2. An offender sentenced under the Narcotic Addict Rehabilitation Act will be required to participate in the drug program, while an addict sentenced under other authority will not be. As noted above, the value of compelling unmotivated prisoners to participate is subject to considerable doubt.

3. An addict sentenced under the Narcotic Addict Rehabilitation Act will participate in the drug program for his entire period of incarceration, while an addict sentenced under other authority is likely to participate only toward the end of his period of imprisonment. In the view of the Bureau of Prisons, it is preferable to concentrate narcotics treatment in the eighteen months prior to return to the community.

4. A sentence under the Narcotic Addict Rehabilitation Act causes the Parole Commission to use the same guidelines it would for a sentence under the Youth Corrections Act, which provide for shorter periods of incarceration than the adult guidelines.

IV. THE USE OF OBSERVATION AND STUDY AS AN AID TO THE SENTENCING JUDGE

Reference has already been made to the authority under 18 U.S.C. § 4252 to place an offender in the custody of the Attorney General for an examination to determine whether he is an addict likely to be rehabilitated through treatment. There are two somewhat similar authorities that are not directed to narcotics addiction. Under 18 U.S.C. § 4205(c), a defendant may be committed for a study "if the court desires more detailed information as a basis for determining the sentence to be imposed." Under 18 U.S.C. § 5010(e), the court may commit an offender who is under the age of 22 at the time of conviction for observation and study to assist in determining whether the offender would derive benefit from treatment under the Youth Corrections Act. In addition, the Probation Division has funds available to pay for studies conducted by psychologists and psychiatrists in the district. Probation offices are expected to maintain lists of qualified psychologists and psychiatrists who are willing to undertake such studies.

Generally speaking, a study performed in the district will be faster. Moreover, local studies often provide an opportunity for the observation and study to take place in a less restrictive

environment than studies performed by the Bureau of Prisons. Finally, if the district of conviction is the offender's home district, there is reason to think that a local psychologist or psychiatrist, familiar with the environment in which the offender has lived, can do a better job than a prison psychologist or psychiatrist. Hence, the Probation Division, the Bureau of Prisons, and the Parole Commission have joined in urging judges to use the commitment authority only if it is concluded that a local study is not feasible.[47]

Before deciding to order a presentence study, it is important that the judge determine what information a study can provide that will be of value in making the sentencing decision. The letter referring an offender for study should specify the questions the judge wants answered, so the person conducting the study can perform such tests as are suitable for answering those questions. If an offender is committed to the Bureau of Prisons for observation and study without a specification of the questions on which the judge seeks advice, the Bureau will ask the court to specify the questions.[48]

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47. Joint Statement on Observation and Study Practices (1978).

48. For a description of observation and study procedures and recommendations aimed at enhancing their usefulness, see Farmer, Observation and Study (Federal Judicial Center, 1977).

V. COMMUNICATION WITH THE PAROLE COMMISSION AND THE BUREAU OF PRISONS

There are a number of situations in which the experience of an offender after sentencing may be influenced by communication from the court to the Bureau of Prisons or the Parole Commission. The AO Form 235, reproduced on page 39, has been developed to facilitate such communication.

The Bureau of Prisons makes an effort to accommodate judges' requests about the types or locations of facilities in which offenders are incarcerated, as well as the kinds of programs to which they should be exposed. If the Bureau is unable to heed a judicial request, they will write the judge and explain that inability. As noted earlier, it is their present policy not to make original designations to community treatment centers unless the judge specifically requests such a designation.

The Parole Commission is less likely than the Bureau of Prisons to heed a judge's recommendations as a matter of deference, but they are very much interested in perceptions and information that may influence their decisions. The following excerpt from a proposed regulation, published in the Federal Register of September 20, 1978, expresses their position on this issue:

REPORT ON SENTENCED OFFENDER BY UNITED STATES DISTRICT JUDGE

To Be Completed by the Probation Officer:

Name _____ FBI No.: _____ DOB: _____

District: _____ Offense: _____ Sentence: _____

To Be Completed by the Sentencing Judge:

SENTENCING OBJECTIVES. Court's intent or purpose for sentence imposed.

COMMENTS ON TREATMENT NEEDS. In the court's opinion what treatment or training should the Probation Office or the Bureau of Prisons provide? (e.g., vocational, educational, medical, alcoholic, narcotic.)

RECOMMENDED INSTITUTION. Type of institution by classification (e.g., penitentiary, youth center, etc.), or by name (e.g., Leavenworth, Morgantown, etc.).

COMMENTS AND RECOMMENDATIONS RELATIVE TO PAROLE. Give comments regarding the appropriateness of parole in view of the present offense, prior criminal background and any mitigating or aggravating circumstances.

NO COMMENT ☐ *This form will be disclosed to the offender and the Parole Commission in connection with parole consideration, unless the court directs otherwise. (See 18 U.S.C. 4208)*

Original: *U.S. Probation Office*
Sentencing Judge

c.c.: *2 copies to Bureau of Prisons institution designated for confinement*

Signed _____

Typed _____ ***Date*** _____

A.O. 235 (11/74)

> "Recommendations and information from sentencing judges, defense attorneys, prosecutors, and other interested parties are welcomed by the Commission. In evaluating a recommendation concerning parole, the Commission must consider the degree to which such recommendation provides the Commission with specific facts and reasoning relevant to the statutory criteria for parole (18 U.S.C. 4206) and the application of the Commission's guidelines (including reasons for departure therefrom). Thus, to be most helpful, a recommendation must state its underlying factual basis and reasoning. However, no recommendation (including a prosecutorial recommendation pursuant to a plea agreement) may be considered as binding upon the Commission."[49]

Among the matters that appear to present appropriate circumstances for a communication from the judge to the Bureau of Prisons or Parole Commission are the following:

1. Cases in which the "official version" of the criminal conduct, as set forth in the presentence report, is known to be at variance with the facts or is considered unreliable. In determining the severity of the "offense behavior," the Parole Commission may rely on this version.

2. Cases in which other information in the presentence report is either incorrect or of doubtful validity. Both the Bureau of Prisons and the Parole Commission rely heavily on information in the presentence report. If the judge has concluded that any of this information is not reliable, it is important that this conclusion be communicated. The fact that the conclusion may be articulated in open court does not, of

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49. 43 Fed. Reg. 42,282.

course, mean that it will be communicated to the Bureau and the Commission; specific action to accomplish this result is necessary.

3. Cases in which the judge has views about the offender's culpability. The Parole Commission allows for departures from the guidelines on the basis of aggravating or mitigating circumstances, but there is some reason to think that it doesn't pay as much attention as most judges do to the individual culpability of the offender. It may therefore be worthwhile to highlight cases in which the offender's culpability is less than, or greater than, what might be inferred from the severity of the offense behavior as defined in the Commission's guidelines.

4. Cases in which the defendant has cooperated with the prosecution, but the cooperation is not reflected in the presentence report. The Parole Commission will take account of cooperation if they are aware of it.[50]

5. Cases in which the judge has views about what kind of institution an offender should serve in, or what

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50. U.S. Parole Commission, Guideline Application Manual, p. 4.17 (1977).

kinds of programs he should be exposed to.

Attention is called to the legend at the bottom of the Form 235, to the effect that the form will be disclosed to the offender and the Parole Commission unless the court directs otherwise. The Parole Commission Act, 18 U.S.C. § 4208, requires that all materials considered by the Commission also be available to the offender. It is, therefore, not appropriate to communicate with the Parole Commission on a confidential basis. It remains possible to communicate with the Bureau of Prisons on such a basis.

APPENDIX

Excerpt from H. Rept. 94-838 (1976), pp. 19-21.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 5727) to establish an independent and regionalized United States Parole Commission, to provide fair and equitable parole procedures, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommend in the accompanying conference report:

Nearly all men and women sent to prison as law breakers are eventually released, and the decision as to when they are released is shared by the three branches of government. Wrapped up in the decision to release an individual from incarceration are all of the emotions and fears of both the individual and society.

Parole may be a greater or lesser factor in the decision to release a criminal offender. It depends upon the importance of parole in the complex of criminal justice institutions. In the Federal system, parole is a key factor because most Federal prisoners become eligible for parole, and approximately 35 per cent of all Federal offenders who are released, are released on parole. Because of the scope of authority conferred upon the Parole Board, its responsibilities are great.

From an historical perspective, parole originated as a form of clemency; to mitigate unusually harsh sentences, or to reward prison inmates for their exemplary behavior while incarcerated. Parole today, however, has taken a much broader goal in correctional policy, fulfilling different specific objectives of the correctional system. The sentences of nearly all offenders include minimum and maximum terms, ordinarily set by the sentencing court within a range of discretion provided by statute. The final determination of precisely how much time an offender must serve is made by the parole authority. The parole agency must weigh several complex factors in making its decision, not all of which are necessarily complementary. In the first instance, parole has the practical effect of balancing differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal criminal justice system. In performing this function, the parole authority must have in mind some notion of the appropriate range of time for an offense which will satisfy the legitimate needs of society to hold the offender accountable for his own acts.

The parole authority must also have in mind some reasonable system for judging the probability that an offender will refrain from future criminal acts. The use of guidelines and the narrowing of geographical areas of consideration will sharpen this process and improve the likelihood of good decisions.

The parole authority must also take into consideration whether or not continuing incarceration of an offender will serve a worthwhile purpose. Incarceration is the most expensive of all of the alternative types of sentences available to the criminal justice system, as well as the most corrosive because it can destroy whatever family and community ties an offender may have which would be the foundation of his eventual return as a law-abiding citizen. Once sentence has been imposed, parole is the agency responsible for keeping in prison those who because of the need for accountability to society or for the protection of society must be retained in prison. Of equal importance, however, parole provides a means of releasing those inmates who are ready to be responsible citizens, and whose continued incarceration, in terms of the needs of law enforcement, represents a misapplication of tax dollars.

These purposes which parole serves may at times conflict and at the very least are complicated in their administration by the lack of tools to accurately predict human behavior and judge human motivation.

Because these decisions are so difficult from both the standpoint of the inmate denied parole, as well as the concerns of a larger public about the impact of a rising crime rate, there was almost universal dissatisfaction with the parole process at the beginning of this decade. As a result, both the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, and the Subcommittee on National Penitentiaries of the Senate Judiciary Committee began seeking legislative answers to the problems raised. In the case of both Subcommittees a major effort was mounted to make parole a workable process.

Following the appointment of Maurice H. Sigler as Chairman of the U.S. Board of Parole in 1972, a working relationship developed between the Board and the two Subcommittees. As a result of this relationship, and with the support of the two Subcommittee chairmen, the Parole Board began reorganization in 1973 along the lines of the legislation presented here.

The organization of parole decision-making along regional lines, the use of hearing examiners to prepare recommendations for action, and, most importantly, the promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into the statute, removes doubt as to the legality of changes implemented by administrative reorganization, and makes the improvements permanent.

It is not the purpose of this legislation to either encourage or discourage the parole of any prisoner or group of prisoners. Rather, the purpose is to assure the newly-constituted Parole Commission the tools required for the burgeoning caseload of required decisions and to assure the public and imprisoned inmates that parole decisions are openly reached by a fair and reasonable process after due consideration has been given the salient information.

To achieve this, the legislation provides for creation of regions, assigning a commissioner to each region, and delegation of broad decisionmaking authority to each regional commissioner and to a national appellate panel. The bill also makes the Parole Commission, the agency succeeding the Parole Board, independent of the Department of Justice for decision-making purposes.

In the area of parole decision-making, the legislation establishes clear standards as to the process and the safeguards incorporated into it to insure fair consideration of all relevant material, including that offered by the prisoner. The legislation provides a new statement of criteria for parole determinations, which are within the discretion of the agency, but reaffirms existing caselaw as to judicial review of individual case decisions.

The legislation also reaffirms caselaw insuring a full panoply of due process to the individual threatened with return to prison for violation of technical conditions of his parole supervision, and provides that the time served by the individual without violation of conditions be credited toward service of sentence. It goes beyond present law in insuring appointment of counsel to indigents threatened with reimprisonment.

THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the Director of the Administrative Office of the United States Courts and five judges elected by the Judicial Conference.

The Center's **Continuing Education and Training Division** conducts seminars, workshops, and short courses for all third-branch personnel. These programs range from orientation seminars for judges to on-site management training for supporting personnel.

The **Research Division** undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, usually at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal court system.

The **Innovations and Systems Development Division** designs and helps the courts implement new technologies, generally under the mantle of Courtran II—a multipurpose, computerized court and case management system developed by the division.

The **Inter-Judicial Affairs and Information Services Division** maintains liaison with state and foreign judges and judicial organizations. The Center's library, which specializes in judicial administration, is located within this division.

The Center's main facility is the historic Dolley Madison House, located on Lafayette Square in Washington, D.C.

Copies of Center publications can be obtained from the Center's Information Services office, 1520 H Street, N.W., Washington, D.C. 20005; the telephone number is 202/633-6365.

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