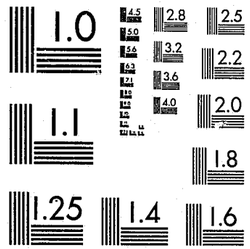

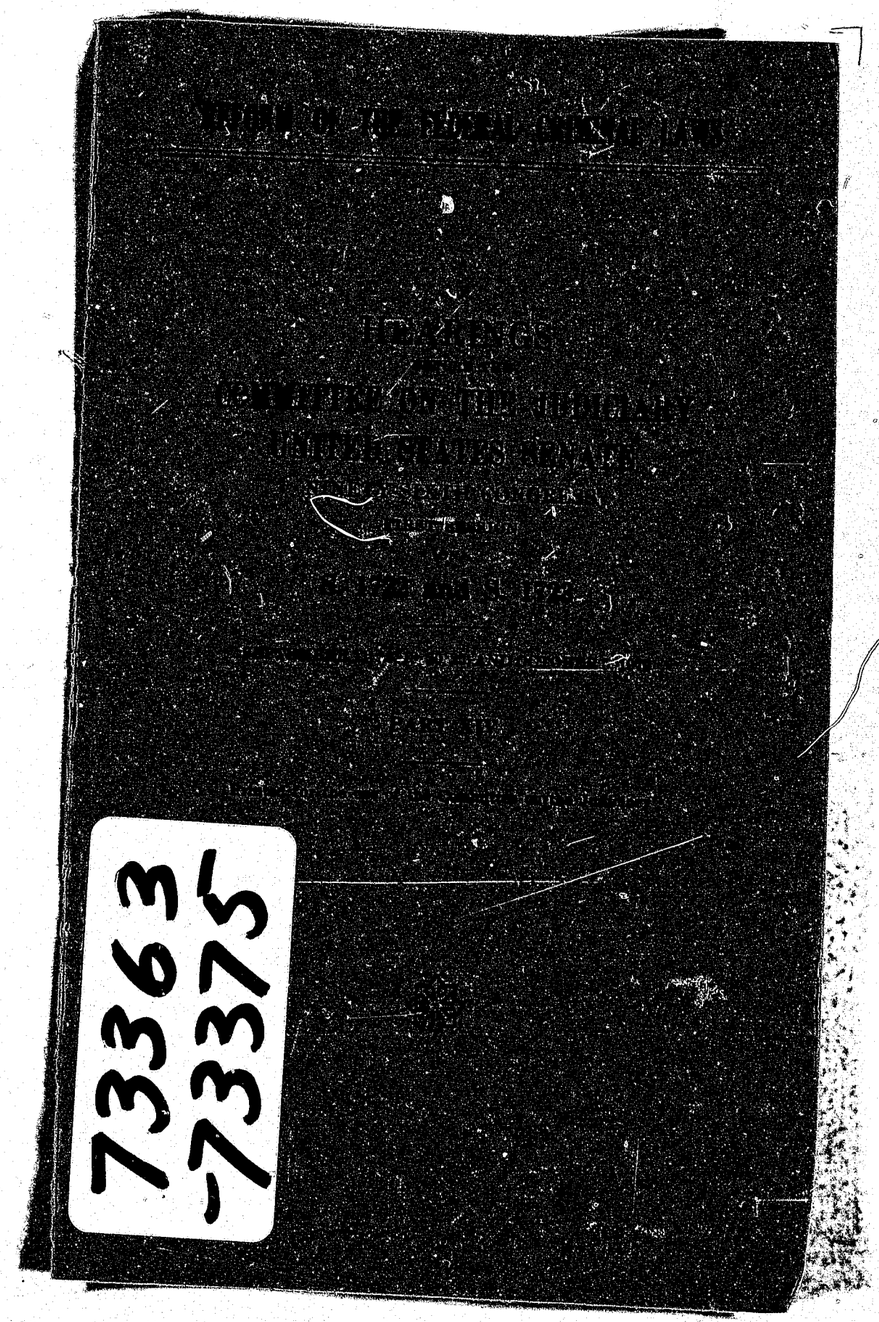

REFORM OF THE FEDERAL CRIMINAL LAWS

HEARINGS
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SIXTH CONGRESS
FIRST SESSION
ON
S. 1722 and S. 1723

SEPTEMBER 11, 13, 18, 20, 25, AND OCTOBER 5, 1979

PART XIV

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73368

TESTIMONY OF MILTON G. RECTOR, PRESIDENT, THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY

I appreciate the opportunity to appear before you on behalf of the National Council on Crime and Delinquency (NCCD), a private, non-profit organization, concerning revision of the federal criminal laws. We have a number of specific suggestions concerning the legislation you are considering, especially in regard to sentencing, but before highlighting those details, I would like to express a few concerns that have dominated our review of the various existing proposals.

I am aware of the tremendous amount of time, energy, and effort that have been devoted to considering federal criminal code revision over the last decade. With the expenditure of such time and energy tends to come a high level of commitment to the resulting product and a sense that adoption of that product is almost a necessity. This is an understandable tendency and one I do not argue against. My concern here is that you continue to take a long view, and exercise

great caution not to undermine any of the efforts to date by in any way cutting the process short. The matter before you is of such importance in its reach and substance that every opportuntiy must be utilized for full scrutiny, review, and debate. Such full and open exploration is vital and not only to achieving a product of the highest quality, but also to attaining a broad base of understanding and support for the important changes to be made. I very much appreciate the opportunity to be a part of this process of comprehensive scrutiny, debate, and revision, and I urge you to arrange for broader hearings and greater public scrutiny in the months to come.

Second, my respect for and concern about the process that should be followed in revision of the federal criminal laws is rooted in a belief that a long view is crucial to achieving the kinds of changes that we so deeply need. You are considering here much more than recodification or reorganization. Especially with respect to sentencing, you are considering fundamental and dramatic changes which, if enacted, will determine the basic nature of practices for decades, if not centuries. I stress the profound impact possible from your decisions here to help place in context the recommendations we will be making. Although you must face the realities of this year and your sense of prevailing public sentiment, the impact of what you decide this year is likely to carry far beyond this term and current notions and moods about crime. In short, you have the opportunity to turn this nation around, to set us off in new, more positive directions. You, who have invested so much time and study, can take the lead in informing the public about the problems endemic in current practices. You are ideally situated to educate the public about the need for some bold new approaches. We are holpeful that you will employ this opportunity to set this nation out upon the long, but vitally needed, journey toward saner and more humane sentencing practices.

There are many problems with respect to current sentencing and punishment practices. You have heard much and will hear a great deal more about a number of these problems. But there is one problem which I think you can hardly hear too much—our national tendency to rely excessively on imprisonment. The United Statse incarcerates more persons per capita than any Western industrialized nation other than South Africa, and the differences cannot be explained by differences in crime rates. Over the last few years, while LEAA's victimization surveys have informed us that the crime rates in the United States have remained relatively stable, our prison and jail population have skyrocketed. Over the last decade, the combined state and federal prison population has grown from 193,000 to 303,000. More and more of the meager public purse is being eaten away on holding people in large, yet frequently overcrowded human warehouses.

Last week in an address to a seminar at the Brookings Institution attended by legislators from fourteen states. Bill Nagel illustrated the proportions of our current confined population in a very vivid fashion. He asked the group to imagine that all prisoners in America's prisons and jails were to somehow incorporate themselves into a governmental entity—say a city called Prisonia. He pointed out that Prisonia would be one of the very largest cities in the U.S., ranking immediately behind St. Louis and just ahead of Denver. It would be larger than many cities having major league baseball and football franchises—Pittsburgh, Atlanta, Cincinnati, Seattle, Kansas City, Minneapolis, Oakland, Miami, Buffalo, Denver, and Tampa. Prisonia would have enough residents for a Congressional district. It would be larger than three states. If Prisonia were to be taken out of the U.S. altogether, it would rank larger in population than 21 of the U.N.'s present member nations.

Until quite recently, the federal government led the way in expansion—in expanding the prison population, in an expanding national network of prisons, and in expanding per capita expenditure on prisoners. A 1976 study by the Congressional Budget Office showed that it then cost more than $17,000 to hold one prisoner for a year in one of the numerous new federal prisons. We believe that the federal leadership role for the future lies in precisely the opposite direction.

We are here today to urge that any sentencing proposals adopted be predicated on achieving an overall de-escalation of criminal sanctioning practices at the federal level. S. 1722 is fundamentally flawed in that its sentencing provisions are centered on only some of the most crucial shortcomings of current sentencing practices. S. 1722 is oriented toward reducing unwarranted disparities in criminal sanctions and toward increasing certainty and equity in application of sentences. These are admirable objectives which we would share. However, the bill fails completely to address the crying need to reduce reliance on incarcerative penalties and generally fails to adhere to the principle that the least drastic means for

effectuating a legitimate governmental interest should be preferred. Rather, the bill is saturated with provisions that would tend to increase reliance on incarceration.

The list of provisions and omissions in S. 1722 that would tend to increase the use of imprisonment is too long to detail here, but let me highlight some of the more glaring examples. The bill would substantially reduce "good time" allowances. The bill would severely undermine the presumption against incarceration that flows from American criminal law's traditional preference for liberty and for minimizing interference in individual lives. Indeed, many sections of the bill and much of its general tone seems to reflect a preference for incarceration. Under S. 1722, all offenses would be punishable by imprisonment. The bill would authorize unduly severe maximum terms. Parole as a form of early release would be eliminated entirely. The limitations set on differences allowable between the upper and lower limits of the sentencing guideline ranges would tend to push the ranges toward the maximum terms authorized. The bill would allow the government to appeal a sentence that fell below the sentencing guidelines. The bill would allow confinement for up to one year as a condition of probation. The bill would direct the sentencing commission to employ current record high levels of incarceration and current excessively long averages of time served as a basis for establishing future sentencing guidelines.

S. 1722 would not authorize penalties such as restitution, community service orders, and other non-incarcerative sanctions other than fines and probation as sole sanctions. The bill does not contain incentives or directives for employing alternatives to incarceration. No administrative mechanisms for establishing and operating alternative programs are set forth. The bill fails to include among the purposes of sentencing the important goals of repairing the harm done by the offense, mending the social fabric, and restoring offenders to full status in the community after the harm has been repaired.

S. 1723 does not share all of these features of S. 1722 that would push federal sentencing practices in precisely the wrong direction. However, S. 1723 also has failed to fully embrace the principles which should be the basis for a major sentencing reform. Many of the "bracketed" portions of the bill reflect the fact that critical policy decisions have not been made as to where the preferences, priorities, and presumptions should lie. The remainder of our statement will be devoted to elaborating on the principles that we believe should guide the Congress in its work with respect to sentencing, as well as to suggesting specific policy decisions that follow from those principles.

Section 4301 of S. 1723 calls for submission of a statement of the expected impact on any sentencing guidelines proposed. It also specifies that the likely impact on federal prisons, criminal dockets, and federal expenditures each should be explored. We endorse the requirement for projecting the impacts to be expected in each of these areas, and suggest that the effort of developing guidelines and projctions of their effects will be most fruitful if tied to clear goals toward which the guidelines are aimed. In addition to the listed purposes of promoting fairness and certainty, eliminating unwarranted disparity, and improving the administration of justice, the Congress should specify as a purpose of sentencing guidelines the goal of achieving an overall de-escalation in sentences authorized and imposed. Failure to adopt this goal and to make decisions consistent with it is a major flaw of both bills.

As David Rothman has noted, ours is a society that marks time and measures events in minutes and seconds. A basketball team, for example, has 24 seconds to attempt to score if it is to retain possession of the ball. Most of those assigned to military "boot camp" talk as if they could not endure one hour more than the thirteen weeks they are usually required to spend there. Yet in comparison to the Europeans, who dole out prison time in spoonsfull, we dish it out in buckets. How often do we stop to consider that a prison sentence of fifteen years is equivalent to half the number of years required to pay off a typical house mortgage, or half the number of years a typical person works toward a pension? Such terms represent major portions of our lives. Both bills contemplate allowable prison sentences in excess of a year for all classes of felonies. We do not know what sentences actually would be imposed under the as yet unspecified sentencing guidelines, but consider for a moment the nation that lies perhaps on the other extreme, Holland. In that country, only four percent of prison sentences exceed one year, and the average prison sentence is 35 days. The prison terms authorized in federal law should be substantially lower than those proposed in either bill.

There is a danger of going overboard in imposing nonincarcerative penalties as well. The British imposed a statutory maximum of 240 hours on community service efforts that could be required of a felony offender. Community service sentences in some American jurisdictions have been known to exceed 2000 hours for shoplifting, a misdemeanor. Another way in which sentencing overload easily can occur involves a series of different kinds of penalties being imposed on large sets of offenders. There is real risk that as new sentencing options are implemented, they will be used as additions to, rather than replacements for, pre-existing sanctions. As an LEAA-funded study of alternatives to confinement cautioned:

There are hazards of over-extending the reach and resources of criminal justice as new alternatives emerge. Innovative options may be used not as alternatives to jail, but as alternatives to unconditional discharge or suspended sentences. This may be appropriate in some cases, but often it represents questionable use of limited resources.

There is also the "add-on" problem. Where previously a fine was imposed, the court may now provide for an extended period of supervision and restitution or community service in addition to the fine.

The issues here relate both to possible use of unduly punitive or restrictive practices and to cost-effectiveness. (Galvin, *et al., Instead of Jail: Pre- and Post-Trial Alternatives to Jail Incarceration*, Vol. IV at pp. 11–12.)

Although it is admittedly difficult to insure that new sentencing options will be employed as alternatives to more severe penalties, and body established to develop sentencing guidelines should be charged with structuring those guidelines so that new penalties would be employed as alternatives to more severe, pre-existing penalties. Thus, although sentences combining a number of discrete penalties might still be recommended, they would be employed for offenders who would have been likely to experience even greater burdens and control in the absence of the alternatives.

THERE SHOULD BE A PRESUMPTION AGAINST INCARCERATION

Deprivation of a person's liberty is so drastic, costly, and disruptive of normal life processes and relationships that it should be avoided whenever suitable alternatives can be employed. As Representative Drinan stated in testimony on this subject last year:

"It seems clear that we should not be relying so heavily on our prisons, which are ineffective as crime deterrents or rehabilitators, dehumanizing, overcrowded and expensive to operate. There ought to be in our federal criminal code, a preference for alternatives to incarceration—a presumption that if practicable, alternative penalties to incarceration shall be assigned." (Hearings at p. 2299.)

But with fear of crime at the current high levels, will the public accept a move away from imprisonment? We believe and our experience confirms that an informed public will support the shift we are proposing. Only a fraction (approximately one tenth) of those now being committed to the Bureau of Prisons have been convicted of robbery and violent crimes. Why shouldn't actual victims and society in general receive compensation from offenders in dollars or services for the losses caused by crimes against property, rather than being asked to pay tens of thousands of dollars for incarcerating those offenders?

Combined with a goal of de-escalating penalties and employing the least drastic means, a presumption against incarceration definitely should help resolve a number of policy issues now under debate. Adoption of such a presumption also would require additions to and strengthening of many sections of the bills under consideration. The presumption against incarceration should be clearly stated in sections pertaining to establishment of sentencing guidelines and in the criteria for imposition of sentences. Adoption of this principle would suggest the desirability of deleting existing provisions which would preclude probation as a sentencing option for certain offenses. Provisions precluding incarceration as a sentencing option for certain offenses should be added. The preference for using the least drastic means and the presumption against incarceration would also provide support for allowing only the defendant, and not the government, to have the opportunity to appeal a sentence. A presumption against imprisonment would create special obligations for persons preparing presentence reports, who would be required to seek out and advocate appropriate non-incarcerative penalties. A presumption against incarceration also should lead to the conclusion that violation of conditions of sentences not involving confinement should not be punishable by confinement. If the underlying offense were not serious enough to justify incarceration, violations short of a new conviction for a more serious offense should not carry incarceration as a potential sanction. This presumption also would provide support for retention of "good time" credits at their present level at the least. Elimination of parole as a method of early release should not be considered until substantial de-escalation of sentences has been fully achieved. A presumption against incarceration also would run counter to standard imposition of contingent terms of imprisonment over and above the basic term provided for the offense.

A BROAD RANGE OF PENALTIES OF VARYING SEVERITY SHOULD BE AUTHORIZED AND PRESENTED IN ORDER OF PREFERENCE

This second principle is a logical follow-on to the presumption against incarceration. Consistent with the presumption of innocence, both bills call for release of defendants prior to trial on personal recognizance or, if necessary, through the first of a series of conditions of release, ranging from less to more restrictive, which will reasonably assure the appearance of the accused for trial. Similarly, consistent with the presumption against incarceration, offenders should be sentenced to the first of a wide series of options, ranging from less to more restrictive, which will satisfy legitimate sentencing purposes.

In August of this year, the American Bar Association approved new policies relating to proposed revisions of the federal criminal code in order to enhance the ABA's previously expressed support for use of alternatives to incarceration. The new ABA policy delineated seven sentencing alternatives which sentencing judges should be required to consider in imposing sentence on an individual. The commentary supporting the new policy referred to previous ABA testimony which had indicated displeasure with the lack of emphasis on alternatives in S. 1437. The discussion noted that the new policy would require the sentencing judge to at least consider, in every case, a sentence of probation or the other sentencing alternatives recommended, including a fine, an order to make restitution to the victim of the offense, forfeiture, community service or supervision, intermittent incarceration, and, finally, term imprisonment in (a) an institution other than a confinement institution, or (b) a confinement institution. The commentary explained that, "S. 1437 sets out these alternatives as available sentences which the judge can impose, but our proposal would mandate a "lockstep" approach: the judge would have to at least look at alternatives short of imprisonment in every case."

In restating the ABA's previously espoused rationale in support of alternatives, the commentary summarized that alternatives: "maximize the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violation of the law; they affirmatively promote the rehabilitation of the offender by continuing normal community contacts; they avoid the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community; they greatly reduce the financial costs to the public treasury of an effective correctional system; they minimize the impact of the conviction upon innocent dependents of the offender."

The National Council on Crime and Delinquency concurs in the recommendations that a broader range of sentencing alternatives should be authorized in federal law that the alternatives should be presented in order of severity, and that judges should be required to impose the first of the options which would satisfy legitimate sentencing purposes.

Although a few federal judges have displayed creatively in sentencing, the federal government generally has failed to serve as a model for the states and localities in utilizing sentencing alternatives. As stated in a Senate Appropriations Committee report dealing with federal sentencing policy and practice.

The cost of constructing and operating new prison facilities is enormous, and the use of imprisonment is the most expensive sanction which can be imposed on a criminal offender. Because cost makes imprisonment a scarce resource, it is essential that imprisonment only be used where necessary to assure the protection of society or the administration of just punishment. In those cases in which imprisonment is not necessary, *the range of alternatives to incarceration currently available is clearly unsatisfactory.* [*Emphasis added.*] (Senate Appropriations Committee Report 94–964 at pp. 21–23.)

Leadership has been exercised in a number of states, localities, and foreign nations in employing non-incarcerative penalties. When Great Britain was faced

with critical prison overcrowding in the late sixties, for example, experiments were initiated in which persons convicted of felonies punishable by imprisonment were ordered instead to perform uncompensated work for private, non-profit or public agencies. After the pilot projects demonstrated the workability of broad use of community service orders, the sanction was authorized throughout the United Kingdom.

In instituting community service sentences on a broad basis, the British imposed no restrictions on the types of offenders eligible, although the Home Office stated that community service was "unlikely to be appropriate for serious sexual offenses or serious offenses of violence or, at the other extreme, for very minor offenses." Experience in the Inner London district over four years indicated that of the offenders placed to perform community service, 55 percent had been convicted of property offenses (including theft, burglary, robbery, forgery, fraud, conspiracy, and blackmail—the majority, theft and burglary); 20 percent of motor vehicle offenses; and 13 percent of crimes against persons. Fully 90 percent of the offenders sentenced to community service had had prior convictions. Furthermore, in all of the British experimental districts combined, 43 percent of those sentenced to perform community service had previously served a custodial sentence. The rate of successful completions of community service orders has remained consistently at about 74 percent, with most of the "failures" involving failure to complete the assigned number of hours, rather than arrests for new offenses. This experience demonstrates that community service sentences can be employed successfully, even with populations convicted of fairly serious offenses and who have had prior contact with the criminal justice system.

A number of American jurisdictions have begun using community service orders and restitution requirements as sentencing options. Approximately fifty different community service order programs now operate in California alone. The Georgia Department of Offender Rehabilitation operates a restitution program for adult offenders which has as a primary goal the reduction of the state's prison population. Participation is open to "any male offender whom the judiciary or the parole board would normally incarcerate in lieu of program participation and for whom restitution would be appropriate." Approximately 85 percent of program participants were convicted of felonies, primarily property offenses. The Community Restitution in Service Project (CRISP) of Pima County, Arizona, also was designed to offer an alternative to incarceration. Virtually all program participants there also were convicted of felony offenses.

The Europeans have led the way in employing financial penalties geared to wealth or worth as well as offense severity, but some experimentation with financial penalties also is occurring here. One federal court has required defendants to pay into a fund established to provide employment training for ex-offenders.

The crucial point is that leadership at the federal level is sorely needed in utilizing and evaluating more extensively these and other alternatives. I stress that the alternatives—alternative mechanisms, alternative processes, alternative penalties—do exist and can be implemented, given reasonable start-up planning and careful implementation. The major ingredient needed is a commitment to move in new directions.

PENALTIES EMPLOYED SHOULD NOT IMPAIR THE CAPACITY OF OFFENDERS TO FUNCTION IN A FREE SOCIETY AFTER SENTENCES HAVE BEEN FULFILLED

This principle has several important ramifications, one akin to the traditional admonition to physicians to "at least do no harm." Even in instances in which deprivation of liberty or other restraints are required, the law should specify that such restraint must be performed in ways that do not harm those restrained. Thus, federal law should delineate a code of offender rights; standards and goals for correctional practices, programs, and facilities; and mechanisms for monitoring and enforcement of these rights and standards. A step in this direction has been proposed with respect to juvenile offenders, in providing that every juvenile in custody shall be provided with "adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment." However, these entitlements need further elaboration and specification. Alternatively, a means for developing and applying more specific standards should be delineated. Furthermore, similar requirements should be adopted with respect to all persons held in federal custody, pre- or post-trial, adults as well as juveniles.

The requirement set forth that whenever possible juveniles shall be committed to foster homes or community-based facilities located in or near their home communities, also should be applied to adults. In addition, standards for compliance with the "whenever possible" clause need to be developed. Furthermore, consideration should be given to whether or not a separate prison system for federal offenders ever could be designed to allow both appropriate custody assignments and access to community resources and linkages. The problems which characterize a federal prison system are illustrated in extreme fashion with respect to women offenders. Currently, women committed to the custody of the Federal Bureau of Prisons are sent to one of four prisons around the country, although they originate from virtually all of the states. Thus, a substantial portion of the female offenders in the federal system are confined far from their families and friends. This fact of life of the federal system constitutes one of its most oppressive features, a feature that is antithetical to societal interests in the maintenance of family ties.

As another means of avoiding doing harm to offenders, the federal law revision proposals should incorporate the position of the National Coalition for Jail Reform (a coalition of 29 major national organizations including the National Sheriffs Association, the National League of Cities, the National Association of Counties, the American Correctional Association, the ACLU National Prison Project, and NCCD) to the effect that no one who has not yet reached the age of eighteen ever should be held in an adult jail.

Another ramification of the principle that practices employed should not impair the capacity of offenders to function in a free society after sentences have been fulfilled relates to the disturbing fact that even people who have "paid their debt" to society by completing a term of probation, imprisonment, or parole, seldom regain their pre-crime status in society. The collateral consequences of a criminal conviction characteristically are life-long in duration and may entail extreme hardships and distress. The tendency to continue to deal with people on the basis of past, already-punished offenses and criminal records perpetuates the "once a criminal, always a criminal" mentality that can divide society and make responsible citizenship difficult for ex-offenders.

S. 1723 envisions establishment of special procedures whereby some offenders who were less than a certain age upon conviction could apply for relief from certain consequences of certain convictions. Logically, the burden should be precisely the opposite. Offenders, regardless of age on conviction, should not be subject to continuing consequences unless such consequences are specifically authorized as a condition of a criminal sentence or unless special proceedings are established wherein the government has an opportunity to show the necessity for such consequences. At minimum, the court in which a conviction of crime has been entered should be authorized, at the time of discharge of a convicted person from its control, or upon discharge from imprisonment or parole, or at any time thereafter, to enter an order annulling, canceling, and rescinding the record of conviction and disposition. Upon the entry of such order, the person against whom the conviction had been entered should be restored to all civil rights lost or suspended by virtue of the arrest, conviction, or sentence, unless otherwise provided in the order. The person should then be treated in all respects as not having been convicted, except that upon conviction of any subsequent crime, the prior conviction could be considered by the court in determining the sentence to be imposed.

The sentencing structure and mechanisms outlined in the bills under consideration are untried and perhaps unworkable. We have concentrated on major points objectionable to us, especially those that we believe may have received insufficient consideration to date. There are many other features of the bills that concern us. We object, for example, to provisions that would exempt federal correctional agencies from the public disclosure statutes that apply to other bureaucracies. We object to the notion of creating an entity such as the proposed sentencing commission or committee without at the same time creating a meaningful opportunity for public input and critique of the guidelines and their effects, during their promulgation and before and after implementation. We object to the retention of most of the commonly proposed purposes of sentencing as allowable with little guidance as to how to balance these complex and perhaps conflicting purposes in making individual dispositions or establishing sentencing ranges.

The legislative branch bears the responsibility for developing a coherent public policy to govern the criminal sanctioning process. This is a difficult and controversial process, but far from an impossible one. It is also a task on which we should not hesitate to spend the time required to achieve the results desired, even if more than a decade is required. It is a task which, undertaken at this point in time, could set this nation on a new and better course, a course away from more

state control over individual lives, away from more prisons. We have offered a small set of time-honored principles which we believe would be of substantial aid in developing a much more progressive set of sentencing laws. We look to you for leadership in moving the nation in these more promising directions.

Thank you for your consideration.

Senator THURMOND. Our next witness is Ms. Esther Herst, National Committee Against Repressive Legislation.

Ms. Herst, come around please, Ms. Herst. I believe that you have a written statement here.

Ms. HERST. Yes, I do.

Senator THURMOND. If you could do just like Mr. Rector did, without objection, we will put your entire statement in the record, at the conclusion of your oral testimony.

Ms. HERST. I will be happy to do so.

Senator THURMOND. If you will just emphasize the points off the cuff that you feel are most important.

Ms. HERST. Yes; I will, Senator. Thank you.

END