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ARMED CAREER CRIMINAL ACT OF 1982

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Mr. SPECTER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1688]

The Committee on the Judiciary, to which was referred the bill (S. 1688) having considered the same, reports favorably thereon with an amendment in the nature of a substitute and an amendment to the title and recommends that the bill as amended do pass.

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REPORT ON THE ARMED CAREER CRIMINAL ACT

I. Amendment in the Nature of a Substitute to S. 1688

Strike all after the enacting clause and insert the following:

Sec. 2. Chapter 103 of Title 18, United States Code, is amended by adding at the end thereof the following new section: 2118. Armed Career Criminals

"(a) Any person who while he or any other participant in the offense is in possession of a firearm, commits, or conspires or attempts to commit robbery or burglary in violation of the felony statutes of the State in which such offense occurs or of the United States—

(1) may be prosecuted for such offense in the courts of the United States if such person has previously been twice convicted of robbery or burglary, or an attempt or conspiracy to commit such an offense, in violation of the felony statutes of any State or the United States and

(2) shall, if found guilty pursuant to this section, and upon proof of the requisite prior convictions to the court at or before sentencing, be sentenced to a term of imprisonment of not less than fifteen (15) years nor more than life and may be fined not more than $10,000.

"(b) Notwithstanding any other provision of law:

(1) any person charged pursuant to this section shall be admitted to bail pending trial or appeal as provided in 18 U.S.C. 3148;

(2) the prior convictions of any person charged hereunder need not be alleged in the indictment nor shall proof thereof be required at trial to establish the jurisdiction of the court or the elements of the offense;

(3) any person convicted under this section shall not be granted probation nor shall the term of imprisonment imposed under paragraph (a), or any portion thereof, be suspended; and

(4) any person convicted under this section shall not be released on parole prior to the expiration of the full term of imprisonment imposed under paragraph (a).

"(c) For purposes of this section—

(1) 'United States' includes the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States;

(2) 'felony' means any offense punishable by a term of imprisonment exceeding one year.

(3) 'firearm' has the meaning set forth in 18 U.S.C. 921.

"(d) Except as expressly provided herein, no provision of this section shall operate to the exclusion of any other Federal, State, or local law, nor shall any provision be construed to invalidate any other provision of Federal, State, or local law."

SEC. 3. The table of sections for Chapter 103 of Title 18, United States Code, is amended by adding at the end thereof the following new item: "2118. Armed Career Criminals."

SEC. 4(a). It is the intent of Congress regarding the exercise of jurisdiction under this Act that ordinarily the United States should defer to State and local prosecutions of armed robber and armed burglary offenses. However, if after full consultation between the local prosecuting authority and the appropriate Federal prosecuting authority, the local prosecuting authority requests or concurs in Federal prosecution and the Attorney General or his designee approves such prosecution to be appropriate, then Federal prosecution may be initiated under this Act.

"(b) It is further the intent of Congress that any person prosecuted pursuant to this Act be tried expeditiously and that any appeal arising from a prosecution under this Act be treated as an expedited appeal.

"(c) This section shall not create any right enforceable at law or in equity in any person, nor shall the court have jurisdiction to determine whether or not any of the procedures or standards set forth in this section have been followed.

Amend the title so as to read:

A bill to combat violent street crime by establishing a Federal offense for continuing a career of robberies or burglaries by using a firearm to commit a third or subsequent such offense, and providing a mandatory minimum sentence of between 15 years and life imprisonment.

II. PURPOSE OF THE AMENDMENT

The substance of the proposed statute has not been materially changed from S. 1688 as originally introduced, except that, in place of a mandatory life sentence, the penalty now provided is any term between 15 years and life imprisonment. Various refinements of language suggested by the Justice Department have also been incorporated.

Finally, the requirement of a concurrence by the local prosecution has been clarified. The Committee accepted one amendment affecting Section 4(a), concerning the circumstances in which the Federal Government will bring prosecutions under the Act. A majority of the members of the Committee present felt that the terms of S. 1688 as reported from the Subcommittee gave the Federal Government too much latitude to prosecute persons accused of the requisite number of state defined crimes when the state objected. There was a consensus that in circumstances where the accused had committed crimes only against a state and not crimes against the United States, the local prosecutor should have the opportunity to forestall the federal charge in favor of a state prosecution.

Through language that was fixed by Chairman Thurmond, Senator Biden, the ranking minority member, and Senator Specter, Chairman of the Subcommittee and principal sponsor of the bill, it was agreed that the U.S. Attorney would only prosecute an individual when such action was consented to or requested by the local prosecuting authorities after full consultation.

Because this statute is meant to assist states in bringing serious criminals to justice, it is proper that the states be consulted in the exercise of federal jurisdiction. Street crime of the variety addressed in the Armed Career Criminal Act, is primarily a local concern. Because of the effect career criminals have on interstate commerce and the interest of all levels of government to secure for all citizens the right to live in a safe environment, it is the intent of Congress that the Federal Government assume a more active role in prosecuting and incarcerating habitual offenders as defined in S. 1688.

There is every reason to believe that the local prosecutor and the U.S. Attorney can reach full agreement in every instance. By order of the Attorney General, Order No. 951–81 dated July 21, 1981, each U.S. Attorney was directed to establish an "Enforcement Coordinating Committee" to improve cooperation between federal and local law enforcement authorities. Through these committees and through less formal channels of communication and cooperation, it is expected that all parties can achieve the coordination of effort contemplated by S. 1688 as reported from the Committee on the Judiciary.

III. HISTORY OF LEGISLATION

S. 1688 was introduced October 1, 1981 and on October 6 was jointly referred to the Judiciary subcommittees on Criminal Law and Juvenile Justice. The latter Subcommittee held hearings on October 26 and December 10, 1981 and January 28 and March 18, 1982. On June 3, the Bill was approved for full Committee consideration with amendments and unanimously polled out.

The Bill was developed in close cooperation with top officials of the Department of Justice and the Administration. Prior to introduction, the concept of the Bill was discussed, separately, in meetings with Attorney General Smith, Deputy Attorney General Schmultz, Associate Attorney General Giuliani and Assistant Attorney General Jensen. It was also discussed before introduction with the President's Counsel. Copies of preliminary drafts were shared with the above officials and their subordinates. Virtually all drafting suggestions made by the Justice Department representatives were adopted.

On November 13, 1981, Senator Specter met with President Reagan at the White House to discuss Administration support for the Bill. Also attending were the Attorney General, the President's Counsellor, his Counsel and his Chief of Congressional Relations. A preliminary meeting had been held the day before with Edwin Meese. The President was encouraging.

The Administration endorsed S. 1688, as amended. On March 18, Assistant Attorney General Jensen testified to the Administration's support for the Bill.

IV. STATEMENT

The purpose of S. 1688 is to begin to employ Federal prosecutorial forces against violent crime. The bill creates a new Federal crime aimed at the most dangerous, frequent and hardened offenders. It applies to career criminals, defined as those with two or more prior convictions, who are using firearms to commit further violent felonies against innocent victims. Within the general category of armed career

criminals, the record developed in Subcommittee hearings demonstrates that additional prosecutorial attention is most needed against professional robbers and burglars. Therefore, the new Federal crime is limited to these two offenses, which are the most prevalent, frightening, and harmful of all the violent crimes that could be federally prosecuted.

The bill contemplates diverting a limited number of selected cases from State to Federal court for prosecution. The primary advantages would be: (1) faster trials; (2) more restrictive bail, and (3) longer, surer sentences. The ultimate result would be greatly increased deterrence against career criminals.

In many jurisdictions, adequate results are achieved as reliably in the State courts as in the Federal courts; in other jurisdictions, however, particularly in metropolitan areas, there is often a great disparity of results. Regarding both speediness of trials and sufficiency of sentences, the Federal courts frequently achieve dramatically better justice. In such jurisdictions, prosecuting some of the career armed robbers and burglars in the federal courts would significantly assist state authorities and enhance the effectiveness of law enforcement.

FEDERAL V. STATE PROSECUTIONS

Federal bank robbery prosecutions are routinely completed within ninety days of initiation, whereas state bank robbery cases in many places take a year or more to try. The average time served nationwide for state robbery convictions is 36 months. According to a recent FBI survey, the average sentence imposed for Federal bank robbery convictions is more than twelve years. Although "street" robberies and bank robberies are not precisely comparable any more than sentences served are comparable to sentences pronounced, the figures nevertheless illustrate the large gap between state and Federal courts: generally speaking trials are up to four times faster and sentences four times longer in the Federal courts.

LIMITED BAIL

S. 1688 provides that bail shall be granted as provided by section 3148 of Title 18 of the United States Code. That provision, which applies in capital and post-conviction cases, is the only current Federal statute of nationwide application that specifically authorizes the court to consider the dangerousness of the offender in making the determination whether or not to release a defendant pending trial. Expressly incorporating the provisions of the statute into S. 1688 overcomes the effect of the Bail Reform Act of 1965 which is generally interpreted as limiting the issues which may be considered by the court to those relating to the likelihood of appearance for trial. Many states have bail statutes or rules similar to the Bail Reform Act in that they contain no provision authorizing the court to deny bail even in the face of evidence that a defendant is dangerous and likely to commit further offenses. In such jurisdictions, S. 1688 would provide a lawful basis for pretrial detention of dangerous offenders in appropriate cases. Therefore, even if trial delays and sentences

were the same in federal and state court in a particular jurisdiction, a given case might be diverted because of lax state bail provisions.

SENTENCES OF 15 YEARS OR MORE ARE MANDATORY

While the bail provision of S. 1688 is permissive, merely authorizing the court to deny bail, the sentencing provision is mandatory. It requires a minimum sentence of at least 13 years. It authorizes a sentence for any term of years greater than 15 years, or for life. In no event, however, may the court impose a term of imprisonment of less than fifteen years. This prohibition against short sentences would apply whether the defendant pleads guilty or is convicted following a trial. In this way, the bill precludes excessive plea bargaining as well as to the risk of an individual federal judge imposing an unduly short sentence following a trial. The goal of S. 1688 is to incapacitate the armed career criminal for the rest of the normal time span of his career which usually starts at about age 15 and continues to about age 30. Hence, the length of the mandatory minimum was set at 15 years.

EXPEDITING COMPLETION OF CASES

To encourage the speediest possible disposition, S. 1688 relies both on the requirements of the Speedy Trial Act and on its own provision directing still faster conclusion of trials and appeals. Under the Speedy Trial Act, defendants indicted under S. 1688 must be tried within seventy days of indictment. By requiring that the persons prosecuted under the bill be "tried expeditiously", the Committee intends that the court place prosecutions under this Act ahead of others and ensure trial in a still shorter time frame. It is anticipated that in most cases trial would be held within sixty days of arrest or approximately 30 days after indictment. Thus, the typical trial under this Act might be three times faster than required by the Speedy Trial Act.

While neither the Speedy Trial Act nor any other Federal statute establishes maximum time limits for appeals from criminal convictions, S. 1688 requires that "any appeal arising from a prosecution under this Act (shall) be treated as an expedited appeal." Again, the intention is that whatever the average time frame, appeals from convictions under this Act would be treated specially and concluded sooner, i.e., at the earliest possible time. Since many Federal courts of appeals have special procedures for "expedited appeals", the Act contemplates that all cases prosecuted under it would have to be handled pursuant to such procedures.

THE SENTENCE IMPOSED MUST ACTUALLY BE SERVED

Following the conclusion of any appeal, the defendant would be required to complete the full term of imprisonment imposed by the court. S. 1688 expressly prohibits the court from placing a defendant on probation, from suspending sentence, or otherwise concluding the proceeding with a sentence of less than 15 years. The bill also prohibits paroling the defendant prior to the completion of his full term. Persons convicted under S. 1688 would simply be ineligible for parole.

In short, the bill seeks to improve public safety and reduce violent crime by incapacitating career criminals, through lengthy incarceration. Since the bill is specifically aimed at "high rate" offenders, many of whom commit a robbery or burglary on the average of nearly one everyday and continue until age 30–40, sentence of fifteen years for each such offender would prevent several thousand major offenses.

INDIRECT EFFECTS

It is anticipated that the entry of the Federal Government into the field of prosecuting violent street crime will have a substantial deterrent effect. This effect will be achieved even with a limited number of prosecutions. In fact, the indirect, deterrent impact will probably be even greater than its direct, incapacitating impact.

It is also hoped that the application of the Act will create a specific deterrent to the use of firearms. Even those offenders who cannot be deterred from committing further robberies and burglaries by the risk of Federal prosecution leading to a minimum sentence of fifteen years, may at least be deterred from carrying a firearm. This in itself would be a highly beneficial result since in many robberies and burglaries, possession of a firearm can lead to its use and possibly to serious injury or death.

BURGLARIES ARE POTENTIALLY VIOLENT CRIMES, TOO

While burglary is viewed as a non-violent crime, its character can change rapidly, depending on the fortuitous circumstance of the occupants of the home being present when the burglar enters, or arriving while he is still on the premises.

The notorious case of Washington heart surgeon, Dr. Michael Halberstam illustrates this point. Dr. Halberstam arrived home with his wife during the course of a burglary by a career criminal named Bernard Welch. Welch had been previously convicted numerous times and had committed several hundred burglaries in the Washington area in the previous few years. Welsh was armed. When Dr. Halberstam surprised Welch inside the home, Welch shot and killed him.

With regard to the use of firearms in robberies, recent trends indicate that weapons are being used more frequently. Ten years ago less than a third of the burglaries involved weapons. Now the statistics indicate that weapons are used in nearly half of the robberies. Moreover, scholars have noted an increasing trend for armed robbers to discharge firearms, often gratuitously, either injuring or killing their victims.

SUPPLEMENTING STATE PROSECUTIONS AS NEEDED

S. 1688 is intended to supplement state prosecutions, not to supercede them. Wherever armed robbers and burglars are all being successfully prosecuted in the state system, S. 1688 simply would not be utilized. In those jurisdictions, those times, and those specific types of armed robberies and burglaries where the results in the State courts are not adequate, S. 1688 would provide an auxiliary means for protecting public safety. The bill erects a "safety net" for public protection. It affords local prosecutors an alternative forum; allowing

Federal prosecutions will achieve adequate results when they cannot be achieved in the state court.

Ideally, each major armed felony ought to be tried in whichever court system is more advantageous for assuring a just and speedy result. The Committee believes that through consultation, the District Attorney and the United States Attorney could readily assess the prospects for a given case in their respective court systems. They could then jointly agree which cases warrant transfer to the Federal system.

THE LOCAL PROSECUTOR HAS PRIMARY CONTROL

S. 1688 contemplates that ordinarily prosecutions under the Act would be initiated upon request of the local prosecuting authority. Section 4 of the bill expresses the intent of Congress in this regard. It also provides, however, that if the Attorney General of the United States or one of four other top ranking Justice Department officials in Washington makes a determination that "Federal prosecution is necessary to vindicate a significant Federal interest," Federal prosecution of a given case could be brought even in the absence of the request or consent of the District Attorney. The Committee expects that this provision would be resorted to rarely, if at all. However, it was the view of the framers of the bill and the Justice Department that it would be inappropriate for the assertion of Federal jurisdiction and the initiation of a Federal prosecution to depend completely on prior agreement of a local official. In addition, there may be a danger of violating Equal Protection in the application of the statute since it is unlikely that the thousands of District Attorneys in the various counties in the fifty States would apply uniform standards in determining which cases they might refer for Federal prosecution.

PROCEDURES FOR EXERCISING CONCURRENT JURISDICTION

The Committee assumes that the procedures would be the same as those now used, without difficulty, for bank robberies, which likewise constitute Federal as well as State offenses. The division of labor between the Federal and local prosecutor could be achieved through a combination of establishing general guidelines for broad categories of cases and, where necessary case-by-case review. The Law Enforcement Coordinating committees, which the Attorney General has directed be established in each of the ninety-four Federal districts, would offer an appropriate forum for discussions and actions leading to such mutually acceptable guidelines and mechanisms for reviewing individual cases.

WHO IS COVERED BY S. 1688

The bill applies to any person who participates in an armed robbery or burglary if that person has been convicted of robbery or burglary on two or more occasions in the past. The prior convictions need not involve possession of firearms nor need they be Federal convictions. The bill expressly includes violations of State law, provided that those violations are felonies. The dates of prior offenses and the sentences imposed are immaterial. The bill applies to all criminals with two or more prior convictions for robbery or burglary who subsequently com-

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mit another robbery or burglary using a firearm. Usually, these offenders will not have a federal record and would not be subject to federal prosecution but for S. 1688.

The nature of the career criminal's participation in the new offense does not matter. The bill includes those who commit a completed offense and also those who are involved in an attempt. Finally, it includes all those who conspire to commit the offense. Similarly, the prior convictions can be for actual commission of robberies or burglaries or attempts or conspiracies to commit such offenses. While the bill requires that the present offense involve the use of a firearm (or a destructive device, such as a bomb), it does not require that each career criminal personally possess a gun. Experience reveals that where multiple perpetrators commit a robbery, for example of a restaurant or business office, not all of the members of the robbery gang carry weapons. Thus, of three robbers who enter a store and a fourth who waits in a getaway car, two of the three in the store may carry guns while the third may be assigned the job of carrying the bags of money taken from the office safe. The driver of the getaway car may also be unarmed. Ordinarily, it is clear to all participants in the robbery that firearms are to be used and are being used. Therefore, it can fairly be said that the use of the weapons is with the knowledge and consent of all participants.

COMPONENTS OF S. 1688

S. 1688 has two distinct parts. The first would form a new section in the federal criminal code, Title 18 of the United States Code. The new section would be added at the end of Chapter 103 of the Code which concerns robbery and burglary. Chapter 103 now ends with Section 2117. Accordingly, the bill would create an additional section numbered 2118, and titled "Armed Career Criminals". The first part of S. 1688 consists of its first three sections. Section 1 merely contains the title of the Act. Section 2 contains the operative language creating the new offense with the mandatory penalty. Section 3 merely provides that the table of Sections in Chapter 103 of Title 18 should be amended to add the new code section number and title.

The second part of the bill consists of Section 4. It would not appear in Title 18, but in the Public Law version of the statute. Section 4 consists entirely of a statement of the intent of Congress. This statement concerns two subjects: (1) The procedures for referral of cases for federal prosecution; (2) Emphasis in the importance of expedited trials and appeals. Since neither of these matters are germane to prosecutions brought under the Act and are provided merely for the guidance of the Executive Branch in connection with bringing them there is no need to include this section in Title 18. Indeed, the section expressly provides that it creates no litigable rights.

S. 1688 IS NOT MERELY AN ENHANCED PENALTY PROVISION

It must be emphasized that S. 1688 creates a new Federal crime. It does not simply provide for punishment of offenders on the basis of their having violated State law. Like the Racketeer Influenced and Corrupt Organiaztions statute (RICO), it creates a separate Federal offense based on State violations and certain additional circumstances.

Accordingly, those to whom the Act is applied would be indicted and tried like any other Federal defendants. The Federal Rules of Criminal Procedure and the Rules of Evidence would apply. However, with regard ot the definition and interpretation of the elements of the underlying state offense, the Federal court would be guided, as it is in a RICO case, by the law as established by the legislature and courts of the State.

It must also be emphasized that the punishment of imprisonment for at least fifteen years is based entirely on the present offense, not on the defendant's "status" as a "career criminal". Nor is it retroactive enhanced punishment for the prior offenses. Whether the prior burglary and robbery convictions resulted in probation, suspended sentence, misdemeanor sentence, or State prison sentence makes no difference. Whatever punishment was imposed by the State court is totally unaffected by application of S. 1688. While the punishment imposed by the Federal court is based entirely on the transaction constituting the third or subsequent robbery or burglary, the fact that the prior convictions is essential to the federal jurisdiction over the person and hence to the applicability of the minimum sentence. In this regard, S. 1688 is much like the Continuing Criminal Enterprise statute which authorizes enhanced penalties for those convicted under that Act in the Federal court who have previously been convicted of drug offenses in the State courts.

S. 1688 EXTENDS PRESENT FEDERAL JURISDICTION OVER ROBBERIES AND BULGARIES AND FIREARMS OFFENSES

The Act essentially extends the Federal offense of robbing a bank to armed robberies wherever they occur. Similarly, the portion of the same statute which governs burglary of a bank could be considered extended by 1688 to cover burglaries regardless of the location. Of course, S. 1688 also requires the firearm and the prior convictions.

It is important to emphasize the interchangeability of offenses. The prior convictions can be either for robbery or burglary or a combination of robberies or burglaries. Convictions for these offenses, while not unimportant for the purpose of selecting appropriate cases for diversion into the Federal system and for determining whether a sentence greater than fifteen years is warranted, nevertheless are irrelevant to establishing whether a given offender may be prosecuted under the Act at all. Nor does it matter whether the prior robberies and burglaries were in the same State or the same county. Thus, if a career criminal committed a burglary in State A, a robbery in State B, and now commits an armed burglary in State C, he would be subject to prosecution under S. 1688, if he had been convicted of those two prior crimes in those respective States. Federal convictions also count with respect to the prior convictions as do Federal violations with respect to the current charge. Thus, a career criminal who is convicted in State A of burglary and then in the Federal court of bank robbery, and who then commits an armed burglary in State B, would be covered by the bill. An offender convicted of robbery in State A and burglary in State B who now commits an armed bank robbery in violation of Federal law could also be prosecuted under this Act.

THE BILL WOULD SHIFT PROSECUTIONS, NOT INVESTIGATIONS

The typical case eligible for prosecution under S. 1688 would arise in the following manner: First, local police would apprehend a criminal during the course of an armed robbery or burglary. They would seize the weapon and the stolen property and arrest the offender or offenders. Charges would be initiated in the local courts and the reports of the incident and any subsequent investigation would be forwarded to the local District Attorney for his review for the filing of formal court charges, usually by indictment. Up to this point there would be no involvement by either Federal investigative or prosecutive authorities. Indeed, it is likely that Federal officials would be unaware of the case. Certainly, they would have no evidence; probably, they would not know the details of the crime. When the District Attorney or his assistants review the case for State indictment, they would also make a determination whether or not Federal prosecution would appear advantageous. Where there is no great advantage or need for Federal prosecution, the case would simply proceed in the ordinary course in the State court system. However, if the District Attorney determined that he could not achieve an adequately rapid trial, and a sufficient sentence, or could not obtain pretrial detention of a defendant whose detention was essential to public safety, then the case might be referred for Federal prosecution. Ordinarily, the file assembled in the State prosecutor's office would simply be sent to the Federal prosecutor for review.

Where the two prosecutors had previously adopted guidelines as to categories of cases that might be considered appropriate for Federal prosecution, application of these guidelines initially by the District Attorney would facilitate handling the case. Upon receipt of the file, the Federal prosecutor and his assistants would review the reasons why the District Attorney felt the advantages of Federal prosecution were critical for this particular case. Second, they would review the facts of the case and the defendant's record from the standpoint of deciding whether or not the case is substantial and significant enough to warrant the use of Federal resources and the assertion of Federal criminal jurisdiction. After all, Federal jurisdiction is exceptional and only to be used in appropriate cases, particularly for violent street crime which traditionally has been primarily the responsibility of State authorities. If the Federal prosecutor did not feel the case was significant enough to warrant Federal prosecution, he would immediately return the case to the State where it would be processed in the ordinary manner that most other State trials are processed. If the Federal prosecutor agreed that Federal prosecution should be initiated, he would seek Federal indictment.

The indictment would be primarily on the report and evidence forwarded to him by the State prosecutor. Certain follow-up investigation might be conducted by the FBI or other Federal investigative organizations. However, it is not contemplated that such investigative activity would heavily burden the FBI because most of the evidence would have been obtained by the State authorities. They would have the gun and the stolen property. They could provide the local police

officers as witnesses concerning the circumstances of the apprehension, the chain of custody of the physical evidence, and so forth. Likewise, the local police would have interviewed victims and any eyewitnesses to the robbery or burglary and have provided the Federal prosecutor with information summarizing the prospective testimony of these individuals as well as practical information concerning their whereabouts so they could be summoned as Federal witnesses.

THE ACT WOULD NOT OVERBURDEN FEDERAL PROSECUTORS

In the typical case, the proof would be rather strong. Since burglary and robbery cases are by their nature relatively easy to try, no great difficulty would be presented to Assistant United States Attorneys, even those who may not have prior experience in trying precisely these kind of cases. Bank robbery prosecutions are common and bank burglary prosecutions are also handled in U.S. Attorney's offices. Furthermore, where robberies and burglaries occur on the Federal enclaves such as military bases, they are prosecuted in the Federal court. Accordingly, neither the Federal prosecutors nor the Federal judges are entirely unfamiliar with these kind of cases. In any event, such cases typically rely heavily on physical evidence and eyewitness identification and are therefore rather easily presented by the prosecutor. Similarly, while the court would have to review the indictment and its sufficiency from the standpoint of the elements of the offense as defined in State law, and to instruct the jury accordingly, these State laws are rather simple and straightforward in nature and therefore would present little difficulty to the court.

An additional procedure exists to facilitate the handling of these cases. It is known as "cross designation." This term simply means that an Assistant District Attorney in a particular county is designated a Special Assistant United States Attorney. He can then appear in Federal court and try cases there as well as in the State court. Conversely, Assistant United States Attorneys can be sworn as Assistant District Attorneys in the county and can appear in its courts to try cases.

Cross designation programs have been tried experimentally in San Diego, Chicago and Philadelphia, with good results. Having been successfully tried out in several different jurisdictions, cross designation will now likely be applied widely around the country. Thus, a system should already be in place for the most efficient handling of cases under S. 1688 when it is enacted.

The State prosecutor who reviewed a particular case for presentation to the grand jury for indictment or prepared it for trial, could simply follow the case across town to the Federal courthouse where he would try it himself. In this fashion, there would be no duplication of effort. In that circumstance no Assistant United States Attorney would have to prepare the case. The same procedure, of course, can work in reverse. For example, an Assistant United States Attorney who reviewed an FBI bank robbery investigation by the FBI for possible Federal indictment which he cannot get, he could then take the file to the State courthouse where he could try the case.

PROOF OF PRIOR CONVICTIONS WOULD BE EXCLUDED FROM TRIAL

The bill contemplates a split proceeding in the Federal court. The first part would be the jury trial on the present offense. The bill specifies that the indictment need not allege the prior convictions nor need they be proven at trial in order to establish the jurisdiction of the court or the elements of the offense. No mention would be made in connection with the trial of the fact of the prior convictions. The defendant and his attorney would be specifically advised separately from the indictment of the evidence proving the prior convictions required for a case brought under S. 1688. The second proceeding would occur after the jury rendered a guilty verdict and was dismissed. The judge would then conduct an inquiry concerning the prior convictions. This inquiry would be in the nature of an evidentiary hearing before, or at the time of the sentencing.

Ordinarily, the prior convictions would be established by the Federal prosecutor with certified court records from the jurisdictions in which the prior convictions were obtained. The defendant could contest the accuracy of such records as provided by law. If the court found any deficiency in the records of the prior convictions, the Federal prosecutor would have to prove them through alternative means or risk the prosecution being aborted. The device available to the court would be to arrest of judgment.

The Federal prosecutor would have fully reviewed the evidence of the prior convictions before seeking the Federal indictment. Accordingly, rarely, if ever, would a serious question arise at the hearing concerning these prior convictions. Indeed, it might be common practice for defendants to stipulate to the prior convictions since the prosecutor would make the certified court records establishing them available to the Defense Attorney well before the commencement of the trial itself. Thus, the Defense Attorney would have ample time to explore any possible infirmities in those records or the underlying convictions.

The separate proceeding on the prior convictions is designed primarily to assure fairness in the trial of the defendant. Obviously there is a risk that if the jury were made aware of the prior convictions it might be influenced in its determination of the proof of the present offense.

CONFINEMENT OF THOSE SENTENCED UNDER S. 1688

Following imposition of sentence, the defendant would be incarcerated in the Federal prisons system like those convicted under the present bank robbery statute. With the use of firearms to commit a violent felony and the prior convictions, these defendants presumably would be confined in the maximum security institutions of the Federal system of which there are presently six. In addition to requiring a very substantial level of security and close guarding, these career armed criminals would seem to be very poor candidates for rehabilitative services. Accordingly, it is contemplated that their treatment in the Federal prison system would be based on the idea that they were being held for incapacitation rather than for rehabilitative purposes.

The most likely institution for those initially sentenced under S. 1688 would be the Federal Correctional Institution at Atlanta,

Georgia, often referred to as the Atlanta Penitentiary. Presently, this institution is filled almost exclusively with Cuban refugees from the Mariel Exodus. They are being released on a regular, although gradual, basis and the spaces thereby made available could be used for career criminals sentenced under S. 1688. Perhaps within a few years, the Atlanta Penitentiary would be occupied exclusively by career criminals prosecuted under the bill. This would be more efficient than housing a portion of these inmates in each of the six maximum security institutions.

EFFECT ON STATE ROBBERY AND BURGLARY LAWS

The bill expressly provides that it shall not "preempt the field," whether or not it has been previously occupied by a State action. That is, the law is not intended to overrule, or modify, or in any way effect the application of any State or local criminal statute that covers the same conduct. Nor is it intended to overrule or affect the application of other Federal statutes involving the same conduct. Thus, the Federal bank robbery statute and the provision of the Hobbs Act concerning robberies which "affect interstate commerce" would remain unchanged. Therefore, a defendant might be charged not only under S. 1688, but also under other Federal statutes which he may have violated by the same transaction. Of course, once convicted of one or more such offenses the normal limitations on additional punishment for the same transaction would apply. Accordingly, it is contemplated that if charged both under the bank robbery statute or Hobbs Act and S. 1688, the defendant would be sentenced only under S. 1688.

If prosecuted locally, the defendant would not also be tried federally—and vice versa. The Act would be used in lieu of state prosecution.

ROBBERY AND BURGLARY AS THE OFFENSES REQUIRING ACTION

The need for special attention to career robbers and burglars can be demonstrated both by crime statistics and by the public opinion polling done in recent years. Violent crime has gotten worse. Robbery and burglary are more prevalent and have increased faster than any other type of violent crime. Some people argue that indications of increasing severity of the crime problem merely reflect greater reporting, more sensitivity to the problem, and the popularity of anecdotes told among friends. This argument is not supported by data. In general, the incidence of violent crime in America had doubled in the last twenty years. Moreover, since 1978 there has been a sharp upsurge following a period in the mid-seventies when crime rates stabilized. The several years of flat rates suggest that improvements in reporting cannot explain increases in crime rates.

Even before the recent upsurge, the level of criminal violence and victimization in the United States was extraordinary by comparison with similar industrialized countries. On April 16, 1981, Dr. Harry A. Scarr of the staff of the Attorney General's Task Force on Violent Crime testified about the robbery rates in the United States and in comparable advanced societies. In 1976, the rate of robberies per 1,000 population in the United States was 195. The robbery rate in England

and Wales in the same period was only 24. In Japan, the rate of robbery was only 11.2. Thus, the United States, even in the stable period of the mid-seventies suffered a robbery rate approximately twenty times that of Japan and eight times that of Great Britain.

THE INCIDENCE OF ROBBERY

The number of robberies per year rose 31 percent from 1978 to 1980. In 1980, the last year for which comprehensive statistics on reported crime are available, there were 548,809 robberies reported to police. The rate of robberies increased 24 percent in the same two year period. The rate of robberies per 100,000 population was 243.5. For cities with populations in excess of 100,000 persons, the robbery rate was nearly three times as great: 664.

In just one year, from 1979 to 1980, the rate of robberies increased 14.8 percent, an even greater increase than the increase in the inflation rate in the same one-year period. Indeed, throughout the late 1970's the increase in the rate of robbery and other violent crime outpaced the increase in the rate of inflation. (Uniform Crime Report: "Crime in the United States, 1980", published by the Federal Bureau of Investigations, September 10, 1981, in Washington, D.C., p. 17).

The Uniform Crime Report summaries offenses reported to police organizations throughout the United States. Therefore, it does not reflect the actual incidence of crime, but only the reported incidence. However, scholars have developed ways of estimating the actual crime rate based on controlled and statistically valid sampling methods. This poll is called the National Crime Survey Report. The National Crime Survey Report is based on a survey of select households across the United States containing approximately 135,000 people. These households are selected to be representative based upon accepted principles and procedures of public sampling. The survey involves having a representative of each household fill out a detailed questionnaire. The survey is published by the Bureau of Justice Statistics of the United States Department of Justice.

The Report published in September of 1980, revealed that the robbery rate was actually twice as great as indicated by the Uniform Crime Report. The Report revealed an estimated nationwide robbery rate of 630 robberies per 100,000 population, as compared with the reported robbery rate of 243 per 100,000 population. By extrapolation, that would suggest that for cities of more than 100,000 persons, the actual incidence of robbery is more than 1300 per 100,000 population (double the reported incidence of 664).

THE COSTS OF ROBBERY

Measuring the various costs of robberies requires important value judgments. Counting only the value of money and property stolen through robbery, the Uniform Crime Report for 1980 reflected a total national loss of approximately $333 million. The average loss per robbery was about $607. (Uniform Crime Report: Crime in the United States 1980, p. 17.) The full financial costs of robbery, of course, are much greater. When one adds the financial costs of days of work missed by injured robbery victims, the full extent of the harm caused by robbery becomes clearer. According to the National

Crime Survey Report, nearly 75 percent of the robbery victims miss at least six days of work. In fact, just over 50 percent missed at least 1–5 days of work (Page 70).

Fortunately, the percentage of robbery victims who sustain actual physical injury is relatively small. According to the Survey Report, 31.8 percent of all robbery victims sustained some physical injury (Page 59). Seven percent of the robbery victims incurred medical expenses (Page 60).

The Criminal Victimization Survey for 1978 estimated that in that year firearms were used in 31 percent of all robberies (Page 57). While the victimization survey cannot validly be compared directly with the Uniform Crime Report, it is nevertheless interesting to note that the UCR for 1980 reflects that firearms were used in 40 percent of all robberies. The fair inference is, that the use of firearms is becoming more frequent in robberies.

Visual evidence of the high and rising incidence or robbery cannot escape the attention of Americans, particularly those living in large towns and cities. For example, in urban banks and financial institutions, tellers are often protected in a ceiling-to-floor plastic or glass enclosure. Even post offices in many urban neighborhoods now have complete separation between the clerks and the customer area. Everyone is familiar with gasoline stations which have no change at night and with drug stores and other stores and delivery vehicles that display signs reflecting that the facility does not have any cash.

The closing of "Mom and Pop" convenience stores in urban neighborhoods is a well-known phenomenon which removes both a colorful and stabilizing element in the neighborhood and the source of a real service to the people in the community. Chain convenience stores have also been subjected to innumerable robberies. The companies that own these chains are required to spend considerable sums for insurance, physical security devices, and sometimes, for guards. Where these costs threaten to outweigh the profitability of a given location, the pressure for the chain to close its establishment at that location becomes very strong.

THE INCIDENCE OF BURGLARY

The volume of burglaries is even more dramatic than the number of robberies. In 1980, police organizations in the United States received reports of burglaries in 3,759,193 instances. The rate for reported burglaries per 100,000 population was 1,668. Thus, there are more than six times as many burglaries as robberies. As with robberies, the number of burglaries climbed steadily in the late 1970's. From 1978 to 1980, the burglary rate increased fifteen percent.

The Criminal Victimization Survey estimated that there were 6,685,400 victim of burglary in 1979. As in the case of robberies, burglaries seemed to be reported to police only about half the time. When expressed in terms of households suffering burglaries in 1979, there were 84.1 burglaries per 1000 households. One out of every 14 American households suffers a burglary every year. This means, in effect, that on the average there is a burglary on practically every street in the United States every year.

Losses from money and property stolen in burglaries in 1980 was reported at $3.3 billion. The average loss for a burglary was $882

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(UCR, page 24). What cannot be readily calculated is the millions or billions of dollars in insurance rates which are attributable to payment of claims for burglaries. Nor are there readily available statistics to reflect the nationwide expenditure for extra locks, alarm systems, and other security devices and services. Certainly, home burglar alarms alone have now become so common in American households that the cost of such devices must run into the tens or even hundreds of millions of dollars per year. Moreover, some residential areas employ private security guards to patrol streets in order to deter burglaries. The cost of these private guards also may total in the hundreds of millions of dollars.

CRIME LOSSES GENERALLY

The President, in a speech to the International Association of Chiefs of Police in New Orleans, in September 1981, put the estimated total annual cost of all crime from damage and loss of property at about $8 billion. With regard to the total cost, including all the indirect costs of crime, many experts have estimated that it falls in the range of $80 to $100 billion per year. Some estimates are even higher. The Administrative Assistant to the Chief Justice in a recent article suggested that the total losses run to $125 billion. His figure is based on various component figures derived from reports of the Bureau of Justice Statistics of the United States Department of Justice.

Of all the money and property taken by robbers and burglars from innocent citizens, less than 25 percent is ever recovered. Accordingly. if one is a victim of a robbery or burlgary, the chances that one's money or property will be returned is slim. Seldom does the victim of robbery or burglary escape serious loss. For example, significant financial loss was suffered in more than 90 percent of the robberies.

LOST TIME SURPASSED STOLEN PROPERTY

One of the most surprising statistics is the amount of time lost by burglary victims. While robbery victims, particularly those who received injury medical attention, could be expected to miss work, much work is also missed by burglary victims. Slightly more than fifty percent of all victims of burglary lost at least 1–5 days of work. This was due to days consumed by the criminal investigation, settling insurance matters, and going to court.

Having lost substantial property or money, the victim of robbery or burglary must then suffer further economic loss, not to mention inconvenience, due to the needs of criminal investigation and prosecution. It may well be that the largest economic loss from crime does not come from the value of the property taken, the cost of medical care or even from inflated insurance rates or the costs of security devices and services. The greatest loss may come from the economic costs, which fall both on individuals and the country, from workdays missed.

ROBBERIES AND BURGLARIES ARE THE MOST NUMEROUS FELONIES

The prevalence of robbery and burglary as the most common violent street crimes is undeniable. Burglaries are 40 times more common than rapes, and robberies are seven times more common than

rapes. In turn, rape is far more common than kidnapping or murder. Therefore, in terms of the likelihood of being victimized, burglary is the number one threat, followed by robbery.

PUBLIC FEAR OF ROBBERY AND BURGLARY—THE POLLS

Public opinion polls reflect a growing level of fear by the populace in the United States that exceeds the level coinciding with actual prevalence of crime as demonstrated by the reported statistics. In recent national public opinion polls, the crime problem is consistently listed as equal to or just behind the country's economic problems. For example, the CBS News-New York Times poll of June 1981 (page 6) listed inflation in prices as the number one concern, other economic problems as the number two concern, and crime as the number three concern. The Gallup Poll conducted by the Field Newspaper Syndicate in October 22, 1981, listed crime as the fourth concern of Americans behind the high cost of living, unemployment, and the Reagan budget cuts.

Concern with crime as one of the most serious national problems is not a new phenomenon. The Gallup Poll conducted July 17, 1972, listed Viet Nam as the top concern; the second concern was inflation and the high cost of living; the third concern was crime and lawlessness.

Both the recent and earlier public opinion polls cited above were conducted on a nationwide basis. People were asked what they thought the major problems were facing the nation. When people are asked in the polls about problems facing the local community in which they live, the ranking of crime rises dramatically. The CBS News-New York Times poll of June 1981, for example, listed the economy and inflation as number one and crime as number two. When questions about local problems are directed to Americans living in urban areas, crime rises to the first position. Thus, the Gallup Poll of April 5, 1981 (page 2), lists crime as the number one concern. Similarly, the Baltimore Sun Poll of October 18, 1981, which was a poll of all Maryland residents, listed crime as the number one concern (see page A–14). The New York City Daily News Poll of May 25, 1981, asked the residents the question "What is the worst thing about living in New York?" The most common answer was "fear of crime" (Page 85). The Los Angeles Times Poll of January 1981 asked Los Angeles residents their views as to what the top priority of government in their community should be. Dealing with crime was ranked number one. The same question was asked by the Los Angeles Times of a sample of people from around the country. Again, addressing crime was ranked first as the top local community priority.

The Los Angeles Times poll cited above included questions that specifically focused on armed robbery and burglary. Persons were asked: "How often do you worry about being held-up by an armed robber?" Thirty percent of Los Angeles and trenty-nine percent of urban residents nationwide answered "very frequently" or "pretty frequently". The same respondents were asked: "How often do you worry about your home being burglarized when you are not there?" The Los Angeles respondents replied "very frequently" in 29 percent

of the cases and "pretty frequently" in 18 percent of the cases. When urban residents around the country were asked the same question, 36 percent replied "very frequently" or "pretty frequently".

Comparison has been made between the level of fear of crime compared with fear of the Soviet Union. The May 25, 1981 Harris Survey ranked these two concerns as equal (page 2). They tied for fourth place in the overall ranking and were expressed as "keeping U.S. military strength at least as strong as the Russians" and "supporting the strongest measures to control crime." The Gallup Poll of October 22, 1981, also contained a tie between concern for war and concern for crime. Again, the two tied for fourth place along with excessive government spending and moral decline in society (page 2).

LAW ENFORCEMENT RESOURCES DECLINE WHILE CRIME RISES

Law enforcement resources are being decreased at the very time that violent crime is increasing sharply. In contrast to military expenditures which are up nearly 7% real growth per year, Federal law enforcement resources decreased about 7% from 1981 to 1982. Moreover, in many major cities the decrease in resources in recent years has been far greater. For example, in New York City there are one-third fewer policemen than a few years ago.

Even special police squads dealing with robbery and burglary have been cut despite the increase in these offenses. For example, in Washington, D.C. the incidence of robbery has nearly doubled in the last few years. However, the size of the robbery squad has been decreased from 43 to 28 men. The decreases reflect severe budget pressures, particularly in the older cities with ailing economies. Unfortunately, the decreases were from a base level that was already in comparison to the incidence of crime in the cities. On the federal level, the number of law enforcement officials even before the 1981 cuts was down significantly because of decisions made in the early and mid-seventies. For example, the FBI today has 1,000 fewer agents than it did in 1975.

The greatest insufficiency in resources is in the area of corrections. Severe overcrowding of many State prison systems and the county jails in urban counties has caused great pressure on state judges against imposing appropriately lengthy sentences for violent and repeat offenders. Yet, the NBC News Associated Press poll of July 24, 1981 (page 11) reflected that 63 percent of the respondents favored State governments using tax monies to build new prisons.

MOST ROBBERIES AND BURGLARIES ARE COMMITTED BY CAREER CRIMINALS

It is now well-documented that a small number of repeat offenders commit a highly disproportionate amount of the violent crime plaguing America today. Recent scholarly studies generally establish that approximately six percent of the offenders commit between 50 and 70 percent of the violent crime. The same studies indicate that true career criminals commit such offenses with extremely high frequency. For example, career robbers may engage in 40 or 50 robberies per year while career burglars often commit well over 100 offenses per year. Many career offenders commit crimes such as robbery, burglary and drug sales at a rate of about one per day.

Pioneering studies on recidivism have been conducted by the Rand Corporation of Santa Monica, California. Rand has conducted three major studies of career criminals. Unlike most earlier efforts which relied on arrest records to establish the crime pattern of a particular offender, the Rand studies relied on admissions by the defendants themselves. For example, the second "Doing Crime: A Survey of California Prison Inmates," by Mark A. Peterson (Santa Monica, California—1980), focused on a representative sample of California State prison inmates serving substantial prison terms on the basis of various convictions. Each inmates was closely questioned about offenses he had committed prior to his incarceration. On the basis of these admissions, the author estimated that in the one year on the street immediately preceding the arrests and convictions on which their imprisonment was based, 100 of these offenders convicted at some time of robbery would have committed 490 armed robberies, 720 burglaries and approximately 4,000 other serious offenses (Page x). In other words, the typical offender in this group in the prior year of street time would have committed five armed robberies and seven burglaries. These career criminals, tended to commit robberies and burglaries interchangeably.

CAREER ROBBERS AND BURGLARS ARE ALSO ADDICTS/SELLERS

This same group of 100 offenders in the previous year on the street would have committed 3,400 drug sales. This fact is consistent with the notion that these career criminals have chosen a life of crime concentrating on offenses with high potential for significant monetary gain. Further, it supports the common view of crime experts and ordinary citizens alike that robberies and burglaries tend to be committed by heroin addicts. Police officials have asserted that at least the street level, those who are addicts are also frequently engaged in extensive drug selling activity. That fact would explain why the 3,400 drug offenses by the inmates in the Rand study where not possession offenses, but actual sales.

Studies of other groups of convicts reveal similar profiles as to which offenses are committed by career criminals and in what relative proportion. For example, the Institute for Law and Social Research (INSLAW) recently completed a study of federal career criminals. This study focused on 200 offenders who were in Federal prison serving substantial sentences for various serious offenses. Accordingly, the sample was similar to the one used in the Rand study discussed above except that the INSLAW group represented a cross-section of Federal prisoners with extensive records. The results of the study appear in Developing Criteria for Identifying Career Criminals by Dr. William Rhodes, (published by INSLAW, Inc., Washington, D.C.—1982) at page 53. On the basis of the admissions and FBI records of these 200 career criminals, the author estimated that if released, in a five-year period on the street, these offenders would commit 179,000 criminal offenses. Among those offenses would be 1.581 robberies and 3.569 burglaries. Like the Rand study, the INSLAW study indicated that career criminals commit two or three burglaries for every robbery. The INSLAW study also concluded that these career offenders in the five-year time period would commit 140,677 drug vio-

lations (including not only sales, but possession cases). Regardless of which type of drug violations are includued, Federal career criminals, like their state counterparts, engage in many drug offenses for every common law offenses such as robbery or burglary.

ADDICTS ARE FREQUENT OFFENDERS

The importance of heroin addiction led the Subcommittee to a review of a study by Dr. John C. Ball of Temple University. At the Subcommittee hearing on October 26, 1981, Dr. Ball summarized the results of many years of research he had conducted on this subject. The research focused on the activities of a group of 243 known heroin addicts in Baltimore, Maryland. They were identified from police files. Their criminal activity over an eleven-year span was established by extensive interviews and questionnaires. Like the Rand study, the principal basis for determining the frequency and nature of criminal activity was not police records, but admissions by the individuals themselves. The study revealed that these individuals committed about 2,000 offenses for every year they were on the street. The 2,000 offenses span the entire spectrum of crime from major felonies like robbery to misdemeanors and petty offenses such as shoplifting.

The volume of crime admitted by Dr. Ball's sample addicts was so great that he found the data on frequency confusing. For example, a great many of the offenders committed "six, eight, or ten crimes a day" (page 75). For convenience, Dr. Ball did not focus on how many crimes were committed on a day of active criminality, but instead focused on how many days out of the calendar year an individual committed crime, whether it was one offense or ten. Looking at his 243 addicts, he determined that on the average, each of them was committing crime on 178 days per year. Offenses were being committed by these addict-career criminals, on the average, every other day.

Altogether, the 243 addicts, in 11 years on the street, had had 473,738 crime days. Again, as Dr. Ball defined it, that meant one or more offenses. Thus, these 243 addicts, over eleven years actually committed well in excess of half-a-million crimes. However, it is not necessary to focus on the exact numbers. What is unmistakable, is that this small group was responsible for an extraordinarily large volume of crime (page 77).

Extrapolating from his sample, Dr. Ball estimated the amount of crime caused by all heroin addicts in the United States. He concluded that heroin addicts in the United States at the present time are committing 50 million crimes per year (page 70). This estimate was reached by simple mathematical calculation. Dr. Ball took the figure 450,000 from official government estimates as to the current addict population in the United States. He then simply multiplied the crime frequency shown in the activities of his 243 addicts by the total addict population to reach the conclusion of 50 million crimes per year. The average number of offenses per year for these 450,000 addicts would be approximately 110 (page 75).

Dr. Ball testified: "We know some of our addicts are committing crimes on a daily basis and sometimes are not arrested for several years. Some are not arrested at all" (page 72). Dr. Ball emphasized that the

sample was a random sample, that is, it was randomly selected from several thousand heroin addicts whose identities were revealed in Baltimore Police files. Thus, the sample was not selected on the basis of unusually high criminal activity. In terms of criminality, the sample was average.

When one looks at the true career criminals among Dr. Ball's random sample of addicts, a dramatic picture emerges. The one-quarter of the addicts who were most active committed one or more offenses on 3,000 days over the eleven-year period. In other words, this highly active group of addict-criminals committed one or more offenses nearly 300 days per year. Thus, the basic fact emerges that they committed offenses at a rate of more than one per day (page 76).

Dr. Ball's study also established how seldom addict criminals are caught. He testified that "less than one percent of their crimes . . . result in arrest" (page 71). Nevertheless, the number of offenses these addicts committed was so high that on the average they had twelve arrests per individual (page 72). While the average number of arrests was twelve, the average number of imprisonments was only three (page 78). Most of the addicts, while committing many more minor offenses, also committed major offenses. Dr. Ball noted that two-thirds of the addicts "had theft as their principal type of crime" (page 77). Nevertheless, "most of the addicts committed numerous crimes of violence, mostly assault and robbery, and of course, they were also involved in burglary. . . ." (page 79). Indeed, sixty percent of the sample had been arrested for crimes of violence.

ACTIVE ADDICTION INCREASED INDIVIDUAL CRIME RATES

Dr. Ball noted a "six-fold increase in the number of 'crime days' per year at risk during addiction as compared to non-addicted periods" (page 77). During periods of addiction, the 237 male addicts of the sample of 243 randomly selected addicts committed one or more crimes on 248 days of each year on the street. When not taking heroin, the rate dropped to 41 "crime days" per year (page 78). As Dr. Ball testified: "We determined that drug use was a major factor in increasing the level of their criminal behavior" (page 78).

TRENDS TOWARD GREATER VIOLENCE

Dr. Ball's partner, Dr. David Nurco, testified to another study which provided a point of comparison as to the extent of violent crime by addicts in different years. Dr. Nurco said that "we have found that in more recent years, this addict population was moving to more serious and violent behavior" (page 83). Dr. Nurco noted that during the 1950's addicts generally met their need for money to buy heroin by committing petty crimes of a non-violent nature, usually crimes against property such as petty larceny, shoplifting, burglary of motor vehicles, burglary of stores and houses, and so forth. However, in the 1970's the addicts "became more competitive and violent" (page 84). In fact, one study by Dr. Nurco of 460 Baltimore addicts revealed that 36 percent of them were carrying weapons in pursuant of their crimes (page 84).

IDENTIFYING HIGH RATE OFFENDERS

The Subcommittee also heard extensive testimony from Dr. Peter Greenwood, Senior Research Project Director for the Rand Corporation. Dr. Greenwood described the three studies financed by Rand. The first study, cited above, was based on interviews of 49 robbers serving time in California prisons. The second study took a larger sample of 625 California prison inmates representing a cross-section of offenses leading to their incarceration. The third study involved 2,400 jail and prison inmates serving time for a wide variety of serious offenses in California, Texas and Michigan. In general, the three Rand studies corroborate one another and corroborate the conclusions of Drs. Ball and Nurco with regard to the extremely high frequency of crime committed by heroin addicts.

Unlike Drs. Ball and Nurco who focused on criminality regardless of whether or not it was violent or major, Dr. Greenwood's review of the above studies and others like them focused only on "personal safety crimes." He found that violent offenses, were committed by most prison inmates at a relatively low rate: roughly five per year (page 88). From the California sample it was found that approximately half the California robbers committed robberies on a far more frequent basis. This group committed an average of 31 robberies per year (page 90). About 10 percent of the inmates studies committed such major violent crime at a rate of 50 or more per year (page 88).

Concerning his efforts to develop criteria to distinguish the "high rate robbers" from the "low rate robbers", Dr. Greenwood testified that with eight or ten criteria he could identify the high rate offenders with very high accuracy. However, he testified that the criterion in S. 1688 of "two priors for robbery or burglary does almost as well as our scale . . ." (page 94).

The studies testified to at the Subcommittee hearing also revealed high frequency and quickness of repeat offenders committing further offenses shortly after release. Dr. Charles Wellford, who conducted the INSLAW, study, noted that it revealed that 50 percent of the career criminals "will recidivate" (be arrested) within a one-year period; almost 85 percent of the career criminals, "will recidivate during a five-year period" (page 110).

THE STATE COURTS ARE INEFFECTIVE WITH CAREER CRIMINALS

Numerous studies contain strong evidence that robbers and burglars move in and out of the criminal justice system repeatedly, and that the system does not control or prevent their criminal activity. In her article, "Mandatory Prison Sentences: Their Projected Effect on Crime and Prison Populations," The Journal of Criminal Law and Criminality, 1978, Joan Petersilia revealed that 60 percent of those arrested for robbery have a prior felony conviction (pages 604–605).

A Vera Institute of Justice study on robbery cases in New York City showed that 74 percent of all persons arrested for robbery had prior records. (Felony Arrests: Their Prosecution and Disposition in New York City's Courts, Vera Institute of Justice, New York, 1977,

page 63.) Another study of robbery statistics in New York City found that of all persons arrested for robbery in New York City, only 14 percent had not been previously arrested for a felony. (Shimmer and Shimmer, "The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach," Law and Society Review, Summer 1975, page 596.) The figures for burglary are similar. For example, of all persons arrested in the test period for burglary in New York City, more than two-thirds had prior felony arrests. (Shimmer and Shimmer, page 596.)

Nor is New York City at all exceptional with regard to such statistics on recidivism. In Washington, D.C., a detailed study by the Institute for Law and Social Research performed for the National Institute of Justice in 1977, reflected the same kind of "revolving door" phenomenon. In Washington, D.C. in 1974, approximately a third of the persons arrested for robbery and a third of the persons arrested for burglary were at the time of their arrest on "conditional release." Conditional release means (1) bail, (2) probation, or (3) parole after serving part of the sentence. Indeed, 23 percent of the defendants under indictment in the Federal court in Washington at the time had other cases pending in the Federal or local court (Curbing the Repeat Offender: A Strategy for Prosecutors, INSLAW, Washington, D.C., 1977, pages 1–11).

These figures in cities such as New York and Washington appear to be highly representative of the experience in many other parts of the country.

STATE SENTENCES ARE OFTEN INSUFFICIENT

The basic fact which leads to this kind of "revolving door" is that in many jurisdictions the sentencing of felons is insufficient. The Vera Institute study cited above, which was limited to felony arrests, demonstrates this phenomenon with just a very few statistics: Of those persons arrested for felonies who had prior convictions but no time served, 42 percent received no jail sentences; 56 percent received only misdemeanor sentences (under two years); and only 2 percent received felony sentences, (more than two years). Of those convicted of felonies who had prior convictions and who did serve jail sentences, 16 percent received no prison time, 56 percent received misdemeanor sentences, and 28 percent received felony sentences (page 21).

DOWNGRADING CRIMINAL CHARGES—NEW YORK CITY

How can felony arrests so often result in misdemeanor sentences or no sentences at all? The answer can be seen by looking at the statistics in New York City. There, in 1979 a total of 539,000 felonies were reported to police. Of those cases felony arrests were made in 105,000. Of the 105,000 felony arrests, indictments were obtained in 16,000 cases, leading to 12,000 felony convictions. Of the 12,000 felony convictions, only 4,000 resulted in any prison time whatsoever (New York Times Magazine, September 27, 1981, pages 120–121).

The problem was well summarized by Kenneth Conboy, Deputy Commissioner for Legal Matters, New York City Police Department,

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in testimony for the Subcommittee on October 26, 1981. Mr. Conboy noted that traditionally, "The cases of robbery and burglary, of which we have tens of thousands in New York City each year, * * * will erode within twenty-four hours of arrest and will be dismissed or treated as a misdemeanor and there will be no viable sanction" (page 35). The erosion Commissioner Conboy spoke of occurs at every stage. The plea bargaining of felony indictments that results in guilty pleas to misdemeanor charges and misdemeanor sentences is well known. But, the degree of erosion at other stages of the criminal process is also high. Commissioner Conboy explained:

> The typical indictment rate in New York City by our beleaguered prosecutors * * * is twenty percent. We only clear twelve percent of the felonies and of those twelve percent the District Attorneys get indictments in only twenty percent of the cases. So the odds are very long against doing any serious time. (Page 37)

With regard to the fact that in only 12% of the felonies an arrest is even made, Commissioner Conboy noted that despite the continuing sharp rise in the crime rate in New York City, which is the number one robbery city in the United States, the police department has thirty-three percent fewer officers. As Commissioner Conboy testified, ". . . in New York City (we) are dealing with twenty percent more crime and thirty-three percent fewer men and women" (page 36).

The low clearance rate and the low indictment rate are then followed by a low rate of treating felonies for what they are. Commissioner Conboy explained:

> The great majority of felony cases in New York City are treated as misdemeanors—eighty percent of them—and a good percentage of those are dismissed or reduced even further to what are called "violations".

Commissioner Conboy also described a study conducted by the New York City Police Department which looked at 235 felons with serious prior arrests and reviewed what those records consisted of. These offenders had an average of twelve previous arrests. Seven of the prior arrests were for felonies and five for misdemeanors. On the average they had been convicted of four felonies and four misdemeanors, yet the aggregate amount of jail time these persons had served was less than three months (page 39).

Looking at robbers as a class of offenders, Commissioner Conboy related the following figures:

> During the last ten years 110,748 persons were arrested at least once for robbery in New York City. Of these, 33,907 are convicted felons arrested for robbery, convicted of some felony. There are 22,108 in the two or more robbery arrest categories. * * * Yet from all these large numbers there are only approximately 1,000 'individuals who have been arrested at least three times for robbery and have three or more robbery convictions'. (Page 41)

The ultimate results were summarized by Commissioner Conboy who testified:

> Well, the single, I think, most important observation to make about sentencing practice in New York is that because of this inverted funnel which most criminal justice systems deal with, there are large numbers of persons with various criminal histories who are serving three months, six months, or nine months at Rikers Island, which is the main city prison and they are serving that sentence as a result of a plea bargain which, in most cases, frankly is necessary because of the resource crisis across the board. (Pages 44–45)

That explains the fact that the career criminals with twelve prior arrests had five misdemeanor convictions but only four felony convictions (page 45). Mr. Conboy pointed out how the "rank and file police are appalled at the systematic erosion of viable felony cases when they are brought into the criminal justice system." (page 49). However, he admits that since the criminal courts can only support a maximum of 750 trials a year, extreme plea bargaining is a necessity (pages 49 and 50). Commissioner Conboy also pointed to the fact that no new prisons have been built in New York in decades, that the police department had been reduced by a third, and that the prisons were severely overcrowded, containing more than twice the number of people as ten years ago (page 57).

Given this circumstance Commissioner Conboy suggested that "we should concentrate only on street robbery defendants" as opposed to less dangerous repeater offenders (page 45). Further, he asserted that "We should concentrate on people who are on the early side of the 18–28 age bracket" (pages 46 and 47). Finally, he noted that "To focus and concentrate on career criminals with long sentences, significant ten, fifteen and twenty year sentences, is the only responsible approach" (page 51).

TESTIMONY OF METROPOLITAN DISTRICT ATTORNEYS

The generalized statistics that are available on disposition of robbery and burglary cases have an uncertain significance because they apply to such a large range of offenders. However, the testimony of metropolitan District Attorneys before the Subcommittee, included examples of individual histories of really extraordinary criminality. William Cahalan, the District Attorney in Wayne County (Detroit) Michigan, testified on October 26, 1981, describing three cases. One admitted committing 65 robberies in a three month period. Another was shown responsible for 200 burglaries in a single year. Still another offender admitted committing 125 rapes over a two and a half year period (transcript page 26).

On December 10, 1981, the Subcommittee heard testimony from Newman Flanagan, the District Attorney of Suffolk County (Boston) Massachusetts and then President Elect and now President of the National District Attorneys Association. District Attorney Flanagan summarized the criminal histories of two repeat violent offenders charged with an assortment of robberies, burglaries and other offenses.

In both cases, these individuals committed crimes and were arrested practically every year over a five to ten year period. They were convicted on numerous occasions, but not sent to jail. Finally, further felony convictions resulted in jail sentences, but only of six months or a year. In both cases, the records were sprinkled with armed robberies, burglaries, and various crimes of violence such as rape. Both cases involved a pattern of continuing and escalating violence. In both cases, the ultimate criminal activities were the worst. In one case, the offender murdered a victim. In the other, the defendant was convicted of kidnapping, robbing, raping his victim.

Mr. Flanagan testified that the two examples which he related arrest-by-arrest were typical of a significant number of such cases. He said:

> I could bring down here, unfortunately, hundreds and hundreds that go through this system, who play this system that we have, know the system better than the prosecutors, play the system, know that they are not going to be apprehended; if they're apprehended that they are not going to go away. (page 18)

Like many other leading prosecutors, District Attorney Flanagan stated his conclusion that quick imposition of lengthy sentences on violent career criminals could prevent an enormous amount of crime. This conclusion is based on the high rate of offenses by career criminals, many of whom commit offenses on a weekly or daily basis. Moreover, Mr. Flanagan and other prosecutors also pointed to specific programs where increasing the attention given by prosecutors and courts to violent career criminals had a very significant impact on a certain type of crime. For example, Mr. Flanagan cited a special program instituted to combat violent crime in the subway system in the City of Boston. The study of the crime pattern on the subways and led to the conclusion that a very small number of individuals were committing a high percentage of crime on the public transportation system. District Attorney Flanagan testified:

> We cut the number of crimes down by over sixty percent, because they knew and we knew that the core of individuals that were causing this problem was a group of about fifty or sixty that committed crime after crime, and that if we could get those scavengers off the street and out of the TEA and into confinement centers, you would cut down that problem on the public transportation.

District Attorney Cahalan testified to one means by which greater sentences can be obtained for a group of major career criminals who are targeted for special concentration. He explained that in Detroit selected felony cases were prosecuted under a special program in which the cases were handled by a unit of prosecutors who had lighter than normal caseloads, who concentrated an extra effort on the preparation of the cases, who followed special limitations on plea bargaining, and who as a result were able to achieve far greater effectiveness. In Wayne County, of all felony cases only 18 percent go to trial. For

the firearm felonies there was a strict limitation on plea bargaining coupled with a mandatory minimum sentence under Michigan law. The result was that of all these cases, 57 percent went to trial. Major offenses, particularly those involving violence, whether or not involving firearms, were singled out for special attention by the Detroit career criminal unit. Since the inception of the unit in 1975, it has put 2,000 hard core violent criminals behind bars for an average minimum sentence of ten years (page 25). District Attorney Cahalan estimated on the basis of known records of the specially-targeted offenders prosecuted by his career criminal unit that each of those 2,000 persons would, on the average, commit ten felonies per year. Accordingly, he asserted that the work of the the unit can be said to have "prevented 120,000 felonies over a five year period. * * *" (page 26). The overall results of the unit were dramatic. Whereas nationally, violent crime has gone up about 18 percent since 1975, in Detroit it has been reduced by 28 percent (page 29).

Deputy Commissioner Conboy testified about the program in New York City which concentrated on a certain group of street robbers with records of two or three prior robbery convictions (as well as assorted other prior arrest and convictions). In addition to less plea-bargaining, the program utilized intensive investigative efforts by a special group of detectives. They sought to build strong cases by bolstering the initial eyewitness identification of the robbery victim. The result of the concentrated police and prosecutorial effort was sentences for offenders far above the average for offenders with comparable records who had been previously prosecuted without the special effort which the program employs.

Newman Flanagan, indicated that the experience in Boston was similar to New York's. Mr. Flanagan believes that the experiences in Boston and New York were typical of those of many other large cities. Mr. Flanagan testified:

> Many local court jurisdictions find their caseload so great that it takes an unreasonable length of time to try the burglar or armed robber. And while he is awaiting trial, he is more often than not back in the community on bail, pursuing his vocation of burglary and robbery. (Transcript, December 10, 1981, page 13.)

District Attorney Flanagan felt the problem was most acute in major metropolitan areas. He testified:

> Too often we see in the major cities of this country where an individual is charged with an armed robbery then gets put back on the street pending his or her trial, and they repeat at least two or three more armed robberies before they are faced with the first. (Page 13.)

District Attorney Flanagan indicated that insufficient sentencing of violent repeat offenders was also a major problem. He noted published statistics indicating that in 1979 more than 12 million crimes were committed in the United States, but only 126,000 persons were

sent to jail. In other words, as Mr. Flanagan noted, "only one in one hundred criminal offenses resulted in incarceration" (page 16).

Mr. Flanagan concluded that the sentencing practices of many judges in state courts simply had to change. He said:

> But in today's society, you have to face up to the fact that if they (the judges) do not do it, things, as bad as they are, are going to get a lot worse. I think we have to get tougher. That is basically the answer. (Page 24.)

Mr. Flanagan supported the motion of long sentences for repeat violent offenders and also the application of mandatory jail sentences. Mr. Flanagan said, "my position is, I think 'mandatory minimum' is the answer to that situation." (Ibid.) Mr. Flanagan asserted that public opinion also supported his judgment as a professional law enforcement officer. He cited a recent poll taken by the Boston Globe which indicated that 90 percent of the citizens "were in favor of some type of mandatory sentence" (page 25).

Mr. Flanagan attributed the inadequate sentencing not only to the attitude of certain jurists, but also to the overcrowding in prisons. He said, "in many jurisdictions, prisons are so overcrowded that judges are reluctant to sentence a convicted felon to a long term sentence" (pp. 15–16). He also noted that many jurisdictions were under court order to reduce prison overcrowding.

Mr. Flanagan endorsed the approach taken in S. 1688. He said: "This approach will remove the robber and the burglar from the community very quickly" (page 14). Mr. Flanagan felt that the effect of the bill would be to prevent a very significant number of violent crimes. He testified:

> Since the felon affected by this bill makes a career of robbery and burglary, many committing one or more each day, it does not take a Ph. D in math to see the number of crimes that can be prevented by using this accelerated procedure for trial and appeal (page 15).

Mr. Flanagan indicated that he thought the experience in Boston was generally typical of what was going on nationwide. He said that, "I would think that ten percent of the criminals are committing almost eighty percent of the crime" (page 28).

As President-elect of the National District Attorneys Association, Mr. Flanagan testified that his support of the general approach of S. 1688 was shared by many other prosecutors. He noted:

> The National District Attorneys Association supports this approach, with guarded opinion, provided that there is a requirement for mutual consent between the local prosecutor and the United States Attorney (page 12).

The subcommittee also heard testimony from Ms. Janet Reno, the District Attorney of Dade County (Miami), Florida, on January 28, 1982. She supported S. 1688 and two companion bills dealing with career criminals, S. 1689 and S. 1690. She said, "I think they are excellent bills" (page 12).

Both District Attorney Flanagan and District Attorney Reno reflected a great sense of urgency which is sometimes not perceived in national decision-making circles. District Attorney Flanagan testified:

> Crime, and especially violent crime, is equal in severity to any domestic problem facing our society today, including the economy. In my opinion, I think they are the top priority. There is a greater danger that crime will destroy this country from within than there is that our nation will be destroyed by foreign aggression (page 10).

Ms. Reno agreed with his assessment and also indicated her belief that federal and state government had not recognized the urgency of the problem. She testified:

> Both state and federal government have got to face up to the fact that most American people consider crime the number one problem. Domestic tranquility is as important as national defense (page 23).

Ms. Reno favored the idea of increasing federal prosecutions against career criminals. She noted that "career criminals * * * are basically a federal problem in terms of their mobile, interstate nature. * * *" (Page 22.) Ms. Reno stressed the high degree of mobility among Americans generally and particularly among criminals. She said:

> Street and violent crime is no longer just a state problem. The career criminal that is created on the streets of New York becomes our career criminal in prison (page 12).

Both Mr. Flanagan and Ms. Reno stress the need for adequate federal resources to support a significant number of career criminal prosecutions under S. 1688. Indeed, Ms. Reno expressed the fear that with the absolute discretion the bill gives to the Attorney General to decline to prosecute in the face of a request from the state prosecutor, that there was a danger that not enough prosecutions would be initiated by the federal government under the bill. Both of them also expressed particular concern over the problem of inadequate confinement space in state prisons. They indicated that financial support for expanding state prison space was an urgent necessity. District Attorney Flanagan noted that in many jurisdictions no new prisons had been built in several decades, even though the prison population had increased by about a factor of two, as had the crime rate.

Both prosecutors stressed the importance of certainty of punishment. Ms. Reno indicated that as younger offenders graduate to increasingly serious offenses, they generally receive neither effective rehabilitative treatment nor adequate punishment. In short, they are not deterred but continue their criminal careers. District Attorney Flanagan pointed to the lack of sufficient punishment as breeding a contempt for the legal system on the part of career criminals. He put it this way:

> And that is why you get these individuals constantly ripping off, ripping off, ripping off. And they know that the system, as it presently is, is a joke. (Transcript, December 10, 1981, page 26.)

The sense that deterrence was lacking was also conveyed by District Attorney Cahalan. He testified:

> The law-abiding have no confidence that the criminal justice system will work and protect them. The lawless have confidence that the criminal justice system will not work and they will go unpunished. (Transcript, October 6, 1981, page 18.)

The psychological harm to the citizens from the epidemic of violent crime was a point stressed by many of the prosecutors who testified. Mr. Cahalan noted, "crime and the fear of crime are destroying the quality of life all across American and crime knows no state boundaries * * *" (page18). Mr. Cahalan also stressed the damaging effect on urban centers. He said, "crime is emptying our cities * * *" (page 18).

District Attorney Flanagan noted the irony that the citizens lived in fear, not the career criminals. Mr. Flanagan testified:

> Crime and the fear of crime affects every citizen of this country everyday. Where else in a so-called, if you will excuse the expression, "free society" must citizens literally barricade themselves in their homes in fear of violent predators. If law abiding citizens cannot walk the streets of their own neighborhood in safety, if law abiding citizens are not safe within their own homes, we are not really a free society. Pages 10–11.)

He continued,

> fear of becoming a victim of violent crime is rapidly changing the lifestyle of Americans everywhere.

Mr. Flanagan noted that the only one who did not live in fear was the career criminal:

> He walks the streets without fear * * * (page 11).

The big city prosecutors also agreed with the importance that S. 1688 places on the felonous use of firearms. They also agreed that the offenses of robbery and burglary, which the bill focuses on are inherently the kind of offenses committed by people making a career of crime. As Mr. Cahalan testified, "Robbers and burglars are career criminals." (Transcript, October 26, 1981, page 32.) Regarding the use of the firearm, it of course represents the ultimate threat to the life of the innocent victim. In addition, however, it was seen as representing a psychological threshold. The prosecutors conveyed the sense that when a person has started to commit robberies and to use a firearm, he is likely to be, for all practical purposes, rehabilitation. District Attorney Cahalan summarized it this way: "By the time you get up to the point when you can hold up someone, you have sort of dedicated yourself to a life of crime" (page 32).

District Attorney Edward Rendell of Philadelphia related the effect on his own city of the nationwide crime epidemic. He testified that in 1980 alone Philadelphia suffered a 22 percent increase in violent crime (Transcript, March 18, 1982, page 50). Ironically, despite this very substantial increase in a single year, Philadelphia maintained

its earlier ranking as the safest of 15 largest cities in the United States. The crime rate in Philadelphia, despite its increase, still did not reach the crime rate of the 14 other large cities. Nevertheless, the increase was having a devastating effect on Philadelphia. District Attorney Rendell testified about a study conducted by the First Pennsylvania Bank and released in March 1982. The study reviewed the circumstances of business closings in the Philadelphia area and the reasons which led to the closings. District Attorney Rendell testified, "The major reason was fear of crime. Not wages, not taxes, but fear of crime" (page 49).

An example of the crimes causing to this devastation was provided by District Attorney Rendell. On March 11, two masked bandits entered a restaurant in the City Line section of Philadelphia, prior to its opening for business late in the afternoon. The robbers herded the four employees who wer present into the food freezer. The robbers then ransacked the restaurant premises, in search of cash and valuables. After they had finished their search, they opened the food locker door and began to shoot at the four employees inside. Two were killed. The other two escaped death only because the robbers guns jammed. As the robbers were fleeing the restaurant, a mailman entered to deliver the afternoon mail. They shot and killed him too. As District Attorney Rendell testified, the owner of the store, former heavy-weight boxing champion Joe Frazier, immediately announced it was closing permanently.

Another case involved a stabbing and rape of a young woman in an alley by a defendant. He left her for dead in the alley, but, miraculously, she survived. In the five years preceding the rape and attempted murder, the accused had been convicted of voluntary manslaughter and three years later of robbery. As District Attorney Rendell testified:

> Because of sentence patterns that exist in the City of Philadelphia for these two prior offenses, Mr. Washington received a total of eight months in prison. Therefore, he was free on the streets of Philadelphia on the night of February 16 to commit this very vicious and horrible assault. (Page 47)

Mr. Rendell testified that there is great disparity of sentencing patterns between the state and federal judges in Philadelphia. He indicated that federal judges were far more severe in the sentences they impose for violent crime than their state counterparts. One category of cases he described concerned firearm possession arrests. He testified, "In Philadelphia, we have someone who is in possession of a loaded firearm, thus a violation of the firearms act, regardless of that person, our judges will never give a jail sentence" (page 68). Mr. Rendell noted that the possession of the firearm by someone with prior convictions was a federal as well as a state crime. Consequently, he had developed an arrangement with the United States Attorney in Philadelphia, whereby some of these cases would be sent to the federal court for trial. Mr. Rendell noted that the same cases where the state judges were giving probation, resulted in substantial jail sentences when tried in the federal court. He reported that he had referred "twenty or thirty of our worst repeat offenders who are just

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charged with firearms violations . . . to the federal court where they are getting routinely one, two, three year sentences" page 68).

District Attorney Rendell endorsed S. 1688 primarily because of the prospect of more adequate sentencing. District Attorney Rendell noted that, "1688 focuses on the crucial problem, career criminals and recidivism" (page 59). Therefore, for Mr. Rendell "1688 is a good proposal" (page 58). The reason he gave was as follows:

> 1688, if it is adopted * * * will allow us to take some of our very, very bad criminals who we may not get adequate sentencing on in the state court, and have them tried in the federal court. * * * (Page 67)

In discussing the reasons for the disparity in sentencing between state and federal judges, District Attorney Rendell suggested that the primary reason was that the selection process for federal judges, "* * * produces a better caliber of federal judges who do sentence more correctly, more strongly. * * * (page 67). Other reasons noted by Mr. Rendell included: concern about the lack of prison space which motivates some judges (page 65); political selection that yields judges that are "inherent compromisers" (page 66); susceptibility to influence by lawyer friends (page 73); personal temperment that makes it traumatizing to send someone to jail for a long period of time (pages 73–74); and the fact that because of the volume of major violent offenses coming before them, many state judges become "innured" and tend to treat robberies, for example, as not serious unless accompanied by injury (page 74).

THE SENTENCING PATTERN NATIONWIDE

The sentencing pattern nationwide on sentencing for robbery and burglary are not available. Nor are precise figures for time actually served available. Of course, there is often a difference between a sentence and time actually served because most criminals are paroled well before the end of their sentence. However, there are some sources of reliable statistics. The reports annd figures issued by these sources indicate that the professional judgment of the District Attorneys who testified before the Subcommittee are not merely aberrational or anecdotal.

The National Council on Crime and Delinquency collects data from its Uniform Parole Reports project for the Bureau of Justice Statistics. The data covers the total amount of time served, whether in county jail or state prison prior to offender being paroled. Data was furnished by the Council to the Subcommittee with a covering letter of March 11, 1982. The data concerned those robbers and burglars who entered parole in 1979. Unfortunately, the data does not represent the situation in all states, as some states do not maintain the statistics necessary to provide time served in both kinds of sentences. Nevertheless, the data does give a general picture. The data is as yet unpublished.

In assessing the data. it must be kept in mind that a great many offenders are never apprehended; of those apprehended, many are never indicated and of those indicted, many are either acquitted or released on probation with no imposition of sentence of incarceration. Accordingly, the figures described below, describe only the minority of robbery and burglary arrestees: those sent to prison.

According to the Uniform Parole Reports, the average amount of time actually served by persons convicted of robbery who were sent to jail was 36 months. The figures regarding burglars are even more startling. The median sentence served before release for burglars was 19 months.

The mandatory minimum sentence under S. 1688, of course, is fifteen years, and S. 1688 applies only to those persons who commit a robbery who have two or more prior convictions for robbery or burglary. While exactly comparable figures were not available from the National Council on Crime and Delinquency, their figures did distinguish between those robbers who had prior convictions involving prison commitments and with those who did not. The figures indicate that the median sentence for those robbers with prior prison commitments was 3.7 years. Accordingly, those with prior convictions, at least one of which warranted imposition of a jail sentence, still served less than four years in prison before being released. The time served by burglars was considerably shorter. The median sentence for those with prior prison commitments was only a little bit over two years.

Of course, the Council's data includes instances in which robbers served sentences in the range of ten to twenty years. However, the total percentage of robbers who served five years or more was only twenty percent. Only four percent of the burglars served five years or more.

The above figures, of course, are not exactly comparable to the category of offenders to which S. 1688 would apply. First, the robbery and burglary cases included in the figures are not limited to those robberies and burglaries involving firearms. Second, the information on prior convictions does not indicate whether the convictions were for robbery, or burglary, or some different kind of offense. Third, the data does not distinguish between those with two or more prior convictions and those with only one. Nevertheless, the figures give an overall sense of the time served by these kinds of offenders.

Fortunately, the Committee was able to obtain some statistics that are more exact. The Pennsylvania Commission on Sentencing made available data which reflected sentences imposed by the court as opposed to time served prior to parole. Moreover, the data was able to distinguish burglaries and robberies committed with a firearm as opposed ot those not involving a firearm. Finally, the data was able to isolate those with two or more prior robbery or burglary convictions. The data was drawn entirely from sentences imposed in 1980 in 2,023 cases in 23 representative Pennsylvania counties. The data was forwarded to the Committee by the commission with a covering letter dated April 19, 1982.

For those offenders who committed robbery with a firearm and had two prior robbery or burglary convictions, the average minimum time of incarceration was 46.5 months. Thus, the category of offenders would be eligible for relief on parole in less than four years. That figure is based on 139 cases. In all of the cases, a jail sentence was imposed. However, the average length of the sentence was rather short.

For those offenders convicted and sentenced for burglary who had two or more prior burglary or robbery convictions, the average minimum sentence was less than ten months. That figure was based on 400 cases. The commission's statistics only included one case of burglary with a firearm by an offender with two prior burglary or robbery convictions. That offender received a minimum sentence of nine months. Accordingly, even those burglars with two or more prior convictions for robbery or burglary are eligible for relief on parole in well under one year.

Sentencing guidelines are being recommended by the Pennsylvania Commission on Sentencing which would result in a requirement of minimum jail sentences for these categories that are four to eight times longer.

POLLS—PEOPLE WANT TOUGHER SENTENCES

The perception of the public is similar to the opinions of the District Attorneys and the implications of the sentencing and parole statistics. A Newday Poll published April 9, 1981 revealed that 80 percent of the sample of citizens from Nassau, Suffolk, and Queens counties in New York felt that Judges in general are too soft on convicted criminals. A Los Angeles Times Poll of January 1981 also reflected that 80 percent of those polled felt the courts do not deal harshly enough with criminals. Lenient courts were cited as the second most important cause for the increase in crime, following unemployment in a Newsweek Poll of March 23, 1981. That nationwide poll revealed that 50 percent of the people interviewed have "not very much" confidence in the courts to sentence and convict criminals. Indeed, 83 percent felt the courts have been too easy in dealing with criminals. The Gallup Poll, published by Field Newspaper Syndicate in April 1981 revealed that lenient courts ranked second behind economic factors among the most important causes of the increase in crime.

Public support for longer sentences as a method of crime control was very high. The CBS News/New York Times Poll of 1981 revealed that punishment was viewed as the best method for controlling crime. Public opinion also showed some sophistication in suggesting that very long sentences should be imposed for the relatively small percentage of criminals who committed very serious crimes involving firmarms. For example, the Newsweek Poll of March 23, 1981 revealed that in cases in which the criminal carries a gun, and commits an offense (excluding murder) 15 percent of the people felt that that offender should be sentenced to life. The majority felt that five to ten years should be added to the sentence for the underlying crime because of the use of the firearm.

LONGER SENTENCES FOR CAREER OFFENDERS

The conclusion that concentrated attention and very long sentences are required in the interest of public safety for those armed repeat offenders who continue to commit serious offenses like robbery is widely shared. It is shared not only among prosecutors such as those big city prosecutors who testified before the Subcommittee, but also among criminal justice professionals generally. For example, the Attorney General's Violent Crime Task Force was made up of prosecutorial, police, judicial, and other officials from both the state and federal levels. The Task Force concluded that not only was more attention needed on the activities of career criminals, but that some of this attention should come from federal authorities. As Assistant Attorney General Lowell Jensen stated in his appearance before the Subcommittee on October 26, 1981:

> The Attorney General's Task Force on Violent Crime * * * specifically recommends that the federal system now take up and deal with the notion of career criminals. U.S. Attorneys can construct an administrative and executive level approach to career criminals, but this bill is the only one that deals with that concept legislatively. (Page 6)

The Attorney General's Violent Crime Task Force specifically recommended federal prosecution of firearms possession cases involving persons with prior convictions. The recommendation (Recommendation 21) is based on the successful practice in a number of cities, including Philadelphia, about which District Attorney Rendell testified on March 18, 1982. In its report, the Task Force cited two primary advantages of shifting these cases into the federal court: (1) faster trial; since in many cities the federal court dockets are far less crowded than those of the state court, and (2) longer sentences. The Task Force recognized that whatever the theoretical sentence available under state law, as a practical matter convicts in possession of firearms seldom got meaningful jail sentences in the state courts. In the federal courts the same offenders receive jail sentences.

LAW ENFORCEMENT COORDINATING COMMITTEES

On a more general level, the Violent Crime Task Force recommended the creation in each federal judicial district of a law enforcement coordinating committee. Recommendation envisioned the committees consisting of investigative and prosecutive personnel of both the federal and local governmental authorities. The report contemplated that the committee could establish better communications and procedures for assuring effective prosecution and sentencing of significant offenders and generally coordinating the work of federal and local prosecutors. The coordination is particularly important in areas of concurrent jurisdiction. The major areas where federal and state prosecution are both available are the following: (1) drug trafficking, (2) bank robbery, (3) forgery and embezzlement involving federal monetary instruments, and institutions and (4) firearms violations.

In addition to increased prosecutions under the firearms statutes and reliance on the coordinating committees, the Violent Crime Task Force also favored the use of cross designation programs enabling state prosecutors to try cases in federal courts and vice versa. Both the coordinating committees and the cross designation procedures would work as effectively for prosecutions under S. 1688 of robberies and burglaries as they have for prosecution of the firearms violations.

MANDATORY MINIMUM SENTENCE

The mandatory minimum sentence included in S. 1688 is also consistent with the recommendations of the Violent Crime Task Force. The Task Force suggested that the Attorney Generals support legislation for increased imprisonment for use of a firearm to commit felonies.

The movement toward mandatory minimum sentence for violent offenses and/or those involving firearms has taken place in a broader context of increased sentences for serious offenses and more determinant sentences. Assistant Attorney General Jensen described the historical development as follows:

> I think you are dealing with a long term kind of development of sentencing practices and the career criminal program itself fits into what I see as a long term kind of development to move away from the so-called indeterminant sentence to determinant sentence structures dealing with specific kinds of conduct.
>
> If you go back into the pattern suggested before, you might find a career criminal where all of the offenses were absorbed into one kind of sentence, where it was an indeterminant base and that would be something controlled by another governmental authority, rather than the court structure itself.
>
> What you have seen paralleling the notion of career criminals is also a notion that given conduct requires a given sentence and that you are now moving into an area where adequate sentences are being imposed on career criminals as a result of that kind of conceptual shift. (Transcript, October 26, 1981, pages 11–12).

The proposed new federal criminal code (S. 1630) contains a provision requiring the mandatory minimum sentence of two years for any federal felony committed with a firearm. As per the recommendation of his Violent Crime Task Force, Attorney General Smith has supported this provision specifically. The code also contains, and the Attorney General has also explicitly supported, the notion of determinant sentences. The code vastly changes the federal law of sentencing. While there are changes in many different aspects, the primary change is to eliminate early release on parole. Under the code a convicted defendant would have to actually serve the sentence imposed by the court. While a certain amount of time might be credited for good behavior in prison pursuant to statutory provisions, the offender could not be released early. If he were sentenced to ten years, he would have to serve the full sentence for violent crimes. The code required that a commission established recommended ranges for sentences for various offenses and directs the commission to assure "a substantial period of imprisonment for major and violent offenders." The code also contemplates that prior convictions will be a major factor leading to longer sentencing ranges for all types of crime. Certainly the notion of limiting judicial discretion so that a sentence would ordinarily fall within a certain range has broad support.

THE DETERRENT EFFECT OF S. 1688

The theory behind determinant sentencing is that certainty of punishment is as important as sufficiency of punishment. Both are essential to deterrence in this regard, the following exchange occurred:

> Senator SPECTER. If one or two cases were picked by coordinating counsels in fifty communities, I think it might have a very substantial deterrent and therapeutic effect on the community.
>
> Mr. JENSEN. I agree with you, Mr. Chairman. (Page 39)

In testimony later the same day (March 18, 1982), David Armstrong, District Attorney of Louisville, Kentucky and then President of the National District Attorneys Association, was asked about his own assessment of the deterrent effect on career criminals of even a limited number of federal prosecutions under S. 1688. The following exchange occurred between Senator Specter and Mr. Armstrong:

> Senator SPECTER. Would you agree with Lowell Jensen's testimony that if 1688 were passed, and the coordinating counsels worked out a select number of cases which might go to the federal prosecutors with the concurrence of the local prosecutor, that would have a deterrent effect on the career type criminal * * *? For example, have the cases tried in the federal court?
>
> Mr. ARMSTRONG. Absolutely. (Pages 87–88)

The concept of deterrence is central to the utility of S. 1688. In commenting on the bill, Assistant Attorney General Jensen noted in his written statement (page 5) that it was the Department's view that the bill "* * * is one of he most cost-effective means of making an impact on violent crime." He went on to note that the bill with its mandatory minimum sentence of 15 years with no parole and no probation results in effective removal of the offender from circumstances in which he can do no further harm. Mr. Jensen noted, "the incapacitation of even a small number of recidivist robbers and burglars would have our communities millions of dollars." (Statement page 5.) At the same time, Mr. Jensen stressed that for the foreseeable future, the economic distress in the country and the pressure against increased federal expenditures would limit the number of prosecutions that could be brought in the federal courts under S. 1688. Yet, because of the deterrent effect of even a limited number of prosecutions, the bill would have high impact at low cost.

Mr. Jensen also agreed with Senator Specter's suggestion of specific deterrence against firearms use. The following exchange occurred:

> Senator SPECTER. * * * And there is, I think substantial deterrence, because my experience has shown that these career criminals are very thoughtful, that they do not carry weapons because they are fearful frequently of using the weapon in the course of the robbery or a burglary, which may result in a first degree murder charge.
>
> They make that calculation with care and they would be much more worried about a prosecution in a federal court than in many state courts.
>
> Mr. JENSEN. I agree with you. (Page 39)

IMPACT OF S. 1688 ON STATE COURT SENTENCING

It is also expected that the availability of prosecution in the federal court may dissuade state judges who may be so disposed from imposing excessively lenient sentences on the repeat offenders who would be covered by S. 1688. The state judges would realize that the case could be transferred to the federal court for prosecution. Such a transfer would reflect poorly on state court and potentially even on the individual state judge who otherwise would have tried the case. Accordingly, it is expected that the mere possibility of referral for federal prosecution could have a substantial impact on the sentencing patterns of some of the judges in those jurisdictions where lenient sentencing has been a problem. Accordingly by, improved handling of cases of armed robbery and burglary by career criminals does not depend on a large number of such prosecutions being shifted to the federal court. Significant improvement may well occur simply because of the possibility of such a shift.

The psychological impact on state judges, state prosecutors, and also on defense counsel arising from the possibility of transfer of the case to the federal court admittedly, is speculative. It would seem, however, that the possibility would tend to increase the desire of the state prosecutor and the state court judge as a matter of personal and professional pride to assure that individual cases were handled with great expedition and that serious offenders received lengthy prison terms. The force of this psychological factor, although impossible to measure precisely, and difficult to even predict generally, is viewed as one of the most important forces which would be at work in the state courts if S. 1688 were enacted. The ultimate effect would be to discourage unjust plea bargains and encourage lengthy sentences for those career criminals convicted after trial.

The effect on the actions of defense counsel are still more difficult to measure. It is expected, however, that generally speaking it would dissuade defense counsel from insisting on plea agreements involving extremely lenient sentences. The individual defense attorney would realize that if he refused to recommend a guilty plea to his client, except in exchange for an unduly lenient sentence, that the response of the prosecutor might simply be to transfer the case to the federal court. With 1688, the defense attorney might be more cautious than no. Certainly, it would not take very many transfers in a given jurisdiction before the word would circulate around the defense bar, both paid and appointed, of the possibility of transfer of individual robbery and burglary cases to the federal courts.

S. 1688 LIMITS PLEA BARGAINING

S. 1688 might effect excessive plea bargaining attitudes of prosecutors as well. As Commissioner Conboy and others testified that in major urban jursidictions that pressure of the volume of cases is so great that a pattern has emerged whereby felony prosecutions are routinely downgraded to misdemeanors. Frequently, the offense for which the defendant is finally tried or to which he finally pleads guilty, bears little resemblance in name or possible penalty to the crime actualy committed and initially charged. Thus, a robbery might be

downgraded to assault and battery or larceny or some such charge. Even where the downgraded charge is still within the same category of crime, such as theft, the fact that the conviction is only for a misdemeanor is important.

S. 1688 is expected to discourage plea bargaining which distorts the nature of the charge or the severity of the possible sanctions. Prosecutors would realize that a second robbery, for example, if downgraded to a misdemeanor, would mean that when the defendant commits a third robbery in the future, he would not be eligible for prosecution under 1688. The prosecutor, accordingly, might insist strongly on a felony disposition of the second robbery charge.

S. 1688 PROHIBITS PROBATION AND SUSPENSION OF SENTENCES

Under S. 1688, a career criminal has much more to fear than simply the mandatory minimum sentence of 15 years to life. He and his attorney will know that the sentence imposed will actually have to be served in full. In contrast to a state judicial system in which chances of probation are often fairly good even for a defendant with prior convictions, under S. 1688 probation is totally prohibited. Similarly, defendants in the state systems often secure early release on parole after serving only a small fraction of their full sentence. It is often forgotten that in a criminal case, the result—the "judgement of the court"—is the sentence. Moreover, the actual sentence under the law is the maximum sentence imposed by the court. Thus, if a sentence of two to ten years is imposed on a person convicted of armed robbery, the legal sentence is ten years. Yet, in many state systems the convict is eligible for release upon the expiration of two years or, with time off for good behavior, perhaps even less than two years. More importantly, such a defendant stands a good chance of actually being paroled at that early date.

The practical effect of the parole system as administered in many states include: release of recidivists who quickly resume a life of serious criminal activity, destruction of deterrences to other potential major violators, and demoralization of law enforcement officers and the general public. Much crime is committed by persons who have been convicted after a due process trial sentenced, and then reelased on parole after serving only a small fraction of the sentence. Precise statistics are not readily available. Often, recidivism by parolees is recorded jointly with recidivism by probationers and sometimes also recidivism by persons released on bail awaiting trial. What is plain is that about half the serious crime in America is committed by persons who at the time of the offense were on "conditional release" in one of these three forms.

Another form of reducing sentences involves imposing a sentence and then suspending execution of much or all of it. This practice is common in some state courts. Following a verdict of guilty in a burglary case, for example, the court might say: "I sentence you to five years imprisonment but suspend all but six months of the sentence." The appearance of such a sentence is that substantial sanction was imposed on the defendant. Certainly, five years is a substantial sen-

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tence. However, the practical effect is quite different. With all but six months of the five year sentence suspended, it is as if the sentence imposed was merely six months. The defendant only has to serve that much. Moreover, in some jurisdictions, he may be eligible for release on parole well before the expiration of even this short time period. S. 1688 not only prohibits parole and probation, but also prohibits the practice of imposing and then suspending all or part of a sentence of imprisonment.

S. 1688 ELIMINATES PAROLE

Excessive use of probation and suspension of sentence by certain judges in state courts can result in grossly unjust and insufficient sentences for career criminals. However, at least these sentences are imposed by an authority that is fully aware of all the facts of the crime and the defendant's record, and has in mind the impact on the victim and the overall severity of the offense. By contrast, in most states, the decision on parole is made by officials who did not attend the trial and who do not have a full record of the trial. The probation officers ordinarily have never met the victim and often have only the impersonal and cursory knowledge of the impact of the crime on the victim, and the prior criminal record of the offender. Frequently, decisions recommending or granting parole are grounded on the fact that the defendant has served a certain portion of his sentence without breaking the rules of the prison or otherwise offending the good order of the institution. The implied inference is that the convict who behaves properly in prison is a safe bet for release in society and can be expected to behave lawfully there. In many cases, this inference is wholly unsupported and illogical. The subsequent recidivism of so many offenders released on parole under such circumstances is evidence of the lack of soundness of this approach.

Such an approach also may be naive, for criminals are not without a sense of self-interest. They know full well that observing prison rules and procedures will greatly increase their chance of early release. They are equally aware of the consequences of infractions against prison rules. Their motivation may be simply to get release at the earliest possible time. However, parole authorities are often tempted to take the more optimistic view that the offender has truly reformed and intends to conduct himself lawfully henceforth, whether in prison or on the street. Once this speculative conclusion is arrived at, it seems only logical to the parole authorities to end the apparently needless incarceration and release the defendant on the street.

Such parole practices, which are followed in the federal system as well as in the state systems, have been subjected to severe and growing criticism. Consequently, there has been a trend in recent years towards fixed or "determinant" sentences. Usually the direct or indirect effect of a shift in a given state toward determinant sentencing is to vastly reduce or totally eliminate parole. The proposed new federal criminal code entirely abolishes early release on parole. If enacted, S. 1688 would preclude parole. Therefore, the repeat offender would actually be confined for at least 15 years.

FEDERAL COURTS PROCEED MORE EXPEDITIOUSLY

Although the provisions of S. 1688 designed to assure sufficient sentences are the most obvious ones, there are many subtler advantages to the federal prosecution which the bill would make possible for appropriate cases. In an earlier section, it has been noted that case dockets in many federal courts are far less crowded than in the state court in the same jurisdiction. Consequently, federal trials on the average are three or four times faster than state trials for comparable felonies. Certainly, longer, more certain and sufficient sentences are of overwhelming importance. But so are faster trials, because they more speedily remove dangerous offenders from society. There is a significant number of cases which in the crowded and inefficient systems in some state courts may not result in a defendant's conviction, whereas the same defendant would be convicted in federal court. The difference is simply in the rigor with which federal courts are administered.

President Reagan was certainly correct when on September 28, 1981 he told the International Association of Chiefs of Police at their annual meeting in New Orleans:

> There has been a breakdown in the criminal justice system in America.

What many concerned citizens and interested public officials do not recognize, however, is that this breakdown has occurred not in the federal courts, but in the trial courts at the county level of state governments. In many states criminal case backlogs have been growing steadily for more than a decade. By contrast, in many federal jurisdictions the backlog and attendant trial delays has been sharply reduced in recent years. The greater speed in the federal court has a number of origins. First, the number of federal trial judges has been greatly increased in recent years. Second, by enacting the Speedy Trial Act, with its sanction of dismissal in the event of undue delay, Congress put substantial pressure on the federal courts to operate with great efficiency. With very few exceptions the time limits established by the Speedy Trial Act have been met. Moreover, successively shorter time limits applied as the implementation of the act continued, and the federal courts accommodated themselves trying criminal cases in increasingly shorter time frames.

Because the federal courts are not burdened with a backlog of untried cases, a newly indicted case is routinely scheduled for trial at a very early date. Usually the trial is held when first scheduled. Not only does that in fact normally occur, but that is the expectation of all concerned: the judge, the prosecutor, the defense attorney and the witnesses. Accordingly, the attorneys know that they have to be prepared to be in trial on the assigned date. The witnesses know that they have to be there, that they will not be excused for non-attendance but at the same time that they will not be needlessly losing time from their jobs, their families or their personal pursuits.

FEDERAL COURTS HAVE INDIVIDUAL JUDGE CALENDARS

Not only is the case assigned for trial within a matter of weeks of the indictment being issued, but immediately upon issuance of the indictment, supervision of the case ordinarily is assigned to a specific

judge. That case then remains the responsibility of that judge until it is completed. Accordingly, from the moment the case enters the federal court, it is under the supervision of a particular judge who knows that he will have that case until it is fully disposed of. There is a substantial incentive for that judge to actively supervise the case in order to prevent undue delays. As a routine practice, federal judges conduct pretrial conferences well in advance of the trial date. These conferences address and resolve any problems that if unattended might complicate, lengthen, or delay the trial. This system, known as the "individual judge calendar", works extremely well.

Because of the federal court practice of actively supervising cases between trial dates, it is only natural for that same strong judicial hand to be seen on the day that the trial is scheduled to begin. Consequently, granting of requests for continuances are rare. Moreover, they are only granted for good cause shown by the requesting party. Finally, even if a continuance is granted, ordinarily it is for very short intervals such as a week or two. The psychological motivation for the federal judge to supervise the case with a very strong hand is high, for he only complicates his own docket problems if he allows a case to be unnecessarily delayed. The psychological effect of a single judge calendar on a defendant and his attorney is even greater. They know that the same judge will preside over the case no matter when it is brought to trial. They know that whatever the sentencing policies of that judge may be they cannot be circumvented. Consequently, the incentive to try to delay the case in the hope of getting a more lenient sentence is entirely removed. Moreover, the extent of discipline imposed on attorneys for both sides by federal judges is ordinarily quite high. For example, attorneys are required to be present when their cases are listed for trial or judicial proceedings. Excuses are simply not accepted. If an attorney absolutely cannot-avoid-being absent, he is required to advise the court well in advance of the scheduled date and obtain permission of the court not to appear.

STATE COURTS PERMIT REPEATED TRAIL DELAYS

The contrast between the practices, described above, in federal courts and the practices in many state courts, particularly those in major cities, is very extreme. In many state courts, the career criminal has a fair chance to "beat the system". First, because of the enormous volume of cases compared with the limited number that can be processed, a great many cases in which arrests are made and legally sufficient proof exists to warrant a conviction are nevertheless not indicted. Thus the first advantage for a defendant in the state court is that he may not be indicated at all. In the federal court, however, the prosecutor is not inhibited by a court backlog from indicting any case where the crime is significant and the evidence is sufficient.

When an indictment is issued by the grand jury, in many state courts it is not scheduled for trial for a substantial period. It is not uncommon for the interval between indictment and the trial date to be several months. This is because the court is facing a huge backlog of older cases and is seeking to dispose of the older cases before the newer ones.

In many state courts, even major felony cases are not tried on the date scheduled. Instead, they are continued to a later date or sometimes for an indefinite period. In many courts, more cases are continued on the trial date than are tried. In fact in many individual cases, continuances are allowed again and again. It is not uncommon in urban courthouses to find major felony cases that have been listed and then continued on six or eight or ten or twelve separate dates. Ordinarily, a continuance brings an additional delay of several months before the next court date.

With the passage of the months, many witnesses become frustrated. Some ultimately refuse to appear. Others faithfully come to court every time the case is listed, but may suffer sufficient loss of memory when some of the details of the crime are subject to strong impeachment on cross examination by the defendant's attorney. It is not uncommon for causes to the lost because memories have faded.

STATE COURTS OFTEN "POOL" CASES

In many state courts, a majority of cases are assigned to a different judge for each "listing". Therefore, there is no judge who is made to feel responsible for disposing of the case. If a given judge does not dispose of it at one listing, he knows that the case will not remain his problem, but will become the problem of a different judge. Rather than being an incentive for pushing to get the case disposed of, this tends to make the judge eager to avoid difficult, controversial or lengthy cases.

The worst effect, however, of this kind of "pool" or "assembly line" system of trial calendaring is the between successive trial dates, the case is not the responsibility of any judge. It is simply returned to the "pool". As a result, pretrial conferences often are not held and the problems that caused the continuance at the first listing of the case frequently go unattended and the result in continuances being granted at subsequent listings.

In many crowded state courts, continuances are readily given and often without good reason. It is not difficulty to understand the plight of a state judge who may face a list of 15 or 20 or more trials on a given day. Since it is obviously impossible to try more than perhaps a third of this number of the cases, if that, there is a strong incentive for the judge to agree to continue any case in which the defense attorney suggests there is some problem. Moreover, when a continuance is granted, it is frequently for an indefinite period. Once continued, then a new trial date is later assigned to the case. Ordinarily, that trial date will be several months hence. Even where a case is continued to a date certain, in crowded courts the earliest available date certain will ordinarily be at least a month away if not more.

In many state courts, a large volume of cases may make it difficult for the court to adopt an individual judge calendar for all serious cases. Typically, there may be a variation of the individual judge calendar for first degree murder cases or some other very limited types of cases. Usually, the typical robbery or burglary case does not get on to an individual judges calendar. In other state courts, the judges prefer to retain the pool system for various reasons which may be

sound or are unsound. Regardless of the validity of the reasons, the result is often to make it easier for repeat offenders to repeatedly avoid trial.

STATE COURTS PERMIT JUDGE-SHOPPING

One motivation for the defendant and his attorney to avoid trial is the hope that the witnesses will forget or refuse to attend. But an even greater incentive is the hope that at a subsequent listing, the case will come up before a judge with a history of more lenient sentencing. This practice of "judge shopping" is the most serious defect of the pool system. Judge shopping is strongly encouraged under this system. The hope always will be that whatever judge one may have today, a more favorable judge may be found later.

Frequently, it is very easy to judge shop because it is easy. There are many ways to obtain a continuance. One device is through the filing of "busy slips". Attorneys with active, paid criminal practices in the state courts frequently have clients with cases listed for trial in different courtrooms on the same date. This kind of conflict in listing occurs because of two factors. First, the attorneys are sometimes permitted to have many more cases than they can in fact reasonably hope to handle and it may be difficult, if not impossible, to avoid scheduling conflicts for such attorneys. Second, in some state courts little effort is made to avoid scheduling the cases of a grain attorney in different places on the same date. In any event, it is a common practice in some state courts for attorneys to have multiple cases listed in different courtrooms. This gives them a very convenient device for avoiding judges regarded as stern on sentencing. Typically, the defendant's attorney will leave busy slips in the courtrooms manned by the judges he most wants to avoid. If he has to try any of his cases, he will try the case that is in front of the most lenient of all the judges.

Another device for avoiding trial before a stern judge, which works in many state courts, is simply to demand a jury trial. Because of the high volume of cases that form the backlog of the court and the long list of cases listed for trial on a given date, many judges feel under substantial pressure to handle cases by guilty pleas or, where that is not possible, by "bench trials" which are far quicker than full dress jury trials. Accordingly, merely by entering a plea of not guilty before a tough judge, a defendant may be able to get a quick continuance by demanding a jury trial, even in a case in which, given a lenient judge, he would be perfectly willing to agree to a bench trial. Needless to say, after avoiding a stern judge in this fashion, the defendant and his attorney have no hesitation to reverse their position at the subsequent listing in front of a judge viewed as more lenient on sentencing. Accordingly, a great many cases in which not guilty pleas were entered and jury trials were demanded, end up being disposed of on a plea of guilty or at least a bench trial in front of a different judge. It might be possible to combat this practice by making the defendant and his attorney stand by whatever election they make with regard to plea and type of trial. But, efforts to do this make the cases subject to challenge on post-conviction collateral attack and have not proven very successful. The source of the problem, clearly, is the pool or assembly line where the case will come before a different judge at each listing.

Generally speaking, defense attorneys feel that delay increases the chances of acquittal and of more lenient sentence. By no means, however, are all continuances a result of trial avoidance devices resorted to by defense attorneys. For example, in many cities, the volume of cases listed for trial on a given date is so great that police witnesses may be scheduled to appear in numerous trials in different courtrooms on the same date. Accordingly, when the officer's case is called for trial in one courtroom, he may be actually on the stand in a different courtroom testifying in another case. Often the result is that the first case will simply be continued, because when it was called, the police witness was not present.

Another example in some state courts concerns juries. Rather than hold panels of potential jurors late in the day, officials will dismiss them until the next day if they appear not to be needed in the early or middle part of the afternoon. Consequently, the defendant may be able to get his trial continued if it happens to be called at that hour in the day. If he demands a jury trial, even if the judge is willing to begin one at this point, the jury panelists may no longer be available. Since a large number of cases are listed for the following day, there is a strong disincentive to simply continue the case overnight to await the return of the panel of jurors.

In these and various other ways, even major felony trials in many state courts are continued repeatedly. Consequently, the trials frequently do not begin until eight, ten or twelve months after the indictment. The passage of this great period of time often gives the defendant an unwarranted advantage and may result in his acquittal, whereas the same case, on the strength of the evidence as it existed shortly after indictment, would have resulted in conviction had the trial been held promptly.

HIGH VOLUME OF CASES INCREASES STATE PLEA BARGAINING

Beyond the problems resulting in undue delay of individual cases, many state courts face a broader problem which has to do with the total volume of cases before them and the extent of the backlog of older cases. This situation sometimes creates the possibility for what might be considered a form of "blackmail". That is, the volume of cases, even major cases, is far too great for all of them to be disposed of through jury trials. Accordingly, great pressure is felt by trial judges in such jurisdictions to actively encourage guilty pleas. In some cities 80 or 90 percent of the cases are disposed of by guilty pleas.

Where guilty pleas are not possible, judges seek to encourage defense waivers of the right to jury trial since bench trials consume only a fraction of the time as jury trials. Indeed, merely choosing the jury frequently takes between several days and several weeks. Once underway, a jury trial progresses far more slowly than a bench trial.

In such circumstances, the judges know that they will not succeed in inducing guilty pleas or jury trial waivers without offering a substantial inducement. The inducement that the defendant wants obviously is a "break" on sentencing. He may hold out for probationary sentencing or in more serious cases, may agree only to a misdemeanor sentence (one year or less maximum sentence). The communications that are implied

if not expressed are plainly of bargaining nature. The judge is eager to dispose of as many cases on his list as he can. The defendants and their attorneys know this and try to take advantage of it by getting a more favorable sentence than they could possibly expect if the judge had only one case before him that day which he could try before a jury without difficulty.

Accordingly, after discussion between the prosecutor and the defense attorneys, the defense may offer to plead guilty if the prosecution and the court will agree that the sentence will not exceed, for example, six months. In a certain sense, the defense has the upper hand in this circumstance because the defense's right to plead not guilty and/or to demand a jury trial are absolute rights protected by the Constitution and all of the fundamental guarantees in our legal system. Since the judge knows this, he may feel induced to accept such a plea bargaining arrangement even if he feels that a sentence of six months is far below an appropriate sentence, given the facts of the crime and the record of the defendant. He knows that the defendant can demand a jury trial if he does not agree with the proposed sentence. The jury trial that would result, would consume between several days and several weeks in an ordinary case. By contrast, disposing of the case by guilty plea would take only a fraction of an hour. With such a great saving in scarce courtroom time, the pressure is strong on the judge to agree to an insufficient sentence.

Other factors may also affect the judge's thinking. When he has a list of perhaps a dozen cases before him one day and all the witnesses are present in the courtroom, he knows that if he refuses a plea bargaining arrangement in case number one and case number one results in a jury trial, it will take the balance of the day in all likelihood, all the other cases will have to be continued, and the witnesses will have come to the courthouse in vain. Since many of these witnesses are police officers, the judges are also concerned about the effect of keeping police witnesses sitting in a courtroom all day when they should be out on the street patroling, investigating, or otherwise engaged in important law enforcement duties.

CONTINUANCES INCREASE THE CHANCES OF RECIDIVISM

Of course, all the causes that contribute toward repeated continuances do more than increase the chance of an acquittal or a lenient sentence. They also increase the chance of another crime being committed by a defendant who has been released on bail. Obviously with each continuance, the defendant obtains another few months on the street. Often he will commit more crimes during this period, sometimes simply because it is his chosen career and other times in order to secure funds to pay his attorney.

With the possibilities of judge shopping in the federal court totally precluded, and the chances of delaying the trial being severely reduced, prosecution in the federal as opposed to the state court usually mean: (1) a much earlier trial; (2) a high chance of conviction; and (3) less risk of further felonies being committed prior to conclusion of trial; and (4) a more appropriate sentence.

The knowledge on the part of the defendants and their attorneys that a given armed robbery or burglary case involving a recidivist,

is subject to being transferred to the federal court for trial, might strengthen the capacity of the state prosecutors and judges to curtail undue delays in the state court. Similarly, the certainty of a sentence in the federal court of at least 15 years, may strengthen the resolve of state court judges to impose sentences appropriate in light of the facts of the crime and the record of the defendant, and to resist the "blackmail" described above.

Accordingly, just the possibility of federal prosecution may have a very substantial effect on improving the handling of these cases in the state courts.

COMMERCE CLAUSE PROVIDES THE CONSTITUTIONAL BASIS

The constitutionality of S. 1688 has been carefully reviewed. In addition to lawyers from the Subcommittee, lawyers for the Congressional Research Service, the Department of Justice, and the White House Counsel's Office, have also researched the issue. Each review led to the same conclusion: The commerce clause is sufficiently broad that there is little question of Congress' authority to enact a penal statute concerning armed robberies and burglaries because of their aggregate effect on interstate commerce. In his prepared statement for the Subcomittee's hearing on March 18, 1982, Assistant Attorney General Jensen said:

> It is the Department's view that S. 1688 would pass constitutional muster. Under the commerce clause, Congress has the power to regulate even purely intrastate activity, where that activity 'combined with like conduct by others similarly situated, affects commerce among the states. . . .' (*See* e.g., *National League of Cities* v. *Usery*, 426 U.S. 833, 840 (1976): page 3)

THE FEDERAL FIREARMS LAW

Mr. Jensen noted that the courts have uniformly sustained the authority of Congress to regulate intrastate transactions involving firearms. (See 18 U.S.C. S 921–28) The Supreme Court has concluded that these intrastate transactions did have the requisite effect on interstate commerce. (See *Huddleston* v. *United States*, 415 U.S. 814 (1974)) Mr. Jensen further cited the federal criminal statute which prohibits convicted felons from possessing firearms. (See 18 U.S.C. App. S 1202). Mr. Jensen stated:

> Moreover, the cases that have dealt with the power of Congress under the commerce clause to enact statutes prohibiting convicted felons from possessing firearms . . . have uniformly upheld such a power (page 3).

What S. 1688 does is to extend federal criminal penalties to the felonious use of the firearm, which is already a federal criminal violation for the convict to possess. Accordingly, the exercise of power under the commerce clause is no broader under S. 1688 than under the existing firearms laws. That is, every case to which 1688 would apply, already involves the federal crime of illegal possession of firearms. Since 1688 requires that the defendant have two or more prior

convictions for burglary or robbery, he is ineligible under federal law to even possess the firearm. For the defendant to use the firearm to commit further offense simply makes federal regulation of this activity all the more necessary. As Assistant Attorney General Jensen noted, "the rationale supporting these firearms statutes applies equally to the use of a firearm in the commission of an offense as addressed by this bill" (page 3).

FEDERAL CRIMINAL STATUTES ANALOGOUS TO S. 1688

There are numerous federal criminal statutes which are analagous to S. 1688. The federal bank robbery statute, the Racketeer Influenced and Corrupt Organization Act, the Hobbes Act, and the Controlled Substances Act of 1970, are all examples of Congress exercising its broad powers under the commerce clause to punish activity which is largely intrastate in character, but which also affects interstate commerce.

A more pertinent example is the loan-sharking statute. The Federal Anti-Loan Sharking Law, 18 U.S.C. s 891–96 prohibits "any extension of credit with respect to which it is understanding of the creditor and the debtor at the time it is made that delay in making repayment . . . could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." Nowhere does the statute require that the transaction directly involve interstate commerce, or persons, or organizations, which have an effect on interstate commerce. Therefore, the statute could apply to transactions of a purely intrastate character.

PEREZ V. UNITED STATES UPHELD THE LOAN SHARKING STATUTE

The Supreme Court of the United States reviewed precisely this issue in *Perez* v. *United States*, 402 U.S. 146 (1971). The court agreed that the particular transaction presented by the *Perez* case was purely intrastate, but nevertheless sustained the constitutionality of the statute and its in that circumstance. The court indicated that Congress may regulate activities in any of the three following circumstances pursuant to its powers under the commerce clause:

(1) The criminal transaction uses the instrumentalities of interstate commerce;

(2) It uses or is in interstate commerce; or

(3) It affects interstate commerce.

The court further reasoned, that where the activity is one "affecting" interstate commerce, the question for judicial review is simply whether the regulated activity falls within a class that Congress could legitimately conclude to have an effect on interstate commerce. Accordingly, there was no requirement that the individual transaction be specifically shown to affect intertsate commerce. It would be sufficient if the class of activities into which that transaction falls have such an effect.

Moreover, the court indicated that in defining these classes of activity that it seeks to regulate, Congress must be allowed considerable leeway. If the class included activity affecting interstate commerce,

the courts will look no further to examine whether the individual transaction itself had such an effect.

Even more clearly than the loan sharking transaction analyzed in *Perez*, the commission of repeated robberies and burglaries involving firearms plainly is a class of activities that Congress could reasonably conclude "affects" interstate commerce because:

(1) Robberies and burglaries of stores and commercial establishments directly interfere with interstate commerce by increasing the cost of operating businesses.

(2) Robberies and burglaries deter and interfere with travel.

(3) Robberies and burglaries funnel stolen goods into interstate fencing operations, and often the offenders themselves travel in interstate commerce in committing the offenses.

(4) Robberies and burglaries are often motivated by addiction to heroin or other illegal drugs shipped in interstate or foreign commerce, purchased in violation of federal laws and marketed by organized crime groups, on an international, national, and interstate basis.

(5) Firearms used in such robberies and burglaries have almost invariably either been shipped in interstate commerce or assembled from components which were shipped in interstate commerce.

The nexus to interstate commerce in the case of a typical loan shark transaction is far weaker. Regarding loan sharking, their is neither the requirement nor the expectation that the offender will have crossed state lines in the commission of the offense, used instrumentalities of interstate commerce, distributed the proceeds of his criminality in interstate commerce or used a firearm.

THE LOAN SHARKING STATUTE NOT LIMITED TO ORGANIZED CRIME

The legislative history of the loan sharking statute clearly reflects that it was intended primarily to combat a principal means whereby the Mafia financed its criminal activities. However, the act itself does not contain any requirement that the particular loan sharking transaction prosecuted thereunder, involve persons affiliated with an organized crime group. In effect, the courts have found that since much loan sharking appears to be connected with organized crime operations, Congess could reasonably utilize its power under the commerce clause to make all loan sharking transactions a federal crime, including loan sharking transactions that had utterly no connection with organized crime.

Indeed, the courts have specifically held that organized crime involvement is not a necessary element of the crime of engaging in extortionate credit transactions (See *U.S.* v. *Cheiman*, 578 F.2d 160 (6th Cir., 1978), cert. den. Sup. Ct. 834). Moreover, in the *Perez* case the court adopted without question and affirmed as sufficient the Congressional finding that: "Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce (Congressional finding and declaration of purpose in Public Law 90–321, § 201, 82 Statutes 159 (1968))." (402 U.S. 147, Note 1.)

POSSESSION OF A FIREARM LINKED TO INTERSTATE COMMERCE

Similar reasoning is seen in the cases upholding the Firearms Act. For example, in *Stevens* v. *United States*, 440 F.2d 144 (6th Cir., 1971), the court upheld the constitutionality of the Firearms Act (18 U.S.C. App. 1202(a), 1970). In fact, the stated connection between interstate commerce and the possession of a firearm by a person who had been convicted of a felony was that many offenses such as bank robberies impaired interstate commerce, that criminal offenses in general were harmful to business, and that less business was conducted in areas where crime was prevalent. The court noted that in many such crimes, firearms were used, frequently by persons with prior felony convictions. Accordingly, the court concluded that it was a constitutionally acceptable means of protecting interstate commerce against the adverse effects of such criminal activity to prohibit convicted persons having firearms. The court simply asserted: "There can be no doubt that the possession of firearms by convicted felons is a threat to interstate commerce" (9440 Fed. 2d at 151–52).

ROBBERIES AND BURGLARIES AFFECT INTERSTATE COMMERCE

Some circuit courts have opined that even in the absence of a firearm, the commission of robberies and burglaries have sufficient effect on interstate commerce in the aggregate, even if not in the individual case, that the effect warrants federal jurisdiction. Thus, in the *United States* v. *Synnes*, 438 F. 2d 764 (8th Cir., 1971), the court specifically noted that robbery and burglary, generically, have a significant impact on interstate commerce (Id. at 768). The court indicated that even crimes against the person that do not have a monetary or property consequence, might still have a sufficient effect on interstate commerce. With regard to crimes such as larceny or auto theft which do have an economic aspect, the effect is clear. While the *Synnes* case was vacated on other grounds (404 U.S. 1009 (1972)), the 8th Circuit viewed the effect on interstate commerce of firearms offenses as "self evident" (438 F. 2d at 768). In fact, at least one commentator has suggested that the commerce clause is so broad that Congress if it wanted to could criminalize virtually all property crimes. In "The Commerce Clause Revisited—the Federalization of Interstate Commerce", 15 Arizona Law Review, 271 (1973), Professor Robert L. Stern noted that, as in the *Perez* case, on loan sharking, for in any other crimes "probable proof would often make it difficult to differentiate those offenses (property crimes) which affected commerce from those which did not. . . ." (Id. at 283). Therefore, Congress could create a broad category of offenses because many cases which would fall therein would affect interstate commerce.

MANDATORY SENTENCE NOT UNCONSTITUTIONAL

A constitutional issue might also be raised with regard to the mandatory penalty provision of S. 1688. Using prior state convictions to enhance federal sentencing has ample precedent and is clearly constitutional. For example, in the Dangerous Special Drug Offenders sentencing statute, 21 U.S.C. § 849, enhanced sentencing is permitted for persons found to have been previously convicted in state or federal

court for two or more drug trafficking offenses. This statute has been upheld against the argument that it violates the double jeopardy clause. *United States* v. *Sierra*, 297 F. 2d 531 (2d Cir., 1961), cert. den. 369 U.S. 853 (1962).

Nor does the possibility of a life sentence for a third or subsequent burglary or robbery present any constitutional infirmity. Indeed, the Supreme Court recently upheld a state recidivist statute that required a life sentence following a third felony in the face of the argument that in that case imposing a life sentence for three larcenies involving a total of only slightly more than $200 violated the constitutional prohibition against cruel and unusual punishment (*Rummel* v. *Estelle*, 445 U.S. 263 (1984)). Similarly, the Continuing Criminal Enterprise provision of the Drug Control Act (21 U.S.C. 848) applies to multiple state convictions which form part of the basis for the federal offense and for the conclusion that the criminality of the organization is continuing. Section 848 also provides the precedent for the propriety of basing a specific federal offense on evidence of a continuing course of conduct in violation of state or federal law as well as providing for enhanced penalties because of the threat of still further felonies. Finally, the Special Dangerous Offender provision of Title 18 likewise permits enhanced sentences based on two or more state convictions for dangerous or violent offenses.

EXERCISING POWERS UNDER COMMERCE CLAUSE—THREE THEORIES—FIREARMS: A BURDEN TO INTERSTATE COMMERCE

With regard to exercising its powers under the commerce clause, Congress has three distinct and individually sufficient theories to follow. First, the possession and felonious use of a firearm may be viewed as placing a burden on interstate commerce because it impedes the free flow of goods, persons, and monetary instruments in interstate commerce. In the face of an appropriate congressional finding, that such a burden exists by reason of such felonious possession and use, there is little doubt in light of the precedence that the Supreme Court would sustain such an exercise of the commerce clause on this basis alone.

In *United States* v. *Bass*, 404 U.S. 336, the Supreme Court reviewed the findings adopted by Congress when it enacted Title VII of the Amendments to the Omnibus Crime Control and Safe Streets Act of 1968. That title became Section 1202(a) of the Appendix to Title 18. By its terms, Section 1202(a) "prohibits any person who * * * has been adjudged by a court of the United States or of a state or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce * * * any firearm. * * *"

Section 1201 contains the congressional findings applicable to 1201(a) and states in pertinent part that:

> The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons * * *, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce. * * *

In *Bass*, the court made it clear that it was not deciding "* * * the question whether, upon appropriate finds, Congress can constitutionally punish the 'mere possession' of firearms. * * *" (404 U.S. at 339, Note 4). The court indicated, however, if the language of the statute had not contained the phrase "in commerce or affecting commerce", that in an individual prosecution, no allegation or proof would be required that the defendant's possession had any link to interstate commerce. The court agreed that the evils the bills sponsor sought to overcome included: "* * * threats to the operation of businesses significant enough in the aggregate to affect commerce" (404 U.S. at 345).

Therefore, while not part of its holding the logic of the court's opinion in *Bass*, is that given appropriate congressional finding and a statute not requiring a showing in each case of a nexus between the firearms possession and between interstate commerce, such an exercise of the commerce power would be found constitutionally permissible. The only way the court could rule otherwise would be if such possession in the aggregate affects interstate commerce was unreasonable and without basis. It is without question that with the losses from burglary alone reaching $4 billion a year, that burglaries by armed career criminals in the aggregate do have an effect on interstate commerce. As the sponsor of Section 1202, Senator Long noted in his speech introducing the measure:

> You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you would like, if in order to do business you have to go through a street where there are burglarers, murders and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce. (114 Congressional Record 13869 quoted at 404 U.S. 354).

With regard to S. 1688, the claim for the firearm aspect of the offense undeniably affecting interstate commerce is far stronger since the firearms conduct involves not merely possession, but possession followed by criminal use of the firearm. Indeed, the criminal use is limited to use in committing robbery or a burglary and therefore use of the firearm as an instrument of a crime which individually as well as in the aggregate has an effect on interstate commerce, at least in every instance in which the robbery or burglary is directed against a business establishment.

FIREARMS MOVE IN INTERSTATE COMMERCE

The second distinct theory under the commerce clause also involves the firearms aspect of the robbery or burglary. It is an undeniable fact that virtually every firearm moves in interstate commerce. First, a great many firearms, particularly handguns, are manufactured overseas and imported to the United States. Indeed, this is the case with regard to the large majority of inexpensive handguns such as the infamous "Saturday Night Special". Secondly, even those handguns and other firearms that are manufactured within the United States or made by assembling parts imported from abroad, are distributed from a very limited number of states and travel in interstate commerce to

the United States are made by only a few manufacturers. Indeed, most pistols are made in Massachusetts and Connecticut.

The distribution of firearms, both through lawful channels, such as gun stores and mail order houses, and through the black-market, undeniably is conducted through interstate commerce and the facilities of interstate commerce including the mails. Accordingly, there is no doubt that under its power to regulate interstate commerce that Congress can prohibit the felonious use of firearms which are distributed in interstate commerce.

A close analogy can be drawn to the basis for federal statutes outlawing drug trafficking. The majority of illegal substances covered by the federal trafficking statutes move in interstate commerce. As in the case of firearms, a very large portion of the drugs originate outside the United States and are imported across our national borders in foreign commerce and distributed internally in interstate commerce. When the material, whether illegal drugs or a firearm, is so inextricably involved with interstate commerce and the instrumentalities of interstate commerce, e.g., interstate highways, interstate trucking firms, commercial airlines, and other federally regulated air borne and water borne carriers, in addition to the mails, there is no doubt that Congress can regulate such trafficking. Nor is there any question that it may regulate the "end use" of the material as well as its transportation. That is why possession of heroin, for example, is within the power of Congress to prohibit under the commerce clause. Similarly, that is the basis for prohibiting the possession of firearms. As noted under theory one, the case of Congress carrying out its regulation by also prohibiting the felonious use of the transported material—here the firearm—is still stronger.

ROBBERY AND BURGLARY AFFECT INTERSTATE COMMERCE

The third theory has nothing whatsoever to do with the firearms aspect of the offense created by S. 1688. Rather, the theory focuses on the nature of the offenses covered. They are robbery and burglary. Inherently, robberies and burglaries involve theft or attempted theft of personal property—in the case of robbery from the person possessing the property directly and in the case of burglary, from the person's office or home, for example. Theft of property being the core of these offenses, their economic and financial impact is invariably present and beyond question. Where the robbery or burglary is direct against a person engaged in business and involves the theft of business assets, or where it occurs on the premise of a business establishment, the effect of an individual offense on interstate commerce is all the more clear and direct.

The only contrary argument that can be made is that the effect may be quite minor. In addition, where the business conducted by the person or on the premises in question is on a very small scale and entirely local in character, the argument can be made that the affect on interstate commerce is not only minimal but also indirect. Nevertheless, the courts have clearly held that even indirect and minimal affects on interstate commerce of particular crimes bring them within the power of Congress to legislate under the commerce clause.

THE HOBBS ACT COVERS ALL COMMERCIAL ROBBERIES

A good example is found in the Hobbs Act. The act prohibits, among other things, any robbery regardless of its characteristics, provided the robbery has some effect on interstate commerce. That is, the robbery need not involve injury, weapons, conspiracies, interstate transportation of the proceeds or any other such facts. Section 1951(a) of Title 18—Interference With Commerce By Threats or Violence covers:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion.

The phrase "in any way or degree" is significant. Much significance has been ascribed to it by the court opinions applying the statute. For example, in *United States* v. *Tropiano*, 418 F. 2d 1069 (1st Cir., 1969) the court stated that the affect on commerce need only be minimal. Generally speaking, courts interpreting the Hobbs Act have found the requisite minimal effect on interstate commerce whenever the defendant's actions threatened or caused any depletion of resources or assets of any business engaged in any degree in interstate commerce (See, e.g., *United States* v. *Phillips*, 577 F. 2d 495 (9th Cir., 1978), cert. den. Supreme Court 107).

Accordingly, a store which serves only local patrons and employs only local people is covered if only it buys some goods or services which have travelled in interstate comerce. Thus, the business establishment or business person need not itself be engaged in interstate commerce. Nor must the business etablishment or person acquire a substantial portion of the goods or services needed in the conduct of its business from sources in another state. If the business buys any of its goods through interstate commerce, it is sufficient. In light of the decisions in the *Phillips* and *Tropiano* cases, there is no doubt that minimal and indirect effects on interstate commerce are covered by the Hobbs Act and are within the constitutional powers of Congress under the commerce clause.

There are even a number of cases involving specific robberies which illustrate this point. While most cases reviewing the constitutionality of particular applications of the Hobbs Act arise in the context of extortion, there are several cases involving robbery. For example, in *United States* v. *Pearson*, 508 F. 2d 595 (5th Cir., 1975, cert. den. 423 U.S. 845) the court found the requisite-effect on interstate commerce to support a conviction for robbery of a hotel where the registration cards reflected that the hotel was patronized by out-of-state guests. In *United States* v. *Caldarazzo*, 444 F. 2d 1046 (6th Cir., 1971), cert. den. 404 U.S. 958) the court sustained a conviction under the Hobbes Act for a street robbery of a jewelry salesman. The court found sufficient effect on interstate commerce from the circumstances that the salesman represented four firms which sold their products across state lines and had the exclusive right to sell and obtain orders for their products in six states. The court also found significance in the fact that following the robbery, the salesman was delayed in making further sales for a period of three weeks since his display and sales merchandise from these firms had been taken in the robbery and he had no replacements for this period.

INTRASTATE ROBBERIES AFFECT INTERSTATE COMMERCE

The above cases in both the extortion and robbery context involve court findings of effect on interstate commerce in the individual case. The issue is much easier when the statute rests on a judgment by Congress, particularly if it is reflected in findings associated with the bill, that such offenses in the aggregate affect interstate commerce. In that event, not even the minimal or indirect showing required for Hobbs Act conviction is necessary. It is beyond question that in the aggregate, robberies and burglaries of merchants and business establishments affect interstate commerce. It is also clear that robberies of persons engaged in non-business pursuits and robberies and burglaries occurring in residences rather than in business establishments also in the aggregate affect interstate commerce. Obviously, if somebody's money or valuables are taken from him, his pesronal assets are depleted. The result is that he is precluded from making purchases.

In todays' economy, the purchases and expenditures of individual citizens in their private, non-business capacity very frequently involve interstate commerce or the instrumentalities of interstate commerce. Therefore, just as an effect on interstate commerce is found in an individual Hobbs case if the resources of a business which makes purchases in interstate commerce are depleted by the robbery or extortion, a similar effect is present when an individual citizen's assets are depleted, since he routinely makes some purchases in interstate commerce.

COSTS AFFECT INTERSTATE COMMERCE

Moreover, whether the robbery or burglary occurs in a business establishment or a residence, it will frequently involve insurance claims. By its nature, insurance is conducted in and through the instrumentalities of interstate commerce. The effect of increased robbery and burglary rates in one area tends to be to increase the insurance premiums of all insureds in all areas. It is the nature of insurance to spread the loss and while some efforts are made to concentrate additional costs on persons in high risk areas who are insured, there is inevitably a rising cost everywhere.

ARMED ROBBERIES OR BURGLARIES ARE USUALLY COMMERCIAL

Moreover, requiring that the robbery or burglary involve the use of a firearm, has the consequence of focusing the application of S. 1688 to the more serious robberies and burglaries. These tend to be robberies and burglaries that have an essentially commercial nature. While sometimes firearms are used in street corner muggings, the vast majority of such minor forms of robbery, if minor is indeed a fair word to use, are committed with knives or clubs or merely through the threat of a beating. By contrast, most robberies of pharmacies, business offices, restaurants, hotels and stores, like robberies of banks, are committed with firearms. With regard to burglary, of course, since it is intended to be, and often in fact, is a crime of stealth, in the vast majority of burglaries it is never known whether the offender possessed a firearm. However, where for example a burglar is caught at the scene or fleeing from it and is found to be in possession of a firearm,

it usually is a burglary of a commercial establishment such as a store or business office. Where the locus is a residence, the burglar who carries a firearm ordinarily is a highly professional burglar who in all likelihood is committing offenses over a wide area which may involve crossing state lines. In addition, it is likely that such a burglar is concentrating on taking items which include coins and monetary instruments and therefore clearly involve the federal government and interstate commerce. Finally, such a professional burglar is likely to be committing a very large number of offenses at a frequent rate—perhaps one or more per day—and concentrating on homes of relatively wealthy citizens. The result is that the value of property taken ordinarily will be high both for individual homes and in terms of the aggregate take over time. Consequently, regardless of the particular characteristics of the armed burglary or robbery in an individual case in general and in virtually every category of case, the effect on interstate commerce is significant, direct and certain.

CAREER ROBBERS OR BURGLARS USE INTERSTATE "FENCES"

There are two variations of the third theory involving aggregate effect of robberies and burglaries on interstate commerce. The first concerns the fencing of the stolen goods. Generally speaking, those offenders committing robberies and burglaries, particularly the career criminals committing them at frequent rates, and still more clearly the most confirmed and dangerous offenders—those carrying firearms, nearly always use interstate fencing operations as the means for disposing of the stolen property. The existence of a large number of interstate fencing operations has been established beyond a doubt. In recent years, the FBI, in conjunction with state and local law enforcement agencies, has conducted innumerable "sting" operations. In these undercover law enforcement ventures, stolen goods are accepted by undercover officers posing as fences. The areas from which the stolen goods turned out to have been taken and the identities of the "customers" who patronize the undercover fencing operation generally reflected broad areas of operation which clearly place them in the stream of interstate commerce. Often, state lines were crossed by the clients; always the goods themselves later moved across state lines. Stolen securities, coins and jewelry are merely examples of the types of commodities which are ordinarily disposed of through the use of the facilities of interstate commerce.

It is clearly within the power of Congress to proscribe such improper and illegal use of interstate commerce and its facilities.

PROFESSIONAL ROBBERS OR BURGLARS ARE OFTEN DRUG ADDICTS

The second variation involves the fact that a very high proportion of professional robbers and burglars—the career criminals covered by 1688—are drug addicts and commit drug offenses including not only possession, but also sales as well as theft offenses. Studies cited earlier in this report reflect that for every robbery or burglary, a career criminal typically commits five or six drug sales and an even larger number of possession offenses. In fact, the studies cited above of Dr. John Ball indicate that the offense rate for major crimes such as

robbery and burglary of an addict actively taking drugs is six times higher than for those same offenders during periods of abstinence. Therefore, it is within the power of Congress, under the commerce clause, to address the problem of interstate drug trafficking and the class of persons engaged in it by also focusing on the non-drug offenses in which those same persons typically engage on a very frequent basis.

BANK ROBBERIES AUTOMATICALLY AFFECT INTERSTATE COMMERCE

The breadth of Congress' powers under the commerce clause to proscribe robbery and burglary offenses is further illustrated by the Bank Robbery and Incidental Crimes provision of Title 18. Section 2112 creates criminal jurisdiction over robberies of banks. The federal jurisdictional requirement is merely that the bank or other financial institution either be organized or operate under the laws of the United States or have its deposits insured by the Federal Deposit Insurance Corporation. Accordingly, a local bank with only local employees and customers, local sources of funds and local activities, which is chartered and operated under the laws of the state or its political subdivision, is nevertheless covered by the statute provided that its assets are federally insured. Practically all commercial banks in the United States are therefore covered by the Federal Bank Robbery Statute. There is no requirement of involvement of organized crime or terrorist groups, use of weapons or crossing the state lines to commit the offense or to dispose of the proceeds. A purely local robber who goes to a purely local bank, holds it up and disposes of the proceeds without ever leaving the same town or in any way utilizing interstate commerce or the instrumentalities of interstate commerce, nevertheless violated the federal law.

The same subsection also covers burglaries of banks and other financial institutions. The operative language is:

> Whoever enters or attempts to enter any bank or any savings and loan association or any building used in whole or in part as a bank or as a savings and loan association with intent to commit in such bank or savings and loan association or part thereof so used, any felony affecting such bank or savings and loan association * * * any larceny.

As in the case of bank robbery, there is no requirement of crossing interstate lines to commit the defense or dispose of the proceeds, no requirement of the use of the weapon or of involvement of drugs. There is no requirement that organized crime of terrorist groups have perpetrated the offense or that it was in any way carried out using the instrumentalities of interstate commerce. And nor is there any requirement with regard either to bank robbery or bank burglary of the government proving an effect on interstate commerce.

Whereas, the robbery provision of the Hobbs Act does require proof in the individual case of an effect on interstate commerce, in the case of bank robberies and burglaries this effect is assured. It is true that the institution must be federally chartered or insured and therefore in certain respects the effect on interstate commerce is established by reason of an effect on the national government which undeniably op-

erates in interstate commerce and through its instrumentalities. Nevertheless, it is significant that no proof is required in the individual case of an effect on interstate commerce either in terms of the amount of money taken and its effect on the operation of the bank or even an effect on the federal insurance system. Thus, for example, it is still a bank robbery even if the robbers are caught in the bank before they escape with the money and the money never leaves the premises. In this event, obviously no resort is made to the reserves of the Federal Deposit Insurance Corporation to restore the funds of the bank's customers. Nevertheless, the attempted bank robbery is clearly a federal violation.

The reason, necessarily implied, is that since generically robberies or burglaries of these banks affect the federal government and thereby affect interstate commerce, that Congress is acting within its power under the commerce clause to criminalize all such robberies or burglaries regardless of the individual effect or characteristics.

CONGRESS MAY EXERCISE COMMERCE CLAUSE BROADLY

It is also clearly established by appellate opinions that Congress may exercise its commerce clause powers broadly. That is, it may cover a class of offenses which includes some which may not affect interstate commerce provided that in general, the offenses included within the class do have such an effect. For example, in the Gun Control Act (18 U.S.C. § 922(a)), Congress asserted power under the commerce clause to require federal licensing of all firearms dealers including those who operated exclusively on an intrastate basis. The assertion was directly challenged as exceeding constitutional powers. The Court of Appeals for the Second Circuit in *United States* v. *Ruisi*, 460 F. 2d 153 (1972) (cert. den. 93 Ct. 234) held that the congressional action was within constitutional limits. In effect, Congress had found that to be effective, a licensing scheme would have to include all gun dealers and could not be limited to those clearly operating on an interstate basis. The court was compelled to honor this conclusion of the Congress since it could not be found to be unreasonable.

S. 1688 NOT A MAJOR EXPANSION OF FEDERAL JURISDICTION

S. 1688 does not represent a significant expansion of federal criminal jurisdiction. Understandably, there is great sensitivity to extending concurrent federal criminal jurisdiction to areas which traditionally have been left largely, if not exclusively to state enforcement. Ultimately, this sensitivity may be traced back to its route in the underlying theory of our constitution. Under the federal constitution, the national government is one of limited and enumerated power. Therefore, powers not clearly accorded to it by the Constitution are reserved to the states and to the people. That is the thrust of the Tenth Amendment. It is beyond argument that authority over most criminal conduct is exercised by the states under the powers reserved to them by the Constitution to protect the public health and safety. This power, commonly referred to as "the police power", is the basis of the notion that the responsibility for law enforcement against violent crime and those

violent crimes involving threats to property lies primarily with state authorities. Therefore, despite the relatively expansive assertions of power under the commerce clause by Congress, as seen in the drug trafficking and bank robbery and burglary statutes, the loan sharking statute, the firearms statute, and in the Hobbs Act, there are nevertheless a great many areas which logically would fall within the gambit of the commerce clause powers as previously defined by the court in which Congress has not utilized its full powers.

SOME BROAD AREAS OF CONCURRENT JURISDICTION

Despite this very considerable restraint, there are numerous broad areas of state and federal concurrent jurisdiction. Perhaps the broadest involve drug offenses. Virtually all drug cases constitute both federal and state offenses. Under past practices, the second largest category of concurrent jurisdiction probably involves bank robberies, for it has remained the policy of the Federal Bureau of Investigation to respond to each and every bank robbery or burglary and then later to confer with local police and prosecution officials with regard to which sovereign will ultimately complete the investigation and prosecute the persons responsible.

Despite the daily practice of drug and bank robbery offenses being coordinated between state and local authorities who sort out their concurrent jurisdiction, it remains a widely held myth that there is a rather clear line of demarcation between federal and state criminal jurisdiction regarding violent offenses, and property crime. Accordingly, many assume that with the exception of bank robbery, which arguably involved a very special case since it requires federal insurance of deposits, robberies and burglaries are simply not within the purview of federal criminal law.

A review of the federal statutes which currently apply to various types of robberies, however, shows the extent to which this myth is unfounded. First, as noted above, every robbery of a bank, savings and loan association or other similar financial institution is a federal offense. As a practical matter, this is true with regard to nearly every such institution since they are either federally chartered or federally insured. Second, also discussed above, are the robbery provisions of the Hobbs Act which in essence cover all commercial robberies. Third, the Racketeer Influenced and Corrupt Organizations Act covers robberies in violation of state law whenever they are committed by an organization which affects interstate commerce. Section 1961 of Title 18 of the United States Code defines "racketeering activity" to include robbery chargeable under state law and punishable by imprisonment for more than one year. In other words, all state robberies that are felonious are considered to be racketeering activity for purposes of establishing a federal violation. To establish a federal violation requires not only racketeering activity, but "a pattern of racketeering activity." The pattern requires "at least two acts of racketeering activity." The statute does require that the pattern be engaged in by a rackeeering "enterprise" which is defined to include virtually any organized entity or "group of individuals associated in fact although not a legal entity."

Section 1962(c) provides that:

> It shall be unlawful for any person employed by, or associated with, any enterprise engaged in or the activities which affect interstate or foreign commerce to conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Accordingly, it is a federal crime for anyone involved with a group which affects interstate commerce, to engage in a series of robberies. The primary purpose of the group does not need to be robbery. Indeed, the primary activities of the group can even be lawful. However, if as a part of the overall activities the group participates in robberies or individuals associated with the group carry out the purposes of the group through robberies, then a federal crime has been committed. Suppose that a group of criminals come together, commit various offenses; among the offenses they commit are robberies. They do not rob banks or stores that are directly engaged in commerce, but instead only rob individuals and take only cash. Assume that because of the character of the robberies committed by the group, the robberies would constitute only state violations. It is nevertheless a federal offense provided only that the activities of the group affect interstate commerce. It is not required that the robberies of the group affects interstate commerce, but only that the overall activities of the group do so. Accordingly, neither the individual robberies charged nor in the aggregate all the robberies the group may be engaged in, or that similar groups may be engaged in, must be shown to affect interstate commerce. All that must be shown is that the group's overall activities affect interstate commerce, and that its affairs are being conducted in part through a series of robberies. Accordingly, under R.I.C.O. robbery would be established by as few as two non-commercial robberies by as few as two persons.

S. 1688 APPLIES TO A RESTRICTED NUMBER OF CASES

By contrast with the broad provisions of the three robbery statutes presently in the federal law and described above, S. 1688 only applies to those robberies which meet three very stringent tests. First, the robbery must be committed with a firearm. This requirement automatically eliminates the majority of robberies which occur every year in the United States. Second, the statute applies only to those armed robberies committed by career criminals. Accordingly, robberies committed by persons without substantial record of prior criminal convictions are not covered. Third, S. 1688 does not apply to armed robberies by all career criminals, but only those career criminals who have specialized in robbery and burglary offenses. The act requires that the career criminal have at least two convictions for robbery and/or burglary. Because the bill does not require the participation of multiple defendants or that the robbery occur in any certain type of place, the bill appears to be a general robbery statute with broad applications. In fact, however, it is very narrowly aimed at the hard core of career criminals with long records for robbery and burglary offenses who now have "graduated" to the point of dangerousness and recklessness that they are using firearms to commit further robberies

and burglaries. Accordingly, the robbery provisions of S. 1688 only apply to a very small portion of the total robberies occurring in the United States. The important feature of the bill is that it focuses on the very worst robberies, by the very worst offenders with the worst records. These are the individuals who present such a danger to society as to justify federal prosecutorial forces working to suppplement the primary efforts of state prosecutors.

The other apparent effect of S. 1688, at first glance, is that it greatly extends the reach of the federal law to cover many offenses and offenders not presently covered. In view of the rather extensive coverage of the three present federal robbery statutes discussed above, this is really not so. Indeed, the breadth of S. 1688 in many circumstances is much less than that of the existing statutes. For example, a first offender who commits a robbery of a motel would violate the Hobbs Act, but not S. 1688. In that context, S. 1688 is a far narrower exercise of federal criminal jurisdiction than the Hobbs Act. Another example concerns federal bank robbery cases. A bank robbery committed by a person who presents a note demanding money and claiming that he has a weapon but does not, is presently a federal crime; it would not be a violation of S. 1688. Third, the R.I.C.O. statute would apply to a pattern of two or more robberies committed by a group whose activities in general affect interstate commerce. Thus, a series of street robberies by a youth gang might violate the R.I.C.O. statute. Because the robberies may not involve firearms and the perpetrators would probably not have two or more prior adult robbery or burglary convictions, it is likely that S. 1688 would not apply.

Accordingly, it is important to remember that many types of robberies are already covered by federal law and that rather than broadening the combined coverage of these three overlapping statutes presently in the federal law, S. 1688's real effect is to provide for a guaranteed long sentence for repeat offenders using firearms who are committing further robberies. Thus, in most robbery cases, S. 1688 would not extend federal jurisdiction to an offender or offense not already covered by the federal robbery statutes, but really would simply provide for an appropriately long penalty which is needed to incapacitate the high rate of career armed offenders.

ALL OFFENDERS UNDER S. 1688 ALREADY ARE FEDERAL OFFENDERS

It also is important to recognize that there is no offense covered by S. 1688 that is not already a federal violation. Even those cases of robbery, which would violate neither the Hobbs Act, the R.I.C.O. statute nor the bank robberies statute, but would be covered by S. 1688, also necessarily constitute violations of the Gun Control Act of 1968 and/or the firearms act. Both of the latter statutes prohibit possession of a firearm by a person who has been convicted of a felony in a state court. S. 1688, of course, requires not one, but two or more felony convictions. Also S. 1688, requires that the convicted felon not merely possess the firearm, but actually use it to commit a felony. Therefore, every offender and every transaction covered by S. 1688 would also involve a violation of the gun laws.

With regard to federal jurisdiction over burglars, it is important to recognize that interstate transportation of stolen property is present-

ly a federal offense. Nor is it one that is merely on the books and not enforced. This statute is one of the most commonly prosecuted as a result of the numerous "sting" operations conducted by the FBI. In actual practice, a typical burglar does not commit the burglary and then no related offense. The post-burglary stage of his activities usually involves carrying the stolen goods often across state lines, or at least participating in a knowing and prosecutable fashion with professional fencing operations which clearly are engaged in transporting stolen property across state lines.

Accordingly, in practice, a great many burglary offenders are violating federal, as well as state, law on a regular basis. This is particularly true of the career burglars. Those like Bernard Welsh, the professional burglar who murdered Dr. Michael Halberstam in his Washington home violate the federal law as well as the state law on a regular basis. Welsh's confessions and independent evidence assembled by state and local authorities revealed that in the years preceding the murder, Welsh had committed several hundred burglaries in and around the Washington area. Since the violations occurred in the District of Columbia, as well as in Virginia and Maryland, Welsh would have crossed state lines carrying stolen property. Moreover, professional burglars like Welsh necessarily cross state lines on a periodic basis in disposing of stolen property on a wholesale scale. Welsh, for example, specialized in stealing coins and silverware and other precious metals. Periodically, he would melt down these precious metals into solid ingots in his basement facility. He then arranged to sell the metal ingots to metal dealers in other states, including Pennsylvania. Accordingly, as a part of his general operation, as well as in the context of an individual burglary, Welsh regularly was transporting stolen property across state lines. The practical effect of S. 1688 as applied to a career burglar such as Bernard Welsh would not be to extend the reach of federal prosecution to someone not already within its reach, but to guarantee a sentence of at least fifteen years.

The critical factor with regard to the issue of whether the burglary provision of S. 1688 significantly extends federal jurisdiction is the requirement of a firearm. Of course, in most instances of burglary, it is not known whether the offender possessed a firearm in committing the crime or not. This is because the vast majority of burglaries do not result in apprehension of the offender. Nor is he normally seen, or if seen, he is rarely observed carrying a firearm. Accordingly, even as to burglaries committed by career professionals, the vast majority of them would not be covered by S. 1688 for lack of evidence of the use of a firearm. The sort of case that would be covered by S. 1688 would be one in which a career burglar with a long series of prior convictions is apprehended at the scene of the burglary, and found to be in possession of a firearm. While in this instance it may well be that he would not clearly have violated any provision of present federal law, the fact that it is relatively rare for burglars to be apprehended on the scene carrying firearms, severely limits the extension of federal penal laws resulting from enactment of S. 1688.

The burglary provision of S. 1688, like the robbery provision, by definition could not apply to any offender who was not already violating at least the federal firearms laws. Regardless of questions of interstate transportation of stolen goods, or other federal violations, the mere fact of possession of a firearm the career burglar would constitute a violation of the federal firearms statutes. Actually, the burglary and robbery provisions of S. 1688 are much narrower than the two gun statutes. Both of those statutes require only one felony conviction, whereas S. 1688 requires two. Even more significantly, both of those gun statutes apply regardless of what the felony was. Accordingly, they would apply to persons convicted of offenses such as rape, aggravated assault, larceny, and others. S. 1688 is far narrower in that the prior felony conviction must be either for robbery or burglary or both. Finally, the recent studies on the background and variety of felonies committed by true career criminals reveal a very high likelihood that most of the career robbers and burglars who might be prosecuted under S. 1688 would likely be regular violators of the federal drug trafficking laws. All S. 1688 offenders would necessarily be violators of the federal gun statutes. In addition, many of them would be frequent violators of the Controlled Substances Act of 1970 covering sale and possession of heroin and other "hard drugs". Third, as noted above, many of these individuals would also have violated other federal criminal statutes in both robbery and burglary situations.

The inescapable conclusion that, with rare exception, S. 1688 would not even apply to individuals who were not already subject to federal prosecution under two or more federal felony statutes.

S. 1688 TO SUPPLEMENT STATE PROSECUTION

The central purpose of enacting the statute is to supplement state prosecution. There is no intent to supersede state prosecutions. Indeed, this would be impossible. Presently, more than 95 percent of the violent crime cases in the United States are prosecuted by state authorities. Similarly, more than 95 percent of the law enforcement resources in the country are at the state and local level rather than at the federal level. Moreover, in the last year or two the level of federal resources devoted to law enforcement has been reduced by approximately five to ten percent, not counting inflation. The real reduction is probably well in excess of 5 percent. Therefore, it is clear that the federal governmentc annot even attempt to prosecute a significantly enlarged percentage of the total robbery and burglary cases each year. In terms of percentages, it might make a difference of a fraction of a percent. The federal government might prosecute on the average five and one-half percent of the federal violent crimes in the country rather than five percent.

S. 1688 ONLY APPLIED WHERE NEEDED

Even more important, the statute plainly expresses the intent of Congress that S. 1688 only be applied where and when needed. Therefore, in all jurisdictions, and at all times, and for all particular types of cases in which armed career robbers and burglars ar being dealt with adequately in the state courts, there would be no federal prosecutions. It is likely that in the vast majority of the several thousand county courts in the United States, few if any cases, would be brought

under S. 1688. The statute would only be seriously reviewed for possible application in a relatively small number of jurisdictions where in a relatively small percentage of the cases there was a real question about the ability of the state courts to achieve justice. Usually these cases would be in major urban jurisdiction burdened by severe backlogs and extensive trial delays and jurisdictions in which there is grossly inadequate sentencing of career armed robbers and burglars.

On the issue of inadequate sentences, it is the opinion of many prosecutors who have been consulted that in highly aggrevated cases of robbery, for example, long sentences are generally readily obtainable in state courts, even in urban counties with big backlogs where lenient sentencing is common in other types of cases. For example, a robbery in a restaurant in which people are actually injured by gun wielding robbers with prior robbery convictions is very likely to result in a sentence of fifteen or more years. Where employees or customers are pistol whipped or shot and wounded or locked in a food locker overnight, state judges ordinarily will impose long sentences On the other hand, where the robbery victim suffered no injury and the firearms were not discharged, a robber usually gets a sentence of no more than a few years in many big city courts. This result would be particularly likely if his prior robbery or burglary convictions or other convictions resulted in only short sentences or in probation. For example, a third-time robber who on a first conviction was placed on probation and on his second conviction received a one year effective sentence, who now is before the court for sentencing for a third robbery involving the possession but not the use of a firearm might very well receive a sentence of well under five years. The problem with such a sentence is that because of the prior convictions and the crossing of the psychological barrier to using firearms, it is nearly certain that this robber is a career robber of great dangerousness who commits crimes on a very frequent basis. He is very likely to continue this chosen career for many years if returned to the streets at an early date.

An individual who has reached the hardness of heart, the recklessness, as well as the disregard for the consequences, that he is committing robberies with a firearm despite his prior convictions is probably impossible to rehabilitate. Even given ideal prison programs and circumstances, such an individual would be an extremely difficult case for rehabilitation. Given the actual circumstances in the prisons in virtually all of our states, it is exceedingly unlikely that such an idividual can be rehabilitated while serving a sentence of two or three years. The overwhelming likelihood is that such an individual will quickly return to armed robbery and other serious offenses once released on paraole, S. 1688 is intended to end his career. The career, which would normally continue until the individual had reached the age range of 30 to 40 years, will be terminated because the minimum mandatory sentence of 15 years under S. 1688 will keep the criminal in prison until he is beyond the age of thirty or forty.

If an offender has a great many prior burglary convictions with sentences that started with probation and moved through the misdemeanor to the felony range for those prior convictions, and he is now caught inside a home with a firearm, there is a fair likelihood he will receive a sentence in the range of four to eight years. Of course, the sentence

usually terminates with release on parole after only 2–4 years. In some states, such an individual might be sentenced under the Habitual Criminal Statute and receive a term comparable to the fifteen year mandatory minimum required by S. 1688. In such jurisdictions, there would be no point in resorting to federal prosecution. In other states, however, an individual with that kind of background and record would serve only a few years. Such a case might be a logical candidate for transfer to the Federal Court under this Bill. The rationale behind a federal prosecution leading to a sentence of at least fifteen years is that this offender is committed to a career of burglaries. He commits them at a high rate, and he has crossed an important psychological threshold in now carrying a gun. Thus, while burglary is ordinarily thought of as being an offense of stealth not involving violence or risk to life, in fact such an offender is a major threat to the lives and physical well being of other persons.

The Halberstam murder illustrates exactly this problem. The burglar who enters what he thinks is an empty home carrying a firearm may in fact find occupants there. Or the occupants may return before the burglar has completed his work. In that event an armed burglar suddenly becomes a potential murderer, and sometimes an actual murderer. Accordingly, such an individual should be viewed as a threat to the lives of others, rather than as a mere thief. Because of the very high likelihood he will not be rehabilitated, but immediately upon release will return to committing burglaries at a very high rate for many years, it is necessary to terminate his career by lengthy incarceration.

S. 1688 APPLIED

Beyond the force of these factual circumstances, S. 1688 in effect creates a presumption that the statute should not be applied, except upon the request of the local prosecutor. Accordingly, it is not left to the United States attorney in the district to make the determination as to the likely adequacy of the state sentence. Instead, this matter is left to the local prosecutor who is in a much better position to make such a determination reliably, accurately, and quickly. The Bill contemplates that no case, except in the rarest circumstances, would be considered for federal prosecution under S. 1688 unless and until the local district attorney had made such a determination and had forwarded his file to the federal prosecutor with a request for federal prosecution. Accordingly, there is a very strong dynamic set in motion against a large number of federal cases and against any intrusion of federal prosecutors into realms where state efforts are judged by state authorities as sufficient.

The real effect of the Bill is to create a kind of "safety net" for armed career criminals. To the extent that in a given jurisdiction at a given time, the offender could likely delay trial for a very extended period of time, and continue his offenses or would likely receive a grossly inadequate sentence, the Federal government would step in at the request of state authorities. Of course, the objective would be a just sentence that would adequately protect the public. The alternative to such a limited and carefully targeted Federal intervention is for the armed career criminal to "beat" the state system and return

to the streets at an early date to threaten and further harm the society. The central conclusion underlying S. 1688 is that such a result is simply unacceptable in a society so terribly threatened by violent criminality. Therefore, although Federal prosecution of "street crime" may be undesirable, in most instances the practical necessity of doing so is compelling.

JUSTICE MUST FIND A SUBSTANTIAL FEDERAL INTEREST

S. 1688 contemplates that the officials of the Justice Department must determine that the individual case, requested by the local prosecuting authority, for federal prosecution, involves a substantial enough Federal interest to warrant the exercise of Federal jurisdiction created by the act. This notion is one that has long been followed by the Justice Department with regard to drug offenses and bank robberies, it has long been the federal policy and practice to prosecute such cases only where there is a significant or substantial Federal interest. S. 1688 assumes application of the same standard. Accordingly, even if a local prosecutor requested a Federal prosecution of a particular robbery or burglary under S. 1688, it would not necessarily be initiated. If the case were trivial in nature or of a very highly localized character, the Federal prosecuting authority would ordinarily decline to accept the case for Federal prosecution. Accordingly, there is no realistic likelihood that an ill-motivated state prosecutor could "dump" cases that would be inappropriate for Federal prosecution. Nor is there any realistic possibility that Federal resources may be overwhelmed by a volume of cases. At all times the control on accepting these cases under S. 1688 rests with the Attorney General. Prosecutorial discretion to decline to prosecute the cases remains in full force.

Accordingly, the actual application of S. 1688 in terms of specific offenders, offenses, and places for prosecution would be far narrower than even the narrowly-drawn theoretical application of the statute.

S. 1688 NOT AN EXPANSION OF FEDERAL INVESTIGATIVE EFFORTS

There is another respect in which S. 1688 does not entail significant expansion of Federal law enforcement activities. In terms of manpower, dollars, time or other such measurements of effort, the overwhelming bulk of such resources in the enforcement of criminal statutes are consumed at the investigative stage. The prosecutor stage requires only a small fraction of the total resource allocation. The cases that would be prosecuted under S. 1688 would, except in the rarest circumstances, involve little, if any, Federal investigation. Instead, the arrest would be made, as it is presently, by local police; in most cases, the robber or burglar would be apprehended at the scene or fleeing from the scene. Accordingly, the physical evidence and the statements of witnesses would be obtained primarily—in most cases entirely—by local police rather than Federal investigative agents such as those of the F.B.I. Accordingly, the Bill does not create risk of the Federal investigative apparatus unintentionally interfering with the activities of local police. Nor does it create the risk of a diversion of scarce federal

investigative resources into street crime at the possible expense of organized crime, white-collar crime, public corruption, or other Department of Justice priorities. These remain the priorities of Federal investigative activity. What role the F.B.I. might play in the enforcement of S. 1688 would be largely limited to follow-up investigations. Some of the witnesses initially interviewed by local police might need to be reinterviewed as a part of the preparation of the case for trial. Similarly, the F.B.I. might conduct some additional forensic analysis of the physical evidence used by local police. It is not anticipated, however, that the F.B.I. efforts would be very substantial. Certainly, no additional F.B.I. resources need be added in order to handle the minimal work load that would be associated with prosecutions under S. 1688.

V. Section-by-Section Analysis

SECTION 1

Section 1 provides that the Act may be sighted as the "Armed Career Criminal Act of 1982". The title of the Act is designed to emphasize that it addresses the problem of violent crime by career criminals who are employing firearms in the commission of offenses. The title is meant to suggest that the Bill have limited scope in that it only deals with career criminals and only those career criminals who are armed. Certainly in ranking all types of crimes and criminals, violent felons who are career criminals using firearms would represent the gravest and most dangerous strata of the entire criminal population in America. Thus, while the Bill is limited in scope and narrowly targeted at one class of particularly troublesome criminal, it is nevertheless, a major bill because it focuses on the most harmful group of criminals. They constitute the core of the epidemic of street crime in America today.

SECTION 2

Section 2 provides that the Bill shall be included in the Federal Criminal Code. Section 2 specifies that a new section shall be added to Chapter 103 of Title 18 United States Code. Chapter 103 includes all the Federal robbery and burglary offenses, both those on Federal enclaves and those within Federal jurisdiction under enumerated Constitutional powers, especially the commerce clause. At present, Chapter 103 ends with Section 2117. Accordingly, the Armed Career Criminal Act would become Section 2118 and would appear at the end of Chapter 103. Including the Armed Career Criminal Act in the primary criminal title of the United States Code is most appropriate. Since the Act is designed to constitute a significant step in the national effort against violent street felonies, placing the Act in any other part of the United States Code would be inappropriate. Unlike certain specialized criminal statutes which are ancillary to regulatory powers of various Federal agencies, S. 1688 concerns the basic criminal jurisdiction of the United States and the criminal law enforcement powers of the Department of Justice.

Since no portion of the Code specifically deals with the category of career criminals, the committee chose to insert the Act in the appropriate part of the Code on the basis of the generic offenses it addresses: robbery and burglary.

The Act does not supercede any of the existing provisions of Federal law concerning robbery and burglary. The robbery provisions of the Hobbs Act, the Bank Robbery Statute, R.I.C.O. and the others are in no way changed by implication either. All will continue in full force and effect although in a given case the prosecution might elect to proceed under the Act in lieu of one or more of the above statutes.

If the proposed Federal Criminal Code revision is ultimately enacted, the committee contemplates that the Act would be inserted following the robbery and burglary provisions of the new Code. This would be possible without displacing any other provisions in the Code as approved by the committee, or undermining the logic by which the various sections of the new Code were sequenced.

SECTION 2 DEFINES THE NEW FEDERAL CRIME

Section 2 also contains the operative language which creates the new Federal offense. The offense itself is contained in Subsection A which provides that:

> Any person who while * * * in possession of * * * any firearm * * * commits, or conspires, or attempts to commit robbery or burglary in violation of the felony statutes of the state in which the offense occurs * * * —(1) may be prosecuted for such offense in the courts of the United States if such person has previously been twice convicted of robbery or burglary * * * in violation of the felony statutes of any state.

Accordingly, the Act applies to any persons participating in a robbery or burglary provided only that the crime involve the use of a firearm and the person have the requisite prior convictions. The Act applies to an offender acting alone as well as those acting in concert. It applies regardless of the location of the robbery or burglary and regardless of the victims. Nor is physical injury to the victims required. While a gun must be used in connection with robbery or burglary, the offense is committed whether or not the firearm is discharged. Since the Act requires only "possession," it would even apply to a robbery or burglary in which the weapon was carried by the offender but not seen by those who observed the offense. Of course, there would have to be proof of the possession of the weapon. Ordinarily, this would be based on the observation of witnesses, or on the confiscation of the weapon upon apprehension of the offender.

With regard to the prior convictions, the Bill requires that they be for robbery, for burglary or for some combination thereof. Moreover, it requires that the convictions be for felonies. Accordingly, even if the offenses originally charged were felonies, where the case is disposed of as a misdemeanor, it does not count as a prior conviction for purposes of the Act. Felony convictions for other violent offenses such as rape or armed assault do not count as prior convictions under the Act. Even though studies show that offenders who have the requisite prior convictions are also highly likely to have a large number of convictions for possession and sale of drugs and for various offenses involving theft

by stealth or physical violence or the threat of violence, the intent of the committee was to limit th focus to those repeat offenders who showed a pattern of committing robberies and/or burglaries. They are the true career robbers and burglars. The Bill is meant to apply strictly to this group of offenders.

The Bill provides that prior convictions may be either under state law or Federal law. Similarly, the third or subsequent robbery or burglary may be in violation of either state or Federal law. Interchangeability of convictions of, and offenses against the law of the two sovereigns is necessary in order to allow vigorous prosecution of the armed career robbers and burglars. Otherwise, those who are apprehended and charged alternatively by the two different sovereigns would escape the provisions of the bill until amassing record of perhaps four, five or six prior convictions.

For example, an offender convicted under state law of robbing a store and then under federal law of robbing a bank who now commits a third robbery using a firearm against a store, would be covered by the Act. His federal bank robbery conviction counts as a robbery conviction just as much as his state conviction for robbing a store. Now, when he robs another store in violation of state law, the robbery becomes a federal violation so that the court has jurisdiction to try that robbery and the two prior convictions required by the Act are present.

SECTION 2 REQUIRES A FIREARM IN THE PRESENT CRIME

Since the Bill addresses armed career criminals, it would have been logical to require that the prior convictions for robbery and/or burglary also involve use of a firearm. The committee determined such a requirement would be impractical, since "rap sheets" frequently fail to reflect whether a weapon was used or, if so, whether it was a firearm or a knife or some other instrument. Ultimately, the certified records of a state court conviction would be obtained by federal prosecutors for production in a federal court. Accordingly, by the time the case was ready for trial, it would usually have been determined whether the state robbery or burglary conviction did or did not involve a firearm. However, in the earlier stage of the case: at, and immediately following the arrest, and through the time of indictment, in many cases it would not be possible to determine whether the prior offenses involved firearms. Accordingly, the committee deemed it sufficient to require that the present offense involve a firearm.

An argument could be made that where the prior offense did not involve use of a firearm, the offender should not be regarded as (1) habitually using a firearm, or (2) likely to continue to use firearms in future offenses. While in individual cases this may be entirely accurate, the committee felt that even the first use of a firearm to commit a felony such as robbery or burglary represented a very important turning point in the course of the career of a repeat offender. Once a habitual robber or burglar turns to carrying a firearm, he has made a decision that he is prepared to kill or injure victims or witnesses. Once he has made such a mental determination, he has become a far more hardened criminal as well as a more dangerous one. Moreover, the

mere presence of the weapon at the time of the new offense creates substantial risk that it may be used. An offender may set out to commit the crime expecting that he would not use the weapon he was carrying. Nevertheless, a burglar caught by surprise or a robber who feels threatened by refusal of victims or witnesses to cooperate may well find himself using the weapon. Consequently, an innocent person may be injured or killed, regardless of the lack of a premeditated plan to employ the weapon. Thus, the mere fact of being armed makes a criminal much more dangerous.

SECTION 2 ASSUMES A PATTERN OF USING FIREARMS

Finally, just as it is unlikely that a robbery or burglary in which a career criminal is apprehended is in fact only his third offense, it is equally unlikely that the occasion represents the first time that he has carried a firearm during the commission of a felony. Far more likely, the two prior convictions were only a small fraction of the total number of robberies and burglaries he committed. After all, on the average, fewer than one-fifth of all robberies result in an apprehension and less than one-sixth of all burglaries result in an apprehension. Thus, in all likelihood, an offender convicted of a second robbery or burglary has probably committed at least ten such offenses which did not result in apprehension. Using the Survey estimate that robberies and burglaries are generally underreported by a factor of two, the likely number of prior offenses would exceed twenty by the time of the second conviction. If some "credit" is given to a career criminal for being able to avoid detection more frequently than the average robber/burglar, the number rises still further. Considering the fact that a reasonable number of robberies and burglaries are committed by people who are significantly intoxicated, either because of excessive use of alcohol or the use of drugs, and thereby many of them become significantly more prone to apprehension both because they are likely to act more recklessly and because they are less able to escape, it can be seen that by the time of a second robbery or burglary conviction a particular offender may well have committed several scores of robberies or burglaries. Thus, it is highly likely that when apprehended for a third robbery or burglary, this one involving the use of a firearm, the offender in fact has been using the firearm regularly on numerous prior jobs.

In any event, the psychological threshold involved in a criminal's decision to carry a loaded firearm on a robbery or burglary is such that if it has been done once, it has or will be done again and again. Just as possession of a firearm is a sign of a hardened career criminal and just as it is an added element of danger in the offense quite aside from the state of mind of the offender, it is a question of "graduating" to a higher level of criminality. Once the level is reached, it is likely to be sustained.

For all these reasons, it is felt that even in the absence of firearms in the two prior convictions, the likelihood of the statute being applied to one who has only used a firearm on one occasion or would be unlikely to use it on future occasions is extremely low.

SECTION 2 ONLY COVERS CAREER CRIMINALS

The significance of the word "if" must be emphasized for it means federal jurisdiction over the person depends on the prior convictions. That is, the statute has no application whatsoever to any armed robbery or burglary in violation of either state or federal law in which the perpetrator does not have two or more prior convictions. Thus, the statute is strictly limited and applies only to career criminals—defined as those with two or more prior robbery or burglary convictions. Arrests, of course, do not count. Neither do convictions, whether following a guilty plea or trial, to lesser offenses that are not felonies. Even where the offense violates federal law—such as a bank robbery—the Act still does not apply unless the criminal has the required prior convictions. The offender could, of course, be prosecuted and convicted for simple bank robbery under the applicable federal statute. But, he could not be prosecuted under this Act. The prior convictions, therefore, are an element of the jurisdiction of the court over the person of the prospective defendant. If he does not have the prior convictions, his conduct is beyond the jurisdiction of the court under this particular statute.

THE ACT APPLIES REGARDLESS OF ROLE OR COMPLETION

Provided the armed robber or burglar has the prior convictions, the Act applies to him regardless of his precise role in the crime. The Act is specifically intended to cover all participants. Whether a particular offender was the driver of the getaway car, the lookout who stood at the door of a business office being robbed, the one who carried the stolen goods, or the one who confronted the victims and presented the demands makes no difference. All are principals in the robbery; all are deemed fully accountable; and all are prosecutable under this Act.

The Act is intended to apply regardless of the extent to which the intended crime was actually consummated. Accordingly, by its terms it applies to one who merely conspires to commit a robbery or burglary as well as one who actually completes the job. Similarly, the bill expressly covers "attempts". Therefore, the Act applies to all robberies and burglaries from the point at which a plan or agreement has been formulated and the first overt action in support thereof has been taken (a conspiracy) through entering the premises or trying to enter (an attempt) to the actual consummation of the robbery or burglary including departure with stolen goods.

The committee concluded that the degree of completion of the crime was irrelevant. What mattered were the objectives of the criminals and their records of prior convictions revealing that they were true career criminals, plus the fact of the use of possession of the firearm. For the same reason, prior convictions meet the terms of the status even if they are merely conspiracies or attempts to commit robbery or burglary in violation of state or federal law.

Two specific phrases which appear in subsection (a) warrant special explanation. The first is the inclusion of the phrase "or any other participant in the offense" in regard to the requirement of possession

of a weapon. Thus, it is specifically intended that the statute apply to a person even if he himself is not armed so long as one of the other participants in the crime is in possession of a weapon. Experience shows that burglars ordinarily operate alone. Therefore, this provision would have little, if any, application to career criminals engaged in a burglary which becomes the basis of a federal prosecution under the Act. With regard to robbery prosecutions, experience reveals that where one or more of a group of robbers are in possession of a firearm, the remaining members of the group usually are fully aware of and consent to the involvement of a firearm. In most cases involving multiple perpetrators, they are all within sight of one another during part or all of the robbery. Therefore, they are specifically aware of the possession of the weapon by their confederate who ordinarily openly brandishes the firearm. Even where none of the offenders carrying weapons are openly displaying them within the sight of others who are not in possession of weapons, the committee believes that the kind of planning required for this sort of robbery usually includes some discussion or at least tacit agreement regarding the use of firearms. Accordingly, even a member of a group who stays outside the premises where the robbery is occurring, such as a gateway driver, is usually fully aware and approving of the use of a firearm even if he himself does not have a firearm.

In general, where there are multiple perpetrators in the robberies of establishments, most if not all of the offenders are carrying weapons. The reason is apparent: the operational effectiveness of the group of robbers is far greater if all of them are carrying weapons since it enables each of them to be in a slightly different part of the premises and exert maximum control over employees, patrons, and others who might be present. Since many establishments that may be the scene of a robbery consist of several essentially separated rooms or hallways or other areas, it is greatly to the advantage of robbers if all of them who are present at the premises carry a firearm.

The statute uses the word "possession" intentionally. Since the hardness of heart, the degree of recklessness, and danger of killing in the event of surprise, all arise from the fact of the firearm being present, the committee decided that its display ought not to be a requirement of the statute.

S. 1688 IS NOT A STATUS OFFENSE

Finally, it is important to emphasize the phrase which appears in subsection (a)(1) that the person prosecuted under the Act is being tried "for such offense". That is, the federal prosecution under the Act is based on the transaction constituting the third robbery or burglary. It is not simply a matter of imposing a federal sentence based on prior state conviction. The robbery or burglary itself would be tried in the federal court under the Act. With regard to the well established body of case law prohibiting "status offenses", the Act accordingly presents no problem. It does not create a status offense. What it does is authorize federal prosecution for the repeated violations of state law by armed career criminals. It is, therefore, comparable to the R.I.C.O. statute which authorizes federal prosecutions based on a pattern of state offenses.

FEDERAL JUDGE DETERMINES OFFENSE THROUGH STATE LAW

The precise elements of the particular offense would be determined by the federal judge according to the applicable state law where the third offense is a state violation. Thus, a federal judge in the Eastern District of Pennsylvania would instruct the jury with regard to the elements required to make out the offense of robbery or burglary under the law of Pennsylvania. The terms "robbery" or "burglary" are meant to describe generic categories of offenses derived from the common law. Thus, burglary includes those felony offenses of the given state which are in the nature of burglary, regardless of what their title may be. Thus, a state felony statute prohibiting Breaking and Entering of a residence would trigger the application of this Act, even though the offense is not called "burglary". While the generic offense of burglary derives from English common law, the committee does not intend that the original common law definition of burglary apply. Thus, there is no requirement that the criminal enter "the dwelling house of another in the nighttime". On the contrary, if the State of Indiana makes it a felony to enter an unoccupied commercial premise in the daytime without authority or color of right, then that constitutes burglary for the purpose of this Act.

The committee does not anticipate that applying the definitions and elements of the offense of the pertinent state's law will create any difficulty or confusion either for the federal judiciary or for federal grand and petit juries. For one thing, federal judges and jurors routinely apply the specific provisions of state law in a large variety of civil cases, including those involving suits brought in the federal courts only because of diversity of the citizenship of the parties. Moreover, as noted above, in the case of the R.I.C.O. statute and other federal criminal offenses the definition in state law of specified state offenses is incorporated by reference into the federal law. This practice has not proven troublesome either as a matter of the conduct of trial or appellate review.

In terms of the procedures of the prosecution, the proceedings would, of course, be conducted according to the Federal Rules of Criminal Procedure rather than the counterpart state rules. Usually the delineation between substantive and procedural law is perfectly clear. In the rare circumstances where it may be somewhat in doubt, the committee anticipates the federal judiciary will have no more trouble in resolving the matter than it has had with the R.I.C.O. statute.

S. 1688 APPLIED

The essential thrust of the Act lies in susbection (a)(1) discussed above. The Act would provide for the first time in the history of federal law enforcement, the opportunity where the circumstances warranted, to shift to the federal courts the prosecution of major crimes and criminals of the generally violent type which heretofore have been largely left to the states. Moreover, it would allow this transfer without a specific showing in a particular case of an effect on interstate commerce. As noted in earlier sections of this record, the primary advantages of such a choice of for a would be three: (1) faster trial, (2) more

restrictive bail laws which would allow highly dangerous offenders to be incarcerated while awaiting an expedited trial and (3) the likelihood, given the prevailing practices of federal judges, of a very substantial sentence for the career criminal who has committed a further felony with a firearm, and the assurance of a sentence of at least 15 years.

As noted earlier, FBI figures reflect that federal judges typically give bank robbery defendants sentences in the ranges of upwards of fifteen years. Nevertheless, in order to emphasize the imperative of incapacitating the armed career criminal for the rest of his normal career, the Act explicitly requires that upon conviction the defendant be sentenced to a fixed term of not less than fifteen years imprisonment. Subsection (a)(2) provides a pertinent part that the sentence shall be "a term of imprisonment of not less than fifteen years nor more than life." It also provides that the defendant "may be fined not more than $10,000". As with regard to federal criminal statutes generally, the fine may be imposed in addition to the required prison term.

The Act creates the federal equivalent of a habitual criminal statute. Forty-five of the fifty states presently have habitual criminal statutes. They variously provide for additional consecutive prison sentence of a minimum amount or of up to a certain maximum range. In many cases, the imposition of a habitual criminal sentence—in addition to whatever sentence the court may choose to give the offender for the underlying offense—is entirely discretionary. That is, the court is left entirely free to impose no sentence on the offender which requires additional punishment because of the combination of the prior record and the current offense. Approximately half of the habitual criminal statutes provide for the possibility of a sentence of life imprisonment. Nearly all of the statutes apply to convictions for any felony. They do not require use of a firearm, either for the earlier or the more recent offense. Nor do they require violence or potential violence. Accordingly, three larcenies would qualify in many states for treating the offender under the habitual criminal statutes.

As originally formulated, the Act required a mandatory sentence of life imprisonment. The reason was that the Act was so narrowly drawn to apply only to the most repetitive and violent and dangerous offender, that a life sentence would be justified in any case that could reasonably be expected to be prosecuted under the Act. Indeed, it is the underlying premise of the Act that at a certain point, a career criminal becomes practically impossible to rehabilitate. The Act also recognizes that career criminals commit offenses very frequently and ordinarily continue to commit them for a period of many years, usually ranging up to the age of thirty to forty years old.

There is also an underlying premise that the likelihood of the individual career criminal returning to a life of crime and continuing that life of crime are essentially unaffected by short or medium range prison sentences. Thus, the conclusion is that the only way to prevent further offenses by such a career criminal is to remove him from society on an essentially permanent basis.

LIFE SENTENCE VERSUS 15-YEAR SENTENCE

In the course of extended consultations with representatives of the White House, the Justice Department and others in the Administration, more attention was paid to the issue of a mandatory life sentence than any other issue. Two objections to a mandatory life sentence were raised by these representatives. First, there was the concern that the inflexibility of the penalty provision might make the statute more difficult to enact. It is well known that mandatory minimum sentencing schemes in general have been opposed by federal judges as well as by many legal scholars and penologists. The framers of the Act in its original form believed that the inflexibility, while a defect in other mandatory sentencing schemes, was not a defect in this one. After all, the statute only applied to the most dangerous and repetitive criminals. Moreover, their prior convictions ordinarily would or should have resulted in extensive prison sentences.

Thus, the idea was that once the career criminal has become a "three time loser", the only reasonable disposition is permanent incarceration. Nevertheless, it was recognized that requiring a life sentence for robbery and burglary was unprecedented. The numerous state habitual criminal statutes that authorize life sentences do so on a discretionary basis and leave entirely within the power and choice of the court the actual enhanced sentence to be imposed.

Moreover, hypothetical circumstances can certainly be formulated which would undoubtedly involve violations of the Act but arguably not justify a life sentence. In addition, it was regarded as essential to prevent premature release of hardened criminals by prohibiting release on parole under the Act. Therefore, imposition of a life sentence would literally mean that unless pardoned, the offender would be confined for the rest of his natural life. Since the criminal studies described in earlier sections of this report generally show a rapid fall off in the rate of offenses committed by career criminals once they reach general age range of thirty or forty years old, a mandatory life sentence could result in unnecessarily extensive incarceration of people who may have reached an age where they might no longer be dangerous. Moreover, the framers of the bill recognize that in general the sentencing pattern of federal judges for violent crimes was entirely appropriate even though many state judges seem to impose unduly short sentences. Thus, there was little apprehension that flexibility in the penalty provision would lead to significant or widespread aberration by the federal judiciary or otherwise compromise the objectives of the statute.

For these reasons, the bill's sponsors agreed to accept the suggestion of the Administration that the bill not require a life sentence in every case, but provide a range of penalties in the discretion of the court. It was agreed that in view of the prior record and the severity of the current offense, as well as the need to incapacitate the offender for the balance of what would otherwise likely be a normal criminal career, a sentence of at least fifteen years was in order. Accordingly, the statute requires fifteen years in prison but allows any greater term in the discretion of the court. The court can impose a sentence of life imprisonment.

PROVING PRIOR CONVICTIONS

A problem was posed how to incorporate proof of the prior convictions into the proceedings. The primary objective was to avoid prejudicing the defendant's opportunity for a fair determination by the

tryer of fact. Accordingly, it was decided at the outset that the facts constituting the prior conviction ought not to be alleged in the indictment or proven at the trial. Subsection (a) (2) stipulates a procedure whereby the prior convictions can be proven any time after the trial and before the sentencing. The section states a requirement of "proof of the requisite prior conviction to the court at/or before sentencing * * *." The language was intended to preclude the facts being presented to the jury, to simplify the trial by eliminating any requirement to prove the prior convictions, even out of the jury hearing as a part of the trial itself, and to provide the presiding judge with considerable flexibility as to precisely when to require the proof of the prior convictions.

EVIDENCE OF PRIOR CONVICTIONS

It is contemplated that ordinarily the court will not require evidence of the prior convictions until after the trial is completed. Of course, the court may, as a part of the discussion during a pre-trial conference, demand assurances that the prosecution has the requisite proof. The court may even require that it be shown the proof at the pre-trial conference. Ordinarily, the proof will be in the form of certified court records from the state or federal courts where the prior convictions were obtained. In some circumstances, there may also be ancillary fingerprint records or other records of identification. Moreover, the court might require the prosecution to submit to the defense attorney, at or before the pre-trial conference, copies of such records. All these measures would be entirely consistent with the procedure envisioned under this bill. The key point is to leave the flexibility with the presiding judge.

Generally, it is expected that the submission for the record of the proof of the prior conviction would occur either at a separate proceeding following the trial and in advance of the date of sentencing or at the proceeding concluded by imposition of the sentence itself. Again, the discretion is with the court. Where the defense has indicated an intention to challenge the sufficiency of the records, probably a separate hearing would be the best way to proceed. On the other hand, if the prior convictions were to be stipulated to, or their proof to not be subject to serious challenge, most efficient use of court time might be for that proof to be presented in the early part of the sentencing hearing.

PRIOR CONVICTIONS NOT AN ELEMENT OF THE OFFENSE

The proof of prior convictions, properly viewed, is an element of the in personam jurisdiction of the court, not an element of the offense. The only elements of the offense are: (1) those required to make out the crime of robbery or burglary under the applicable state felony statute and (2) proof of possession of a firearm. Therefore, there is no legal requirement that the prior convictions be proven prior to the jury rendering a verdict or the defendant entering a guilty plea.

To make plain the intent of Congress with regard to proof of the prior convictions, subsection (b) specifies that the prior convictions "need not be alleged in the indictment". Subsection (b) (2) further

provides that neither "shall proof thereof be required at trial to establish the jurisdiction of the court or the elements of the offense". This language is included to make it clear that the phrase in the prior section of "at or before sentencing" was not intended to include the trial proper.

In addition, it is important to preclude collateral litigation on the circumstances for proof of the prior convictions. The effect of the language in Subsection (b) (2) is to eliminate the need to complicate the trial with proof of the prior conviction as well as to eliminate the risk of prejudice to the defendant. Moreover, the language is intended to preclude motions during the trial of the prior convictions.

The only alternative procedure suggested was to put the defendant to an election. He would be required to either stipulate to the prior convictions or agree to their being proven during the course of his trial. Such an election seemed unfair to the defendant, unnecessary and unwise. Even if the issue of the prior convictions and the sufficiency of the proof thereof were to be heard outside the jury during the course of the trial, it would have potentially troublesome effects and no significant advantages. For one thing, it would likely result in the jury being held longer than necessary. Second, it might result in an undesirable diversion of the course of the trial. Ordinarily, the defendant has only three lines of attack against the proof of prior convictions: (1) that the records are not in due form and are not admissible and reliable under the judicial notice provisions of the Federal Rules of Criminal Procedure; (2) that even if in proper form, the records do not in fact accurately reflect the disposition of the cases in the earlier prosecutions; and (3) even if the records are in due form and accurate, they refer to another person.

The second and third lines of challenge are likely to involve the defendant taking the stand and possibly the presentation of other witnesses as well. For such a "trial within a trial" to occur was viewed as an unfortunate diversion from what ought to be the proper course of the trial. Nor is there any advantage to the defendant. He is as well served by litigating these issues in a post-trial evidentiary hearing. Finally, if the defendant is acquitted, there is no need to pursue determination of issues raised regarding sufficiency of the proof of the prior conviction.

Accordingly, the framers of the Bill chose to leave this issue for the post-trial phase. Subsection (b) also contains clarification with regard to sentencing under the provisions of Subsection (a) and particularly the matter of serving the sentence.

SUBSECTION (b) (3) PRECLUDES PROBATION

Subsection (b) (3) provides: "any person convicted under this section shall not be granted probation nor shall the term of imprisonment imposed under paragraph (a) or any portion thereof be suspended". The general authority of the court to impose probation in lieu of a prison sentence authorized by the penal statute is thereby explicitly removed. Similarly, the general authority of judges to suspend all or part of a prison sentence is also removed. This language therefore reinforces the implications of Subsection (a) (2) that the sentence means at least fifteen years in prison.

SUBSECTION (b)(1), COURTS CONSIDER DANGEROUSNESS IN ASSIGNING BAIL

Subsection (b) also contains substantive provisions with regard to bail and parole. Concerning bail, Subsection (b)(1) provides that "any person charged pursuant to this Section shall be admitted to bail pending trial or appeal as provided in 18 U.S.C. 3148". Section 3148 concerns persons awaiting trial for capital offenses and persons who have been convicted and have appeals pending. The essence of this Section is to authorize the judicial officer to determine the issue of the defendant's bailability in the light of his dangerousness to the community. It is generally assumed that pursuant to the provisions of the Bail Reform Act of 1965, a federal judge does not have the authority to consider the defendant's dangerousness, as opposed to the risk that he may not appear for further proceedings. Under current law the only provision explicitly providing the court the authority to consider dangerousness is Section 3148. If the federal criminal code were to pass, it has more elaborate provisions to the same effect. However, the future fate of the proposed code has been sufficiently uncertain for a long time, that it was thought advisable to incorporate the provisions of an existing statute.

Section 3148 does not require pre-trial incarceration. Nor does it authorize the setting of bail in unreasonably high amounts. It merely allows the court to consider the dangerousness of the offender to the community, including the victims and witnesses, in determining whether or not to release him under any conditions or terms of bail. It is expected that under S. 1688 defendants would be released, to await trial in some cases and held in custody in others. It is also expected that those defendants held in custody awaiting trial would be tried even more expeditiously than those released.

Of course, the Speedy Trial Act, provides for trial within seventy days of indictment for all federal defendants. Failure to meet this deadline can result in dismissal of the charges against them. In light of the intent of Congress as stated in Section (4)(b), discussed below, that all persons charged under this Act shall be tried expeditiously, it is anticipated that defendants charged under this Act will be scheduled for trial more rapidly than virtually any other category of federal defendants. Therefore, it is expected that their trials will be held at a far earlier date than required by the Speedy Trial Act. Defendants released on bail might be tried in six to eight weeks in the ordinary cases. Under S. 1688 it is expected that they might be tried in three to five weeks. Those held in custody awaiting trial would be brought to trial even faster.

It is believed that since the capacity of the federal courts to try defendants in compliance with the Speedy Trial Act in every case is not in doubt, but proven by a massive record assembled in recent years, the capacity of the federal court to give cases under this Act the precedence that would result in far faster trials for those prosecuted under the Act, is equally clear. Accordingly, there is assurance that defendants incarcerated and awaiting trial under this Act would actually be tried in a matter of a few weeks. Accordingly, it is thought that the prospect of a very early trial provides an adequate safeguard and assures basic fairness for those denied bail.

Originally, the Bill stipulated that the trial must be within sixty days of arrest or indictment, whichever occurred first. The specificity of this provision was viewed as being too inflexible and potentially troublesome by the Justice Department. There was a concern that it might interfere with the management prerogatives of the federal judges and their court administrators and also might complicate the task of the United States Attorneys. However, the Justice Department agreed with the notion that cases under this action be tried at the earliest possible time and in preference to cases under nearly all other federal criminal statutes.

SUBSECTION (b)(4) PROHIBITS RELEASE ON PAROLE

Subsection (b)(4) requires that the sentence imposed shall be the sentence served. It states: "any person convicted under this Section shall not be released on parole prior to the expiration of the full term of imprisonment imposed under paragraph a." Accordingly, if the court imposes a sentence of twenty years, the defendant must actually serve the entire twenty years. Similarly, any life sentence imposed under the Act would be literally for life. The provision does not preclude parole supervision following completion of the sentence imposed. Thus, if the court imposes a sentence of fifteen years on an offender, he would be released after he had served fifteen years and could thereafter be under parole supervision as ordered by the court. The provision simply intends to eliminate early release on parole. The reason, of course, is that these offenders are viewed as undeserving of early release even given exemplary behavior in prison, because of the heinous and dangerous quality of their recent crime and prior felony convictions. Moreover, the studies cited above indicate that if released prior to reaching the age at which their criminality will naturally diminish, these offenders are highly likely to quickly resume their careers.

Given the typical backgrounds of offenders who would be prosecuted under the Act, recent studies based on confessions of the inmates themselves establish that any career criminal with two or more prior convictions for robbery or burglary is almost certain to have an even larger number of prior convictions for other serious offenses, as well as a large number of lesser offenses. Given the prior criminal record viewed in its totality and the fact of using firearms to commit a major felony, it is viewed as conclusive that the application of the statute is limited to very serious criminals who are highly dangerous and effectively beyond rehabilitation. Under these circumstances, precluding early release on parole seems warranted and does not subject the defendant to unjustified sanctions.

The proposed federal criminal code revision likewise eliminates early release on parole. In fact, it does so for all categories of offenses. The proposed code also contemplates that crimes of violence will result in lengthy sentences. Thus, the code would establish a commission which would recommend guidelines which, if approved, would be followed by federal judges in imposing sentence. For each offense the guidelines would recommend a range of sentences. With regard to serious and violent crimes, the statute itself mandates that the commission's proposed guidelines contain a substantial period of incarceration for such offenses. Moreover, the code provides that where a firearm is

used to commit a federal felony, the court impose at least two years imprisonment above and beyond that imposed for the underlying felony.

Accordingly, in every respect, the sentencing scheme proposed in S. 1688 is consistent with the proposed criminal code. The sentencing scheme of the Act is also consistent with the trend in the legislatures and state courts throughout the country over the last decade. They have moved increasingly toward a determinant sentencing structure and the view that highly serious criminality must result in sure and substantial prison terms. Finally, like the proposed federal criminal code, the laws of many states contemplate an additional sentence being imposed whenever a firearm is present. Both federal and state enactments, and proposals of recent years also give considerable weight to prior record of convictions in terms of what a minimum sentence should include.

S. 1688 REQUIRES NO PRIOR INCARCERATION

S. 1688 does not require that the prior convictions resulted in incarceration. Some habitual criminal statutes in various states do require that the prior convictions led to sentences of imprisonment. Such a requirement was not adopted for this bill because the very problem the bill is designed to remedy is the consistent pattern in certain jurisdictions of totally inadequate sentencing of violent criminals for major offenses. To require that in order to qualify under S. 1688 as prior convictions, the prosecutions have ended in a jail sentence, would be to provide a sanctuary for precisely those armed career criminals most in need of federal prosecution.

The argument could be made that the imposition of probation or the suspension of jail sentences in earlier cases reflected a judicial determination that the crime was not serious. This argument seldom has any justification. By requiring that the conviction be for a felony rather than a misdemeanor, the Act excludes less serious offenses. Whether the jury convicted of a lesser offense, or the conviction was the result of plea bargaining reflecting the judgment of a prosecutor that a misdemeanor conviction and sentence were appropriate does not matter. One way or the other, it is believed that all of the truly non-serious burglary and robbery prosecutions would have been downgraded to misdemeanors. Where the conviction is for the felony, and particularly when the felony must be in the "family" of robbery or burglary, no argument can be maintained that the offense is not serious. Moreover, it is well understood that where probationary sentences are imposed, they reflect the hope and the expectation that despite the past offense, the offender is likely to reform and not to commit further felonies. Where subsequent events prove this hope to be totally unfounded, the defendant does not deserve the benefit of any inference that his earlier crimes should be viewed as not serious.

SECTION 3

Section 3 of the Act merely provides that the table of sections for Chapter 103 be added to by placing at the end of the new Armed Career Criminal section, Section 2118.

SECTION 4

Section 4 reflects the intent of Congress with regard to the initiation of prosecutions under the Act. Section 4 has three subsections which deal with one major issue. Subsection (a) concerns the consultation with local authorities and joint review of cases to determine whether they should be transferred to federal court for prosecution under this Act. The subsection stipulates that ordinarily cases will be prosecuted only upon request of the local District Attorney. It also stipulates that even where the District Attorney has made a request, the Attorney General retains full discretion to accept or refuse to bring such a prosecution. Finally, the subsection contains a procedure whereby even in the absence of the request of the local District Attorney, four specified top-level Justice Department officials in Washington can authorize the initiation of a case under the Act.

The subsection begins with the broad statement of understanding as follows: "It is the intent of Congress regarding the exercise of jurisdiction under this Act that ordinarily the United States should defer to state and local prosecution of armed robbery and armed offenses." More than 95% of such cases are presently prosecuted in the state courts, except for bank robberies which have a higher percentage prosecuted federally. Nothing in the Act is expected to change case unless there is specific reason. Thus, where the local prosecution this overall division of labor between federal and local law enforcement. Nor is the Act expected to change the handling of an individual cases unless there is specific reason. Thus, where the local prosecution system is able to achieve just results, there is no expectation that the case would even be reviewed for transfer to the federal courts, much less prosecuted federally. Where, however, because of sentencing patterns bail laws, court backlogs, or some other circumstance, the expectation is that just results cannot be achieved in the ordinary course of state prosecutions, consideration should be given to the possibility of transfer to the federal court. Thus, in many jurisdiction there will be little, if any use of S. 1688. On the other hand, in those limited number of jurisdictions, most of which are in major urban centers where there has been a major breakdown in the criminal justice system, there may be a need to resort to federal prosecution.

The Act is very flexible. Under the Act, in one period, cases might be referred for federal prosecution whereas in the same jurisdiction in another time period they may not. Thus, the pattern of referral of cases for federal prosecution is expected to vary, not only from jurisdiction to jurisdiction, but from time to time.

The statute contemplates that there will always be consultation before a decision is made as to which forum the case should proceed in. The creation of law enforcement coordinating committees in most of the jurisdictions throughout the country should provide a mechanism for assuring the maximum cooperation in this matter. Similarly, the expanding programs for cross-designating federal and state prosecutors should facilitate application of the statute. Finally, the development of written and unwritten guidelines on declination policy for federal prosecutors should facilitate the orderly review of these cases and the development of the firm standards for making the necessary determinations.

The statute contemplates full consultation in all cases and mutual consent in most. That is, no federal prosecution would begin without full discussion with the local prosecuting authority and any other state and local officials interested in the matter. Second, in all but the absolutely rarest of cases, no consideration would be given the federal prosecution unless and until there were requests from the District Attorney. Even then, prosecution would not necessarily follow, but would be a matter for the Attorney General and his subordinates to determine as they do in other cases of broad concurrent jurisdiction. The essential considerations would be two-fold: (1) Is there reason to believe that a far better result could be obtained in the federal court and (2) does thec ase involve a "significant federal interest"? Unless Justice Department officials determined both questions in the affirmative, there would be no federal prosecution.

ATTORNEY GENERAL RETAINS NORMAL PROSECUTORIAL DISCRETION

The local District Attorney does not have an absolute veto over initiation of the federal prosecutions. To give him such a power would be grossly anomalous. Accordingly, the statute that provides that "if after full consultation between the local prosecuting authority and the appropriate federal prosecuting authority, either the local prosecuting authority requests or concurs in a federal prosecution and the Attorney General finds such prosecution practicable, *or* the Attorney General, Deputy Attorney General, Associate Attorney General, or designated Assistant Attorney General, determine that federal prosecution is necessary to vindicate a significant federal interest, then federal prosecution may be initiated under this Act." Thus, one of the four top officials in the Department of Justice in Washington can authorize federal prosecution even over the objection of the local District Attorney. However, the United States Attorney, the counterpart of the local District Attorney cannot do so on his own. Moreover, the high Justice Department can only authorize a prosecution upon making a determination that the federal prosecution is "necessary to vindicate a significant federal interest". That requires (1) that there be a significant federal interest presented by the circumstances of the case and (2) that the significant federal interest cannot be met by local prosecution.

It is expected that this provision would be used rarely. It may not be used at all. Nevertheless, it is important and represents a basic principle. The prosecutive power of the Attorey General cannot be made contingent upon the assent of a local official. There would be no justification for violating that principle here, nor is there any need. To do so would be not only anomalous, but totally without precedent. There is no federal criminal statute, the exercise of which requires prior consent of a local prosecuting official.

As explained more fully below, the National District Attorneys' Association in April 1982 adopted a resolution opposing the Act because it contained the language allowing for a federal prosecution over the local District Attorney's objection. In November 1981, the NDAA had adopted a resolution supporting the Act in principle. The earlier resolution urged that language be added to reflect the concept of

"mutual consent." The later resolution, in effect, expressed the dissatisfaction of the Association with the language ultimately employed. The framers of the Bill concluded that they had no choice but to add an "escape clause" whereby the Attorney General could prosecute even without a request from the local District Attorney. The Department of Justice and the Administration felt as strongly on this point as the framers of the Bill.

Subsection (4)(b) further expresses the intent of Congress that "any person prosecuted pursuant to this Act be tried expeditiously and that any appeal arising from prosecution under this Act be treated as an expedited appeal". The use of the word "expeditiously" is meant to imply the equivalent of "as soon as possible". The phrase "expedited appeal" has general meaning and application in the courts of appeals in the various circuits around the country. Generally speaking, "expedited appeals" are taken out of sequence and treated as fast as possible given the nature of the case.

As noted earlier, originally the statute contained an absolute requirement of trial within sixty days and disposition of appeal within sixty days. These provisions were omitted at the request of the Administration and the Department of Justice. They were viewed as having exactly the right intent and purpose, but of being too rigid. There was also concern about unintended interference with the application of the Speedy Trial Act to all federal prosecutions. In the final analysis, it was judged that it was sufficient for Congress to express its concern about the need for speedy disposition. The actual execution of the objectives is in the hands of the federal judiciary.

Finally, Section (4)(c) preserves the principle of nonlitigability. That is, it provides that nothing in Section (4) can become the subject of an attack by a defendant on his indictment or conviction. The section provides in part: "This section shall not create any right enforceable in law or in equity in any person. . . ." The Subsection continues by providing that the courts shall not hear claims as to whether or not "the procedures or standards set forth in this Section has been followed". Of course, all the normal motions available to a defendant to contest the charges against him or the conduct of the prosecution brought by the government remain available. The effect of this Subsection is merely to make clear that various expressions of Congress' intent regarding the application of the Act to particular cases should not give defendants any additional grounds for challenging their cases.

VI. Agency Views

S. 1688 has been endorsed by the Administration and the Department of Justice. Throughout the period during which the bill was developed, consultations were carried on with representatives of the Department of Justice and the Administration. The principal representative of the Administration was Lowell Jensen, the Assistant Attorney General in charge of the Criminal Division of the Department of Justice. Mr. Jensen was instrumental in the development of the legislation. He made many suggestions, both before and after its introduction on October 1, 1981. Virtually all of his suggestions were adopted. The changes in the Bill between the form in which it was originally introduced in October and the amendment in the nature

of a substantive before the committee now are the result of conferences with Mr. Jensen and his associates. In nearly every case the changes reflect suggestions made between October 2 and March 17 by Mr. Jensen and his counsel, Jay B. Stevens.

On March 18, 1982 at the fourth and final hearing before the Juvenile Justice Subcommittee, Mr. Jensen testified to the Administration's support of the Bill. He stated: "Today I am pleased to advise you that after further analysis of the proposed Act, the Department of Justice supports S. 1688" (p. 33).

Mr. Jensen stressed that the Bill reflects the same priority to increase efforts to combat violent street crime which the Department of Justice has established. He stated: "The Department of Justice is committed to doing a more effective job of combating violent crime in this nation" (p. 34). Mr. Jensen noted that: "S. 1688 is designed to strike at the heart of violent crime, the recidivist" (p. 34). Mr. Jensen agreed that by targeting those recidivists who are using firearms, the Bill has identified the most dangerous of all offenders for special attention. He said: "It is our view that the Bill appropriately focuses on the critical problem of repeat offenders who use a firearm in the commission of yet another robbery or burglary" (p. 34). Mr. Jensen emphasized that because of "the limited class of offenders targeted by this Bill" (Statement, p. 4), S. 1688 "facilitates a concrete federal participation in attacking" the core of the problem of violent crime in America (p. 4). Because of its focus on this limited class of offenders, Mr. Jensen stated that the Bill provided a "means of making an impact on violent crime" (p. 5).

MANDATORY SENTENCE IS DESIRABLE

Indicating that the Bill contains "a number of significant features" (Transcript p. 33), Mr. Jensen stressed that "defendants convicted under this provision are subject to a term of imprisonment of fifteen years to life, without the benefit of probation, parole, or a suspended sentence" (p. 33). With its mandatory minimum sentence of fifteen years imprisonment, the Bill "recognizes the need to deal swiftly and effectively with those offenders who habitually prey on the property and safety of innocent victims. . . ." (p. 34). Mr. Jensen stressed the Department's support for "enhanced penalties for career criminals" (Statement pp. 3–4). Mr. Jensen explicitly agreed with the central premise of S. 1688 that lengthy incarceration is needed. Without incapacitation of career criminals, there is little prospect of reducing the spiraling rates of violent crime. In this regard, Mr. Jensen said:

> Substantial periods of incarceration for persons who have demonstrated repeatedly that they are a violent threat, is one way of insuring the safety of our communities and curtailing the disproportionate number of offenses committed by career criminals. (Page 4)

Not only are lengthy sentences essential for these offenders, but the impact on prevalence of crime will be significant. Mr. Jensen indicated that the direct impact of the Bill would be substantial. He said: "The incarceration of even a small number of recidivists, robbers, and burglars would save our communities millions of dollars (p. 5).

Mr. Jensen stressed that the penalty provisions of the Bill not only reflected the position of the Department of Justice, but also of the Attorney General's Violent Crime Task Force. He noted that:

> The proposed legislation is consistent with the mandatory sentence recommendations of the Attorney General's Task Force on Violent Crime. (page 4)

Recommendation 17 states: "The Attorney General should support or propose legislation to require a mandatory sentence for the use of a firearm in the commission of a federal felony" (Report, page 29). In its commentary the Task Force stressed that mandatory sentencing was strongly supported by the public and the police and that it would "provide an effective deterrent to crimes of this sort" (page 30). The Task Force stressed, however, that: "To be effective, the mandatory sentence should be severe enough to have the necessary deterrent force" (page 30). The Commentary reflected the Task Force's conclusion that the mandatory penalties for use of firearms in a felony should be in addition to the sentence that would otherwise be imposed and should not be subject to being suspended or avoided by imposition of probation (page 30).

STRICTER PUNISHMENT OF FIREARMS OFFENDERS

While Recommendation 17 was limited by its terms to use of firearms in connection with federal felonies, the Task Force also recommended increased prosecution of convicts for possession of weapons even in the absence of any underlying federal felony. Recommendation 21 stated in part that the Attorney General should provide "for increased federal prosecutions of convicted felons apprehended in possession of a firearm" (Report, page 30). The Task Force explicitly adopted the theory behind S. 1688 that federal prosecution should be instituted where it will result in sufficient sentence which might not be obtained in the state courts. The Task Force stated in Recommendation 21: "The appropriate federal role is to initiate prosecution, in order to bring federal prosecutorial resources and more severe penalties to bear on the most serious offenders in a locality who are apprehended with firearms in their possession" (page 30). The Task Force also recognized that since federal prosecution could not be brought against all firearms-bearing convicts, efforts would have to be concentrated on the worst and most dangerous offenders in a particular locality. In the Commentary the Task Force explicitly recognized that the need for federal intervention will vary greatly from one jurisdiction to the next. The Commentary noted, for example, that local firearms laws vary significantly. The Commentary states: "In some states, the federal firearms laws are significantly more severe than comparable state statutes". Of course, with its minimum mandatory sentence of fifteen years, S. 1688 will provide for the certainty of a substantially longer sentence in many cases.

JOINT JURISDICTION AND COOPERATION FAVORED

The Task Force also recognized that the federal prosecution may be preferable to state prosecution, even where the ultimate sentences might be similar, since in many jurisdictions federal prosecution will be far more speedy. The commentary stated: "* * * in any federal

districts the federal court dockets are not as crowded as county and city course calendars" (page 32).

Mr. Jensen also stressed the policy of the Justice Department that the attack on violent crime in America must reflect an overall national program. He expressed the view that S. 1688 formed an essential part of this national program. In this regard he noted that" "This legislative proposal is intended to assist the national effort to combat the rising incidence of violent crime" (Transcript, page 34). By providing new federal jurisdiction, the Bill enables the federal government to participate in new, better and more effective ways in combating violent crimes. Mr. Jensen said: "We believe this legislation * * * facilitates a concrete federal participation in attacking that problem * * *" and does so without requiring significant increases in federal resources (Statement, page 4).

Mr. Jensen noted that the Department strongly supported efforts to integrate the prosecutive programs of federal and local authorities. Mr. Jensen also noted that: "The cooperative federal-state efforts contemplated by this Bill is consistent with the recommendations of the Attorney General's Task Force on Violent Crime" (Transcript, page 37). Mr. Jensen noted that the Task Force had emphasized the importance of improving the attack on violent crime by increasing the coordination and cooperation between local and federal prosecutive efforts. He noted that the Task Force had recommended the creation or reconstitution of federal, state, and local law enforcement coordinating committees to provide the main mechanism for such an integrated law enforcement effort.

The primary mission of such committees, as Mr. Jensen stated, would be to ". . . implement concurrent jurisdiction areas" (Transcript pages 37–38). Mr. Jensen noted that in more than 50 of the 94 districts in the country the United States Attorneys had initiated meetings of their committees. Mr. Jensen emphasized that the coordinating committees would be able to establish criteria for referral of cases for federal prosecution under S. 1688 which would reflect local conditions.

Mr. Jensen stated his belief that even a limited number of referrals would have a very substantial deterrent effect. In this regard, the following exchange occurred:

> Senator SPECTER. If one or two cases were picked by coordinating counsels of fifty communities, I think it might have a very substantial deterrent and therapeutic effect on the community.
>
> Mr. JENSEN. I agree with you Mr. Chairman. (Transcript, page 39)

Mr. Jensen also discussed the issue of whether S. 1688 might lead to encroachment on law enforcement responsibilities appropriately left to state and local authorities. He stated:

> We are sentitive to the issues of federalism inherent in this bill and we do not view this legislation as an invitation to intrude into those areas of law enforcement which state and local authorities traditionally prosecuted.
>
> We recognize fully that the local authorities have the responsibility and the power and the commitment to direct the prosecutions of violent offenses. This bill, however, provides an important complement to that. And we see this bill as a tremendously important complement to the responsibilities of the local prosecutors. (Transcript, pages 36–37)

Mr. Jensen stressed that the arrangement contemplated by the Bill and the availability of the coordinating committees to implement it assured that the issues involved in concurrent jurisdiction would be ones " * * * we should be able to effectively address * * * in a partnership" (page 40).

Quoting the language of Section 141, expressing the intent of Congress for a presumption of state prosecution, Mr. Jensen indicated that he did not feel there would be difficulty in achieving full cooperation and complementary prosecutions (Transcript, page 37). Indeed, the language of Section 141 was drafted jointly by the sponsors of the Bill and the Justice Department.

S. 1688 PASSES "CONSTITUTIONAL MUSTER"

With regard to the question of the constitutionality of the bill, Mr. Jensen said: "It is the Department's view that S. 1688 would pass constitutional muster" (page 35). Mr. Jensen noted that the courts have uniformly upheld the power of Congress under the commerce clause to regulate intrastate transactions in firearms. He noted that this reasoning," * * * applies equally to the use of a firearm in the commission of an offense as addressed in this Bill" (page 35).

NO ADDITIONAL RESOURCES ANTICIPATED

With regard to the issue of resources. Mr. Jensen stated that the Department did not anticipate the need for significant additional law enforcement resources in order to implement S. 1688. He stated: "We do not anticipate additional expenditures for investigation and prosecution of the limited class of offenders targeted by this Bill * * *." (Page 36)

Indeed, throughout the development of the legislation, Mr. Jensen expressed the view that its implementation wold not require increases in the number of federal investigators, federal prosecutors or federal judges. Through proper exercise of prosecutorial discretion and sound management of available resources, sufficient attention could be devoted to prosecutions and related activities in support of prosecution to implement this Bill without greater manpower. Moreover, Mr. Jensen stressed that: "It is our view that this is one of the most cost-effective means of making an impact on violent crime" (Statement, page 5).

With regard to the federal prison system, Mr. Jensen acknowledged that implementation of the Bill would have some impact. He indicated that it was virtually impossible to predict the impact or to make precise estimates of the number of inmates who would be sentenced under the Bill. For one thing, the number of instances in which state prosecutors will request federal intervention is not known. Nor can it be predicted from any available statistics. Second, the influx of federal prison inmates from prosecutions of other federal penal statutes is also difficult to predict.

The federal prison population has fluctuated substantially over the last three or four years. In 1980 there were a substantial number of empty beds in the federal prison system. Only a few years earlier it

had been substantially over filled. Currently, the federal prison system is at full capacity. There is the expectation that as Cuban immigrants not serving federal sentences who now make up nearly the entire population at the federal penitentiary at Atlanta, Georgia are gradually reelased, spaces should become available which might be used for inmates sentenced under S. 1688. On the other hand, many of these spaces may be needed for other federal prisoners. One of the great areas of uncertainty concerns defendants sentenced for drug trafficking. To the extent that the efforts of the Drug Enforcement Administration focus on middle level or lower level drug sellers, these efforts tend to generate a very large number of inmates. Conversely, where greater emphasis is given to the highest level of traffickers, the number of inmates tends to decrease significantly.

Nevertheless, in the final analysis, Mr. Jensen expressed confidence that the inmates sentenced under the Bill could be accommodated within the existing federal prison system. He stated:

> Nor do we expect that the limited additional federal prison population resulting from prosecution under this provision will impose an undue hardship (Transcript, page 36).

In sum, Mr. Jensen strongly supported the legislation in each of its particulars as well as the overall principles in the Bill. He stated:

> From the Departments' standpoint, we see this as an important kind of legislative response to the Task Force, so we see it as an important bill, Senator, and appreciate the opportunity to work with you and your staff on it (Transcript, page 44).

THE PRESIDENT ALSO PERSONALLY SUPPORTS S. 1688

The provisions of S. 1688 have been consistently supported not only by the Department of Justice, but by the Administration as a whole and by the President himself. As described in preceding sections, the Bill's author met with President Reagan on November 13, 1981 specifically to discuss S. 1688. At that meeting, he indicated his support for the Bill. He did respond to concerns about its implications for federal prison resources by asking for further analysis and study of those issues. But, he made clear that unless the Bill turned out to be costly, he intended to support it publicly.

The President's most definitive statements on the crime problem and the greater effort which the federal government under his leadership would make to combat it appear in a speech that the President delivered on September 28, 1981 before the International Association of Chiefs of Police who were meeting in their Annual Convention that day in New Orleans, Louisiana. The President said:

> Now I fully realize that the primary task for apprehending and prosecuting these career criminals—indeed for dealing with the crime problem itself—belongs to those of you on the state and local level. But there are areas where the federal government can take strong and effective action. (Text, page 2)

The President specifically supported new federal legislation to enhance federal participation in efforts to combat violent crime. Among

the primary characteristics of such new federal legislation should be the requirement of mandatory minimum sentences for firearms offenses. The President said: "And we will support mandatory prison terms for those who carry a gun while committing a felony" (page 4).

The President also endorsed the use of law enforcement coordinating committees to increase the cooperation between key state and local law enforcement officials. He stated: "These committees * * * will lead to a more flexible, focused and efficient attack against crime" (page 3).

As a general matter, the President expressed the view that efforts against violent crime had to be given increased priority. He indicated that under his Administration, "* * * violent crime is a major priority" (page 5). With respect to violent crime as well as more sophisticated forms of crime, the President stressed the need to concentrate attention on career criminals. The President said: "The truth is that today's criminals, for the most part, are not desperate people seeking bread for their families. Crime is the way they have chosen to live" (page 5).

The President clearly analyzed the need for greater federal efforts against violent crime and career criminals. He noted that only a small percentage of criminals were caught and a tiny percentage incarcerated. He noted that:

> In New York City, less than one-sixth of reported felonies ever end in arrest and ultimately only one-percent of these felonies end in a prison term for an offender (page 6).

He cited the experience in New York as described by Commissioner McGuire whereby cases involving violent felonies are reduced through plea bargaining to the point where they are "being trivalized". Because of trial delays, lenient sentencing practices, excessive release of dangerous defendants on bail and other problems, the President noted that 70 percent of the people had "little or no confidence in the ability of our courts to sentence and convict criminals" (page 6).

The President was frank to acknowledge the extent of the problem. He said:

> It is time for honest talk, for plain talk. There has been a breakdown in the criminal justice system in America. It just plain isn't working.

The consequences are disasterous. In the President's words:

> All too often, repeat offenders, habitual law breakers, career criminals—call them what you will—are robbing, raping and beating with impunity * * *." (page 6).

VIEWS OF CHIEF JUSTICE BURGER

The objectives of S. 1688 enjoy a remarkable breadth of support. In addition to the President and the Administration, there is strong support for these objectives from prominent members of the Judiciary, including the Chief Justice of the United States. Chief Justice Burger appeared before the Annual Meeting of the American Bar Association in Houston, Texas on February 8, 1981 to discuss the problems of criminal justice. First, the Chief Justice noted that the prevalence of crime in America, and particularly its larger cities was

vastly greater than in comparable industrialized societies. He noted, for example, that: "The United States has 100 times the rate of burglary of Japan" (page 4). The Chief Justice also noted that the rate of violent crime had been increasing steadily in recent years. In addition, he noted: "Overall violent crime in the United States increased sharply from 1979 to 1980, continuing a double-digit rate" (page 4). He noted that the extent of crime was so great that every year one-quarter of all the households in this country are victimized by some kind of criminal activity. Reference was also made to the studies which indicated that the chances against a person arrested for a felony or of being punished in any way in many American cities were more than 100 to 1.

After reviewing these and other measurements of the crime epidemic and the failure of the criminal justice system in America to curtail it, the Chief Justice raised the issue of the need for national leadership and action. He asked the following provocative question:

> For at least ten years many of our national leaders and those of other countries have spoken of international terrorism, but our rate of routine day-by-day terrorism is almost any large city exceed the casualties of all the reported "international terrorists" in a given year.
>
> Why do we show such indignation over alien terrorists and such tolerance for the domestic variety? (Page 4)

After a general discussion of the causes of crime, the Chief Justice turned from social and economic and moral factors to the perceived response of society through its criminal justice system. The Chief Justice said:

> We must not be misled by cliches and slogans that if we abolish poverty, crime will also disappear. There is more to it than that. A far greater factor is the deterrent effect of swift and certain consequences: swift arrest, prompt trial, certain punishment, and—at some point—finality of judgment. (Page 5)

At the conclusion of this speech, the Chief Justice recommended specific remedial measures. They included speedier trials and appeals, certainty in the imposition of sentences and the conclusion of criminal proceedings, and reform of bail laws to allow judges to consider the "crucial element of dangerousness to the community. . . ." (Page 10) The Chief Justice also endorsed reforms with regard to availability of probationary sentences and early release on parole.

He said:

> It is clear that there is a startling amount of crime committed by persons on release awaiting trial, on parole, and on probation release (page 6).

CONCLUSION

S. 1688 addresses and overcomes each of the problems noted herein. First, it provides for federal assistance to the overburdened state prosecutive and judicial systems. Second, it provides for speedier trial and appeal than is often possible in the state systems. Third, it provides for swift, sure, and sufficient punishment and thereby achieves the necessary deterrent effect. Fourth, it allows dangerous offenders to be detained while awaiting trial in appropriate cases. Fifth, it eliminates the opportunity for improper use of probationary sentences and the dangers of releasing pardoned criminals on parole long before the expiration of their sentences and while they usually still represent a danger to society.

VII. Cost Estimate

S. 1688 would permit federal prosecution of persons with two prior convictions for robbery or burglary who use a firearm or possess a firearm in connection with another robbery or burglary in violation of state law. The Justice Department plans to prosecute no more than 500 such cases per year and has absolute discretion to bring or not to bring such cases or any particular case. Cases in which federal prosecution is requested by the local District Attorney—a prerequisite for federal prosecution—but is declined, would be prosecuted by state or local authorities as at present.

Virtually, all investigation would be conducted by local police, not the Federal Bureau of Investigation. Prosecutions in many cases would be by local prosecutors appearing in federal court under "cross designation" procedures as Special Assistant United States Attorneys. Other cases would be tried by Assistant United States Attorneys in addition to or in lieu of the caseload they would otherwise carry. The Justice Department has determined that these cases could be handled by the present number of assistants and its representative has so testified. He stated that no significant additional resources would be required by any agency of the Department or the courts to enforce the statute according to plan.

The Federal prison system is expected to absorb inmates convicted under this bill into present facilities with present staff. The Department of Justice witness testified that it can do so "without undue hardship."

The Congressional Budget Office has estimated that the costs of enforcing the statute would be negligible in fiscal year 1983–85. The estimate is based on information provided by the Department of Justice.

The Committee on the Judiciary notes that S. 1688 neither contains nor implies any new budget authority. On the contrary, the Committee intends that the costs of implementing the statute will be absorbed by the Department of Justice. S. 1688 is not intended to "drive up" the Department's future budget requests.

U.S. Congress,
Congressional Budget Office,
Washington, D.C., September 24, 1982.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1688, the Armed Career Criminal Act of 1982, as ordered reported by the Senate Committee on the Judiciary, September 21, 1982.

Under this bill, any person involved in an armed robbery or burglary in violation of federal or state law may be prosecuted for the offense in

U.S. courts if the person has been previously convicted twice of robbery or burglary. The bill applies special criteria for bail, sentencing, probation, parole, and other matters. It specifies that the United States may prosecute such cases if the person has violated a provision of federal law or if the local prosecuting attorney requests or concurs in federal prosecution.

Because the number of prosecutions and subsequent convictions resulting from the bill depend on the discretion of the Department of Justice and the courts, it is difficult to precisely estimate the impact of the bill on the federal government's legal and penal systems. Most of the costs are expected to result from the extended incarceration of persons convicted under the bill. Based on information from the Justice Department, it is assumed that approximately 500 cases will be prosecuted by the federal government, with 400 resulting in conviction. It is expected that this caseload would be undertaken in lieu of cases that would otherwise be prosecuted under existing federal laws. Under these assumptions, there would be no significant increase in the costs of the Department's investigations or prosecutions. However, successful prosecution of such cases will result in prison terms of at least fifteen years, compared to an average sentence of four years for felony convictions under existing law. Based on an expected average cost per prisoner of over $14,000 in fiscal year 1983, gradually rising in subsequent years, the operating costs of the federal prison system are estimated to increase by approximately $1 million in fiscal year 1986, $3 million in 1987, $10 million in 1988, and by increasing amounts in subsequent years. It also is likely that additional capacity will be needed in the federal prison system in the future in order to accommodate this number of long-term inmates.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

RAYMOND C. SCHEPPACH
(For Alice M. Rivlin, Director).

VIII. REGULATORY IMPACT STATEMENT

The Bill is not expected to have any significant regulatory impact.

IX. CHANGES IN EXISTING LAW

(S. 1688, as amended, to be shown in context in Chapter 103 of Title 18.)

X. VOTE OF THE COMMITTEE

On September 21, 1982, the Committee on the Judiciary met and voted without dissent to report favorably S. 1688, the Armed Career Criminal Act of 1982.

○

END