ARMED CAREER CRIMINAL ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 1627 and S. 52

ARMED CAREER CRIMINAL ACT

JUNE 28, 1984

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ARMED CAREER CRIMINAL ACT

THURSDAY, JUNE 28, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 9:55 a.m., in room B-352, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives Hughes and Shaw.

Staff present: Hayden W. Gregory, counsel; Edward H. O'Connell, and Eric Sterling, assistant counsel; Theresa Bourgeois, staff assistant; Charlene Vanlier, associate counsel; and Phyllis N. Henderson, clerical staff.

Mr. HUGHES. The Subcommittee on Crime will come to order.

This morning we will be considering two bills, H.R. 1627 and S. 52, which would permit Federal prosecution of any individual who, after being previously convicted of two or more robberies or burglaries, is charged with a third robbery or burglary involving the use of a firearm.

[Copies of H.R. 1627 and S. 52 follow:]

98TH CONGRESS
1ST SESSION

Date 2/23/83

H. R. 1627

Entitled the "Armed Career Criminal Act of 1983".

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 23, 1983

Mr. WYDEN introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

Entitled the "Armed Career Criminal Act of 1983".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Armed Career Criminal Act of 1983".

SEC. 2. Chapter 103 of title 18, United States Code, is amended by adding at the end thereof the following section:

"§ 2118. **Armed career criminals**

"(a) 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 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 of 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 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 section 3148 of title 18, United States Code; (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; and

"(3) 'firearm' has the meaning set forth in section 921 of title 18, United States Code.

"(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.

"(e) Ordinarily, armed robbery and armed burglary cases against career criminals should be prosecuted in State court. However, in some circumstances such prosecutions by State authorities may face undue obstacles. Therefore, any such case lodged in the office of the local prosecutor may be received and considered for Federal indictment by the Federal prosecuting authority, but only upon request or with the concurrence of the local prosecuting authority. Any such case presented by a Federal investigative agency to the Federal prosecuting authority, however, may be received at the sole discretion of the Federal prosecuting authority. Regardless of the origin of the case, the decision whether to seek a grand

jury indictment shall be in the sole discretion of the Federal prosecuting authority.

SEC. 3. The table of sections for chapter 103 of title 19, 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 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.

(b) 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 section 2(e) or this section have been followed.

98TH CONGRESS
2D SESSION

S. 52

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 27, 1984
Referred to the Committee on the Judiciary

AN ACT

To combat violent and major crime by establishing a Federal offense for continuing a career of robberies or burglaries while armed and providing a mandatory sentence of life imprisonment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Armed Career Criminal Act of 1984".

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) Whoever carries a firearm during the commission of a robbery or burglary offense which may be prosecuted in a court of the United States, or commits such an offense with another who carries a firearm during the commission of such offense, or attempts or conspires to do so, shall be fined not more than $25,000 and imprisoned not less than fifteen years.

"(b) An offense under this section shall not be prosecuted unless the United States proves beyond a reasonable doubt that the defendant has been convicted of at least two offenses described in subsection (c) of this section.

"(c) The offense referred to in subsection (b) of this section is any robbery or burglary offense, or a conspiracy or attempt to commit such an offense, which may be prosecuted in a court of any State or of the United States and which is punishable by a term of imprisonment exceeding one year.

"(d) Notwithstanding any other provision of law—

"(1) any person charged with an offense under this section shall be treated in accordance with the provisions of section 3148 of this title;

"(2) the indictment or the information need not contain allegations pertaining to or references to subsection (b) of this section;

"(3) the issue of whether the United States has fulfilled its burden of proof beyond a reasonable doubt

under subsection (b) of this section shall be heard and decided by the court before trial; and

"(4) the court shall not sentence the defendant to probation, nor suspend such sentence, and the defendant shall not be eligible for release on parole before the end of such sentence.

"(e) For purposes of this section—

"(1) 'State' means any State of the United States, any political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States;

"(2) 'firearm' has the meaning set forth in section 921 of this title;

"(3) 'robbery offense' means any offense involving the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury; and

"(4) 'burglary offense' means any offense involving entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense.

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

SEC. 3. The table of sections at the beginning of chapter 103 of title 18 of the United States Code is amended by adding at the end thereof the following new item:

"2118. Armed career criminals.".

SEC. 4. It is the intent of Congress that—

(a) the trial and appeal of any person prosecuted under section 2118 of title 18, United States Code, as added by this Act, shall be expedited in every way; and

(b) this section shall not create any right enforceable at law or in equity in any person.

Passed the Senate February 23 (legislative day, February 20), 1984.

Attest: WILLIAM F. HILDENBRAND,

Secretary.

Mr. HUGHES. The objective of these bills, as I understand it, is to add the power of the Federal Government to the efforts of local prosecutors in dealing with habitual violent offenders. As a prosecutor in New Jersey for some 10 years, I am all too familiar with the problems caused by these so-called career criminals, and they are substantial.

Currently I am sponsoring a bill, the Justice Assistance Act, H.R. 2175, which would provide funds for successful local career criminal programs. The Justice Assistance Act passed the House on May 10, 1983, by a vote of 399 to 16, and I am pleased to say that our first witness today, the distinguished Senator from Pennsylvania, Arlen Specter, is sponsoring a companion measure in the Senate, the Justice Assistance Act, S. 53, which has also been approved by the full Senate Judiciary Committee, and which I fervently hope will shortly be considered by the Senate.

The bills before us today represent other approaches to dealing with career criminals. The major issue separating the two bills is the division of responsibility concerning crime between the Federal Government and State and local authorities.

H.R. 1627 permits a Federal prosecution of a third offense of a robbery or burglary under either State or Federal law if the defendant possesses a firearm.

The Senate career criminal bill, S. 52, as amended, reflects a different balance of federalism concerns. S. 52 essentially provides enhanced penalties for those who commit a third robbery or burglary with a handgun, but this third offense must be a Federal crime.

In our discussion today, I hope we will deal with another specific concern I have in this area, the question of the availability of Federal criminal justice resources to handle any new Federal offenses. That is to say, if Federal resources are diverted from their present responsibilities to cover new areas of jurisdiction, we must assure that other Federal crimes are not neglected.

In my view, these bills raise still another issue, and that is the major problem of handgun abuse. Gun abuse is a substantial national tragedy, and these bills are designed to deal with just one aspect of this problem.

Guns and criminals who use them in crimes move with ease in interstate commerce, and the criminal misuse of handguns in particular is a legitimate Federal concern, as these bills recognize. We must take sensible steps to discourage the illegal use of guns without infringing upon the citizen's ability to have and use guns for legitimate sporting and defensive purposes.

I am sure that my distinguished witnesses today will comment on all these problems, and I look forward to a frank discussion.

I would like at this time to introduce our distinguished colleagues, starting with Senator Arlen Specter, our most distinguished Senator from Pennsylvania.

Prior to his election to the Senate, Senator Specter had an exemplary career both in private practice and as a district attorney in Philadelphia. Senator Specter has also served in the U.S. Air Force as a first lieutenant, is a graduate of Yale Law School and the University of Pennsylvania, where he was Phi Beta Kappa. Among his many honors and responsibilities, he currently is cochairman of the Crime Caucus of the Congress.

We are also joined today by my colleagues, Ron Wyden and Al Gore.

Congressman Ron Wyden graduated from Stanford University with an A.B. in political science with distinction. He subsequently attended and graduated from the University of Oregon School of Law in 1974.

In his career, he has been the cofounder and codirector of the Oregon Gray Panthers, director of the Oregon Legal Services for the Elderly, instructor of gerontology at the University of Oregon, Portland State, and the University of Portland. He was elected as representative of the Third District of Oregon in 1980 and has committee assignments on Energy and Commerce, Small Business, and Aging.

Our next panelist is Congressman Al Gore, who graduated from Harvard University with honors and has attended Vanderbilt School of Religion and Vanderbilt Law School. Congressman Gore is a former investigative reporter and editorial writer as well as a Vietnam veteran.

He was elected as representative of the Sixth District of Tennessee in 1976 and serves with distinction on the Energy and Commerce and the Science and Technology Committees and is chairman of the Subcommittee on Investigations and Oversight for the Science and Technology Committee.

Congressman Gore, I hope and believe, will soon be joining our distinguished colleague, Senator Specter, in the other body, and I hope he doesn't forget us when he arrives in that most prestigious body.

I understand that, Arlen, you have a time problem, so I think what we should do perhaps is, if it's agreeable with my colleagues, take your testimony, and if we have any questions, take care of them at that time. We then will move on to our other colleagues.

Welcome.

Arlen Specter was, as I indicated, a very distinguished district attorney. We share in southern New Jersey the Philadelphia TV markets, so I have followed his most distinguished career for a number of years.

Welcome, Arlen.

TESTIMONY OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA; HON. RON WYDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON; AND HON. ALBERT GORE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Senator SPECTER. Thank you very much, Mr. Chairman.

I very much appreciate your calling me first, and I do have a time problem, but I will endeavor to stay here as long as I can, because I consider this hearing to be a very important hearing on a very important subject.

We are scheduled to take up treaties this morning in the Senate, and we have 16 treaties which we are going to consider on 1 vote, so 1 vote counts 16 times, and as my colleagues in the Congress know what the votes are, we may face an issue if we want to ratify 15 and not 1. I don't know how that is to be severed.

But we do have that vote issue. But I do consider this to be a very important matter and will stay just as long as I can.

Mr. Chairman, I want to commend you for your leadership and your perseverance and your diligence on the problems of crime control in this country. There has been no one in the Congress in my 3½ years on the Hill with whom I have enjoyed a better working relationship than you, Mr. Chairman.

As you know, we have labored long and hard not only through the hearing process and the negotiation process but through countless meetings as you and I have tried to blend together a wide variety of divergent interests and accelerate the process of Federal involvement in crime control.

Part of that is the formation of the crime caucus, which I believe has a great opportunity to be a catalyst on Capitol Hill, with 59 House Members being represented and 21 Senate Members being represented. It has great potential for the future on a matter of really enormous, enormous importance for the American people, because we are not controlling crime in this country, and we could do a much better job at it if we could direct more of our attention to sitting down and really working out some of the basic concerns which are present in the House and in the Senate.

I am convinced that men and women of good will can resolve virtually all of these problems. I know of no problem which can't be resolved which is on our agenda, and we have about 50 such problems in the course of many, many very important bills.

There is no reason why Justice Assistance wasn't passed last Congress; forfeiture provisions, bail, and sentencing, and a wide variety of items ought to have been passed already, and it is high time that we got the job done.

I know this is for no lack of effort by you, Mr. Chairman, and by those of us who are in this room today to try to work out these problems.

I have submitted a full statement, and I would ask that it be made a part of the record.

Mr. HUGHES. Without objection, it is so ordered.

Senator SPECTER. I will not go through all of the points made there, because they are for the record, but I will touch only some of the highlights.

It need not be repeated, the tremendous problem caused by the career criminals, where some 6 percent of the criminals in this country account for some 70 percent of the crime, and the core of the career criminal problem—what do the buzzers mean?

Mr. HUGHES. The House of Representatives just went into session, and we will probably have a vote on the journal very shortly.

Senator SPECTER. Back to the career criminal. That, in my judgment, after spending most of my professional life in law enforcement, is the central problem for law enforcement today.

The real thing which we must do is put any remnant of partisan politics aside and not have any effort to place blame on any political party, because the people of this country have no interest in which party advocates or promotes crime control.

The people of this country, rightly, would put a plague on both political parties if the job isn't done, and the effort at partisanship

could not be more misplaced than on the area of crime control, and the partisan issue has been the subject of extensive commentary.

The ABC television show on Sunday with David Brinkley focused on that issue, and then as Sam Donaldson and David Brinkley concluded the program, they focused on their view that the Federal Government had no real role in crime control, and that is a misconception in those lofty areas, because we have not done a job in bringing the Federal Government into the picture and explaining what the Federal Government can do.

Today's bill, I would suggest, Mr. Chairman, as you know from our countless discussions on this and other subjects, could be a centerpiece by providing leverage for State prosecutors.

It is best illustrated by the example that I faced as district attorney of Philadelphia when I had some 500 career criminals on the docket, and these career criminals and their counsel were determined not to come to trial, or to drag out the cases as long as they could. Witnesses would disappear, or memories would dim, or that they could work a plea bargain and, notwithstanding a record of 5, 6, 7 armed robberies, 7, 8, 9, 10 burglaries, walk out of court with probation, which happened again, and again, and again, over my strenuous protests in the criminal courts of Philadelphia, because the judge shopping and moves for continuance were simply beyond the power of that judicial system to control.

If the career criminal bill were in place, it would be possible for a district attorney, like the district attorney of Philadelphia, to refer a few cases—3, 4, or 5, out of 500—where there would be the individual judge's calendar, a trial within 90 days, strong cases, virtually certain convictions, and minimum mandatory sentences of 15 years to life.

I can tell you, Mr. Chairman, that if that happened to a few of Philadelphia's career criminals, there would be a mass rush for guilty pleas in the State courts, and that it is not optimistic to predict that 300 or 400 of the balance of those 500 cases would result in guilty pleas, and not with sentences of 15 years to life but with sentences of 10 years, or 12 years, much more than is being obtained at the present time. It is that leveraging which we really seek to accomplish through the career criminal bill.

The bill was passed in both houses and was passed in the House of Representatives through your efforts, Mr. Chairman, as you very well remember, in December 1982, and then we had that inexplicable occurrence of the veto of the seven-part crime package in January 1983 over the issue of the drug czar, which should never have posed any veto reason.

Since that veto was directed at the insistence of Attorney General William French Smith, the Justice Department has agreed to similar legislation, which has passed the Senate, with a drug czar.

The proposal at the time, in January 1983, was to have the drug czar be the Vice President or the Attorney General. It could have been worked out in a wide variety of ways; Ed Meese had suggested an analogy to the Director of Central Intelligence—a lot of ways to work it out, and it wasn't worked out, and this country has suffered because it wasn't worked out.

The additional crime legislation has suffered because that was a linchpin to agreements which were made with Chairman Rodino

and others to move ahead, and that has been an enormous stumbling block.

One of the provisions which fell was the career criminal bill. Concern had been expressed by the Department of Justice at that time regarding a possible constitutionality issue if the local prosecutor had the veto power in the jurisdictional section of the bill.

Mr. Chairman, I do not believe that there is a constitutional problem in having the veto power of the local district attorney in the jurisdictional section of the bill. There is absolutely no authority that that is a constitutional problem, but it is a concern.

An alternative to placing that provision in the jurisdictional section, section 4, is to have the provision of section 2, which is the intent section, and I repeat this for the record and for others present, although it is well known to you, Mr. Chairman.

I believe that it would be entirely satisfactory and consistent with the interests of the National District Attorneys Association and any local prosecutor to have the provision in the intent section, which says flatly that no Federal prosecution shall be brought under the career criminal bill unless the local prosecutor agrees to the prosecution, so that if the prosecutor dissents, you can't have the prosecution.

Now there was absolutely, positively no authority that would warrant a Federal judge proceeding with the prosecution in the face of a district attorney's objection. I have practiced in the criminal courts extensively in the 27 years I've been at the bar, and it is incomprehensible to me that any case would arise—and I make that statement fully aware of the vagaries of the law and the uncertainties of the law and the varieties of dispositions of judges, but I repeat, it is incomprehensible to me that any judge in the face of that mandatory language of intent of the Congress would, in the face of an objection by a local district attorney, proceed with the Federal prosecution.

Mr. Chairman, as you know, I am not determined as to where the provision is in section 2 or in section 4, only that we work it out and move the bill forward.

As a result of this concern by the National District Attorneys Association and the Department of Justice, the career criminal bill was emasculated in the Senate when it was made applicable only to other Federal offenses, and I said that plainly on the Senate floor in terms of the history of the bill, where Senator Thurmond and Senator Kennedy brought differing points of view, one being concerned—Senator Kennedy was—with the National District Attorneys, and one—Senator Thurmond was—being concerned with the Department of Justice to unite to defeat the bill in its form of general applicability and limiting it instead to matters where there was otherwise Federal jurisdiction.

My thinking, Mr. Chairman, is that this bill, if applied to all career criminals found in possession of a firearm, would have enormous beneficial effects.

You raise a question about Federal resources, and that is a real problem, and if you and I, Mr. Chairman, and Congressman Wyden and Congressman Gore and others are around long enough, I believe we will add significant Federal resources to Federal prosecution authority as it is so desperately needed.

I have introduced legislation, S. 889, which does that in a very significant way, and I'm trying to do that, and with some success, in the District of Columbia, on the District of Columbia Subcommittee of the Appropriations Committee. But for the time being, the reality is that it is going to be limited.

When I had an opportunity to discuss the career criminal bill with President Reagan in November 1981 and the President was very enthusiastic about the bill for what it could do, the issue arose as to how many cases there would be. The Office of Management and Budget was involved, as was the Department of Justice, and we structured an approach whereby some 500 cases which were to have been brought in 1 year, which would, Mr. Chairman, not take tremendous Federal resources but would be very beneficial on the leveraging principle.

If only a few of these cases were brought in each jurisdiction on reasons that I have already outlined, there is no question, when you take the career criminals in this country and you compare them to, say, the 30-odd-thousand Federal prisoners, that 500 career criminals would be among the worst of the 30,000.

As you and I well know as former prosecutors, the entire line of prosecutorial work is discretionary. You take the worst people you can find. You can't prosecute everybody. You can't put everybody in jail whom you'd like to. You can't prosecute all law violators. It is discretionary and you always select the worst group.

But looking at the Federal picture, this is the worst group. If you took the 500 worst career criminals in this country, you could not find 500 people among the 30,000 in the Federal prisons who would be worse. It is that simple, and the bill will have an enormously beneficial leveraging effect.

As for now, it would involve a limited application of Federal resources, but I think a very significant one.

When you, Mr. Chairman, raised the problem of gun control, you raised a very major issue, and we know the difficulties of dealing with this problem from many aspects, and one area of dealing with it that no one can disagree with is to be very tough on criminals who use guns.

Among the legislative proposals to be tough on criminals who use guns, none is tougher than this bill, which would use this as the clearly established Federal jurisdictional nexus and would trigger a 15-year-to-life sentence, not just for the use of the gun but in the context where the records of these men and women establish their preeminent right and preeminent place in jail for a very, very long period of time.

Mr. Chairman, I have already talked too long, but I feel very, very deeply about this subject, and not because of the very strenuous efforts that I've put into this matter, but because of my very deep conviction, after being a prosecutor for some 14 years, and working on the National Commission on Criminal Justice Standards and Goals and wrestling with a wide variety of problems—plea bargaining, and sentencing, calendar control, et cetera—and serving on the Judiciary Committee, that this bill could be a linchpin in conjunction with the other proposals which are on the very important agenda which the Judiciary Committee of the House, and the Judiciary Committee of the Senate, and Congressman

Hughes, and Arlen Specter, and the Crime Caucus, and others have fashioned.

I thank you very much for this opportunity to make a presentation.

[The statement of Senator Specter follows:]

House Armed Career Criminal Act

Let me begin this afternoon, Mr. Chairman, by commending you for your leadership in moving this and other important crime legislation through the House. I am particularly pleased to testify today on behalf of the Armed Career Criminal Act, which I drafted in the fall of 1981 and which passed overwhelmingly in the Senate a year later.

I would also like to commend Representative Ron Wyden who introduced the Act in the House and under whose able leadership it was passed in December 1982, as part of a larger crime package, and who is primarily responsible for its success so far this year -- with critical support from his cosponsors including Representative Barney Frank and Representative Albert Gore.

Although the President vetoed the package last year, largely due to an unrelated provision, he has since expressed to me in a private meeting in November his enthusiastic support for this legislation.

The key to the Armed Career Criminal Act is the revelation that a surprisingly small number of criminals commit the vast majority of crimes. Studies reveal that six percent of the criminals arrested commit as much as 70% of the serious crime in this country.

The statistic is startling, but the implication is evident: by targeting our resources on this six percent we can dramatically reduce crime. This is what the Armed Career Criminal Act is all about, and this is why we must get it enacted this year.

We do not know exactly who makes up this six percent, but we do know they are repeat offenders -- "career criminals" -- and most are involved in robberies, burglaries and drugs.

Who are these repeat offenders, these "career criminals"? The author of a widely cited study by the Rand Corporation has testifie

that nearly all are involved in robberies, burglaries and drugs. Other studies support this.

Listen to these statistics:

-- one study found 243 male heroin addicts were responsible for nearly 1/2 million crimes other than sale or possession of drugs over 11 years. 243 men, 500,000 crimes.

-- another study showed 49 imprisoned robbers committed 10,000 felonies -- an average of over 200 felonies committed by each robber;

-- 80% of those arrested for burglary had a prior record of adult arrests;

-- 58% had a prior burglary arrest; and

-- 44% were on parole, probation, or bail at the time of arrest.

A typical group of 100 persons convicted of robbery would have committed 490 armed robberies, 310 assaults, 720 burglaries, 70 auto thefts, 100 forgeries and 3,400 drug sales in the previous year of street time.

It is clear that effective prosecution of these career criminals will have at least two tremendously beneficial results: it removes those committing the crimes from circulation with the direct result of significantly less crime, and it will have the enhanced deterrent effect that accompanies a threat of punishment that is swift and certain.

The Armed Career Criminal Act would allow the Federal Government to supplement the efforts of local prosecutors in achieving these objectives by targeting repeat offenders. It permits the Federal Government -- with the permission of local prosecutors --

to prosecute criminals convicted two or more times in state court of robbery or burglary who are then charged with a third armed robbery or burglary. If convicted these "one person crime waves" would face a mandatory 15 year sentence in federal prison, with no eligibility for parole.

The primary benefit of this legislation will not be the federal prosecution of criminals, but the leverage that the threat of federal prosecution will give state prosecutions. The threat by the state prosecutor to move a repeat offender's case to the federal level -- where trials are conducted on the average four times faster than in crowded state courts and where the defendant would face a mandatory 15 year sentence -- would significantly cut down on the growing tendency of defendants to file one delaying motion after another and otherwise attempt to circumvent the state judicial process.

When I was district attorney of Philadelphia, at any one time I had approximately 500 career criminals on the docket, and it was an extraordinarily difficult matter to bring those defendants to trial because, with their serious records and their serious charges, defendants had great motivation to seek continuances and delays. They also had great motivation for judge-shopping, which is a practice where the defense bar seeks to place the case before a lenient judge. There are a variety of techniques which are available as a defense tactic to have cases continued. And congested court dockets, lack of individual calendars, insufficient support staff, all combine to make the delay the norm rather than the exception. As a result, it was extraordinarily difficult to bring these 500 serious cases to trial.

Had the career criminal bill been in effect while I was district attorney of Philadelphia, I am confident that with the referral of a few cases to the Federal prosecutor, there would have been many, many guilty pleas from the other defendants on the docket. They would not have received sentences of 15-years-to-life as is provided under the Career Criminal Act, but they would have received sentences of 5-to-10 years or 7-to-14 years. This would have been a highly desirable period of incarceration following from the leveraging effect of this Federal prosecution.

In addition, scarce resources would be freed up to allow more careful review of "close" cases, where the full panoply of judicial safeguards and processes is most critical. This kind of efficient allocation is absolutely essential if our inundated criminal justice system is to survive in a manner befitting our democracy.

This kind of focused, targeted effort can be effective. We have seen it already in the large number of cities that have career criminal units of their own. They have had great results in terms of the speed of trials and the length and certainty of sentences.

Most of these units receive federal financial assistance, and the Justice Assistance Act on which you, Mr. Chairman, have worked so hard and ably, and which I fully support, would provide additional money to expand existing units and spread to additional jurisdictions.

But these are still not sufficient to meet the need in many large urban areas where the career criminal problem is overwhelming.

The Attorney General's Task Force on Violent Crime made up of professional, police, judicial, and other officials from both the state and Federal levels, 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. 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. By contrast, many state courts face huge backlogs, often are unable to schedule trials for months, must continue many cases on the trial date, often pool cases, permit judge-shopping, and encourage guilty pleas to vastly reduced charges. All these factors work to the career criminal's advantage.

The beauty of this proposal is that it provides for a national response to a national crisis, and has a maximum impact with a minimum of resources. This is a situation where the federal government can have a direct effect on crime through existing mechanisms, rather than simply throwing vast amounts of money at the problem.

The benefit of federal participation in achieving effective prosecution of armed career criminals is clear, but it is also an appropriate federal role. The U.S. Government has a constitutional responsibility to protect the people from domestic enemies, to guarantee the right not to be deprived of life or property except by due process of law. This justifies a more active federal role in our domestic defense, generally. But there is more specific

constitutional authority for the federal role outlined in the Armed Career Criminal Act -- the Commerce Clause.

Given the broad authority by this constitutional clause, there is little question that Congress can enact a penal statute concerning the carrying of firearms during robberies and burglaries because of their aggregate effect on interstate commerce:

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

(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.

This bill simply extends federal criminal penalties to the felonious carrying of a firearm by a convicted felon, which in almost all cases is already a federal criminal violation. Since it requires that the defendant have two or more prior convictions for

burglary or robbery, he is usually ineligible under federal law even to possess the firearm for the defendant to carry the firearm to commit a further offense only makes federal involvement more necessary.

The Armed Career Criminal Act is not unique. There are numerous federal criminal statutes which are analagous.

The Federal bank robbery statute, the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1961-1968, the Hobbs Act, and the Controlled Substances Act of 1970, 21 U.S.C. 801 et seq., are all examples of Congress exercising its powers under the Commerce Clause to punish activity where it is unfeasible to prove an interstate nexus in each individual case but where it is clear that the class of crimes significantly affects interstate commerce.

The most pertinent example of such a statute is the Federal anti-loan sharking provision, 18 U.S.C. 891-896, which prohibits "any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make 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.

The Supreme Court 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. 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 plainly is a class of activities that Congress could reasonably conclude "affects" interstate commerce.

When John Witherspoon, Princeton's President in 1776, was asked whether the situation in the colonies was ripe for change, he replied "the situation is more than ripe -- it is rotten." So too our criminal justice system. It is rotten, and we can no longer afford to delay effective action.

This legislation, in this form, can and must be enacted this summer. It has already passed overwhelmingly in both Houses, the Senate vote was 93 to one, and it would probably be law today had it not been for an unrelated provision in the crime package with it that the President felt compelled to veto, thereby defeating the entire package.

After I reintroduced it this session, it again passed overwhelmingly -- 92 to 0 -- in the Senate, though in a greatly diluted form.

The original version of the bill commands broad-based support in the criminal justice community, in the Justice Department, and in the Congress.

The Administration endorsed the bill through Assistant Attorney General Jensen's testimony in 1982, and this past November I met with President Reagan, along with Attorney General Smith, counselor Edwin Meese and others, to discuss the Act. At the conclusion of the meeting, the President expressed his support for this legislation, provided it could be worked out in a way which did not overburden the federal courts or create tremendous additional expenses for the Federal Government. I am convinced this legislation meets this criteria. We expect that some 500 cases a year would be targeted for federal prosecution. This is an insignificant number when compared to the total number of federal prosecutions annually, and can hardly be perceived as burdensome. Yet, the rippling effect of these 500 cases in overburdened city and state courthouses would produce very significant results.

The beneficial impact of the threat of federal prosecution backed up by a handful of actual federal cases in each of the most heavily burdened jurisdictions countrywide has been clearly recognized by the District Attorneys from Boston, Detroit, Miami, Philadelphia, and Louisville, Kentucky. It is precisely in these kinds of swamped urban centers that this bill is designed to assist. Unfortunately, the National District Attorneys Association has opposed the bill.

This is particularly unfortunate because the Armed Career Criminal Act is intended to supplement state prosecutions, not to supercede them. Wherever armed robbers and burglars are being successfully prosecuted in the state systems, the Act would not be utilized because there would be no incentive for the state prosecuting

authorities to request federal intervention. In those jurisdictions, those times, and those specific types of armed robberies and burglaries where the results in the state courts are not adequate, the Act would provide an auxiliary means for protecting public safety.

Local prosecutors will have ultimate control, since the Act contemplates that prosecutions under the Act will be initiated upon request of the local prosecuting authority. The bill expresses the intent of Congress in this regard by requiring the concurrence of the local prosecutor.

Others argue that federal prosecution of career criminals is unfeasible because there is no more space in federal prisons. Frankly, there is no more space in state prisons either. The federal prison population grew less than half as fast as the state prison population last year, and the new budget calls for the federal prison system to be expanded even further than the nearly 2,000 beds originally requested by the President through a program we added in appropriations. Prison overcrowding is a crisis that plagues correctional facilities at every level -- federal, state, and local. It is a crisis I am actively working to alleviate, but in the meantime we cannot allow it to become an excuse for inaction. The last decade has seen a dearth of significant anti-crime initiatives become law. During that time the crime rate has risen to its highest point this century.

The time has come to move beyond pompous pronouncements promising "law and order," toward a pragmatic program to handle a burgeoning criminal class.

The time has come to stop treating all criminals alike, time to target crime control efforts where they will have the greatest impact.

The time has come to translate public outrage and private fear into a national response to rampant crime rates.

The time has come to enact the Armed Career Criminal Act.

In ancient Greece, the great philosopher Thucydides was asked when justice would come to Athens. He answered: "Justice will not come to Athens until those who are not exploited are as indignant as those who are."

Well, the fact is that we are all the victims of every crime, and I for one <u>am</u> indignant.

The time for justice to come to this country is now, and we should begin by enacting the Armed Career Criminal Act.

Mr. HUGHES. Thank you, Arlen, for an excellent statement. I know that your presentation was extemporaneous and I think that it was an accurate explanation of your bill and the premises upon which it is based.

I share your concern. I don't think there's any question that we have got to begin to target our resources towards those areas where we can maximize our law enforcement effort, and certainly the career criminal programs have been very successful.

I, frankly, think that the career criminal category that we have developed on the Justice Assistance Act is probably one of the most important of those categories. So I feel very strongly about it, as you do.

I think anybody that has any doubt about it can just look at Professor Ball's study in Baltimore County over a period of 11 years, where some 460 individuals committed something like 500,000 crimes—I mean only 460 people, and that is typical of what is happening in most communities around the country.

It is a small group, and if we can identify them, fast track the process, and, if need be, incarcerate them, we can solve much of our crime problem in our communities. So I share your concern.

Resources, however, present a serious dilemma for me. I am not really sure we are serious about dealing with crime. I mean it's only been a couple of weeks ago that I saw the House of Representatives take an amendment on the floor when the State Justice Appropriation bill was there, a 4-percent cut across the board that did some serious damage to the FBI and drug enforcement.

It is ironic, for instance, that we are about to debate the immigration bill, and that amendment took not just the $20 million additional we had proposed for a new border patrol in order to bring the Immigration Service into the 20th century, but it took $3 million in addition.

So I am not sure that we are dealing realistically at the Federal level with the crime problem. We also are declining too many cases already that are legitimate Federal cases. I mean it's shameful that we are declining something like 90 percent of the bank robberies in some areas. It is a resource problem.

It was shameful, for example, that in southern Florida for a number of years we had a declination policy that said unless a violation involved about 3 tons of marijuana, we dumped it on the States. I mean that's Federal responsibility, and we are avoiding our responsibility.

We have a resource problem on one hand and I must say I also have some concerns, as you know, with the Federal nexus in these bills. I think you have articulated the premise upon which you move your bill, that is, the use of a handgun in the commission of a robbery or a burglary provides the Federal "nexus." The premise as I understand it is that a handgun, in all probability, has traveled in interstate commerce, or was either imported in this country or manufactured in this country and transported across State lines.

I have wrestled with this question of a nexus. When we hear from the National District Attorneys Association later, one of their concerns, obviously, is the question of a Federal nexus and their fear that we are moving into an area that basically is State jurisdiction. How do you respond to their concerns that, frankly, we are

not a very good partner when it comes to what are clearly Federal offenses and here we are trying to move into areas that have been traditionally reserved to the States?

You also state that the State's prisons are overcrowded in your own area of Philadelphia. I read in the Philadelphia Inquirer just last weekend that under a common plea court order, it could empty out something like 900 prisoners out of the jails if that overcrowding order is sustained by the higher courts but Federal prisons are overcrowded also. How do you answer these questions?

Senator SPECTER. Mr. Chairman, I respond to the question of nexus by pointing to the Federal case law which says that where there is the use of a firearm, there is conclusive Federal jurisdiction because, as you have noted, of the conclusion that the firearm travels in interstate commerce.

I point also to the specific Federal statute which makes it a Federal offense to possess a firearm and punishes it by 2 years in jail, so that if you can have a Federal offense to possess a firearm, certainly it is a Federal offense to possess a firearm in the commission of a robbery or a burglary in the context where an individual has two or more convictions for robbery or burglary in the past.

Beyond those very solid legal justifications in terms of existing statute, existing case law, there is the reality that career criminals do travel in interstate commerce, that if you take an area like south New Jersey and southeastern Pennsylvania, where Congressman Hughes and I worked for so many years, we know that they move from Camden to Philadelphia to Wilmington all the time, and that is the pattern of criminal conduct across our country.

I think we also have to realize that where there is a significant objective to be obtained, that we are looking for imaginative, realistic ways to deal with the problem as, for example, on the drunk driving issue, which is much more remote for Federal authority, as eloquently stated by Senator Symms and others on the Senate floor and in the House, but that is a realistic approach to a problem.

What I think we have to do, Mr. Chairman, is, we have to start talking sense where we look at problems and not use our legal training to find technical reasons to impede, but use our imaginative, creative abilities as legislators to find answers to stop people from suffering from armed robbers and career burglars. There's plenty of legal justification for this being a Federal offense.

Where you were talking about the Federal Government not doing as much as it should, I agree with you about that, and I think that you and I and others are going to see to it that that is improved upon.

Whether we can correct it depends on our energies and our longevity, but we can certainly improve upon it, and this is one of the steps which I think we have to take, but in the order of priorities this, I would suggest to you, comes at the very top of the list. If you deal with 500 of the worst career criminals in this country, I think no one would say that any 500 deserve more attention of the Federal Government.

Mr. HUGHES. I think that much of what you say is correct, and I agree with you. I think that career criminals do travel quite often across State lines.

If this bill dealt with those patterns where the activity was interstate such as convictions in different jurisdictions than the one where the defendant is before the bar on the final conviction of an armed robbery, then we would clearly have some Federal nexus, but that's not the case in the H.R. 1627. H.R. 1627 deals with more or less of a presumption of interstate effect and I think there may be merit in that approach. I don't disagree entirely.

Senator SPECTER. Mr. Chairman, I would like to see it done in the way which you have suggested and we have talked about in our conferences in the past, and that is one of the great advantages of having been in the criminal list room with 20 cases and criminal records, or having gone through literally, thousands of records. We do not have a recordkeeping system which can answer the question on disposition of so many cases.

Mr. HUGHES. Sure.

Senator SPECTER. We are just at a loss. We have a person who comes into the Philadelphia criminal courts, and there may be offenses in North Carolina, New Jersey, Tennessee, and Oregon, and we cannot tell, and it would be a major investigation to find out what has happened in those cases.

That is why we have to apply our experience and the conclusions as to the interstate aspect, and I believe that the factual basis is real, although we cannot prove it, in each one of the cases.

Mr. HUGHES. I will be interested in hearing from the National District Attorneys Association relative to your leveraging, because I believe that there is much merit to that suggestion.

Thank you. You really have provided a great deal of leadership, and I shared your sentiments when you were sick when the Career Criminal bill went down the drain. I shared your concern, because we had about five other legislative endeavors that took this committee about a year and a half to develop that also met the same fate.

I am fortunate that we do have an efficient and bipartisan Subcommittee on Crime. Hal Sawyer, who will be joining us shortly, and I have managed as partners, I think, to develop a number of initiatives in a strictly bipartisan fashion that could have a profound impact on crime in this country. I share your concerns that we lost much of that in the last Congress, and I hope we have benefited from those mistakes and don't engage in the same type of activities that could endanger the important activities that my colleague from Pennsylvania has engineered and others that we in the House are engaged in. So thank you very much.

Senator SPECTER. I know ordinarily a witness asks permission to leave. I am going to ask permission to stay. I am going to stay as long as I can. I want to hear the National District Attorneys and the Department of Justice as well, after hearing from Congressman Wyden and Congressman Gore, whom I thank for their initiatives in the field.

I think it might be well to make one supplemental comment as to what you and I have both alluded to, and that is the events of January 1983, and at that time, when we were in recess, I was scheduled to speak at a conference in Zimbabwe and was scheduled to leave on a given Saturday—I believe it was January 8—and

made a request that if the President were disposed to considering a veto, to have a meeting at the White House.

You remember it well, because you were there, I was there, the President was there, the Vice President was there, Ed Meese was there, Attorney General Smith was there, Treasury Secretary Regan was there, Senator Biden was there, Senator Thurmond was there, and there were others; and there was a strenuous effort at that time to work out the differences, and Mr. Meese suggested an idea on the drug czar by analogy to the Director of Central Intelligence.

When we had taken more of the time of the President than allotted, as you will recall, I made the suggestion that we try to work it out along the lines that Mr. Meese had suggested, and I canceled the intended trip to go to Zimbabwe to speak and worked the next week, and sat down with Secretary of Defense Weinberger, who had a problem, satisfied him; sat down with Central Intelligence Agency Director William Casey and satisfied his concern; and sat down with John Walker, the Department of the Treasury, because Treasury Secretary Regan was unavailable, and we satisfied the concerns of the Treasury Department; and we had satisfied the concerns of everyone except for this will-of-the-wisp concern of the Attorney General, and I do not use those words lightly either, and that drug czar issue has since evaporated, and it has been passed by the Senate, and there's no reason why that crime package should not have been signed.

Mr. HUGHES. I remember very well, because we offered to do exactly what you have ended up doing in the Senate as a way of trying to free up the bill, so I understand.

Senator SPECTER. And, Mr. Chairman, that's yesterday. I guess I haven't quite forgotten it but almost; I used to remember it in more vivid detail.

Mr. HUGHES. I notice you fellows are still packaging though.

Senator SPECTER. Packaging? Some of us do, and some of us don't.

Mr. HUGHES. Ron, it's great to have you here.

We have your statement which, without objection, will be part of the record. Why don't you just go ahead and proceed as you see fit?

Mr. WYDEN. I will do that, Mr. Chairman, and I will be brief.

Let me echo Arlen's comments; in my view, nobody on Capitol Hill has done as much and has worked in such a dedicated fashion on crime issues as you have. It is just a pleasure to work with you in every respect. In fact, that's one of the nicest things about this issue, is to be able to work on a bipartisan basis with distinguished colleagues like Senator Specter and Senator-to-be Al Gore.

Mr. HUGHES. Thank you.

I hope the reporter is taking this all down.

Mr. WYDEN. Yes.

I think Arlen's point about the nonpartisan nature of this question is important as well. I think it is pretty obvious that violent, armed, career criminals don't go out and look at the voter registration cards of their victims. It is a nonpartisan issue in every respect, and I think Arlen went through some of the keys.

We are dealing here with one-man crime waves. I think it's clear that studies show that under 10 percent of all our criminals

commit two-thirds of violent crime in this country. In fact, the estimate is that some of these people—500, and Arlen talked about them—we really want to zero in on—commit something along the lines of 100 crimes per year per individuals. So we are talking about skewing, in effect, the whole nature of the criminal justice system to the worst actors in terms of the percentage of offenses.

What I would like to concentrate my remarks on, Mr. Chairman, because I think Arlen covered so many of the key points, is the question of why the Federal Government should be in all this, because I think that's the guts of this.

There's nobody who is in favor of violent, armed, career criminals; the issue really becomes why should the Federal Government be involved in it, and I want to focus on the two questions you discussed: resources and our nexus.

Now the first question on resources, it seems to me, is where are the dollars going to come from? In this budget now, there is $90 million extra for Federal prisons, and another $10 million scattered on top of it for prosecutors and others.

Now we have—at least the figures were of 1981—30,000 jail spaces in terms of the Federal prison system. We are talking about adding about 3,000 with the extra money.

It seems to me, if at a time of record Federal deficits we want to target our resources, we should be moving to a situation where, at the very least, of those 30,000 to 33,000 Federal jail spaces, somewhere in the vicinity of 500 should always be occupied by the very worst offenders, because that's just in the interests of the Federal Government, is to target our resources. I don't think we are doing that today.

Now on the question of our nexus, we talked about the commerce clause and the impact on interstate commerce. I think it's important to talk about some of the specific statutes that we have already moved on in this general area that I think are valuable precedents.

The Federal Bank Robbery statute, the RICO statute, the Hobbs Act, the Controlled Substances Act; I think the most pertinent example of a statute that is in this vein of the Federal nexus that has been established is the Federal antiloan-sharking provision. Nowhere does that statute require that the transaction directly involve interstate commerce or persons or organizations which have an effect on interstate commerce.

So in that case, where the Federal Government felt there was a profound interest, we passed the statute that could apply to transactions of a purely intrastate character, but it was deemed to be of such great importance that we moved ahead anyway.

Now, Arlen touched on the question of the intent section, the question of section 2 as opposed to section 4. I think it is the feeling of all of us who are sponsoring this legislation that we will put it anywhere where we can get an agreed upon good bill, and the Senate bill takes the guts out of our effort.

Under the Senate bill, you basically could only move against bank robberies because it's a Federal crime. You take 90 percent of the robberies out under the Senate bill, and you take out all the burglaries.

So the Senate bill essentially guts our whole effort, and, as Arlen said, we are very agreeable to putting it either in the intent section, section 2, or in the body of the bill, and I would hope out of these hearings that's what we could fashion, is a bipartisan agreement to locate this somewhere where there isn't any constitutionality problem and at the same time where local prosecutors feel that their jurisdiction would not be trampled upon.

I come from such a jurisdiction. In the city of Portland, OR, we have the support in Portland of both the district attorney and the U.S. attorney because, as one of them said, there is no way we could work together on this, because the most likely way these cases are going to come to the attention of anyone is if the local prosecutor calls up the U.S. prosecutor. In other words, that's the likely way in which anyone is going to find out about this, and of course the local prosecutor would be calling the U.S. prosecutor up to say, "This is an area where I would like your involvement."

I want to touch on just one last point, Mr. Chairman, and that again deals with why the Federal Government ought to be involved in this.

Now we have seen in the last year or two that the crime rate has generally gone down. There have been some discrepancies in this—different jurisdictions, different statistics—but generally the crime rate has gone down.

That is not true for robberies and burglaries. Robberies and burglaries are at a record high level, and the question really is, with the Federal Government with the constitutional responsibility to protect people from domestic enemies, to ensure that they are guaranteed the right not to be deprived of life or property except by due process of law, I think philosphically—I have already talked about the statutes—the RICO statute and the loanshark statute—but just philosophically, I think there ought to be a broader Federal role in providing for our domestic defense against the most prevalent kind of violent crime, which is street crime.

You went through my background—and I call it infamous rather than famous—before I went to Congress. My background is working with the elderly. We are seeing a huge portion of the elderly people in this country, because of violent street crime, not willing to go out after, say, about 4 or 5 o'clock in the afternoon.

I think at a time when we are trying to target our resources, philosophically there is a case for the Federal Government to be involved in a cooperative kind of basis where local prosecutors, in effect, are asking for assistance in a modest number of cases for the Federal Government to play a role against the most prevalent kind of violent crime, and that is street crime.

So I wrap it up with the comment, Mr. Chairman, we are not talking about bringing thousands and thousands of prosecutions here. The theory is to bring a relatively small number of carefully selected prosecutions.

I might add that the President's people have even said that the system could afford somewhere in the vicinity of 500 of these prosecutions a year. So I think there is already testimony on the record that we could go forward with a modest number of cases, and my own view is that we couldn't even start with 500. Let's start with 200 or 300, because, again, of the tremendous ripple effect it would

have on the system to get these one-man crime waves off the street, who are literally committing, as I said the statistics would indicate, somewhere in the vicinity of 100 crimes per year per person.

So with that, Mr. Chairman, let me break my orating off. Again, we are very pleased that you would convene these hearings and, as always, enjoy working with you.

Mr. HUGHES. Thank you, Ron, for an excellent statement.

[The statement of Mr. Wyden follows:]

TESTIMONY OF THE

HONORABLE RON WYDEN

BEFORE THE SUBCOMMITTEE ON CRIME OF THE

HOUSE JUDICIARY COMMITTEE

ON THE

ARMED CAREER CRIMINAL ACT, HR 1627

June 28, 1984

Mr. Chairman and members of the subcommittee, I would like to thank you for scheduling today's hearing on the Armed Career Criminal Act, legislation which Senator Specter and I have introduced in the Senate and the House. This legislation will take strong action to stop one of the most serious threats to the safety of all Americans: the career criminal.

During every recent election year, a lot of overheated political rhetoric has revolved around the issue of crime -- and for good reason. There's no question that our constituents are greatly concerned about this issue. Public opinion polls show that fear of crime ranks second only to unemployment among domestic problems of concern to the American people.

Crime and the fear of crime has disfigured the lives of millions of our citizens who fear attacks in their streets and invasion of their homes. Crime affects one in three households, and major crime hits one in 10 homes.

But the public knows that the sound and fury of a biennial rhetorical debate won't stop crime -- they want strong, decisive action and they want it now.

Senator Specter and I, along with many of our colleagues, believe that we have found an approach that will significantly reduce violent street crime in America and provide the kind of response that Americans are looking for.

Our bill would permit the federal government -- with the permission of local prosecutors -- to prosecute criminals convicted two or more times in state court of robbery or burglary, who are then charged with a third armed robbery or burglary.

If convicted, these one-person crime waves would face a mandatory 15-year sentence in federal prison, with no eligibility for parole.

We believe that the Congress should target the armed career criminal for four reasons:

First, studies show that less than 10 percent of the criminal population commits more than two-thirds of all violent crime in America. They also show that career robbers commit one or more robberies every couple of days, and that career burglars commit one or more burglaries a night.

Second, at a time when the federal deficit is more than $200 billion and the resources of the federal government are sorely pressed, the federal government should target its law enforcement efforts on the career criminals who present the greatest risks to society.

Third, with the courts and judicial systems on the state level stretched to the limit, the federal government should help local jurisdictions as much as possible. With the passage of the Armed Career Criminal bill, a modest number of cases could be tried at the federal level -- where trials are conducted on the average four times faster than in crowded state courts.

Perhaps most important, this bill will give local prosecutors leverage. The threat to move a case to the federal level -- where trials move much faster and where the defendant would be facing a mandatory 15 year sentence -- would, I believe, cut down on the growing tendency of defendants to file one delaying motion after another and otherwise attempt to circumvent the judicial process.

Finally, street crime is the proper business of federal law enforcement when a firearm is used to steal since both firearms and stolen goods move in interstate commerce, just as do drugs. In addition, robberies and burglaries burden interstate commerce even if the criminal does not cross state boundaries.

Federal statutes currently cover bank and pharmacy robberies on this basis, as well as mere possession of firearms by persons with prior felony convictions in state court. The career criminal statute proposed by my colleagues and I, simply combines these established bases of federal criminal jurisdiction which have been upheld by the courts.

The Career Criminal Act was passed originally by the Senate in 1982 by a vote of 93-1. It then passed the House that year as part of the comprehensive crime package that was voted out on December 20, 1982, and then pocket vetoed by the President.

Earlier this year, the Senate again passed Senator Specter's bill but, because of turf battles between various law enforcement agencies, in Senator Specter's words, it "emasculated" the original career criminal legislation so that it would apply only to those three time offenders whose third conviction is for a federal crime such as bank robbery.

The Senate action guts any effective federal effort to go after violent street crime because it would permit federal prosecutors to go after only 10 percent of the armed robbers and none of the armed burglars.

We believe that the House should pass our career criminal bill without diluting it as was done in the Senate, and that, if it does, when the House goes into conference with the Senate on this legislation, the House version will prevail.

The American people want the federal government to play an effective role in the fight against violent street crime. There are two approaches to the problem in Washington and before the subcommittee today -- the weak Senate bill dealing with career criminals and a strong House version. We believe that it is in the public interest that quick action be taken on the House bill.

I strongly urge the members of this subcommittee to approve the Career Criminal Act and to help us send a message that will help prevent perhaps thousands of crimes -- the message that violent crime is a national problem and that the federal government has a legitimate and important role to play in curbing it.

Mr. Chairman, I would like to submit with my testimony for the record a recent Wall Street Journal editorial in support of our bill.

Thank you.

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Mr. HUGHES. Al, welcome.

Mr. GORE. First let me thank you for your kind words earlier on and thank you for the chance to work with you.

I know in the Democratic Caucus—and let me echo my colleague's remarks that this is in no way a partisan issue at all, but I have had the chance to work with you in the Democratic Caucus Committee on Party Effectiveness and was really impressed, to say the least, when you took over that crime task force and really educated us in the Democratic Party in the House about what needs to be done to effectively address this problem.

It is a joy to work with you, and I want to thank Senator Specter and Congressmen Ron Wyden and Barney Frank, who could not be here this morning, for their leadership on this issue. I am happy to play a part in it.

Violent crime is a national problem; I mean it is just that simple; and it is increasingly interstate in nature. So much of it is related to drug trafficking. All of the studies show that. In Tennessee, we have a tremendous problem with these airstrips in rural areas and small towns and planes coming in during the middle of the night, and a tremendous amount of violent criminal activity surrounding that interstate drug trafficking.

The people of Tennessee and other States want to see an effective response. They turn to local prosecutors, and the local prosecutors have their hands tied; they really do.

In Tennessee—and I don't know how much worse we are than the average State in this respect, but in Tennessee our prisons last year were operating at 122 percent of their capacity. They are under a court order to take people out of the prisons.

Thirty-five percent of the people who are in prison today in Tennessee are parole violators and repeat offenders—35 percent.

Now a local prosecutor who walks into a conference with a defense attorney is really at a disadvantage. That defense attorney knows that he has one up on the local prosecutor, because the local prosecutor is dealing with a system that is completely overwhelmed, and as a result, a lot of career criminals who should be removed from circulation in the public are just put on parole; they are put on probation; they go back out and commit more crimes; and people are sick and tired of it. We have an opportunity with this legislation to effectively address that problem.

Local control is not removed in any way, shape, or form. This gives the local prosecutors another tool, another weapon, in their arsenal. They retain complete discretion, and if there is any doubt about that, there shouldn't be any doubt about it, because the intent is crystal clear; the legislation speaks for itself.

The record of the congressional consideration of the bill adds to that clear intent, and there just shouldn't be any doubt about it.

I would ask consent to put the complete text of my statement in the record.

Mr. HUGHES. Without objection, it is so ordered.

Mr. GORE. I am going to forego most of it, because most of it has been said already by my colleagues and by you, Mr. Chairman, but I feel very strongly about this, my constituents feel very strongly about it, and I dare say that Americans all across this country want to see this Congress give violent crime and the heart of the

problem, the career criminal, the attention that this problem deserves.

This legislation will allow us to do that, so I commend it to your consideration and thank you for the opportunity to be here.

[The statement of Mr. Gore follows:]

THE HONORABLE ALBERT GORE, JR.
TESTIMONY BEFORE THE
SUBCOMMITTEE ON CRIME
HOUSE COMMITTEE ON THE JUDICIARY
JUNE 28, 1984

GOOD MORNING. FIRST, I WANT TO THANK CHAIRMAN HUGHES AND THE MEMBERS OF THE SUBCOMMITTEE FOR ALLOWING ME THIS OPPORTUNITY TO TESTIFY IN SUPPORT OF H.R. 1627, THE ARMED CAREER CRIMINAL ACT. THIS IS A TIMELY ISSUE AND I COMMEND THE SUBCOMMITTEE FOR HOLDING THIS HEARING.

THE ARMED CAREER CRIMINAL ACT REPRESENTS A CHANGE IN DIRECTION. IT IS A THOUGHTFUL, INNOVATIVE PROPOSAL THAT STRIKES HARD AT THE HEART OF CRIME IN AMERICA -- THE REPEAT OFFENDER. IN THIS LEGISLATION, WE SHIFT FROM TALK TO ACTION. WE TAKE THE FIRST STEPS TOWARD PROVIDING GREATER PROTECTION FOR OUR FAMILIES AND FRIENDS, OUR HOMES AND COMMUNITIES.

CRIME IN THIS COUNTRY IS INCREASINGLY AN INTERSTATE PROBLEM. FOR INSTANCE, DRUG TRAFFICKING, AND THE RASH OF OTHER CRIME THAT IT SPAWNS, IS NOT ONLY INTERSTATE BUT INTERNATIONAL. IT HAS PRESENTED SPECIAL PROBLEMS FOR LAW ENFORCEMENT OFFICIALS IN ISOLATED, MOUNTAINOUS AREAS OF EAST TENNESSEE. AIRPORTS IN THESE AREAS HAVE BECOME PORTS OF ENTRY FOR ILLICIT DRUGS. DESPITE THE BEST EFFORTS OF LOCAL, STATE, AND FEDERAL LAW ENFORCEMENT OFFICIALS, THERE IS A STEADY FLOW OF DRUGS ACROSS STATE BORDERS

IT IS WELL KNOWN THAT ARMED ROBBERY AND BURGLARY WITH A WEAPON ARE TWO CRIMES CLOSELY TIED TO DRUG-RELATED ACTIVITIES. THE INTERSTATE CHARACTER OF THIS ACTIVITY DEMANDS A STRONG AND EFFECTIVE FEDERAL RESPONSE. WE HAVE EXPERIENCED THE INTERSTATE CHARACTER OF THIS CRIME IN TENNESSEE, AND I AM SURE THAT IT IS A PROBLEM IN OTHER STATES AS WELL.

THE ARMED CAREER CRIMINAL ACT, WHICH PROVIDES FOR A MANDATORY MINIMUM SENTENCE OF 15 YEARS IN A FEDERAL PENITENTIARY FOR ANYONE CONVICTED THREE OR MORE TIMES OF ARMED ROBBERY OR BURGLARY WITH A WEAPON, IS SUCH A RESPONSE. IT WILL EFFECTIVELY COMPLEMENT EXISTING LOCAL AND STATE LAW ENFORCEMENT EFFORTS BY PROVIDING A FEDERAL SANCTION, IN APPROPRIATE CASES, TO HELP GET THE REPEAT VIOLENT OFFENDER OFF THE STREETS.

TENNESSEE HAS ACTED AS WELL TO DEAL WITH THE PROBLEM OF THE REPEAT OFFENDER. TENNESSEE HAS A VERY TOUGH "HABITUAL OFFENDER" LAW. PROSECUTORS HAVE BEEN HAMPERED IN ATTEMPTING TO UTILIZE THAT LAW TO KEEP HABITUAL OFFENDERS IN PRISON, HOWEVER, BY PRISON OVERCROWDING. OTHER STATES HAVE SIMILAR PROBLEMS.

THIS LEGISLATION, IF ENACTED, WILL HELP STATES SUCH AS TENNESSEE BY PROVIDING GREATER FLEXIBILITY TO PROSECUTORS IN GETTING CAREER CRIMINALS OFF THE STREET. THE BILL MAINTAINS LOCAL CONTROL OVER PROSECUTION FOR STATE OFFENSES. THE U.S.

ATTORNEY WOULD BECOME INVOLVED ONLY IF REQUESTED TO DO SO BY THE LOCAL DISTRICT ATTORNEY.

THE FEDERAL ALTERNATIVE MAY BE USEFUL AS A WAY OF DEALING WITH THE STATE PRISON OVERCROWDING PROBLEM. IN ADDITION, IT CAN BE A HELPFUL ALTERNATIVE FOR LOCAL PROSECUTORS IN BRINGING TO BEAR THE GREATEST POSSIBLE RANGE OF RESOURCES FOR FIGHTING CRIME.

TENNESSEE STATE PRISONS WERE OPERATING AT 122 PERCENT OF CAPACITY IN 1983. STATE CORRECTIONS OFFICIALS ARE NOW UNDER COURT ORDER TO REDUCE THE PRISON POPULATION, AND THEY ARE TAKING STEPS TO REDUCE THE NUMBER OF INMATES BEING HELD. I SHOULD NOTE ALSO THAT OF INMATES IN TENNESSEE PRISONS, 35 PERCENT ARE PAROLE VIOLATORS.

THERE ARE NO COMPREHENSIVE STATISTICS ON RECIDIVISM IN TENNESSEE, THE MEASURE OF CRIMES COMMITTED BY REPEAT OFFENDERS. BUT THE FACT THAT 35 PERCENT OF INMATES CURRENTLY ARE PAROLE VIOLATORS, A STATISTIC THAT DOES NOT INCLUDE PERSONS WHO COMMIT A SECOND OR THIRD OFFENSE AFTER THEIR PAROLE PERIOD HAS ENDED, IS CLEAR INDICATION THAT REPEAT OFFENDERS ARE A VERY SERIOUS THREAT TO THE PUBLIC. STATISTICS FROM CORRECTIONS OFFICIALS IN OTHER STATES REFLECT A SIMILAR TREND.

IT SHOULD BE EMPHASIZED THAT THE ARMED CAREER CRIMINAL ACT DOES NOT PRE-EMPT STATE LAW. RATHER, IT IS A SIGNAL TO

CRIMINALS THAT THE FEDERAL GOVERNMENT WILL ACT TO GET THEM OFF THE STREETS WHEN ASKED TO DO SO BY LOCAL PROSECUTORS. WE CANNOT LET PRISON OVERCROWDING REDUCE THE DETERRENT EFFECT OF THE CRIMINAL LAW. A REPEAT OFFENDER SHOULD REALIZE THAT HE RUNS THE RISK OF FEDERAL PROSECUTION AND A MINIMUM OF 15 YEARS IN A FEDERAL PENITENTIARY FOR HIS CRIME. STATE PROSECUTORS WILL STILL DECIDE WHETHER TO SEEK CONVICTION UNDER A STATE HABITUAL OFFENDER STATUTE OR WHETHER TO REFER THE CASE TO THE U.S. ATTORNEY'S OFFICE. BUT THE THREAT OF A TOUGH FEDERAL SANCTION WILL EXIST IF THIS LEGISLATION IS ENACTED.

SOME STATES HAVE REPEAT OFFENDER STATUTES WITH COMPARABLE, OR IN THE CASE OF TENNESSEE MORE SEVERE, PENALTIES. BUT CONGESTION IN THE STATE COURTS STRAINS THE SYSTEM TO THE LIMIT. PROSECUTORS ARE FORCED TO MAKE COMPROMISES IN ORDER TO PREVENT THE SYSTEM FROM BREAKING DOWN. THESE COMPROMISES DILUTE THE IMPACT OF STATE REPEAT OFFENDER STATUTES.

THE CRITICISM MAY BE HEARD THAT FEDERAL COURTS AND PRISONS ARE OVERCROWDED AS WELL. BUT THE FUNDAMENTAL POINT IS THAT AS BAD AS IT IS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, THE SITUATION IN THE STATES IS MUCH WORSE. H.R. 1627 OFFERS AN ALTERNATIVE THAT GIVES PROSECUTORS MAXIMUM FLEXIBILITY TO ACHIEVE QUICK AND CERTAIN JUSTICE, AN ESSENTIAL ELEMENT OF THE DETERRENT VALUE OF THE CRIMINAL LAW.

In short, the Armed Career Criminal Act increases the tools available to prosecutors in fighting crime. It reduces the possibility that overload in the corrections system will diminish the severity of punishment. It is a strong, realistic, and common sense anti-crime measure. I plan to work enthusiastically for its enactment, and I urge the Subcommittee to act favorably on the legislation..

Mr. HUGHES. Thank you, Al. I appreciate that. I appreciate your very kind remarks.

Both Ron and Al have served on the Democratic Caucus, which I think did do great work, and I enjoyed working with both of you for you provided a great deal of leadership in your own fields of expertise.

I might say to my colleague, Arlen Specter, you couldn't have selected a couple of more well respected younger Members than Ron Wyden, Al Gore, and Barney Frank. They are very well respected experts in their own fields.

I think the arguments you advance are good arguments.

Al Gore, in his closing remarks, alluded to the fact that drug trafficking is a national problem, and he is absolutely right.

If you just look at the categories of property crime, in many categories much of that is drug-related, and much of the substance abuse is with us because the Federal Government hasn't done a very good job in source countries. We also haven't done a very good job of interdiction. We have committed too little too late domestically to all of our enforcement efforts, so that much of the property crime today is related to matters that are indeed Federal matters.

I couldn't agree with you more, and I think that that puts it in the kind of perspective, perhaps, that we ought to be looking at the overall problem.

So thank you. You have made some tremendous contributions here today, and we appreciate your testimony. Thank you.

Mr. HUGHES. Our next witness, Stephen S. Trott, was appointed Assistant Attorney General of the Criminal Division, Department of Justice, in July of last year.

Mr. Trott graduated from Wesleyan University in 1962 and Harvard Law School in 1965. In his career, he has been the Los Angeles chief deputy district attorney, heading the Organized Crime and Narcotics Division, the U.S. Attorney for the Central District of California, and the U.S. attorney coordinating the regional drug trafficking task force in central California and Nevada.

Mr. Trott is also a distinguished faculty member of the National College of District Attorneys.

This is Mr. Trott's first appearance before the Subcommittee on Crime. I am sure he has probably testified before other committees, but we welcome you warmly. You have had a most distinguished career.

We have your statement, which will be made a part of the record, and you may proceed as you see fit. Welcome, Mr. Trott.

TESTIMONY OF STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. TROTT. Thank you, Mr. Chairman. It is my pleasure to be here.

Let me just indicate at the outset that after listening to the testimony of the other witnesses and considering these bills, I could offer one suggestion based on my experience as a prosecutor.

I prosecuted my first armed robbery case in 1966, and I've been in law enforcement in the capacity of a prosecutor ever since. Frankly, after reading these bills and thinking about them this

morning and listening to what everybody says, it strikes me as almost inappropriate to talk about the bill itself, that the sentencing structure starts out at 15 years.

I would strongly suggest that anybody—anybody—and I mean all people who fall within the category described by the House bill, ought to be considered for a life sentence without possibility of parole.

If we are talking about creating a bill that will give us some fire power and some leverage over those savages who have destroyed America's freedoms on the streets, we ought to be talking about putting them away forever. Frankly, I think that people like this should never ever again see the light of day.

As to persons with this type of record, having been convicted of these kinds of offenses and showing up for the third time on a robbery or a burglary with a firearm, we ought, as responsible people representing the decent people of this country, to take every step to ensure that they will never ever again be given the opportunity to menace another person, young or old.

So although I applaud the idea that we are taking a tough stand against criminals, if we are going to take a tough stand, let's put a life sentence on here.

I think the continuing criminal enterprise statute, for example, that we use when we are talking about drug offenders, is a tough statute because of the penalties that go with it, and I think that with respect to this category of people, if we are going to have such a Federal career criminal bill, it ought to be one that takes a look at these people right in the eye and says, "That is it. You have forfeited your right to be a free person in the United States."

I just offer that observation for openers.

We talk about career criminals——

Mr. HUGHES. That certainly would get their attention.

Mr. TROTT. We know what they do. We know what they do, and it would get their attention.

Senator Specter would like to create a situation where people will think twice in State court before they get sent over to Federal court. A life sentence without parole would be pretty good.

Now let me talk a little bit about resources. I am also troubled to hear the concern about resources. It is a concern. The Federal Government is underpowered in terms of resources; that is absolutely true. But I am convinced that if this committee and if Congress, in its wisdom, sees fit to pass this type of a bill, we will handle it.

But, again, if I can footnote that—and I will get to this later—I think that the House version, H.R. 1627, should only ever come into play, not just in a case that's lodged already in a local prosecutor's office but at the request and with the voluntary concurrence of a local prosecutor.

But if a local prosecutor signs off on one of these kinds of cases and believes that the case ought to come into Federal court for prosecution, we will handle it, and I will tell you how we will handle it.

At the beginning of this administration, we rejected completely the idea that the Federal Government could do very little to combat violent crime. In every district, we set up a law enforcement coordinating committee, which was designed to enable the

Federal Government to go in with State and local people and say, "How can we help with violent crime?"

We have taken enormous strides in the area of narcotics offenses and also in violent crime, and one of the ways we have done this is to institute the cross-designated prosecutor concept.

What we do under these circumstances when we have concurrent jurisdiction is take State deputy district attorneys, county deputy district attorneys, or whatever, and we make them special assistant U.S. attorneys for the purpose of coming into Federal court with a case.

The very first two cases that I prosecuted in California were with a cross-designated deputy district attorney. She and I tried firearms, terrorist violations in Federal court, and we did it together with a local police department and the FBI in a joint effort. That is one of the ways we can address resources.

So, for example, in a bill like this, if a State prosecutor came to us and said, "We have here a career armed criminal; let's take him in Federal court and hammer the hell out of him," the first thing that a Federal prosecutor would do is say, "Fine; then if your people want to be special assistant U.S. attorneys cross-designated, come into Federal court; we'll do it together."

So I am suggesting, even though we have a resource crunch, and it's going to be difficult, and we can't take all these cases, we can do it, and we will do it, by the use of cross-designated prosecutors.

In California, I had a special case like that. Two people who had been sentenced to death in California got out of jail as a result of changes in the laws, and they continued to terrorize the neighborhood. The local prosecutor's office came to me and said, "We can bring a *Ricco* case against these people." I said, "Terrific." We cross-designated the local prosecutors, we put them in with our U.S. attorneys, we got them convicted, and we put them in Federal prison.

So, yes, be concerned about Federal resources; yes, continue as you have, to work as hard as you have worked, to get us additional resources; but if we get a bill like this that comes with the concurrence of local prosecutors, we will use it, and we will get them.

Now we do have some problems with H.R. 1627 which are outlined in my statement, but let me just go over them briefly.

Our major difficulty with H.R. 1627 is with proposed section 2118(e) that addresses the exercise of Federal jurisdiction, which, because of its unusual wording—which everybody is familiar with—causes some problems.

Now this subsection is obviously an attempt to overcome the administration's chief problem with the version of this bill that passed in H.R. 3963 and as S. 1688 in the last Congress.

Those bills would have allowed a State or local prosecutor to veto any Federal prosecution in his or her district even if the Attorney General had approved prosecution. Such a restraint on Federal prosecutorial discretion and delegation of executive responsibility would have raised some serious difficulties, as well as possible constitutional concerns.

Although it is somewhat imprecisely drafted, subsection (e) apparently tries to overcome the constitutional difficulties by leaving the ultimate decision on whether to seek a Federal indictment to

Federal prosecutors. However, since a case lodged in a State prosecutor's office may only be considered for Federal indictment on the request or concurrence of a local prosecutor, it's not really clear how a U.S. attorney's office would ever officially be made aware of such a case if the State prosecutor did not request its consideration.

But if a case were not lodged already with a State prosecutor's office, does that mean that the Federal Government could go out hunting for it on its own, fight it, and bring it in without the concurrence of a local prosecutor?

This bill is in trouble unless local prosecutors believe that it will not operate to steal cases that they feel they should be involved in.

We, the Federal Government, want to be involved in these kinds of cases only if State prosecutors fully agree that this is the best tool to take out of commission a serious armed career criminal.

So, again, I submit that to you as a serious concern, and I know you will take into consideration the testimony that will be presented to you today from the attorneys general and the National District Attorneys Association.

I also have some concern that we are only talking about burglars and robbers. If we are going to be talking about career criminals who are menacing people in this country, I see no reason why a bill such as this should not include armed rapists, for example, who have performed their deeds on more than one occasion in the past.

There are other violent crimes, too, that would fall into this category that I think probably ought to be considered in something like this, and I know that's probably somewhat of a tangent here, but I would simply suggest to you, Mr. Chairman, and to this committee, that not only burglaries and robberies are the kinds of crimes that people are really worried about. Rape is a very, very serious crime that is equally damaging, especially to the women of this country.

We set up a sexual assault program in the district attorney's office in Los Angeles in 1975, and it came as a surprise even to those of us who had been in law enforcement for 10 years what the crime of rape means to the women of this country. It has prevented not only, as was pointed out, old people from going into streets and parks, but women from using public facilities and public areas.

So I would suggest that those are some of the other aspects of this bill that we believe ought to be looked at.

Now, finally, I guess I can conclude by stating that really the center of the movement in this country against this type of crime comes from State and local prosecutors. They are the offensive line. They handle most of these cases.

The Federal Government is pleased to be of assistance and would be delighted to help, but, again, only under circumstances where it is clear that we would not be perceived as taking cases away from State jurisdictions that have traditionally belonged there.

I would be happy to answer any questions that you might have.

[The statement of Mr. Trott follows:]

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON CRIME
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

CAREER CRIMINAL - S. 52 AND H.R. 1627

ON

JUNE 28, 1984

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice on two bills which provide lengthy mandatory sentences for armed career criminals. These bills are S. 52 as passed by the Senate on February 23, 1984, and H.R. 1647, a bill identical to S. 52 as it was originally introduced.

The subject of federal prosecution of persons with two or more robbery or burglary convictions who commit another one of these offenses while armed with a firearm is a familiar one both to the Department and to this Subcommittee. In the last Congress, then Deputy Assistant Attorney General Roger M. Olsen testified before you concerning H.R. 6386, a bill quite similar to H.R. 1627. We took the position that the federal government can lend some degree of assistance to the states in combatting career robbers and burglars, provided that the problems inherent in establishing concurrent federal-state jurisdiction in this area can be resolved. That remains our position today. We are not opposed to legislation creating federal jurisdiction over armed robberies and burglaries committed by recidivist offenders, although we think that the problems associated with concurrent jurisdiction over these crimes are real and must be carefully addressed.

In addition, I would emphasize that while we are willing to accept some share of the load in prosecuting career robbers and burglars, we do not regard legislation allowing us to do this as

having a particularly high priority. In our view, such legislation does not approach the same importance in the fight against crime as most of the provisions in S. 1762 and other bills that have passed the Senate as part of the Administration's anti-crime package. We think that what is most urgently needed is comprehensive, effective reform of such major areas of the criminal justice system as the sentencing, labor racketeering, bank secrecy, bail and forfeiture laws, rather than the sort of piecemeal tinkering with specific statutes that is done in S. 52 and H.R. 1627. Moreover, it bears mention that, of the fifteen violent crime proposals in Title X of S. 1762, of which S. 52 is not one, the Congress has thus far completed action on only one, the proposal aimed at pharmacy robberies and burglaries. We believe several of the remaining proposals contained in Title X -- many of which we know are not within the purview of this Subcommittee's jurisdiction -- are more important than the matters addressed in S. 52 and H.R. 1627.

Turning to H.R. 1627, this bill sets out a new section 2118 in title 18 providing that any person who has already been convicted of two felony robberies or burglaries and who commits a third such offense in violation of either federal or state law while armed with a firearm may be prosecuted in federal court. If found guilty, he must be sentenced to imprisonment for at least fifteen years or to life imprisonment. Regardless of the length of the sentence, it may not be suspended or made probationary, and the defendant would not be eligible for parole.

Our major difficulty with this bill is with proposed subsection 2118(e) addressing the exercise of federal jurisdiction which, because of its unusual wording, I have quoted below.[1] This subsection is apparently an attempt to overcome the Administration's chief problem with the version of this bill that was passed in H.R. 3963 and S. 1688 in the last Congress. Those bills would have allowed a state or local prosecutor to veto any federal prosecution in his district even if the Attorney General had approved prosecution. Such a restraint on federal prosecutorial discretion and delegation of executive responsibility would have raised serious difficulties as well as possible constitutional concerns. Although it is somewhat imprecisely drafted, subsection (e) would apparently overcome any constitutional difficulties by leaving the ultimate decision on whether to seek a federal indictment to federal prosecutors. However, since a case "lodged" in a state prosecutor's office may only be considered for a federal indictment on the request or concurrence

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[1] Subsection 2118(e) provides:

> "(e) Ordinarily, armed robbery and armed burglary cases against career criminals should be prosecuted in State court. However, in some circumstances such prosecutions by state authorities may face undue obstacles. Therefore, any such case lodged in the office of the local prosecutor may be received and considered for Federal indictment by the Federal prosecuting authority, but only upon request or with the concurrence of the local prosecuting authority. Any such case presented by a Federal investigative agency to the Federal prosecuting authority, however, may be received at the sole discretion of the Federal prosecuting authority. Regardless of the origin of the case, the decision whether to seek a grand jury indictment shall be in the sole discretion of the Federal prosecuting authority."

of the local prosecutor, it is not clear how the United States Attorney's office would ever officially be made aware of such a case if the state prosecutor did not request its consideration. If federal authorities found out about such a case unofficially they could still seek an indictment in spite of what the state prosecutor might want, but the assertion of federal power in such a manner is hardly conducive to good federal-state relations. Moreover, there is, we submit, no rational basis for making even an initial determination of whether the state (which nearly always has jurisdiction over robbery and burglary) or the federal government (which would be given jurisdiction over a limited number of such cases under the proposed statute) should prosecute turn on whether a state or federal agency investigated and presented the case. The only justification for any federal involvement in this area of traditional state responsibility is to aid the states in certain unique situations. This necessitates close coordination and cooperation between state and federal investigators and prosecutors which can often best be obtained by consultations and decisions on a case-by-case basis.

Accordingly, we recommend that subsection 2118(e) be deleted and that a new provision be inserted in section four of the bill expressing the intent of Congress that ordinarily no prosecutions should be brought under this provision unless the appropriate state or local prosecutor requests or concurs in federal prosecution. Since section four is non-jurisdictional in nature, this language would not raise any of the constitutional problems

regarding a local prosecutor vetoing federal prosecution which I have previously mentioned, and at the same time it would minimize the risk of disrupting important federal-local law enforcement relationships when prosecutions are brought under this statute.

In addition to our overriding concern with H.R. 1627 over the way it allocates jurisdiction between the federal and state prosecutors, we have several suggestions with respect to the new armed robbery and burglary offense itself. First, subsection 2118(b) provides that the two prior felony convictions need not be alleged in the indictment or proven at trial to establish an element of the offense or the jurisdiction of the court. Rather, subsection 2118(a)(2) provides that the prior convictions are to be proven to the court at or before sentencing. We think that the two prior felony convictions which provide the basis for federal jurisdiction should be established prior to the attachment of jeopardy. If verification of this jurisdictional element is left until sentencing, a defective prior conviction, for example, one in which the defendant did not have counsel at the entry of a prior plea, could nullify the entire prosecution because double jeopardy considerations would prevent retrial. We would suggest the inclusion of language which would require the prosecution to notify the court and the defendant prior to the attachment of jeopardy of the prior convictions relied upon to

establish jurisdiction and mandate that the defendant contest the validity of any such conviction prior to the attachment of jeopardy.[2]

Second, we think that the requirement that the firearm be in the actual possession of the robber or burglar who has already been convicted twice is too narrow. We believe that the statute should reach such a recidivist robber or burglar while he or any other participant in the offense is in possession of or has readily available to him a firearm or an imitation thereof. Under the provisions of the bill as drafted, a recidivist who planned and organized a particularly life-endangering armed robbery or burglary involving several persons could remove himself from the reach of the new section simply by having his confederates carry all the firearms. In certain types of robberies, such as of banks, it is not uncommon for one or two persons to actually hold the weapons while others remove the money. Since there is no meaningful difference in their degree of culpability, all participants who have the two prior convictions should be covered by the new statute.

Third, section 2118(a) is silent on the question of how federal jurisdiction, which is based on the possession of a firearm, is to be shown. Presumably, it is intended as an element of the offense which must be proven to the trier of fact, inasmuch as the section's application is intended to be limited

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[2] The bill should make clear that the pendency of an appeal does not affect the usability of the conviction, regardless of the outcome of the appeal.

to firearm-carrying recidivists, but the recidivism requirement is explicitly not made an element. Thus, it would appear that a conviction under section 2118(a) would require proof of possession of a firearm plus proof of all the elements of the state or federal statute that the defendant is charged with having violated. We would suggest that this point be specifically addressed in the legislative history.

In addition, since the terms "robbery" and "burglary" are not defined in the proposed statute, we would recommend that either the bill or the legislative history make it clear that the terms are to be given a generic rather than common law meaning and include state offense that do not use the words "robbery" or "burglary," such as a statute that proscribes criminal entry with different gradations for the types of structures entered and the act committed therein.

Finally, as we pointed out when we testified before the Subcommittee on H.R. 6386 in the 97th Congress, we think that any legislation in this area would benefit from Congressional findings that armed robberies and burglaries have an adverse effect on interstate commerce. See Perez v. United States, 402 U.S. 146(1971). While we think the Commerce Clause provides a sustainable basis for asserting federal jurisdiction over the traditionally state crimes of robbery and burglary, Congressional findings would facilitate the bill's passing constitutional muster.

S. 52

Turning to S. 52 as passed by the Senate, this bill eliminates most of the problems I have noted with respect to H.R. 1627. It provides that the two prior felony convictions necessary to establish federal jurisdiction shall be proven to the court before jeopardy attaches. It reaches the situation in which a twice convicted robbery or burglary participates in another armed robbery or burglary but does not himself handled the gun. And it contains appropriately broad definitions of the terms "robbery" and "burglary."

Most significantly, S. 52 solves the problems associated with concurrent federal-state jurisdiction over third-time robbers and burglars by making the new section 2118 applicable only where the charged third-time robbery or burglary offense can itself be prosecuted in a court of the United States. In effect, while section 2118 does set out a new offense, it would actually operate as an enhanced sentencing statute for person who have two prior state or federal robbery or burglary convictions and who are involved in another armed robbery or burglary that is a violation of a federal statute such as robbery in the special maritime and territorial jurisdiction (18 U.S.C. 2111), robbery of federal property (18 U.S.C. 2112), robbery or burglary in the Indian country (18 U.S.C. 1153), or bank or postal robbery or burglary (18 U.S.C. 2113-2115). Thus, the coverage of S. 52 as passed is considerably narrower than as introduced. It would not

expand federal jurisdiction over third-time state robberies and burglaries, the obvious goals of the sponsors of S. 52 and H.R. 1627.

As I indicated at the start of my testimony, the Department of Justice is not opposed to such an expansion, although we realize that distinguished groups directly concerned with law enforcement at the state level, such as the National District Attorneys Association, are opposed to the concept of extending federal jurisdiction over state robberies and burglaries. Indeed, we agree that in most cases, local police, prosecutors, and the court system can handle the threat posed by even the most dangerous career robbers and burglars. This obvious fact is the reason that we do not regard the assertion of federal jurisdiction over selected robbery cases as being of great significance in the fight against violent crime when compared with other, more urgently needed reforms of the federal criminal justice system.

Nevertheless, from our perspective there may be a need for federal assistance in certain limited situations where, for example, court congestion, prison overcrowding, inadequate state sentencing statutes, or any number of other factors may render state prosecution of an armed robber or burglar inadequate or ineffective. We believe, moreover, that a statement of Congressional intent that ordinarily federal prosecution should not be undertaken without the request or concurrence of the local prosecutor would underscore the point that the creation of federal jurisdiction over these crimes is to assist the states

and at the same time would serve to avoid any constitutional problems associated with allowing a federal prosecution only with the concurrence of or lack of objection from a non-federal official. We strongly urge the Subcommittee to include such a provision if it decides to report out legislation in this area.

Mr. Chairman, that concludes my prepared remarks and I would be happy to respond to any questions at this time.

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Mr. HUGHES. I take it that you would prefer only an "intent of Congress" section that local prosecutors should handle most of these cases.

Mr. TROTT. Yes. These kinds of cases are traditionally the fodder of local prosecutors, which I was for 16 years before I went into the Federal system.

Mr. HUGHES. Why would you resist a specific provision which, in essence, made the triggering mechanism the request by a local prosecutor?

Mr. TROTT. I am not really resisting that. I am saying that this triggering mechanism is not particularly clear in the way in which it works. Reading it in one way, it says, "Therefore, any such case lodged in the office of a local prosecutor may be received and considered for Federal indictment by a Federal prosecuting authority, but only on request."

Mr. HUGHES. I agree.

Mr. TROTT. What if the case is not lodged there?

Mr. HUGHES. I agree. It is a very complex and, I think, confusing. It is a drafting problem.

Mr. TROTT. It is difficult. It's attempting to cope with this problem, but I think it's very vague, and lodged becomes a sort of unusual term, and you have got here a situation which could allow a Federal prosecutor to go out hunting for these cases, and if they are not yet lodged in a local prosecutor's office, you could run into some problems.

You also have some difficulties with the Federal grand jury rules here. What happens, for example, if, during your investigation of an organized crime case, you develop some 6(e) material? You had evidence that is only Federal evidence—could not be shared with State and local people. You run into some confusion as to how you would perform this consultation.

But again, the principle that I think could be implemented is the principle that this should not happen unless State and local people are in full agreement. Then, as I said earlier, I think the presumption would be that we would cross-designate them, and we would do it together.

Mr. HUGHES. I find that provision the easiest of the problems to deal with. It seems to me that if in fact there is merit to the proposal—and I must say that I find that there is some merit, the intent to defer to local prosecutors is the easiest part of the problem with the bill. If everything else were equal, I would be inclined to require that it be by request of the local prosecutor, with the ultimate decision to be made by Justice. I would not like to see some jurisdictions just automatically pushing cases over to the Federal Government, because we have our own resource problems, and as they empty more and more prisons out because of orders due to overcrowding, why, local prosecutors are going to be looking for more ways to deal with their problem, their caseload.

Mr. TROTT. We have also cross designated the other way.

Mr. HUGHES. The ultimate decision has to be made by, it seems to me, the Justice Department, but I think there is no question but that the local prosecutor should have the initial role of deciding what should be sent to the Federal Government.

Let me ask you a question on another subject, which gives me even more concern. Arlen Specter and our other witnesses alluded to the fact that the bill that came from the Senate in S. 52 actually gutted the Specter bill in that it was so delimiting. It restricted it, first of all, to just certain types of robberies and eliminated burglaries altogether, and it required that the last offense be a Federal offense of carrying a weapon in a robbery triggering a Federal felony conviction. I think you'll concede that that's going to leave us with a very limited class of career criminals.

My question is, if the concept is good, why isn't it good for all burglaries and robberies?

Mr. TROTT. If the concept is good, if the concept involves the absolute concurrence of State and local prosecutors, I think it probably should be extended to all the robbers and burglars you have, in addition to rapists, and be up to a life sentence without parole.

Mr. HUGHES. That's another question I want to get into, but your view is, and you have so expressed, that you can see no distinction.

Mr. TROTT. No.

Mr. HUGHES. What other types of street crime besides, armed rapists—have you modified that now to say all rapists, or just armed rapists?

Mr. TROTT. No; I think if we are talking about the connection with interstate commerce, you would have a difficult time finding a rape case falling within the Federal nexus.

Mr. HUGHES. I see.

Mr. TROTT. But if you have a firearm, then you are there.

Mr. HUGHES. Any other offenders? How about armed terrorists?

Mr. TROTT. Well, armed terrorists we already have sufficient statutes to cover. Those are the kinds of cases that I was referring to that Lael Rubin and I prosecuted in California. We have firearms laws; we have a lot of laws that cover that.

I think that you want to have this broad enough——

Mr. HUGHES. We have statutes that cover burglary and robbery, too, for the States.

Mr. TROTT. I mean I think you have Federal statutes that cover a lot of the behavior that you would include as terrorism, but I think that burglaries and robberies, in the main, are the core of this. However, I would strongly suggest adding rapes.

A lot of rapes are conducted by people who have firearms, and if we are talking about a way to try to add an additional tool that could be used at the request of State and local prosecutors, I don't see any reason why that shouldn't be in there.

We cannot understate the danger of these kinds of people. I think when you are talking about people who are in for a third time using firearms, they should never ever see the light of day again.

Mr. HUGHES. Let me ask you, do you see any problems with the "on request of local prosecutor" standard violating the concerns that Justice has raised over the veto provisions?

Mr. TROTT. That becomes a thorny problem. You have a situation here where the Federal jurisdiction is really exercised by State and local people. It would have to be clear that the Federal Government is exercising powers within its prerogative, but I still believe

that this is a traditional crime that State and local people take care of.

For example, if we were to create a bill that said: "Well, the Federal Government can just swoop in and grab these cases whether the State and local people like it or not," I think everybody in this room would agree, that would be a horrible idea, and it would be one that would not be accepted for 5 minutes.

So we have to go to the other extreme and recognize that these matters are the traditional crimes prosecuted by State and local prosecutors and figure out some constitutional way to get them into our backyard only when State and local prosecutors agree.

Mr. HUGHES. You have suggested that one way to get attention would be to expand the sentence to life without parole as the outside parameter, and my question is, what is your feeling about the mandatory sentence provisions?

Mr. TROTT. I think mandatory sentence provisions are good on balance. We started using those in California a number of years ago, and the CCE statute provides us with a good example. You have to have teeth in this, and I think you should have enough teeth to protect people.

The bottom line is, what are we trying to accomplish? We are trying to protect the decent people of the United States against savages who use guns, and the only way we can do that for certain is to lock them up forever.

These are people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture, we should say, "That's it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again."

Mr. HUGHES. So you would impose a mandatory life sentence.

Mr. TROTT. I have always believed for people who use firearms, who have demonstrated their proclivities by a couple of convictions, that they should go away forever.

Mr. HUGHES. I think you have answered all of my questions.

One of the premises that Arlen and the cosponsors in the House operate on is that the Federal nexus comes about because it can be presumed that possession of a handgun involves interstate commerce.

Al Gore alluded to the fact that much of the property crime today, in particular, is committed by people that have drug problems or drug related in one form or another, either drug trafficking or stealing to pay for one's habit. Do you think that that is a valid premise?

Mr. TROTT. Absolutely. Every study now shows that an extremely high percentage of violent crimes is committed by people using drugs and looking for money to support their habit, or people who have used drugs and have become so bombed out by the process, they are incapable of holding a job, so they become predatory and just live off other people.

Dr. Samenow was right when he described the criminal mentality.

Mr. HUGHES. Well, thank you, Mr. Trott.

You know, the one thing I am going to say before you leave is that I wish I shared your optimism with regard to resources. You know, we have had a terrible time trying to provide resources.

I listened to 3 days of debate on the budget. I never heard one Member get up and mention the words "anticrime program" for the criminal justice system. I heard literally dozens of my colleagues get up and talk about areas of concern to them.

In fact, I went to the well and made that point. In 3 days of debate, I never heard anybody mention the criminal justice system, and every time we end up with the Department of Justice appropriation, we end up taking cuts, and we still have not recovered from the deep—I mean the very deep—cuts that we took in 1982.

Mr. TROTT. We fight as hard as we can for the resources, but the attitude that we take once we know what our budget is going to be is, "How can we do this?" We want to know how we can accomplish what we want to accomplish, not why we can't.

Mr. HUGHES. Well, Mr. Sawyer and I took the Attorney General over the coals so many times in that 1981-82 timeframe, particularly in relation to the cuts in DEA and the Bureau of Alcohol, Tobacco, and Firearms, which we still are reeling from.

BATF, in particular, lost more seasoned law enforcement officers because of the turmoil, the RIF notices, that went out to those officers during that period of about a year when there was some question as to whether they would continue to exist.

The same thing with the Drug Enforcement Administration. With all the uncertainty, we have lost a lot of good people. We also have zero-funded programs like diversion investigative units that were very successful, as you know as a seasoned prosecutor.

The leveraging of those funds in the area of diversion was one of the best things we could do to deal with the diversion of licit drugs into the illicit market. We still haven't restored those funds! They are still zero funded!

The task force operations of DEA also are in trouble. We haven't expanded them. We have managed only to hold our own. So we are not really winning any major battles on resources around here.

Mr. TROTT. Well, the Organized Crime Drug Enforcement Task Force has increased by approximately $130 million and close to 1,000 people the effort against drugs.

Mr. HUGHES. Well, I realize that, but in many respects we are spinning a lot of wheels.

Thank you, Mr. Trott. We appreciate your testimony.

Mr. TROTT. Thank you, Mr. Chairman.

Mr. HUGHES. Our next witnesses are a panel. We have Arthur C. Eads, district attorney from the 27th District of Texas, representing the American Bar Association; and Austin McGuigan, the chief State's attorney for the State of Connecticut, representing the National District Attorneys Association.

Why don't you come forward?

Mr. Eads graduated from Southern Methodist University and Baylor Law School, where he was first in his class. In addition to his law enforcement career, he has established an outstanding reputation as a scholar and teacher of criminal justice issues.

Among his many current activities, Mr. Eads is chairman of the Criminal Law Section of the State Bar of Texas, a member of the

Texas Criminal Justice Policy Council, vice president and member of the board of directors of the National District Attorneys Association, and a member of the Criminal Justice Council of the American Bar Association.

I might say, Mr. Eads, that I know that you are a close friend of Congressman Hance, our distinguished colleague. He was telling me that you would be here this morning and wanted me to convey his greetings.

Our next panelist is Mr. Austin J. McGuigan, chief State's attorney for the State of Connecticut, a position he has held since 1978.

As chief State's attorney, he is head of the division of criminal justice for the State of Connecticut, which has the responsibility for the investigation and prosecution of all criminal matters in the State of Connecticut.

Mr. McGuigan graduated from Merrimack College in Andover, MA, served in the U.S. Army as a special agent in military intelligence, and then graduated from Boston University Law School cum laude.

After graduating from law school, Mr. McGuigan served as law clerk to the Honorable John P. Cotter, chief justice of the Connecticut Supreme Court, and then joined the division of criminal justice in Connecticut, where he became chief prosecutor of the statewide organized crime investigative task force and then became chief of the special investigative unit.

We welcome you this morning.

We have your statements which, without objection, will be made a part of the record, and I think the best thing for me to do, before we get into the testimony, is to go catch a vote in the House of Representatives, rather than interrupting you 5 minutes from now.

If I am having a tough time talking this morning, it's because a conference committee on bankruptcy ended about 3 o'clock this morning, and I am having a difficult time getting going.

We will stand in recess for 10 minutes.

[Recess.]

Mr. HUGHES. The Subcommittee on Crime will come to order.

OK, Mr. Eads, why don't we begin with you?

TESTIMONY OF ARTHUR C. EADS, DISTRICT ATTORNEY, 27TH JUDICIAL DISTRICT OF TEXAS, REPRESENTING THE AMERICAN BAR ASSOCIATION; AND AUSTIN McGUIGAN, CHIEF STATE'S ATTORNEY, STATE OF CONNECTICUT, REPRESENTING THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Mr. EADS. Congressman Hughes and members of the subcommittee, before I say anything, I guess I should preface it by beginning that this is a new experience for me, so I would like to emphasize that it is a tremendous honor for someone from a rural jurisdiction like myself to have the opportunity to appear before you.

I'll be testifying on behalf of the American Bar Association. The American Bar shares the concern of the National District Attorneys Association. It is one of those situations where, as Mr. McGuigan and I sit here, it is almost as if the lion has laid down with the lamb, perhaps with regard to the ABA and NDAA.

The statements which I have are on file, Mr. Chairman.

Mr. HUGHES. Yes. Without objection, both statements will be made a part of the record.

Mr. EADS. The American Bar Association, I think, in all deference to the National District Attorneys Association, of which I am also a member, being composed of defense attorneys and prosecutors and academicians, is uniformly opposed to H.R. 1627, primarily because of the Federal jurisdiction over what has historically been a local law enforcement responsibility and one which the American Bar Association feels has been done rather well.

I think that the thrust of the position of the American Bar Association is their concern over what is an expansion of Federal jurisdiction in what has always been the job of the local district attorneys.

I, as a local, rural district attorney, certainly not only share that, but, Mr. Chairman, I, at times and in hearing the subcommittee, even have difficulty in visualizing that particular situation where I would go to my U.S. attorney and say, "Hey, I have a career criminal, and I would like for you to prosecute him for me." That's one of those things that, in my area of the country, we take a particular delight in the responsibility.

It is ironic that the Federal legislation which Senator Specter would have to be considered is legislation which would reduce the criminal punishment for the career criminal offender in the State of Texas in my jurisdiction.

We would have defense attorneys going to Federal prosecutors requesting that it be done in Federal courts, because they would receive less punishment in the Federal system than they would under our State system. Perhaps that is not true in all States. I know that in Mr. McGuigan's State of Connecticut, the defendant could actually receive some 75 years less for that particular offense in the Federal system than he could in the State of Connecticut.

So those are our concerns that are shared again not only by defense attorneys, by the academicians, by the prosecutors uniformly, and I wonder as I sit before you today, when you have a situation where a prosecutor seems to be testifying from a position against an anticrime bill—and I don't want to come from that direction, but I would wonder when you have defense attorneys and academicians and prosecutors from across this country uniformly opposed to crime legislation, if it's not something that needs to be looked at and really asked that basic question, why?

Our concern as local prosecutors, and the concern of the American Bar Association, is the fact that it has traditionally been a State's right. It is one that is being done well, and it is one in which conflicts are just going to arise, Mr. Chairman, when you have the possibility of concurrent jurisdiction between U.S. attorneys and local district attorneys, whether it's at my request to go ask him or it's at his prerogative to consider or to ask me. There are just going to be problems, whether those were initiated by the Federal investigative authority and which I may not know of at the time, or I may have one that he may not know of.

The American Bar Association would ask of this committee to consider, as I know, Mr. Chairman, you have in the past, that if the Federal Government is sincere in helping local prosecution. Then please do that in such a manner rather than the continual

passing of bills without any concommitant dedication of resources, to where we can adequately train prosecutors through the National College of District Attorneys in Houston, to where it doesn't suffer the same fate that the National College of Criminal Defense Lawyers suffered in Houston, and that is that it went under, and it's regretful, and it's sad, because we, as prosecutors, I think, as much or more so than anyone else, want to go against well-qualified, well-trained, and competent defense lawyers, because we don't want to have to defend those defense lawyers in 2 or 3 years on writs of ineffective assistance of counsel.

But if we are concerned about the crime problems of this country, we would ask the Federal Government to give us the financial resources, and the ABA would ask that, to not only train defense lawyers to aggressively defend their clients but to train young prosecutors.

Mr. Chairman, I will assure you that the local prosecutors in this country can and will continue to handle career criminals.

I know that in the Federal legislation, it refers to armed robbery and armed burglary. If there is a problem in Tennessee with the length of their punishments, I think that that is one that should be addressed by the legislature in the State of Tennessee.

I would respectfully submit, if Senator Specter feels that is a problem in Pennsylvania, that is a subject that should be approached by the legislature of the State of Pennsylvania as it was in Texas.

In Texas, you do not have to be an armed burglar or an armed robber. Our statute reads not less than 25 years nor more than life if it's a third hot check over $750. So we have handled that problem, and I think that is best left to the States to do so.

I would stand ready to answer any questions which I could.

[The statement of Mr. Eads follows:]

AMERICAN BAR ASSOCIATION

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STATEMENT OF

ARTHUR C. "CAPPY" EADS
CRIMINAL JUSTICE SECTION

ON BEHALF OF
THE
AMERICAN BAR ASSOCIATION

CONCERNING
S.52 AND H.R.1627
ARMED CAREER CRIMINAL ACT

BEFORE THE
SUBCOMMITTEE ON CRIME
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

JUNE 28, 1984

42-048 O - 85 - 4

Introduction

Mr. Chairman and members of the Subcommittee:

My name is Arthur C. "Cappy" Eads. I am the District Attorney of the 27th Judicial District of Texas, comprising Bell and Lampasas Counties. I currently serve as a member of the governing Council of the American Bar Association Criminal Justice Section. I appear before you today on behalf of the American Bar Association.

This Subcommittee and the sponsors of the "armed career criminal" legislation being considered today are to be commended for their interest and efforts in providing ways to fight armed burglary and robbery offenses.

Burglary and robbery are serious offenses. The serious nature of them has long been recognized in our system of jurisprudence. They were identified as two of the nine common law crimes.

The circumstances under which they are perpetrated provide a high risk of violence. That risk, and the potential seriousness of these crimes, is heightened when they are committed with the assistance of a firearm.

They have become all too common "street crimes." As such, they are crimes likely to be confronted by the ordinary citizen. Unlike some other crimes, they are not usually perpetrated between persons who are acquainted. They qualify as the type of offense that causes a "fear of crime" among citizens.

An Overview of S. 52 and H.R. 1627

Both S.52 and H.R. 1627 contain the same "crime fighting" proposal. They create a federal habitual offender statute.

The "predicate" habitual offenses that qualify a person for prosecution under both bills are the same. A person must have been twice previously convicted of committing, attempting or conspiring to commit any burglary or robbery.

However, having committed the requistite "predicate" offenses, the principal offense for which the person may thereafter be prosecuted as a habitual offender differs. H.R. 1627 applies to any armed robbery or burglary in violation of either state or federal law. S. 52 is more restricted. Its provisions would only federally prosecute persons as habitual offenders if they commit any armed burglary or robbery which is a federal offense. This is a significant difference.

Prosecution of Armed Burglary and Robbery as a Federal Offense

In February 1984, the American Bar Association House of Delegates considered S.52, as originally introduced in the Senate. In that form, it was substantially similar to H.R. 1627. They adopted a policy in opposition to S.52 "...or similar legislation." The report that accompanied the policy based the Association's opposition, in part, on the bill's potential authorization of federal prosecution for state offense of armed burglary and robbery.

Senate floor amendments to S. 52 have mooted this issue by making it clear that the bill would apply only to "...a robbery or burglary offense which may be prosecuted in a court of the United States...."

However, H.R. 1627 contains language that prompted, in part, the ABA to oppose this type of legislation. The report that accompanied the ABA policy of opposition expressed concern about the legislation's "...unclear policy of when a federal prosecution for a state offense may be initiated." H.R. 1627 contains provisions that draw into question the exclusive autonomy of state and local prosecutors to continue to prosecute armed burglaries and robberies within their jurisdictions without federal prosectorial interference or duplicity.

In general, the ABA believes this scheme of allowing federal prosecution of matters that are essentially local offenses is an unwise precedent. State and local prosecutors should handle these cases within the parameters of the state laws provided for their disposition. The injection of federal prosecution authority into these cases is not warranted and poses serious problems for the long established doctrine of a division of powers between the states and the federal government. It is also contrary to the spirit of the Tenth Amendment to the United States Constitution (powers reserved to the States).

Section 2118(e) of H.R. 1627 provides an example of language that could bring about the federal prosecution of state and local offenses. It states that armed robbery and armed burglary cases "...presented by a Federal investigative agency to the Federal

prosecuting authority...may be received at the sole discretion of the Federal prosecuting authority." Furthermore, it provides, "Regardless of the origin of the case, the decision whether to seek a grand jury indictment shall be in the sole discretion of the Federal prosecuting authority."

The ABA requests that such language that would allow the federal prosecution of state offenses be deleted from the bill.

Procedural Considerations

The American Bar Association recognizes that there may be a need to enact special statutes to provide appropriate sentences for dangerous or habitual offenders. It has set forth the criteria that should govern these statutes in Standard 18-2.5(b) of the ABA Standards for Criminal Justice. A copy of that Standard is attached to this statement as Appendix "B".

The Standard articulates a number of procedural considerations that the Subcommittee may find useful in conjunction with its review of the details of both S. 52 and H.R. 1627. It should be of assistance in raising issues that are relevant to these habitual offender bills in the context of: (1) requisites to identifying a person as an habitual offender, (2) the offender's sentencing hearing, and (3) appellate review of the sentence.

This Standard was discussed in detail by the report that accompanied the Association's February 1984 policy on career criminal legislation. A copy of the policy and the report is attached to this statement as Appendix "A" for the Subcommittee's review and consideration.

In addition, since S. 52 and H.R. 1627 provide for mandatory sentences, the Association requests that the Subcommittee consider its position on this matter. Standard 18-2.1 of the ABA Standards for Criminal Justice and the accompanying commentary discuss this issue. They are attached to this statement as Appendix "C" so that you might examine them in detail.

Supplemental Suggestion

Although the American Bar Association has raised a number of questions concerning the "armed career criminal" legislation that should be examined, it also emphasizes that it shares the sponsors' concern about crime in America. In an effort to formulate a workable plan to combat crime, the ABA Criminal Justice Section created a Task Force on Crime in March 1981. After two years of work, the Task Force submitted its report to the ABA House of Delegates. That report and its recommendations were approved by the House as ABA policy in February 1983.

A portion of the report dealt with the role that the federal government should play in assisting state and local governments to combat crime. It stated, "An effective campaign to combat crime requires that the federal government make a commitment to provide financial and technical assistance to state and local governments, private non-profit organizations and neighborhood or community based organizations to enable them to initiate and sustain programs of justice system improvement."

The Chairman of this Subcommittee and the sponsor of S.52 have been in the forefront of those working to have such a program established. The Association supports their efforts and the legislation they have introduced to create this type of program. It is our fervent hope that it is enacted in this session of Congress. We believe it provides the most desirable and effective means of accomplishing the purpose of combatting the nation's crime problem.

It would provide the financial and technical assistance that is much needed to improve all aspects of our justice system. Under it, local prosecutors and law enforcement personnel could be better trained to handle habitual offenses of robbery, burglary, and a host of other "street crimes" that are the root of our citizens' concern.

Just as important, it would provide funding to better train defense counsel. As a prosecutor, I have a duty "...to seek justice, not merely to convict" (ABA Standards for Criminal Justice, Standard 3-1.1(c)). Justice cannot be assured in a system that fails to provide adequate training for defense counsel. The proper functioning of our adversary system is predicated upon equally vigorous prosecution and defense of the accused. This requires more than the cosmetic appearance that defendants have been provided counsel. Defense counsel must be adequately trained. I take no personal pleasure, nor does our system of justice benefit, when a conviction is obtained because of an inadequately trained defense counsel.

In March of this year, the National College for Criminal Defense closed its doors because of inadequate funding. The National College did yoeman's work in training defense counsel. It will be missed.

Its counterpart, the National College of District Attorneys, continues to survive. However, its work could be furthered by more funding.

These are concrete examples of the need for federal justice assistance. Other needs could be cited, but I believe the point has been adequately made.

Conclusion

Considerable time and effort has been devoted by this Congress to the problem of crime. You have laid the foundation for legislation that would chart a course for the federal government in forming a partnership with state and local authorities in a concerted effort to reduce crime. We hope you will be able to capitalize on this opportunity and construct a program providing maximum benefits.

We hope that our statement and a review of the appended policy and standards will be helpful to the Subcommittee in its consideration of the armed career criminal legislation.

To the extent that Congress seeks to develop legislative proposals helpful to effective processing of person's accused of criminal offenses at the state and local level, we commend to you the programs of federal financial and technical assistance embodied in pending legislation such as H.R. 2175 and S.53. These are programs that are desperately needed by all segments of the criminal justice community and hold the best potential for managing this nation's crime problem.

APPENDIX "A"

AMERICAN BAR ASSOCIATION FEBRUARY 1984 POLICY ON
"ARMED CAREER CRIMINAL ACT"

APPROVED - FEBRUARY, 1984

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association opposes the proposed "Armed Career Criminal Act of 1983" (S.52 of the 98th Congress) or similar legislation.

REPORT

The American Bar Association has recognized that there may be a need for legislatures to enact special statutes to provide appropriate sentences for dangerous or habitual offenders. It has set forth the criteria that should govern these statutes in Standard 18-2.5(b) of the ABA Standards for Criminal Justice. The "Armed Career Criminal Act of 1983" (S.52) fails to meet the criteria of this Standard in a number of respects.

One of the key provisions of the Standard is the requirement that the sentence provided for a dangerous or habitual offender should "...not be imposed in the absence of a specific finding by the court that the offender constituted a dangerous or persistent offender..." The proposed "Armed Career Criminal Act of 1983" does not contain this criteria. The bill does not require there to be an objective finding of dangerousness. The only element required in order to subject a person to prosecution and punishment under the bill is a showing "beyond a reasonable doubt" that the defendant has

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twice been previously convicted of "...any robbery or burglary offense, or a conspiracy or attempt to commit such an offense..."

The bill therefore makes a predetermined decision that persons who are twice convicted of any combination of these offenses is "per se" a person that is subject to the Act if he or she is subsequently charged with committing, attempting to commit or conspiring to commit a burglary or robbery with a firearm. The bill is devoid of any other criteria or guidelines to determine whether a particular individual should be prosecuted under its terms.

Standard 18-2.5 recommends other safeguards that are not incorporated into S.52. The Standard states that "Special standards for the sentencing hearing should be required in accordance with the principles reflected in standard 18-6.5 before an extended term is imposed." These principles would include: (1) notice of the grounds for the sentence so that a submission on behalf of the defendant may be made prior to sentencing, (2) a finding by "clear and convincing evidence" that the defendant meets the criteria for the sentence, and (3) notice to the defendant of the sentencing consequences if he or she is going to enter a guilty plea, and a subsequent opportunity to withdraw that plea.

Following sentencing, the Standards recommend, "Precautions should be taken, such as by a requirement that adequate information be developed about the offender and by provision for appellate review of the sentence, to assure that such a special term will not be imposed in cases where it is not warranted." Although Sec. 4 of the bill provides that "the trial and appeal of any person prosecuted...shall be expedited in every way," it does not specifically speak to the need for appellate review of the sentence.

Standard 18-2.5(b)(iv) proposes, "The sentence authorized for such extended terms should be structured to preserve a reasonable proportionality to the gravity of the offense for which sentence is being imposed and otherwise conform to the principles enunciated in standard 18-4.2(c)." S.52 has no provision that requires the sentence to be structured so as to be proportional to the gravity of the offense. Quite the contrary, it provides for a prison term of not less than fifteen years. Although it could be argued that the proportionality could be reflected in a range of prison terms in excess of fifteen years, the fact remains that at the very least, a person would receive a fifteen year sentence - a sentence that is very likely not to be proportional to the seriousness of the offense. It is conceivable that the penalty provisions of S. 52 could even result in punishment that violates the Eighth Amendment ("cruel and unusual punishments") of the U. S. Constitution . See Solem v. Helm , 463 U.S. , 33 Cr.L.Rptr. 3220 (U. S. June 28, 1983).

The bill's failure to provide adequately for proportionality in sentencing is exacerbated by 2118(d)(4) which makes the penalties under the bill mandatory. Mandatory criminal sentences are opposed by the American Bar Association. Standard 18-2.1(c) of the ABA Standards for Criminal Justice provides, "The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense." The commentary to that Standard explains, "...no assertion is more central to these standards than that the

legislature should accord substantial discretion to judicial and parole authorities. Absent discretion to respond to the substantial variety of offense and offender combinations that inevitably arise, our sentencing system can be neither just nor effective." The commentary summarizes the objectionable characteristics of mandatory sentences by stating (1) they "...produce rigidity and unsophisticated crudeness in matching of punishment to either the crime or the criminal...." (2) cause "...inflation of a penal code whose authorized sentence lengths are already believed to be the longest in the Western World," (3) would be "...frequently frustrated in practice by a pattern of covert nullification as judges, prosecutors, and juries decline to enforce penalties they consider overly harsh," and (4) would, in effect, transfer sentencing authority "...from the court to the prosecutor and correctional authorities..." In summary, the commentary states, "The appeal of a democratically elected legislature fixing definite penalties for crimes is undesirable."

In addition to these procedural and mechanical shortcomings of the bill, the Association is concerned about the unclear policy of when a federal prosecution for a state offense may be initiated. This issue has been a source of considerable controversy. The predecessor of S.52 was S.1688 of the 97th Congress. The provisions of S.1688 were incorporated into a large crime package (H.R. 3963) which was passed by the Congress and presented to the President. In declining to sign the bill, the President mentioned that he was concerned about the "veto" power local prosecutors held over federal prosecution of career criminal offenes. In order to answer the Administration's concern, S.52 was changed and the authority of local prosecution authorities to preclude federal prosecution of an offense was relegated to an uncodified Sec. 4 of the bill, which contains expressions of Congressional intent.

Paragraph (c) of Sec. 4 purports to make federal prosecution conditioned upon "the appropriate state prosecuting authority" requesting or concurring in such prosecution. However this language is not sufficient to assure that state prosecutors and local prosecutors will maintain autonomy. The use of the words "requests or concurs" falls short of requiring an absolute approval by the state or local prosecutor. The mere use of the word "concurs" suggests that the prosecution could be initiated by someone other than the local prosecutor and envisions a passive role of nodding approval on the part of the local prosecuting authority.

Furthermore, there are instances when it is not easy to determine who is the "appropriate state prosecuting authority." It may occur that one prosecutor would approve federal prosecutorial action in the case, while some other prosecutor may also assert jurisdiction and be opposed to federal prosecution.

In general, this scheme of allowing federal prosecution of matters that are essentially local offenses is a dangerous precedent. State and local prosecutors should handle these cases within the parameters of the state laws provided for their disposition. The injection of federal prosecution authority into

these cases is not warranted and poses serious problems for the long established doctrine of having a division of powers between the states and the federal government. It is also contrary to the spirit and intent of the Tenth Amendment to the United States Constitution (powers reserved to the States).

Conclusion

The American Bar Association is in sympathy with many of the reasons that prompted the introduction of the "Armed Career Criminal Act of 1983." The ABA House of Delegates recognized the seriousness of firearm-related crime and the need for appropriate penalties as a means of curbing these offenses when it approved the ABA Criminal Justice Section Task Force on Crime Report in February 1983. However, that report made it clear that the Association adheres to its long held policy of opposing mandatory sentences. Instead, it opted for endorsing "stringent" penalties for these offenses.

The Association believes that there is merit to habitual and dangerous offender statutes, but only when properly drafted to provide requisite safeguards within the reasonable limits outlined in the ABA Standards for Criminal Justice. It believes that these Standards set forth principles that will guarantee accused persons a fair trial and preserve certain basic tenets that are characteristic of our system of justice.

The Association urges Congress to give thoughtful consideration to the concerns raised by this report in its further deliberations on S.52 and similar legislation.

Respectfully submitted,

Richard H. Kuh
Chairperson

February 1984

APPENDIX "B"

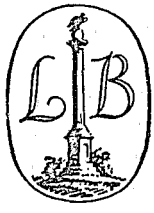
AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE
STANDARD 18-2.5(B) - RELATING TO HABITUAL OFFENDERS

American Bar Association

Standards for Criminal Justice

Second Edition

Volume III



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Standard 18-2.5. Total confinement

(b) As stated in standard 18-2.1(e), many sentences authorized by statute in this country are, by comparison to other countries and in terms of the needs of the public, excessively long for the vast majority of cases. Their length is in part the product of concern for protection against exceptional cases, most notably the particularly dangerous offender and the professional criminal. Rather than shape its penal code with a view focused on this minority of offenders, the legislature should instruct its guideline drafting agency to develop detailed and narrow criteria by which sentencing courts may distinguish the professional or dangerous criminal from the broader population of offenders. Existing statutory structures which authorize special additional terms for dangerous or habitual offenders should also be revised so as to integrate provisions for such offenders into a unitary penalty framework having a single statutory maximum for each offense but providing for a continuum of interior categories to be established by guidelines. Under this approach, the legislature would provide that a sentence in excess of a specified percentage of such maximums could not be imposed in the absence of a specific finding by the court that the offender constituted a dangerous or persistent offender as defined by it. Although a statutory structure having a single outer maxi-

59. *See* standard 18-2.8(a)(i)(A), (b)(i).

mum term is preferred to a structure having two legislatively prescribed maximums (one for the nondangerous offender and one for the dangerous), both structures, to the extent that the latter is retained, should be required to conform to the following principles:

(i) A substantial and general reduction in the length of prison terms prescribed for most offenders should accompany the adoption of either legislation or guidelines providing for extended terms for dangerous or habitual offenders;

(ii) Precise criteria should be developed both in enabling legislation and in guidelines to delineate narrowly the type of offender for whom such an extended sentence is appropriate. Such instructions should also make clear that mere predictions of dangerousness unsupported by the fact of present or past serious criminal conduct should not provide a sufficient basis for the imposition of such an extended term;

(iii) Precautions should be taken, such as by a requirement that adequate information be developed about the offender and by provision for appellate review of the sentence, to assure that such a special term will not be imposed in cases where it is not warranted;

(iv) The sentence authorized for such extended terms should be structured to preserve a reasonable proportionality to the gravity of the offense for which sentence is being imposed and otherwise to conform to the principles enunciated in standard 18-4.2(c); and

(v) Special standards for the sentencing hearing should be required in accordance with the principles reflected in standard 18-6.5 before an extended term is imposed.

Such special terms should not be authorized for misdemeanors and other lesser offenses.

History of Standard

Paragraph (b) has been modified in its approach to dealing with the dangerous offender in order to follow the statutory structure adopted by the Brown Commission subsequent to the first edition. Under that approach, an outer maximum term would be legislatively established for all offenses, but an interior limit (*e.g.*, some percentage of that maximum) would constitute the maximum penalty that could be imposed absent a special finding of dangerousness under the procedures specified in standard 18-6.5. Paragraph (c) has been revised to delete rehabilitation as a justification for the imposition of total confinement. The final sentence of subparagraph (b)(ii) is also new and parallels standard 18-3.2(a)(vi).

Related Standards

ABA, Standards for Criminal Justice 18-2.1, 18-4.2(c), 18-4.4
ALI, Model Penal Code §§6.07, 6.08, 7.03
NAC, Corrections 5.2, 5.3
NCCUSL, Model Sentencing and Corrections Act §§3-101 to 3-103

Commentary

Standard 18-2.5 summarizes and integrates themes outlined in the earlier standards: the limited role of the legislature, the presumption against confinement, the permissible justifications for imprisonment, and the tendency toward excessive sentence length. In addition, it deals at length in paragraph (b) with a special problem of statutory structure: how to provide adequately for the special dangerous offender without distorting and inflating the penalty structure applicable to the vast majority of nondangerous offenders.

The Need for Proportionality

Paragraph (a) calls upon the legislature to establish a graded penalty structure expressed in terms of a limited number of offense levels. It does so in recognition that many of the accepted justifications for incarceration are open-ended; that is, they could conceivably be used to support long-term, indefinite confinement of many offenders who have committed offenses of only intermediate or lesser gravity. As the commentary to the original standard noted, a treatment-oriented philosophy of punishment is particularly susceptible to such a tendency.[1] Since then, the dangers of confusing therapeutic and punitive processes have been emphasized by many. But it is less frequently noted that the same lack of proportionality can result whenever any established purpose of sentencing is zealously pursued without recognition of the need for side constraints on the pursuit of the goal of crime prevention. Both deterrence and incapacitation are legitimate goals of sentencing, which can, however, be overextended so as to justify extreme deprivations of liberty. For example, a severe exemplary sentence of twenty to thirty years for a crime that is reaching epidemic proportions in a given community might be imposed in the belief that it would have a significant preventive effect on potential offenders.[2] Similarly, incapacitation of the likely recidivist unquestionably reduces crime, and the ability of social scientists to predict recidivism has undeniably progressed in recent years with the development of base expectancy rate tables that permit the comparative assessment of offenders in terms of broad generic variables.[3] But both the morality and the methodology underlying the use of penal sanctions in such a manner are troubling. In both cases the same imbalance results between what the offender has done and what price society exacts as when extended confinement is used to attempt rehabilitation. In a sense, the offender is being punished less for what the offender has done than for the risk the offender represents. In common with other model codes and standards,[4] these standards be-

1. ABA, SENTENCING ALTERNATIVES AND PROCEDURES, commentary at 82-83 (1968). *See generally* Hart, *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROB. 401 (1958).

2. The morality of deterrence has been much discussed and various limits suggested. *See* F. ZIMRING & G. HAWKINS, DETERRENCE 35-50 (1973); Andenaes, *The Morality of Deterrence,* 37 U. CHI. L. REV. 649 (1970).

3. *See* D. GOTTFREDSON, L. WILKINS, & P. HOFFMAN, GUIDELINES FOR PAROLE AND SENTENCING 41-67 (1978). *But see* A. VON HIRSCH, DOING JUSTICE 26 (1976) ("[O]ne may question whether it is ever just to *punish* someone more severely for what he is expected to do . . .").

4. *See* NCCUSL, MODEL SENTENCING AND CORRECTIONS ACT §3-102(6); NAC, CORRECTIONS, commentary at 203-204. The concept of proportionality, of course, also underlies the

lieve that limits are necessary and, more specifically, that an essential link must be maintained in any just sentencing system between the crime and the punishment: the latter must not be disproportionately severe in relation to the former.

The rationale underlying this position deserves brief exposition. Admittedly, it is possible to frame hypotheticals in which an extreme deprivation of liberty visited upon a single offender may seem justified by the greater benefits to society in terms of the future crimes thereby apparently prevented. On a cold-blooded utilitarian basis, the benefits exceed the costs no matter how disproportionate the sentence is to the crime. As logical as such arguments appear at first inspection, they have several deficiencies. First, the presumed benefits of such a strategy are inherently unknowable and highly speculative. Our understanding of general deterrence is incomplete, but the fragmentary evidence available tends not to conform to any simple model under which sentences of high severity can always be justified on the grounds that they yield greater preventive benefits.[5] In the case of incapacitation, it has been repeatedly demonstrated that any technique for identifying the high-risk offender will also yield a high number of false positives (*i.e.*, persons predicted to recidivate but who fail to do so).[6] A substantial rate of error is therefore a necessary corollary, and such overprediction has a tendency to fall most heavily on the least favored groups within society.[7] Overshadowing these objections, however, is a more important one, rooted not in the problems of methodology but in the political philosophy of a free society. As the late Herbert Packer wrote, the purpose of the criminal law in a democratic society is not simply to prevent crime; its "ultimate goal . . . is to liberate rather than restrain."[8] Yet, if the end purpose is to liberate the individual and foster a collective sense of security, few systems of criminal justice seem more incompatible with such a goal than one in which punishment may be applied without limit

Model Penal Code's graded penalty structure. The need for limits on punishment for predicted dangerousness is further discussed at standard 18-3.2.

5. *See* sources cited in notes 46-48 to standard 18-2.1.

6. *See generally* von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972); N. MORRIS, THE FUTURE OF IMPRISONMENT 62-73 (1974); Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24 (1971). The specific context of the base expectancy rate table and its use at sentencing is discussed in Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978).

7. *See* Coffee, *supra* note 6, at 1002-1007, 1018-1030.

8. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 66 (1968).

for even a minor offense. The unrestrained use of the state's coercive force justified only by such a simplistic cost-benefit analysis is incompatible with that basic premise of a free society: the inviolability of the individual.

Finally, the perspective of the criminologist is also relevant to the need for a retributive limit to the punishment that may be imposed in any individual case. Arguably, the social and political costs of treating the offender as a scapegoat might not be unacceptable if the offender could truly be seen as somehow qualitatively different from other citizens. Increasingly, however, criminologists have been breaking down the we/they dichotomy of the offender and other citizens[9] and have reported considerable evidence, based on self-reporting studies, suggesting that perhaps a majority of citizens could at some time in their lives be legitimately prosecuted for the commission of a felony.[10] In short, denying offenders some maximum boundary on the sanctions that may be visited upon them based on what they retrospectively have done rather than on the harm they prospectively might do is not simply unfair to them, but adversely affects the security and level of social anxiety of the broader society.

Thus, a commonsense proportionality between the offense and the permissible maximum sanction is an essential element of a rational sentencing policy. This position is premised not on any aesthetic sense that the punishment should fit the crime, but on the more realistic foundation that flows from recognizing, first, that decisions about punishment allocation are necessarily made under conditions of uncertainty and carry a substantial risk of error and, second, that any system of punishment that lacks proportionate limits on the sanctions that may be imposed threatens the psychic security of a broad segment of the general population. Such a use of penal sanctions may prevent, but it hardly liberates.

The case for proportionality between the gravity of the crime and the severity of the sanction has been made by virtually every jurisprudential writer to consider the problem of punishment allocation, from Kant to modern writers, such as H. L. A. Hart and John Rawls.[11] Increasingly,

9. *See* Porterfield, *The "We-They" Fallacy in Thinking About Delinquents and Criminals,* in BEHAVIORAL SCIENCE AND MODERN PENOLOGY (W. Lyle & T. Horner ed. 1973).

10. R. HOOD & S. SPARKS, KEY ISSUES IN CRIMINOLOGY 21, 47-51 (1970); *see also* sources cited in Coffee, *supra* note 6, at 1101 n.429.

11. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 23-25, 172-173 (1968); Rawls, *Two Concepts of Rules,* in PUNISHMENT (J. Feinberg & H. Gross ed. 1975); *see also* N. MORRIS, *supra*

courts are also finding this concept to be constitutionally required under the eighth amendment's ban on cruel and unusual punishments.[12] But the growth of a constitutional doctrine of proportionality has been uneven, and to date has largely been limited to minor or victimless crimes.[13] In part this is because, in measuring a concept as subjective as proportionality, courts have sought to find some relatively objective criteria and have thus focused on comparisons with the penalties assigned by the legislature for crimes of equal or greater gravity: Is the penalty fixed for crime X disproportionate because it exceeds the penalty fixed for the more serious crime Y? Because the judicial criteria for evaluating the proportionality of the punishment to the crime thus depend in turn on legislative judgments, the prime responsibility for rationalizing the penalty structure of the penal code must in the last analysis fall upon the legislature.

It has already been advocated in this chapter that the legislature establish only a very limited number of sentencing categories. To this recommendation is now added the corollary that the legislature establish for each such category a ceiling consistent with what has come to be called the principle of just deserts — namely, a maximum equal to that level of punishment which the legislature in its democratic judgment sees as deserved by the gravity of the offense. It must be emphasized here that these standards accept just deserts as only a limiting constraint and not as a motivating force for the imposition of punishment; that is, the principle endorsed here does not provide reasons for

note 6, at 60, 74; A. VON HIRSCH, *supra* note 3, at 73-74; Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277 (1973); J. FEINBERG, DOING AND DESERVING (1970).

12. *See In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972); *In re* Rodriquez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); United States v. McKinney, 427 F.2d 449 (6th Cir. 1970), *cert. denied*, 402 U.S. 982 (1971).

13. One recent survey has found that "fewer than two dozen lower courts to date have invoked a proportionality rationale in reversing sentences." Note, *A Closer Look at Habitual Criminal Statutes: Brown v. Parratt and Martin v. Parratt, a Case Study of the Nebraska Law*, 16 AM. CRIM. L. REV. 275, 285 (1979). Most of the cases cited there involve regulatory offenses (typically alcohol tax violations), minor sexual transgressions, or offenses involving possession of marijuana or other controlled drugs. Where more serious crimes have been involved, defendants have been less successful. *See* People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 741 (1975); Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978). Even a ten-year sentence for reckless driving and flight to avoid arrest has been recently upheld in the context of an habitual offender statute. *See* Goodloe v. Parratt, 453 F. Supp. 1380 (D. Neb. 1978).

imposing a sentence where basically preventive justifications are lacking. Such a ceiling concept, elegantly outlined by Norval Morris[14] and recently adopted by the Model Sentencing and Corrections Act,[15] is logically necessary if the least restrictive alternative principle endorsed earlier is to have meaningful content. Otherwise, if these standards were instead to recommend that confinement be commensurate with the offender's culpability, the least restrictive alternative concept would be an empty one, since the sentence in each case would have to be matched to the gravity of the offense and the offender's level of culpability.

Two-Tier Sentencing Structures and the Dangerous Offender

As noted in standard 18-2.1(e), American prison sentences tend to be comparatively severe. The first edition attributed this characteristic harshness to a legislative desire to assure that authorized sentence lengths were sufficiently long to be able to provide incapacitation for the professional or dangerous criminal. As a result of this legislative preoccupation with the especially dangerous offender, the statutory structure was extended beyond that necessary to deal with the majority of offenders not posing a serious danger to society. In turn, sentencing courts may have tended to assume that the midpoint of these wide authorized ranges was the natural benchmark for the typical case, and they therefore reserved the lower ranges for cases having special mitigating features.

Given this diagnosis, the first edition moved to a logical conclusion: create a bifurcated, or two-tier, sentencing structure with a longer authorized term available for those offenders determined to be dangerous or professional criminals, such determination to be attended by special due process safeguards. This concept of extended terms for dangerous offenders was endorsed earlier by the Model Penal Code[16] and the Model Sentencing Act.[17] For example, under the latter act the authorized range for most felonies is zero to five years, but if the defendant is determined to be dangerous under special criteria set forth in the act, the ceiling on this range is extended to thirty years.[18] Subsequently, the

14. N. Morris, *supra* note 6, at 73-80.
15. NCCUSL, Model Sentencing and Corrections Act §3-102.
16. ALI, Model Penal Code §§6.09, 7.03.
17. NCCD, Model Sentencing Act §5.
18. *Compare id.* §§5, 9.

National Advisory Commission approved a similar approach,[19] and in the Organized Crime Control Act of 1970, Congress adopted special long-term sentences of up to twenty-five years for "dangerous special offenders" in line with these proposals.[20]

Nonetheless, this edition modifies its approval of the idea of a separate legislatively created sentencing range for the dangerous offender. Although the logic underlying the idea of a bifurcated statutory structure still seems sound, refinement is desirable to realize its intended purposes. A dramatic dichotomy between the sentencing ranges applicable to the "dangerous" and the "nondangerous" seems increasingly unjustified on the available empirical evidence concerning the prediction of dangerousness. With the advent of guideline systems, a better alternative becomes feasible. Both the theory and the practice of two-tier sentencing is vulnerable to legitimate criticism.

First, in terms of its underlying rationale, it now seems less certain that the desire to provide for the most aggravated offense or the most dangerous offender is the sole or even the most important cause of the excessive sentence lengths characteristic of United States sentencing. Certainly, this explanation does not give a sufficient account of why European penal codes have shorter maximums, since the legislatures in those nations are presumably also concerned about the worst offender. Other factors — the greater acceptance of a rehabilitative model for sentencing within the United States and the greater dependence on parole boards — may provide a superior causal explanation of the existence of longer authorized maximum sentences in the United States.[21] In any event, whatever the causes of sentencing severity within the United States, the adoption of two-tier sentencing structures has not significantly alleviated that tendency. Yet the underlying premise motivating all of the model codes that have endorsed this approach is that, by permitting very long sentences in the case of a small minority of offenders, a substantial and general reduction can be achieved in the length of sentences authorized for the vast majority of offenders. Sadly, such a legislative trend is not apparent, and to this extent, the experiment with extended terms cannot yet be called a success.

19. NAC, CORRECTIONS 5.3; *see also* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT §3202 (1971).

20. 18 U.S.C. §3575 (1976); *see also* 21 U.S.C. §849 (1976) (dangerous special drug offenders). For a summary of the legislative history, *see* L. SLEFFEL, THE LAW AND THE DANGEROUS CRIMINAL (1977).

21. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 303-304 & n.17 (1974); W. GAYLIN, PARTIAL JUSTICE (1974).

In addition, extended-term sentencing provisions have been an even greater failure in terms of the extent to which they are actually used. On the federal level, although the two statutes providing special terms for dangerous offenders have generated a considerable volume of appellate litigation,[22] they are apparently used only infrequently.[23] Commendable as the restrained use of the drastic sentencing power authorized by these statutes is, their relative desuetude appears attributable partly to doubts about their constitutional validity and even more so to the tendency for the plea bargaining process to nullify their utility as a means of incapacitating the dangerous or professional criminal.

A number of civil libertarian objections surround such statutes. Even if seldom used, such statutes may significantly tip the balance in favor of the prosecution in plea bargaining negotiations, since it remains within the prosecutor's power to threaten an extreme sanction in order to secure a plea of guilty.[24] That such a threat is credible is, in turn, the result of the statutory vagueness present in the definition of those offenders potentially subject to such statutes. The endorsement of dan-

22. *See* United States v. Duardi, 384 F. Supp. 861 (W.D. Mo. 1973), *affd. on other grounds,* 529 F.2d 123 (8th Cir. 1975); United States v. Bailey, 537 F.2d 845 (5th Cir. 1976), *cert. denied sub nom.* Harstrom v. United States, 429 U.S. 1051 (1977); United States v. Kelly, 519 F.2d 251 (8th Cir. 1975); United States v. Stewart, 531 F.2d 326 (6th Cir. 1976), *cert. denied,* 426 U.S. 922 (1976); United States v. Neary, 552 F.2d 1184 (7th Cir. 1977), *cert. denied,* 434 U.S. 864 (1978); United States v. Ilacqua, 562 F.2d 399 (6th Cir. 1977); United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); United States v. Williamson, 567 F.2d 610 (4th Cir. 1977). *See also* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals,* 89 HARV. L. REV. 356 (1975); Comment, *Statutory Vagueness in the Sentencing of Dangerous Special Offenders,* 62 IOWA L. REV. 1204 (1977).

23. Since 1972, it has been the policy of the Attorney General to require centralized approval by the Department of Justice before such a "special offender" prosecution may be commenced by a United States attorney. Note, *Constitutional Problems in Enhanced Sentencing for "Dangerous Special Offenders,"* 40 Mo. L. REV. 660, 662-663 n.29 (1975). In response to an inquiry made during the consideration of this standard by the Task Force, the Department of Justice estimated that its Organized Crime Task Force commenced only five such prosecutions during the 1977 fiscal year out of over 1,000 prosecutions initiated by that strike force during the same period. A similarly limited use of habitual offender statutes at the state level has been repeatedly observed. *See* commentary to standard 18-4.3.

24. Under 18 U.S.C. §3575 (1976) and numerous state habitual offender statutes, authority to invoke the statute is discretionary with the prosecutor, and under some statutes the enhanced sentence is mandatory if the requisite elements are proven. This pattern has been widely criticized on the grounds that it shifts sentencing discretion to the prosecutor and leads to selective and uneven application. *See* Cook, *The "Bitch" Threatens, but Seldom Bites: A Study of Habitual Criminal Sentencing in Douglas County,* 8 CREIGHTON L. REV. 893, 903-919 (1975); Note, *supra* note 13, at 277 n.4, 300-314. *See also* standard 18-3.3.

gerous offender statutes in the first edition was expressly qualified on the development of adequate criteria in the enabling legislation to delineate carefully and narrowly the types of offenders who could receive such a term. Yet the definitions found in existing statutes have a shotgun breadth in the activities they encompass and employ a circularity of reasoning that fails to provide sentencing courts with adequate standards. For example, on the federal level, 18 U.S.C. §3575(e) enumerates the type of offender who might be considered a "special offender" and includes within its ambit any person committing a felony "as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income and in which he manifested special skill."[25] This simple formula — a "pattern" generating substantial income and requiring special skill — might be satisfied by a college student without a prior conviction who sold marijuana or even term papers (a crime in some jurisdictions), assuming that such an offender showed the requisite skill in developing a campus marketing system. The criterion of substantial income is reduced in its significance by tying its definition to the federal minimum wage on an annual basis.[26] An alternative definition of "special offender" is even vaguer: any person who engages in an illegal conspiracy with three or more persons in which he or she plays a leadership or planning role or gives or receives a bribe.[27] Thus, even though failing to show skill or make a profit, the campus criminal could still be covered if he or she used and directed three or more henchmen.[28] This definition

25. 18 U.S.C. §3575(e) (1976). In addition to the requisite special offender finding, a finding of dangerousness must be made under §3575(f) before the statute's enhanced penalties become applicable, but additional criteria are not specified for defining "dangerousness." Case law has generally refused to presume that a special offender is necessarily also a dangerous one. *See* United States v. Duardi, 384 F. Supp. 861 (W.D. Mo. 1973); United States v. Ilacqua, 562 F.2d 399 (6th Cir. 1977).

26. 18 U.S.C. §3575(e) (1976) ("[A] substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year . . ."). For the "source of income" to be substantial, it must exceed 50 percent of the defendant's "declared adjusted gross income." Use of "declared" income again tends to trivialize the standards, since the earnings of most crimes are not reported to the Internal Revenue Service. For example, an individual who earns $31,000 a year, of which $11,000 was earned illegally and not reported, would be found to have received over 50 percent of his or her "declared" income ($20,000) from an illegal source.

27. 18 U.S.C. §3575(e)(3) (1976).

28. A court would doubtless reject such a farfetched extension of the statute's purpose, but the threat of such a statute may substantially tip the balance of advantage between the defendant and the prosecution.

of "special offender" is then supplemented by section 3575(f), which with obvious circularity defines an offender to be "dangerous" "if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."[29] How is this prediction to be made? The statute does not tell us. Clearly, such a definition raises more questions than it answers, as the case law under it clearly indicates.[30] Admittedly, federal courts would be unlikely to permit extension of such provisions to reach all potentially eligible offenders, but this judicial restraint does not adequately answer the objection that such statutes give excessive leverage to the prosecution.

An adequate legislative definition of "dangerousness" seems an increasingly remote possibility. In part, this is for the reasons outlined in the commentary to standard 18-2.1: legislative definitions tend to have a significant degree of overbreadth. But more important, the very meaning of the term "dangerousness" is becoming increasingly suspect.[31] Although there is little doubt that such offenders do exist, the problem is that any clinical or diagnostic process for identifying them seems to result in significant overprediction. One respected forensic psychiatrist has estimated that the rate of such overprediction may reach 100 to 1.[32] Such extended-term sentencing based only on a diagnostic assessment of the offender and a sweepingly inclusive legislative definition aggravates the problem of false positives that exists under any system of prediction. In this light, it is noteworthy that the recent model sentencing codes have geared extended-term provisions to a definition of "per-

29. 18 U.S.C. §3575(f) (1976)

30. *See* United States v. Kelly, 519 F.2d 251 (8th Cir. 1975), and United States v. Neary, 552 F.2d 1184 (7th Cir. 1977), for decisions detailing the unresolved procedural problems under the statute. *See also* United States v. Tramunti, 377 F. Supp. 6 (S.D.N.Y. 1974); United States v. Sutton, 415 F. Supp. 1323 (D.D.C. 1976).

31. As noted earlier, although recidivism in general is often predictable, social scientists are today dubious that specific crimes or violent crime can be predicted without an unacceptably high ratio of false positives to true positives. A task force of the American Psychiatric Association has thus concluded: "Psychiatric expertise in the prediction of 'dangerousness' is not established and clinicians should avoid conclusory judgments in this regard." AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE ON CLINICAL ASPECTS OF THE VIOLENT OFFENDER, CLINICAL ASPECTS OF THE VIOLENT OFFENDER 33 (1974) (quoted with approval in Smith v. Estelle, 602 F.2d 694, 699 n.7 (5th Cir. 1979)).

32. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 447 (1974); *see also* Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUT. L.R. 1084 (1976); N. MORRIS, *supra* note 6, at 62-73; Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 529 (1968).

sistent offender" rather than "dangerous offender."[33] Such an approach assures a closer and self-effectuating proportionality between the crime and the punishment by extending the authorized maximum for the underlying offense by some specified percentage for each prior conviction.

The methodological problems of predicting future dangerousness are dealt with in more detail in standard 18-3.2(a)(vi). In summary, these standards take the view that (1) the tendency toward overprediction in the clinical diagnosis of dangerousness makes past criminal conduct the best and fairest guide to the determination of whom to incapacitate for an extended period, and (2) the fallibility of any attempts to predict future human behavior makes the limiting principle of proportionality essential in this context as well.

What role, then, should the legislature take for itself in determining the scope of extended-term sentencing provisions? Once again, the more prudent course appears to lie in delegating the problems of refining the coverage of such provisions to the guideline drafting agency. As noted at standard 18-2.1, the United States Senate has adopted this course in its bill to recodify the Federal Criminal Code, which would repeal 18 U.S.C. §3575. Several distinct reasons support the conclusion that it is wiser to rely on an administrative agency's more flexible discretion than on a fixed legislative definition. First, not only can guidelines provide more specific definitions, but they can also better distinguish degrees of "dangerousness." However carefully and narrowly the legislature seeks to delineate its concept of the dangerous or professional criminal, any dichotomy of "special" versus "ordinary" offenders forces sentencing authorities to make an often unfortunate either/or decision. Inevitably, cases will occur that are close to the line on both sides, and significant differences in treatment will result that are not justified by equally material differences among the offenders thereby distinguished. It would better comport with the reality of dispositional decision making to avoid such all-or-nothing choices and instead create a continuum of categories recognizing that the differences among offenders tend to be marginal rather than dramatic. A guideline drafting agency is best suited to do this. It might, for example, establish multiple categories of special offenders ranging from high to moderate

33. NCCUSL, Model Sentencing and Corrections Act §3-105 (defining a "persistent offender" as one "who has at least 2 prior felony convictions for offenses committed within the 5 years immediately preceding commission of the instant offense").

levels of risk roughly in the manner that the United States Parole Commission has done.[34] The use of narrowed sentencing categories might also minimize the tendencies toward de facto nullification that result whenever harsh choices are forced upon dispositional authorities. More precise guidelines should also reduce the leverage given to prosecutors by broad and vague definitions of dangerousness and help assure that a closer proportionality between the underlying crime and the sentence is achieved — a goal that existing dangerous offender statutes respect in principle but fail to implement with standards.[35]

In recommending the integration of extended-term provisions within a unitary penal code, these standards do not depart from their earlier insistence that such enhanced-sentencing proceedings should be accompanied by special due process safeguards. As is discussed more thoroughly at standard 18-6 5, a decision of such gravity requires special safeguards. In part, this is because the nature of the judicial inquiry is substantially different in such enhanced-sentencing proceedings. The focus of judicial attention becomes more predictive and forward looking, the nature of the offense becomes less important, and other factors involving allegations of unrelated criminal conduct never proven at any trial assume greater significance. It has been argued that, in contrast to ordinary sentencings, such proceedings amount to "new and separate criminal charges" which under the Supreme Court's holding in *Specht v. Patterson*[36] require "the full panoply of the relevant protections which due process guarantees."[37] Although subtle constitutional distinctions can be drawn here,[38] it is noteworthy that Senator John McClellan, the

34. *See* 28 C.F.R. §2.12 (1978). These guidelines are discussed in more detail in part III of this chapter.

35. Although 18 U.S.C. §3575(b) (1976) requires that the sentence not be "disproportionate in severity to the maximum term otherwise authorized by law for such felony," this attempt at structuring proportionality into enhanced-term sentencing provisions seems unlikely to succeed. Criteria are lacking by which to measure severity or treat like cases alike. Part III advances the argument in more detail that the goal of proportionality requires guidelines for its implementation.

36. 386 U.S. 605, 608 (1967).

37. *Id.* at 609-610, *quoting with approval* United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966), *and quoted in* United States v. Duardi, 384 F. Supp. at 882.

38. *Specht* can be distinguished on the grounds that the Colorado statute at issue did not require the punishment to be proportional to the offense (as 18 U.S.C. §3757 (1976) does; *see* note 35 *supra*), and thus the penalty there imposed, by being in excess of that justified by the instant crime, was necessarily for a "new and separate charge." As the Senate report to proposed 18 U.S.C. §3575 (1976) saw it: "[T]he requirements of *Specht*... are inapplicable, since no separate charge triggered by an independent offense is at issue. Only circum-

sponsor of the Organized Crime Control Act of 1970, conceded in his testimony on the bill that "special offender sentencing is a 'half-way-house' between trial and sentencing" for which due process safeguards in excess of those yet mandated at ordinary sentencings are necessary.[39] The merits of the contending constitutional arguments need not be resolved here, but as a matter of policy the additional safeguards recommended in standard 18-6.5 continue to be essential. The transition to a guideline structure for enhanced-sentencing proceedings should not alter this conclusion, since by furnishing a more explicit framework for the sentencing court, they frame the issues to be resolved at the more formalized hearing required by standard 18-6.5. With greater specificity should come greater formality.

In turn, this need for greater procedural formality in the imposition of extended terms based on special characteristics of the offender explains why this edition expresses a preference for the Brown Commission's approach to two-tier sentencing over that of S. 1437, which relies exclusively on administrative guidelines. Put simply, a clearly marked watershed is desirable between ordinary sentencing ranges and enhanced ones. This is best and most unmistakably achieved by legislative action. Such a legislative line of demarcation clearly establishes when the special due process protections mandated by standard 18-6.5 become applicable (*e.g.*, a higher standard of proof, supplemental medical and psychiatric reports, advance written notice of the possibility of such a term before a plea of guilty is accepted, etc.). For example, standard 18-6.5(b)(i) requires that the prosecution serve written notice on the defendant and defense attorney "of the proposed ground on which such a sentence could be based a sufficient time prior to the imposition of sentence so as to allow the preparation" of a defense. The possibility of such a term must also be indicated to the defendant before a plea of

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stances of aggravation of the offense for which the conviction was obtained are before the court." S. REP. No. 617, 91st Cong., 1st Sess. 163 (1969), *quoted in* United States v. Stewart, 531 F.2d at 332 n.2. Commentators have disputed this as a formalistic distinction, since it enables courts to consider at sentencing allegations of criminal conduct vastly more serious than those that resulted in conviction (*e.g.*, that a defendant convicted of illegal possession of a handgun used the weapon in an armed robbery). *See* sources cited at note 22 *supra*. To the extent that this potential for abuse is the primary problem, guidelines establishing a presumptive range offer an answer, particularly when supplemented by heightened due process safeguards for the proof of such special sentencing facts. *See* standard 18-6.5.

39. *Hearings on Organized Crime Before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess. (1970), quoted in Note, *supra* note 23, at 666.

guilty is accepted. To implement such special standards, it is desirable to have the legislature clearly separate the ordinary sentencing range from the enhanced one. The Brown Commission's approach achieves this purpose by denying the sentencing court the power to sentence in excess of a specified interior limit inside the statutory maximum without express findings as to the requisite special status of the offender as a dangerous or persistent offender. Under its approach, the legislature might establish, for example, an outer statutory maximum of twenty years for an especially serious crime but require that a sentence not be imposed in excess of ten years without special findings of dangerousness or professional criminality. Within this outer range of ten to twenty years, these standards contemplate that the guideline drafting agency would then establish presumptive guideline ranges both to ensure that the sentencing court's discretion is not unfettered and to implement the proportionality limit.

Such a statutory structure also achieves a second purpose: it prevents the inflation of ordinary or lower-tier sentencing ranges based on predictions of dangerousness. Disfavored as such predictions are, they should only be able to support an enhancement of the sentence where the special due process protections of standard 18-6.5 are applicable and the criteria mandated by standard 18-3.2(a)(vi) are established.

APPENDIX "C"

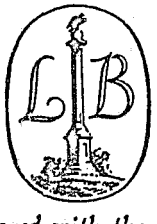
AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE STANDARD 18-2.1 - RELATING TO MANDATORY SENTENCES

American Bar Association

Standards for Criminal Justice

Second Edition

Volume III



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PART II. STATUTORY STRUCTURE

Standard 18-2.1. General principles: role of the legislature

(a) The proper role of the legislature with respect to sentencing is a limited one. All crimes should be classified by it for the purpose of sentencing into a small number of categories which reflect substantial differences in gravity. For each such category, the legislature should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this.

(b) The legislature should provide sentencing authorities with a range of alternatives, including nonincarcerative sanctions and gradations of supervisory, supportive, and custodial facilities, so as to permit an appropriate sentence in each individual case consistent with standards 18-2.2 and 18-3.2.

(c) The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.

(d) The legislature should establish a guideline drafting agency authorized to develop more detailed sentencing criteria and standards and to promulgate presumptive sentencing ranges in order to curtail unwarranted sentencing disparities. Standards addressed to such an agency are set forth in standards 18-3.1 to 18-3.5.

(e) Both the legislature and sentencing authorities should recognize that in many instances prison sentences which are now authorized, and sometimes required, are significantly higher than are needed in the vast majority of cases in order adequately to protect the interests of the public. For most offenses, the maximum prison

term authorized ought not to exceed ten years and normally should not exceed five years. Longer sentences should be reserved for particularly serious offenses committed by particularly dangerous offenders, but such sentences should only be authorized or imposed in accordance with specific criteria established by the legislature and its guideline drafting agency and should require a specific finding of dangerousness based on repetitive criminality in accordance with standards 18-2.5(c) and 18-4.4 and reached under the special procedures required by 18-6.5.

History of Standard

The major substantive change is the recommendation that the legislature establish a centralized sentencing agency (hereafter called the "guideline drafting agency") to develop specific sentencing criteria and benchmark sentencing ranges. In addition, this edition adopts the recommendation of the National Commission on Reform of Federal Criminal Laws (the "Brown Commission") regarding the appropriate statutory structure for dealing with dangerous offenders. Stylistically, references to the sentencing court have been replaced by references to "sentencing authorities" where it is intended that the sentencing court would be expected to consider guidelines promulgated by such an agency.

Related Standards

ALI, Model Penal Code arts. 6, 7

NAC, Corrections 5.2, 5.3, 16.1, 16.7, 16.8

NCCUSL, Model Sentencing and Corrections Act §§3-103, 3-104, 3-110, 3-112

Commentary

This standard states at the outset that the legislature's role in sentencing is a limited one. Although this represents only a change in emphasis and not in philosophy, such an underscoring seems necessary in light of the recent trend toward determinate sentencing structures.[1] Put sim-

1. These sentencing structures are examined in more detail in standard 18-4.1. For a general overview, *see* NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, DETERMINATE SENTENCING (1977).

ply, no assertion is more central to these standards than that the legislature should accord substantial discretion to judicial and parole authorities. Absent discretion to respond to the substantial variety of offense and offender combinations that inevitably arise, our sentencing system can be neither just nor effective.

This conclusion implies neither that the ABA rejects the case for greater determinacy in sentencing nor that it fails to recognize the validity of many of the critiques that have been directed at indeterminate sentencing structures. These questions are addressed in part IV. But here, it is necessary to face a more fundamental question: Should we turn from a judicial model for sentencing to a legislative one in which the potential for disparities is minimized by the enactment of a system of relatively fixed sentences?

Legislative preemption of the field is unsound for essentially four reasons: (1) Legislatively fixed sentences would tend to produce rigidity and unsophisticated crudeness in the matching of punishment to either the crime or the criminal, largely because of the inevitable overbreadth of criminal statutes. (2) A likely consequence would be the inflation of a penal code whose authorized sentence lengths are already believed to be the longest in the Western world. (3) Perhaps least obviously, experience shows that the intent of such a reform would frequently be frustrated in practice by a pattern of covert nullification as judges, prosecutors, and juries decline to enforce penalties they consider overly harsh. (4) The net effect of seeking to eliminate judicial sentencing discretion may well be only to transfer it from the court to the prosecutor and correctional authorities, whose less visible discretion in charging, plea bargaining, and the determination of "good time" credits would acquire enhanced significance. For these reasons, it seems wiser to seek to tame discretion than to abolish it — to seek to structure its exercise rather than to deny decision makers the opportunity to respond to factors and considerations the legislature could never have anticipated in advance.

The appeal of a democratically elected legislature fixing definite penalties for crimes is understandable. Perhaps in an ideal system, the legislature would eliminate all the problems connected with the exercise of discretion by precisely defining each crime, establishing fixed penalties for each grade of offense, and exhaustively listing all aggravating and mitigating circumstances to be evaluated by the court (along with the precise numerical weight each factor is to carry). Attractive as such a solution is in theory as a means of reducing sentencing disparities,

experience teaches us that such a goal is more heroic than realistic. A number of formidable obstacles are apparent that seem likely to interfere with the effective translation into policy of this ideal vision of a discretionless system of criminal justice.

First, these standards agree with those commentators who have expressed skepticism that the legislature can encompass in any fixed penal code all "the subtleties of crime-to-criminal relationships essential to just sentencing."[2] The starting point adopted by one recent distinguished task force on sentencing seems irrefutable: "No coherent theory of criminal justice that acknowledges punishment as an appropriate response to crime can treat bank robbers and bicycle thieves as equal for the purpose of punishment."[3] Yet at present, crime categories tend to be broad and inclusive, often sweeping within a single category conduct ranging from the virtually insignificant to acts of the gravest culpability. Indeed, it is thus possible and perhaps probable that many armed robbery statutes would be equally well satisfied by the bicycle thief who uses a jackknife as by the professional criminal whose bank robbery was committed with a sawed-off shotgun. Thus, the same maximum sentence would be at least authorized for both. As a result of this overbreadth, any system that attaches a single sanction or even a limited range of sanctions to a particular offense would have to begin by redefining offenses "with a morally persuasive precision that present laws do not possess."[4] It is clear neither that this can be done nor that carefully articulated legislative distinctions would be respected in practice by prosecutors or judges. That is, although the legislature can respond to the overbreadth problem by painstakingly fragmenting offenses into finely graded degrees, most observers have doubted that such distinctions are given serious attention in the charging and plea bargaining process. The competitive realities of plea bargaining, the pressure of the prosecutor's caseload, and the limited number of cases that the individual prosecutor encounters understandably lead the prosecutor to focus more on securing a conviction than on achieving equity among similarly situated offenders. The upshot is that even careful legislative specifications of relevant distinctions may have less impact

2. Morris, *Towards Principled Sentencing*, 37 Md. L. Rev. 267, 274 (1977).

3. Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 8 (1978).

4. Zimring, *A Consumer's Guide to Sentencing Reform — Making the Punishment Fit the Crime*, in *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary*, pt. 13, 95th Cong., 1st Sess. 9423, 9426 (1977).

in reducing sentencing disparities than might be anticipated. As a result, prior determinations of sentencing criteria by the legislature may not achieve the intended goal of greater sentencing equality unless such criteria are implemented through a retrospective examination of the case by a decision maker — be it judge or parole board, for the moment — entrusted with substantial discretion.

Second, even where plea bargaining is not a substantial factor, the task of specifying the relevant criteria that must be considered if like cases are to be treated alike seems one for which the legislature is particularly ill-suited. As one commentator has noted, it surely must make a difference under a morally coherent criminal code whether even a serious crime like "armed robbery was committed with a machine gun, a revolver, a baseball bat, a toy gun or a finger in the pocket."[5] Presumably, too, if the criminal law is to express the community's moral evaluation, it is relevant

> whether the crime was motivated by a desperate family financial situation or merely a desire for excitement; whether the robber wielded a firearm himself or simply drove the getaway car; whether the victim of the crime was a blind newsstand operator . . . or a person against whom the robber had legitimate grievances; whether the robber took five cents, $100,000 or a treasured keepsake that the victim begged to retain; . . . whether the robber walked voluntarily into a police station to confess or desperately resisted capture; and whether the robber was emotionally disturbed or a calculating member of an ongoing criminal organization.[6]

The list of relevant factors could go on, but already it is clear that any penal code that attempts to specify all such factors for all crimes would begin to approach telephone book length and would inevitably omit some that most would agree merit consideration. Moreover, even if a satisfactory statute could be drafted, it would be static and inflexible, unable to adjust to changing community attitudes about the relative gravity of different offenses, or to the short-terms needs for greater deterrence in the case of specific crimes or for incapacitation of certain types of offenders.

The risk is also unacceptable that mandatory sentencing statutes will result in the exclusion, or at least the dwarfing, of soft variables that

5. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 557 (1978).

6. *Id.*

most recent model codes have agreed should be considered in any just system for the allocation of punishment.[7] These factors, which typically relate to subjective questions such as the offender's intention, capacity for responsibility, state of mind, and motivation, occur in patterns too plastic and undefinable for them to be given a formal numerical weighting or are otherwise specified in a manner that precludes the exercise of substantial discretion by the sentencing court. In response to this objection, one compromise approach of those favoring a legislative model for sentencing has been to permit a small range — for example, a 20 percent margin above and below the legislatively prescribed benchmark sentence — within which judicial discretion could operate.[8] Attractive at first glance, such a system is ultimately inadequate. For example, consider a case of euthanasia prosecuted by the state as manslaughter, for which crime the legislature has prescribed a presumptive sentence of eight years but provided a 20 percent margin for judicial discretion. To most, the mitigating factors that may be present in such a case — or that at least distinguish it from a cold-blooded murder for hire — cannot be adequately expressed in a sentence within such narrow margins, nor is it likely that the legislature had such a case within its contemplation in passing the statute. Other examples can be given of "soft variables" that, although not amounting to legal defenses, merit recognition at sentencing: the wife who responds belatedly to a vicious beating and murders her husband, the feeble-minded defendant whose mental capacity is just above the margin necessary to consider him or her legally responsible for personal actions, the defendant who commits an armed robbery to obtain necessities for the family, the youth just days older than the maximum age of eligibility for more lenient juvenile

7. Variables relating to the offender's intent, the degree of provocation under which he or she acted, or the offender's diminished capacity for responsibility are recognized by most recent model codes. *See* ALI, MODEL PENAL CODE §7.01; NCCUSL, MODEL SENTENCING AND CORRECTIONS ACT §3-108; NAC, CORRECTIONS 5.2(3); CAL. SUPER. CT. SENT. R. 423; TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 44-45 (1976). It has been suggested that the guidelines employed by the United States Parole Commission tend in operation to slight these factors because they require a moral evaluation of the offender which cannot be quantified in advance. *See* Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1054-1055 (1978).

8. This approach is sometimes called the "Fogel Plan." *See* D. FOGEL, "WE ARE THE LIVING PROOF . . ." (1975). The 1977 Indiana statute is commonly cited as an example. IND. CODE ANN. §§35-50-1-1 *et seq.* (Burns 1979). For critiques, *see* Morris, *supra* note 2, at 280-281; Alschuler, *supra* note 5, at 559-560.

court treatment. In each case, the common denominator is the existence of factors that may diminish the culpability of the defendant but are inadequate to excuse the conduct in question. As a result, any sentence seems manifestly unjust that gives only a small reduction against a benchmark term which was clearly intended for a more aggravated typical crime.

The net result is that the drafters of sentencing codes that seek to eliminate opportunities for judicial discretion face an unfortunate choice. Either they can rigidly abolish all opportunities for discretionary decision making at the cost of excluding those factors long thought to bear most heavily on the question of the offender's culpability, or they can reintroduce a substantial element of subjectivity into the decision-making process by recognizing factors such as culpability and relative blameworthiness with the result that they thereby concede, to this degree, the futility of the original effort. In contrast, discretion in the view of these standards is more a virtue than a vice. However flawed has been its exercise on occasion, it has the redeeming virtue of making possible a system of punishment that can individualize and tailor the sanction to both the offense and the offender. This the legislature can never do. To abandon this effort in the name either of sentencing equality or of making punishment "fair and certain" seems likely to produce a sadly ironic consequence. Although "like cases" might be treated more alike under such a legislative model of nondiscretionary sentencing, so also would "unlike cases." Highly dissimilar offenders (in terms of their relative culpability) would receive the same sentence. In the end, the effect would be to substitute one type of sentencing disparity — the similar treatment of dissimilar cases — for inequity that results when similar cases are treated dissimilarly. To call this equality is to mistake crudeness for equity.

Four other dangers that arise from reliance on a legislative model for sentencing reform can be more briefly stated. First, considerable concern exists that substantial curtailment of judicial discretion would result not in the elimination of unjustified variations in sentencing but only in corresponding enhancement of the discretion accorded prosecutors.[9] In

9. Alschuler, *supra* note 5, at 563-576; Zimring, *supra* note 4, at 9427. It has been suggested that, in addition to reallocating power from the court to the prosecutor, determinate sentencing statutes, such as Indiana's, substantially increase the control of the correctional staff over the time to be served by enhancing the importance of good time credits. *See* Clear, Hewitt, & Regoli, *Discretion and the Determinate Sentence: Its Distribution, Control, and Effect on Time Served*, 24 CRIME & DELINQUENCY 428 (1978).

short, while legislatively fixed sentences reduce the judge's options, they increase the significance of the prosecutor's decision in determining what charges to prosecute and what plea to accept.

A second problem involves the recurring low-visibility phenomenon of nullification. Either because mandatory sentences are deemed too harsh by the participants in the criminal justice system or because they make more difficult the prosecutor's ability to secure guilty pleas through plea bargaining, some studies have found both courts and prosecutors condoning practices that effectively subvert legislative requirements of minimum or mandatory sentences.[10] It is recognized that other studies have not found such a tendency toward nullification where the minimum sentence was short or where other special factors were present,[11] but on balance this pattern suggests that the legislative goal in denying discretion to sentencing courts may not be fully obtainable. Beneath the surface, discretion lives. If so, it may again be the wiser policy to seek to channel its exercise than to attempt its abolition.

Third, even where the legislature does not prescribe the actual sentence to be served but only specifies a mandatory minimum, the effect may be to widen rather than decrease disparities. This paradox (which is examined in more detail in standard 18-4.3) occurs because the sheer volume of cases that confront the criminal court system makes informal pretrial screening and diversionary mechanisms essential. As a result, when a significant percentage of cases are diverted before trial and given probation-like dispositions, the effect of a mandatory minimum sentence provision is to aggravate the difference in treatment between their cases and those formally adjudicated.

Finally, the danger exists that reliance on a model of legislatively fixed sentences could result in a substantial inflation of the already excessive penalty structure of many penal codes. Much discussed as the possibility has been that flat time sentences will result in longer actual confine-

10. One of the most recent and impressive of these studies is ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND DRUG ABUSE COUNCIL, THE NATION'S TOUGHEST DRUG LAW (1977), evaluating New York State's tough drug laws adopted in 1973 (*see esp.* pp. 13-30). *See also* Remington, Book Review, 29 VAND. L. REV. 1309, 1315 (1976); R. DAWSON, SENTENCING 188-192, 201-214 (1969). This same observation is made in ALI, MODEL PENAL CODE, comment to §7.03 (Tent. Draft No. 2, 1954), with respect to habitual offender laws: "Experience has shown that sanctions of this kind are more effective when they are flexible and moderate; highly afflictive, mandatory punishment provisions become nullified in practice."

11. Beha, *"And Nobody Can Get You Out": The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston* (pt. 1), 57 B.U.L. REV. 96, 115-145 (1977).

ment for the average offender,[12] sufficient evidence is not yet available to confirm or dispel this hypothesis. Nonetheless, it would be myopic to ignore the possibility that once the legislature enters the field and becomes the principal determinant of actual sentence length, political temptations will become strong to increase sentence lengths to levels in excess of those realistically justified by any penological purpose.[13]

Thus, the bottom-line position of these standards is unchanged from the first edition. The allocation of substantial discretion to sentencing authorities remains a sound and essential prescription, indeed one that has received the continued support of the majority of drafters and commentators since the drafting of the Model Penal Code in the 1950s. Where that prescription needs modification is in its failure to provide an adequate mechanism for structuring the discretion of the individual judge. This topic is deferred until part III.

That the legislature's proper role in sentencing is limited does not make it unimportant. Its appropriate scope can be subdivided into four distinct components: (1) rationalization of the penal code structure, (2) provision of adequate criteria and guidance, including nonexhaustive lists of aggravating and mitigating factors, (3) establishment of a sufficient range of sentencing alternatives, including in particular authorization and funding of intermediate sanctions not involving total confinement, and (4) creation of a centralized sentencing agency (the guideline drafting agency) to promulgate presumptive sentencing ranges and otherwise fill the void now existing between the legislature and the individual sentencing court. In each of these areas there have been significant developments since the appearance of the original edition of these standards.

American Bar Association

June 28, 1984

SUMMARY OF STATEMENT
PRESENTED BY ARTHUR C. "CAPPY" EADS
ON BEHALF OF THE
AMERICAN BAR ASSOCIATION

CONCERNING S. 52 AND H.R. 1627
("Armed Career Criminal Acts")

Mr. Eads' statement is based on the policy that the American Bar Association House of Delegates adopted in February 1984 concerning the proposed Congressional legislation relating to "Armed Career Criminal Acts." This policy opposes certain aspects of this legislation on several grounds.

First, it expresses concern about any language that may be included in such a bill that would permit federal authorities to prosecute crimes (i.e. armed burglary and armed robbery) that are currently within the jurisdiction of state and local authorities to prosecute. The report that accompanied the February 1984 policy opposed the concept of federal incursion into the province of state and local prosecutors.

Second, the policy raises several "procedural" concerns not addressed by the pending legislation. These procedural concerns are based on the ABA Standards for Criminal Justice and relate to aspects that should be included and that pertain to (1) requisite identification of a person as a "habitual offender," (2) the offender's sentencing hearing, and (3) appellate review of the sentence.

Third, the policy reiterates the view expressed by the ABA Standards for Criminal Justice in opposition to legislatively enacted mandatory penalties.

Mr. Eads' statement concludes by expressing support for pending "Justice Assistance" legislation, and endorsing it as the most effective way to improve the nation's justice system and provide much needed help to all aspects of the system at the system at the state and local levels.

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SECTION OF CRIMINAL JUSTICE
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Mr. HUGHES. Thank you, Mr. Eads.

Mr. McGuigan, welcome.

Mr. MCGUIGAN. Our feelings are pretty much the same.

First of all, Mr. Chairman, I would like to once again thank you for the opportunity to be here today. I was here last year, and last year I was, if you recall, urging financial support to State and local government for their career criminal programs on that level, and it's good to have a member of the ABA sitting on my right for a change, and it's good to have my good friend Mr. Eads here. The National District Attorneys Association's position is similar to that of the ABA.

Basically, what this bill does is attempt to address a national problem by changing the substantive law. There is simply no need to do that. The Federal offices, prosecutors, and investigators are presently understaffed. Their declination policies in bank robbery and other types of cases have inundated the State courts with those matters. They don't have the financial resources or the capacity to deal with career criminal cases, and what they are giving us, what is being proposed here, it has a laudible purpose, but the problem is it's clearly caught in a thorny thicket of jurisdictional problems. It is somewhat glossed over, but the jurisdictional problem is a real one.

In order to assuage the feelings of local prosecutors, it is being suggested that the bill should require the approval of a local prosecutor. The Department of Justice takes the position that under those circumstances the bill would be unconstitutional.

It clearly would appear that that would be an incursion into the exercise of Federal jurisdiction, which would be unacceptable to the Department of Justice and might very well be unconstitutional.

For instance, on page 4 of my good friend Mr. Trott's testimony, he points out, if Federal authorities found out about a case unofficially, they could still seek an indictment in spite of what the State prosecutor might want.

What he is saying is that the limiting language jurisdiction in the proposed bill is advisory, and the Department of Justice views that language, as being merely advisory. It is not a real jurisdictional restriction on the Federal Government, because it can't operate in that way.

So what you really have is, if it constitutes a real jurisdictional restriction, it's probably unconstitutional, and if it doesn't, it's simply going to exacerbate State and Federal relations. And the question is why? Is this a wise policy?

Our position is that there is no need for a substantive Federal law in this area, that the responsibility is with the State, with the local prosecutor, to handle these cases.

I can tell you, in Connecticut, that the three-time loser, armed robber, is not the type of case that we have a significant problem with, and I think Mr. Eads pointed out, if there are some jurisdictions that have problems with these cases, they should be required to go to the legislature to get the appropriate legislation. There's no answer. There's no solution, in federalizing the criminal law.

I think there is a solution in providing resources for model programs, in some of the jurisdictions which may not have career criminal programs, to try to get those jurisdictions to begin to focus

on these type of criminals and revive some Federal financial support, but this bill will simply do very little to alleviate the problem of career criminals in this country and, at the same time, poses significant Federal-State problems in terms of the relationship between the two sovereign powers.

Now, Mr. Trott has pointed out, and I think it is fair to say, that we have an excellent relationship with the Department of Justice at this time. This is true, but one cannot over time assume that the relationship will be that, because this bill, in effect, creates a new substantive Federal offense, and what may occur later on is that there may be divisiveness between the State and the Federal prosecutor over the exercise of jurisdiction of these cases, and for what gain?

Some people are suggesting that the three or four cases in one jurisdiction may have a significant impact on that jurisdiction's case backlog, on the prison overcrowding problem. I see it as taking three or four cases will simply not alleviate the prison overcrowding problem, and I can't imagine how the taking of three or four cases would alleviate a docket problem in a major jurisdiction in an American city; I just don't see that as providing real support.

So I think the real thrust of legislation on career criminals for the Congress should be in providing some type of financial support to the appropriate governmental agency, the State and the local prosecutor, because they are the people who have the primary responsibility here, and they are the people who should receive support in handling these cases.

Given the problems that the Department of Justice has at the present time with its budget, I think that this bill will not alleviate the problem, and it's simply not worth the effort.

Thank you.

[The statement of Mr. McGuigan follows:]

TESTIMONY

OF

HONORABLE AUSTIN J. McGUIGAN

VICE PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION

AND

CHIEF STATE'S ATTORNEY FOR THE STATE OF CONNECTICUT

BEFORE THE

HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON CRIME

UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 28, 1984

Chairman Hughes, distinguished members of the subcommittee, my name is Austin J. McGuigan and I am the chief State's Attorney for the State of Connecticut. I appear before you today as the spokesman for the National District Attorney's Association at the request of its president, Edwin Miller, to address H.R. 1627 the Proposed Armed Career Criminal Act of 1983.

I come here not to express my own views on this bill or the views of some small but powerful faction. I come before you today to present to you the position of nearly seven thousand state and local prosecutors. Our membership extends to every state in the union, and we are by far the largest association of prosecutors in the country. I believe that our interest in the effective administration of criminal justice throughout the nation is surpassed by no one.

As you know, H.R. 1627 in essence federalizes state prosecutions of repeat, armed burglary and robbery suspects. The

question that I should like to present to you today is, "How far should we go in the expansion of federal criminal jurisdiction?" This bill, unlike any other enacted by Congress to date, contains no interstate or other federal component whatsoever. Its enactment would constitute an unprecedented departure from principles of federalism that are as old as our republic itself. In short it goes too far.

When the structure of our constitutional government was designed many years ago, the overriding concern of the architects, as representatives of the various states, was that the federal government have a limited national role, carefully defined and always tied to a legitimate federal interest. Our young nation's experience under the Articles of Confederation demonstrated all too well the founders' determination that the federal government they were creating would not overstep its bounds by interfering in what were essentially state concerns.

Over the years, we have seen an extraordinary expansion of the federal government's involvement in American life in all areas and, in particular, in law enforcement. Most of that expansion, of course, has been in the pursuit of bonafide federal interests. Bank robberies, racketeering and drug syndicates that cross state lines, and offenses against federal property and personnel, for example, are clearly areas of legitimate federal concern. The limited jurisdiction and resources of any particular state affected by interstate criminal enterprizes oftentimes render state prosecution of these crimes untenable and inappropriate.

In recent years federal criminal jurisdiction seemed to have reached its limits with the enactment of the Hobbs Act in 1948 and the federal racketeering statute in 1970. The Hobbs Act requires that interstate commerce merely be "affected" by robbery or extortion in order for federal jurisdiction to exist over

these crimes. It has been described uniformly by the courts as requiring only a minimal effect on interstate commerce. The federal racketeering statute, on the other hand, actually incorporates state offenses as predicate acts for conviction of the overall racketeering offense, which must "affect" interstate commerce. Nevertheless, both acts retain an interstate component, and the declination policies of the various United States Attorneys' offices reveal that, as a practical matter, that component has real meaning.

The nexus to interstate commerce, or some other federal interest, that federal criminal statutes possess is not a matter of form. In one case the government argued that the federal statute proscribing possession of a firearm by a felon required no showing that interstate commerce be affected or involved. The United States Supreme Court rejected the argument and pointed out that any federal criminal statute that lacked such a federal

component would "dramatically intrude[] upon traditional state criminal jurisdiction." United States v. Bass, 404 U.S. 336, 350 (1971).

The proposed Armed Career Criminal Act of 1983 would do just that. It has no such federal component. It simply confers federal jurisdiction over specified state crimes. We ask whether such a bill comports with the principle that the States are entitled to exercise their police power free from unwarranted federal interference, and whether the authority of a state to vindicate its own criminal laws should be subject to the inclination of a particular federal prosecutor. Where would such federal incursions into state systems of criminal justice end? We believe that the designers of our federal system took care to ensure that the authority of the various states to act as independent sovereigns within their proper sphere would be safeguarded and respected. Yet this bill clearly does not

recognize the distinct realm of state and local governmental authority. As the Supreme Court has warned in an analogous setting, "such assertions of power if unchecked, would indeed . . . allow 'the National Government [to] devour the essentials of state sovereignty.'" National League of Cities v. Usery, 426 U.S. 833, 855 (1976).

We are convinced that broad enough latitude has been accorded federal law enforcement agencies under the currently expansive body of federal criminal jurisdiction. The already overburdened offices of the United States Attorneys are in no position to assume the very serious felony cases that state prosecutors will invariably identify and prosecute. In many districts, for example, an assistant United States attorney labors under an annual caseload of some 200 cases. Even if federal prosecutors had the resources to prosecute such cases, the exercise of federal jurisdiction over essentially state

felonies can only create friction between state and federal authorities. The administration of criminal justice would certainly not benefit from such strained relations.

Furthermore, a host of problems would be created by the prosecution of state crimes in federal courts. No doubt, the state substantive criminal law, unfamiliar to federal judges and prosecutors, would be applicable. The particular state's procedural law might likewise be imposed upon the federal prosecution to avoid any claim by the accused of unequal treatment. These considerations are of no slight significance, for they implicate the ability of federal judges and prosecutors to function effectively in their appropriate setting, and are bound to provide ample raw material for appellate litigation.

Finally, repeat offenders charged with armed robbery or burglary do not create the type of cases that require a special expertise peculiar to federal law enforcement authorities. These

cases are handled, and are handled efficiently, at the state and local level. Furthermore, the hard-pressed federal investigators and prosecutors would have to divert attention from other crimes if they were to focus on these crimes. Thus, this Bill would misallocate scarce federal resources in an area where local law enforcement is already doing the job.

This is not to say that serious repeat robbery and burglary offenders do not pose a substantial threat to the security of each American, or that the federal government has no role in dealing with the danger they present. The proposal before you is not the appropriate response to that threat, however. Over a year ago, I appeared before this Sub-Committee to urge Congressional assistance to revive or help maintain career criminal prosecution programs initiated with LEAA funding. These programs successfully concentrated the power of the states against that small but formidable segment of the criminal population that

accounts for the largest proportion of serious crimes. Their track records are impressive. We renew our appeal for direct formula grants to states that create or maintain such programs.

To the question, then, "How far should we go in the expansion of federal criminal jurisdiction?" the state and local prosecutors across the country are saying that the answer does not lie in an expansion of federal jurisdiction but, rather, in more vigorous local prosecution. Our message to you, in sum, is to help local prosecutors to meet their responsibilities as the principal guardians of the safety and security of the nation's citizenry through well-directed financial assistance. But do not undermine the distinction between our respective federal and local roles so as to render it without meaning.

Thank you.

Mr. HUGHES. Thank you, Mr. McGuigan.

I almost got the impression near the end there that you were talking about the Justice Assistance Act of 1983.

Mr. MCGUIGAN. Well, I was referring to that, since I did testify on that last year and urged——

Mr. HUGHES. I didn't hear it mentioned, but, you know, I wouldn't want the opportunity to pass, because I try to mention it at least once a day.

Mr. MCGUIGAN. We really need support in some of these areas.

The Federal correctional institutions, as you know, are also overcrowded, and I don't think there's any solution there, and we need some new ideas.

As you pointed out in the past to me, we need new ideas in correctional institutions; we need people to provide us with novel approaches for a national problem, and there is no solution here.

If in some of the major jurisdictions of the country there is no place to put armed career criminals, the answer is in providing some type of financial incentives, research in getting people to construct present facilities and use alternatives where possible.

Those are the answers. Not in new substantive Federal law. Every time we have a problem we think we pass a new substantive law and that is going to solve it. I don't see that.

Mr. HUGHES. Well, I think the biggest thing we could do is provide some leadership. And I look upon the Justice Assistance Act, really, as providing that kind of leadership and some resources. It is a modest amount of resources, but it provides leadership.

It is surprising how many jurisdictions around this country that are not really using techniques that are available to deal with criminals and those that for instance, have substance abuse problems and who don't have PROMIS computerized record system as a tool to try to track offenders. It is amazing that there are so many jurisdictions that don't even know what their neighboring jurisdictions are doing and where there is no sharing of criminal histories.

So I think that the Justice Assistance Act is an important initiative. Not to mention the fact that you folks are so busy that you don't have the opportunity and you don't have the resources to test new ideas in the marketplace. NIJ provides research data to a lot of other institutions and we do have some mechanisms to test those new ideas in the marketplace.

Let me ask you, Mr. Eads, is the ABA position that it opposes all mandatory minimum sentences?

Mr. EADS. I think generally that would be true. I think their concern would be not only with mandatory but as to proportionality. I don't personally share those concerns, but yes, I think that the ABA does.

Mr. HUGHES. Either one of you. Any specific amendments to H.R. 1627 or S. 52 which would make either of these bills acceptable to your organizations?

Mr. MCGUIGAN. The Senate amendment is acceptable to NDAA, the original Senate amendment.

Mr. HUGHES. Limited to the so-called gutting amendment.

Mr. MCGUIGAN. Well, I don't think it guts it. I think it puts the Federal Government——

Mr. HUGHES. You're right. It just——

Mr. MCGUIGAN [continuing]. To prosecute Federal crimes. And that is what it should be doing.

Mr. HUGHES. It doesn't gut it, it mutilates it.

Mr. EADS. Kind of echoing what Austin says, the ABA would take the same position as far as something that would be palatable.

Mr. HUGHES. In other words, bare minimum.

Mr. EADS. At most.

Mr. HUGHES. That is the one time that the ABA likes the minimum standard. Mandatory minimum standard.

Mr. EADS. I can assure you if there is a minimum standard the ABA has it somewhere.

Mr. MCGUIGAN. The NDAA, however, isn't in favor of mandatory minimum sentencing for many crimes, as you know.

Mr. HUGHES. Yes. Earlier we had a discussion as to whether 2118(e) of H.R. 1627 is a veto by the local prosecuting authority. What is your opinion?

Mr. MCGUIGAN. The Department's position is that it is not. They say that it is imprecisely drawn I think in page 3 of the Department of Justice testimony. It is imprecisely drawn and apparently overcomes constitutional difficulties by leaving the ultimate decision of whether to seek a Federal indictment to Federal prosecutors. I think that is pretty clear what their position is. Their position is that, although the language seems to indicate they need consent, they don't. Those are the cases that are originally filed in State court or local court and for cases that are originally filed in the Federal court there wouldn't even be an approval provision.

But their position is clear that Federal prosecutors are not bound by that language. I think their position is also clear that if the bill is drawn in a way that they are bound it is unconstitutional.

Mr. HUGHES. Yes.

Mr. MCGUIGAN. Which kind of hoist us up on a petard of a jurisdictional dilemma, and I think the answer to that is to stick to Federal crimes.

Mr. HUGHES. We will go off the record for just a second.

[Discussion off the record.]

Mr. HUGHES. Mr. McGuigan, I take it from your testimony that the career criminal programs funded through LEAA were considered a great success at all levels.

Mr. MCGUIGAN. Yes, they were.

Mr. HUGHES. There is no question that the career criminal programs were successful. Your argument is that they are successful and the States are doing a decent job with career criminal and the problem is one of resources, if anything. From the number of cases that we would see projected under H.R. 1627, it would have little impact and just elevate blood pressures.

Mr. MCGUIGAN. And avoid the funding problem for the Justice Assistance Act. Again, if we are going to talk about substantive legislation, we should talk about new programs and some leadership out of Washington in terms of financial support for new approaches. That is what we really want to see, and forget about changes in substantive law.

Mr. HUGHES. I was particularly interested in parts of your written statement, Mr. McGuigan. You indicated that Federal judges

and prosecutors might have problems with applying State criminal law. I wonder if you could expand on that for me.

Mr. McGUIGAN. Well, if you are going to use State criminal law as a basis, although Mr. Trott again pointed out cross-designation was a possibility. We don't have that everywhere, so a Federal prosecutor might be caught trying to prosecute under a State statute that he is unfamiliar with——

Mr. HUGHES. We could correct that. We could provide cross prosecution.

Mr. McGUIGAN. Well, you can provide cross prosecution, but that is going to cost money. If you are saying the office is overcrowded, then the State prosecutor is going to have to go to another courthouse to handle the case. And I don't see that as time saving. And in some jurisdictions, such as mine, we have not been able to get the legislature as of yet to approve cross-designation; although this year we may have that accomplished.

Mr. HUGHES. Mr. Eads, what are the essential criteria the ABA proposes for sentences for dangerous or habitual offenders?

Mr. EADS. I think one of those would be evidentiary matters such as a clear and convincing test that that particular defendant is in fact a continuing threat. I find it somewhat ironic along with you, Mr. Chairman, that on that particular view one of their concerns was again that of proportionality, which has been recently settled by the U.S. Supreme Court and is not only one of those requirements. But I think it was a legitimate concern by the American Bar Association, although I don't necessarily agree with that.

Mr. HUGHES. I see.

Mr. Eads, these bills deal, in part, with the problem of handgun abuse and violent crimes. Does the ABA have a position on how to deal with what is a very serious problem in our society?

Mr. EADS. Not with particular regards to the banning of handguns. I would certainly just in that regard echo what Steve Trott said. Sure it is a concern. I know there are parts of this country, perhaps mine is one of those that would have the bumper sticker that would say "My wife yes, my dog maybe, my gun never," and I think that that is an attitude I don't know if you are ever going to overcome. I don't know that I would go to my voters, Mr. Chairman, with antihandgun. It is a heck of a problem, and I think it is one where we are not really getting accomplished in the area of law enforcment what we should.

Mr. HUGHES. Thank you.

The gentleman from Florida.

Mr. SHAW. The young lady to my left says you should change that to my spouse rather than my wife. [Laughter.]

I have no questions, but simply an observation. I certainly want to do everything that I can do on the Federal level to contribute to the woes of the career criminal. However, I think the gentleman at the desk has made some very important points. I think as a part of the Federal prosecution or Federal courts we are going to be like the dog that chases a car, what are we going to do with it when we catch it? Our courts are overloaded. We are concerned now about taking care of the litigation that we have, particularly when you get down into south Florida and see the nightmare that our Federal courts have because of the tremendous criminal load that they

are carrying now. If you put more pressure on them, it may even dilute their ability to take care of the Federal crimes that we now have.

And I think perhaps it might even be a little bit of a slap in the face to the States, who have traditionally from the beginning days of our country, taken care of their matters. I think that we may be sort of reacting to Federal frustration as to the crime problem in this country and maybe not reacting in the most beneficial way to the end that we all wish to obtain.

I would like to thank the gentlemen for coming up and spending time with us here.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you.

Let me just ask you a question bearing on something that Clay Shaw just said. It is something that I have thought about.

Is there a certain amount of effrontery involved in H.R. 1627, that in some way the Feds can do it better than the States are already doing it? Is that a consideration?

Mr. MCGUIGAN. I think that is real, although the relationship with the Department of Justice, with the new Law Enforcement Coordinating Committees is improving. But I think that is a real feeling.

The Federal Government certainly has no particular expertise in the area of violent crime, violent armed robbery or burglary. These are handled very well by local law enforcement officers and by local prosecutors who have been prosecuting cases for years. And there seems to be to them no reason why the Federal Government would want to become involved in those types of cases. They haven't, certainly, displayed the expertise.

This isn't a document case where millions of documents might be involved, and accountants and auditors. One may understand that. So I think there is a feeling that the Federal Government may have the idea that it can do everything better than the State and local people, and I don't think they can.

Mr. HUGHES. The reason I ask, you know I just don't have a passing interest in it, because I had that feeling in the 10 years that I was a prosecutor. At times we got that impression because often it was a one-way street with the Federal Government. There was an attitude that we—the Feds—can do it better and it permeated your relationship and really undercut a good relationship.

We were fortunate in my own area in that we had a very good relationship with the Federal agencies. There was a great deal of sharing which was not typical of other parts of the State.

Let me just, however, swing around a little bit for you because I was surprised when I came to Congress to learn that there is a perception that in some way if the Feds are involved that it really means that the heavy hand of Government is going to come down on them. We have had groups come in that would have been satisfied just to be able to put up a sign in their store that this store is protected by the Federal Government. I mean they came in for a specific statute but they would settle for a sign, if we could have authorized a sign because they felt that that would be a deterrent.

So there is that perception and it is not a perception that is necessarily generated entirely by the work of the Federal law enforce-

ment community. It is just a perception that developed over the years. I am sure it has been shaped by the media to a great extent. "The FBI" series, perhaps, made some contributions in that regard because that was an excellent series, and focused attention upon that particular excellent agency.

But there is that perception, and there are not very many months that go by that we don't have a group come in here and express that to us.

Mr. EADS. Mr. Chairman, just speaking of that perception just a moment. I think in jurisdictions, I know in my size, if we have a black minority go into our local bank and say in the name of Jesus give me your money and the bank teller does, the U.S. attorney doesn't rush to me to say can I try that bank robber. I think if it is a white who goes into the bank with a double-barrel shotgun and blows out the front window and kills two or three people in the bank, yes, then I would think that the expert 25 miles away from home may be more interested in the prosecution of that case. But I think there that that is just perceived as 25 miles away from home you are the expert. I bank at that bank; the Federal prosecutor may not.

I think you are right in your perception that that is perceived if the Federal Government comes, gosh, it must be serious. But at the same time I think in the reality of it I don't think there is any difference.

Mr. HUGHES. Well, I know the story about the expert from out-of-town. I run into that all the time, and you are quite correct.

Well, thank you. You really have made tremendous contributions, and you have provided some very incisive testimony and we are grateful to you.

Mr. MCGUIGAN. Thank you very much.

Mr. HUGHES. And thank you for mentioning the Justice Assistance Act once a year. We appreciate that.

Mr. MCGUIGAN. Thank you for supporting that here.

Mr. HUGHES. The subcommittee stands adjourned.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

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