STATEMENT OF HON. WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. WEBSTER. Thank you, Mr. Chairman. I join Mr. Jensen in expressing my appreciation for this opportunity to discuss the new domestic security/terrorism guidelines. Some of our comments may overlap, but I think it is important to explain for the record what is intended by some of the more significant features of the guidelines.

As you know, I have stated on several occasions that the 1976 guidelines worked reasonably well, and I continue to believe so. I would be surprised if the initial effort to deal with this complex and very sensitive area of our responsibilities was the last word on the subject. Writing rules for the conduct of investigations is a relatively new undertaking. I know of no comparable effort on the Federal, State, or local level to establish standards for determining who should be investigated, when and under what circumstances, and what kinds of techniques should be utilized at various stages of the investigative process. Furthermore, the guidelines were not meant to be static. They were promulgated on an experimental basis with the understanding that they would be reviewed after our experience under them could be adequately assessed.

I think it should be possible now to reach firmer conclusions than could have been accepted a few years ago about the domestic security problem and the consequences of various ways of dealing with it. I believe also that the contours of the problem have changed substantially over the past several years, with the result that the old rules no longer provide adequate guidance in dealing with the kinds of terrorist groups that we are confronted with today. For the most part, these groups are more militant, more disciplined, and more violent than organizations that were commonly investigated in the sixties and seventies. It was time, therefore, to reexamine the rules.

The old guidelines were drafted over 7 years ago at a time when serious questions were raised in Congress and elsewhere about the scope and propriety of the Bureau's domestic intelligence activities. It was originally intended that guidelines could be prepared for all aspects of the Bureau's investigative activities. The development of rules governing domestic security matters was given the highest priority. The process proved to be more difficult and time-consuming than had been anticipated, with the result that the original guidelines committee failed to complete its work. In fact, guidelines governing the remaining areas of the Bureau's criminal jurisdiction—general crimes and racketeering enterprise investigations—were not put into effect until December 1980. In the meantime, the Bureau operated for a period of almost 5 years with a discrete set of rules that applied only to a small segment of its operational responsibilities. Furthermore, these rules were viewed by some as a condemnation of the past and as a means of phasing out this aspect of the Bureau's history. They acquired, perhaps unfairly, negative connotations which suggested to our agents that they conducted such investigations at their peril.

Added to these concerns was an increasing amount of litigation directed at agents who participated in domestic security investiga-

Mr. WEBSTER. Those 51 incidents, I think you should understand, include both domestic and international terrorist incidents, and there have been a number of activities at the planning stage that we have had a legitimate interest in that are not reflected in the statistics.

There are certain domestic groups that have to be considered in their subcomponents; for instance, some klaverns of the Ku Klux Klan that could be legitimate subjects for investigation.

The shooting of the two marshals this year in North Dakota raises a question, which I am not prepared to answer at this time at this hearing, about whether there was or was not an enterprise ongoing for violent purposes which resulted or eventuated in the killing of those Government officials.

That is an example of one where there was, as I recall, not an investigation ongoing at that time.

COUNSEL. I don't want to keep on this subject too long. I think it is obvious that the chairman's questions relate to some concern about what it is you are saying about the change in the nature of terrorism that leads you to want to make some of these adjustments in the guidelines, and I guess rather than continue it here perhaps at some later point the subcommittee could explore it further.

I do want to go back to some questions that were raised earlier about preliminary inquiries and the difference between the preliminary inquiry under the Smith guidelines and under the Levi guidelines, and I believe that you, Mr. Jensen, indicated in your responses to some questions from the chairman, that the preliminary inquiry under the Smith guidelines—that is, the general crimes preliminary inquiry—was narrower in scope than a preliminary inquiry under the old Levi guidelines.

Is that accurate?

Mr. JENSEN. By that, I meant that, insofar as the scope, in the Levi guidelines was directed essentially at organizations and under the Smith guidelines the preliminary inquiry is under the general crimes rubric, which means it is directed at a specific criminal actor.

COUNSEL. Well, I think that the subject came up in the context of some hypotheticals that the chairman was suggesting to you in terms of individuals standing up and making certain kinds of statements that might indicate an intention to commit a crime.

What if the statements were being made by groups or, that is, representatives of groups? How would your preliminary inquiry be limited then?

Mr. JENSEN. Well, your preliminary inquiry would be those people who were making the statements, the speakers, and if the preliminary inquiry were to result in a finding of reasonable indication that two or more persons are engaged in an enterprise, then you could move to the threshold for an investigation.

But in terms of any number of speakers, if we are looking at it as the threshold preliminary inquiry, we are only looking at the speakers themselves. But you can now, by looking at that inquiry, find that there is, in fact, an enterprise.

COUNSEL. So if this room were filled with representatives of various draft resister groups—which I believe was the hypothetical the

T-10

Airtel

3/17/83

Director, FBI

All SACs
All LEGATS

ATTORNEY GENERAL'S GUIDELINES FOR THE
CONDUCT OF DOMESTIC SECURITY/TERRORISM
INVESTIGATIONS, EFFECTIVE MARCH 21, 1983

Reference teletype to all SACs dated 3/7/83, captioned as above.

Enclosed for each recipient is a copy of the new Attorney General's Guidelines governing the conduct of FBI investigations concerning domestic security/terrorism (DS/T) matters. These Guidelines will become effective on 3/21/83.

With the exception of some modifications noted below, instructions regarding implementation of the provisions governing general crimes investigations and racketeering enterprise investigations set forth in Memorandum to All Special Agents dated 12/30/80 are still applicable. Some of the more significant features of the new rules governing domestic security/terrorism investigations are described below.

These Guidelines change the way the FBI conducts investigations and administratively manages DS/T cases. These cases are now governed by the rules set forth in Part III of the Guidelines and are considered another form of criminal intelligence investigation. As the Guidelines indicate, criminal intelligence investigations differ from general crimes investigations in several important respects. As a general rule, an investigation of a completed criminal act is normally confined to determining who committed that act and with securing evidence to establish the elements of the particular offense. An intelligence investigation of an ongoing criminal enterprise, on the other hand, must determine the size and composition of the group involved, its geographic dimensions, its past acts and intended criminal goals, and its capacity for harm. While a standard criminal investigation

Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Ms. Lois Petersen
Liberty Lobby
300 Independence Ave., SE
Washington, DC 20003

Person to Contact:
Mr. Perretta
Telephone Number:
(202)566-4912
Refer Reply to:
PM:S:DS:P:2
Date:

AUG 25 [redacted]

Dear Ms. Petersen:

This is in further response to your inquiries concerning Document 7072 (1-86), Illegal Tax Protestor Information Book.

The office that originated Document 7072 (1-86) has sent a memorandum to those offices having the document in their possession to destroy the document immediately.

Sincerely yours,

A. W. Perretta
Tax Law Specialist
Public Services Branch

Illegal Tax Protester Information Book

Official Use Only

IMPORTANT NOTICE!

The IRS has withdrawn this book from circulation because it is replete with inaccuracies. See the letter dated August 25, 1986 from Mr. A.W. Perretta of the IRS on the back cover of this document. Absolutely no information in this book is to be given credence for that reason.

This document is privately republished only to illustrate the significant fact that the U.S. government may be often victimized by special interest groups with a political axe to grind. In this case, it is believed that the information herein was supplied by an agency of a foreign government, the Anti-Defamation League of B'nai B'rith, which is ever mindful of the fact that tax protesters threaten the lifeline of Israel—the U.S. tax dollar.

To repeat, readers of this document must bear in mind that information herein may be exactly opposite from the truth.

A full story about this matter may be found on page 5 of the September 25, 1986 issue of The SPOTLIGHT, 300 Independence Ave., S.E., Washington, D.C. 20003.

Department of the Treasury
Internal Revenue Service

Criminal Investigation
Office of Intelligence
Washington, D. C.

Document 7072 (1-86)

135
Tr. App. ~~124~~

ILLEGAL TAX PROTESTER INFORMATION BOOK

SENSITIVE MATERIAL

Prepared by:
Intelligence Analyst Ruth E. Schweizer
Criminal Investigation
Office of Intelligence
Washington, D.C.

136
Tr. App. 125

ILLEGAL TAX PROTESTER INFORMATION BOOK

INTRODUCTION

This tax protester information document was compiled with limited information and is being disseminated in this form to promote an awareness of various organizations and individuals who appear to be involved with militant protest activities. It is not an in-depth study of the various organizations but a summary of information received from investigations, publications, and other law enforcement agencies, and should not be considered all inclusive. IRS Service Center protest statistics were not used, but CI field offices were contacted in compiling this information. Much of the text is paraphrased from news articles and protest materials. Although the information is not perfected, it is felt that for the safety of all Service personnel there is a general need for awareness of the groups discussed in this report.

Information gathered (subsequent to the GORDON KAHL incident) for the purpose of dissemination to the US Attorney in North Dakota was the initial data used to compile this document. From a review of that data as well as receiving current intelligence from certain ongoing investigations, it became clear that some of the tax protest movement had progressed to a right wing, anarchist, white supremacy movement. The main goal of these groups is to overthrow the government and their tax protest activities are only one way to achieve these goals. Therefore, we believe it is helpful for all Service personnel who may be dealing with individuals who may be part of an organization described herein to be aware of this information. Further, as we become aware of incidents which are to take place in a particular locality (i.e., meetings, threats or violence, locations of fugitives) we will continue to bring this to the attention of the local Chief, Criminal Investigation Division. We may also produce follow-up reports on the activities of this part of the tax protest movement based on the readers input.

We would appreciate your comments as to the usefulness of this document to determine if we should continue to apply resources in this area. Please direct your comments to Anders E. Flodin (OP:CI:INT) at FTS 566-5905.

TABLE OF CONTENTS

PAGE NO

Introduction 1

Organizations

Posse Comitatus 2
Profile of: James P. Wickstrom. 7
Thomas Stockheimer. 8

Identity Churches and Identity Movement. 9
Organizations Associated with Identity
Aryan Nations. 11
Profile of Richard Butler. 13

Christian Defense League (CDL). 14

The Covenant, The Sword, and the Arm
of the Lord (CSA). 15

The Christian Patriots Defense League
(CPDL). 17
Individuals in Identity:
William Potter Gale. 19
Sheldon Emry. 20
Dan Gayman. 20
James K. Warner. 21
Robert E. Miles (KKK). 21
Thomas Arthur Robb. 22

Miscellaneous Organizations
We The People. 24
Your Heritage Protection Association 25
Patriot Network. 26
Ku Klux Klan 27
The Order. 28

Miscellaneous Individuals
Traves Brownlee 30
Wilhelm Ernest Schmitt. 31

Alphabetized List, By State, of Organizations with a
Propensity Toward Violence. 36

Index of Individuals. 40

POSSE COMITATUS

The Sheriffs' Posse Comitatus (SPC), also known as Citizens Law Enforcement Research Committee (CLERC), is a right wing, anti-semitic, extremist group. This close-knit, nationwide organization has been in existence since the late 60's or early 70's and was initially established in Portland, Oregon by Henry Lamont "Mike" Beach.

The name Posse Comitatus is a Latin term meaning "Power of the County" and Posse members hold a duly elected sheriff to be the only legal law enforcement authority. Its members maintain it is a Christian, patriotic group dedicated to freedom and defending the Constitution. The Posses are unauthorized, self-appointed groups seeking the return of vigilante "justice" and many groups are considered violent and dangerous.

In one of the organization's first official manuals, founder Mike Beach wrote: "In some instances of record the law provides for the following prosecution of officials of government who commit criminal acts or who violate their oath of office. . . He shall be removed by the posse to the most populated intersection of streets in the township and, at high noon, be hung by the neck, the body remaining until sundown as an example to those who would subvert the law."

Members associated with some of the posse groups wear tiny gold hangman's nooses on their lapels.

The "Posse" originated as tax protester groups acting as clearinghouses for information relating to the procedures and methods of protecting property and/or evading state and federal taxation, also, to return power to the county citing all other forms of government, including Internal Revenue, null and void. They have become more militant as the years have gone by, although initially their assaults were focused on state and federal revenue agents. Recently their violent acts have been extended to all state and federal law enforcement since the only law enforcement official they recognize is the local sheriff.

Many posse groups regularly hold meetings (some on a weekly basis) and convocations (very likely held annually). They teach basic survival instruction including military training. They advocate the stockpiling of weapons, ammunition, gas masks, medical supplies, food, water, gasoline, etc.

POSSE ORGANIZATIONAL STRUCTURE

Goal: To organize a group in every county of the United States. Charters are sold by Beach to groups of individuals paying $21.00 and meeting the following qualifications:

1. Each group must contain at least seven male individuals;

2. Each individual must be of the "white" race;

3. Each individual must be patriotic;

4. Each individual must be of good character;

5. Each individual must be interested in the preservation of law and order; and

6. Each individual must be a Christian.

Note: Each group must file for a charter.

The posse allows each county charter to establish its own priorities, militancy level, involvement in politics and defense preparations. As of now, the Posse Comitatus does not appear to have a strong national organization that we can determine. However, "the membership is growing in leaps and bounds", per Thomas Stockheimer, a leader and charter member of the Posse in Wisconsin. Many of the groups are becoming increasingly more militant.

PHILOSOPHY OF THE SHERIFF'S POSSE COMITATUS

1. The belief that the U.S. Treasury does not have the authority to issue currency because it is not backed by gold and silver.

2. Accepts the Justice of the Peace court to be the highest court of the land because it is closest to the people.

3. Holds that graduated income tax is illegal and advocates not paying any.

4. Advocates ending foreign aid.

5. To resist statutory authority related to federal, state, and local tax authority.

6. Belief that blacks and Jews should be returned to their origination areas.

7. They reject the court's power to impanel juries, stating that juries should be formed by the citizens, i.e., the Posse.

A portion of the Posse philosophy is: "A good side arm may save your life", "Remember... your life and the lives of your loved ones are at stake!! If you can't eat it, wear it, or shoot it... you don't need it!! Be your own "Emergency Planner". Work with small groups. Establish small groups. Establish code names and alternate communications. Prepare alternate escape routes via back roads, etc. Store sufficient gasoline to get to an alternate destination. "GET OUT OF THE CITIES!! PREPARE TO DEFEND IN RURAL AREAS!!"

"Where are the $$$ for all this last minute preparation??? Cut off mortgage payments and property taxes, etc. Your family comes first in this battle foisted upon us by "The Powers of Darkness" that rule America!!! Better to be prepared a month early-...than a day late." Note: the quotes in these last two paragraphs are from the Wisconsin Posse Comitatus in Tigerton, Wisconsin.

POSSE OBJECTIVES AND ACTIVITIES

1. To limit the access of all law enforcement agencies in trespassing on individual properties.

2. The establishment of schools to teach pupils how to evade federal and state taxes.

3. The formation of one member or small member churches designed to be used as tax shelters to avoid payment of taxes.

4. The conducting of paramilitary training.

5. The filing of frivolous lawsuits and liens against law enforcement officers and public officials.

6. Many groups advocate firearms, paramilitary, and survivalist training to prepare its members for the conflict they anticipate.

141
Tr. App. 130

TRENDS OF POSSE COMITATUS

1. Posse Comitatus members have filed a voluminous number of lien cases against personal property of judges, Court Commissioners, District Attorneys, Assistant Attorneys General, Clerks of Courts, and newspaper publishers in an effort to clog the court system and to embarrass, impede, and obstruct the trial courts in the administration of justice. (Note: In 1980 over 100 such cases were filed during a one week period in the state of Wisconsin, amounting to millions of dollars.) A lien previously filed against a Federal Judge was thrown out of court. Because of the voluminous number of frivolous liens filed against state officials, the state of Wisconsin passed a statute that this type of lien would be thrown out of court. As a result of this statute, the number of frivolous liens has been significantly reduced.

2. We note a growing trend of the Posse Comitatus toward open hostile interference with all law enforcement officials. In New Orleans, Louisiana, Posse members have managed to take pictures of IRS agents for Posse "threat" use. The Posse has stated their intent to lure federal agents to isolated places and then assassinate them.

3. The Posse Comitatus is becoming more militant, stockpiling large quantities of various types of weapons and regularly instructing its members in their use. They are constantly practicing their maneuvers and forming new "compounds" where these various activities can be carried out, especially in the Midwest.

4. Establishing more "schools" for instruction to be given on forming new Posse groups, as well as family survival in the face of "The Holy War" and "Blood Bath" as they refer to what they believe will be inevitable. The location and number of schools were not announced.

5. Some of the Posse leaders are strongly advocating counterfeiting money, maintaining that the Posse has as much right to print and circulate money as does the federal government.

6. The Posse groups are becoming actively involved in protesting the farm foreclosure sales.

7. The Posse groups also advocate a well-equipped communications system network to enable their members to summon assistance from fellow members during periods of

crisis. Recommended are walkie-talkies, CB radios, as well as public telephones and members are advised to establish codes for use in communicating. The Posse maintains tight security on their communication system and if they use designated channels.

8. Some of the chapters in Texas reportedly require ownership of a four-wheel drive vehicle as a prerequisite for membership. In general, members drive four-wheel drive vehicles, all terrain vehicles, as well as family-type cars.

9. They are establishing compounds in rural, sparsely populated areas affording the necessary privacy to establish illegal manufacturing shops used to convert legally acquired firearms from their semiautomatic stage (legal) to unregistered fully automatic stage (illegal). These rurally situated compounds are not limited to any one part of the country.

143
Tr. App. ~~132~~

FOR OFFICIAL USE ONLY

98/25

UNITED STATES PAROLE COMMISSION

U.S. Department of Justice

RULES AND PROCEDURES MANUAL

OCTOBER 1, 1984

144
Tr. App. 133

§ 2.2-04. *Non-Parolable Sentences (21 U.S.C. §848).* Offenders sentenced und this section (continuing criminal enterprise involving narcotics) are not eligible fo parole.

§ 2.2-05. *Treaty Cases.* Cases returned to the United States under prisoner transfer treaties are treated as if sentenced under 18 U.S.C. 4205(b)(2) for all parole purposes. Exception: In Mexican and Canadian treaty cases, the 'street time' forfeiture provisions upon parole revocation are the same as those applicable to Youth Corrections Act cases.

§2.3 SAME; NARCOTIC ADDICT REHABILITATION ACT.

A Federal prisoner committed under the Narcotic Addict Rehabilitation Act may be released on parole in the discretion of the Commission after completion of at least six months in treatment, not including any period of time for "study" prior to final judgment of the court. Before parole is ordered by the Commission, the Surgeon General or his designated representative must certify that the prisoner has made sufficient progress to warrant his release and the Attorney General or his designated representative must also report to the Commission whether the prisoner should be released. Recertification by the Surgeon General prior to reparole consideration is not required. (18 U.S.C. 4254).

Notes and Procedures

§ 2.3-01. *Certificate of Release Readiness.* This certificate is signed by the local Drug Abuse Program Manager through authority delegated by the Medical Director of the Bureau of Prisons and the Surgeon General.

§2.4 SAME; YOUTH OFFENDERS AND JUVENILE DELINQUENTS.

Committed youth offenders and juvenile delinquents may be released on parole at any time in the discretion of the Commission. (18 U.S.C. 5017(a) and 5041).

§2.5 SENTENCE AGGREGATION.

When multiple sentences are aggregated by the Bureau of Prisons pursuant to 18 U.S.C. §§4161 and 4205, such sentences are treated as a single aggregate sentence for the purpose of every action taken by the Commission pursuant to these rules, and the prisoner has a single parole eligibility date as determined by the Bureau of Prisons.

§2.6 WITHHELD AND FORFEITED GOOD TIME.

While neither a forfeiture of good time nor a withholding of good time shall bar a prisoner from receiving a parole hearing, Sec. 4206 of Title 18 of the United States Code permits the Commission to parole only those prisoners who have substantially observed the rules of the institution.

Notes and Procedures

§ 2.6-01. *Disciplinary Infractions.* An effective or presumptive parole date may be granted by the Commission only after a thorough review of circumstances underlying any disciplinary infraction(s) and where the Commission is satisfied that the date it sets will require a period of imprisonment sufficient to outweigh the seriousness of the prisoner's misconduct. Any presumptive or effective date is contingent upon the absence of further misconduct. A parole date shall not be made contingent upon restoration of good time by the Bureau of Prisons.

§ 2.11-02. *Refusal to Make Application/Recalcitrant Prisoners.*
(a) Where a prisoner declines either to apply for or waive parole consideration, institution staff should prepare a signed, dated memorandum to the prisoner's file noting that the prisoner has been advised of (1) his right to apply for parole consideration and (2) that failure to apply for parole is deemed as a waiver of parole consideration; and that the prisoner has declined to file a parole application or waiver. No action is taken by the Commission unless the prisoner has declined to file a parole application or waiver. No action is taken by the Commission unless the prisoner subsequently applies for parole.

(b) When a prisoner refuses to enter the hearing room, physical force should not be used to ensure his appearance. Instead, an official of the institution should make a written statement that the prisoner was properly advised of his right to a hearing, but refused to make such appearance. The hearing panel, in such cases, should consider that he has waived parole and enter a memo for the file to that effect.

§ 2.11-03. *Prisoner Background Statement.* In addition to formal application for parole, all prisoners who desire to be considered for parole are provided a background statement (Form I-32). The prisoner may use this statement to bring any material he/she desires to the attention of the Parole Commission.

§ 2.11-04. *"Safe" House Cases.* Notice and hearing procedures are applicable as they are to prisoners confined at a federal institution. Since there will be a minimum of classification material, it is suggested that the Deputy U.S. Marshal be asked (by the person arranging the hearing) to be available to answer questions from the examiner panel. The Bureau's Case Management Administrator in the Region will be responsible for obtaining any available material to be used by the examiner panel and should be contacted prior to the hearing.

§ 2.11-05. *Prisoners Out of the Institution.* A prisoners entitled to a hearing who is unavoidably out of the institution during an examiner panel's visit is normally passed over until the next docket. Such instances occur when a prisoner has been delivered to a court on the basis of a writ, when he has been placed in a civilian hospital or other similar facility, or when he has escaped. A brief memo to the file is prepared. However, when a prisoner has been removed from an institution on a court writ of ad testificandum or for hospitalization, and is past his parole eligibility date, and return by the next docket is not anticipated, the panel is to notify the Regional Office by memo. The Regional Office should, absent reasons to the contrary, schedule a hearing at the place of confinement as if the prisoner were a federal boarder (2.16-01). For procedures in revocation cases where the alleged violator is unavailable, see 2.49-01(c) and 2.49-02(a)

§ §2.12 INITIAL HEARINGS: SETTING PRESUMPTIVE RELEASE DATES.

(a) An initial hearing shall be conducted within 120 days of a prisoner's arrival at a Federal institution or as soon thereafter as practicable; except that in the case of a prisoner with a minimum term of parole ineligibility of ten years or more, the initial hearing shall be conducted at least 90 days prior to the completion of such minimum term, or as soon thereafter as practicable.

(b) Following initial hearing, the Commission shall (1) set a presumptive release date (either by parole or by mandatory release) within fifteen years of the hearing; (2) set an effective date of parole; or (3) continue the prisoner to a fifteen year reconsideration hearing pursuant to Sec. 2.14(c).

146
Tr. App. ~~135~~

(c) Notwithstanding the above paragraph, a prisoner may not be paroled earlier than the completion of any judicially set minimum term of imprisonment or other period of parole ineligibility fixed by law.

(d) A presumptive parole date shall be contingent upon an affirmative finding by the Commission that the prisoner has a continued record of good conduct and a suitable release plan and shall be subject to the provisions of Sections 2.14 and 2.28. In the case of a prisoner sentenced under the Narcotic Addict Rehabilitation Act, 18 U.S.C. Sec. 4254, a presumptive parole date shall also be contingent upon certification by the Surgeon General pursuant to Section 2.3 of these rules. Consideration of disciplinary infractions in cases with presumptive parole dates may be deferred until the commencement of the next in-person hearing or the prerelease record review required by Sec. 2.14(b). While prisoners are encouraged to earn the restoration of forfeited or withheld good time, the Commission will consider the prisoner's overall institutional record in determining whether the conditions of a presumptive parole date have been satisfied.

Notes and Procedures

§ 2.12-01. *Reports from Probation Officers.* Before a hearing may be conducted there must be available to the examiner panel a copy of a pre-sentence report or a post-sentence report. A scheduled hearing shall be continued if neither is available to the panel. In such case the panel shall notify the Regional Office to take whatever action necessary to secure the required report.

§ 2.12-02. *Permissible Actions.* Following initial hearing, the panel may recommend: an 'effective date' of parole [within six months from the date of the hearing]; a presumptive parole date [more than six months from the date of initial hearing but no later than fifteen years]; a fifteen year reconsideration hearing [at fifteen years from the month of the present hearing]; or continue to expiration [if the statutory release date is within fifteen years of the month of the hearing]. Prisoners will be scheduled, in addition, for statutory interim hearings automatically as required by law.

§ 2.12-03. *Parole on the Record.*
(a) Where it appears upon pre-hearing review (1) that parole upon completion of the minimum sentence (at parole eligibility date) or within 180 days of the pre-hearing review decision is clearly warranted, (2) that such release date occurs within or above the applicable guideline range, and (3) that an in-person hearing does not appear necessary for further examination of the case, a hearing panel may recommend that parole based upon the record be granted. When such recommendation is made by a hearing panel and the Regional Commissioner concurs, a standard Notice of Action will be issued with the addition of the wording in paragraph (b) or (c). If the Regional Commissioner does not concur, the panel recommendation is voided and the case will be scheduled for hearing under standard procedure.

(b) Where parole is granted upon completion of the minimum sentence, add to each Notice of Action following the "reasons" section: *"Note: The Commission has decided to grant you a parole date upon completion of your minimum sentence on the basis of a review of your record. As the Commission is precluded by law from releasing you at an earlier time, this release date is NOT APPEALABLE."*

(c) Where parole is granted within 180 days of the date of the pre-hearing review and the parole eligibility date will have already passed, add to each Notice of Action following the "reasons" section: *"Note: Under 18 U.S.C. 4208(a), the Commission has decided to grant you an effective parole date on the basis of a review of your record without a personal hearing."*

§2.13 INITIAL HEARING; PROCEDURE.

(a) An initial hearing shall be conducted by a panel of two hearing examiners. The examiners shall discuss with the prisoner his offense severity rating and salient factor score as described in Sec. 2.20, his institutional conduct and, in addition, any other matter the panel may deem relevant.

(b) A prisoner may be represented at a hearing by a person of his choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. Interested parties who oppose parole may select a representative to appear and offer a statement. The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statements.

(c) At the conclusion of the hearing, the panel shall orally inform the prisoner of its recommendation and of the reasons therefor. Written notice of the official decision, or the decision to refer under Section 2.17 or Section 2.24, shall be mailed or transmitted to the prisoner within 21 days of the date of the hearing, except in emergencies. Whenever the Commission initially establishes a release date (or modifies the release date thereafter) the prisoner shall also receive in writing the reasons therefor.

(d) In accordance with 18 U.S.C. 4206, the reasons for establishment of a release date shall include a guidelines evaluation statement containing the prisoner's offense severity rating and salient factor score (including the points credited on each item of such score) as described in Sec. 2.20, as well as the specific factors and information relied upon for any decision outside the range indicated by the guidelines.

(e) No interviews with the Commission, or any representative thereof, shall be granted to a prisoner unless his name is docketed for a hearing in accordance with Commission procedures. Hearings shall not be open to the public.

(f) A full and complete record of every hearing shall be retained by the Commission. Upon a request, pursuant to Sec. 2.56, the Commission shall make available to any eligible prisoner such record as the Commission has retained of the hearing.

Notes and Procedures

2.13-01. *Panel Functioning.* Examiner panel(s) conduct hearings at the institution of confinement according to a printed schedule. The appropriate Case Manager is also in attendance. A recording device is used to record the interview. [If the hearing is continued for any reason, a tape of the discussion with the prisoner, if any, leading to the continuance is made, and a memo of the reasons for the continuance is prepared.] The hearing summary is dictated following each hearing. Except where the case is "continued to the Regional Office" for some unusual reason the summary includes a recommendation relative to parole, revocation or continuance. At the conclusion of the hearing, the prisoner (and his/her representative) is informed of the panel recommendation (and the fact that his recommendation is subject to review at the Regional Office). If there is a split recommendation, the prisoner is told the alternative recommendations (examiners need not be identified by recommendation). In original jurisdiction cases, the prisoner is told the alternative panel recommendation.

2.13-02. *Representation.*
(a) Representation is normally limited to one person. However, it is in the presiding hearing examiner's discretion, where appropriate, to permit additional representatives to appear. Any continuance due to the absence of a prisoner's representative shall be at the discretion of the presiding hearing examiner and shall be granted only for good cause. A brief memo to the file is prepared.

13

148
Tr. App. ~~137~~

(b) At local or institutional revocation hearings, a person other than an attorney (Member of the Bar) shall be limited to the role of a witness or representative except that where permissible by state law, a law student may function in the role of an attorney provided (i) the inmate knowingly and intelligently consents; and (ii) the law student is under the direct supervision of a member of the bar (who is physically present). However, representation by both law student and supervisor shall not be permitted. An attorney or other representative at any other hearing shall be limited only to the role of representative as previously defined.

(c) The prisoner and his/her representative will normally be entitled to be present during the entire hearing except during deliberations of the decision-makers, or where institutional security would be jeopardized and/or personal safety of adverse witnesses might be involved. If the prisoner is removed at the request of the panel, the reasons for such exclusion from the hearing must be well documented into the record. A prisoner's representative will also be allowed to be present when the panel informs the prisoner of its recommendation and reasons regardless of the type of hearing.

(d) In cases where the witness will be unavailable, or wishes to give testimony containing matters exempt under the statute or where the witnesses' testimony would be adverse in nature and the witness does not wish, for proper grounds, to give the testimony in the presence of the prisoner, the prisoner may be removed from the hearing, or in the alternative the witness may offer a written statement to be used by the panel in their deliberations. If at all possible, this written statement should be submitted by the witness well in advance of the hearing.

(e) If the written statement so offered contains exempt material, and the witness represents a government agency, it is the duty of that witness to determine what material is exempt and to summarize that material for the benefit of the prisoner. If the witness is a private person, the Regional Office will perform that task in advance of the hearing. Where the material is submitted directly to the panel of examiners, the summary will be given to the prisoner along with his Notice of Action.

▌2.13-03. *Computation of guidelines*. The guidelines evaluation worksheet will be completed at all initial hearings.

▌2.13-04. *Provisions of Reasons*. Reasons following the appropriate guideline format will be typed on all Notices of Action denying a parole date or granting a presumptive or effective parole date. However, repetition of the reasons already given is not required (a) when an effective date is granted as a result of a pre-release review of a previous presumptive date order, and the date of release has not been changed; and (b) on any other Notice of Action where no change in the previous decision is made.

▌2.13-05. *Summary Formats*. Use the hearing formats as indicated in Appendix 1. In preparing correspondence, hearing summaries, reports and other documentation, use professional language which describes the subject and explains the Commission's position clearly, simply, and accurately. It should be kept in mind that much of what is written is disclosable to the prisoner or releasee and may come before the Courts, the Congress, or the public. Language which may be interpreted as discriminatory, prejudicial, or insensitively descriptive discredits the Commission and the writer, and its use violates the Commission policy.

▌2.13-06. *Standardized Wording on Orders*. Use the standardized wording in Appendix 2. It is conceivable that there may be an action not covered by this wording. In such instances wording should be developed to fit the action desired.

149
Tr. App. ~~138~~

§ 2.13-07. *Co-defendants*. Co-defendants and their parole status including sentence and guideline data, any reasons for departure from the guidelines, and months served will be listed, when available, in initial and reconsideration summaries.

§ 2.13-08. *Conditions of Parole*. Special conditions (including drug aftercare) should be recommended, where appropriate, by the hearing panel at the time the presumptive date (whether by parole or mandatory release) is determined (normally at the initial hearing). Where appropriate, special conditions may be added or modified at any time prior to the prisoner's release.

§ 2.13-09. *Additions to Docket*. Where by reason of transfer a prisoner has missed his initial hearing, subsequent hearing or revocation hearing, the prisoner may be added to the docket at the request of the Warden and with the approval of the Senior Examiner designated by the Regional Commissioner. No other interviews for cases not on the docket will be conducted without written approval from the Regional Commissioner.

§ 2.13-10. *Visitors at Hearings*.
(a) *In General*. As a general principle, Parole Commission hearings are not open to the public. However, where good cause exists, visitors may be permitted to attend provided their presence will not interfere with the orderly course of the proceedings. The presiding hearing examiner determines who will be admitted to the hearing room. If he or she cannot make the final decision in accordance with subsection (b), he or she will communicate with the authorized official.

(b) *Criteria*. The Commission has found it appropriate to allow the following classes of visitors (other individuals must be considered by the presiding examiner on a case by case basis). Persons having a direct interest in a case shall be considered under procedures dealing with representatives.

(1) U.S. Parole Commission, Bureau of Prisons, or U.S. Probation Service employees; and Federal Judges or Magistrates.

(2) Federal or State Legislators; state judges, state parole or probation personnel.

(3) Newspaper or Magazine Correspondents (permission must be granted by the Regional Commissioner).

(4) Researchers (prior permission must be granted by the Chairman).

(5) Students in fields related to criminal justice.

(c) *Restrictions*.
(1) Visitors are not to participate in hearing proceedings. Examiners will not discuss cases with visitors in any instance until after a recommendation has been made and the summary dictated.

(2) Visitors will not be permitted to use recording devices.

(3) Examiners may request visitors to leave the hearing room when it is affecting the progress of the hearing. Examiners should also remove visitors from the room prior to hearing cases which, in their judgement, involve matters usually sensitive as far as the prisoner is concerned.

(4) Visitors should not be permitted to enter or leave the hearing room during the proceedings (for sake of the dignity or orderly proceedings).

150
Tr. App. 139

(5) Except for visitors listed under subsection b(1), permission must be granted in writing by the prisoner (at a revocation hearing the attorney must also be in agreement) for visitors to be present at hearings. It must be explicitly and forcefully made clear to the prisoner that he has a right not to have visitors present, and that such action will not affect the Commission action on his case in any way. Panel members should be careful that a prisoner does not feel coerced to allow such visitors to be present.

(6) Visitors should not be present at hearings on original jurisdiction cases, or cases which in the judgement of the examiner will be referred to the Regional Commissioner as original jurisdiction cases.

(7) No visitor shall remain in the hearing room during deliberations or dictation unless specifically authorized by the examiner panel.

§ 2.13-11. *Interested Parties Opposing Parole.*
(a) A victim/witness (verified by the Bureau of Prisons Victim/Witness Coordinator) or a criminal justice official [e.g., U.S. Attorney, FBI or DEA Agent] may attend a specific parole hearing to oppose parole without special permission. Any other person wishing to attend a hearing to oppose parole must obtain permission from the Regional Commissioner in advance of the hearing. Requests for such permission must be in writing. Interested persons opposing parole are encouraged to submit written comments in lieu of a personal appearance. Where a personal appearance is made, any persons opposing parole will be requested to select one person as a spokesperson. However, it is in the presiding examiner's discretion, where appropriate, to permit additional persons to be present. A continuance due to the absence of an interested party opposing parole shall be in the discretion of the presiding examiner and shall be granted only for good cause. A brief memo to the file is to be prepared.

(b) An interested party opposing parole shall be provided an opportunity to make a statement at the appropriate time determined by the presiding hearing examiner. The prisoner may be excluded at the request of such person for good cause, or when it appears to the hearing panel that institutional security or the personal safety of such person might be involved. The reason for any such exclusion must be documented in the record and any testimony out of the prisoner's presence must be promptly summarized for the prisoner with an opportunity for response.

(c) Upon request, any victim/witness (verified through the Bureau of Prisons Victim/Witness Coordinator) or criminal justice system official may be notified of the Commission's official decision in accordance with 2.24-13. A separate memo to the Regional Office is to be prepared by the panel pointing out the above request for notification. The hearing panel may inform an interested party opposing parole of its recommended decision following the hearing, but the applicable reasons (e.g., guideline indicants) are to be provided only under 2.24-13.

§ §2.14 SUBSEQUENT PROCEEDINGS.

(a) Interim proceedings. The purpose of an interim hearing required by 18 U.S.C. 4208(h) shall be to consider any significant developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing.

(1) Notwithstanding a previously ordered presumptive release date or fifteen-year reconsideration hearing, interim hearings shall be conducted by an examiner panel pursuant to the procedures of Sec. 2.13(b), (c), (e), and (f) at the following intervals from the date of the last hearing:

Tr. App. 151 ~~140~~

(i) In the case of a prisoner with a maximum term or terms of less than seven years, every eighteen months (until released);

(ii) In the case of a prisoner with a maximum term or terms of seven years or more, every twenty-four months (until released). However, in the case of a prisoner with an unsatisfied minimum term, the first interim hearing shall be deferred until the docket of hearings immediately preceding the month of parole eligibility.

(2) Following an interim hearing, the Commission may:

(i) Order no change in the previous decision;

(ii) Advance a presumptive release date, or the date of a fifteen-year reconsideration hearing. However, it shall be the policy of the Commission that once set, a presumptive release date or the date of a fifteen-year reconsideration hearing shall be advanced only (1) for superior program achievement under the provisions of Sec. 2.60; or (2) for other clearly exceptional circumstances.

(iii) Retard or rescind a presumptive parole date for reason of disciplinary infractions. In a case in which disciplinary infractions have occurred, the interim hearing shall be conducted in accordance with the procedures of Section 2.34(c-f). (Prior to each interim hearing, prisoners shall be notified on the progress report furnished by the Federal Prison System that any finding of misconduct by an Institutional Disciplinary Committee since the previous hearing will be considered for possible action under this subsection);

(iv) If a presumptive date falls within six months after the date of an interim hearing, the Commission may treat the interim hearing as a prerelease review in lieu of the record review required by paragraph (b) of this section.

(b) Pre-Release reviews. The purpose of a prerelease review shall be to determine whether the conditions of a presumptive release date by parole have been satisfied.

(1) At least sixty days prior to a presumptive parole date, the case shall be reviewed on the record, including a current institutional progress report.

(2) Following review, the Regional Commissioner may:

(i) Approve the parole date;

(ii) Advance or retard the parole date for purpose of release planning as provided by Sec. 2.28(e);

(iii) Retard the parole date or commence rescission proceedings as provided by Sec. 2.34;

(iv) Advance the parole date for superior program achievement under the provisions of Sec. 2.60.

(3) A pre-release review pursuant to this section shall not be required if an in-person hearing has been held within six months of the parole date.

(4) Where: (i) there has been no finding of misconduct by an Institutional Disciplinary Committee nor any allegation of criminal conduct since the last hearing; and (ii) no other modification of the release date appears warranted, the administrative hearing examiner may act for the Regional Commissioner under paragraph (b)(2) of this section to approve conversion of the presumptive parole date to an effective date of parole.

152
Tr. App. 147

(c) Fifteen-year reconsideration hearings. A fifteen-year reconsideration hearing shall be a full reassessment of the case pursuant to the procedures at Sec. 2.13.

(1) A fifteen-year reconsideration hearing shall be ordered following initial hearing in any case in which a release date is not set.

(2) Following a fifteen-year reconsideration hearing, the Commission may take any one of the actions authorized by Sec. 2.12(b).

Notes and Procedures

2.14-01. *Statutory Interim Hearing.*
(a) Statutory interim hearings are scheduled each 18th or 24th month (or the preceding month when the panel does not visit the institution during the specified month) after the month of any previous hearing, as required by law. An exception occurs when the minimum term date will not have arrived by the time of a statutory interim date. In such cases the first interim hearing will be deferred until the docket immediately preceding completion of the minimum term.

(b) Where a statutory interim hearing is scheduled for a time subsequent to a presumptive date record review, the statutory interim hearing shall be cancelled if the record review results in an effective parole date. [For example, a prisoner is scheduled for a presumptive date after 21 months (with a statutory interim hearing at 18 months). During the 17th month, a presumptive date record review is conducted, and the effective parole date is approved. The statutory interim hearing is not to be conducted]. If the prisoner has already been docketed for a statutory interim hearing, the institution shall delete his name from the docket upon receipt of the notice of the approved effective date. [See 18 U.S.C. §4208(a)].

(c) Following a Statutory Interim Hearing, the panel may recommend:

(1) No change in the presumptive parole date (if the presumptive date is within six months, the panel may recommend that it be changed to an "effective" date.);

(2) Advancement of a presumptive parole date (or change from a "Continue to Expiration" or "Fifteen-Year Reconsideration Hearing" to a presumptive or "effective" date) but only for documented exceptional circumstances, or superior program achievement pursuant to 28 C.F.R. 2.60;

(3) Retardation of a presumptive parole date to a "Continue to Expiration" or "Fifteen-Year Reconsideration Hearing") on the basis of disciplinary infractions [in cases with disciplinary infractions the interim hearing will be conducted as a rescission hearing].

2.14-02. *Pre-Release Record Review.* Following a Pre-release Record Review (a record review which may be conducted by an examiner or analyst), the Regional Commissioner may:

(1) Approve the release date [order an "effective" date];

(2) Approve an effective parole, but advance or retard the release date for release programming; or advance the release date for superior program achievement pursuant to 28 C.F.R. 2.60;

(3) Approve an effective parole, but retard the release date for not more than 90 days without a hearing on account of disciplinary infractions; or

(4) Schedule a rescission hearing.

Tr. App. 153 142

§2.15

When a Federal reopeni set by why it extraor

§2.16

(a) An United territor and co such p other c

(b) Fe or ter Upon r by the approp sentenc soon as

(c) Pr boarde facilitie for hea

(d) Fe and w conside

2.16- initial are co Normal situati shall b Boarde copy c matter Prison agree

2.16 month 4205(f revoca design Regior

§2.15

(1) The local U.S. Marshal will request designation of the Bureau of Prisons Community Programs Officer. The Community Programs Officer will insure that the prisoner is given as parole application form, a background statement (Parole Form I-32) and a waiver form by facility staff immediately upon arrival at the facility. The facility staff will return the forms to the CPO within two weeks. The CPO will then forward the BP-5, the parole forms and the pre or post sentence report, if available, to the Commission's Regional Office.

(2) Upon receipt of a parole application, the Regional Office will create a file and expedite obtaining a pre or post sentence report (if not provided by the CPO) from the United States Probation Officer. The Regional Office will then fix the parole or mandatory parole date. The Notice of Action will be sent directly to the facility with copies sent to the CPO and the USPO. In all other respects, these cases will be handled under all the standard USPC procedures relating to guideline application, notice, appeals, etc. Release planning may have to be waived in very short term cases.

(c) All cases sentenced under this Act must be mandatorily paroled no later than three months prior to the expiration of the full term. If a prisoner does not apply for parole, the federal institution or Community Programs Officer, as applicable, shall request a mandatory parole certificate in sufficient time for release. If parole is applied for and denied, the Regional Office will send the mandatory parole certificate with the Notice of Action. In cases confined in state/local facilities, the Regional Office will send the certificate directly to the facility with copies to the CPO and the USPO. The regular youth certificate will be used with the word "*Mandatory*" typed on the certificate.

§2.17 ORIGINAL JURISDICTION CASES.

(a) Following any hearing conducted pursuant to these rules, a Regional Commissioner may designate certain cases for decision by a quorum of Commissioners as described below, as original jurisdiction cases. In such instances, he shall forward the case with his vote, and any additional comments he may deem germane, to the National Commissioners for decision. Decisions shall be based upon the concurrence of four votes with the appropriate Regional Commissioner and each National Commissioner having one vote. Additional votes, if required, shall be cast by the other Regional Commissioners on a rotating basis as established by the Chairman of the Commission.

(b) The following criteria will be used in designating cases as original jurisdiction cases:

(1) Prisoners who have committed serious crimes against the security of the Nation, e.g., espionage or aggravated subversive activity.

(2) Prisoners whose offense behavior (i) involved an unusual degree of sophistication or planning or (ii) was part of a large scale criminal conspiracy or a continuing criminal enterprise.

(3) Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial, or prisoner status, or because of the community status of the offender or his victim.

(4) Long-term sentences. Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences.

(c)(1) Any case designated for the original jurisdiction of the Commission shall remain an original jurisdiction case unless designation is removed pursuant to this subsection.

Tr. App. 143-154

(2) A case found to be inappropriately designated for the Commission's original jurisdiction, or to no longer warrant such designation, may be removed from original jurisdiction under the procedures specified in paragraph (a) of this section following a regularly scheduled hearing or the reopening of the case pursuant to Sec. 2.28. Removal from original jurisdiction may also occur by majority vote of the Commission considering an appeal pursuant to Sec. 2.27. Where the circumstances warrant, a case may be redesignated as original jurisdiction pursuant to the provisions of paragraphs (a) and (b) of this section.

Notes and Procedures

§ 2.17-01. *Referral by Panel.* A hearing panel shall refer any case falling within the criteria for original jurisdiction cases to the Regional Commissioner. The applicant should be told that his case is being referred for possible original jurisdiction consideration and the reasons therefor. The panel should also render an alternative recommendation (in the event the case is not designated an original jurisdiction case). Advising the prisoner of the possible original jurisdiction designation and the reasons therefore is normal practice but is not a due process requirement.

§ 2.17-02. *Regional Review.*
(a) The Commissioner may designate the case as original jurisdiction and submit the case with his recommendation to the National Commissioners. In such case, a Notice of Action shall be sent to the prisoner including the basis for his original jurisdiction (e.g., National or Unusual Attention; Unusual Sophistication or Planning). If an original jurisdiction designation is based upon the criteria of 28 C.F.R. Sec. 2.17(b)(2), then the Intelligence Unit, Department of Justice, Washington, D.C., should be notified of the pending parole consideration via teletype message, using the form provided in Appendix 4, if this has not already been done at pre-hearing review.

(b) Designation of a case meeting the criteria under §2.17 as original jurisdiction by a Regional Commissioner is presumptive not mandatory. A Regional Commissioner may decline to designate the case as original jurisdiction (with a memo to the file) and (1) let the panel recommendation stand, or (2) take other action under 28 C.F.R. Sec. 2.24.

(c) Where a report from the Justice Department or other government law-enforcement agency is considered essential and such report has not been received, the Regional Commissioner may reschedule the case for the next docket for consideration of additional information. In such case, follow-up will be made with the appropriate agency to insure an expedited report.

§ 2.17-03. *Referral to National Commissioners.* The Regional Commissioner referring a case for original jurisdiction shall use two orders (see Appendix 2). The reasons for designation specified in 28 C.F.R. §2.17 shall be particularized to the individual case and an analysis of the case and the reasons for decision shall be set forth (see Appendix 4).

§ 2.17-04. *Processing by National Commissioners.* Upon receipt of an original jurisdiction case, the National Commissioners, where feasible, shall process the case within 21 days. Cases not requiring a meeting of the National Commissioners shall be voted on sequentially. Cases shall be docketed and Notice of Action and other notifications shall be processed by the Central Office.

§2.20 PAROLING POLICY GUIDELINES; STATEMENT OF GENERAL POLICY.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain instructions for the rating of certain offense behaviors. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at Sec. 2.21.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate.

(h)(1) The Adult Guidelines shall apply to all offenders except as specified in paragraph (2).

(2) The Youth/NARA Guidelines will apply to any offender sentenced under the Youth Corrections Act, the Narcotic Rehabilitation Act, or the Juvenile Justice Act, and to any other offender who was less than 22 years of age at the time the current offense was committed, regardless of sentence type. If an offender was less than 18 years of age at the time of the current offense, such youthfulness shall, in itself, be considered as a mitigating factor.

(i) For criminal behavior committed while in confinement see §2.36 (Rescission Guidelines).

(j)(1) In probation revocation cases, the original federal offense behavior and any new criminal conduct on probation (federal or otherwise) is considered in assessing offense severity. Where there is new criminal conduct on probation, the original federal conviction is also counted in the salient factor score. Credit is given towards the guidelines for any time spent in confinement on any offense considered in assessing offense severity.

(2) Exception: Where probation has been revoked on a complex sentence [i.e., a committed sentence of more than six months followed by a probation term], the case shall be considered for guideline purposes under Sec. 2.21 as if parole rather than probation had been revoked.

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

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981) Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category One *[formerly 'low severity']*	<=6 months	Adult Range 6-9 months	9-12 months	12-16 months
	(<=6) months	(Youth Range) (6-9) months	(9-12) months	(12-16) months
Category Two *[formerly 'low moderate severity']*	<=8 months	Adult Range 8-12 months	12-16 months	16-22 months
	(<=8) months	(Youth Range) (8-12) months	(12-16) months	(16-20) months
Category Three *[formerly 'moderate severity']*	10-14 months	Adult Range 14-18 months	18-24 months	24-32 months
	(8-12) months	(Youth Range) (12-16) months	(16-20) months	(20-26) months
Category Four *[formerly 'high severity']*	14-20 months	Adult Range 20-26 months	26-34 months	34-44 months
	(12-16) months	(Youth Range) (16-20) months	(20-26) months	(26-32) months
Category Five *[formerly 'very high severity']*	24-36 months	Adult Range 36-48 months	48-60 months	60-72 months
	(20-26) months	(Youth Range) (26-32) months	(32-40) months	(40-48) months

157
Tr. App. 146

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981) Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category Six *[formerly 'Greatest I severity']*	Adult Range 40-52 months	52-64 months	64-78 months	78-100 months
	(Youth Range) (30-40) months	(40-50) months	(50-60) months	(60-76) months
Category Seven *[formerly included in 'Greatest II severity']*	Adult Range 52-80 months	64-92 months	78-110 months	100-148 months
	(Youth Range) (40-64) months	(50-74) months	(60-86) months	(76-110) months
Category Eight* *[formerly included in 'Greatest II severity']*	Adult Range 100+ months	120+ months	150+ months	180+ months
	(Youth Range) (80+) months	(100+) months	(120+) months	(150+) months

*Note: For Category Eight, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category BY MORE THAN 48 MONTHS, the pertinent aggravating case factors considered are to be specified in the reasons given (e.g., that a homicide was premeditated or committed during the course of another felony; or that extreme cruelty or brutality was demonstrated).

SPECIAL INSTRUCTIONS - FEDERAL PAROLE VIOLATORS WITH NEW CRIMINAL BEHAVIOR

Item A The conviction from which paroled counts as a prior conviction.

Item B The commitment from which paroled counts as a prior commitment.

Item C Use the age at commencement of the new criminal behavior.

Item D Count backwards three years from the commencement of the new criminal behavior.

Item E By definition, no point is credited for this item.

Item F No special instructions.

SPECIAL INSTRUCTIONS - FEDERAL CONFINEMENT/ESCAPE STATUS VIOLATORS WITH NEW CRIMINAL BEHAVIOR IN THE COMMUNITY

Item A The conviction being served at the time of the confinement/escape status violation counts as a prior conviction.

Item B The commitment being served at the time of the confinement/escape status violation counts as a prior commitment.

Item C Use the age at commencement of the confinement/escape status violation.

Item D By definition, no point is credited for this item.

Item E By definition, no point is credited for this item.

Item F No special instructions.

2.20-07. *Principle of Parsimony.* It is the intent of the Commission to use the least restrictive sanction required to fulfill the purposes of 18 U.S.C. 4206 and 28 C.F.R. 2.20. It is expected that when a decision within the guidelines is recommended, a case generally will be placed in the lower half of the guideline range unless the offense behavior or prior record/salient factor score is among the more serious contained within the category [For example, other factors being equal, a property offense near the lower limit of the Category Four severity ($20,000) generally would be placed towards the bottom of the range; a property offense near the upper limit ($100,000) generally would be placed higher in the range; less culpable codefendants would generally be placed towards the bottom of the range; codefendants with prime responsibility would generally be placed higher in the range]. If the offense behavior involved (a) the possession of a weapon during the commission of another offense (e.g., robbery with a weapon, or possession of a weapon during a drug offense); or (b) the offense behavior involved multiple separate Category Five or higher offenses not sufficient to raise the severity level (e.g., two robberies); or (c) the offender is a parole violator with new criminal conduct, the case will normally be placed in the upper half of the applicable guideline range. It is to be stressed that this paragraph is intended to provide a methodology to promote analysis, not a mechanical rule.

159
Tr. App. ~~148~~

§2.23 DELEGATION TO HEARING EXAMINERS.

(a) There is hereby delegated to hearing examiners the authority necessary to conduct hearings and make recommendations relative to the grant or denial of parole or reparole, revocation or reinstatement of parole or mandatory release, and conditions of parole. Hearings shall be conducted by a panel of two hearing examiners, except where specifically provided that a hearing may be conducted by a single hearing examiner or other official designated by the Regional Commissioner.

(b) The concurrence of two examiners shall be required for a panel recommendation. If a hearing is conducted by a single examiner (or other official), the case shall be reviewed on the record by an additional examiner or examiners for the required vote or votes.

(c) A panel recommendation requires two concurring examiner votes. In the event an examiner panel cannot agree upon a recommendation, the administrative hearing examiner shall vote. If the administrative hearing examiner does not concur with either member of the panel, the case shall be referred to any available hearing examiner for a further vote until a recommendation is reached. If the administrative hearing examiner is serving as a member of a hearing examiner panel or is otherwise unavailable, cases requiring his action under this paragraph will be referred to another hearing examiner.

(d) A recommendation of a hearing examiner panel shall become an effective Commission decision only upon the Regional Commissioner's approval, and docketing at the regional office.

Notes and Procedures

2.23-01. *Documentation of Decisions and Decision Modification.*
(a) To facilitate a consistent national policy, examiners shall briefly indicate in the evaluation section of the hearing summary the factors pointing to placement of a decision at the bottom, middle, or top of the guide lines. This requirement is separate from the requirement that any recommendation outside the guidelines (either above or below) be explained with specificity on the Notice of Action Worksheet.

(b) This need for specificity is present at all levels of decision review (e.g., review of panel recommendations by the Regional Commissioner; Regional Appeals, National Appeals). Therefore, the Regional Commissioner, National Commissioners, and National Appeals Board, as applicable, shall record the specific factors in the case file indicating any modification of a panel recommendation or previous Commission action.

§2.24 REVIEW OF PANEL RECOMMENDATION BY THE REGIONAL COMMISSIONER.

(a) A Regional Commissioner may review the recommendation of any examiner panel and refer this recommendation, prior to written notification to the prisoner, with his recommendation and vote to the National Commissioners for consideration and any action deemed appropriate. Written notice of this referral action shall be mailed or transmitted to the prisoner within twenty-one days of the date of the hearing. The Regional Commissioner and each National Commissioner shall have one vote and decisions shall be based upon the concurrence of two votes. Action shall be taken by the National Commissioners within thirty days of the date of referral action by the Regional Commissioner, except in emergencies.

(b) Notwithstanding the provisions of paragraph (a) of this section, a Regional Commissioner may:

160
Tr. App. 149

▌2.52-03. *Driving While Impaired.* In the case of a parolee found to have violated parole by driving under the influence of (while impaired by) alcohol or drugs, revocation will be the presumptive sanction if the parolee is found to have been driving in a life threatening manner or has caused a serious accident, or if the violation is the second or subsequent such violation during the current period of supervision. Whenever parole is not revoked, the presumptive response will be imposition of a special condition that the paroiee undergo an aftercare treatment program for alcoholism and surrender his driver's license to the U.S. Probation Officer for a period of time determined by the Regional Commissioner (normally 90-180 days). Consideration of the public welfare shall guide the Commissioner in determining whether such action may be withheld in a particular case.

▌§2.53 MANDATORY PAROLE.

(a) A prisoner (including a prisoner sentenced under the Narcotic Addict Rehabilitation Act, Federal Juvenile Delinquency Act, or the provisions of 5010(c) of the Youth Corrections Act) serving a term or terms of five years or longer shall be released on parole after completion of two-thirds of each consecutive term or terms or after completion of thirty years of each term or terms of more than 45 years (including life terms), whichever comes earlier, unless pursuant to a hearing under this section, the Commission determines that there is a reasonable probability that the prisoner will commit any Federal, State, or local crime or that the prisoner has frequently or seriously violated the rules of the institution in which he is confined. If parole is denied pursuant to this section, such prisoner shall serve until the expiration of his sentence less good time.

(b) When feasible, at least sixty days prior to the scheduled two-thirds date, a review of the record shall be conducted by an examiner panel. If a mandatory parole is ordered following this review, no hearing shall be conducted.

(c) A prisoner released on mandatory parole pursuant to this section shall remain under supervision until the expiration of the full term of his sentence unless the Commission terminates parole supervision pursuant to Sec. 2.43 prior to the full term date of the sentence.

(d) A prisoner whose parole has been revoked and whose parole violator term is five years or more shall be eligible for mandatory parole under the provisions of this section upon completion of two-thirds of the violator term and shall be considered for mandatory parole under the same terms as any other eligible prisoner.

Notes and Procedures

▌2.53-01. *Review Procedure.*
(a) Upon receipt of a progress report from the institution prior to the "two-thirds" date, an examiner panel shall conduct a record review. A recommendation to parole normally should be made in order to provide a period under supervision for all except those who have the greatest probability that they will commit any federal, state or local crime following release. A parole should not be recommended, however, for prisoners who have seriously or frequently violated the rules of the institution.

(b) Unless mandatory parole is ordered on the basis of the record review, the case should be placed on the next hearing docket for a personal Mandatory Parole Hearing. If the Regional Commissioner disagrees with a panel recommendation to grant Mandatory Parole on the record, he may order that the case be heard as originally scheduled. If parole is not recommended following such hearing, the panel may recommend any such action as may be appropriate.

161
Tr. App. ~~150~~

2.53-02. *Release Certificate.* The Commission's regular parole release certificate (Parole Form H-8) shall be used, except that the word "Mandatory" should be typed beneath the title of the form.

2.53-03. *Concurrent State Sentences.* If Mandatory Parole at two-thirds of a federal term is not granted on the basis of a record review, and the prisoner is serving a state sentence concurrently, no personal hearing is required. If the prisoner is merely "boarded" in a state institution such personal hearing must be conducted as in cases confined in federal facilities.

2.53-04. *Previous Hearing Within 120 Days.* If a personal hearing is conducted within 120 days of an inmate's "two-thirds date" the examiner panel may recommend relative to Mandatory Parole without the need for a subsequent review on the record or separate Mandatory Parole hearing. Any serious institutional misconduct following such determination will be reported to the Commission in accordance with procedures relative to any parole grant, and in such event a rescission may be scheduled.

2.53-05. *Effective Date.* The effective date of Mandatory Parole normally shall be the date on which two-thirds of the maximum term(s) occurs. In the event a Mandatory Parole Hearing is not conducted prior to such date (i.e., where such prisoner has previously waived such hearing) the effective date shall be set as soon as practicable thereafter, but in no case later than the date the prisoner would otherwise be released on the basis of "good time" credits.

§2.54 REVIEWS PURSUANT TO 18 U.S.C. 4215(c).

The Attorney General, within thirty days after entry of a Regional Commissioner's decision, may request in writing that the National Appeals Board review such decision. Within sixty days of the receipt of the request the National Appeals Board shall, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing at the institution or regional level. The Attorney General and the prisoner affected shall be informed in writing of the decision, and the reasons therefor.

§2.55 DISCLOSURE OF FILE PRIOR TO PAROLE HEARINGS: PREHEARING REVIEW.

(a) Procedure.
(1) At least 60 days prior to a scheduled hearing pursuant to §§2.12 or 2.14, each prisoner shall be furnished a notice of his right to request disclosure of the reports and other documents that may be relied upon by the Commission in making its determination.

(2) Upon request by the prisoner, review of disclosable documents in the institution file will be permitted by the Federal Prison System, pursuant to its regulations, within fifteen days of the request. Such review may be requested prior to the hearing, or at any other time thereafter.

(3) The prisoner shall be permitted to obtain, prior to a hearing, copies of any disclosable documents within the scope of this section that may have been retained in the Commission's regional office file, provided that the regional office receives such request at least thirty days in advance of such hearing to allow for processing.

(b) Scope of disclosure. The scope of disclosure under this section shall be limited to the following reports and other documents which the Commission utilizes in making its parole determinations:

(g) Reopened cases. Whenever a case is reopened for a new hearing under §2.28 or related sections, the relevant supporting document(s) shall be sent to the institution wherein the prisoner is confined and the prisoner shall be informed of his right to request disclosure of such documents.

Notes and Procedures

2.55-01. *Disclosure Procedures*. See Appendix 5.

§2.56 DISCLOSURE OF PAROLE COMMISSION REGIONAL OFFICE FILE (PRIVACY ACT DISCLOSURE).

(a) Procedure. Copies of disclosable documents pertaining to a prisoner or parolee which are contained in the Regional Office files of the Commission may be obtained at any time by that prisoner or parolee upon written request pursuant to the Privacy Act of 1974. Such requests shall be answered within forty business days of its receipt, absent an emergency. Other persons may obtain copies of such documents only upon proof of authorization from the prisoner or parolee concerned.

(b) Scope of disclosure. Disclosure under the Privacy Act of 1974 shall extend to Commission documents concerning the prisoner or parolee making the request. Documents which are contained in the regional file and which are prepared by agencies other than the Commission shall be referred to the appropriate agency for a response pursuant to its regulations, unless such document has previously been prepared for disclosure pursuant to §2.55 or is fully disclosable on its face. Any request for copies of court documents (incuding the presentence investigation report) must be directed to the appropriate court.

(c) Exemptions to disclosure. A document may be withheld from disclosure to the extent it contains:

(1) Diagnostic opinions, which if known to the prisoner could lead to a serious disruption of his institutional program;

(2) Material which would reveal a source of information obtained upon a promise of confidentiality; or

(3) Any other information, which if disclosed, might result in harm, physical or otherwise, to any person.

(d) Specification of documents withheld. Documents that are withheld pursuant to paragraph (c) of this section shall be identified for the requester together with the applicable exemption for withholding each document or portion thereof. In addition, the requester must be informed of his or her right to appeal any non-disclosure to the Office of Privacy and Information Appeals (Associate Attorney General).

(e) Hearing record. Upon request by the prisoner or parolee concerned, the Commission shall promptly make available a copy of any verbatim record (e.g., tape recording) which it has retained of a hearing, pursuant to 18 U.S.C. 4208(f).

(f) Costs. In any case in which reproduction costs exceed three dollars (e.g., reproduction of over thirty pages or of one cassette and twenty-four pages), prisoners will be notified that they will be required to reimburse the United States for such reproduction costs. The Regional Commissioner may waive such reimbursement upon a showing of the prisoner's inability to pay. The Regional Commissioner may require payment in advance of making a disclosure in circumstances where deemed necessary.

Notes and Procedures

§ 2.63-01. *Application.*
(a) Determine the presumptive parole date that would have been appropriate if (1) the assistance had not occurred, and (2) the Commission had discretion to set a presumptive release date unrestricted by maximum sentence length. Consider any reduction for assistance to the government from this date. [For example, if a 40 month presumptive parole date would have been appropriate under the above conditions, a reduction of up to one year for substantial assistance to the government is to be considered from this 40 month date (even though the prisoner may have an earlier mandatory release date). If this prisoner had a mandatory release date at 28 months or earlier, his or her assistance would be presumed to have already been adequately rewarded.]

(b) The above guidelines indicate the total reward contemplated by the Commission whether the cooperation is given at one time or over a period of time.

(c) The requirement of personal endorsement by the responsible United States Attorney or an official of equivalent rank (e.g., a state/county chief prosecutor) is prospective only. Any recommendation dated prior to January 1, 1984 submitted by an Assistant United States Attorney or an official of equivalent rank may be considered under this procedure.

Miscellaneous Procedures

§ M-01 *Aggregated/Non-Aggregated Sentences.*

(a) *Aggregation of sentences.* Under federal law, adult sentences will be aggregated (combined to form a single term) for purposes of determining good time release and parole eligibility dates.

(b) *Aggregation for parole.* Under Title 18 U.S.C. Sec. 4205(a), a prisoner may be released after serving one-third of the term or terms of confinement.

1. For sentences under Sec. 4205(a), eligibility for parole consideration will be calculated at one-third of the term or terms of confinement; except for any term or terms totaling more than 30 years, parole eligibility is after ten years of such term or terms.

2. For sentences under 18 U.S.C. Sec. 4205(b)(2), eligibility for parole is at the Commission's discretion.

3. For combined sentences (18 U.S.C. Sec. 4205(b)(2) and 4205(a)), parole eligibility will be considered for hearing purposes to be at the one-third point of the 4205(a) sentence, calculated from the beginning date of the aggregated sentences (and adjusted for jail time credit).

(c) *Sentences that are not aggregated for parole eligibility purposes.*

1. FJDA sentences. Federal Juvenile Delinquency Act (FJDA) sentences can only be aggregated with other FJDA sentences.

2. YCA sentences. Youth Correction Act (YCA) sentences are not aggregated with other sentences or with each other.

3. NARA sentences. NARA sentences are not aggregated with other sentences.

4. Split sentences. "Split sentences" (confinement and probation imposed on a single count) are not aggregated with other sentences.

Tr. App. 164 ~~153~~

Commission Orders signed by the Regional Commissioner in appeal and reopen cases and the accompanying FOIA copies of the Notice of Action.

(b) The Attorney Management Analyst shall maintain indexed binders for each region, by month, containing this information with prisoner identifying information deleted. The Attorney Management Analyst shall also maintain copies of all Commission Orders and Notices of Action of the National Commissioners and National Appeals Board.

M-04 *Courtesy Hearings.* When resources permit, the Commission, upon the request of a state parole board, will endeavor to provide a hearing for a state prisoner when such prisoner is confined in a federal institution outside the requesting state and such institution is located at a substantial distance from the requesting state. The requesting state will be asked to provide specific instructions for the conduct of the hearing, as to any criteria to be considered, and as to whether a specific recommendation is desired.

M-05 *Disqualifications of Commission Personnel.* A hearing examiner or Commissioner shall disqualify himself when it reasonably appears that he may have a conflict of interest or that his participation in the hearing might place the Commission in an adverse situation. The disqualification should be recorded on tape and made a part of the hearing, followed by a memorandum to the file.

M-06 *Standards for Prisoner Interviews.*

The processing of a parole case requires the exchange of substantial amounts of information between the parties involved. Interviews must be scheduled promptly and be conducted in circumstances that are conducive to the achievement of their purpose. It is the responsibility of the custodian of those defendants who have not been released from custody to provide adequate facilities and the timely presence of prisoners for interview.

Some of the physical conditions essential to a successful interview are:

1. A quiet, private room free of distractions (if glass is necessary for observation, interviewee should be able to face away from glass).
2. Walls should be adequate to provide a sound barrier.
3. Atmosphere should be pleasant, relaxing, unthreatening, uncluttered and conducive to communication.
4. Freedom of telephone calls or other interrupting intrusions.

Some conditions deleterious to the purpose of the interview and unfair to the parties involved are:

1. Questions or statements can be overheard by others.
2. Poor acoustics or bad lighting.
3. Distractions caused by other voices, movements or noises in the area.
4. Uncomfortable furniture.
5. Interviews through or behind bars.
6. Unnecessary physical restraints.
7. Scheduling of interview causes prisoner to miss a meal, medical or other basic needs.

M-07 *Designation of Personnel Other Than Hearing Examiners to Conduct A Hearing.*

(a) *Assignment of Commission Staff.* A case analyst may conduct any hearing as assigned by the Regional Commissioner. Any other Commission staff may conduct hearings upon designation and assignment by the Chairman. Case-by-case designation is not required.

Tr. App. ~~154~~ 165

(f) Subject (has) (does not have) a history of Opiate Dependence: (if applicable describe)

Prisoner (admits) (contests) factual basis of the salient factor score items. (summarize prisoner's explanation):

V. OTHER SIGNIFICANT PRIOR RECORD/STABILITY FACTORS: (psychological/psychiatric problems; drug abuse other than noted above; or other positive/negative stability factors as relevant including any particularly aggravating or mitigating factors concerning prior record)

VI. INSTITUTIONAL FACTORS:

(a) Discipline

(b) Program Achievement

VII. RELEASE PLANS: (note what resources are likely to be available upon release, with consideration given to recommending CTC placement and/or adding special conditions of parole where advisable)

VIII. COUNSEL/WITNESSES/REPRESENTATIVE: (give name, relationship, address and comments of each)

IX. EVALUATION: Note applicable guideline range and explain factors sufficient to warrant a decision above/below guidelines; or factors relative to placement at top/middle/bottom of guidelines. Note any comments/recommendations.

X. PANEL RECOMMENDATION: Regarding revocation; credit for street time; release on the new federal sentence; commencement of the unexpired portion of the original sentence; release on the unexpired portion of the original sentence.

XI. REASONS:

For Revocation: PLEASE COPY FROM FINDINGS OF FACT SECTION OF THE SUMMARY

For Continuance: PLEASE COPY FROM THE REPAROLE GUIDELINE WORKSHEET

APPENDIX 2 - STANDARD WORDING ON ORDERS [EXAMPLES]

1. PAROLE HEARINGS (INITIAL AND SUBSEQUENT; INCLUDING FIFTEEN YEAR RECONSIDERATION).

(A) "Parole effective after service of ( ) months (date)" (used only when date is within six months from date of hearing)

(B) "Continue to a Presumptive Parole after service of ( ) months (date)" (used when date is later than six months from date of hearing)

(C) "Continue to a Presumptive Parole after service of ( ) months (date) or Continue to Expiration, whichever comes first." [use when parole prior to the statutory release date (sentences of less than five

years) or prior to the two-thirds date (sentences of five years or more) is desired, but extra good time may result in even earlier release].

NOTE: The following conditions, among others, may be added:

". . . .with placement through a Community Treatment Center recommended".

". . . .to a (concurrent) (consecutive) sentence".

". . . .provided the committed fine is paid or otherwise disposed of according to law".

". . . .to the actual physical custody of detaining authorities only". if not taken into custody on the detainer, place on the next docket for a special reconsideration hearing.

". . . .to the actual physical custody of detaining authorities, or if detainer is not exercised parole (presumptive parole) to the community effective (date)." Allow an additional 30 days for release planning.

". . . .to the actual physical custody of immigration authorities, or if detainer is not exercised parole (presumptive parole) to the community effective (date)." Allow an additional 30 days for release planning.

NOTE: When parole is to a detainer, the written reasons given should be associated with the date of release to the detainer; the reason for setting the alternative date of parole to the community 30 days later is to allow for release planning. If a detainer is withdrawn sufficiently in advance to make this additional 30 day period unnecessary, the institution should notify the Commission.

(D) "Continue for a Fifteen-year Reconsideration Hearing in (month & year)."

(E) "Continue to Expiration" [use where parole prior to the statutory release date (sentences of less than five years) or prior to the two-thirds date (sentences of five years or more) is not desired]. NOTE: For purposes of determining quorum requirements for actions under 2.24(b)(2), 2.25, or 2.28(a) the statutory release date should be used for sentences of less than five years and the two-thirds date should be used for sentences of five years or more.

II. SPECIAL CONDITIONS

(A) ". . .with the special drug aftercare condition"
NOTE: The special parole condition must be typed out in full on the Notice of Action immediately after the order, i.e., "You shall participate as instructed by your Probation Officer in a program approved by the Parole Commission for treatment of narcotic addiction or drug dependency, which may include testing to determine if you have reverted to the use of drugs."

(B) ". . .with the special alcohol aftercare condition"
NOTE: The special alcohol condition must be spelled out, "You shall participate in a community based program for the treatment of alcoholism as directed by your U.S. Probation Officer."

Tr. App. 156 167

5. At the end of the 90-day period, the Regional Commissioner of the Parole Commission is to be given a complete report by the agency which is to indicate, in as much detail as possible, the extent of the parolee's cooperation in the specific case under investigation and the status of the investigation at that time.

The Chief Probation Officer for the appropriate District will be informed by the Regional Commissioner of the Parole Commission of its decision and the CUSPO or his representative will be designated as the Commission's representative at the briefing. The Regional Commissioner of the Parole Commission may desire that the agent assigned to the case assume the duties and responsibilities of the advisor who was approved under the principles of the release plan.

During the period of cooperation, the agency will be responsible for testing and assessing the relationship to make certain that the parolee or mandatory releasee is not violating his operational instructions. Violations will be brought to the attention of the Regional Commissioner of the Parole Commission and may result in immediate termination of use of the parolee's or mandatory releasee's services. Additionally, a change in the investigative plan that would require a significant change in operating instructions to the parolee or mandatory releasee will require the approval of the Regional Commissioner of the Parole Commission.

C. Periodic Reports to the Parole Commission. The agency concerned will furnish to the Regional Commissioner of the Parole Commission a comprehensive report at the end of each 30 days on the progress of the operation; the cooperation and effectiveness of the parolee or mandatory releasee; and the amount, if any, of financial remuneration to him. In the event that circumstances develop which indicate an extension of the specified time period would be in the interests of the Government, a written request with appropriate justification will be furnished to the Regional Commissioner of the Parole Commission.

APPENDIX 8 - TEMPORARY/SPECIAL PROCEDURES

A. IMPLEMENTATION AND RETROACTIVITY OF CERTAIN COMMISSION REVISIONS
[Cancellation Date - Effective Until Canceled]

(1) Retroactivity of Guideline Revisions

(a) Retroactivity for guideline revisions authorized by the Commission is as follows: The revised severity rating and salient factor score will be recalculated at subsequent hearings (statutory interim hearings) and pre-release record reviews. If either the revised severity rating or salient factor score category is more favorable to the prisoner, the revised severity rating or salient factor score category (whichever is more favorable) will be applied.

(b) At a statutory interim hearing, if either the revised severity rating or revised salient factor score category is more favorable, complete reasons will be provided (whether or not the actual decision is modified). If neither is more favorable, complete reasons need not be given.

Example (A) - Retroactivity does not apply. Neither your recalculated severity rating (old category _____; new category _____) nor your recalculated salient factor score risk category (old category _____; new category _____; old score_____; new score _____ - see attached sheet) is more favorable.

168
Tr. App. 154

Example (B) - Your guidelines are recalculated as follows. Your offense severity (is recalculated as) (remains as) _____. Your offense behavior involved _____.
Your salient factor score risk category (is recalculated as) (remains as) _____. (old score _____; new score _____ - see attached sheet).
[Continue with full reasons from parole or reparole guideline worksheet.]

Note: If the previous date is advanced or retarded for other reasons (e.g., superior program achievement or disciplinary infractions) amend the above wording as appropriate.

(c) Pre-release reviews. Advancement of the parole date will be considered, but revised reasons need not be provided to the prisoner.

(d) Termination of Jurisdiction. The probation service will use the salient factor score calculated by the U.S. Parole Commission. The post-release analyst should calculate whether the revised score would place the parolee in the 'very good' category, and if so, apply the revised score.

(2) Retroactive Application of Parsimony At a statutory interim hearing or a pre-release record review, a case may be advanced to correct an unwarranted departure from the principle of parsimony at a previous decision. This may be cited on the Notice of Action as 'retroactive application of parsimony'.

(3) Dispositional Revocation Procedure. The revision to 28 C.F.R. 2.47 (effective 10/1/84) is prospective only and applies to cases given dispositional record reviews on or after 10/1/84. Cases for which dispositional revocation hearings were ordered under previous procedure will be heard as previously ordered.

(4) Fifteen-Year Reconsideration Procedure. Cases previously scheduled for ten-year reconsideration hearings will be given reconsideration hearings at the time of the next scheduled statutory interim hearing. Following such hearing, a presumptive release date may be set up to fifteen years from such hearing or a fifteen-year reconsideration hearing may be ordered.

B. SPECIAL PROCEDURE FOR PRELIMINARY INTERVIEWS: WESTERN DISTRICT OF WASHINGTON CASES [Cancellation Date: Effective Until Canceled]

In order to comply with a decision by the United States District Court for the Western District of Washington, U.S. Probation Officers who conduct preliminary interviews in that district make the actual finding rather than a recommended finding whether or not there is probable cause to believe that the parolee violated a condition of his parole. If the Probation Officer finds no probable cause, he is to contact the Regional Office by telephone immediately, so that the Regional Commissioner may, if appropriate, reverse that finding before the parolee is released.

In all other respects, preliminary interviews in this district are conducted in accordance with standard procedures, including the use of the summary report of the preliminary interview and the Commission's probable cause letter.

C. SPECIAL PROCEDURE FOR RESCISSION CONSIDERATIONS: SECOND CIRCUIT CASES[Cancellation Date: Effective Until Canceled]

The following procedures are presently being used to comply with a decision involving parole rescission in the Second Judicial Circuit (New York, Vermont, and Connecticut). Drayton v. McCall, 584 F.2d 1208 (1978).

U.S. Department of Justice
Federal Prison System

Operations Memorandum

Number : 34-87(5050)
Date : March 17, 1987
Subject : PAROLE COMMISSION RULES

Cancellation date : March 31, 1988

1. Purpose. To provide staff and inmates of the Federal Bureau of Prisons notification of the United States Parole Commission's final rules. The Commission is adopting a new regulation, 28 C.F.R. 2.64, to explain it's interpretation of Section 235 (b)(3) of the Sentencing Reform Act of 1984, which provides for the transition from the present system of sentences with parole eligibility to a determinate sentencing system.

2. Action. Distribute to all Correctional Programs staff. Place copies on bulletin boards and in inmate law libraries.

3. Cancellation. Although this Operations Memorandum reflects a cancellation date, the procedures are in effect until changed by the Commission.

G.L. INGRAM, Assistant Director
Correctional Programs Division

170
Tr. App. ~~159~~

Billing Code 4410-01-M
Billing Address Code 153123

DEPARTMENT OF JUSTICE
United States Parole Commission
28 C.F.R. Part 2
Paroling, Recommitting and Supervising
Federal Prisoners

AGENCY: United States Parole Commission

ACTION: Final Rule

SUMMARY: The Parole Commission is adopting a new regulation, 28 C.F.R. §2.64, to explain the Commission's interpretation of Section 235(b)(3) of the Sentencing Reform Act of 1984, which provides for the transition from the present system of sentences with parole eligibility to a determinate sentencing system. Section 235(b)(3), which calls for the Parole Commission to set release dates within the applicable parole guideline ranges for the prisoners remaining in its jurisdiction before ceasing operations, has given rise to a number of questions. This regulation is intended to resolve those questions by giving formal notice of the Commission's interpretation of that provision. Specifically, the Commission interprets the release provision of Section 235(b)(3) (in its present form) as (a) applying only to persons who will be incarcerated on October 31, 1992 (the day before the fifth anniversary of the effective date of the Sentencing Reform Act); (b) not requiring the release dates to be

171
Tr. App. 160

set any earlier than the last three months before October 31, 1992; and (c) not allowing the Commission to set a release date which would conflict with the parole eligibility or ineligibility provisions of a prisoner's sentence.

EFFECTIVE DATE: (Upon Publication)

FOR FURTHER INFORMATION CONTACT: Patrick J.Glynn, General Counsel, U.S. Parole Commission, 5550 Friendship Boulevard, Chevy Chase, Maryland, telephone (301) 492-5959.

SUPPLEMENTARY INFORMATION: Section 235(b)(3) of the Sentencing Reform Act, states as follows:

> The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this act, that is within the range that applies to the prisoner under the applicable parole guideline. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

Legislation was introduced in the 99th Congress to delete the requirement for the Section 235(b)(3) release decisions to within the parole guideline range. S.1236, Sec. 37. That section, however, was not acted upon, and, although it is anticipated that similar legislation will be introduced in the 100th Congress, the requirement for decisions within the applicable parole guideline ranges remains a part of the Sentencing Reform Act as enacted.

A number of prisoners have urged that Section 235(b)(3) be applied to their benefit in ways which the Commission had not envisioned. The claims of those prisoners have generally been one

172
Tr. App. 161

or more of the following:

1. that the Commission must give them decisions within the parole guideline ranges now because they will be in the Commission's jurisdiction (either in prison or on supervision) at the end of the five-year phaseout period;

2. that their parole eligibility dates are overridden by the requirement for a release date within the guideline ranges;

3. that parole ineligibility provisions [e.g., 21 U.S.C. §848(c)] are overridden by the requirement for a release date within the guideline ranges; and

4. that the five year period referred to began on October 12, 1984.

The Commission does not believe any of the above points are correct interpretations of the Sentencing Reform Act.

First, the five-year period referred to in Section 235(b)(3) does not begin until November 1, 1987. The reference is to "five years after the effective date of this Act." Section 235 appears in Chapter II of the Comprehensive Crime Control Act of 1984, which is referred to as the "Sentencing Reform Act of 1984," 98 Stat. 1987, and which has a general effective date of November 1, 1987. Section 235(a)(1), 98 Stat. 2031, as amended, Pub. L. 99-217, Sect. 4, 99 Stat. 1728. Furthermore, the legislative history of Section 235(b) states that that section retains the Parole Commission and current law provisions related to parole in effect for the five-year period after the effective date of the Sentencing Reform Act to deal with sentences imposed under current sentencing practices, and that the setting of release dates within the guideline ranges is required for the prisoners who have not

Tr. App. 162 173

been released before the end of that five year period. Senate Report No. 98-225 (98th Cong., 1st Sess.) 189, reprinted at 1984 U.S.Code Cong. & Admin. News 3182, 3372.

Second, although Section 235(b)(3) refers to persons within the Commission's jurisdiction at the end of the five-year period, the section was clearly not designed to require release dates within the guideline ranges for persons who will be within the Commission's jurisdiction as parolees at the end of the five-year phase out period, (i.e., prisoners who will be released at some time prior to November 1, 1992, above the applicable parole guideline ranges). The legislative history of the Section explains its operation as follows:

> Most of those individuals incarcerated under the old system will be released during the five-year period. As to those individuals who have not been released at that time, the Parole Commission must set a release date for them prior to the expiration of the five years that is consistent with the applicable parole guidelines.

Senate Report No. 98-225, supra, at 189. Thus, the term "jurisdiction," as used in Section 235(b)(3), refers to the Commission's parole-releasing jurisdiction and not to the Commission's post-release supervisory jurisdiction.

Third, the Commission does not read Section 235(b)(3) as requiring the release dates within the guideline ranges to be set any earlier in the five year period than the three to six months necessary to permit an administrative appeal of the date before the end of the five year period. See 18 U.S.C. §4215(a). This is consistent with the above-quoted portion of the legislative

history and with the provision in Section 235(a)(1)(B) that the current parole laws, which include the possibility for decisions outside of the guideline ranges, remain in effect during the five-year period. The parole guidelines may be revised at any time until their final application, pursuant to the Commission's current statutory mandate. Hence, the applicable guideline ranges will not necessarily be known until the Commission sets final release dates in 1992.

Fourth, Section 235(b)(3) does not advance a prisoner's parole eligibility date or confer parole eligibility on a prisoner whose sentence does not provide for any parole eligibility at all. The guidelines are not "applicable" in the first instance to any but an "eligible" prisoner. 18 U.S.C. §4206(a). Moreover a prisoner serving a non-parolable sentence is not a person who would be within the Commission's jurisdiction the day before the expiration of the five year period. And in the case of either a minimum term of parole ineligibility or a totally nonparolable sentence, the general savings statute 1 U.S.C. §109 would prevent such penalties, once imposed, from being retroactively extinguished since there has not been express statutory release from such penalties. See Warden v. Marrero, 417 U.S. 653 (1974).

This new interpretative regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

LIST OF SUBJECTS IN 28 C.F.R. PART 2.

Administrative practice and procedures, Probation and Parole, Prisoners.

Part 2 -- [Amended]

28 C.F.R. Part 2 is amended as follows:

1. The authority citation for 28 C.F.R. Part 2 continues to read:

Authority: 18 U.S.C. 4203(a)(1) and 4204(a)(6).

2. 28 C.F.R. §2.64 is added to read as follows:

§2.64 SENTENCING REFORM ACT.

(a) It is the Commission's interpretation of Section 235(b)(3) of the Sentencing Reform Act of 1984 (Chapter II of the Comprehensive Crime Control Act of 1984), as originally enacted, that persons who will be incarcerated at the expiration of five years after the effective date of the Sentencing Reform Act, and whose sentences provide for parole eligibility shall, before the expiration of that five year period, be given release dates by the Commission within the guideline ranges found by the Commission to be appropriate for their cases.

(b) The release dates required by Section 235(b)(3) need not be set any earlier than the time required to allow an administrative appeal within the five-year period; i.e., three to six months before the end of that period. Thus, the Commission may continue to make decisions outside of its guideline ranges, with such

decisions being subject to a de novo review and modification by the Commission to conform to the guideline ranges before the end of the five year period.

(c) Section 235(b))(3) does not apply to persons who will be on parole or mandatory release supervision at the expiration of the five-year period.

(d) Section 235(b)(3) does not change the parole eligibility date established by a prisoner's sentence and does not confer parole eligibility on prisoners whose sentences do not provide any eligibility for parole.

Sept. 6 1987
DATE

for BENJAMIN F. BAER
Chairman
U.S. Parole Commission

177
Tr. App. 166