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THE WHITE HOUSE

WASHINGTON

July 6, 1984

MEMORANDUM FOR RON PETERSON
CHIEF, RESOURCES-DEFENSE-INTERNATIONAL
BRANCH, LEGISLATIVE REFERENCE
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: OMB Testimony by Paul McGrath Concerning S. 707, Domestic Content Legislation for the U.S. Automobile Industry, July 6, 1984

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

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Subject: On: R testimony by Paul McGrath concerning S 707, Domestic Content Legislation for the U.S. Automobile Industry on July 6th 1984

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION Type of Response	Code	Completion Date YY/MM/DD
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DRAFT

STATEMENT OF

J. PAUL MCGRATH
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

COMMITTEE ON COMMERCE,
SCIENCE AND TRANSPORTATION
UNITED STATES SENATE

CONCERNING

S. 707, DOMESTIC CONTENT LEGISLATION
FOR THE U.S. AUTOMOBILE INDUSTRY

ON

JULY 6, 1984

IN

DES MOINES, IOWA

Mr. Chairman and members of the Committee:

I am pleased to have this opportunity to provide the views of the Department of Justice on domestic content legislation for the U.S. automobile and automotive parts industries. The bill under consideration is S. 707, the "Fair Practices in Automotive Products Act." This bill would require that, beginning with model year 1985, a certain percentage of the value of automobiles sold in the U.S. be produced or added in the U.S. The annual domestic content percentage requirement for an individual firm is defined in S. 707 as the added domestic value for all vehicles sold in the U.S. by that firm for that model year, divided by the overall production costs for that firm for the same year. For purposes of these calculations, the bill provides that "production costs" is the sum of the list wholesale price to dealers of all vehicles produced by that firm; "added domestic value" is the production costs less the appraised value (for customs purposes) of the automotive products (e.g. vehicles and parts) imported by that firm for that model year.

The bill phases in domestic content requirements over a three-year period, with the amount of domestic content increasing for all firms until it reaches its maximum in 1987. When the bill has been completely phased in, firms that sell more than 100,000 vehicles in the U.S. ~~in a year~~ annually will have domestic content requirements proportional to those sales. For

example, if the firm sells 200,000 units, it has a domestic content requirement of 20 percent; if it sells 300,000 units, its domestic content requirement is 30 percent; and so on to a maximum required domestic content of 90 percent for sales of 900,000 or more units.-

Assuming their 1982-83 sales levels at or exceeding 900,000 units continued, S. 707 would apply a 90 percent requirement to the "Big Three" domestic auto firms by 1987. Applying the ratio formula to the two leading Japanese auto firms selling in the U.S., Nissan and Toyota, in model year 1987 their domestic content ratios would be about 73 percent and 67 percent, respectively, based on 1982-83 U.S. sales. 1/

The Department of Transportation and the courts would have regulatory and enforcement responsibility for monitoring and enforcing compliance with the bill. Manufacturers would be required annually to file a series of reports and records with the Secretary of Transportation, who is authorized to request additional information and to seek orders from the district courts compelling the production of such information. The penalty for failure to meet the specified minimum domestic content ratio is a reduction in the quantity of imported vehicles or parts allowed for a subsequent time period; the

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1/ As you know, Japanese firms' sales levels are currently limited at least in part by the export restraint imposed by the Goverment of Japan.

amount of the reduction is equivalent to the percentage by which the manufacturer failed to meet its minimum content requirement. In addition, failure to comply with any other provision of the Act, or with any rule or regulation issued pursuant to it, would result in a civil penalty of not more than $10,000. Each day the violation continues constitutes a separate offense. 2/

The Justice Department and the Administration oppose domestic content legislation in the strongest possible terms. If enacted, such legislation would seriously hurt -- not help -- our economy. It would harm our consumers, our exporters and our work force. In addition, it would threaten the world trading system and would create regulatory burdens and impose new costs on the auto industry and on consumers. What it would not do is provide any real solution to the auto industry's problems.

Domestic content legislation would seriously harm American consumers. By model year 1987, the maximum domestic content requirements of the bill would have the effect of imposing a quota on most imported autos. Firms would be expected to

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2/ The bill also requires the Secretary of Transportation and the Federal Trade Commission to investigate and report to Congress within a year after enactment concerning whether automakers have attempted to persuade domestic auto dealers to select foreign-made over domestic replacement auto parts. The report is to include legislative or administrative recommendations for ensuring that domestic parts producers are afforded fair access to the domestic parts market.

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As noted above, the bill
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unted for 8 percent of the Gross National Product in 1980,
ease from 4 percent in 1970. Between 1977 and 1981, 80
f the new jobs created in the manufacturing sector
ed for by products made for export. 3/ Retaliation
effective, of course, if directed against those
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major problem with domestic content legislation is
will inevitably lead to retaliation by our trading
ers against U.S. exports. Exports of U.S. goods and
vices totalled nearly $350 billion in 1982. Exports

retaliate against them. In 1982, Japan bought about $6.0 billion and the EC $7.8 billion, or a total of nearly 40 percent of U.S. agricultural exports. Thus, domestic content legislation will not only hurt U.S. consumers, but it also threatens serious damage to U.S. ~~exporters~~ agricultural producers because its targets happen to be our largest customers for agricultural exports.

Domestic content legislation would also hurt U.S. employment by reducing the total number of jobs in our economy. Although the United Auto Workers has forecast an increase or preservation of more than a million jobs, including 200,000 direct auto manufacturing jobs and 500,000 indirect auto supplier jobs, 6/ all of the independent analyses of which the Department is aware are far less optimistic. Rather, those reports conclude that any gain in auto sector employment would not only be far smaller, but would come ~~only~~ at the expense of jobs elsewhere. For example, the Congressional Budget Office analyzed an earlier version of the present House counterpart to S. 707. 7/ That study concluded that, if enacted, by 1990

6/ U.S. Auto Trade Problems: Hearings on H.R. 1234 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 170 (1983)(statement of Douglas A Fraser).

7/ Fair Practices in Automotive Products Act (H.R.5133): An Economic Assessment, Congressional Budget Office, August 16, 1982, cited in H.R. Rep. No. 98-287 Part 1, 98th Cong., 1st Sess. 34 (1983).

domestic content legislation would create 38,000 auto sector jobs, but would result in 104,000 lost jobs in sectors that manufacture goods for export, which would be the targets for retaliation by our trading partners. This, of course, translates into a net loss to the economy of 66,000 jobs.

An inter-agency task force chaired by Commerce Secretary Baldrige reported to Congress in May 1983 that domestic content legislation would result in a net gain by 1987 of only 6,500 new jobs in the automobile industry because of offsetting job losses at ports, automobile dealerships and the U.S. facilities of foreign auto manufacturers. 8/ Calculating the potential job losses in the export sector from retaliation by our trading partners, the task force concluded that at least 132,000 export-related manufacturing and agricultural jobs would be lost. The cost of the lost jobs is incalculable. The cost of the estimated 6,500 new jobs, taking the task force's modest estimate of only an average price increase of $450 per auto, would be about $740,000 each, or a total cost to our economy of $4.8 billion in less than three years. 9/

8/ Letter to Hon. John D. Dingell, Chairman, House Comm. on Energy and Commerce from Hon. Malcolm Baldrige dated May 13, 1983, ~~cited~~ Id. at 51.

9/ Id. at 52. reprinted in

Domestic content legislation would also seriously harm U.S. interests in world trade. The United States supports a free and open international trading system because such a system is necessary to world prosperity and because the economic benefits to the U.S. have been substantial -- indeed essential to our domestic economic health. U.S. trade (exports and imports of goods and services) totalled 21 percent of the GNP in 1983 -- nearly double the 1972 level of 12 percent. Because the United States economy is so dependent on trade, we have regularly reaffirmed our commitment to the world trading system and our opposition to protectionism -- most recently at the London Summit meetings.

The international trading system is far from perfect and this Administration has fought to improve it. We have worked hard to keep existing U.S. trading opportunities open and to create new ones. We will continue that effort. But the domestic content bill -- or any other protectionist legislation -- would seriously impede our efforts. Such legislation would undermine multinational support for the world trading system which has sustained the world's economies since the end of World War II. Enactment of such legislation by the United States would be a significant bellwether for other countries' protectionist actions that would doubtless be contrary to U.S. interests.

Automobile domestic content legislation is not only a substantial step backward in our efforts to foster open international trade, it also would violate our international obligations under the General Agreement on Tariffs and Trade (GATT) and other international agreements. Among other things, the GATT explicitly prohibits "internal quantitative regulations" that a specified proportion of any product be supplied from domestic sources. For example, late last year, in a case filed by the United States, a GATT panel declared illegal Canada's Foreign Investment Review Act ("FIRA"), which required foreign investors in Canada to purchase a certain percentage of their supplies from Canadian manufacturers. 10/ Thus, we would expect a similar finding against the U.S. if this legislation were passed.

Domestic content legislation would also create a new and burdensome regulatory scheme. The calculations and recordkeeping required by S. 707 would impose heavy costs on automakers and suppliers. Before S. 707, if enacted, could be implemented, the Department of Transportation ("DOT") would first have to undertake a formal rulemaking process to establish, at a minimum, explict definitions, procedures and forms to be followed by industry and government to collect, analyze and certify domestic/foreign content data. In a recent

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10/ Report of the General Agreement on Tariffs and Trade Dispute Panel on the Canadian Foreign Investment Review Act, 19 BNA Export Weekly 767 (1983).

hearing on this matter before this Committee, the Department of Transportation estimated the rulemaking alone would cost the government $8 million; the costs of implementing the law are estimated at $20-25 million per year for the government for the the first few years and about $10 million annually afterwards. 11/

A large manufacturer of automobiles typically deals with numerous suppliers each year and has many separate transactions with each one. Each manufacturer would have to assemble data on all of its transactions with all of its suppliers and certify the annual domestic content of the cars it sells. Each parts supplier (whether manufacturer, importer or both) would have to go through the same exercise in order to provide the manufacturer with accurate domestic content data. The cost to the industry to comply with these reporting and certification requirements is estimated by DOT at $50 to $100 million annually. 12/

In addition, DOT would have to audit the submissions for correctness. At least initially, DOT would have to conduct

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11/ Fair Practices in Automotive Products Act: Hearings on S.707 Before the Senate Comm. on Commerce, Science and Transportation, 98th Cong., 2nd Sess. 4 (May 16, 1984) (statement of Philip Haseltine).

12/ See note 6 supra, at p. 650 (letter to Hon James J. Florio from Secretary of Transportation Elizabeth Hanford Dole, dated May 18, 1983).

large-sample audits of purchase and import invoices at several levels of the supply chain to determine the accuracy of those submissions and whether they were properly characterized. 13/ DOT would have to administer some independent investigation of the correctness of the transactions reported. Customs records and firms' financial statements would need to be inspected to ensure that domestic content was not being achieved by accounting manipulation.

I must also emphasize that domestic content legislation would not be in the long-term best interests of the U.S. auto industry. Proponents of this legislation claim it is necessary to restrain competition from foreign-produced automobiles in order to maintain the domestic industry's profitability. While there might be some short-term benefits for the industry, we believe that the costs to the economy and to consumers, as well as the probability of reduced efficiency in our domestic industry, are too high a price to pay. We in the Department of Justice see the benefits of competition in our day-to-day

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13/ How complicated a determination that could prove to be is demonstrated by the following hypothetical example: U.S. manufacturer "X" installs a carburetor it bought from a U.S. supplier. A closer look at the "domestic" carburetor reveals, however, that the screws were made in Italy, the springs were fabricated in Mexico, the valves are from Germany and the gaskets were made in Korea. Furthermore, the casing was made in the U.S. but from an alloy imported from Japan, and the diaphragm assembly was purchased from a subcontractor who had them assembled in Hong Kong. It is not clear from the bill how each of these elements is to be treated in determining the carburetor's domestic content; what is clear is the tremendous burden and expense that would be imposed by such an endeavor.

enforcement of the antitrust laws, which are designed to preserve our competitive free market economy. We also see the harm that comes from undue restrictions on competition -- whether from secret price-fixing agreements or from government interference with free market forces like the proposed domestic content legislation. We believe it is squarely in the national interest to promote, to the fullest extent possible, vigorous competition in the auto industry -- indeed in all industries. Competition is the most effective way to ensure the efficient and productive allocation of our scarce resources. It drives firms to produce the best possible products at the lowest possible prices. Competition from foreign firms can, and ought to be allowed to, provide a needed spur to efficiency, innovation and investment by all members of an industry. Furthermore, the threat of entry by new importing firms, or of increased imports from firms already selling in the market, can be a significant check on the ability of U.S. firms to raise prices above competitive levels. Foreign producers who sell automobiles and parts in the U.S. therefore play an important role in providing the benefits of competition.

The domestic content bill, by ~~eliminating~~ seriously restricting competition from such producers, would not only raise U.S. auto prices significantly, but would discourage rather than encourage innovation and efficiency that is necessary to increased productivity in the domestic industry. Indeed, at least one

recent study has found that U.S. automakers were more aggressive in their efforts to adjust to the "oil shocks" and the consequent shift in demand to smaller, lighter, more fuel-efficient and reliable autos before the 1981 Japanese export restraint agreement was in place than they have been since then. 14/ This study found that the automakers had made significant investments for new plant, equipment and retooling before the 1981 export restraint was in place, but found little evidence to show that innovation and production improvement efforts have continued since then. Indeed, it found that real investment expenditures have fallen by 30 percent since 1981. 15/ Thus, domestic content legislation would not solve the auto industry's problems or, in the long run, produce a healthy, competitive auto industry. Rather, without the pressure of significant foreign competition, the problems of the U.S. auto industry -- be they work rules, wages and salaries, design, or management -- will be likely to remain -- or even to become worse.

14/ The State of the U.S. Automobile Industry: Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance, 98th Cong., 2nd Sess. (1984)(statement of Robert W. Crandall at 14)(June 27, 1984); to be published in the summer 1984 issue of The Brookings Review, Washington, D.C.

15/ Id. at 15.

While it is clear that the U.S ordinarily benefits from foreign competition, I must add that such competition should be fair and conducted in accord with internationally agreed-upon trade disciplines. Thus, U.S. trade laws deal with unfair import competition in an industry -- including the automobile industry. Our existing trade laws can be used to impose duties on imports that are unfairly subsidized by foreign governments and on imports sold here at less than fair value. The Commerce Department has been vigorously acting on, and meeting deadlines in, the record number of unfair trade practice cases filed during this Administration. 16/ The U.S. International Trade Commission ("ITC") likewise has been vigilant in acting on petitions alleging injurious increased imports and has recommended relief when the statutory criteria have been met. The domestic content bill does not distinguish between fair and unfair import competition, however. Rather, it is a blunt instrument that would impose quantitative restraints on imported automobiles whether traded fairly or unfairly.

In conclusion, Mr. Chairman, domestic content legislation would harm consumers by the higher prices they would be forced

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16/ The Commerce Department shares enforcement responsibility with the U.S. International Trade Commission for statutes against foreign government subsidies (countervailing duty statute) and sales of imported products at less than fair market value (antidumping statute).

to pay for automobiles. It would cost exporters, especially in the agricultural and farm equipment sectors, thousands of lost business and job opportunities. It would eliminate more jobs in our economy than it would create and it would needlessly cost the economy billions of dollars. It would threaten the international trading system and violate our international obligations. It would create a new regulatory scheme and impose substantial additional costs on both domestic and foreign automobile and parts manufacturers, thus increasing the prices of autos without addressing the structural problems of the industry. In fact, the strong likelihood is that domestic content legislation would decrease the long-term profitability and international competitiveness of the industry by discouraging the innovation, investment and cost-savings necessary to promote maximum efficiency and profitability. For all those reasons, the Department of Justice and the Administration strongly oppose enactment of S. 707.

Mr. Chairman, that concludes my prepared remarks. I would be happy to respond to any questions you may have.

THE WHITE HOUSE

WASHINGTON

July 25, 1984

MEMORANDUM FOR FRED F. FIELDING
RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Testimony of Joseph DiGenova Concerning the Policies and Procedures of the D.C. Parole Board

I have reviewed the above-referenced testimony -- actually a comprehensive report which I suspect will simply be submitted for the record -- and have advised OMB that our office has no objection. The report is, however, a stinging indictment of the policies, procedures, and indeed attitudes of the D.C. Parole Board, and I thought you should be aware of it. The gist of DiGenova's message -- amply supported by careful research -- is that the D.C. Parole Board is negligently releasing dangerous criminals who routinely commit new crimes while on inadequately supervised parole. DiGenova ultimately recommends that parole be abolished (as the Administration's crime package does for the Federal system), and also recommends a broad range of reforms if abolition is not adopted.

Attachment

THE WHITE HOUSE

WASHINGTON

July 25, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Testimony of Joseph DiGenova Concerning the Policies and Procedures of the D.C. Parole Board

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

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Subject: Testimony of Joseph DiGenova concerning the policies and procedures of the D.C. Parole Board

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DRAFT

TESTIMONY OF

JOSEPH E. DIGENOVA
UNITED STATES ATTORNEY
FOR THE
DISTRICT OF COLUMBIA

BEFORE THE
SUBCOMMITTEE ON THE DISTRICT OF COLUMBIA
OF THE
SENATE APPROPRIATIONS COMMITTEE

JULY 26, 1984

DRAFT

Mr. Chairman:

I am glad to have this opportunity to respond to your request for a detailed evaluation of the policies and procedures of the District of Columbia Board of Parole. My aim is to explain in specific terms why and how the D.C. parole system breaks down, putting Washington residents at tremendous risk.

The United States Attorney's Office has brought a similar message to this committee in the past. In this report to you, I wish to emphasize the urgency of our criticisms and the pressing need for reform. The ardor which I bring to this critique of what I perceive to be a fatally flawed system stems from my duty to the citizens of the District of Columbia, at whose daily peril the misfunctioning system currently operates. I do not impugn the personal motives or intentions of any individual -- Board member or staff. I presume them all to be well-intentioned public servants with whom I have substantial disagreements concerning the policies and practices of the D.C. Parole Board.

CONTENTS

Part One: Introduction

The parole system in the District of Columbia unjustifiably impedes effective law enforcement and thereby threatens community security. At the center of this failed system, the D.C. Board of Parole operates under misguided standards and neglects its responsiblity to protect the law-abiding public. Despite repeated criticism from congressional committees, the United States Attorney's Office (USAO), concerned citizens and the local media, the Parole Board continues to release large numbers of dangerous criminals at the earliest opportunity. These parolees commit hundreds of new crimes every year.

This testimony traces the parole system from initial parole decision to final revocation and identifies the following crucial failures:

I. Initial parole decisions are based on vague and discredited criteria, without sufficient concern for community safety. As a result, a startling proportion of prisoners are released at the earliest possible date and subsequently commit new crimes.

II. Inadequate supervision of parolees undermines the aim of regulated readjustment to society and encourages recidivism.

III. Parole violations do not result in quick, effective Board action. Delays in the execution of parole violator warrants interfere with the prosecution and punishment of known chronic offenders.

IV. Parole revocation policies do not adequately deter veteran criminals who view prison as a "revolving door" proposition.

Each of these failures is aggravated by the Board's reliance on incomplete prisoner profiles and its refusal to seek more information from sources such as the USAO, the Pretrial Services Agency and the courts. The problems analyzed herein are endemic to an agency which seems incapable of shouldering its most profound responsibilities. The reforms recommended would require major philosophical and procedural changes. Such improvement must occur immediately to protect the nation's capital from violent crimes committed by parolees.

Part Two: Statistical Overview

The Board of Parole consists of three members appointed to six-year terms by the Mayor. The members annually conduct more than 7000 actions with the assistance of 22 staffers and a budget of approximately $630,000. 1/

I. In its only recent self-evaluative study, released in 1981, 2/ the Board revealed the following statistics:

A. Rearrest and reconviction

Fifty-two percent of the sample parolees were rearrested one or more times during the two years following release. Of those rearrested, 31 percent were charged with crimes against persons, 20 percent with drug law violations, 47 percent with crimes against property and 2 percent with other crimes. Nearly 80 percent of those rearrested were reconvicted.

B. Revocation

Twenty-seven percent of the parolees had their parole revoked during the two years following release. The 27 percent total comprised 7 percent "technical" violations and 20 percent new offenses. (The Parole Board classifies as "technical" all violations, however serious, other than commission of a new offense. Drug use, even when demonstrated by urine testing, is also routinely dismissed as a "technical" violation.)

C. Revocation in cases of reconviction

Only 50 percent of those parolees who were reconvicted had their parole revoked.

II. The Chronic Offender Unit of the USAO observes the results of erroneous parole decisions firsthand. This Unit prosecutes the city's most violent recidivists; persons on

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1/ Source: District of Columbia Board of Parole 1982 Annual Report (most recent available). The Parole Board refused to comply with a USAO request for 1983 statistics.

2/ This December 1981 study surveyed a random sample of 322 parolees from 1977-79.

parole for committing crimes of violence when they are re-arrested for crimes of violence automatically receive special attention. The Unit reports the following pattern of violent parolee rearrests: 2a/

A. 1982: Two hundred and twenty-five out of nearly 700 Chronic Offender Unit defendants (32 percent) were on parole for crimes of violence and charged with new crimes of violence.

B. 1983: More than 250 out of 669 Chronic Offender Unit defendants (37 percent) were on parole for crimes of violence and charged with new crimes of violence.

C. 1984 (through July 11): Specifically in preparation for this testimony, the Chronic Offender Unit analyzed the 73 defendants rearrested for crimes of violence between January 1 and July 11 who were on parole for crimes of violence. Fifty-four of these defendants (74 percent) had been on parole for two years or less at the time of their rearrest. At least 25 of these defendants (34 percent) had committed "technical" violations prior to being rearrested. Other significant information about this group of rearrested parolees includes the following:

1. Chronic offender parolees re-arrested between January 1, 1984 - July 11, 1984: 73

2. Time between parole and re-arrest:

0 - 3 months	9
3 - 6 months	9
6 - 9 months	9
9 - 12 months	7
12 - 18 months	11
19 - 24 months	9
2 - 3 years	9
More than 3 years	10

3. Parole warrant issued as a result of rearrest: 40
   - Number of court denials: 9
   - Number of Parole Board denials: 9
   - Number of parolees where other hold requested: 15

4. Technical violations indicated pre-arrest: 25 (34% of total sample). 2b/

   Non-reporting: 6 (24% of technical violators, 8% of total sample).
   Drug usage: 12 (48% of technical violators, 16% of total sample).
   Re-arrest: 6 (24% of technical violators, 8% of total sample).

2a/ See note 41, infra, for more on "crimes of violence."

2b/ Department of Corrections parole supervision refused to provide information for technical violations on 10 defendants; information was unavailable on seven defendants.

5. Pre-arrest parole warrant requests by parole officer for technical violators:
6 (24% of technical violators, 8% of total sample).

Number granted by Parole Board:
4 (16% of technical violators, 5% of total sample).

Number denied by Parole Board:
1 (4% of technical violators, 1% of total sample).

III. The Parole Board's most recent available annual statistics 3/ reveal the extent of early releases:

A. Release of prisoners at earliest possible date, i.e. after serving minimum prison term

In 1982, 61 percent of adult parole applicants were granted parole at the first opportunity, after serving their minimum prison term.

B. Release at rehearing

In 1982, 73 percent of adult prisoners who were initially denied parole or who had served additional time for committing parole violations were granted parole at rehearings.

C. Total early release rate

Although the time interval between initial hearing and rehearing is unclear from the Board's statistics, the release figures suggest that nearly 90 percent of statutorily eligible inmates are released at or shortly after the minimum portion of their sentence.

3/ Source: 1982 Annual Report.

Part Three: The Decision to Grant Parole

I. Background

The Parole Board is authorized by 24 D.C. Code § 204 to grant parole when it appears that there is

> a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his release is not incompatible with the welfare of society, and that he has served the minimum sentence imposed or the prescribed portion of his sentence, as the case may be....

Title 9 of the D.C. Rules and Regulations provides operating guidelines for the Board. 4/ Barring violation and revocation, parolees remain on release under supervision for the remainder of their maximum prison term, less any reductions for good conduct.

The Board considers parolees eligible for parole after service of the minimum of a minimum-maximum range, or after service of one-third of a single, flat sentence. 5/ According to Title 9, the Board considers "some of the following factors" in making parole determinations: (1) nature of the offense; (2) prior history of criminality; (3) personal and social history of the offender; (4) physical and emotional health and/or problems; (5) institutional experience; and (6) community resources available to assist offenders.

In addition to considering "some" of these factors, the Board in February 1982 promulgated an overlapping set of parole criteria in the form of a numerically weighted system. This second set of factors consists of (1) seriousness of present offense; (2) risk of rearrest and/or revocation; (3) institutional discipline; (4) prison program and work participation; (5) assaultive potential; (6) seriousness of prior criminal record; (7) social stability; and (8) substance abuse potential.

4/ Title 9 will be included in the new Title 28 later this year.

5/ The Federal Youth Corrections Act (18 U.S.C. § 5005 et seq.) provides more flexible parole guidelines for offenders under the age of 22. If a person is sentenced under the Act, the court may order alternatives to imprisonment, such as probation or special treatment and supervision. The Act allows a paroling authority to consider a youth offender immediately eligible for parole, based on the benefit the offender can derive from court-ordered treatment, supervision or incarceration.

The eight factors receive numerical weights ranging from "one" to "five." The lower the individual rating, the more favorable the parole risk. A total numerical score of 24 or below would result in a grant of parole; 25 or above would result in a denial of parole. 6/

II. Discussion and Evaluation

A. Challenging the numerically weighted system

More specific classification and numerical weighting of parole criteria are advisable first steps toward coherent parole decision-making. However, the Board's February 1982 system is vague and technically flawed. Futhermore, there is no indication that the Board has actually implemented or tested the system since February 1982.

-- Technical flaws

After providing a system of numerically weighted criteria, the February 1982 guidelines state that the Board "may, at its own discretion, go outside the decision guidelines." Thus, the advantages of a standardized weighting system -- namely, accountability, predictability and fairness -- slip away through a loophole.

Even if the loophole were closed, however, the weighting system would be inadequate: Its numerical ranges are too undiscriminating and vague. Under "assaultive potential," for example, the guidelines do not indicate what past violent crimes would warrant a risk rating of "3-moderate" versus "4-high". Likewise, under "seriousness of present offense" and "seriousness of prior criminal record," no specific crimes are enumerated. The "substance abuse potential" rating lacks a numerical weighting range altogether, raising the question as to how drug abuse would be figured into the overall score.

-- Apparent disuse of the numerically weighted factors

Technical flaws in the system notwithstanding, the Parole Board has given no indication that it has even attempted to implement the numerically weighted criteria. The Board rarely provides any insight into how it makes individual parole decisions. However, in a February 6, 1984

6/ See D.C. Parole Board Memorandum: Guidelines for Initial Parole Hearing, adopted February 24, 1982.

memorandum prepared at the request of this subcommittee, Board Chairman Bernice Just did explain the Board's reasoning in 40 decisions to grant parole made during January 1984. In not a single case did Ms. Just refer to the numerical weighting system or a parolee's meeting the system's mimimum requirements. Rather than scores based on a rigorous review of the eight enumerated factors, Ms. Just generally emphasized the parolees' apparent rehabilitation, as inferred from their institutional experience. Other recent Board explanations of parole policy similarly lack specific references to use of the February 1982 numerically weighted factors. 7/

In sum, it seems doubtful that the new guidelines have affected Parole Board operations in any significant way. Even if implemented, however, the guidelines would not substantially clarify or improve parole decision-making.

B. The factors that actually dominate the parole process

In light of the apparent disuse of the February 1982 numerical weighting system, the question arises as to upon what, in fact, the Parole Board does base its decisions. Certainly the Board seems at least aware of valuable criteria such as the nature of the present offense, history of prior criminality and tendency toward violence or drug use. But in recent USAO experience, it has become clear that several questionable factors far outweigh other, more crucial criteria in most Board decisions.

-- Presumptive release after service of the minimum term

The Board routinely grants parole at or shortly after the intial parole eligibility date. 8/ Under 24 D.C. Code § 204, the Board has the authority to grant parole after service of the minimum term. But the Board apparently transforms this mandate to incarcerate for the minimum term into a policy of presumptive release after the minimum term. In the process, the Board improperly usurps the sentencing authority vested in the courts. A 15-year maximum sentence -- imposed to provide strict punishment, certain incapacitation and emphatic deterrence -- becomes a presumptive five-year sentence in the Board's hands. Factors

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7/ See transcript of testimony of Board members Bernice Just, H. Albion Ferrell and John Gibson before the Senate Appropriations Subcommittee on the District of Columbia, November 1, 1983; see also 1982 Annual Report, at 4-5, 8-9.

8/ Nearly 90 percent of adult parole applicants received such lenient treatment in 1982. See Part Two: Statistical Overview, supra.

of concern to the judge, such as the offender's past convictions, violent tendencies or drug habit, are overshadowed by the de facto rule of presumptive early release. 9/

In addition to the statistical data supporting this analysis, individual case histories provide vivid evidence of the presumptive early release of dangerous inmates. In decision after decision reviewed by the USAO, the Board releases chronic offenders, many with histories of violence and drug addiction, at or near the earliest possible eligibility date. 10/

One assumption apparently underlying the policy seems to be the Board's concern about prison overcrowding -- more accurately, prison undercapacity -- and the cost of incarceration. Board members have denied that these concerns affect parole decisions, 11/ but, in fact, in its own 1982 Annual Report, the Board states that it facilitates

> the graduated supervised return to the community of offenders whose continued incarceration is deemed not to be in their best interests or those of the community when variables such as prison overcrowding, severity of sentence, cost of incarceration and relative danger to the community are analyzed. (Emphasis added.) 12/

Statistics also reveal a relationship between prison undercapacity and parole decisions. It has been reported that

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9/ Board members seem oblivious to the magnitude of statistics such as the 61 percent rate of release at the earliest possible date. Rev. H. Albion Ferrell, a 20-year veteran of the Board, said in a recent interview, "You can say 61 percent of the people were granted parole. It's just as easy to say that 39 percent were not granted parole. Now 39 percent is a lot of people . . .. If anything, maybe we ought to be paroling more -- I don't know." Interview with Jack Cloherty, WRC-TV, June 12, 1984.

10/ See, e.g., the memorandum on January 1984 parole decisions written by Bernice Just and referred to on page 6.

11/ See, e.g., testimony of Bernice Just before the Senate Appropriations Subcommittee on the District of Columbia, November 1, 1983 at 37.

12/ 1982 Annual Report at 4.

the Board averaged 60 paroles per month for the first seven months of 1983, but after the disturbance last July at D.C. Jail, blamed on crowded conditions, the Board doubled its releases in the next month to 120. 13/

Although prison undercapacity and costs are pressing public issues, they should not influence individual parole decisions. No dangerous criminal should go free because, in the opinion of the Parole Board, D.C. prisons are too full or incarceration too costly. The City Council and the Congress have legislative responsibility to address such problems; the Parole Board's shifting of that responsibility to itself seems only to further distort a flawed system.

-- Overemphasis on prison experience and the inmate's concerns

Presumptive early release is only one thread leading to a much larger knot of problematic attitudes and policies which afflict the D.C. parole system. Parole Board members confuse humaneness with indiscriminate leniency; they preach the former but practice the latter. In making parole decisions, for example, the Board vastly overemphasizes prison experience -- as a purported reflection of rehabilitation -- and unwisely underemphasizes crucial factors such as seriousness of present offense, prior criminal record and tendency toward violence and drug abuse. This produces a doubly dangerous situation: A factor of dubious predictive value, prison experience, is magnified in the name of rehabilitation, while factors clearly linked to community safety receive scant attention. 14/

Evidence of the Board's over-reliance on prison experience emerges most clearly from public statements by Board members 15/ and case histories. The January 1984 case

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13/ Reported by Jack Cloherty, WRC-TV, June 15, 1982.

14/ The Youth Corrections Act mandates heavy emphasis on rehabilitation in the cases of youth offenders. The Board, however, has interpreted the Act as a mandate to focus exclusively on the offender's apparent institutional progress. As a result, the Board tends to discount danger to the community to an even greater extent in releasing youth offenders. See, e.g., testimony before the Senate Appropriations Subcommittee on the District of Columbia, November 1, 1983 at 28-36.

15/ See testimony of Board members before the Senate Appropriations Subcommittee on the District of Columbia, July 20, 1983 and November 1, 1983; see also 1982 Annual report at 2-5.

histories mentioned previously reveal that in almost every decision to grant parole, the Board relies heavily, often exclusively, on the applicant's institutional experience. 16/ The inference that can be drawn from these cases is that in the eyes of the Board, any criminal, no matter how dangerous in the past, can be assumed to be rehabilitated if he does not commit serious infractions during a minimum term of incarceration.

A broad spectrum of social scientists and corrections experts have for the past decade questioned whether rehabilitation can be a realistic goal of corrections and a satisfactory justification for discretionary parole authority. 17/ Central to the criticism of rehabilitation theory is the acknowledgement of "the limitations of available knowledge concerning acceptable means of changing individual behavior, and the potential for abuse inherent in a system of wide discretion and low visibility." 18/ Operating in an informational vacuum, the D.C. Parole Board seems unaware of these developments. It relies heavily on perhaps the worst indicator of a prisoner's danger to the community: institutional performance.

When Congress in 1976 approved rigorous numerically weighted parole guidelines for the U.S. Parole Commission, it set aside institutional performance altogether because the factor has not been clinically proven to have any predictive value. 19/ One survey of recent research concludes:

> When inmates with similar backgrounds and past records are compared, neither institutional program participation and achievement, nor disciplinary record, nor the level and type of of pre-incarceration or post-release supervision

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16/ See memorandum referred to on page 6.

17/ See, e.g., Report to the Nation on Crime and Justice (1983), Bureau of Justice Statistics, U.S. Department of Justice at 71; Standards for Adult Parole Authorities (1980), American Correctional Association, at xix.

18/ Standards for Adult Parole Authorities (1980) at xix.

19/ See The Parole Commission and Reorganization Act: The Impact of Parole Guidelines on the Federal Youth Corrections Program and Indeterminate Sentencing, 34 Rutgers L. Rev. 491 at 529 (1982); Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810 at 826-28 and notes cited therein (1975).

> programs have any measurable impact on the probability of successful rehabilitation, the rate of recidivism, or the likelihood of later parole success. Holding other factors constant, time served in an institution appears to have, if anything, a slightly negative effect on the inmate's chances for success once he or she is released. Nor do "expert" decisions by parole officers or psychologists appear any more accurate in discerning likely success than decisions by lay people. There simply is no way to know when "rehabilitation" has occurred in an individual. (Citations omitted.) 20/

Certainly, it should seem obvious that a veteran criminal familiar with the D.C. parole system would know enough to obey prison rules and claim he had finally learned his lesson so that he will receive early parole release. Searching for some magic moment of rehabilitation, the Parole Board unwittingly abets the manipulative offender. The effect is that concern for the convict's desire to get out of prison appears to overshadow concern for the community.

C. Failure to acknowledge the link between drug abuse and crime

It bears reiterating that in all phases of its activity, the Parole Board devotes insufficient attention to evidence of drug abuse. Operating without clear, numerically weighted decision-making criteria, the Board cannot possibly assure itself or others that drug abuse receives thorough scrutiny. Recent case histories demonstrate that either because of a lack of information or outright negligence, the Board fails consistently to recognize that a convict prone to drug abuse is a convict likely to commit crimes while on parole. 21/ In fact, the Board apparently believes that the best place for a dangerous chronic offender with a drug history is in the community, not in prison.

Criminal justice research demonstrates conclusively the inevitable link between drug abuse and crime. Drug users commit an enormous number of crimes, mainly theft and drug dealing. One recent study found that on the average, the

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20/ Parole Release Decisionmaking, 84 Yale L.J. 810, at 827.

21/ See memorandum referred to on page 6.

22/ S. Gettinger, "Addicts and Crime," Police Magazine (1979), 2(6):35.

typical addict commits a crime every other day. 22/ According to findings from a 1979 survey of prison inmates:

> -- More than 75 percent of all state prisoners had used one or more illicit drugs in their lifetime, about double the rate for the U.S. population, reported by the National Institute of Drug Abuse.
>
> -- At the time of their offense, 33 percent of all prisoners had been under the influence of a drug.
>
> -- Heroin, used by only four percent of all youths age 18-25, was used by 28 percent of all inmates, most of whom used it at least once a week before they entered prison.
>
> -- Amphetamines and barbituates were used by close to 40 percent of the prisoners, about twice the proportion who used them outside prison.
>
> -- Marijuana was used by 86 percent of the prisoners, compared to 68 percent of the general population age 18-25. 23/

Illegal drug use is pervasive in Washington. In 1983, the USAO prosecuted close to 24,000 cases in Superior Court of which 8,800 were drug cases. Chief of Metropolitan Police Maurice T. Turner, Jr. has stated publicly on numerous occasions that 80 percent of all crime in the city is connected directly or indirectly to drugs. Given such a high level of dangerous drug use in the District, and the well documented connection between drug use and crime, the Parole Board's willingness to release previously violent criminals prone to drug abuse indicates a reckless disregard of community safety.

III. Recommendations for Reform

The Board makes bad parole decisions because it relies on dubious criteria revolving almost exclusively around vague notions of rehabilitation. Effective reform of the situation requires acknowledgement by the Board of its past mistakes and a commitment to sensitize its procedures to the legitimate

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23/ Report to the Nation on Crime and Justice (1983), Bureau of Justice Statistics, U.S. Department of Justice at 38-39, citing statistics from Survey of State Prison Inmates (1979)

concerns of the law-abiding public. 24/ Change at such a basic level may well be possible only through the mayoral appointment process.

Under the best of circumstances, a philosophical reorientation of the Board will yield long-term improvement only if it is accompanied by introduction of clear parole guidelines and more thorough hearing procedures.

The USAO strongly recommends the following reforms of parole guidelines and procedures:

A. Institute clear, numerically weighted parole guidelines.

In light of past Board practice, the guidelines should explicitly state that authority to release after service of a minimum term is not to be translated into presumptive release after service of the minimum term. The guidelines should require the Board to weigh heavily offender characteristics such as prior criminality, violent tendencies and potential for drug abuse. The guidelines should also require the Board to weigh heavily the nature of the present offense. Successful institutional experience should be required for parole application but explicitly set aside as insufficient sole justification for parole. Enumerated factors drawn from offender and offense characteristics should be given numerical values, with the total scores determining all parole decisions. 25/

24/ The Board's solicitousness toward convicted criminals and insensitivity to advocates of community safety permeate its professional staff as well as politically appointed membership. Hallam H. Williams, Jr., director of planning for the Board, said in a recent speech, "[W]e are refusing to stand by as idle observers while self-styled experts sell the country on gettough policies toward crime." He added that "get-tough" law enforcement policies "ignore the root causes of crime and fail to take cognizance of . . . substandard housing, inadequate educational opportunities, inadequate employment and training opportunities, which spawn crime." Quoted in The Philadelphia Inquirer, March 28, 1984, page B-3. (The USAO supports efforts to learn more about the root causes of crime, whatever they are. However, in the real world of D.C. crime and D.C. parole, such statements seem out of touch with the specific public trust bestowed upon the Board.)

25/ A solid foundation for parole guidelines would be the factors enumerated in the U.S. Parole Commission's Guidelines for Parole Decisionmaking. (The Mayor's Office of Criminal Justice Plans and Analysis is reportedly researching the effectiveness of parole criteria used in Iowa for possible application in the District of Columbia. This study was to have been completed by June 1984.)

B. Seek information on parole applicants from a wider variety of sources and improve contacts with other agencies in the criminal justice system.

An effective parole decision requires analysis of all pertinent information on the applicant. However, consistent with its over-reliance on institutional performance, the Board apparently bases its parole decisions almost entirely on information provided by the Department of Corrections. Two problems result: First, the Department of Corrections, operating under the pressures of prison undercapacity and court orders to alleviate unconstitutional conditions, may naturally tend to provide information to the Board that will grease the wheels of the parole-granting process. Second, vital information about dangerous criminals available from other agencies may never come to the Board's attention. The USAO, the D.C. Pretrial Services Agency and the courts themselves could provide valuable information to the Parole Board about prior convictions and the likelihood of recidivism. The Board could use this information to better execute a numerically weighted factor system.

Ironically, the Board seems to go out of its way to avoid inter-agency links. The USAO, for example, generally receives no notice of pre-parole or formal parole hearings. There is often no opportunity for the USAO to inform the Board of crucial facts about particularly dangerous parole applicants.

What is needed is a formalized procedure under which the Board notifies the USAO, the Pretrial Services Agency and any other agency that has had contact with the parole applicant of all hearings, with the understanding that any pertinent information will be conveyed to the Board. The Board must also be held responsible for making specific inquiries into the parole applicant's history of drug abuse and treatment while in prison or under some form of modified supervision, e.g., halfway house or work furlough program. Finally, prosecutors should have the opportunity to make personal presentations to the Board in cases involving particularly dangerous chronic offenders.

C. Require notice of hearings to crime victims and assure victims an opportunity to be heard.

The criminal justice system is belatedly acknowledging the importance of involving crime victims in the parole process.

In May 1984, for example, the U.S. Parole Commission announced new procedures to assure that victims of the crimes for which federal prisoners are incarcerated will receive notice in advance of parole hearings and an opportunity to contribute their views on the possibility of release. Victim participation, now lacking in the D.C. parole system, allows those most intimately familiar with a convict's offense to assist a parole authority in categorizing the severity of the crime. Such participation also sheds light on the parole process and enhances public awareness of a parole board's philosophy. The D.C. Parole Board should immediately implement formal procedures for victim participation comparable to those followed by the U.S. Parole Commission. Victims should receive notice of upcoming hearings and an opportunity to present written coments or oral testimony on the propriety of release and the proposed conditions of parole. 26/

D. Require public reporting of Parole Board policies and decisions.

One reason the parole system has deteriorated to its present state is that the Parole Board operates in virtual secrecy. Not only are individual decisions shrouded in mystery, but the Board periodically changes significant policies without publicity, e.g., the promulgation of the inoperative February 1982 numerically weighted guidelines. To increase understanding of the parole process and make the Board more accountable for upholding its guidelines, the City Council should require by law that the Board make monthly public reports describing all parole-related decisions, statistics on parole failure (rearrest and convictions), and any proposed policy changes. Public reporting will encourage broader contributions of information and constructive criticisms from other government agencies and concerned private citizens. 27/

26/ On October 17, 1983, Bernice Just testified before the City Council in opposition to victim participation in the parole process.

27/ In addition to requiring public reporting of Parole Board policies and decisions, the City Council should immediately require that the Board attain accreditation from the Commission on Accreditation for Corrections, a private non-profit organization located in Maryland which maintains correctional standards for hundreds of state agencies across the country. The Parole Board has previously promised to arrange a review by the Commission on Accreditation, but such a review has not taken place.

E. Review the adequacy of the Board's record-keeping and its financial and personnel resources.

Bad parole decisions may sometimes stem from an inability to undertake adequate investigation and deliberation. By all indications, the Board's current record-keeping system fails to provide adequate basic information on parole applicants. New responsibilities to implement better guidelines, improve inter-agency links, open up the hearing process and provide public progress reports will only add to the Board's already considerable burden. Computerization of all record-keeping would seem to be the only way way the Board could keep track of the additional information it must begin to analyze and act on. The Board should have the capacity, for example, to tap into computerized court records and information compiled by the Pretrial Services Agency. More money and personnel may be needed to insure adequate performance.

Part Four: Supervision

I. Background

The Parole Board determines mandatory conditions for a parolee's release, 28/ but the Department of Corrections actually supervises individual parolees. Thirty-six Corrections Department parole officers currently supervise approximately 3000 parolees. 29/ The Chief Parole Officer is responsible for formulating parolee release plans regarding employment, drug treatment and similar matters. Parole officers communicate with the Parole Board over parolee progress and violations by means of periodic memoranda. The Corrections Department requires parole officers to submit to the Board a minimum of two reports per year on each parolee. Parole officers do not, however, automatically request a parole violator warrant from the Board for so-called "technical" violations of routine conditions, e.g., failure to report to a parole officer, failure to maintain employment or failure to attend a treatment program.

Approximately 470 parolees classified as "under supervision" are actually on "inactive" status and have no regular contact with parole officers. 30/ The Parole Board releases parolees from supervision after a minimum of only one year of active supervision. All conditions of the releasee's parole are waived, except the condition that he violate no law or engage in conduct which might discredit the parole system, under penalty of possible revocation of parole or of the order of release.

28/ The ten "typical" conditions of release are: (1) reporting immediately to a specified parole officer; (2) not leaving the D.C. Metropolitan area without permission; (3) not visiting an illegal establishment; (4) maintaining and providing information on residence; (5) maintaining and providing information on employment; (6) not possessing or using weapons; (7) not possessing or using drugs; (8) not serving as an informant; (9) obeying all laws and reporting any arrests to a parole officer; (10) cooperating fully with parole supervision. (The Board may impose additional, more specific conditions.)

29/ Source: Department of Corrections.

30/ The Corrections Department places a parolee into one of four supervision classifications: (1) "maximum," with twice-monthly contact; (2) "medium," with once-monthly contact; (3) "minimum," with contact every two months; and (4) "inactive."

II. Discussion, Evaluation and Recommendations

Although the Corrections Department undertakes many aspects of supervision, the Parole Board must retain ultimate responsibility for prisoners it releases early. The following problems currently mar the supervisory process:

A. The Corrections Department's tendency to encourage release

From the Correction Department's vantage point, the pressure of prison undercapacity is somewhat eased if convicts are released on parole and not returned to prison. Without alleging any conscious interference with the goals of parole supervision, it must be noted that overburdened Corrections Department personnel may sometimes diminish the extent of violations, overemphasize the progress of rehabilitation and encourage maintenance of parole. In recognition of the pressures on the Corrections Department, the Parole Board must assume a more active role in shaping the supervision process.

-- Parole supervision classification and release planning

The Board should routinely participate in decisions as to how much supervision a parolee will receive because the Board should have access to crucial information on subjects such as prior criminal activity and drug use, which may not be readily available to parole officers. For the same reason, the Board should routinely oversee development of the required release plan. By explicitly assuming responsibility in this fashion, the Board would improve the supervision of all parolees.

-- Parole reporting by Corrections Department personnel

Given the number of parolees who commit new crimes, the Board must make a greater effort to elicit reports from parole officers of developing problems. A system of required bi-monthly reporting to the Board would insure greater awareness of parolees heading toward trouble and would allow for earlier consideration of revocation. By the same token, the City Council should require by law that the Corrections Department report all violations of parole conditions -- "technical" or otherwise -- so that the Board can evaluate whether prompt action might pre-empt commission of a new crime.

B. Release from supervision

Ideally, parolees would receive at least some supervision for the full extent of the parole period. The public deserves as much protection from parolees as possible. Parolees themselves benefit from the firm guidance of trained parole officers. An ultimate goal for the Parole Board and Corrections Department, therefore, should be elimination of the practice of releasing parolees from supervision (or placing them in "inactive" status). If the Corrections Department lacks the manpower to accomplish this goal immediately -- and that would appear to be the case -- Congress should quickly consider what additional resources are justified. In the interim, the Parole Board should establish guidelines for granting release from supervision. (None now exist.) At the minimum, chronic offenders with violent criminal histories should automatically be made ineligible for release from supervision.

C. Notice to the USAO and public reporting of supervision arrangements

The Parole Board fails to notify the USAO of many crucial developments in the parole process. In addition to notification of hearing dates and final parole decisions, the Board should routinely alert prosecutors as to the type of supervision provided for each parolee so that the USAO can comment on the propriety of judgments made by the Board and Corrections Department. This information, presented in aggregate form, should also be included in the Board's monthly public report.

D. Commitment to community correctional detention

Complicating the entire supervision process is the Board's apparent policy of releasing certain prisoners to community correctional detention, or "halfway houses," before their parole eligibility date. 31/ This practice takes place without official guidelines and with little apparent concern for the prisoner's prior record or potential for drug abuse. Not only does it pose an immediate threat of dangerous criminals committing crimes while in the less restrictive community setting, but the practice also blurs the distinctions between mandatory mimimum incarceration and parole eligibility, between Parole Board responsibilites and Corrections Department responsibilities.

31/ Many individual case histories indicate that parolees are commonly released on parole from community confinement.

The entire policy of alternative incarceration under the auspices of both the Parole Board and the Corrections Department deserves reassessment. It is the sense of the USAO that too many dangerous prisoners are released too quickly into the community because of prison undercapacity. However, if the Parole Board continues to shift prisoners to community confinement prior to parole eligibility, it must at least establish clear guidelines for such decisions. These guidelines must require consideration of the present crime and prior criminal record, with preeminent concern for public saftey. Clearly, the USAO should be notified of any Parole Board decision to release a prisoner.

Part Five: Violations and Issuance of Warrants

I. Background

The Parole Board may issue a parole violator warrant when it learns that a parolee has been accused of committing a crime, implicated in criminal activity or has violated any other condition of parole. After a hearing, the Board may revoke parole and return the parolee to some form of confinement. No general guidelines exist for the issuance of parole violator warrants. Specific guidelines do exist, however, for issuance of warrants after a parolee charged with a new crime has been detained on a "five-day hold" pursuant to 23 D.C. Code § 1322(e).

II. Discussion and Evaluation

A. Effective refusal to issue warrants unless the parolee is in custody: an abandonment of preventive supervision

The Parole Board's purported regime of strict parole conditions backed up by the threat of warrants and revocation does not actually exist. The Board has a tacit policy of not issuing a warrant unless a parolee is already in custody, charged with a new offense. Violations not associated with a new criminal charge either never come to the Board's attention because of inadequate communication with parole officers or are sloughed off without thorough Board review.

No statistics exist on how many violations parole officers fail to report to the Board, how many violation reports result in Board inaction, or what types of violations do prompt revocation proceedings. The Board's lack of concern over violations not stemming from new offenses can be inferred from the fact that it has promulgated guidelines for issuance of warrants only when a parolee is being held on a five-day detainer. The Board's neglect of its duty to monitor all violations of parole conditions indicates its abandonment of any attempt to prevent parolee crime. The central purpose of establishing and enforcing parole conditions is to steer the cooperative parolee toward proper behavior and to confine the violator before he has a chance to commit new crimes. The Board currently waits until rearrest before initiating the revocation process.

B. The special problems of warrants in the five-day hold situation

As a result of the Board's general refusal to issue warrants unless the parolee is in custody, most discussion of problems related to warrants involves the five-day hold situation. Pursuant to 23 D.C. Code § 1322(e), prosecutors may request the court at the bail hearing to detain a defendant for up to five days if it appears that he is on probation or parole and may flee or pose a danger to the community if released pending trial. The USAO often exercises this option in hopes that the parole revocation process will begin immediately, while the repeat offender remains incarcerated. 32/

Consideration of the warrant question should not be limited to five-day holds. But even in this more dangerous area, where the parolee is often a repeat offender, existing policies fail to protect the community adequately.

-- Failure to issue warrants for certain serious crimes

The Board has established conditions necessary for issuance of warrants when the parolee is in custody under a five-day hold. One central condition is that the parolee have been charged with one of ten enumerated offenses. 33/ However, three serious crime categories -- non-residential burglaries, weapons offenses other than when a gun is found on the parolee and drug offenses involving possession and single sales -- do not prompt issuance of a warrant. In other words, the Board will not issue a warrant if a person clearly violates his parole by committing a commercial burglary or illegally carrying a pistol in his car glove compartment. 34/ The dangerousness of not punishing parolees for such serious violations requires little explanation. Under the Board's

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32/ In 1983, the USAO requested 226 five-day holds; 189 were granted.

33/ Eligible offenses: abduction, aggravated assault, arson, burglary I, burglary II involving residence, firearm violation (when the weapon is on the person of the parolee), homicide, robbery, sexual assault and certain charges under the D.C. Controlled Substance Act.

34/ "Possession" of a weapon may be "constructive," rather than "actual" -- as in the glove compartment scenario -- and still be legally recognized as a violation of the law. See D.C. Criminal Jury Instructions, 3.11 at 131 (1978). Such violations are prosecuted vigorously by the USAO, especially where a parolee is charged with illegal possession of a gun.

guidelines, the veteran parolee learns that committing these crimes will not result in revocation. The deterrence value of conditional release disappears.

-- Requiring an inappropriate evidentiary standard for issuance of warrant

In addition to enumerating certain offenses, the Board requires "clear and timely eyewitness identification" of the defendant parolee before issuing a warrant in a five-day hold situation. The Board will accept only an in-person identification and routinely rejects conclusive photo identifications. This policy directly contradicts Supreme Court precedent, under which a parole authority need only have "probable cause" to believe that a parolee violated conditions of parole in order to detain him pending final revocation proceedings. 35/ An unambiguous photo identification provides ample probable cause. The Board unnecessarily exceeds the probable cause standard with its eyewitness identification requirement, creating yet another obstacle to efficient issuance of warrants.

C. Execution of warrants

Under Parole Board policy, a parole violator warrant may be "issued" without being "executed." Execution of the warrant describes actual service of the warrant and return of the parolee to custody pending a hearing. As a rule, the Board does not execute warrants it has issued as the result of new charges being brought against a parolee until after conviction on those charges. In other words, the Board generally does not begin its own inquiry into whether the new charges reveal parole violations unless the parolee is found guilty. This policy may result in a convicted parolee serving his new sentence and parole violator time concurrently rather than consecutively.

Under Board policy, unless a warrant is executed prior to sentencing on the new charge, the parole violator punishment, or back-up time, will automatically run concurrently to the new sentence, regardless of what the court orders. (Conversely, if a warrant is executed prior to sentencing, the new sentence will automatically run consecutively to the back-up time.) By postponing execution, the Board increases the chances that sentencing on the new charge will take place before execution. In that case, the parolee suffers no additional punishment whatsoever for violating parole conditions while committing the new crime.

35/ See Morrissey v. Brewer, 408 U.S. 471, 487 (1972); see also Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973).

Board policy on execution of warrants apparently confuses many D.C. Superior Court Judges, who assume they are sentencing parolees to consecutive sentences when, in fact, the sentences will run concurrently. Defense attorneys routinely take advantage of this confusion by arguing for a reduced sentence on the the new offense because, it is claimed, the defendant will have to serve consecutive back-up time. If the judge reduces the new sentence and back-up time is assessed concurrently by the Board, the defendant receives a double bonus. Furthermore, the fact that under Board policy two penalities might run concurrently in contradiction to the intent of the court seems to be a violation of 23 D.C. Code § 112, which states:

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not. (Emphasis added.)

III. Recommendations for Reform

Improvement of the warrant issuance process depends intrinsically on improved supervision. Without more frequent and more thorough reports on parole violators, the Board will not be able to increase the number of warrants issued.

Other specific recommendations are:

A. Expand the fundamental role of the warrant as a deterrent and preventive tool.

Warrants should be issued for all significant infractions of parole conditions, i.e. for all violations. This step would require a reassessment of what constitutes a "violation," as opposed to what parole problems are properly dealt with by parole officers without direct Parole Board involvement. The line must be clear, and all problems falling into the "violation" category should result in issuance of a warrant. The Board must also establish guidelines on warrant policy for situations other than the five-day hold so that parole officers can police violations more effectively. The Board must constantly reaffirm that violations lead to warrants, which may lead to revocation. The warrant should serve as a deterrent to prevent parolee crime.

B. Improve existing policies for the five-day hold situation.

Once general guidelines for issuance of warrants are in place, special rules now governing the five-day hold situation should be discarded. One broad standard based on probable cause to believe a violation has occurred should be sufficient. In the interim, the Board must alter current practices and issue warrants when parolees are charged with any serious crime, including commercial burglaries, weapons offenses and simple sales of drugs. The Board must also eliminate its gratuitous requirement of eyewitness identification of the parolee in connection with the new charges.

C. Execute warrants promptly.

Execution of warrants prior to sentencing on a new crime is imperative if the warrant/revocation process is to have any deterrent or retributive bite.

Part Six: Final Revocation

I. Background

Upon determining at a hearing that a person has violated a parole condition, the Parole Board may revoke parole and order reincarceration. A finding of a violation does not, however, automatically result in revocation. In fact, even a conviction on a new charge does not guarantee that a parolee will lose parole privileges. Alternatives include reinstatement to some form of supervised release, brief reincarceration to be followed by reparole, or continuation of proceedings for further investigation. In revocation hearings where the basis for review rests on new charges, the Board typically postpones its decision pending the outcome of the trial. (The Board generally does not even execute parole violator warrants until after a verdict on the new charge.)

If the Board ultimately revokes parole, the prisoner is theoretically obligated to serve the remainder of the sentence originally imposed, less any commutation for good conduct. The net violation penalty is commonly known as back-up time. But under Board policy, the prisoner may become eligible for a parole rehearing in only six months and at the maximum, in no more than two years. The rehearing date is also the presumptive release date. Thus, violators serve no more than two years of back-up time, regardless of what new crimes they commit or their prior criminal history.

II. Discussion, Evaluation and Recommendations

A. Inadequate standards for revocation

Faulty warrant procedures, discussed in Part Five, prevent many violations from ever reaching the final revocation stage. When the Board does consider revocation, generally as the result of rearrest and conviction, it too often decides against reincarceration. As at every other stage in the parole system, deterrence of chronic offenders and protection of the community become practically impossible. Only half of those parolees convicted on new charges have their parole revoked. 36/

36/ The Board is demonstrably insensitive to the magnitude of this figure and the effect it has on encouraging recidivism. In a recent interview, Board member Rev. H. Albion Ferrell was asked whether rearrest automatically results in revocation.

(continued on next page)

The Board must begin immediately to revoke parole on the basis of reconviction. Breaking the law is the most blatant and dangerous of parole violations. Furthermore, the Board must establish stiff revocation standards for violations other than commission of a new crime. Conviction for a criminal offense is not necessary for a parole (or probation) revocation. 37/ In fact, it is well settled that even an acquittal on the merits or dismissal of the charge upon which revocation is based does not preclude revocation. 38/ Simply put, violations must result in issuance of a warrant. Violations that directly or indirectly threaten the safety of the community must result in revocation and reincarceration.

B. Inappropriate application of the exclusionary rule in revocation proceedings

No guidelines govern evidentiary matters in revocation hearings, but it is the perception of the USAO that the Board generally hesitates to revoke where certain evidence might be excluded in court. This policy flies in the face of recent court determinations that the exclusionary rule does not apply to parole or probation revocation proceedings. 39/ The Board should explicitly acknowledge these holdings and abandon use of the exclusionary rule.

C. Notice to the USAO.

As at other stages in the parole process, the USAO may have valuable information to contribute to a revocation

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36/ (continued from previous page)
He answered, "No. Let's say if 90 or 95 percent of arrests resulted in convictions, then maybe we would look at revoking purely on the fact of arrest. That's not the case." Interview with Jack Cloherty, WRC-TV, June 13, 1984. In fact, according to the Board's own statistics, nearly 80 percent of parolees rearrested are ultimately convicted. See Part Two: Statistical Overview.

37/ See Melson v. Sard, 402 F.2d 653 (D.C. Cir. 1968) (parole); see also United States v. Webster, 492 F.2d 1048 (D.C. Cir. 1974) (probation).

38/ See United States v. Chambers, 429 F.2d 410 (3rd Cir. 1970): Seymore v. Beto, 383 F.2d 384 (5th Cir. 1967). (This situation might arise where a defendant is acquitted through jury nullification despite overwhelming evidence or where probative evidence is excluded by judicial decree, resulting in a not guilty verdict.)

39/ See United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (2nd Cir. 1970) (parole); Thompson v. United States, 444 A.2d 972 (1982) (probation).

deliberation. The Board should routinely notify the USAO as to upcoming hearings and permit prosecutors to submit written comments or make personal presentations on individual parolees.

D. Back-up time

Reform of the entire revocation process will succeed only if the Board institutes steeper penalties for violation. At present, depending on the nature of the violation -- "technical" versus new offense -- and the length of time remaining to be served, the range of possible back-up time service is six months to two years. 40/ In other words, a "seven-to-21 years" sentence in most cases becomes at most a "seven-to-nine years" sentence: The prisoner is likely to get parole after a minimum term, and even if he commits a new felony while on parole, his maximum back-up time after revocation will be two years.

Lenient penalties for violation of parole fail to adequately punish or deter dangerous repeat offenders. Guidelines distinguishing among offender backgrounds and the severity of new charges are useful, but existing distinctions are too broad and maximum penalties too short. More specifically, the following standards for rehearing dates should be adopted:

40/ In setting parole rehearing dates -- in effect reparole dates -- the Board "may consider...the nature of the new offense...the length of time on parole, and the overall adjustment on parole." D.C. Rules and Regulations, Title 9, Section 103.

The following guidelines apply:

A. For technical violations of parole:

-- If less than five years remain on the underlying sentence, six months;

-- If greater than five years remain on the underlying sentence, six to nine months.

B. For misdemeanor convictions or misdemeanor convictions and technical violations:

-- If less than five years remain on the underlying sentence, six to nine months;

-- If greater than five years remain on the underlying sentence, nine to 15 months.

C. For felony convictions or felony convictions and other violations:

-- If less than five years remain on the underlying sentence, nine to 15 months;

-- If greater than five years remain on the underlying sentence, 15 to 24 months.

-- Technical violations

The existing range of six to nine months, depending on length of time yet to be served, seems essentially fair for violations such as failure to report to a parole officer.

-- Misdemeanor convictions or misdemeanor convictions and technical violations

More emphasis must be placed on the nature of the original offense for which the defendant is on parole, the nature of the new conviction and the prior criminal history. The following standards would provide adequate distinctions among violent and non-violent crimes: 41/

> The presumptive release date for a violator serving time for a violent crime will ordinarily be 12 to 24 months from the date of revocation if the violator is convicted of a nonviolent misdemeanor, and 24 to 36 months if the violator is convicted of a violent misdemeanor. The presumptive release date for a violator serving time for a nonviolent crime will ordinarily be six to 12 months from the date of revocation if the violator is convicted of a nonviolent misdemeanor, and 12 to 24 months if the violator is convicted of a violent misdemeanor.

-- New felony convictions or new felony convictions and other violations

The existing range of nine to 24 months fails to distinguish among widely disparate felonies and generally is too lenient. The following standards are recommended:

> The presumptive release date for a violator serving time for a violent crime will ordinarily be 36 to 48 months from the date of revocation if the violator is convicted of a nonviolent felony, and 60 or more months if the violator is convicted of a violent felony. The presumptive release date for a violator serving time for nonviolent crime will ordinariliy be 24 to 36

41/ Violent misdemeanors should include: simple assault, attempted residential burglary and possession of a firearm. Violent felonies should include the offenses enumerated in 23 D.C. Code § 1331 (4), as well as possession of a firearm.

months from the revocation date if the violator is convicted of a nonviolent felony, and 48 to 72 months if the violator is convicted of a violent felony.

Part Seven: Concluding Remarks

Jurisdictions across the country have increasingly limited the discretionary authority of parole boards over the past ten years. The trend reflects recent criticism of rehabilitation theory, as well as widespread alarm over disparities in sentencing and actual time served. As of August 1983, nine states had eliminated parole altogether in favor of determinate sentencing. 42/ The 1978 District of Columbia Law Revision Commission recommended to the Senate that the D.C. Code be amended to institute determinate sentencing and sharply curtail Parole Board authority. 43/ Much in the same spirit, the criminal law reform package approved by the Senate, 99-1, and now before the House of Representatives would end parole on the federal level. The USAO advocates elimination of parole authority in the District of Columbia and institution of determinate sentencing.

If not completely abolished, the D.C. Parole Board must immediately begin operating under drastically reformed standards and with far more attention to the preservation of community security. The USAO stands ready to assist in the revamping of parole policy and the implementation of more stringent guidelines for release, supervision and revocation. Progress will occur only in an atmosphere of cooperation among the branches of the city's criminal justice system. Above all, law-abiding citizens deserve better protection against convicted criminals.

42/ See, Time Served in Prison (1984), Bureau of Justice Statistics, U.S. Department of Justice; Setting Prison Terms (1983), Bureau of Justice Statistics, U.S. Department of Justice.

43/ See Proposed District of Columbia Basic Criminal Code and Commentary (1978), District of Columbia Law Revision Commission (prepared for the Senate Governmental Affairs Subcommittee on Governmental Efficiency and the District of Columbia).