Testimony of

Mr. Frank Bowman

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Are the penalties imposed on white-collar offenders by federal criminal law tough enough? Although the question sounds simple, it is extraordinarily difficult to answer because a truly full answer would require resolution of some of the most intractable problems in criminal law and public administration: What are the purposes of punishment, and which are the most important? Should the objective of punishment be crime control? Or should punishment be meted out according to the defendant's deserts, regardless of how it affects his future behavior or that of other prospective criminals? How do we know if punishment has achieved its stated purpose? How should we rank the severity of different crimes and the deserts of different offenders? And given the scarcity of federal criminal justice resources, on which sorts of offenses and offenders should we concentrate our investigative, prosecutorial, judicial, and penological resources?
I can't answer these big questions, but I hope the remarks that follow will give the Subcommittee some useful information on the history and current state of federal economic crime sentencing. I have also ventured some tentative opinions about whether Congress should enhance current white-collar crime penalties, and perhaps more importantly, whether Congress should augment federal law enforcement resources devoted to detecting and prosecuting white-collar crime.

I. On Average, Federal Economic Crime Defendants Receive Much Lower Sentences Than Defendants in Any Other Major Crime Category

If we consider federal economic crime defendants as a group, they unquestionably receive lower sentences than defendants in any other major crime category. As indicated in Table 1, in FY 2000, defendants convicted of larceny, embezzlement, fraud, and counterfeiting who were sentenced to federal prison received average (mean) sentences of 15.6 months, 9.9 months, 18 months, and 17 months respectively. By contrast, robbery defendants received 110.6 months, drug defendants 75.3 months, and firearms offenders 64.1 months. Even the average immigration sentence was 27.8 months, ten months longer than the average fraud penalty. Moreover, federal economic crime defendants receive sentences of probation at dramatically higher rates than

virtually any other class of defendant. More than one-half of all larceny defendants and one-third of all fraud defendants receive probation.

TABLE 11
FY 2000 Sentencing Data
Larceny Embezzlement Fraud Counter-feiting Robbery Drug Trfck Firearms Immigrn All other
Average (mean)
Sentence (mos.) 15.6 9.9 18.0 17.0 110.6 75.3 64.1 27.8 49.5
Percent probatn 54% 40.6% 32.8% 38.4% 1.4% 3.8% 9.2% 5.1% 30.4%

One might conclude that the question that brings us together today is answered by the figures in Table 1. Plainly, economic crimes are punished less severely than any other sort of federal crime, and perhaps we should proceed immediately to increasing economic crime sentences. But, of course, the problem is not that simple. There are reasons, many of them entirely sound, why average economic crime sentences are low relative to other kinds of federal crime.

First, non-violent property crimes have traditionally ranked rather low on the scale of crime seriousness. By contrast, robbery and firearms offenses are violent crimes, or potentially so, and crimes of violence have traditionally ranked at the top of the crime seriousness scale. Relatively high drug sentences are the direct consequence of repeated congressional determinations that drug offenses are of the utmost seriousness, meriting commensurate punishment. Even the fact that the average immigration sentence is now ten months higher than the average fraud sentence is the result of legislation raising sentences for immigration crimes, particularly those involving aliens with criminal records.

Second, the rubric of "economic crimes" covers a literal multitude of sins, many of which are pretty small potatoes. The mental images of "white collar criminals" that gave birth to this hearing are probably those of crooked corporate tycoons, document-shredding Big Five accountants, and devious fat cats with offshore accounts. Such folks surely exist and sometimes find themselves as unwilling guests of the Bureau of Prisons, but the rank-and-file federal economic felon is usually a much less interesting fellow. For example, in FY 1999, about half of the defendants sentenced under the theft guideline, U.S.S.G. §2B1.1 (2000), stole less than $10,000, and 35% fell below $5,000.2 In the same year, approximately 22% of all fraud defendants caused victim losses less than $10,000, and 15% fell below $5,000.3 A great many of the larceny, embezzlement, and fraud cases sentenced in federal court involve Treasury checks stolen from the mail, small embezzlements by tellers from federally insured banks, so-called "dead payee check cases" (in which a relative of a person receiving Social Security or veteran's benefits neglects to inform the government of the beneficiary's decease and continues to cash the checks), and similar matters. These are certainly crimes, and many of them are prosecutable only in federal court. Indeed, in the aggregate such offenses cost the taxpayer many millions of dollars and must be pursued if the public fisc is to be protected. Still, it is hard to argue that the law ought to be changed to require the Widow Smithers to do a long stretch in prison if she continues cashing her dead husband's Social Security checks for a year or two.

II. Are Serious White Collar Offenders Punished Enough?

Thus, I would submit that the question is not so much whether the relatively low-level felons who make up much of the pool of federal economic crime defendants are under-punished, but

whether those who commit more extensive, and expensive, frauds and swindles are punished enough. To answer this question requires some historical perspective. As relatively low as average economic crime sentences may seem, their current levels represent a marked increase over those prevailing fifteen years ago. When the original Sentencing Commission drafted the first Sentencing Guidelines, they sought to replicate pre-Guidelines sentencing levels for most types of crime, the notable exceptions being increased sentences for drug offenses and economic crime. The increase in drug sentences was essentially mandated by legislation such as the Anti-Drug Abuse Act of 1986.4 However, the Sentencing Commission made the independent determination that white-collar sentences ought to increase. The Commissioners were plainly concerned that probationary sentences had been too common for economic crimes, and that the Guidelines' objectives would be better served by the imposition of "short but certain terms of confinement for many white-collar offenders...."5 As Marvin Frankel put it, "[T]he Commission produced guidelines that actually increase the overall severity [of federal sentences] taking particular aim at so-called white-collar offenders whom the Commission found (perhaps correctly) to have been treated with undue solicitude."6

It is, I think, undeniable that since 1987 the Guidelines have sent to prison thousands of white-collar criminals who would previously have been given straight probation. Nonetheless, as the years passed even the new higher white-collar Guidelines sentences began to seem inadequate to some observers. As the Subcommittee is doubtless aware, last year the U.S. Sentencing Commission passed (and Congress accepted) an "economic crime package" of amendments to the federal sentencing guidelines governing theft and fraud offenses.7 The package had a number of objectives, but one important one was to respond to concerns expressed by judges, probation officers, and prosecutors that sentences for at least some serious economic crime offenders were notably low.

The position of the judges is particularly noteworthy. As a group, federal judges have not been avid fans of the Sentencing Guidelines, and many judges have been pointedly critical of what they perceive to be unduly high sentences for some offenses, particularly drug crimes. Nonetheless, in the long debate that produced the 2001 economic crime package, the most influential advocates for raising white-collar sentences were the judges of the Criminal Law Committee of the U.S. Judicial Conference. In the end, a key element of the 2001 economic crime package was a modification of the economic crime guideline which introduced a graduated series of sentence increases for defendants found to have inflicted losses in excess of $70,000.8 Thus, one way of framing the question for today becomes: did the Sentencing Commission do enough in 2001? There is, of course, no objective method of measuring how much punishment is "enough," either in absolute terms or in comparison to those who commit other sorts of crimes. Still, some illustrations may be helpful.

CASE #1: The president of a medium-sized, federally insured bank defrauds his bank of $750,000 and conceals the money in an offshore account. If the bank president pleaded guilty to the offense, his sentencing range under the Guidelines in effect prior to November 1, 2001 would probably have been 30-37 months.9 Under the current Guidelines, his sentencing range would probably be 37-46 months.10 Of course, adding or subtracting facts from the example would change the results markedly. Had the banker not moved the money offshore or otherwise used sophisticated means to commit the crime, his old guideline range would drop six months to 24-30 months, and under the new guidelines, his range would decline to 30-37 months.11 On the other hand, had he stolen $1 million, rather than $750,000, and had that loss jeopardized the safety and soundness of the bank, his sentencing range under the old guidelines would increase

to 57-71 months, and under the new guidelines to 70-87 months.12

CASE # 2: A swindler sets up a "boiler room" operation which makes fraudulent telephone solicitations to elderly persons to invest in phony securities. He succeeds in bilking over one hundred seniors out of $2.5 million. Under the 2001 Guidelines, this defendant's sentencing range, if he pleaded guilty, would probably be 57-71 months.13 If he employed five other co-conspirators, his sentencing range would increase to 87-108 months.14 If he also committed the offense from an offshore location or used sophisticated means, his sentencing range would increase further to 108-135 months.15 And if, in addition, the court determined that his elderly victims were "particularly vulnerable," his sentence could go as high as 168-210 months.16

Thus, depending on the particular facts, we can say with reasonable assurance that a banker who steals between $750,000 and $1 million will now receive a Guidelines sentence of between 2 ½ and seven years in prison. And a swindler who defrauds the elderly of $2.5 million will receive a Guidelines sentence of between 5 ½ and 17 ½ years. Are sentences in this general range "tough enough"? The answer probably depends on what yardstick one uses.

History: As noted, by historical standards federal economic crime sentences are at an all-time high, both in terms of the prevalence of prison sentences as opposed to probation and in terms of the length of the sentences imposed on those who go to prison.

Comparison with other federal offenses: It is difficult to escape the conclusion that some considerable part of the perception that economic crime sentences are "low" results from comparisons to the sentences now customary for other types of offenses, notably drugs. I am certain, for example, that the judges' support for higher white-collar sentences arose in some measure from the cognitive dissonance induced by the routine experience of being legally obliged to sentence young, often minority, drug defendants to five or ten or more years, and then finding that the Guidelines dictate a sentence of a year or two for educated professional defendants who steal significant sums. Even judges who view current drug sentencing levels as too high were surely moved by this disparity.

The real question, however, is what lesson one should draw from the fact that drug sentences are now much higher than, say, fraud sentences. Ought we necessarily to conclude that fraud sentences are too low? Or might the problem be that drug sentences are too high? Or perhaps there is no problem. Perhaps current drug sentences are and should remain much higher than economic crime sentences because drug crimes are so much more serious than economic crimes. In the end, I do not find the comparison between drug sentences and white-collar sentences to be particularly useful in determining the proper level of either.

Just deserts: As a general matter, a criminal sentence should be no longer than can be morally justified by principles of just deserts. How much punishment any defendant "deserves" is customarily determined by assessing the degree of harm he caused and his blameworthiness for that harm (which in turn usually involves an evaluation of the defendant's mental state). A strong argument can be made that the punishments traditionally imposed on white-collar offenders reflect a persistent under-evaluation of both harm and blameworthiness.

The harms inflicted by economic crime can be substantial. Theft and fraud are never victimless crimes. Unlike, for example, narcotics offenses in which one can at least argue that the crime consists of a willing seller providing a willing buyer with a desired commodity, no one wants to be swindled. Moreover, the harm inflicted by economic offenses often extends far beyond monetary losses to loss of jobs, homes, solvency, access to health care, or financial security in retirement. At the macro level, recent events remind us that economic crime can destroy businesses, injure entire professions, cause loss of confidence in markets, and damage both local

and national economies.
In addition, true "white collar" economic crimes impose unusual costs on the criminal justice system. They require police and prosecutors with special skills, skills that take time and training to develop. Such crimes are often expensive and time-consuming to discover and prosecute. When they go to trial, and sometimes even if they do not, they consume disproportionate amounts of judicial resources.
As for blameworthiness, it bears emphasis that economic crime of the truly "white collar" variety - that is, frauds and swindles of substantial sums by educated members of the business and professional classes - are particularly reprehensible. Such crimes are customarily crimes of greed rather than need. They are committed by persons with significant personal advantages, usually with substantial careful planning.
In my own view, significant white-collar offenders often deserve lengthier sentences than virtually any other category of offender, even including some defendants who resort to unpremeditated violence. Who, after all, is more deserving of punishment, a fellow who gets in a bar fight and concusses his opponent with a bottle in the heat of the moment, or a corporate executive who over a period of months coolly swindles his shareholders out of several million dollars?
Unfortunately, while the foregoing considerations may solidify the conclusion that white-collar crimes should be punished with some stringency, neither singly nor together do they answer the question of whether present sentencing levels are tough enough.
Crime control: We punish people not only, and perhaps not even primarily, because they deserve punishment, but also, and perhaps more importantly, in order control criminal behavior. Punishment is thought to reduce crime by deterring the punished defendant from offending again, by frightening and thus deterring other prospective criminals who witness the punishment, by incapacitating offenders disposed to recidivate, and also by reinforcing with public examples the general moral code of the community. In the pre-Guidelines period, federal white-collar penalties may have achieved very few of these objectives. When most white-collar criminals, even if caught, receive probation, the disincentives to crime are low and respect for the law is diminished.
It was frequently argued in former days that actual imprisonment of white-collar offenders was superfluous because the collateral consequences of a felony conviction to a person in business or professional life are so uniquely devastating - destruction of a career, disqualification from a profession, destruction of family relationships, collapse of standard of living and social standing, etc. Indeed, such arguments remain a staple of defense sentencing arguments in the Guidelines era. As a matter of equity and social justice, I generally find such arguments both elitist and distasteful. The inability to secure a position in the building trades because of a felony record is certainly no less a hardship for a poor man than disbarment for a felony is for a rich one. Likewise, the shame of visiting with one's family through Plexiglas is no less acute for a blue-collar than for a white-collar criminal. That said, it is doubtless true that the collateral consequences of a felony conviction are a substantial deterrent to white-collar crime.
Although it is not clear that the general public or even the community of potential white collar offenders realizes it, the days of automatic probation or de minimis sentences for significant white-collar crime ended with advent of the Guidelines. Moreover, the economic crime package of 2001 increased penalties still further. I do not know whether this fundamental transformation has had any impact on the incidence of white-collar crime. Indeed, I am not sure how that correlation could be tested. However, if general and specific deterrence have an effect in the real

world, the penalty structure currently in place certainly has a better chance of reducing white-collar crime than the state of affairs that existed before the Guidelines, or even before November 1, 2001.

Conclusion on sentence severity: Overall, my sense is that the range of penalties now in effect for moderate to serious white-collar offenses is not unreasonable. Certainly, one can no longer look at white-collar sentencing and immediately pronounce it a travesty which reflexively favors defendants whose backgrounds look like those of the judges who sentence them. And I see no persuasive evidence that would justify a blanket injunction from Congress to the Sentencing Commission to raise economic crime sentences across the board.

That said, there may nonetheless be classes of cases which current law systematically underpunishes. My recommendation to this Subcommittee would be to consider whether there are such classes of cases and, if so, to instruct the Sentencing Commission to consider crafting appropriate enhancements to account for them.

Two potential examples of such enhancements are included in the bill Senator Leahy has recently introduced (S. 2010):

Section 5 of Senator Leahy's bill would direct the Sentencing Commission to consider adding a sentence enhancement "for a fraud offense that endangers the solvency or financial security of a substantial number of victims." The present economic crime guideline provides that a judge may depart upward where '[t]he offense endangered the solvency or financial security of one or more victims."17 However, a judge need not depart in such circumstances. Adding a sentence enhancement, as distinct from a departure consideration, would require an upward adjustment upon a finding of endangerment of solvency or financial security.

Senator Leahy's proposal is very much akin to one I put forward several years ago. It was and remains my view that the amount of loss caused by a defendant is an important indicator of offense seriousness, but that the loss of the same sum of money can mean very different things to different people. The loss of $100,000 to Bill Gates is an entirely different matter than the loss of the same amount to a retiree for whom this amount represents a large percentage of his life savings. Consequently, I suggested a two-level upward adjustment "if the offense caused significant financial hardship to any victim." The term "significant financial hardship" was defined as one which causes a victim

"to file for personal bankruptcy protection, to suffer foreclosure on or eviction from his primary residence, to be terminated from employment which was a significant source of the victim's income, to suffer the closure, bankruptcy, or loss of ownership interest in any business that was a significant source of the victim's income, to lose health insurance protection for a period of six months or more, or to pay significant medical expenses during any period in which health insurance benefits were terminated or unavailable to the victim as a result of defendant's conduct, to lose a significant portion of his pension or retirement benefits, or to suffer any financial deprivation similar in scope and effect to the examples listed above."18

2) The November 1, 2001 Guideline amendments added two- and four-level enhancements in fraud cases involving 10-50 and more than 50 victims.19 Section 5 of Senator Leahy's bill would direct the Sentencing Commission to consider whether some additional enhancement might be appropriate in cases where "the number of victims adversely involved is significantly greater than 50." I would not be disposed to prejudge the matter, but the number of victims is certainly an important indicator of the extent of harm caused by an offense, and there are some offenses in which the number of victims is very much larger than 50.

Does White-Collar Crime Go Unpunished for Lack of Federal Resources?

I would respectfully suggest that the Subcommittee should consider, not only whether penalties are adequate for white-collar criminals who are caught and convicted, but also whether a great many white-collar offenders are never caught and punished at all because federal prosecutors and investigative agencies lack the resources to pursue cases worthy of federal intervention.

In the United States, both state and federal law criminalize theft and fraud, and the same case is often theoretically prosecutable by either federal or local authorities. However, in practice in most places, prosecution of significant white-collar offenses has become the nearly exclusive province of the federal government. There are a variety of reasons for this state of affairs.

Local police and prosecutors customarily view their primary responsibility to be the apprehension and prosecution of those who commit crimes against persons - murders, rapes, assaults, robberies, and the like. Property crimes that garner their attention tend to be offenses that involve physical intrusions in homes, offices, or vehicles - burglaries, criminal trespass, auto theft. And in recent years, drug offenses have assumed a larger profile in state criminal courts. With a relatively few exceptions in some large metropolitan areas, local police and prosecutors give low priority to financial crimes, particularly significant white-collar offenses.

As a former Deputy District Attorney in Denver, I can attest that, at least in my era, the cultural ethos of both police and prosecution was that paper crimes were "civil matters" and were not thought of as "real" crimes.20 This attitude was reinforced by the fact that neither the police department nor the District Attorney's Office had any significant expertise in financial crimes. I think it fair to say that both this culture and similar resource constraints remain the norm in most, if not all, local police departments and prosecutor's offices.

Therefore, in most states and localities, the only Sheriff in town for white-collar crimes is the federal government. Federal agencies -- the FBI, the IRS, the SEC, and others -- have developed expertise in the investigation of economic offenses, while the Fraud and Tax Sections of Main Justice and Assistant U.S Attorneys across the country have become the nation's experts in financial crime prosecution. To a large extent, this de facto division of labor is entirely appropriate. White-collar prosecution is resource intensive and the federal government has resources that local and state governments often lack. Moreover, much white-collar crime is multi-state in character and impinges on interests peculiarly federal in character. And in any event, whether one likes it or not, the federal government is and will remain the primary enforcer of laws against complex economic crime.

Therefore, if this Subcommittee would like the federal government to be tougher on economic crime, it should consider ways of giving federal law enforcement agencies the resources to investigate and prosecute more white-collar offenders. After all, one can be tough on crime by catching only a few of the villains at large in society and imposing harsh penalties on them as an example to the rest. Or one can show toughness by giving law enforcement the tools to ensure that most wrong-doers will be caught and subjected to appropriate, even if not draconian, punishment.

I recognize that the allocation of law enforcement resources is particularly ticklish in the current state of national uncertainty. In a time of "dirty bombs" and the "War on Terrorism," it may seem almost frivolous to be talking about beefing up law enforcement units devoted to ferreting out mail fraud, health care swindles, or crooked stock manipulation. Nonetheless, the dedication of additional money and manpower to uncovering and prosecuting white-collar crime would be the surest sign of congressional commitment to true toughness.