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Extended Terms for Dangerous Offenders Under the Proposed Federal Criminal Code (S. 1):
The Emerging Legislative History

JAMES H. KLEIN*

In late 1975 Congress moved toward enacting the first comprehensive federal criminal code in the history of the United States. The Senate Subcommittee on Criminal Laws and Procedures reported on the Criminal Justice Reform Act of 1975 (S. 1 or the Code). S. 1 is the product of over four years of work by the Subcommittee, building on earlier efforts by the National Commission on Reform of Federal Criminal Laws (Brown Commission) and the American Law Institute. As of December, 1976, S. 1 awaited action by the Senate Judiciary Committee.

Among its voluminous provisions the Code creates a category of felons known as “dangerous special offenders” (DSO). DSOs may be imprisoned for terms much longer than conventional offenders committing similar crimes. This article examines some procedural and substantive prerequisites for DSO sentencing under S. 1, particularly focusing on the emerging legislative history of these provisions.

Under the Code a DSO is an offender within one of three categories described in section 2302: recidivist, professional criminal, or organized crime conspirator. The authorized extended term of im-

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1. S. 1, 94th Cong., 1st Sess. (Comm. Print 1975). All references to S. 1 are to this version of the bill unless otherwise noted. The draft report submitted by the Subcommittee is cited as STAFF OF THE SENATE COMM. ON THE JUDICIARY, REPORT TO ACCOMPANY S. 1, 94th Cong., 1st Sess. (Comm. Print 1975) [hereinafter cited as REPORT]. See 121 CONG. REC. S18318 (daily ed. Oct. 21, 1975).


3. S. 1 is presently 799 pages in length.

4. These labels are used by the Subcommittee in describing the categories covered by the Code Report, supra note 1, at 922. Section 2302 sets out the DSO categories in much greater detail:
prisonment for a felony committed by a DSO is "not more than twice the term authorized for the felony" by the conventional sentencing provision, "or twenty-five years, whichever is less." Status as a DSO is not in itself sufficient grounds for sentencing as a DSO. The district court also must find "that, considering the nature and circumstances of the offense and the history and characteristics of the defendant, such an extended term is warranted to protect the public from further crimes of the defendant." Both issues—whether defendant is a DSO and whether he is a future threat to public safety as to warrant sentencing as a DSO—must be determined through special procedures set forth in that part of S. 1 which amends the Federal Rules of Criminal Procedure.

Increased sentences for dangerous offenders would not be a wholly novel addition to federal criminal law. The first statutes applying the concept were enacted in 1970. However, the Code's language

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A defendant is a dangerous special offender if:

1. He has previously been convicted of two or more felonies committed on different occasions; one or more of such felonies resulted in his being in imprisonment prior to the commission of the current offense; one or more of such felonies was committed within, or resulted in his being in imprisonment or on probation or parole within, ten years of the commission of the current offense; and no such felony was charged to be a basis for increasing the grading of the current offense under section 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), 1813 (Possessing Drugs), 1814 (Violating a Drug Regulation), or 1823 (Using a Weapon in the Course of a Crime);

2. He committed the current felony as part of a pattern of criminal conduct from which he derived a substantial portion of his income, or in which he manifested special skill or expertise—such as unusual knowledge, judgment, ability, or manual dexterity—in facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution, or concealment of criminal conduct, the enlistment of accomplices in such conduct, the avoidance of detection or apprehension of such conduct, or the disposition of the fruits or proceeds of such conduct; or

3. The current felony constitutes, or was committed in furtherance of, a conspiracy with three or more other persons to engage in a pattern of criminal conduct; the current felony was not charged to be an offense, or an attempt of conspiracy to commit an offense, under section 1801 (Operating a Racketeering Syndicate) or 1802 (Racketeering) or 1803 (Washing Racketeering Proceeds); and he initiated, organized, planned, financed, directed, managed, supervised, or supervised, all or part of such conspiracy or conduct, or agreed to do so, or gave or received a bribe or used force in the course of such conduct. For purposes of paragraphs (2) and (3), criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, accomplices, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

5. S. 1 § 2301(c).
6. Id. § 2302(b).
7. Proposed rule 32.1, S. 1, supra note 1, at 380. See note 11 infra.
differs substantially from current law in several respects. The question then arises, in what ways does S. 1 alter the procedural and substantive basis of extended sentencing?

There are similarities between the elements of DSO status in the Code and the analogous concept of "special offender" used in 18 U.S.C. § 3575 and 21 U.S.C. § 849. While these statutes also aim at recidivists, professional criminals, and organized crime conspirators, such similarities should not foreclose inquiry into significant differences that exist in the way these concepts are operationalized. However, this article examines other aspects of the Code which have the apparent intent of producing major alterations in the procedural and substantive bases of the requirement that a defendant be so dangerous as to warrant extended sentencing. Specifically, to what extent does the Code require the Government to give notice of its intent to prove defendant so threatening as to warrant DSO sentencing; what if any tests does the Code require a district court to use in deciding whether defendant's menacing char-

Title II, § 409 of the Act).

9. A defendant is a special offender for purposes of this section if—

1. the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof; or

2. the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

3. such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.


10. For example, S. 1's definition of a recidivist would encompass many more offenders with prior convictions than current law. S. 1 makes prior convictions over a 10 year period preceding the current offense relevant to the DSO finding, whereas current law is limited to the preceding 5 year period. See notes 4 and 9 supra.
acteristics justify DSO sentencing; and in what sense does S. 1 alter current law regarding these issues.

THE PROCEDURAL REQUIREMENT OF NOTICE BY THE GOVERNMENT

Proposed rule 32.1 requires a special post-conviction hearing to determine whether an extended term should be imposed, if the prosecutor files a pre-trial notice requesting the hearing. The notice must allege "that the defendant is a dangerous special offender who, upon conviction . . . , is subject to the imposition of an extended term of imprisonment" under Code sections 2301(c) and 2302(b). Moreover, it must set forth "with particularity the reasons for [the prosecutor's] belief that the defendant is a dangerous special offender." While invoking the extended term process is within the discretion of the prosecutor, the apparent intent of the Senate

11. Rule 32.1—Sentence of a Dangerous Special Offender
   (a) Pretrial Notice—If the attorney for the government has reason to believe that a defendant charged with a felony is a dangerous special offender as defined in 18 U.S.C. 2302(b), he may sign and file with the court, a reasonable time before trial or before acceptance by the court of a plea of guilty or nolo contendere, a notice:
   (1) alleging that the defendant is a dangerous special offender who, upon conviction for such felony, is subject to the imposition of an extended term of imprisonment under 18 U.S.C. 2301(c) and 2302(b); and
   (2) setting forth with particularity the reasons for his belief that the defendant is a dangerous special offender.
   In no case shall the fact that the defendant is alleged to be such an offender be disclosed to the jury. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, the notice shall be sealed by the court and shall not be filed as a public record, produced under subpoena, or otherwise made public during the pendency of the criminal matter, except on order of the court, but shall be subject to inspection by the defendant who is alleged to be a dangerous special offender or by his counsel.
   (b) Hearing—After a defendant alleged to be a dangerous special offender is found guilty or enters a plea of guilty or nolo contendere, and before sentence is imposed, the court shall fix a time for, and shall hold, a hearing to determine whether the defendant should be sentenced as a dangerous special offender. The hearing shall be held before the court sitting without a jury, and the defendant and the government shall be entitled to assistance of counsel, compulsory process, and cross examination of such witnesses as appear at the hearing. If it appears by a preponderance of the information, including information submitted during the trial, during the sentencing hearing, and in so much of the presentence report as the court relies on, that the defendant is a dangerous special offender and that a sentence as a dangerous special offender is warranted to protect the public from further crimes of the defendant, the court shall sentence the defendant in accordance with the provisions of 18 U.S.C. 2301(c) and 2302(b). The court shall place in the record its findings, including an identification of the information relied upon in making its findings.

12. Rule 32.1 states that the prosecutor may file notice thereby triggering a post-conviction hearing. At least one court has construed identical language concerning the notice provisions of one of the current federal enhancement statutes, 18 U.S.C. § 3575(a) (1970), to create prosecutorial discretion to seek enhancement but no discretion as to the filing of notice. United States v. Edwards, 379 F. Supp. 617 (M.D. Fla. 1974).
Subcommittee is to make the filing of pre-trial notice a necessary condition for the hearing. More clear is what the “particularity” requirement demands of the content of the notice.

At first glance the Code seems to provide a partial answer to this question. Since “dangerous special offender” refers to the offender type described in section 2302, the notice must show the basis for the belief that the defendant falls within one of those statutory categories. But the Code does not indicate the degree of specificity required of factual allegations pertaining to defendant’s DSO status.

More significantly, the Code fails to state whether the notice must also show the basis for believing that the defendant should be sentenced as a DSO, which belief presumably underlies the initiation of the procedure in the first place. These issues might be overlooked were it not for two aspects of the legislative history of S. 1. The first is the Subcommittee’s stated intent to use current extended sentencing procedures as a model, and the second is the construction which federal courts have imposed upon current statutes.

Notice Under Current Law

The Subcommittee’s report states that proposed rule 32.1 “makes one significant change in existing law” and cites the omission, from the proposed rule, of the current ban on disclosure of the notice to the judge until after the trial. No mention is made of any intent to alter the requirements under current law pertaining to the con-

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13. “The rule governs two procedures basic to dangerous special offender sentencing—the requirement of pretrial notice and the necessity for a hearing to determine whether a defendant should be sentenced as a dangerous special offender.” Report, supra note 1, at 1125 (emphasis added). Two district courts have construed the two current enhancement statutes upon which rule 32.1 is based in ways that support the mandatory nature of notice. United States v. Tramunti, 377 F. Supp. 6 (S.D.N.Y. 1974) held that the procedures described in 21 U.S.C. § 849 must be precisely followed. United States v. Edwards, 379 F. Supp. 617 (M.D. Fla. 1974) held that 18 U.S.C. § 3575 would accommodate no interpretation other than one which required filing of notice before trial or the rendering of a guilty plea. For an argument that notice of the possibility of enhanced sentencing is a due process requirement, see Note, The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals, 89 Harv. L. Rev. 356, 383 (1975) [hereinafter cited as Increased Sentences].

14. See note 4 supra.

15. “In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties.” 18 U.S.C. § 3575(a) (1970). The Report explains that disclosure is not likely to cause judicial bias and that non-disclosure creates practical difficulties in some districts, e.g., those where only one judge sits. Report, supra note 1, at 1125. The Report cites section 3575(a) as the basis for proposed rule 32.1. Id. Nearly identical language appears in the special sentencing statute pertaining to dangerous drug offenders, 21 U.S.C. § 849 (1970).
tent of the notice, nor does the language of rule 32.1 differ materially from that of current statutes.\textsuperscript{16}

The meaning of current notice provisions has been the concern of at least three district courts in recent cases. Because current enhancement statutes were enacted in 1970, and since these statutes have been seldom invoked by federal prosecutors,\textsuperscript{17} the courts were confronted with novel questions concerning both the nature and specificity of the notice allegations.

In \textit{United States v. Kelly}\textsuperscript{18} the defendant was found guilty of unlawfully receiving firearms as a convicted felon, which would subject him to a maximum two year prison term. Before trial, the Government had filed notice alleging that defendant's previous felony convictions brought him within the recidivist provision of 18 U.S.C. \textsection 3575(e)(1), thereby making him a "special offender."\textsuperscript{19} The notice also alleged that defendant was "dangerous" under 18 U.S.C. \textsection 3575(f)\textsuperscript{20} without stating any support for this allegation. Granting defendant's post-trial motion to strike the notice, the court held that section 3575(a)'s particularity requirement demanded a statement of reasons pertinent to both the elements of special offender status and dangerousness. Moreover, the court held that the defective notice could not be amended after trial.\textsuperscript{21} In \textit{United States v.}

\begin{itemize}
  \item \textsuperscript{16} \textit{Compare} the language of rule 32.1 set out at note 11 supra, with 18 U.S.C. \textsection 3575(a) (1970): "[A] notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender."
  \item \textsuperscript{18} 384 F. Supp. 1394 (W.D. Mo. 1974), \textit{aff'd}, 519 F.2d 251 (8th Cir. 1975).
  \item \textsuperscript{19} \textit{See} note 9 supra.
  \item \textsuperscript{20} "(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." 18 U.S.C. \textsection 3575(f).
  \item \textsuperscript{21} Affirmed on appeal by the Government. United States v. Kelly, 519 F.2d 251 (8th Cir. 1975).
\end{itemize}
Tramunti 22 another court placed a similar construction on the nearly identical special drug offender sentencing provision of 21 U.S.C. § 849.

By far the most elaborate judicial analysis of current notice requirements appears in United States v. Duardi. 23 Over the course of four separate post-conviction opinions, District Judge John W. Oliver rejected broadly the Government’s efforts to invoke an extended term hearing for four “organized crime” defendants under 18 U.S.C. § 3575(e)(3). 24 As in Kelly, the Government’s pre-trial notice alleged only facts pertinent to the issue of defendants’ special offender status. It failed to mention the element of dangerousness. 25 While agreeing with Kelly that the statute generally bars post-trial amendment of notice, Judge Oliver assumed that special circumstances in Duardi made “timely amendment” permissible. 26 Consequently, he ordered the Government to file a statement of the evidence it would introduce at the sentencing hearing to prove dangerousness. 27 The Government argued that it should not be required to prove facts beyond showing that defendants were special offenders, because dangerousness could be inferred from their status as “organized crime offenders” within section 3575(e)(3). The court rejected the theory of inferred dangerousness, characterized the “organized crime offender” allegation as “loose talk” insufficient for notice purposes, and again ordered a summary statement of evidence. 28

The Government then filed an amended notice describing the following evidence it would introduce: records of prior forgery and burglary convictions and probation revocation for firearms possession; testimony that defendants attempted to kill the Government’s chief trial witness; hearsay testimony of reports by a confidential informant that one defendant was “the most powerful member of the criminal organization” in Kansas City; testimony, excluded at trial, showing Duardi’s status as “a current representative of an

24. See note 9 supra.
25. 384 F. Supp. at 862.
26. Id. at 879. In an earlier proceeding Judge Oliver had ordered a pre-sentence report by the Bureau of Prisons and had sentenced defendants pursuant to 18 U.S.C. § 4208(b) (1970), upon his finding that the government’s notice was insufficient. However, at that time he ruled that the section 4208(b) sentence did not preclude the filing of an amended notice and subsequent enhanced sentencing under section 3575. He then ruled that the Government could move to amend. Id. at 872-73.
27. 384 F. Supp. at 861.
28. Id. at 868-70.
organized criminal group”; hearsay statements made by him 10 years ago admitting his “long standing association with organized crime”; 25 year old government reports, prepared by a now deceased F.B.I. agent, showing Duardi’s “organized crime connections”; and records showing consistent under-payment of sales taxes on receipts from a tavern owned by him.29 The court dismissed the amended notice on the ground that the Government’s proffered evidence was legally insufficient for invoking an extended term hearing. Such evidence would not “validly support a judicial finding that a particular defendant is, in fact, a dangerous special offender.”30

If Kelly, Tramunti, and Duardi were decided correctly on the notice issue,31 at least three generalizations can be made about current requirements. The notice must indicate the factual basis for the prosecutor’s belief that the defendant, if convicted, may be subjected to an extended term. The statement of reasons must be in terms more concrete than a mere recital of statutory language defin-

29. Id. at 877-79.
30. Id. at 880. Judge Oliver relied on three theories to reach his conclusion of legal insufficiency. First, evidence concerning prior convictions and probation revocations would be “irrelevant and immaterial” to the claim that defendants were organized crime special offenders under subsection (e)(3). Such evidence would only be relevant if defendants were alleged to be recidivists under subsection (e)(1). But the court fails to resolve the issue that it might be relevant to the element of dangerousness. See id. at 881 n.3. Secondly, evidence merely showing connections with “organized crime” would be outside the scope of what Congress intended as relevant to sentencing. Subsection (b) requires that defendant’s dangerous special offender status be shown by a “preponderance of the information,” and that the “information” relied upon by the court be entered in the record. Evidence of association with “organized crime” was merely “loose talk” rather than “information” within the intent of the statute, in spite of legislative history indicating that section 3575(e)(3) was aimed at “organized crime offenders.” See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 61, 62, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4038. Third, reliance on the evidence sought to be introduced by the Government would violate due process on several counts. Citing Townsend v. Burke, 334 U.S. 736 (1948) and United States v. Tucker, 404 U.S. 443 (1972), the court urged that proffered hearsay testimony about organized crime contacts would be inadmissible at the hearing because its accuracy could not be tested by cross-examination or otherwise. Citing Specht v. Patterson, 386 U.S. 605 (1967) and In re Winship, 397 U.S. 350 (1970), the court argued that proffered evidence tending to show by a “preponderance of the information” other criminal conduct which defendants had not yet been convicted of would violate the applicable “proof beyond a reasonable doubt” test.

31. Kelly was affirmed at 519 F. 2d 251 (8th Cir. 1975). In its opinion the court of appeals quoted favorably from Duardi. The same court dismissed a government appeal from Duardi on the grounds that the trial court had not yet imposed final sentence and, therefore, had not yet rendered a final decision from which appeal could be made. 514 F.2d at 545. United States v. Holt, 397 F. Supp. 1397 (N.D. Tex., 1975) conflicts with Duardi in so far as the latter holds section 3575 unconstitutional. Holt imposed an extended term on recidivists after holding, inter alia, that the government’s notice met the particularity requirements “by specifying the reasons the U.S. attorney believed [defendants] to be special dangerous offenders,” Id. at 1400. Since the court failed to discuss the contents of the notice further, it is impossible to determine whether it would have met the requirements of Kelly, Tramunti, or Duardi.
ing a dangerous special offender. And the allegations must run to both dangerousness and special offender status, as those terms are separately defined in current law. In effect, the third requirement may impose on the Government the burden of pleading and proving in the pretrial notice that the defendant should be given an extended term of imprisonment. This potential exists because of the way in which 18 U.S.C. § 3575 and 21 U.S.C. § 849 define the terms “special offender” and “dangerous.”

“Special offenders” are of three types, similar to the DSO categories of S. 1—recidivists, professional criminals, and organized crime conspirators. A special offender is dangerous, under subsection (f), if an extended term “is required for the protection of the public from further criminal conduct by the defendant.” Consequently, in giving notice of reasons for believing that a defendant is dangerous, the prosecutor must state reasons for believing an extended term is required for public safety. Kelly and Tramunti found the notice defective because of the complete absence of such reasons; Duardi focused on the legal sufficiency of the reasons provided in the amended notice. The Kelly rationale does suggest that whatever reasons are given must pass some test of legal sufficiency, although perhaps one not so demanding as that imposed by Duardi. Which test is applied determines whether, under current law, the notice must show the Government's ability to prove defendant so dangerous as to require an extended term or whether the notice carries some lesser burden. In order to understand the significance of these tests, and whether S. 1 incorporates them, further analysis of Kelly and Duardi is necessary.

The Kelly court perceived that the notice requirement serves more modest purposes than those posited by Duardi. In Kelly, the court focused on the role which the Government's notice might play in defendant's decision to plead guilty. Notice of the possibility of an extended term is a prerequisite to a knowing and intelligent plea. Failure to file until after defendant pleads guilty would vitiate the plea because it was made in ignorance of the maximum sentence that might be imposed as a consequence. The court extended this logic to the case of post-plea amendment of notice, which would give defendant “grounds to withdraw or set aside his plea for the reason

32. See note 9 supra.
33. In United States v. Edwards, 379 F. Supp. 617, 621 (M.D. Fla. 1974), the court reasoned from this premise to the conclusion that a notice filed under 18 U.S.C. § 3575 (1970) after a conviction resulting from a trial was as defective as one filed after a guilty plea, because “the statute provides no basis whatever for a distinction to be drawn between a plea and a trial vis-a-vis the express requirement that the notice be filed prior to those events.”
that the plea of guilty or nolo contendere was not knowledgeably made in the absence of the additional, derogatory information contained in the amended notice." 34 The argument rests on the premise that defendant's plea relies not only upon the fact that a notice has been filed, which triggers the possibility of an extended term, but also relies to some extent on the contents of the notice; and the contents must be such as will serve the purpose of facilitating intelligent pleas. 35 The court gave no guidance as to either the quality of the "reasons" set forth in the notice or the particularity of its factual allegation required to facilitate intelligent pleas. It seems, however, that some standard of bare legal sufficiency which serves this purpose would fall well short of the burden of indicating the Government's ability to prove dangerousness or the necessity for an extended term. A test that merely requires the notice to indicate the reasonableness of the prosecutor's decision to initiate the extended term procedures may satisfy the court. 36

Legislative History of the Notice Provisions

A simple notice incorporating only the prosecutor's judgment

34. 384 F. Supp. at 1400. The court further extended this argument to cases where a not guilty plea had been entered on the theory that a double standard barring post-plea amendment but allowing post-trial amendment would tend to penalize those exercising their right to a jury trial contrary to due process. Compare United States v. Jackson, 390 U.S. 570 (1968).

35. This is consistent with the Justice Department's view of the purpose behind the notice requirement set forth as part of the legislative history of section 3575. Assistant Attorney General Will Wilson in a letter to Congressman Emanuel Celler, then Chairman of the House Judiciary Committee, states: "In any event, as a matter of fairness it is essential that a defendant be notified prior to pleading that he faces the possibility of sentencing as a dangerous special offender, whether or not such notice is at that time required to be filed with the court. . . ." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 8998, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4069. Reliance on the content of the notice is but an extension of the logic of reliance on the fact of the notice. A guilty plea entered in reliance on a notice that is facially defective or that alleges facts which plainly would not support an extended term would seem, if post-plea curative amendments were allowed, to be no more knowledgeable than one entered in reliance on the fact that no notice had been filed. Some minimal assessment of the probability of an extended term may be as important for plea purposes as knowledge of the mere possibility.

36. While this test would not go directly to the issue of intelligent guilty pleas, it may go to the related issue of their voluntariness. The test would serve the purpose of curtailing the abuse of prosecutorial discretion that could accompany the filing of facially or otherwise invalid notices as a device for coercing guilty pleas from uncooperative defendants. The coercive power of such a notice which would arise from the prosecutor's promise to withdraw it upon the entry of a guilty plea would be diminished if grounds existed for attacking its legal sufficiency. A suggestion that the court in Kelly was cognizant of the coercive potential of the notice is evident. 384 F. Supp. at 1401 n.3. In at least one reported case, defendant based an appeal from a denial of a motion to vacate sentence on the ground that he was coerced into pleading guilty by the Government's threat to try him as a dangerous special offender under section 3575. The appellate court vacated the sentence and plea on other grounds. United States v. Untiedt, 479 F.2d 1265 (8th Cir. 1973).
would not satisfy the court in Duardi where two more demanding rationales were suggested for the notice provision of 18 U.S.C. § 3575. One rationale emerged fairly clearly from the legislative history of the provision. In defending the extended sentencing procedure, the Senate Judiciary Committee Report on S. 30, which contained language that was incorporated into section 3575, quoted from the comment to section 7.08 of the Model Penal Code proposing similar procedures: "[F]airness demands a hearing, focused on the precise question of the existence of the grounds for such a sentence with notice to the defendant of the ground proposed." Moreover, Senator McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures which initially reported S. 30, states in a lengthy analysis of the bill: "The notice provided to a defendant accused as a dangerous special offender was changed to add the grounds for considering him dangerous." Finally, the House Judiciary Committee Report on S. 30 emphasized the requirement in section 3575 (a) that "the notice will be subject to inspection by the defendant and his counsel." Taken together, these expressions of legislative intent suggest that the notice must be sufficient to enable the defendant to prepare adequately a defense for the extended term hearing. This might be called the appraisal function of notice.

It is evident from section 3575(b) that the hearing is an adversary proceeding at which defendant may controvert evidence justifying an extended term. Moreover, the Government is not limited to evidence submitted during the trial or contained in the pre-sentence report but may introduce new facts at the hearing. However, the

41. This is analogous to the appraisal function of the indictment of information in the prosecution of the substantive offense. See Russell v. United States, 369 U.S. 749, 785 (1962) (Harlan, J., dissenting); United States v. Cruikshank, 92 U.S. 542 (1875); FED. R. CRIM. P. 7(c). The indictment must state the elements of the offense with sufficient factual specificity so as to apprize the defendant of the actual crime with which he is charged in order that he may prepare an adequate defense. Note, Indictment Sufficiency, 70 COLUM L. REV. 876 (1970) [hereinafter cited as Indictment Sufficiency].
42. Within certain limitations, the defendant may examine the pre-sentence report prior to the hearing so as to afford a reasonable opportunity for verification. The parties may be required to give each other notice of their intent to controvert any part of the presentence report. The parties are entitled to assistance of counsel, compulsory process, and cross-examination of witnesses appearing at the hearing. 18 U.S.C. § 3575(b) (1970); 21 U.S.C. § 849(b) (1970).
rules of admissibility do not govern the hearing. The adversary nature of the hearing would be subverted were defendant not apprised of the kinds of information the Government would submit. A statement of the "grounds" for believing defendant to be a dangerous special offender, sufficient to aid the preparation of an adequate defense, at a minimum must be more specific than that required if the only function of notice were to facilitate intelligent guilty pleas. However, the review presented earlier of the amended notice in *Duardi* suggests that it was clearly sufficient for defense preparation. Yet, the court held it insufficient. Apparently, in spite of the court's recognition of the apprisal rationale in the statute's legislative history, a stricter test of legal sufficiency was applied. The nature of that test emerges from the court's citation of a single sentence from the Senate Report: "The proceeding may not be initiated unless there is 'reason to believe' the defendant is a dangerous special offender. See *Minnesota v. Probate Court*, 309 U.S. 270, 60 S. Ct. 523, 84 L. Ed. 744 (1940)." This statement may suggest that the Senate drafters of section 3575(a) did not intend that the initiation of the extended term procedure be left wholly within the discretion of the prosecutor, subject only to the weak limitation implicit in the test for abuse of discretion. Rather the drafters may have intended that initiation depend upon a reasonable and demonstrable belief that facts exist which, if proven, would prove dangerousness. The notice requirement would provide a basis for judicial review of the legality of the decision to trigger the procedure. This might be termed the judicial review function of notice.

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44. See text accompanying notes 25-30 supra. While the argument might be made that the amended notice's repeated reference to defendant's alleged associations with "organized crime" were not specific enough to provide an adequate basis for preparing a defense, the fact that each allegation was linked to a specifically identified piece of testimonial or documentary evidence, which presumably defendant could have access to before the hearing, made the amended notice sufficient for this purpose. General allegations that defendant was linked to organized crime might fail this test.


46. A minimal notice requirement would be one way to effect an abuse of discretion limitation. See text accompanying note 36 supra.

47. This is analogous to the function of the indictment "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." Russell v. United States, 369 U.S. 749, 768 (1962). It may also be analogized to the use of an indictment by a court to identify the factual basis for a grand jury's decision to indict. *Id.* at 770-71. The judicial review function requires that the indictment provide sufficient information to determine whether the Government's case rests upon a legally valid definition of the crime. Minimally, the indictment must include the essential
In reviewing the sufficiency of notice, the court would focus on the reasonableness of the prosecutor’s belief and the legal sufficiency of the facts, if proven, to require an extended term.

That Duardi implicitly adopted this very burdensome interpretation of the notice requirement is evident from its holding that the Government’s evidence would not “validly support” a finding that defendant was a dangerous special offender. The grounds for this holding were a mixture of statutory construction and constitutional interpretation. While the court does not dismiss the Government’s notice explicitly because its allegations fail to specify all the elements of “dangerous special offender,” (i.e., the court does not identify what elements must be shown to prove “dangerousness”), its analysis is indistinguishable from that theory, at least insofar as the burden which the notice must carry. If the notice must state “reasons” which Congress “intended to be judicially considered as a relevant sentencing factor” and which comport with constitutional limitations on sentencing discretion, presumably the “reasons” must also be such as would, if proven, justify extended sentencing as a dangerous special offender. Failure of the notice to state such reasons is grounds for dismissal under this theory, just as a civil complaint’s failure to state a cause of action is grounds for a summary judgment. That Congress intended this result in formulating the notice provisions of 18 U.S.C. § 3575, and its corollary 21 U.S.C. § 849, is a highly debatable proposition.

elements of the offense. However, it may not be sufficient to frame the indictment wholly in the language of the statutory definition of the offense, where courts have construed statutes to encompass elements not explicitly appearing in the statutory language, e.g., knowledge. United States v. Carli, 105 U.S. 611 (1881). Whether the judicial review function may require a degree of factual specificity greater than that demanded by the appraisal function is an unresolved issue. See Russell v. United States, 369 U.S. 749 (1962); Note, Indictment Sufficiency, supra note 41. See also Scott, Fairness in Accusation of Crime, 41 MINN. L. REV. 509 (1957).

48. See note 9 supra.
49. 384 F. Supp. at 880.
50. “It is therefore apparent that the government’s proposed amended notice does not state with the required particularity proper reasons which may be said to establish a factual base for either a government attorney’s belief or for an ultimate judicial factual finding that any of the defendants may properly be considered to be dangerous special offenders, within the meaning of §§ 3575(e)(3) and 3575(f).” Id. at 883.
51. The court may have misconstrued the fragment quoted from the Senate Report to support its rationale. See note 45 supra and accompanying text. In conjunction with the assertion that reasonable belief that defendant is a dangerous special offender is a prerequisite to initiating the procedure, the Report cited Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940). That case upheld a civil procedure for involuntary institutionalization of a person with a “psychopathic personality” which rendered him “dangerous to other persons.” Passing reference was made to the fact that the statute required a petition be filed with the court after the county attorney had satisfied himself that “good
Rationales for Notice Under S. 1

The foregoing review of the law developing around this procedural aspect of extended sentencing suggests the application of three rationales to determine the content and particularity of the Government’s notice. Whether the Senate Subcommittee which drafted S. 1 incorporates all of these approaches into proposed rule 32.1 is an open question despite the Subcommittee’s recognition of only “one significant change in existing law” not pertinent to this issue.52

Proposed rule 32.1 contains no substantive changes in its structure or language indicating that notice is not intended to serve the minimal function of facilitating intelligent guilty pleas. Nor does the Subcommittee’s Report indicate such a legislative intent. Notice must, as under current law, be filed “a reasonable time before trial or before acceptance by the court of a plea of guilty or nolo contendere” and “shall be subject to inspection by the defendant.”53 Presumably the reasonable time and inspection requirements allow the defendant to weigh intelligently the consequences of a guilty plea. A curious omission from proposed rule 32.1, however, may suggest a legislative intent to alter the Kelly theory by limiting the application of the intelligent-guilty-plea rationale. Kelly disallowed, as inconsistent with this rationale, post-plea curative amendment of defective notice.54 The statute seems to require this result when it states that the prosecutor, before trial or plea, “may sign and file with the court, and may amend, a notice.”55 The legislative intent to subject the power of amendment to the same temporal requirements as the filing of notice seems clear. However, S. 1’s proposed rule makes no reference to amendment, which raises a question of whether the drafters intend, by implication, to permit post-plea amendment. If so, then the notice’s content is irrelevant to the intelligence of a plea entered in reliance on it. The only important consideration for plea purposes would be the fact of filing.

On the other hand, if content is irrelevant, rule 32.1’s insistence that defendant be able to inspect the notice “during the pendency of the cause” existed for initiating the procedure. On the basis of the petition, the court held a hearing and ordered a psychiatric exam of the patient. Findings followed from the hearing and exam. There was no indication that the probate court had jurisdiction to review the legal sufficiency of the “good cause” finding of the county attorney. Moreover, the Supreme Court focused primarily on the other procedural protections present.

52. REPORT, supra note 1, at 1125. See note 15 supra and accompanying text.
54. See notes 34 and 35 supra.
of the criminal matter" is curious. Inspection is important if content is; and if content is unimportant before entering a guilty plea, inspection accomplishes little at that point. Moreover, the history of the rule’s development does not support an interpretation that omitting reference to amendment constitutes a rejection of Kelly. An earlier draft, with the same omission, was introduced into Congress by essentially the same draftsmen over a year before Kelly was decided. On the basis of these considerations, the mere silence of S. 1 is a weak argument for inferring a legislative intent to permit unrestricted post-plea amendment of notice.

While it is reasonable to conclude that S. 1 is not intended to alter current notice requirements insofar as they depend on the intelligent-guilty-plea rationale, the same cannot be said concerning the other purposes served by notice in the extended sentencing context. S. 1 contains major structural revisions of current law which considerably lighten the Government’s burden stemming from the appraisal and judicial review functions of notice, despite the Subcommittee’s professed non-recognition of the alteration.

While proposed rule 32.1’s description of the notice’s content is nearly identical to that of current law, the Code’s radical change in the definition of dangerous special offender reduces what the Government must allege. Current law provides separate and distinct definitions for the concepts “dangerous” and “special offender.” A defendant is a special offender if he falls within one of the statutory definitions for recidivists, professional criminals, or organized crime conspirators. He is dangerous if an extended term is required to protect the public. Notice allegations must run to both elements. In contrast, section 2302 of S. 1 collapses these separate elements into a unitary concept. Under S. 1, a “dangerous special offender” is one who merely meets the current definition of “special offender.” The Subcommittee has, through a process of labeling, determined that recidivists, professional criminals, and organized crime conspirators are dangerous per se. Consequently, under a literal reading of proposed rule 32.1, notice allegations need not run to the element of dangerousness—the fatal defect in Kelly.
and Duardi. The issue, of course, is whether the Subcommittee intends this result.

An argument that it does not arises from an interesting occurrence in the development of S. 1. The Subcommittee does not explain its decision to sever the procedural requirements of extended term sentencing from its substantive statutory base through a proposed rule of federal criminal procedure. It makes sense, however, to treat the procedural aspects in the rules.61 This decision was made in an earlier draft of S. 1.62 At that time neither the procedural nor the substantive aspects were materially altered, so that dangerousness and special offender status were still separately defined and both had to be alleged.63 It was after this initial severance that the substantive revisions referred to above took place, which had the effect of changing the notice requirements although the language of proposed rule 32.1 remained unaltered. It is possible that the reduced notice requirements are simply a result of careless draftsman-ship.

This possibility becomes slightly more plausible when it is recognized that the substantive revisions do not necessarily lessen the burden of proof that must be carried by the Government at the hearing in order to sustain the legality of an extended term. While the Subcommittee has, by a labeling process, made special offenders per se “dangerous,” S. 1 does not authorize the imposition of an extended term solely on the finding that defendant is a DSO. As indicated earlier, the bill also requires the court to find that “such an extended term is warranted to protect the public from further crimes of the defendant.”64 S. 1 retains the functional equivalent of the dangerousness element in current law, i.e., the district court must find defendant to be so threatening as to warrant DSO sentencing. Consequently, since the changes in S. 1 may be purely semantic, the possibility is enhanced that apparent changes in the notice requirements wrought by proposed rule 32.1 are wholly unintended. The Subcommittee’s real intent may be that notice allegations still run to two distinct elements: that defendant is a DSO and that “an extended term is warranted to protect the public.”

61. This decision was criticized in testimony before the Subcommittee by John K. Van de Kamp and Laurie Susan Harris of the Los Angeles Federal Public Defender’s Office. Hearings, supra note 2, pt. XI, at 7807, 7818.
62. S. 1, 93d. Cong., 1st Sess. (1973), reprinted in Hearings, supra note 2, pt. V, at 4211, contained proposed rule 32.2 whose language is substantially identical to proposed rule 32.1.
64. S. 1, § 2302(b).
This conclusion is further supported when the appraisal rationale for notice is considered. Proposed rule 32.1(b) clearly demonstrates the Subcommittee's intent to preserve the adversary nature of extended term hearings. The parties are entitled to assistance of counsel, compulsory process, and cross-examination of appearing witnesses. The court bases recorded findings of fact on these proceedings. Findings as to whether defendant is a DSO and whether an extended term is warranted to protect the public must be supported by a preponderance of the information. Moreover, in spite of the proposed rule's omission of the current requirement that the court give 10 days notice of the hearing, the Subcommittee "expects that adequate notice of, and adequate time to prepare for the hearing will be afforded." Finally, the proposed rule assures that the Government's notice shall be subject to inspection by the defendant. If the notice is to apprise the defendant of the basis for invoking the extended term procedure so that counsel can adequately prepare a defense for the hearing, it is difficult to see how the appraisal function can be served if the notice allegations do not run to both factual predicates of a DSO sentence.

Three countervailing considerations, however, argue against the conclusion that the Subcommittee intends to require the notice to allege facts showing defendant's menace sufficient to warrant a DSO term. First, this allegation is not required to apprise the defendant of the case against him, because much of the information, upon which the court must make its finding that defendant is a public menace, may be unavailable to the Government when it files notice. Section 2302(b) of S. 1 requires the court to base its public safety finding on "the nature and circumstances of the offense and the history and characteristics of the defendant," a focus absent from current law. The proposed rule directs that this information be adduced from the evidence offered at the trial and the sentencing hearing and from the pre-sentence report. The latter probably contains the information most pertinent to the sentencing decision—that bearing on the defendant's history and characteristics. Since this information is not developed until after conviction, it would be impossible for the Government to make pre-trial allegations based on this data. The silence of the notice in this regard does

65. See note 11 supra.
66. REPORT, supra note 1, at 1126.
67. The purpose of the presentencing report in the proposed Code is "to provide a court with the resources necessary for the acquisition of a large base of information on a convicted offender, including his past history, his present condition, and his future prognosis, in order to insure a sound basis in fact for its sentencing decision." REPORT, supra note 1, at 896.
not necessarily weaken defendant’s ability to prepare an adequate defense for the hearing.

The Appraisal Function and the Scope of Notice Under S. 1

The appraisal function is served by pre-hearing disclosure of the pre-sentence report. Proposed rule 32(c)(3)(A) provides for disclosure, upon defendant’s request, of those portions of the report the disclosure of which might be harmful to defendant or others, excluding sentence recommendations, diagnostic opinion, and information sources protected by a promise of confidentiality.68 The Subcommittee clearly intends that the disclosure provisions of proposed rule 32 pertain to both conventional and extended term sentencing.69 Whether the limitations on disclosure, itemized in proposed rule 32, so weaken the appraisal function of disclosure as to make it less than adequate is an open question.70 However, it is evident that even a limited disclosure of the pre-sentence report would better serve the appraisal function than a notice filed before the pre-sentence investigation is conducted.

Second, the argument that S. 1 makes purely cosmetic changes in the substantive findings required to authorize an extended term may be overstated. Section 2302(b) does more than merely attach the label of dangerousness to special offenders. Additionally, it re-casts the definition of the public menace which the court must find. Current law authorizes an extended term if it is “required” for public protection, while section 2302(b) authorizes it if “warranted” for public safety. Also, current law authorizes an extended term if “a period of confinement longer than that provided” by conventional sentencing statutes is required.71 This suggests that the authorized

68. S. 1, § 378.
69. “It is not necessary for subdivision (b) of [proposed rule 32.1] to carry over the provisions of 18 U.S.C. 3575(b) regarding inspecting of the presentence report and related matter. Comparable provisions appear in Rule 32(c)(3) of these rules.” Report, supra note 1, at 1126.
70. See Symposium, Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion, 26 Hastings L.J. 1527 (1975). It is worth noting that while proposed rule 32(c)(3)(a) represents a more liberal approach to disclosure than current rule 32, in the context of extended term sentencing, it may result in less disclosure than section 3575(b) and section 849(b). Current law provides for inspection sufficiently in advance of the hearings to afford a reasonable opportunity for verification; limits non-disclosure to extraordinary cases and, even in such cases, leaves disclosure as a matter of judicial discretion; requires a withholding judge to record reasons for non-disclosure; and requires the inspecting parties to give notice of intent to controvert the contents of the presentence report. Proposed rule 32 leaves the timing of disclosure up to the court; expands the described instances of non-disclosure and appears to make it mandatory upon the court; merely requires the withholding judge to summarize the information relied on in determining sentence; and imposes no requirement of notice of intent to controvert.
71. See note 20 supra.
maximum conventional sentence for the felony, of which defendant is convicted, is a fixed baseline against which defendant's danger to society is measured. Section 2302(b) merely authorizes "an extended term," if warranted and section 2301(c) defines an extended term as "not more than twice the term authorized for the felony" under the conventional sentencing provisions. Hence, the authorized maximum conventional sentence is not necessarily the baseline against which defendant's dangerousness is measured.

Both of these alterations move the critical element in extended term sentencing—defendant's threat to public safety—away from the mechanical approach of current law and toward the more discretionary model of judicial sentencing. As discretion to find that an individual defendant is a threat to public safety increases, contingent upon proof that defendant is a recidivist, professional criminal, or organized crime conspirator, the burden on the Government to plead and prove the public menace element may lessen. While expanded judicial discretion to find dangerousness may create constitutional difficulties, the Subcommittee appears willing to risk it in order to lighten the burden imposed on the Government by Kelly and Duardi.

Third, the argument that inadvertent draftsmanship explains the
apparent relaxation of notice requirements is further weakened by the fact that when the Senate drafters reworked an earlier version of S. 1, containing a forerunner of proposed rule 32.1, they made several cosmetic changes in the rule. It is difficult to believe that they inadvertently overlooked the effect of the rule's language in light of major revisions in the substantive sections upon which the rule depends.

A final issue remains—whether S. 1 imposes those requirements on the Government which Duardi derived from the judicial review function of notice. If the Subcommittee does not intend that notice serve the appraisal function with respect to defendant's menacing characteristics it is unlikely that it intends to burden the Government with Duardi. S. 1 appears to reverse that holding. It is unclear from the legislative history, however, whether that aspect of notice running to the element of DSO status is also immune from scrutiny by the court on a motion to dismiss on grounds of legal insufficiency. The differences outlined above between the elements of DSO status and defendant's actual threat together with the apparently different roles ascribed to the court in determining these issues, may justify stricter notice requirements with respect to DSO status. As to whether defendant is a recidivist, a professional criminal, or an organized crime conspirator, the Government may still be required to justify its decision to trigger the procedure. This would not be inconsistent with any aspect of the legislative history of S. 1 apparent at this time.

JUDICIAL CRITERIA FOR MEASURING DEFENDANT'S DANGEROUSNESS

The Code leaves unspecified the factual predicates which must support a finding that defendant is so menacing as to warrant sentencing as a DSO. However, the district court's discretion to make the determination is not unlimited. Findings on the issue are reviewable on appeal under the standard of clear error. The question remains: What limits does Congress intend to impose upon this discretion?

Dangerousness Under Section 2302

These limits are not easily discerned from the statutory language of S. 1. Section 2302(b) directs the district court to determine

77. See note 62 supra.
78. See text accompanying notes 58-63 supra.
79. Due process may compel stricter notice requirements concerning DSO status. See note 75 supra.
80. S. 1, § 3725(c)(2).
whether, "considering the nature and circumstances of the offense and the history and characteristics of the defendant, such an extended term is warranted to protect the public from further crimes of the defendant." The focus is on defendant's potential for future criminal conduct as inferred from past and present behavior. More than a mere probability of future crime is required. The probability and seriousness must be sufficient to "warrant" an extended term. If this is more than a tautology, i.e., a court grounds its decision to impose a DSO term on its "finding" that such sentencing is "warranted," it suggests that the legal sufficiency of a DSO's threat should be measured by comparing the offender's menacing characteristics with those of some control group. Only if a DSO presents a more significant threat is sentencing as a DSO warranted. The question remains: What are the parameters of the control group against which a particular DSO is compared? An incomplete answer is some group of offenders who have previously been treated under the court's conventional sentencing authority. If menacing characteristics distinguish a DSO from this group, the court's conventional authority may be inadequate to protect public safety.

Although not clearly mandated by S. 1, this comparative approach is wholly consistent with the statutory language. Current law suggests more clearly, however, that courts should use this methodology to measure a special offender's dangerousness. 18 U.S.C. § 3575(f) specifies that an offender is dangerous when "a period of confinement longer than [the maximum conventional term] provided for such felony is required for the protection of the public from further criminal conduct by the defendant." The underlying issue is whether the court's authority to impose the maximum conventional term is adequate to protect the public. A reasonable way to resolve that issue is to compare the defendant's dangerousness with the dangerousness of offenders sentenced to the maximum term for committing similar offenses.

There is other language in 18 U.S.C. § 3575, however, indicating that this may not be the intended construction. Subsection (d) states: "This section shall not be construed as creating any mandatory minimum penalty." Yet the approach described above—the "maximum term" test for dangerousness—implicitly carries a mandatory minimum term for dangerous special offenders equal to the conventional maximum for the offense involved. As the Justice De-

partment argued to the House Judiciary Committee, which acted upon section 3575, "[i]f a court finds that the usual maximum term for the felony, or any lesser term, is all that should be imposed, by definition the court could not find the defendant to be a dangerous special offender." 84

If subsection (d) is taken literally, the logic of the "maximum term" test falls and the language of subsection (f) must be construed in some obscure manner. A compromise between the two provisions is possible if both are construed loosely. Subsection (f) may refer to some lesser standard than the maximum conventional term as a baseline for measuring dangerousness, e.g., how does defendant compare to the control group delineated by those receiving sentences near the mean term for the felony in question? This approach would not conflict with subsection (d)'s repudiation of mandatory minimums if read more narrowly. Subsection (d) is then merely an effort to authorize sentences for dangerous special offenders less than the statutory conventional maximum. No reported decision has engaged in the legal gymnastics which this harmonization of congressional purposes demands.

The vagaries of S. 1 sidestep these dilemmas. Mandatory minimums for DSOs are neither blessed nor cursed. Consequently, the "maximum term" test for dangerousness does not have to overcome the logical obstacles of current law. On the other hand, the public safety interest is more loosely formulated so that the "maximum term" test is not mandated. In other words, while S. 1 seems to recognize that some mandatory minimum term is the logical corollary of any test for dangerousness that compares a particular DSO with some control group, the minimum consisting of whatever sentencing level delineates the group, Congress permits the courts to decide what test to apply.

Judicial Delimiting of Section 2302

A close reading of the sentencing provisions confirms the unresolved nature of the issue. If the court finds defendant to be a DSO who warrants sentencing as such, it "shall impose an extended term


85. To reach this result the word provided in subsection (f)'s phrase, "A defendant is dangerous . . . if a period of confinement longer than that provided for such felony is required," must be construed more broadly than meaning "the maximum authorized by statute." Interestingly, when this narrow, technical meaning was clearly intended in subsection (b), Congress expressed itself more explicitly by stating "the maximum term otherwise authorized by law for such felony."
of imprisonment, within the range authorized by section 2301(c).” However, the range, as described in that section, has no lower limit, only an upper limit. If the Subcommittee clearly intended the "maximum term" test, ambiguity could have been easily avoided by providing a lower limit for extended terms equal to the maximum conventional term.

At least two alternatives to the "maximum term" test are available under S. 1. One might be labeled the "mandatory imprisonment" test. The control group for comparison consists of felons committing the same offense, who had been sentenced to probation and/or fines rather than imprisonment. A significant difference between the threat potential of a DSO and the members of this group would be the basis for concluding that some incapacitation was warranted to protect the public, that the court's conventional sentencing authority to grant probation was inconsistent with this purpose, and that authority to imprison defendant as a DSO was warranted.

A second alternative might be labeled the "reasonable term" test. Here, the control group consists of those non-DSO felons, with offenses and personal characteristics similar to defendant's, excluding those aspects of defendant's conduct comprising the factual predicates of DSO status. If the DSO facts, in conjunction with defendant's other characteristics, indicate a threat significantly greater than that of the control group, sentencing as a DSO is warranted. Absent those facts, the court's conventional authority is limited by

86. S. 1, § 2302(b).
87. In elaborating upon S. 1's definition of "extended term," the Report in a footnote states: "In a case involving the commission of a Class D felony, for example, a defendant, who is not found by the court to be a dangerous special offender can be sentenced to imprisonment for any period from zero to seven years, while a defendant who is found to be a dangerous special offender can be sentenced to imprisonment for eight, nine, ten, or any greater number of years—up to a maximum of fourteen—that the court finds to be warranted." REPORT, supra note 1, at 919 n.11 (emphasis added). If this comment is read to imply that a Class D felon cannot be sentenced for less than 7 years, then a legislative preference for the "maximum term" approach seems to emerge. But the comment can just as easily be taken as a simple illustration of how the district court's sentencing authority is enhanced by correct DSO findings.
88. There is some evidence in the legislative history of section 3575 that the Justice Department understood the mandatory minimum implicit in that provision to be some prison term. Assistant Attorney General Will Wilson, in a letter to the Chairman of the House Judiciary Committee stated: "Furthermore, inasmuch as an offender in any of the three defined categories is to be considered 'dangerous' only when the court finds that a longer prison term than that which may be imposed for the felony of which he has been convicted is required to protect the public from further criminal conduct on his part, it would be incongruous for the court to fail to sentence a 'dangerous' offender to any prison term at all." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 89, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4065.
the policy of sentencing "reasonableness" applied by appellate courts reviewing sentences under new Code provisions aimed at re-forming and rationalizing federal sentencing practices. Given defendant's distinctive threat arising from conduct associated with DSO status, the authority to sentence to a reasonable term within conventional statutory limits may be inadequate, thereby warranting enhancement of judicial authority to impose a DSO term.

As of this writing, the choice among these three tests—maximum term, mandatory imprisonment, and reasonable term—appears to be a matter left for judicial policy-making. The consequences of each test for the operation of S. 1's provisions for dangerous offenders and its attempt to rationalize sentencing through appellate review are very different. Any assessment of these tests should begin with an understanding of their consequences. The remainder of this article focuses on these impacts.

One consequence involves the number of DSOs who would be subjected to enhanced sentencing authority. Fewer DSOs would be sentenced as such under the "maximum term" test than under either other alternative. Very few conventional offenders receive the maximum term. A DSO's conduct, apart from that mere legal status, would have to be menacing in the extreme to set the offender apart from the control group. Under the "reasonable term" test, however, defendant's public threat could be considerably less and still justify DSO sentencing. Apart from the DSO facts, the defendant's characteristics might suggest a control group posing a relatively minor threat. Giving the DSO facts their proper weight, the court would not be required to perceive dangerousness comparable to that posed by conventional offenders, receiving the maximum term, in order to justify DSO sentencing. The "mandatory imprisonment" test would expose the largest number of DSOs to enhanced sentencing authority. The circumstances would be rare when the threat posed by a DSO would be perceived as less than the dangerousness of conventional felons given probation or simple fines.

A second consequence concerns the harshness of the terms resulting from DSO sentencing. The "maximum term" test is the most punitive because its logic requires imposition of a sentence longer than the conventional maximum authorized for the felony. The district court has greater leeway under the "reasonable term" test. The norm for non-DSOs similar to defendant would probably be substantially below the conventional maximum. Therefore, mandatory

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89. S. 1, § 3725. See text accompanying notes 96-101 infra for a discussion of these provisions.
minimum sentences would be generally shorter. The "mandatory imprisonment" test provides the broadest discretion to impose the most lenient sentences on DSOs, eliminating only probation and simple fines as sentencing alternatives.

**Appellate Review and the Impact of Judicial Scrutiny**

Several consequences affect S. 1's novel provisions for appellate review of sentencing decisions. In order to understand these consequences, it is necessary to summarize the review sections.

Prison sentences for felonies may be reviewed by federal circuit courts upon the defendant's petition if the sentence exceeds one-fifth of the statutory conventional maximum, or upon the Government's petition, if the sentence is less than three-fifths of the conventional maximum. In deciding whether to affirm or modify the sentence, or remand for further proceedings, the appellate court must make several determinations. First, it must decide if the

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90. S. 1, § 3725(a).
91. S. 1, § 3725 provides in pertinent part:
(c) Considerations.—Upon review of the record, the court of appeals shall determine whether:
(1) the sentence imposed is clearly unreasonable, having regard for:
   (A) the nature and circumstances of the offense and the history and characteristics of the defendant;
   (B) the purposes of sentencing required to be considered by part III of this title;
   (C) the opportunity of the district court to observe the defendant; and
   (D) the findings under section 2302(b) if the defendant was sentenced as a dangerous special offender; and
(2) the findings under section 2302(b), if the defendant was sentenced as a dangerous special offender, were clearly erroneous.
(d) Decision and Disposition.—If the court of appeals:
(1) determines that:
   (A) the sentence is not clearly unreasonable; and
   (B) the findings under section 2302(b), if the defendant was sentenced as a dangerous special offender, were not clearly erroneous, or were clearly erroneous but the sentence was not affected, it shall affirm the sentence;
(2) determines that the sentence is clearly unreasonable and that the sentence is:
   (A) excessive, it shall set aside the sentence and:
      (i) impose a lesser sentence;
      (ii) remand the case for imposition of a lesser sentence; or
      (iii) remand the case for further sentencing proceedings;
   (B) insufficient, it shall, if a petition for review by the government had been granted by the court of appeals, set aside the sentence and:
      (i) impose a greater sentence;
      (ii) remand the case for imposition of a greater sentence; or
      (iii) remand the case for further sentencing proceedings; or
sentence is "clearly unreasonable" having regard for several factors, including the district court's findings as to DSO status and whether an extended term is warranted. These section 2302(b) findings are relevant to the reasonableness issue only "if the defendant *was sentenced as* a DSO. Second, the court must determine if these findings are "clearly erroneous," but, again, only if the defendant "was sentenced as" a DSO. Third, if these findings are erroneous, the court must further determine if the error "affected" the sentence or if it was merely harmless error. Fourth, if the sentence is clearly unreasonable, the court must determine if it was "excessive" or "insufficient."

If defendant was not sentenced as a DSO, the appeal depends on how the court resolves the reasonableness and excessiveness or insufficiency issues. However, if an extended term was imposed, the matter is more complex. If the district court's 2302(b) findings are clearly erroneous and affect the sentence, the case must be remanded for further sentencing proceedings. On the other hand, if the DSO findings are correct or only infected with harmless error, S. 1 is ambiguous as to the result. Section 3725(d)(1) requires affirmance if the sentence is not clearly unreasonable and if the DSO findings are not harmfully erroneous. When "and" is read conjunctively, i.e., affirmance required only when both conditions are met, the circuit court is not precluded from modifying or remanding a DSO sentence, on grounds that it is unreasonable, merely because the DSO findings are free from harmful error. Holding that the sentence is unreasonable moves the court on to the excessiveness or insufficiency issue. If "and" may be read disjunctively in its context, i.e., affirmance required when either the sentence is not unreasonable or the section 2302(b) findings are not harmfully erroneous, the scope of review of DSO terms is drastically curtailed. Whether the defendant appeals because of excessive severity or the Government because of insufficiency, the appellate court is precluded from resolving these issues when DSO findings are substantially correct.

Unless an especially punitive congressional purpose is read into the extended sentencing provisions, the principle of leniency, which

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(3) determines that a finding under section 2302(b), if the defendant was sentenced as a dangerous special offender, was clearly erroneous and the sentence was affected by such finding, it shall set aside the sentence and remand the case for further sentencing proceedings.

92. S. 1, § 3725(c)(1)(D) (emphasis added). See note 91 supra.
93. S. 1, § 3725(c)(2). See note 91 supra.
94. S. 1, § 3725(d)(1)(B) and § 3725(d)(3). See note 91 supra.
96. S. 1, § 3725(d)(3).
the drafters of S. 1 expressly recognize as left intact by the Code,\textsuperscript{97} calls for the conjunctive construction, as the one less severe on defendants. However, the Subcommittee Report contains language suggesting a legislative preference for the harsher construction: "[I]f the court of appeals finds that the sentence imposed is not clearly unreasonable, it is to affirm the sentence. It is also to affirm the sentence if there were findings under section 2302(b) and such findings were not clearly erroneous or, if erroneous, the sentence was not affected thereby. . . . Section 3725 calls for the sentence to be affirmed even if the finding as to a dangerous special offender was erroneous if the error did not affect the finding. The Committee intends that the well established and traditional harmless error rule of current law be applied in such a situation."\textsuperscript{98} The comment treats non-error, or harmless error, as a separate and mandatory ground for affirmance.

Yet, if the disjunctive construction is required, section 3725(c)(2)'s rule that the appellate court consider DSO findings in resolving the reasonableness issue makes little sense. The only instance where this rule applies is when the DSO findings are correct.\textsuperscript{99} Under the disjunctive interpretation, correct findings require affirmance. Then why make the court determine the reasonableness of DSO sentences at all? Furthermore, if in light of correct DSO findings the sentence is unreasonable, the disjunctive approach puts the court in the paradoxical position of affirming a sentence it has found unreasonable. Finally, this interpretation forces the court to violate section 3725(d)(2) which mandates sentence modification or remand upon a finding of unreasonableness.

The drafters of S. 1 provided for appellate review of sentences, guided by the reasonableness standard, in order "to eliminate unwarranted disparities in federal sentences" and to promote "the development of a body of principles which will better rationalize the sentencing process."\textsuperscript{100} Their report contains no hint of an intent to place DSO sentencing beyond the objectives of uniformity and rationality. But the disjunctive construction makes application of the

\textsuperscript{97} REPORT, supra note 1, at 24.

\textsuperscript{98} Id. at 1052.

\textsuperscript{99} If the findings are harmfully erroneous, the court must remand for further proceedings. S. 1, § 3725(d)(3).

\textsuperscript{100} REPORT, supra note 1, at 1050-51. Considerable attention was focused on this problem during the hearings before the Subcommittee. E.g., Hearings, supra note 2, pt. VI, at 5514 (testimony of Daniel J. Meador); id. at 5649 (testimony of Marvin E. Frankel); id. at 7689 (testimony of Raymond L. Falls, Jr.). The problem of non-review of sentences has been examined in Comment, Federal Appellate Review of Sentences—United States v. McKinney, 7 Suffolk U.L. Rev. 1128 (1973); Case Note, 3 Hofstra L. Rev. 867 (1975).
reasonableness standard to DSO terms practically impossible. Therefore, comments in the report which seem to treat the correctness of DSO findings as a necessary and sufficient ground for affirmance should be read as an oversimplification of the statutory language requiring a conjunctive interpretation. Review, modification, or remand of extended terms because they are clearly unreasonable may occur despite substantially correct findings that defendant is a DSO who warrants sentencing as such.

The foregoing summary of the appellate review provisions makes it possible to return to the main theme of this discussion—the impact of various tests for deciding when DSO sentencing is warranted. Two broad types of consequences are discernible: the effect on review for clear error in DSO findings and the impact on review for reasonableness in the sentencing decision itself.

*Toward a Standard of Review for Dangerousness*

The impact on clear error review stems from the Code's limitation that such review occur only if the defendant "was sentenced as" a DSO. Even if the district court finds that defendant is a DSO, its decision that an extended term is not warranted, i.e., its decision not to sentence defendant as a DSO, is non-reviewable and precludes review of findings as to DSO status. The "maximum term" test produces the greatest quantitative shrinkage in the scope of review because, under it, the largest proportion of DSOs escape extended term sentencing. The Government will frequently find itself in the frustrating position of having proven defendant to be a DSO while being unable to obtain review of the district judge's refusal to sentence as a DSO. Moreover, if the Government seeks review on grounds of unreasonable leniency, the fact that defendant is a DSO is irrelevant to the reasonableness determination, again because the Code limits consideration of that fact to cases where DSO sentencing actually occurs. The "maximum term" test is not burdensome to defendants in the same sense because only those receiving extended terms would be likely to seek review of DSO findings.

At the other extreme, the "mandatory imprisonment" test maximizes clear error review of district court discretion to impose extended terms, since practically all DSOs would be sentenced as

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101. At least part of the comment cited in the text accompanying note 98 supra merely states the legislative intent that the established rule of harmless error be the standard for determining when erroneous DSO findings must be remanded.

102. S. 1, § 3725(c)(2).

103. S. 1, § 3725(c)(1)(D).
such. While such review has little significance for defining the limits of district court discretion to decide when extended terms are warranted (because few reversals would occur on the issue before the appeals court—whether it was clear error to sentence a DSO to some prison term rather than probation and a simple fine), this type of review has greater importance for shaping the law developing around the elements of DSO status. Moreover, the disparity between the defendant’s and the Government’s ability to invoke review of DSO determinations is diminished.

The “reasonable term” test falls in between these extremes. Since the proportion of DSOs sentenced as such is higher than under the “maximum term” test, the frequency of the Government’s inability to obtain review of refusals to impose a DSO sentence decreases, but is still greater than under the “mandatory imprisonment” test. Moreover, instances of non-review would largely consist of offenders whose menacing characteristics are not especially more aggravated than non-DSOs committing similar crimes, in contrast to the pattern under the “maximum term” test where many DSOs, not being sentenced as such, would tend to be more threatening than the norm.

The other type of consequence for sentence appeals involves the impact on review for reasonableness. Two effects are discernible. One arises from the requirement that erroneous DSO findings be harmful in order to be grounds for a remand. If the district court makes an erroneous finding of fact upon which may rest an ultimate finding that defendant warrants DSO treatment, the error is harmless if it did not substantially affect the ultimate finding.104 If the error contributes to the ultimate finding or influences the court’s decision that extended sentencing is warranted, the error is harmful. Interestingly, S. 1’s focus is not limited to error which affects an ultimate finding that DSO sentencing is warranted, although the Subcommittee intends to include this type of error as grounds for a remand.105 The Code’s language is broader, condemning error which affects a sentence.106

If the district court erroneously concludes that defendant should be sentenced as a DSO, and in reaching that result applies the “maximum term” test, it is impossible for the error to be harmless in the sense that “the sentence was not affected.” The error automatically escalates the sentence into the range above the conven-

104. Kotteakos v. United States, 328 U.S. 750 (1946); cf. proposed rule 52(a), S. 1, at 392.
105. See text accompanying note 98 supra.
106. S. 1, §§ 3725(d)(1)(B) and 3725(d)(3).
tional maximum. The only errors amenable to harmless error analysis are incorrect findings of fact which do not substantially affect ultimate DSO findings. Erroneous ultimate findings that DSO sentencing is warranted are per se harmful when based on this test.

On the other hand, such erroneous findings reached as a result of applying the "reasonable term" or "mandatory imprisonment" tests are not per se harmful, because the findings do not necessarily affect the sentence. If the district court sentences defendant as a DSO but does not go beyond the conventional maximum, the sentence may still be justified, on appeal, by factors other than the erroneous DSO findings. The harmless error standard, in the broad sense the Code seems to require, may be satisfied under these tests.\(^\text{107}\)

The significance of this difference for review of sentencing reasonableness arises from the Code's clear mandate that when a DSO sentence is infected with harmful error, review for reasonableness is precluded and a remand for further proceedings is required.\(^\text{108}\) The focus of any further proceedings is on correcting the error rather than on the propriety of the sentence. This pattern would be more frequent under the "maximum term" test, given its tendency toward per se harmful error, than under either of the alternatives. If the earlier analysis is valid regarding the congressional intent to authorize review and sentence modification on reasonableness grounds even in the face of correct DSO findings,\(^\text{109}\) an appellate court's greater leeway under the alternative tests to disregard DSO errors as harmless enhances the court's ability to focus on the policies which underlie DSO sentences. Hence, the alternative tests will promote a greater likelihood that appeals will be disposed of on the merits of the sentence rather than on the technical grounds associated with DSO findings under section 2302(b).

The other effect upon review for reasonableness stems from the implied mandatory minimum term which accompanies each test. That minimum, in effect, becomes a floor below which analysis of sentencing reasonableness cannot probe. If the finding is correct that a DSO term is warranted as measured by the sentencing benchmark of each test, then an appeals court cannot require the imposition of a lesser term on grounds of sentencing reasonableness. This holds in spite of the possibility that absent DSO findings reason-

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107. It does not follow that DSO errors accompanying sentences less than the conventional maximum would be per se harmless. The issue of whether the error affected the sentence would remain open.

108. S. 1, § 3725(d)(3).

ablleness would require a lesser term. Of course, the whole point of the DSO provisions is to create a double standard of reasonableness—one for conventional offenders and one for DSOs. But the extent to which those standards overlap, or more accurately, the range of sentencing alternatives which appeals courts should be allowed to consider in deciding what reasonableness requires for a particular DSO, is precisely the issue that the Code leaves open.

Perhaps the problem is best illustrated by example. Defendant is convicted of a Class D felony under section 1731(b)(2)(B)(ii) for stealing a car worth $350 and moving it across state lines. He was an addict at the time of the theft. Defendant's record of previous convictions (two minor drug related felonies during the previous 10 years, one resulting in his imprisonment for six months) establishes his DSO status under the recidivist provision. The district court's finding that defendant's danger to society is such as to warrant sentencing as a DSO is not clearly erroneous. A four year prison term is imposed. The conventional maximum for a Class E felony is three years and defendant appeals. On review, the court's inquiry into the reasonableness of the sentence is limited by the principle that a three year term is per se reasonable, i.e., logically mandated since the "maximum term" test is the accepted rule for deciding whether DSO sentencing is warranted. However, if the "some imprisonment" test is used, review for reasonableness has a broader scope limited only by the principle that some term of imprisonment is per se reasonable. Moreover, factors related to the circumstances of the offense and defendant's characteristics may argue compellingly that any term longer than two years would be clearly unreasonable in light of federal sentencing policy. At the same time, those factors might not be relevant to the assessment of defendant's dangerousness in comparison to some control group. Consequently, there would not be grounds for remanding because of erroneous DSO findings. But neither could there be grounds for sentence modification because of unreasonable excess if the "maximum term" test is accepted. The factors relating to the circumstances of the offense and characteristics of the defendant would justify reduction if the "mandatory imprisonment" test is accepted. These factors would also justify reduction if the "reasonable term" test is used because the mandatory minimum implicit here would probably be less than the two year maximum arising from the above application of the clearly unreasonable standard, taking into account all information

110. S. 1, § 2302(b)(1). See note 4 supra.
111. S. 1, § 2301(b)(5).
about defendant’s conduct including the factual predicates of his DSO status.

The following table summarizes the foregoing comparison of the three approaches to deciding whether a defendant’s dangerousness warrants sentencing as a DSO:

<table>
<thead>
<tr>
<th>Consequences</th>
<th>Tests</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Maximum Term</strong></td>
<td><strong>Reasonable Term</strong></td>
</tr>
<tr>
<td>1. Number of DSOs sentenced as such</td>
<td>Only the most menacing</td>
</tr>
<tr>
<td>2. Length of term imposed</td>
<td>Longest</td>
</tr>
<tr>
<td>3. Frequency of review for clear error in DSO findings</td>
<td>Seldom since few DSOs sentenced as such</td>
</tr>
<tr>
<td>4. Frequency of review for reasonableness of DSO terms</td>
<td>Least often since erroneous DSO findings</td>
</tr>
<tr>
<td>5. Scope of review for reasonableness of DSO terms</td>
<td>Narrow</td>
</tr>
</tbody>
</table>

**CONCLUSION**

If enacted, S. 1 will produce significant changes in current federal law concerning enhanced sentencing for dangerous offenders. While retaining the present requirement that the Government give pretrial notice of its intention to invoke special sentencing procedures that may expose defendant to an extended term, S. 1 considerably reduces the burden which that notice must carry. No longer will the Government have to indicate in its notice the kind of evidence which will be introduced to prove that defendant is so menacing as to warrant an extended term. A practical result of eliminating this burden will be to lessen an unwilling district court’s ability to avoid the extended term procedures by finding defects in the Government’s notice. Furthermore, Congress appears to be willing to open a door for judicial policy-making relative to the crucial issue of how to measure a particular defendant’s dangerousness and what degree of danger is necessary to warrant an extended term. The suggestion of current law—that defendant’s menace must exceed the threat posed by the most menacing conventional felons committing similar crimes—is absent from S. 1, and the door is left open for the adop-
tion of more flexible alternatives. The discussion of these alternatives and their consequences for the operation of the dangerous offender provisions hopefully will contribute to the resolution of a difficult issue left open to the federal courts if S. 1 becomes law in substantially its present form.