



STATEMENT OF
PAUL D. BORMAN, CHAIRPERSON
U.S. SENTENCING GUIDELINES COMMITTEE
CRIMINAL JUSTICE SECTION

ON BEHALF OF THE
AMERICAN BAR ASSOCIATION

BEFORE THE
U.S. SENTENCING COMMISSION

CONCERNING
PROPOSED 1991 AMENDMENTS TO THE SENTENCING GUIDELINES

WASHINGTON, D.C.
MARCH 5, 1991

Mr. Chairman and Members of the Commission:

My name is Paul D. Borman. I appear today to testify on behalf of the 350,000 members of the American Bar Association in my capacity as Chairperson of the ABA Criminal Justice Section Committee on the United States Sentencing Guidelines. Our Committee is made up of attorneys from every aspect of the criminal justice system -- prosecution, defense, judicial and academic. The Committee has had the benefit of two extended discussion of the 1991 proposals -- most recently on Thursday, February 28.

As many of you remember, our ABA Committee has testified before the Commission on numerous occasions, concerning the process by which the Commission promulgates guidelines, the substance of many guidelines, and the overall role of the Commission. Most recently, we testified about organizational sanctions. We appreciate the Commission's willingness to both listen to and give serious consideration to our positions. We believe that the dialogue between the ABA and the Sentencing Commission has developed into a mutual respect on both sides which significantly benefits the criminal justice system.

The saga of the United States Sentencing Guidelines has been followed with great interest by the ABA both because sentencing guidelines have a critical impact on every federal court conviction, and because the ABA has developed sentencing standards by which we evaluate your Guideline proposals.

Today marks the formal beginning of yet another chapter in the epic saga of the Federal Sentencing Guidelines.

We strongly urge the Commission to spend a major part of its time and budget in setting up multiple Guideline training programs all around the country.

We urge that each and every one of you and your staff go forth and teach, and to learn from the foot soldiers in the criminal justice system. Sitting here and writing more amendments, or "clarifications", as many of them are called, is part of the problem. Venturing forth will help solve problems and avoid creating more problems. General Schwarzkoff didn't run the war sitting in the Pentagon in Washington.

We all recognize that the Guidelines by their nature cannot be kept simple. But that does not justify making the Guidelines even more complex, so that as soon as some people come close to understanding them -- SHAZAM ! -- out comes a new set of amendments and clarifications.

This is the most important message that the organized bar can offer you this morning. And the following recent New Yorker cartoon, as amended, probably conveys the message better than my testimony so far.

Now to the 1991 amendment process:

First, we want to compliment the Commission for making better efforts in these areas:

1. Providing additional time for comments-- 45 days between publication and the public hearing, and 60 days for the entire comment period. We continue to seek the 90 day period proposed in last year's testimony.
2. Providing background reports tied to specific proposed amendments.
3. Asking, early on, for comments on matter's that are going to be on the Commission's agenda in the coming year.
4. Urging Congress to not enact additional mandatory minimum sentences.

At the same time we have searched in vain for the required comprehensive PRISON IMPACT STATEMENT -- that the Congress mandated the Commission to prepare. The Commission should not send out any additional proposals without first fulfilling this prerequisite.

Further, we want to urge the Commission to study in depth certain key aspects of the Guideline program that our experience has shown requires examination.

1. The importance and impact of offender characteristics, including prior unadjudicated crimes.
2. Mitigating Roles. This ties in with Amendment 11 and the study that Commissioner Carnes is undertaking.

With regard to the proposed 1991 amendments, we firmly believe that the Commission's credibility as an expert agency depends upon the openness of its decision making process and the extent to which the Commission's actions are grounded in empirical research, and its adherence to its enabling

would propose increased sentences in an era of dangerously overcrowded prisons without carefully weighing the impact each such proposal would have on prison populations.

At the same time, some of the most important proposals put forward by the Commission are unaccompanied by reports. For example, in amendment 9B, the Commission proposes to raise an offense level by up to eight level without providing adequate reason for the change and without providing any supporting data. Merely providing "a more appropriate sanction" does not set forth an adequate "Reason for".

Further, there are crucial structural issues underlying many of the amendments that are not addressed in the staff reports. For example, amendments 14 and 22 would entail significant shifts in the balance between real offense and charge offense sentencing, thus altering one of the bedrock policy choices of the initial guidelines. Meanwhile amendments, 1, 2 and 5 raise the question of how the Commission should respond to various expressions of congressional intent.

Yet neither the real offense issue nor the congressional intent issue is the subject of the Commission's own comprehensive staff report, despite their overarching importance. Either the Commission is proposing to act without considering the far reaching implications of its actions, or the Commission has itself considered these structural issues but proposes to act without affording the bench and bar an opportunity to comment intelligently upon them. Neither scenario is appropriate.

Carruther's proposals on Alternatives to Incarceration, Commissioner Carnes' working group on Mitigating Roles, and Commissioner Nagel's working group on Plea Bargaining. I believe that the mutuality of our interests in the federal criminal justice system will produce greater benefits as we work together early on, concerning the 1992 cycle.

At this point, I would be pleased to answer your questions.

COMMENTS ON SPECIFIC PROPOSED AMENDMENTS

Item 1. The 1990 crime bill increased the maximum offense level for certain sexual offenses. At the same time, the Congress directed the Commission to Study the sexual offense guidelines and determine if increased offense levels were appropriate. Now, before completing its mandated study, the Commission proposes to increase offense levels for these crimes.

This raises the broad question of how the Commission should respond to declarations of congressional sentencing policy. As noted in the body of our testimony, we believe that a comprehensive examination of this question is warranted.

Sometimes Congress is explicit: if it directs the Commission to set the base offense level for a crime at 22, the Commission is duty bound to comply. At other times, Congress is ambiguous: if a new law increases the maximum penalty for an offense, it may not always be necessary or wise for the Commission to increase the corresponding offense levels. Such legislation may be understood to provide greater scope for the court to depart upward from a guideline range that already provides adequate punishment for the heartland case.

Both options propose specific offense characteristics which would move the guidelines away from a modified charge offense system to a real offense system by permitting punishment for unrelated conduct that has not been proved beyond a reasonable doubt. This structural revision deserves far more consideration and analysis than it receives in the explanation accompanying this amendment.

logical for the Commission to ascertain the underlying cause of the prosecutorial disparity. One possibility is that some prosecutors find the operation of section 924 to be too harsh in individual cases. If this is so, a guideline amendment that would make the operation of the guideline uniformly harsh is plainly unwise.

The primary "Reason for" advanced is that U.S. Attorneys are not following the "Thornburgh Memorandum". The Commission should bring this matter to the attention of the Justice Department rather than act to supervise the Justice Department. The Supreme Court in Mistretta placed the Commission in the Judicial Branch, not in the Executive Branch. Further, the standard that the U.S. Attorneys must utilize in charging an offense, what is readily provable; one wonders how the Commission can arbitrarily second guess them on their decision-making.

Item 8. The explanation accompanying this amendment would make the extortion guideline equivalent to the armed robbery guideline, but does not say why this is just. Extortion typically involves the threat of future harm while robbery involves the threat of immediate harm. The explanation is also deficient in that it fails to justify the proposed offense level "floor" of 24, nor does it explain why a specific offense characteristic is needed for the few cases of product tampering.)

Item 8C proposes several specific offense characteristics that are either vague (what does the phrase "organized crime" mean?) or, as far as can be discerned from the absence of supporting data, unnecessary. Here again, the proposed amendments raise more questions than they answer. Of particular concern is the uncertain relationship between these specific offense characteristics and the "relevant conduct" and "role in the offense" guidelines.

Item 9B. This amendment proposes to double the punishment that a defendant will receive for a particular crime, but the only explanation offered for such a dramatic change is that it will "provide a more appropriate sanction" for the crime. By what criteria, did the Commission determine what constitutes an "appropriate sanction".

Item 11. The ABA appreciates the Commission's willingness to publish this request for comment, because it involves an aspect of the guidelines that we find most troubling: the unduly harsh punishment imposed on very low-level drug dealers under the structure of the current drug guidelines.

Pursuant to the Commission's request for a specific proposal, we suggest that a guideline be structured to provide an offense ceiling for the minor and minimal participants convicted of drug offenses. For example, a minimal participant

Item 19. This proposed amendment seems to respond to a very rare fact pattern, and therefore is best addressed through departure. Placing such "fixes" within the guideline, as in option one, leads to the increase bulk and complexity of the guidelines. No specific "Reason for" is set forth.

Item 21. The report accompanying this guideline suggests that majority of courts are sentencing toward the bottom of the guideline, so it is unclear why the Commission is proposing a complex revision of the guideline that would lead to higher offense levels. As in the bank robbery amendment, we commend the process by which the Commission proposes the amendment, but question whether the process has supported the outcome.

We believe that a significant in-depth study is warranted before implementation of this wholesale revision of firearms and explosives offenses. After reading the staff report, one is led to conclude that this proposal is based primarily upon the wishes to the ATF, and a single letter from a federal district judge.

Item 22. This proposed amendment would contain a series of alternative base offense levels, depending upon the court's assessment of the defendant's conduct under a preponderance of the evidence standard. This structure replaces several different guidelines, a structure which requires a defendant to be convicted of certain conduct before he is assigned to a particular guideline.

This shift to real offense sentencing may or may not be appropriate, but it appears to have been adopted without adequate consideration of the real offense issue, and is therefore objectionable for the reasons set forth in response to Item 14.

Item 23B. One part of the amendment would treat a foreign conviction as an aggravator, even if that country had failed to provide due process. This is inconsistent with § 4A1.2(h). It should be allowed only as a possible basis for departure.

In response to Item 16, we pointed out that it was difficult to offer informed comment on a proposed amendment that includes a four level range of possible offense levels. In this item, the Commission asks for such comment with respect to a fourteen level range. If the Commission has no basis for choosing an offense level between six and twenty for this conduct, it has no rational basis for this proposed amendment.

Item 25. Is there supporting data to justify raising the base level to make prison mandatory for at least part of the sentence.

Item 28. This new guideline carries a BOL of nine, higher than the BOL (8) for failure to report monetary

The Commission is not the Supreme Court of Sentencing.

We believe that the Commission should do a study of the case law in the area relating to burdens of proof and going forward, and the issue of due process.

Item 37C. This will likely result in a shut-off in any and all information provided by Defendants. Is the limitation of the protection provided the Defendant worth this result?

Item 37F. The issue of tying in of a gun not directly used in a narcotics offense with marginal, unknowing conspirators deserves study as part of Commissioner Carnes study.