

Testimony before the
United States Sentencing Commission
on the Structure and Operation
of the Federal Sentencing Guidelines

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Mr. Chairman and members of the Commission, my name is Dr. Edward Burger. I am pleased to have the opportunity to comment on aspects of the Federal Sentencing Guidelines. I represent the Council for Court Excellence of the District of Columbia. I am a member of its Board of Directors and Chairman of the Criminal Justice Committee of the Council. The Council for Court Excellence is a nonprofit civic organization that works to improve the administration of justice in the local and federal courts, and related agencies, in the Washington metropolitan area and in the nation.

The Council for Court Excellence embraces, by design, several groups interested in seeking improvements in the courts - jurists, U.S. attorneys, practicing lawyers, members of the business sector and the general community of the citizenry. My remarks this morning should not be understood as necessarily representing the opinions of the separate institutions from which some of the Council's members come.

The Council for Court Excellence has, from near its beginning ten years ago, contributed to the discussions of sentencing and sentencing reform. The Council, early in its history, played an important role in bringing to the attention of the local courts, prosecutors and defense

lawyers and the District's legislative council, in a systematic fashion, the fund of experience across the nation concerning sentencing reform efforts and the relationship of sentencing practices to broader matters, including parole and prison capacity.

In December 1986, we testified before the Commission on aspects of what were then Preliminary Draft Sentencing Guidelines. Our position at that time was to commend the Commission both for the concept and for the then emerging guidelines process. We applauded and associated ourselves with the Commission's goals of moving the federal courts towards reducing sentencing disparity, preserving sentencing authority in the court, increasing the correspondence between the sentence imposed and the sentence served and, as a result, enhancing public confidence in the criminal justice system. At the time, we commented on eight specific features of the guidelines:

1. We expressed concern that the draft guidelines were highly detailed and overly specific.
2. We observed that it was not clear how proposed guidelines were linked to past sentencing practices and experience.
3. We applauded the adoption of the concept of modified real offense

sentencing.

4. At the Commission's specific request, we commented on the proposal to reflect "other offender characteristics" such as age, education, or community ties, as mitigating or aggravating factors in reaching sentencing judgments.

5. We observed that the draft guidelines at that time seemed to give little focus to alternatives to incarceration such as fines and restitution.

6. We noted our concern that at that time, there appeared to be no provision for analysis of the effects of the operation of the guidelines on prison use in the face of pressures on prison capacity.

7. Finally, the draft guidelines at that time were silent as to procedures for departures from the prescribed guidelines.

The institution of the federal sentencing guidelines process four years ago was unquestionably a bold step, conceived by Congress and developed by the members of the Sentencing Guidelines Commission. Development of the Federal Sentencing Guidelines followed in time the introduction of several other sentencing guidelines systems in state courts. The results and effectiveness of the federal guidelines in practice are only now beginning to

be understood.

There is still little empirical information of recognized quality, and what data there are reflect only a portion of the period since the guidelines process was introduced. At the same time, the institution of the federal guidelines process has been accompanied by proffered appraisals from many quarters, including a very large number of severe criticisms.

The evidence thus far does seem to indicate that, since the U.S. Sentencing Commission's guideline process was put into effect, disparity of sentence among similar offenders and similar offenses has been reduced. Further, there is strong indication that there is now greater certainty in sentencing. Finally, as the Commission itself reports, with the abolition of parole, there is correspondence between the sentence awarded and the sentence actually served.

I must qualify these judgments by pointing out that empirical data to support the conclusion of reduced disparity, pre-guidelines versus post-guidelines, are still quite limited. The only real data bearing on this subject come from Commission itself. They cover only 2 1/2 years of experience and are drawn from relatively few cases.

In our view, there are two features of the present system which

threaten to compromise the ability of the guidelines process to achieve its intended goals. One derives from the combining of the guidelines system with the series of statutory mandatory minimum sentences. The other concerns the highly mechanical and formulaic character of the guidelines, themselves. As the Commission's own reviews have noted, the evolution of the Federal Sentencing Guidelines corresponded in time with the Congress' enactment of a large number of statutory mandatory minimum sentence laws directed especially at drug- and weapons offenses. In our view, and in the opinion of others, this enforced admixture has compromised the intended workings of the guidelines, has contributed to a number of perverse outcomes and may be a principal factor provoking criticism of the guidelines themselves.

The Commission's challenge, when crafting the guidelines, of incorporating the statutory minimums into the guidelines framework has led to numerical values for base case categories which, in the view of some, may not be justified in all instances. In some instances, undesirably harsh sentences are said to have emerged from the resulting combined numerical values. The mandatory minimum sentences appear to have further exaggerated an unwanted transfer of sentencing discretion from judges to

prosecutors, who are able to craft charges to match intended sentencing outcomes. Finally, the mandatory minimum sentencing values appear to have compromised the intended operation of real offense sentencing. It is this latter process which was designed by the Commission as a mechanism intended to provide a balance to the findings of prosecutors.

The Commission staff have also pointed to the fact that statutory mandatory minimum sentence penalties have tended to diminish the achievement of the principal goal of the guidelines process - reduction in disparity in sentencing. As the Commission's own analysis has shown, patterns of prosecutors' selection of charges to bring to the court have varied among geographic regions and among racial groups of offenders. The Commission's assertion that "...lack of uniform application creates unwarranted disparity in sentencing..." is a serious matter to the extent that it may undermine the singular goal of the guidelines process.

The second issue I would like to underline for the Commission is the highly mechanical, structured process that is the character of the federal guidelines. The determination of a numerical value in the federal guidelines system is supposed to be a process which anticipates all possible factors which could shape the character of both the offender and the offense. The

federal process appears highly complex, overly mechanical and highly specific. Judicial discretion appears to have been substantially reduced to a point which exceeds what the Commission had originally intended. As you know, a plea for more flexibility in the structure and operation of the guidelines was the sense of the recent recommendations of the Judicial Conference of the United States.

Again, I would note that this comment is consonant with our testimony on this matter in 1986. The Commission should examine again the perverse and undesired effects of the high degree of attempted specification in the guidelines and the constraining, formulaic character of the process of determining sentences. In doing so, the Commission would do well to study the experience and character of some of the mandatory state guidelines systems designed around more conceptual structures. For example, Minnesota's 10-year experience is a worthy example.

Finally, as we did in our earlier testimony, I would urge the Commission to put in place mechanisms for keeping track of the effect of sentencing practices under the guidelines system, among other factors, on prison use. Burdens on prison capacity and on public expense for incarceration will continue to be important issues raised by the public and

legislators. An understanding of these relationships will be important in future support for sustaining confidence in the elements of the criminal justice system.

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