

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

PROBATION OFFICE

S. THOMAS NOELL, JR.
CHIEF PROBATION OFFICER
227 FEDERAL BUILDING
401 WEST TRADE STREET
CHARLOTTE, N. C. 28202

March 29, 1990

GEORGE E. MICHAEL, JR.
SUPERVISING PROBATION OFFICER

REPLY TO:

Charlotte, N.C.

Mr. Paul K. Martin
Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Re: Comments on Proposed
Guideline Amendments

Dear Mr. Martin:

I serve as Chief Probation Officer in the Western District of North Carolina and wish to forward my responses, comments and opinions on the proposed amendments to the Sentencing Guidelines, to be submitted to Congress on or before May 1, 1990. My comments are contained on the attached page(s) in response to the numbered proposed amendments and more specific to the changes proposed in revision of Chapter Seven (Violations of Probation and Supervised Release). My comments are responding only to those changes to which I highly favor or those changes to which I object.

Please see that this information is forwarded to the proper person for consideration. Thank you for soliciting input to the amendments.

Sincerely yours,

S. Thomas Noell, Jr.
S. Thomas Noell, Jr.
Chief U.S. Probation Officer

STN:cm

Encl.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

On behalf of all Federal Public and Community Defenders throughout the United States, thank you for the invitation to testify. We also want to thank the Commission for

- 1) inviting a Federal Defender intern to join your staff, and
- 2) setting up a Defense Practitioner Advisory Committee.

We commend the Commission for inviting comments on the proposed amendments. As federal defense practitioners, we have been totally immersed in Guideline Sentencing.

A few opening salient points about Guideline practice.

While we who are present today in these hallowed chambers are privy to the inner-workings of the Guidelines of 1987, 1988, 1988 1/2, 1989 and now proposed 1990, we are not participants in all of the federal criminal cases in the 50 United States. And unfortunately, we cannot develop Guideline de-coder rings to include in lawyers boxes of Oat Bran.

Most of the participants in Federal Guideline practice have not even mastered the original Guidelines -- the complex, complicated categories, multipliers, aggravators, mitigators, etc., etc., etc.

- (1) The most constructive answer to the present-day situation is to put these amendment proposals on hold. Don't change the Guidelines; let everyone try to master them. You should, each and every one, and your entire staff, get out of Washington and visit the federal districts where they are being implemented, to find out first-hand what is going on. Watch sentencing proceedings, talk to participants, see if they truly know how to apply the Guidelines, ask for their suggestions. To use the old Railroad Crossing Maxim, we believe that the Commission should "stop, look and listen", then proceed cautiously.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

- (2) A second constructive suggestion would be for the Commission to establish a task force aimed at simplifying the Guidelines. They are extremely and unnecessarily complex.
- (3) The Commission should not propose any 1990 Guidelines amendments except for those few technical matters absolutely essential to the functioning of the Guidelines. These 88 pages of proposals lack necessary supporting background data and research. The explanations accompanying most of the amendments-- "clarification", "to even out penalties", "to better reflect the seriousness of the conduct" -- provide support for the Defender recommendation that these proposals be shelved.

We provide the following comments with regard to the specific proposals:

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-897-9642 (FTS)
815-897-9642 (COMM.)

VII. Concluding Comments

Since the effective date of the sentencing guidelines in November of 1987, the Commission has amended the guidelines on four occasions resulting in the incorporation of 306 amendments. The frequency and number of amendments is burdensome, not only in mastering the changes, sometimes minor and sometimes major, but also in dealing with legal issues that they generate such as the ex post facto considerations. The current notice of proposed amendments entails 70 more. I speak for my colleagues on the Committee and the federal bench as well as the U.S. probation officers that assist us in requesting that the pace of future amendments be slowed.

Beyond this general request for a substantially reduced pace of guideline amendments, I strongly urge that the Commission not promulgate any amendments at this time (this comment pertains to those addressed by Judge Kocoras as well as those addressed herein). That is because the Commission is far below its statutory complement and lacks the statutorily required three judicial members, 28 U.S.C. § 991, so that any guidelines that it promulgates may well be subject to legal challenge. The uncertainty, confusion and extra work that such challenges will create surely makes the game not worth the candle.



Washington, D.C. 20530

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

Mr. Chairman and members of the Commission:

I appreciate the opportunity to appear before you to address the proposed sentencing guideline amendments. I am pleased that the proposals address a number of concerns of the United States Attorneys, including current weaknesses in the guidelines for assault with intent to commit murder and arson. While we recognize that some important amendments are needed, the United States Attorneys are concerned about the disruption caused by guideline amendments every year and the need to determine in each case which version of a guideline applies. We urge the Commission to give careful consideration to the proposed amendments and to adopt those that are necessary. I will address two areas where we believe that revision of the guidelines is necessary.

Mr. Chairman and Members of the Commission:

My name is Samuel J. Buffone. I appear today to testify on behalf of the 350,000 members of the American Bar Association in my capacity as Chairperson of the A.B.A.'s Committee on the United States Sentencing Commission. I am pleased to have this opportunity to convey the views of the A.B.A. with respect to the proposed 1990 amendments to the federal sentencing guidelines.

Our Committee has testified before the Commission on numerous occasions, and many of our comments have concerned the process by which the Commission promulgates guidelines. We have praised the Commission when its process has been most deliberative and receptive to the comments of interested observers, as in the case of guidelines for organizational defendants. But we have never hesitated to criticize the Commission when its process has been characterized by haste and inaccessibility. Today, I am compelled to convey the A.B.A.'s disappointment at the process by which the proposed 1990 guideline amendments are being promulgated. Our concerns lead us to urge that many of the proposed amendments not be transmitted to Congress.

Our position on the proposed guideline amendments is based upon our Standards for Criminal Justice (Standards). The

Standards envision a guideline process that has at its core an expert administrative agency with broad authority to draft and refine sentencing guidelines. The provisions of the Sentencing Reform Act reflect a similar view of the Commission. The Act grants broad authority to the Commission to promulgate and amend guidelines. The legislation, however, places limits on the amendment process.

The Commission is first required under 28 U.S.C. 994(x) to comply with the notice and comment procedures of the Administrative Procedures Act. 28 U.S.C. 994(o) provides authority to the Commission to amend and revise the guidelines "in consideration of comments and data coming to its attention." That same section sets out a process for solicitation of comments on the operation of the guidelines by interested segments of the criminal justice community. Finally, one of the statutory purposes of the Commission as set out at 28 U.S.C. 991(b)(1)(C) is to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."

The Standards' vision of an expert sentencing commission acting as an informed and responsive administrative agency is consistent with the Supreme Court's Mistretta opinion. In affirming the constitutionality of the Commission, the Court relied on the legislative standards for exercise of delegated authority and the status of the Commission as a true expert administrative agency.

Consistent with our view of the Commission as an expert administrative agency, we renew our suggestion that the Commission promulgate internal regulations to govern the guideline amendment process. We note that 28 U.S.C. 994(a) envisions that the Commission will promulgate and amend its guidelines pursuant to "its rules and regulations."

This model for the Commission's deliberative process also furthers another major goal recognized in the Standards. The Commission must develop the confidence of those who work in the criminal justice system. The development of institutional credibility should be a priority for the Commission. If judges, probation officers, prosecutors and defense attorneys recognize the fairness and thoroughness of the process by which guidelines are developed, implementation will be smoother.

We fear that the proposed amendments stray far from this model of decision making in at least three respects. The Commission has offered little time to respond to complex amendments. The proposals lack meaningful statements of reasons for their adoption. Perhaps most significantly, the proposals do not appear to be grounded in an empirical analysis of current guideline practice.

Turning first to the issue of timing, I wish to express the A.B.A.'s dismay at the very short comment period the Commission has established for this set of amendments. Less than 30 days

have passed since these highly complex proposals were published in the Federal Register. We are aware that the comment period will remain open until March 30, but that allows for only 42 days during which the federal bench and bar are expected to discover, decipher and comment on the significance and desirability of the proposals. This period is clearly inadequate, and may account for the paucity of witnesses at today's hearing.

It must be remembered that the Sentencing Commission is a quasi-legislative body. In the absence of Congressional intervention, this Commission writes law, but does so without the benefit of the legislative process. These proposals will probably not be the subject of committee hearings, or a committee report, or debate on the floor of the House or Senate. In light of the importance of the Commission's work, the underpublicized nature of the amendment process, and the large number of judges, lawyers and citizens who have a stake in the guidelines, it would not be unreasonable to suggest that the Commission initially circulate proposed amendments by December 15 of the year preceding the May 1 submission to Congress.

Our concern over the abbreviated comment period is exacerbated by the absence of meaningful explanations accompanying the proposed amendments. Some of the proposals are merely technical or clarifying and do not warrant an extended rationale, but many others represent far reaching changes in the structure of the guidelines and the scope of criminal punishment. Yet there is

little in the Federal Register that explains the reasoning underlying the Commission's substantive proposals. If the Commission relied on current practice data or social science research or studies of any kind in support of its work, one would not know that from reading the perfunctory explanations accompanying these proposals. As a result, it is exceedingly difficult to evaluate the need for many of the proposed amendments or their efficacy.

Many of the proposals would alter offense levels, resulting in harsher sentences. Why should this occur? Does empirical research demonstrate that current sentences are too low? Are these lengthier sentences based on a deterrence rationale or a retributive rationale, and are they justified by either rationale? In an era of dangerously overcrowded prisons, a heavy burden of persuasion rests on anyone who would advocate longer periods of incarceration, and the Sentencing Commission has not met this burden.

In the absence of supporting data or explanatory position papers, we can only assume that these amendments reflect the normative views of the four remaining Commissioners. Is robbery more serious than extortion? Is two years enough punishment for selling obscenity? Congress created a commission of social scientists, correctional specialists and judges: in short, a commission of experts. Congress anticipated that this expert commission would seek objective answers in the literature of

penology, in legal precedents, and in the experience drawn from the application of the guidelines. This commission's work product does not, as far as we can tell from this set of amendments, draw upon any of these sources.

To be sure, social science does not have all the answers -- Congress itself makes many normative judgements about the severity of criminal conduct without reference to the scholarly literature. We do not believe, however, that the Sentencing Reform Act of 1984 created the "junior-varsity Congress" Justice Scalia feared in his Mistretta dissent. The Act created an administrative agency to make decisions within legislative constraints based on technical material uniquely within the agency's ken. To justify its existence, the Commission must produce empirical research that supports each policy decision it reaches. Virtually all of the substantive amendments the Commission has proposed this year fail that basic test and therefore should not be adopted.

The proposed amendments fail a second test: they are not accompanied by research that predicts their likely effect. Specifically, they are not accompanied by prison impact statements.

The population of the federal prison system exceeds capacity by more than 50%. The Commission is not unaware of that fact but goes about its business as though it were not required to "take into account the nature and capacity of the penal, correctional

and other facilities" in promulgating guidelines. 28 U.S.C. 994(g). In fact, 994(g) mandates that the guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." We do not know if the Commission complied with this directive, because its proposals are not accompanied by any prison impact analysis. This is another ground upon which a number of the proposals should be rejected.

Finally, the Commission is to be faulted for not encouraging the development of a common law of sentencing, one of the stated goals of the Sentencing Reform Act. There are two ways in which this goal could be furthered. First, when the Commission proposes to amend a guideline that the courts have already interpreted, the explanation accompanying the proposal should reference the published opinions on the subject. Hopefully the Commission is using the "feedback" process inherent in the guidelines system to inform its decision-making process, and interested observers should be able to comment on proposed amendments in light of the available case law. Second, there are a number of areas in which the Commission should not rush to respond to individual judicial decisions, but should instead permit courts to interpret the guidelines over a period of time. The Commission should encourage, not stifle, the ability of judges to influence the guideline system through the process of guideline interpretation.

Let me highlight three of the proposals to illustrate the concerns I have just expressed.



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Mr. Chairman and members of the Commission:

I am pleased to appear before you today to discuss the amendments recently proposed to the sentencing guidelines. We find that many of the amendments will improve the implementation of the guidelines. We applaud the Commission's efforts in several important areas, including the amendment of the arson guideline, the revisions made to the guidelines relating to child pornography, and the addition of a new criminal history category for serious offenders. These amendments will foster the purposes of sentencing set forth in the Sentencing Reform Act and assure that serious offenders are punished appropriately. We urge the Commission to adopt these amendments for submission to the Congress by May 1. There are several areas, however, where we believe further work is needed before amendments are submitted to Congress.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PROBATION OFFICE

CARLOS JUENKE
CHIEF PROBATION OFFICER

364 U.S. COURTHOUSE
P.O. BOX 012559
MIAMI, FL 33101-2559

March 8, 1990

Ms. Sharon Hennigan
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

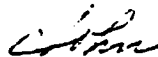
Dear Sharon:

Enclosed for your review are three copies of the letter that was directed to Judge Wilkins in reference to the findings and recommendations of the work group on probation revocations. I have sent copies directly to Jerry, Joe, Nancy and Bill. I would ask that you provide copies to Patricia and Tim. Additionally, please feel free to make copies for distribution to Rusty, Jay, Phyllis and anyone else that you feel may be interested.

There is something that you should be aware of in terms of the letter's contents. I was not the sole author. The letter was very much a group project. I wrote an initial draft of a letter. The contents of that letter were reviewed with each work group member. Several of the members felt that changes should be made. For example, two members felt that the paragraph describing the committee's recommendations as to Option Two were too tame. Consequently, stronger language was inserted at the request of these members. I point this out in case a suggestion is made that the letter was written on behalf of the committee members without their approval.

This is a highly charged issue and generates considerable personal investment for all parties. If you wish to discuss this matter further or review the letter, please do not hesitate to contact me. Thank you for asking me to participate on the committee and please do not hesitate to contact me again if you feel I may be of the slightest assistance to the commission.

Sincerely,



John M. Shevlin, Supervising
U. S. Probation Officer

JMS:mhd

Enclosures

PREPARED REMARKS OF BENSON B. WEINTRAUB ON BEHALF OF
THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL)
AT A PUBLIC HEARING BEFORE THE UNITED STATES SENTENCING
COMMISSION ON MARCH 15, 1990

Judge Wilkins and Members of the Commission:

I am a partner in the law firm of Sonnett Sale & Kuehne, P.A. with offices in Miami, Florida. My practice is substantially limited to the representation of offenders in connection with matters relating to application of the sentencing guidelines, direct appeals and habeas corpus proceedings. For the past five years I have served as the Chair or Vice Chair of the NACDL Sentencing Committee and have had the pleasure of working with members of the Commission and its staff in matters concerning drafting of the guidelines and proposed amendments. I also have the distinct privilege of serving on the Commission's Practitioners' Advisory Group.

In preparing these remarks, I have considered the consensus of opinion on behalf of the constituency which I am pleased to represent, more than 20,000 criminal defense lawyers who practice in every State and Federal District throughout the nation.^{1/} Quite candidly, my colleagues have not only expressed substantial objections to the guidelines generally but to these amendments specifically.

^{1/} NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to assure justice and due process for persons accused of crime, to foster the independence and expertise of the criminal defense bar, and to preserve the adversary system of criminal justice. The membership of NACDL and its 40 State and Local affiliates includes criminal defense practitioners, public defenders and law professors.

I will comment on salient portions of the proposed amendments. At the outset, however, I must relate certain procedural objections to the Commission's rulemaking process. Under 28 U.S.C. §994(x), Congress deemed the notice and comment provisions of the Administrative Procedure Act applicable to the Commission's rulemaking function. 5 U.S.C. §553. However, the APA merely provides that "general notice of proposed rulemaking shall be published in the Federal Register" and such notice shall include the time and place of the public hearing and the subject matter of the agency's proposals. Parties interested in preparing substantive comment, testimonial or otherwise, have simply had insufficient time within which to prepare for today's hearing.

NACDL concurs with those who have expressed the position that proposed amendments being considered for the May 1st submission to Congress should be circulated and published no later than December 15th of the preceding year. Interested parties should be provided with annotated versions of the full text of any proposals at the time of the notice.

Before addressing the substantive proposals, those members of NACDL who have studied the amendments have identified several relevant themes of general application.

First, the Commission is dutybound to conduct extensive empirical research in monitoring sentencing trends under the guideline system in order to best reflect how the new process is working. Prior to undertaking development of the initial set of guidelines, the Commission reviewed previous sentencing practices

through statistical analysis based upon summary reports of approximately 40,000 convictions and 10,000 Presentence Investigation Reports.^{2/} As one of our colleagues succinctly stated, "If the Commission relied on current practice data or social science research or studies of any kind in support of its work, one would not know that from reading the perfunctory explanations accompanying these proposals." Consequently, it is difficult, if not impossible, to evaluate the need for many of these amendments based upon the Commission's generalized statement of reasons published in the Federal Register. Similarly, we have not discerned any evidence that the Commission has or is considering guidelines which "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. §991(b)(1)(C). Moreover, since the vast majority of substantive changes appear to lengthen the amount of actual prison time required to be served under the guidelines, we have not been made aware of substantial evidence indicating that the Commission has complied with its statutory mandate to consider the impact of the guidelines and amendments on prison population. See generally 28 U.S.C. §994(g).

^{2/} Interestingly, NACDL has been seeking access to the Commission's raw data for several years, especially that data upon which the original set of guidelines was based. NACDL has sought to avail itself of the Commission's rule relating to public access to Sentencing Commission documents and data and we have been consistently frustrated in accessing specific data concerning FPSSIS through the Inter-University Consortium for Political and Social Research.

Through these amendments, the Commission seeks to further limit the traditional exercise of the Court's discretion at sentencing by proposing changes to guidelines where the Court might otherwise employ a departure in an appropriate case. These sweeping changes are too broad and remedial action, if indicated, can frequently be obtained through departure.^{3/}

As a final introductory note, NACDL has noted with interest the apparent impact of the Department of Justice on this judicial agency. This is best seen through a full-time staff position occupied by an AUSA. Why not have a full-time defense advocate serve on the Commission's staff to contribute much needed insight and balancing to the deliberative process?

Proceeding to the merits, I will address certain amendments which have been proposed. However, no inference should be drawn with respect to any amendment which is not specifically addressed as we have not had sufficient time within which to prepare a comprehensive response.

^{3/} According to the Commission's 1988 Annual Report, 82.3% of all sentences imposed were within the guidelines; 2.91% were above; 9.1% were below; and 5.7% of the sentences were below the guidelines based upon USSG §5K1.1. Does the Commission believe that the departure rate is too high? Too low?