

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).

CHAPTER 1 -- Part A (Introduction)

4(b), Departures, at Page 8,

In rewriting the provision, the Amendment deletes two sentences from Page 7 of the Guidelines that should be retained:

Thus in principle, the Commission by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the court's departure powers.

They should be retained to permit the courts, where necessary, to fashion justice through a departure, which will then be channeled back to the Commission for a better understanding of how the Guidelines are functioning. This is just the type of information the Commission needs as a basis for implementation of future amendments.

4(c), Plea Agreements at Page 9

The rewrite Amendment deletes the last sentence from page 8 of the Guidelines:

Since they will have before them the norm, the relevant factors (as disclosed in the

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).

plea agreement), and the reasons for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

This should be retained. The Commission should not discourage proper departures. They should be utilized, where appropriate, as the type of experience that can form the basis for constructive amendments in the future.

(g) Sentencing Ranges, at Page 12

The rewrite Amendment neglects to update the prison population numbers and projections. We propose the revised numbers. As of 11-1-87, Federal Prisons were at 159% of capacity; as of 3-12-90, they are at 168% of capacity. Inmate numbers have gone from 44,000 to 55,000.

STATEMENT OF
SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 1. This amendment would revise the introductory chapter of the guidelines. This appears to be an unwise amendment. Chapter One is a historical account of the initial guideline promulgation process, and any changes in it, even if not intended to be substantive, will be interpreted as a change in the key compromises underlying the guidelines. The topics discussed in Chapter One include real offense sentencing, plea bargains, departures and consideration of offender characteristics. The Commission should send only the clearest signals in these important areas, and indeed should address each topic comprehensively. The proposed amendment of Chapter One may be read as an attempt to address these subjects through indirection, a problem complicated by the absence of meaningful statements of reasons throughout the amendment package.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

1. Reference to the proposed amendment to Chapter One, Part A is correlated with the pagination of the December 16, 1989 draft of "1990 Amendments 001" at 1.7. Under subsection "(b) Departures.," NACDL feels it would be inappropriate to delete the language: "Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure." The next sentence should also remain and be modified to reflect: "At this time, however, the Commission does not so limit the courts' departure powers." The spirit of full faith and credit, without limitation, should be accorded the concept of "'judicially-created' departures." United States v. Summers, 893 F.2d 63 (4th Cir. 1990) (Wilkins, J.). 18 U.S.C. §3553(b). Judicially created departures may sometimes override the Commission's self-imposed limitation on the availability and extent of departures purportedly proscribed by USSG §§5H1.1-.10.

Regarding the second full paragraph of 1.8, "(c) Plea Agreements.," we feel that the elimination of the last full sentence is unwarranted ("Since they [Courts] will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.") 1.8-1.9.

Elimination of this sentence would be inconsistent with the spirit of 18 U.S.C. §3553(b).

As a general observation with respect to plea agreements, the prosecutors' unbridled ability to manipulate the guidelines through charging decisions is capable of gross abuse. This position is in marked contrast to the statement at 1.6 (last paragraph, second sentence) which states "Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence." Ibid. (emphasis supplied). That statement is erroneous because the standard of evidence relating to a finding of guilt radically differs from the standard governing resolution of disputed facts or factors relevant to sentencing. Moreover, through multiple count charging, the prosecutor can immediately upgrade guideline units and bring relevant conduct within the scope of the count to which the defendant may plead guilty pursuant to a plea agreement. The Commission must proceed cautiously and carefully, taking into account the views of both prosecutors and defense lawyers regarding the effect of the guidelines on plea practices.

The Commission purports to have considered the "Sentencing ranges in light of their likely impact upon prison population." 1.11. However, we feel that it would be disingenuous to rely upon data generated in 1987 with respect to current and future prison population, particularly in view of the guideline amendments and legislative changes which have taken their course in the interim.