

THE INSTITUTE FOR GOVERNMENT AND POLITICS

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REVISED

TESTIMONY

PATRICK B. McGUIGAN

DIRECTOR, JUDICIAL REFORM PROJECT

INSTITUTE FOR GOVERNMENT AND POLITICS

The United States Sentencing Commission
Hearing on Offense Seriousness
April 15, 1986
Washington, D.C.

TESTIMONY OF
PATRICK B. MCGUIGAN

Judge Wilkins and members of the Sentencing Commission, I appreciate this opportunity to present my views on some of the important issues you face as you develop firm, effective sentencing guidelines for the federal system.

The Institute for Government and Politics is a division of the Free Congress Research and Education Foundation, a public policy research organization based here in the nation's capital. Since 1980, I have been Director of the Judicial Reform Project, one of the activities of the Institute. We have published several books on legal policy questions, including two books specifically on criminal justice issues. A third book in this area, Crime and Punishment in Modern America, will be released this summer. Obviously, the work of the U.S. Sentencing Commission is of vital importance to our organization and to the thousands of Americans who support our research activities.

It is important for me to begin by stressing a point I have raised in earlier correspondence with one member of the Commission. Specifically, it seems to me that the Commission is taking an incorrect approach to its agenda. Your first step should not be to collect hordes of data or factors, but rather to decide policy. Moreover, it is crucial that your policy-making decisions be appropriately limited. The kind of sample cases you sent me are not so much illustrative of the problems you face, or of the decisions you should be making, as they are instead of a flawed approach.

The very nature of the data-collection process you are apparently undertaking represents a hidden policy agenda that I believe is antithetical to the purposes of the Commission as I -- and I believe many other supporters of the Comprehensive Crime Control Act -- understood those purposes.

The primary goal of the Commission should be to establish sentencing guidelines designed, first and foremost, to promote Truth in Sentencing as a

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policy goal. The American people deserve to have a sentencing policy which is open and known -- and understood -- and not a sentencing policy masked by sociological gobbledygook. It sounds to me as if you are looking at masses of complicated -- and thoroughly irrelevant -- criteria. As Jack Kress puts it in his seminal book, Prescription for Justice, the central purpose of sentencing guidelines "is to open a system too long shielded from public scrutiny."

It does not appear to me that your functional committee structure facilitates that central purpose. Rather, it allows, and even encourages, a mindset that gives great weight to issues of relative insignificance. Indeed, I note that not one of your several committees even mentions the primary issue of underlying and consistent policy-setting.

Moreover, I find astonishing the time-consuming and incredibly costly data collection process the Commission appears to be undertaking. From your earlier communications to me, one might assume that no previous work has been done in collecting lists of factors or ranking offenses. To the contrary, literally millions of tax dollars -- most of it at the federal level -- has already been expended to these same ends. The Commission can successfully meet the "tight" deadlines it has and, furthermore, save the law-abiding taxpayers enormous sums of money by reviewing the data and legislation already in hand.

There is simply no need for you to waste money in a period of already excessive federal spending. The Commission should, instead, learn from the already existing state and local sentencing guidelines systems. The Commissioners can build upon the models of intelligent and successful programs -- and learn from the errors already made.

As one important example of the latter, the Commission must avoid the gross error made in Minnesota, where that Commission implicitly decided that

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providing larger living quarters for serious felony offenders was more important that protecting decent citizens from criminal predators.*

For all intents and purposes, Minnesota adopted a purely "just deserts" model, with no concern for deterrence, crime control or public safety in the formation of sentencing guidelines. This approach is absolutely antithetical to everything ^{The U.S.} Congress believed when it passed the legislation.

(As an aside, I might also stress that the existing Parole Commission is invalid as a model for the U.S. Sentencing Commission's work. Leave the determination of moral blameworthiness, justice for the offender and other aspects of "just deserts" theory to the Almighty. Your job is to develop sentencing guidelines designed to promote deterrence of crime through the punishment of criminals.)

Frankly, this sort of thing is starting to get obscene. Americans communicated quite effectively in 1984 their determination that criminals be incarcerated. It will be a tragedy if those who described the Comprehensive Crime Control Act of 1984 as "dead on arrival" in the House of Representatives wind up being the ones who manage and implement its provisions. The mentality that ferrets out rehabilitationist minutiae instead of concentrating on central policy goals may lead the Commission to repeat just such errors in its work, should the Commissioners proceed on the path they are already following.

Now, placed in this context, I can deal with the specific concerns you asked me to address. The topic of this hearing is the ranking of offenses by seriousness. While your role in this area is crucial, I also believe it to be sharply limited. Congress uniquely placed this Commission within the judicial branch for a reason. You are not to legislate. As I see it, this is not a matter of choice -- it is a constitutional imperative. The federal criminal code states the policy of the judicial and legislative branches of the government -- and your limited and proper function is not to redefine those roles by even your most brilliant insights, or even by a consensus of the many "experts" whom you may ask to rank order offense scenarios. These law school hypotheticals may be fun to play with, and will doubtless provide days of entertaining and intellectually engaging activity for your staff, but they are not what your task is about.

Your first task in ranking offense seriousness is to go to the criminal code and ascertain how Congress has preliminarily rank-ordered the offense in question. Then, and only then, should you try to flesh out the interstices between the code provisions. I, for example, would probably opt for a generic ranking of crimes, putting crimes against the individual first, followed by

McGuigan testimony, page four

crimes against the state (among which I would include drug offenses) and then crimes against property (among which I would count most of the so-called white collar crimes). But, should my ranking -- even if my views are accompanied by those of numerous "experts" -- really matter anywhere near as much as that of a congressional enactment? Of course not. Yet, your methodology is leading you down this slippery slope with ease.

Indeed, I note with some shock that this most basic separation and allocation of powers question is not even asked! Instead, the questions you do ask virtually assume the propriety of ignoring legislative enactments. Obviously, if not asked to address this, most of your respondents will not answer it; this appears to me to be a major methodological flaw. I hope that this was merely accidental. Frankly, given the direction in which the Commission seems determined to head, I wonder.

Surely, for example, your bank robbery hypothetical is already addressed by the criminal code. I am not a legal authority, but most statutes of which I am aware address the issue of danger to the public more than they do the fortune of the robber (in terms of how much he or she gets away with). Given my own predilections, I certainly regard weapon use and harm to the citizen as far more important than the amount taken -- don't you?

Your question concerning the matching of sanctions as against crimes is incomprehensible in isolation. Until you set policy, you simply cannot answer it. Assuming the primacy of protecting the public, I can answer the question; but otherwise none of your respondents will be talking the same language. A Marxist concerned with state monopoly of property would give an altogether different response, as would anyone more concerned with redistribution of wealth than with the reduction of violent crimes.

As to the questionnaire, I am attaching my rank-ordered response. I emphasize, however, the reluctance with which I do this because

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Perhaps the most glaring -- and I dare say, outrageous -- methodological flaw in this assignment is the hidden assumption of equal spacing between the ranks. The most immense gaps will be viewed as equal in this analysis, unless your research staff decides to interpolate their own biases into the results.

A second, and equally hidden, flaw is how these examples were chosen. You concede they are not representative and yet they will clearly be treated as such in discussion. Among the many important questions begged by these choices is whether or not this Commission's task is to create a working guidelines system for the federal courts or whether, instead, your task is to put forward a national "model" virtually ignoring the fact of the uniqueness of the federal caseload. While the Commission's work will undoubtedly be closely monitored by concerned individuals in the various states, I opt for the former approach -- because my federalist leanings tell me the "models" already exist in the states. But again, why do I have to draw out this basic question? Why, instead, do you not yourself address it as of first importance? The approach you have taken will have you constantly reinventing the wheel and going over the same ground ad nauseum.

I urge the Commission to restructure and reorganize its approach to these questions so that you may meet your time schedule, reduce your expenditures, and most importantly meet the goals assigned by both the Congress which created you and the President who appointed you.

Thank you for this opportunity to address you.

OFFENSE SERIOUSNESS QUESTIONNAIRE

INSTRUCTIONS: This questionnaire presents sixteen crime scenarios which you are asked to rank in order of seriousness. In the box beside each, please rank the relative seriousness of the offense from 1 to 16, number 1 being the most serious and number 16 the offense you deem least serious among those presented. Please attempt to differentiate each offense with a unique rank from 1 to 16. If, however, in your opinion two offenses are essentially identical in seriousness, you may assign the same number to both offenses (for example, 5). In that case, do not assign the next number in the sequence (6), but rather assign 7 to the offense that follows in seriousness.

You may write in additional comments in the space provided on page 4. Please indicate your name, organizational affiliation, and the organization's address and phone number.

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Pat McGuigan

Organization:

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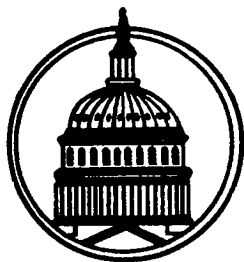
Phone:

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- A. The reported head of an organized crime family is found guilty of racketeering in a corrupt organization (RICO). The predicate offenses involved violent crimes and frauds. 4
- B. A chemical corporation's valuable machinery will be damaged unless toxic chemicals are released into a stream. The chemicals pose no risk to human life. After approval by the company's board of directors, the plant manager releases the chemicals which kills a substantial number of fish. The corporation is convicted of a felony for polluting the environment. 11
- C. An estranged husband is convicted of first degree murder for shooting his wife at her place of employment in a federal building. 1
- D. A draft evader is convicted after a presidential order suspending the draft, though the evasion took place prior to the suspension order. 16
- E. An Assistant Secretary of Defense is convicted of accepting a \$10,000 bribe from a bidder on a multimillion dollar defense contract in which the bidder is awarded the contract over an equally qualified and priced bidder. 3
- F. A person enters a bank and hands a teller a note which says "Give me cash or you're in big trouble." The teller fills a sack with \$10,000. The offender did not have a weapon. 7
- G. A bank teller is caught embezzling \$10,000 from a federal bank at a time when a number of unsolved embezzlements have been reported around the country. 9
- H. A government employee takes and sells several documents to the Soviet Union during peacetime. The documents reveal technical details about defense systems which now must be altered at a cost of \$15 million. 2

- I. A Coast Guard inspection of a boat at sea heading into Miami leads to the conviction of the captain for possession with intent to distribute heroin with a street value of \$15 million. 5
- J. A hiker in a national forest shoots at a forest ranger, but misses. 6
- K. A wholesale automobile dealer is convicted of altering odometers on the used cars he sold. It is documented that he altered odometers on over 200 automobiles with the average "roll back" being 50,000 miles per car. 10
- L. The president of a small college is convicted of making false statements to the department of education so that the financially troubled school could receive assistance through federal financial programs. A total of \$750,000 was illegally received by the school through this fraud. 8
- M. A camper is convicted for camping in a federal park without a permit and starting a campfire which resulted in a forest fire. The fire was brought under control rather quickly without extensive destruction. 15
- N. An elderly woman receives her deceased husband's social security check for several months after his death. She forges his name and thereby receives \$3,000 worth of undeserved benefits before being detected. 14
- O. An individual with a prior felony record buys a .410 gauge shotgun from a hardware store. In the process he signs the required federal forms wherein he swears that he has never been convicted of a crime. He is convicted of receipt of a firearm by a felon and falsely completing the form. 12
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