

Oversight Hearing on the United States Sentencing Commission Testimony

December 14, 1995

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CHAIRMAN MCCOLLUM'S OPENING STATEMENT
OVERSIGHT HEARING ON THE U.S. SENTENCING COMMISSION
December 14, 1995

For decades, federal judges were left with nearly unfettered discretion when it came to sentencing defendants. The only limit upon a judge's sentencing decision was any maximum and minimum sentence established by statute. Consequently, sentences diverged as widely as the backgrounds and philosophies of the judges themselves. Some judges made extensive use of probation, while others gave long sentences intended, in part, to anticipate the future possibility of parole. It was not unusual for defendants in nearly identical cases, but in different federal courts, to receive drastically different sentences--probation for the one; years behind bars for the other. Over time, such sentencing disparities exacted a high price, as the very integrity of the federal criminal justice system was weakened.

In 1984, Congress responded. It passed the Sentencing Reform Act of 1984, abolishing parole at the federal level, and creating the U.S. Sentencing Commission. The Commission was given a monumental task: Overhauling the sentencing policies of the -federal system, by developing sentencing guidelines to ensure uniformity and proportionality in sentencing. Within 18 months, the Commission had finished its initial job and on November 1, 1987, the sentencing guidelines took effect.

Every year, the Commission reviews its guidelines and amends them, as necessary, to further the objective of sentencing uniformity and proportionality. The guideline amendments become effective automatically, unless Congress affirmatively intervenes. Less than two months ago, as the members of this subcommittee well know, Congress rejected the amendments to reduce guideline sentences for crack cocaine trafficking and money laundering. It's important to note that this was the first time Congress ever vetoed a Commission guideline amendment. While I would hope such disagreements between the Commission and Congress would be few and far between, the experience clearly demonstrates that Congress takes seriously its responsibility under the Sentencing Reform Act to re-view guideline amendments and is fully prepared to act against them when they would be injurious to the administration of federal criminal justice.

The guidelines seek to promote sentencing uniformity by requiring that judges sentence defendants based on two factors: criminal history and seriousness of the offense. Under the guidelines, there are six different criminal history categories, based upon the number of past offenses, and 43 possible offense levels, based upon the severity of the offense: All in all, it's a complicated, finely-tuned system that has done a superb job of accomplishing the objective of federal sentencing uniformity.

There is also little doubt that the sentencing guidelines--along with mandatory minimum sentences and the abolition of parole--have toughened up the federal criminal justice system. Sentences for Federal drug offenses illustrates the point: From 1980 to 1989, the average sentence for Federal drug offenders increased by 59 percent. In 1980, drug traffickers received an average sentence of 48 months; and in 1990, 84 months. Thanks in no small part to the guidelines, the federal system is generally regarded as the toughest system in the country today.

This hearing provides an important opportunity for us to examine a number of issues regarding the Commission and the guidelines. A central question is how well the guidelines are working. They have clearly reduced disparities in sentencing, but have they done so by unduly

limiting judicial discretion, and by adding excessively cumbersome complexity to the sentencing process?

Critics of the guidelines often cite the concern that the guidelines have inappropriately transferred discretionary authority from judges to prosecutors. Given that a prosecutor's decision of what offense to charge generally defines the judge's sentencing range under the guidelines, the question raised by such a transfer of discretionary authority is, what are the limits on the exercise of prosecutorial discretion? I, for one, am satisfied, that over the years the Justice Department has taken appropriate and adequate steps to regulate the charging and plea decisions of federal prosecutors to ensure that the objective of sentencing uniformity is realized.

While some of my subcommittee colleagues have different perspectives regarding the Sentencing Commission's recent proposed amendments to reduce guideline sentences for money laundering and crack cocaine trafficking, the amendments nevertheless raise important questions about the current direction of the Commission: Is it the view of the Commission that guideline penalties for a variety of crimes are too high? Will the Commission in the future be seeking to substantially reduce guideline sentences, even if it means creating severe disparities between guideline sentences and federal statutory sentences? Is it the Commission's view that it may amend the sentencing guidelines so as to leave guideline sentences lower than the sentencing floors established by Congress? Are such actions consistent with the Commission's enabling statute? I look forward to the testimony addressing these concerns.

I also look forward to hearing about the various projects the Commission has initiated, including its exploration of ways to simplify the guidelines, and its assessment of the success of the guidelines in meeting their objectives established in the Sentencing Reform Act.

At this point, I would like to recognize my friend from New York, the ranking minority member, Mr. Schumer.

TESTIMONY OF RICHARD P. CONABOY, CHAIRMAN,
UNITED STATES SENTENCING COMMISSION,
BEFORE THE SUBCOMMITTEE ON CRIME
OF THE HOUSE OF REPRESENTATIVES'
COMMITTEE ON THE JUDICIARY

December 14, 1995

I. Introduction

Mr. Chairman, members of the committee: I very much appreciate the opportunity to speak with you today about the United States Sentencing Commission and the work being done by the Commission and the Commission's staff. As you know all too well, recent discussion relating to the Commission has been dominated by the issue of cocaine and federal sentencing policy. While this issue is without doubt an important one, it has overshadowed the broad scope of responsibilities that is the major focus of the Commission's work. The idea of a fair and structured sentencing policy is extremely important to our society. Thus, we welcome this hearing and the chance to lay out for the committee the nature of the Commission's responsibilities, especially the critical role the Commission and the sentencing guidelines play in the federal effort to control crime. After briefly recapping why Congress created the Commission, we hope to explain fully how the Commission is fulfilling its statutory mandates.

The United States Sentencing Commission is an independent agency in the judicial branch of the federal government. It was first organized in October 1985. In the broadest terms, the Commission is responsible for developing and monitoring sentencing policy and practices for the federal courts and for assisting Congress and the executive branch in the formation of effective and efficient crime and sentencing policies. The Commission promulgates sentencing guidelines, subject to congressional review, that set structured parameters for the appropriate form and severity of punishment for offenders convicted of federal crimes. In addition, the Commission collects, analyzes, and disseminates a broad array of information on the sentences meted out in the federal courts; information and analyses used by policymakers to evaluate the efficacy of current sentencing policy and develop needed improvements.

In hopes of informing this committee on the very important role and work of the Commission, I will use the first part of my testimony to describe briefly the history of the Sentencing Commission, why it is a valuable component of the federal criminal justice system, and how the Commission first developed and implemented the federal sentencing guidelines. I will then discuss some of the Commission's ongoing duties and how our work assists and complements Congress and the law enforcement community in shaping effective crime policy. Finally, I will lay out the Commission's agenda over the next several years and describe what we hope to accomplish.

II. The Advent of Sentencing Reform

For some time now, this country has been struggling with the profound problem of crime. The statistics show that while crime rates fluctuate over time, crime continues to occur at an unacceptably high level. Simply put, far too many crimes are being committed, and the American public does not feel safe.

As many members of Congress have articulated, it is government's first responsibility to protect the well-being of its citizens. To fulfill this responsibility, over the past two decades, federal, state, and local governments have been working hard to develop and implement various strategies to combat crime. For many years on the federal level, effective crime policy meant strong and ample federal criminal laws, powerful investigative agencies, and vigorous prosecutions. In the early 1980s, however, congressional leaders and other policymakers realized that this strategy was not enough; that there was a gap in the federal criminal justice system, namely sentencing policy, that also plays a vital part in effective crime policy. Congress saw the need to close this gap; to put in place a more effective sentencing policy so that all parts of the criminal justice system -- legislation, investigation, prosecution, sentencing, and corrections -- would work together in order to have an effective national strategy of crime control.

The federal system of sentencing in place before the Commission existed was almost entirely discretionary. Choosing a sentence for those convicted of federal offenses was left to the unfettered discretion of federal judges and essentially was ungoverned by law. Beyond a statutory direction limiting the maximum sentence, judges had the discretion to decide what factors in a case were relevant to sentencing and how such factors should be weighed.

Congress found this discretionary system too often resulted in unacceptable outcomes. Studies showed that judges used their vast discretion in sentencing decisions to reach inconsistent results. This was not surprising given varying judicial backgrounds and philosophies and the strong disagreement among judges on the purposes of sentencing. The problem was exacerbated by the existence of a parole system, under which some incarcerated offenders served all of their sentences and others as little as one-third. With sentencing authority divided between the judge and the United States Parole Commission, some judges attempted to craft sentences to anticipate the decisions of the Parole Commission, while others did not. And, of course, a substantial percentage of offenders were never subject to parole because they were not sentenced to prison at all. The net result of the entire process was that with disturbing regularity, similar offenders who committed similar offenses received and served substantially different sentences. And on many occasions, the sentences simply were not sufficiently punitive. Congress recognized that this inconsistency and uncertainty in federal sentencing practices was incompatible with effective crime control. Congress specifically indicated that "the existing Federal system lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime."¹

III. The Creation of the United States Sentencing Commission and the Sentencing Guidelines In 1984, in an attempt to fill the gap in the criminal justice system created by the existing

¹S. Rep. No. 225, 98th Cong., 1st Sess. 49-50 (1983) (hereinafter "S. Rep.").

sentencing policy, Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984. The Act created the United States Sentencing Commission and mandated that the Commission design sentencing guidelines to bring consistency and certainty to federal sentencing law. The Sentencing Reform Act was intended, in the words of the Senate Report, to bring about "sweeping" reform.² Both the statute creating the Commission and its legislative history made clear that the guidelines Congress envisioned were to be detailed and comprehensive.³

With more than 2,000 different federal criminal offense statutes, including many complex offenses such as the Hobbs Act and RICO, and crimes such as mail fraud that cover a broad range of proscribed conduct, the task of writing the sentencing guidelines was difficult. Adding to the difficulty was the element of time. Congress gave the Commission just 18 months to organize itself into an agency and to develop this unprecedented and comprehensive body of federal law.

Many other factors made the Commission's task difficult, including the need to produce an extensive analysis of the guidelines' prison impact, the divergent national views on the purposes of sentencing, and the need to review past sentencing practices in the federal system. Notwithstanding these difficulties, the Commission accomplished its initial task of producing guidelines and the related analyses on time. The guidelines took effect in November 1987 after the requisite six months' congressional review.

Thus, today's federal sentencing system -- created by the Commission pursuant to a carefully crafted and, I think, wise congressional mandate -- is very different from the inconsistent and uncertain system in place before the Sentencing Reform Act. It is a structured and tough sentencing system. Under the guidelines, sentencing courts are directed to evaluate specific enumerated factors grounded in experience and reason and to engage in appropriate fact-finding to determine whether these factors are present in each case. If they are, the guidelines and Commission policy statements provide the court with substantial guidance as to how these factors ordinarily should contribute to the sentence. This structure provides fairness, predictability, and appropriate uniformity. In addition, the guidelines structure allows for the targeting of longer sentences to especially dangerous or recidivist criminals.

For example, Congress has been concerned recently with drug distribution in prisons and other detention facilities. As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress directed the Commission to amend the guidelines to provide an adequate enhancement for drug offenses that occur in detention facilities. Because of the structured nature of sentencing under the guidelines, the Commission was able to provide a specific mandatory instruction that requires drug sentences to be increased by approximately 25 percent if the drug crime occurred in or surrounding a jail or prison.

²S. Rep. at 65.

³*See, e.g.*, S. Rep. at 168-69.

The structure, though, is only part of the story. The guidelines substantively are tough, providing in most cases appropriately punitive sentences for violent, predatory, and other dangerous offenders, sentences substantially longer than those meted out before the guidelines. Studies have shown, for example, that since the guidelines have been in place, sentences for drug and violent offenders have increased substantially. In addition, the Commission in its original guidelines specifically raised penalties for several classes of offenses including white collar offenses and civil rights crimes, which include police brutality offenses. The Commission determined that before the guidelines, sentences for these classes of offenses were simply too low and thereby did not provide sufficient deterrence. Also, years before the 1994 Crime Bill, the Commission developed and implemented a “three-strikes” provision in the guidelines that ensured penalties near the statutory maximum for repeat offenders.

Within the structured system, the guidelines, however, do allow courts to depart, or in other words, move away from the narrow parameters of uniformity, either up or down, in unusual cases. In such cases, the reason for the departure must be stated clearly and the sentence is subject to appellate review. Other than a growth in the rate of departures based on a defendant’s substantial assistance in the investigation or prosecution of others, the guideline departure rate has remained relatively constant over the last years, as shown in the chart [attached]. Excluding substantial assistance departures, more than 9 of 10 defendants are sentenced within the guideline range determined by the court. Thus, the current sentencing law ensures a general rule of firm, fair, uniform sentences, while allowing departures, whether they be above or below the applicable guideline range, when unusual factors dictate unique sentences. Importantly, this system brings the critical element of honesty to the sentencing process by abolishing early release through parole. Now, the sentence meted out by the court is what the defendant must serve with only a very small percentage of the sentence available for "good time" credit. In my view, this guideline system of sentencing is a vast improvement over the system that existed prior to the Commission and its guidelines.

IV. The Commission's Ongoing Responsibilities

Since November 1987 when the initial set of guidelines became law, the Commission has shifted its focus from the production of its initial set of guidelines to its ongoing statutory duties. These include monitoring the operation of this new sentencing system, making adjustments as experience shows necessary and as directed by Congress, and serving as an important resource that, together with Congress and the executive branch, can ensure that the country has effective crime control and sentencing policies. To fulfill these duties, the Commission's work has focused on several areas.

A. Guideline Amendments

Because of the short time allotted for preparation of the initial guidelines, because the guidelines were intended by Congress to be evolutionary, and because Congress itself has directed the Commission to address certain pressing crime policy issues, the Commission has promulgated numerous amendments to the sentencing guidelines. While most of the changes have been of a technical and clarifying nature, the Commission has made a significant number of substantive modifications. These amendments ensure that the guidelines will work as Congress and the

Commission intended by resolving interpretive conflicts among the courts and responding to changing criminal justice priorities, including advancements in knowledge surrounding the criminal justice and penal systems.

As the recent amendments surrounding crack cocaine have pointed out, the Congress and the Commission will have disagreements from time to time over the amendments. It should be noted that before the crack cocaine issue, Congress had never overturned a Commission amendment. This latest experience has shown, however, that the system of legislative review the Commission and the Congress put in place through the Sentencing Reform Act actually works. Thus, we believe the system should continue to work in this independent and objective fashion, and Congress should look to the Commission to provide the leadership and expertise on sentencing policy issues. Sometimes it will be to Congress's advantage, and the ends of justice will be well served, by permitting the Commission some leeway in handling particularly complex or politically difficult issues, subject to Congress's directives and right of final review. Then, as Congress evaluates the Commission's recommendations, it adds an element of direct accountability to the American public, thus completing a delegation and review system that will best promote effective criminal justice policymaking.

B. The Advisory Role of the Commission on Federal Crime Policy

To fulfill its statutory mandate to advise Congress and the executive branch on sentencing policy, commissioners and senior Commission staff regularly meet and speak with members of Congress, congressional staff, and members of the criminal justice community, including federal judges from around the country and senior officials at the Department of Justice. The Commission provides statistical information and sentencing policy analysis. Just as importantly, it listens to the concerns of policymakers and practitioners. Our staff conducts continuing research and policy analysis that allows the Commission to provide the necessary information for policymakers to act in an informed basis.

We view it as a fundamental part of our mandate to be an independent, non-partisan resource to Congress, the executive branch, and the judiciary. With regard to Congress, we are redoubling our efforts to provide useful and timely information and analysis on the broad scope of crime control and sentencing policy matters that this and other committees face. We have recently restructured our legislative staff so as to better shepherd the full resources of the Commission to assist members of this committee and all members of Congress in the evaluation and formulation of crime and sentencing policy.

C. Monitoring

To provide a basis upon which the guidelines and the federal criminal justice process can be analyzed and refined, the Commission extensively monitors the way the guidelines are applied within the federal criminal justice system. The Commission receives court documents on every federal criminal case resulting in a conviction -- about 40,000 cases every year. To date, the Commission has received documents on approximately 250,000 cases in which the guidelines have been applied. An extensive data collection system is used to capture the most pertinent sentencing information from these cases, including statutory information, the sentence imposed, and a variety of case-specific data

(up to 300 variables). Additionally, we have instituted an appeals database to similarly collect and analyze specific issue data relating to the approximately 4,000 guideline sentence appeals per year. This information is used to track the cases flowing through the criminal justice system, the effectiveness of the policies in place, and the way the guidelines are being applied. With these data, the Commission compiles an annual report, mandated by statute, that is distributed to the Administration, the Congress, and the Courts. This report gives perhaps the most thorough and complete picture of the year's work of the federal criminal justice system available, and is used extensively by the various components of the federal criminal justice system (*e.g.*, judges, prosecutors, defense attorneys, probation officers) to monitor their own practices under the guideline structure.

For example, the chart [attached] was compiled from our database and shows the percentage of each type of crime category prosecuted in the federal system in fiscal year 1994. The chart shows that drug prosecutions accounted for the largest part of the federal docket, followed by fraud, immigration offenses, and robbery. This chart is a very simple example of how the Commission's data can be used to evaluate how federal enforcement dollars are being spent. We can break down our data by a host of different variables to provide a more targeted look at parts of the federal criminal justice system. For example, we have provided each member of this committee with a packet of information concerning his or her district in comparison to the national picture. These data provide a quick look at the crime mix and use of prosecutorial and investigative resources in the district. The Commission's policy analysis office can of course provide more sophisticated analyses, and as part of our mandate, we do conduct both short- and long-term research bearing on crime policy.

D. Training

To ensure that the guidelines work as intended, the Commission staff conducts training and information sessions across the country. From the period immediately prior to the initial guidelines becoming law, the Commission has led or participated in hundreds of training sessions involving thousands of judges, probation officers, attorneys, and other criminal justice professionals. The Commission also has developed a sophisticated computer software program, known as ASSYST, to help probation officers and other practitioners apply the guidelines. Finally, the Commission operates a hotline service to provide technical assistance to prosecutors, defense attorneys, judges, and probation officers.

V. The Commission's Immediate Agenda

While many in Congress and the criminal justice community believe the guidelines have contributed strongly to a more effective justice system, we recognize that the guidelines have been the subject of significant criticism. Much of that criticism, we believe, has stemmed simply from the fact that sentences under the guidelines are more consistently tough than sentences under the fully discretionary pre-guidelines system of sentencing. We discount much of this criticism because we believe that tough sentences for dangerous offenders play a critical role in crime prevention.

Other criticism, however, has focused on the perceived rigidity and complexity of the guidelines and the cost of implementing the guidelines both in terms of court resources and the

resources spent by prosecutors and defense attorneys on sentencing issues under the guidelines system. The Commission plans to address these criticisms as well as our ongoing responsibilities through a straightforward agenda for the Commission and Commission staff. This four-point initiative involves (1) the continued fulfillment of the Commission's statutory responsibilities, (2) an evaluation of problem areas within the sentencing guidelines system, (3) simplification of the guidelines, and (4) organizational assessment.

First and foremost, the Commission will continue to meet its statutory responsibilities of advising Congress, the executive branch, and the judiciary on crime policy matters. We will continue monitoring application of the guidelines in order to make appropriate modifications. We plan to continue our statutory assignments to conduct appropriate substantive crime policy research, train members of the court family on guideline application, and serve as a clearinghouse on sentencing issues.

Second, the Commission is in the midst of a program to identify those areas of the guidelines and the guideline process that are not meeting the mandates of the Sentencing Reform Act as well as they should. In addition, this assessment program will provide information by which the Commission can evaluate the need to change the guidelines in response to the previously mentioned criticisms. The assessment will focus on an emerging and potentially troubling aspect of guideline sentencing, namely the inconsistent exercise of prosecutorial discretion. Commission data have shown that with increasing frequency, prosecutors have been using their discretion to get out from under mandatory statutory and guideline sentences. This has been done in a variety of ways, including the use of substantial assistance departure motions and some charging and plea bargaining practices that appear to undermine Sentencing Reform Act goals. Commission data also suggest that this discretion is being employed inconsistently among districts, and we are in the midst of analyzing its impact throughout the criminal justice system. We are concerned that inconsistent prosecutorial practices will cause problems for the criminal justice system just as inconsistent sentencing practices did before the guidelines.

Third, in light of the criticisms surrounding the rigidity and complexity of the guidelines, the Commission has embarked on a project to explore simplifying the guidelines, and plans to use the work of the assessment project to examine simplification options. The Commission is looking at the way state sentencing commissions have tackled some of the thornier guideline issues and is working together with the Criminal Law Committee of the Judicial Conference, the Criminal Division of the Department of Justice, the Attorney General's Advisory Committee, and others, including defense attorneys and probation officers, to examine several different approaches. Finally, the Commission plans to solicit comment from the judiciary, the Congress, criminal justice practitioners, and the public.

In the last point of our initiative, we are taking a hard look at the Commission's organizational structure and use of advanced technology to ensure that the Commission's own resources are being put to the best and most efficient use as we enter this new phase in guideline sentencing.

VI. Conclusion

Overall, we believe the guidelines and the Commission have brought about three positive changes in the federal criminal justice system. First, the system is more honest. With the abolition of parole, there is truth in sentencing for the first time in the federal courts. Second, the system generally is more consistent, tougher, and fairer. Similar defendants who commit similar crimes are now sentenced in a similar manner. And third, the system is more effective. The certainty by which punishment is imposed under the guidelines will provide increased deterrence to future criminal conduct. In sum, the federal sentencing process has successfully undergone the first stages of sweeping reform Congress envisioned.

As I mentioned, some problems remain and there are issues to be resolved. We at the Commission believe regardless of the disagreements and controversies we have recently been through, that working together with the Congress, the judiciary, and the executive branch, we can make the criminal justice system a better system: one that will be more efficient and effective in reducing the amount of crime in our society.

I thank you again for giving me the opportunity to be here. I would be happy to respond to any questions the committee might have.

TESTIMONY
THE HONORABLE J. HARVIE WILKINSON, III
JUDGE, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
SUBCOMMITTEE ON CRIME, HOUSE COMMITTEE ON THE JUDICIARY

December 14, 1995

It is a pleasure to appear before the House Subcommittee on Crime in connection with this hearing on the United States Sentencing Guidelines. No topic could be more important than this one, implicating as it does the shared roles of Congress and the Judiciary in sentencing federal offenders and bearing directly upon the protection of both public safety and individual rights.

My own sense is that there has been a significant shift in judicial opinion in favor of the Guidelines since they first took effect on November 1st, 1987. At that time there was a good deal of grumbling on the part of federal judges about three things: (1) the loss of sentencing discretion; (2) the strictness of Guidelines sentencing; and (3) the complexity of the Guidelines scheme.

The Guidelines have now been in effect for some eight years, and I think that the level of judicial support for them has risen appreciably. In part, of course, this is due simply to increased familiarity with their operation. But that is only a partial explanation. Judges have come to appreciate the essential coherence of the Guidelines scheme and the enormous work that went into their formulation, including that of my respected colleague on the Fourth Circuit, Judge William W. Wilkins, Jr., who served as the first Chairman of the Sentencing Commission. The intricacy of the Guidelines was unavoidable given the wide variety of federal offenses which the Guidelines cover. The remarkable thing, however, is that the Guidelines work. More than that, they work well. Terms such as Base Offense Level, Specific Offense Characteristics, Adjustments and Enhancements, Grouping of Counts, and Criminal History Category have become as much second nature to the judicial branch as *res judicata* and collateral estoppel. In short, judges have accepted this scheme and appreciated that it makes internal good sense. Many of us hope it will become in time a model for more uniform sentencing in state courts as well.

I sometimes hear the complaint that Guidelines sentencing is too tough. That is not a complaint that I share. When sentences are strict under the Guidelines, they are deservedly so. Let me give the Committee some examples. One critical concept underlying the Guidelines is that of Relevant Conduct. Put simply, Relevant Conduct means that a sentence should be based on acts that occurred in preparation for a criminal offense, during an offense, and in attempting to avoid responsibility for an offense. In the case of a conspiracy involving trafficking in illegal drugs, for example, the Guidelines would hold the defendant responsible for the acts and omissions of others that were reasonably foreseeable by the defendant and within the scope of the jointly undertaken criminal activity. It is only proper to hold a defendant responsible for these acts. They unquestionably constitute a part of the course of criminal misconduct and they should not be artificially eliminated from the sentencing equation. Any other approach to sentencing would be of a hear no evil, see no evil, speak no evil variety. Far better that we have a Truth in Sentencing system such as the Guidelines which seeks to have the punishment fit the actual criminal misconduct. Under the Guidelines, moreover, the public is not deceived by sentences which sound long but in actuality are drastically shortened by the early availability of parole.

Like the consideration of Relevant Conduct, it is not unfair to increase sentences under the Guidelines on the basis of realistic specific offense characteristics. For example, the Guidelines mandate incremental increases for fraud offenses as the loss created by the fraud mounts, increased sentences for counterfeiters who possess counterfeiting devices or materials, and mandate increased sentences when dangerous weapons are involved, when serious bodily injury is inflicted, or when exploitation of a minor is at issue. As a general matter, sentences increase steeply under these sorts of circumstances, and they should. It is not inappropriate to designate as a career offender a violent felon who has at least two prior felony convictions of a crime of violence or a controlled substance offense. In other words, when the Guidelines are strict, there is good reason. The Guidelines are tough when the criminal misconduct they punish involves circumstances that would shock the public conscience. The Guidelines, however, take pains to differentiate serious offenders with extensive criminal records from those whose conduct warrants lesser condemnation. The Guidelines are above all a system of sensitive gradations which punishes hardened criminals harshly and less culpable persons much less so. In short, the general allegation that the Guidelines are too tough fails to hold up when one examines the specific offense characteristics and criminal histories that lead to stiffer penalties in particular cases.

When the Supreme Court approved the Guidelines in Mistretta v. United States it endorsed Congress' judgment that there should be uniformity in sentencing. 488 U.S. 361 (1989). The Guidelines promised a sentence that reflected the seriousness of the actual offense and the criminal history of the defendant, not one that reflected the predilections of an individual district judge or, worse still, a defendant's relative affluence or position. Before the Guidelines went into effect, sentencing disparities were notorious. We had a legendary courthouse in our Circuit where one judge invariably imposed a heavy sentence and another consistently refused to impose any penalty other than probation. The greatest favor lawyers could do their clients at sentencing was to arrange an appearance before the more lenient judge. These radical disparities in sentencing have now been eliminated, as has a system in which the severity of the sentence depended heavily upon the nature of the charged offense rather than upon the facts of the actual misconduct.

Opponents often accuse the Guidelines of eliminating any sentencing discretion on the part of the trial judge. That simply is not true. Judges retain some discretion in, for example, assessing whether a defendant has accepted responsibility for his or her wrongdoing, in assigning a defendant an aggravating or mitigating role in the offense, in attributing controlled substances that are reasonably foreseeable to a defendant, and, of course, in determining whether or not to undertake a departure. In fact, once a sentencing range has been determined under the Guidelines, the district court has total discretion about where within that range to set the sentence. The Guidelines thus do not eliminate discretion. What they do is curb the kind of wild, unrestrained discretion that no one can justifiably defend and that results in defendants whose conduct is for all intents and purposes indistinguishable receiving dramatically different sentences.

It bears repeating that the United States Sentencing Commission, although within the judicial branch, is ultimately a creature of the Congress and that broad sentencing policy, impacting as it does on public safety, is a matter on which popular government must have a decisive say. For that reason, it is my hope that the Guidelines will not develop sharp sentencing differences with the Congress immediately below the quantities of controlled substances at which mandatory sentences kick in. Dramatic drop offs in sentences immediately below the level of a mandatory minimum would

reintroduce the sort of federal sentencing disparities from which the system has only recently emerged and lead to incentives of the most regrettable sort to manipulate attributable drug amounts.

I would, finally, like to enter a plea for stability in the Guidelines system. A federal sentencing scheme which is constantly churned by new amendments and is periodically unsettled with every change in Commission personnel will do no one any good. Frequent amendments to the United States Sentencing Guidelines will make the system more difficult to administer for judges, prosecutors, probation officers and defense attorneys, who should not be required to undertake a daunting course in continuing Guidelines education with each new year. Too frequent amendments also have another significant drawback. They raise the very questions of unfairness and lack of uniformity which it was the purpose of the Guidelines to ameliorate. It is difficult to explain to individuals who receive different sentences for identical offenses that one sentence came before the effective date of a Guidelines amendment and the other came afterward. Revisiting periodically the length of Guidelines sentences, not to mention the fundamental concepts of the Guidelines themselves, threatens to compromise one of the most priceless assets of the entire system. The Guidelines represent uniformity and predictability in federal sentencing, and the temptation to have sentences swing in the wind threatens to compromise these essential principles.

I appreciate the privilege of appearing before you, and I will be happy to answer any questions.

STATEMENT OF CHIEF JUDGE JON O. NEWMAN
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,
BEFORE THE
CRIME SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE
December 14, 1995

Mr. Chairman and members of the Committee. I appreciate your invitation to speak with you this morning about the federal Sentencing Guidelines, a topic of intense interest to all members of the federal Judiciary. Let me emphasize at the outset that the views I express are my own, not necessarily those of my Court or of other judges.

Briefly, by way of background, I have been a federal judge for 24 years, serving eight years as a United States District Judge in the District of Connecticut and 16 years as a Circuit Judge on the Second Circuit Court of Appeals. Earlier in my career, I served as senior law clerk to Chief Justice Warren, as a staff assistant in the Executive Branch and in the U.S. Senate, and for five years was the United States Attorney for the District of Connecticut.

My interest in the Sentencing Guidelines is of long standing. I was one of the few federal judges who supported the Sentencing Reform Act of 1984, and publicly urged, and testified in favor of the adoption of sentencing guidelines. Though I continue to believe that the principle of having sentencing guidelines is sound, it is my conclusion, after watching the operation of the Guidelines for the eight years of their existence, that the current Guidelines are in need of substantial revision.

Let me make clear that my criticism has nothing to do with the severity of punishment. I am not here to urge that the punishments for particular offenses should be reduced, nor that they should be increased. My concern is that the Guidelines are too rigid, too detailed, and too cumbersome, and that, in several important respects they reflect ill-advised policy decisions, none of which is required by the Sentencing Reform Act and none of which has been followed by any of the several state commissions that have adopted sentencing guidelines.

Let me identify what I believe are some of the major deficiencies of the current Guidelines.

1. The original Commission faced a fundamental choice concerning the extent to which uncharged conduct should be punished after conviction for a charged offense. For example, if a defendant is charged and convicted of selling 500 grams of cocaine, and evidence is presented at sentencing that he also sold or agreed to sell an additional 2,000 grams, how much additional punishment should he receive for the uncharged conduct relating to the 2,000 grams?

The Commission rejected the alternative of totally disregarding the uncharged conduct and also rejected the alternative of prescribing additional punishment for every aspect of wrong doing that the defendant could be shown to have committed. Ostensibly adopting a "middle" ground between what it called "charge offense" sentencing and "real offense" sentencing, the Commission chose "modified real offense" sentencing. This means that in addition to the conduct for which the defendant is convicted, the defendant will also be punished for other misconduct that is related to the

offense of conviction -- so-called "relevant conduct."

It was at that point that the Commission made a fundamental and unprecedented decision. It decided that all relevant conduct should be punished at exactly the same level of severity as conduct for which the defendant had been convicted. Thus, in the example mentioned above, the defendant, though convicted of selling 500 grams, would be sentenced to exactly the same sentence he would have received if he had been convicted of selling 2,500 grams. In fact, and you may find this hard to believe, he will be sentenced as if he had sold all 2,500 grams even if he is acquitted of selling the additional 2,000 grams! This is not a guess on my part. It is a result that I regret to may has been found to be within the Commission's authority. See United Staten v.Concepcion, 983 F.2d 369 (2d Cir. 1992).

I do not question the basic idea that a defendant should receive some additional punishment for wrongdoing related to the offense of conviction. A bank robber who injures a taller in the course of a robbery should receive additional punishment for inflicting the injury, even though he was convicted only of the offense of bank robbery. What I criticize is the Commission's decision to punish all relevant conduct at exactly the same level of severity as the offense of conviction. Instead, the sentencing Judge should be given some limited discretion to increase the punishment, perhaps between a range of one-third to two-thirds of the additional punishment that would have been imposed if the defendant had been charged and convicted of the additional conduct.

All courts give some consideration at sentencing to the related misconduct of a convicted defendant. But no court in any state or foreign country that I am aware of is required to punish unconvicted conduct exactly as if it had resulted in a conviction. only the federal Sentencing Guidelines require that result.

2. The original Commission also faced a fundamental choice concerning the degree of detail and complexity it would build into the Guidelines. Most models available in the states had opted for fairly general guidelines. Instead, the Commission chose the most complicated and detailed system of sentencing guidelines every devised. They constructed a sentencing table with 43 offense levels and six criminal history categories for a total of 258 separate sentencing ranges. In addition, they chose to divide offense conduct into minutely graded levels of severity. The result in 17 different levels in the drug quantity table (§ 2D1. 1 (c)), 19 different levels of dollar amounts in the fraud table (§ 2F1.1(b)(1)) , and 21 different levels of dollar amounts in the larceny table (§ 2B1.1(b)(1)).

Again, I do not doubt the general principle that a defendant who taken a large sun of money should normally receive a heavier sentence than a defendant who takes a small sum. But the Commission's approach takes that principle to extreme lengths. It requires a higher sentence for the thief who taken \$3,000 than for the thief who takes \$2,000. No criminal I have ever encountered reached into the cash drawer and decides how much wrongdoing he feels like committing that day; he takes whatever in the drawer. It makes no sense whatever to calibrate the sentence so finely to add punishment for theft of an extra \$1,000. And it imposes a senseless burden on courts to have to engage in the detailed fact finding required to determine into which of the Commission's numerous

categories of offense conduct the defendant falls.

The number of separate levels of offense conduct should be significantly reduced. Similarly, the minute gradations of adjustments for aggravating and mitigating factors should be replaced by sensible ranges in which the sentencing judge could select an appropriate value. For example, a judge need not hold a hearing to make a precise finding whether a defendant should get a four-level reduction for playing a "minimal" role in the offense or only a two-level reduction for playing a "minor" role. The judge should simply have discretion to make a discount within a prescribed range to recognize the fact that the defendant's role in the offense was not significant.

3. A third major decision made by the Commission -- one that probably affects more sentences than any other decision -- is the decision to sentence drug offenses primarily on the basis of drug quantity and only secondarily on the basis of role in the offense. If a defendant has a major role in a drug operation, he should receive a very heavy sentence, and it should not matter whether the quantity of drugs found the day of the arrest was large or small. By the same token, a minor player like a street addict or a "mule" crossing a border should receive a sentence of just a few years, regardless of whether the higher-ups deal in large quantities.

The Commission elected to scale sentences in exactly the opposite manner. The head of a drug ring who can be linked only to a relatively small quantity gets a relatively small sentence; a street addict selling a few grams to support his habit, who can be linked to a large organization selling large quantities, gets a very high sentence. With drug offenses, role in the offense should be the major determinant of punishment, and quantity should be only a secondary adjustment.

4. Another important decision made by the Commission was the now requirement that a sentencing judge is prohibited from giving a defendant any discount for cooperation with law enforcement authorities unless the prosecutor makes a specific request for such a reduction. This is the so-called "5K1.1 letter." Until 1987, sentencing judges regularly heard arguments by defendants that they had cooperated and also heard arguments by prosecutors, sometimes urging a discount for cooperation and sometimes opposing one because the cooperation was either nonexistent or minimal. After hearing argument, the judge decided how such consideration should be shown for the defendant's cooperation. Usually the judge gave major deference to the prosecutor's version.

By requiring a written request from the prosecutor, the Commission has significantly shifted sentencing authority away from the judges and placed it in the hands of prosecutors. Nothing in the Sentencing Reform Act required the Commission to make that change in sentencing practice. It is a drastic change that can and has led to some entirely unfair sentences. In one case, a defendant alerted the prosecutor to six other suspects and provided helpful information. He was asked about a seventh person. He said he would not implicate her because she was his sister. The prosecutor declined to give a 5K1.1 letter and the judge was therefore barred from giving any discount for the considerable cooperation the defendant had already given to the prosecutor.

5. My final criticism is that the Commission has gone too far in eliminating offender

characteristics an a determinant of the appropriate sentence. Under the current Guidelines for all practical purposes, the only fact about a defendants background that affects the sentence is the prior criminal record. Yet, prior to the Guidelines, judges had historically endeavored to give some consideration to the background of a defendant, increasing a sentence for unfavorable characteristics and reducing a sentence for favorable characteristics.

There is a risk that consideration of offender characteristics can unintentionally inject racial and class bias into sentencing. For example, if sentences are adjusted downward in recognition of a prolonged record of employment or substantial civic contributions, there is a risk that the beneficiaries of such adjustments will be predominantly middle-class, White, well-educated defendants who frequently have better opportunities for steady employment and for civic contributions than poor, Afro-American, high school drop-outs. Nevertheless, that risk need not have impelled the Commission to make offender characteristics, other than prior record, virtually irrelevant to sentencing. The Sentencing Reform Act explicitly accords the Commission ample authority to take into account many personal characteristics. See 28 U. S. C. § 994(d). Some modest role for offender characteristics should be provided.

* * * * *

These are some of the major decisions of the original Commission that have made the Guidelines far too complicated and, in some respects, demonstrably unfair. Not one of these decisions was required by the sentencing Reform Act, and all of them could be changed by the Commission, exercising its considerable authority to amend the Guidelines.

Today, there are hopeful signs that the Commission is taking a fresh look at many of the decisions made by the original Commission. with a now chairman and several new commissioners, the time is appropriate for reconsideration of many of the original decisions.

An important key to whether the Commission taken the opportunity to reconsider some of the ill-advised decisions of the original Commission will be the perceived attitude of the Congress, especially the members of the Judiciary committees of the House and Senate. Recently, as you know, Congress for the first time in the Commission, a eight-year existence, rejected a proposed amendment the amendment that would have equalized crack and cocaine penalties. I do not wish to reenter the debate on that subject. Rather, my point is to express concern about the distinct risk that the Commission may feel inhibited by its defeat on the crack/cocaine issue and therefore decline to propose any amendments that might be attacked as insufficiently tough on crime. My further point is to urge the members of this committee to keep entirely open minds on the question of future Guidelines amendments and even to give the Commission some encouragement to propose whatever amendments the commissioners deem appropriate.

The sentencing patterns of the federal courts are very severe. We are imposing very high sentences, and, as you know, those high sentences cannot be mitigated by parole. I am not here to debate the wisdom of severe sentences, nor to urge a reduction of any particular sentencing range.

I do urge both this Committee and the Commission to take a careful look at how the Guideline system is operating and to encourage changes that can make the Guidelines less cumbersome, less complicated, and less arbitrary. We can have both severe sentences and fair sentences, and we can have a sentencing regime that imposes heavy sentences and still accords sentencing judges some limited range of discretion to adjust sentences in individual cases to the particular circumstances they encounter in the variety of cases before them.

Sentencing will never be an exact science. Congress made a useful contribution in 1984 by authorizing the creation of a Sentencing Commission and empowering it to promulgate sentencing guidelines. But the Guidelines that the first Commission gave us are urgently in need of revision. After eight years of experience, it is time to make the needed changes.

Thank you very much for the opportunity to present these views.

TESTIMONY OF HON. EMILIO M. GARZA,
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT,
BEFORE THE SUBCOMMITTEE ON CRIME
OF THE JUDICIARY COMMITTEE
OF THE HOUSE OF REPRESENTATIVES

My introduction to the Sentencing Guidelines was rather inauspicious. Several months before my confirmation as a federal district court judge, I was invited by the Chief Judge of our District to attend a seminar on the Guidelines along with all the judges of the District and several United States magistrate judges. To my knowledge, this seminar was the first detailed instruction session for district judges on the Guidelines. The judges were rather apprehensive about the Guidelines on a number of different grounds. One of the judges in attendance would later hold the Guidelines unconstitutional,⁴ and some of the others were sympathetic with that position.

The judges at the seminar were also concerned that the Guidelines would only add to an otherwise heavy workload. Before imposition of the Guidelines, each of the district judges in the District was responsible for over five hundred cases annually, over one hundred of which were criminal cases.⁵ In order to alleviate backlog, I was eventually assigned half of the civil docket of one district judge who had over three hundred criminal cases pending in his court. All of the judges at the Guidelines seminar were concerned about the additional time it would take to sentence defendants under the Guidelines, time which all believed they did not have.

Despite the grumblings of my colleagues, what I heard that day made sense to me. In detail, the intricacies of the new sentencing structure under the Guidelines were explained: Offense Conduct, Offense Levels, Adjustments (to the Criminal Conduct), Criminal History, criminal History categories, and Sentence Determinations. Having been an Engineering/Science intent my freshman year in college, I was reminded of a chemistry lab book, which laid out the specific steps of a lab procedure necessary to arrive at a desired conclusion. After the presentation, I sensed that most of the judges were at least more comfortable with the now Guidelines, though still bothered by the "intrusion" into their judicial routine. I kept an open mind. Soon, two cases for which I determined sentences without benefit of the Guidelines helped me to discover the value of the Guidelines and better

⁴ See *U.S. v. Pares*, 685 P. Supp. 990 (W.D. Tex. 1988) (holding that the Sentencing Reform Act of 1984 violates the separation of powers doctrine and that the Sentencing Guidelines violate the due process rights of defendants); but see *Mistretta v. U.S.*, 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (rejecting arguments that Congressional creation of Sentencing Commission violated non-delegation doctrine or separation of powers doctrine, and thus holding that Sentencing Guidelines are constitutional).

⁵ The present caseload in the District is between 200-300 cases, reflecting a dramatic drop-off since the late 1980's.

understand the tough issues faced by the Sentencing Commission.⁶

I recall the first case vividly. The president of a small bank had pled guilty to a one-count information, alleging misapplication of bank funds, in violation of 18 U.S.C. § 656(f). The courtroom was filled. The defendant's wife, relatives, friends, and many of his business colleagues were in attendance. Several individuals spoke on his behalf, all claiming that the defendant's conduct was aberrational. His attorney stated that his client was a good man who had simply made a mistake and deserved another chance. It was punishment enough, defense counsel stated, for a professional to stand before the Court and confess his guilt.

However, this particular defendant had already been given a second chance. Five years before, he had pled guilty in state court to theft of property valued above \$10,000 (a second-degree felony). He had consequently been placed on deferred adjudication (a form of probation) for ten years. In addition, the defendant had taken advantage of a customer who requested an extension on a prior loan and an additional \$1,000 to fly her children to Florida for a Christmas vacation. Unbeknownst to the customer, the defendant approved a \$5,000 loan in her name and kept \$4,000 for himself. When the bank auditor became concerned about the loan, the defendant asked the customer to lie to the auditor. Later that month, the defendant caused a \$6,000 loan to be issued to a fictitious person in order to pay off the original loan.

In the face of such a fact pattern, what are the "appropriate" sentencing factors, and to what extent should such factors be considered in arriving at a just sentence? Statutorily, the maximum sentence I could impose was five years and/or a fine of \$250,000. But within those statutory limits, I had the discretion to impose any sentence consistent with my own sense of a just result. The defendant had a wife and three children. He had worked regularly and supported his family. However, he had also breached a duty of trust & rising from his relationship with a bank customer. He had been on probation for a previous crime at the time of the instant offense, and had obviously not taken advantage of his deferred adjudication for rehabilitation purposes. Clearly, his character was flawed by a persistent dishonesty. In fact, he even lied to the Court after pleading guilty, erroneously informing his probation officer that he had graduated from college with a degree in business administration. Even though I had the probation officer's presentence report and recommendations, it was ultimately my responsibility to evaluate this man, evaluate all the surrounding circumstances, and impose an appropriate sentence. I realized that in order to impose an "appropriate" sentence, I first had to define the ultimate purpose of sentencing. Deterrence? Punishment? Rehabilitation? What are the ends of justice? I quickly realized that these questions, and other difficult sentencing questions of which I had not yet thought, simply cannot be answered objectively. When left to their own discretion, different judges answer these questions in different ways, with each judge fully capable of explaining the rationale behind his or her answer in a reasonable way. I concluded that the lack of uniformity caused by different judges imposing different sentences under the same circumstances was completely inconsistent with my sense of justice.

My education on this subject was just beginning. A year later, I presided over another case involving a businessman who was well-liked in the community. The two-count indictment alleged that the defendant conspired to defraud the Government via a false claim, in violation of 18 U.S.C.

⁶ In both cases that I discuss below, the underlying crimes were committed before the effective date of the Guidelines, November 1, 1987.

§ 286, and made false statements to defraud the United States, in violation of 18 U.S.C. § 1001. In a Form 1443 (Contractor's Request for Progress Payment), the defendant stated that he was due \$136,540, having paid that amount to a subcontractor. In court, the case agent testified that the defendant had admitted that he had not paid the amount to a subcontractor; the defendant argued that he had no criminal intent. The government argued that the defendant was in financial difficulty, needed the money to bring his company back to financial viability, and believed that he would not be detected if he filed a false claim. The jury acquitted on Count One, but convicted on Count Two. Like the prior case discussed above, the defendant's crime was statutorily punishable by up to five years in prison and/or a fine \$250,000.

The defendant in this case enjoyed a strong and close relationship with his family. He had no prior criminal history. He had a master's degree and had been a well-respected, contributing member of the community. However, aggravating factors were also significant. He had defrauded the Government, and, according to testimony, he had so admitted to the case agents and a member of his staff. The presentence report indicated that fraud by government contractors was (as it still is) a serious problem for the Government, and recommended that deterrence be an important factor in the determination of sentence.

These two cases illustrate the difficulty in attaining uniform sentences among similar cases under a system governed by judicial discretion. How should the various mitigating and aggravating factors in the banker's case compare with the mitigating and aggravating factors in the government contractor's case? The government contractor had no prior criminal history. However, the government contractor failed to cooperate with the investigation and took the matter to trial, even though testimony suggested that he had previously admitted making the false statement. In contrast, the banker did have a prior criminal record, but the banker cooperated with the investigation and pled guilty. In addition, the loss involved in the government contractor's case exceeded the loss involved in the banker's case by \$130,000. Justice requires some proportionality of sentences between these two cases, but how should judges make that determination?

By that time, having tried a substantial number of cases under both pre-Guidelines and Guidelines procedures, I was convinced that uniformity and proportionality in sentencing were best served through the use of sentencing guidelines. After presiding over some three hundred sentencing determinations as a federal district judge, and having reviewed countless others since my appointment to the Court of Appeals, I remain convinced that the Guidelines are far superior to ad hoc determinations of sentencing factors and their relative significance by individual judges. Those judges who continue to object to the Guidelines seem to believe that they can do a better job of imposing just sentences in individual cases. However, I have yet to hear one of these judges address whether his definition of an "individualized sentence" matches the definitions of other judges who share in his critical opinion. No one judge at any level holds the key to justice. I submit that within the community of federal judges, there is wide-ranging opinion on sentencing matters; even among the critics of the Guidelines, there would be great disagreement over what would constitute a better alternative. I fully realize that there will always be a tension between judicial discretion and reasonable sentence uniformity. The greater the discretion to determine individualized sentences, the lesser the uniformity of sentences. The greater the uniformity of sentences, the lesser the discretion to determine individualized sentences. Fine tuning this tension will be a recurring problem, but in my opinion the Guidelines strike a far better balance than the discretionary system they replaced.

If I may, I would also like to provide a few brief personal comments on one of the "hot topics" in sentencing- the disparity of sentences provided for by the Guidelines between crack cocaine and powder cocaine. When considering whether a 100:1 ratio should exist between sentences imposed for the same amounts of different forms of the same drug, those participating in the legal debate may lose sight of the policy implications of their arguments. The effectiveness of sentences in combating the spread of drugs depends significantly on the damage that these drugs cause. Crack is insidious, cheap, easy to get, and utterly destructive. Although I have heard and understand the equal protection arguments of those who challenge the constitutionality of the Guidelines based on their disparate impact on African-Americans, I have also learned and come to understand the devastating consequences to unborn children of mothers addicted to crack. I invite any Member of this Committee to go to the nearest neo-natal unit and observe firsthand the tragic and painful consequences of crack use that premature babies suffer. This cruelty, played on the unprotected because of the sale of crack, is heinous. In addition, it seems that every month, when I travel to New Orleans, the lead story on the local television news features the sobbing face of a young mother whose child has been killed or maimed by a drug dealer's bullet. I would also ask the Committee to subpoena news footage from network affiliates in New Orleans in order that you may see the oft-occurring effects of crack deals gone awry. The public projects in New Orleans, as they are here in Washington, D.C., and in countless other cities in our country, are filled with individuals who demand and deserve protection. These people, the real victims of drug use, should be considered foremost in any discussion of the appropriate penalties for drug crimes.

None of these matters are easy to resolve. I wish you well in your discussions and deliberations.

TESTIMONY OF THOMAS N. WHITESIDE
DEPUTY CHIEF UNITED STATES PROBATION OFFICER
BEFORE THE SUBCOMMITTEE ON CRIME
OF THE HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY

December 14, 1995

I. Introduction

Mr. Chairman, Members of the Committee: Thank you for allowing me to appear before you today to discuss the federal sentencing guidelines and the United States Probation system's experience with the guidelines. The federal probation system is charged with the responsibility under the Federal Rules of preparing a presentence investigation and report which is to be submitted to the court before sentence is imposed. The only exception to the rule occurs when the court finds that the information in the record enables it to exercise meaningful statutory sentencing authority. The exception seldom occurs (1.5 % of defendants sentenced in 1994 under the Sentencing Reform Act were processed without a presentence report according to the United States Sentencing Commission's Annual Report). The presentence report contains, by rule, guidelines that the probation officer believes to be applicable in a defendant's case.

When the guidelines went into effect on November 1, 1987, the federal probation system was presented with its greatest challenge. Probation officers quickly developed an expertise in the new system. Working closely with the United States Sentencing Commission, probation officers from every part of the country attended training sessions at the Sentencing Commission. Judge Wilkins, the former Chair of the Commission, created a hot line so that probation officers could call the Sentencing Commission and obtain advice about handling guideline issues. The training staff, since the beginning, has routinely traveled to the districts to provide training to probation officers, attorneys, and judges. The Commission encouraged and supported the development of a Probation Officers Advisory Group with representatives from each circuit sitting on the group. The group has made every effort to acquire information from the field on the operation of the guidelines. This has resulted in a free flow of information to and from the Commission on how the guidelines are operating. Amendments consolidating and clarifying the guidelines have been enacted into law as a result of this process. Given the high level of support in research, education and training by the United States Sentencing Commission, I am proud to say that the federal probation system has met the challenge in its role of implementing federal sentencing guidelines.

II. Comparison of Probation Officer's Role under Old System vs. New System

Under the old law system, probation officers provided a service to the court that was fundamentally similar to the role that we play today. We have always provided the court with unlimited information with which the judge could use to render a fair and equitable sentence.

However, in the past, much of our focus was on the background and social history of the defendant and each court had the liberty of choosing those factors which were deemed most important and attach weight to the chosen factor at its discretion. Often the probation officer, in an attempt to please the court, left no stones unturned in providing full case histories which made good reading but often provided an abundance of information that had little relevance to sentencing. Today, under the Federal Sentencing Guidelines, specific sentencing factors have been identified by the Sentencing Commission and the probation officer must apply these factors to the facts of the case as disclosed in his or her investigation. These elements appropriately identified by the Sentencing Commission are salient factors that have been characteristic of the various criminal behaviors over the decades. For example, in a drug case such factors as the type of drug, the amount distributed, and whether a weapon was possessed determine the guideline sentence. In a robbery, the use of a weapon, injury to victims, the taking of a hostage, and the amount of money stolen determine the guideline sentence. And, the defendant's past criminal record is another important sentencing factor under the guidelines. This allows for a distinction to be made between first offenders and recidivists, and all of those who fall in between. Now, with emphasis on a defendant's actual criminal behavior and prior criminal history, probation officers uniformly have the same focus and make recommendations based upon the same factors which are considered by the court. Because of this, the wide-spread sentencing disparity that previously existed has been greatly reduced.

The probation officers' work in the guidelines system is placed under a microscope. There is full disclosure, prior to the sentencing hearing, of the probation officer's preliminary calculations and recommendation as to the applicable sentencing range. Attorneys are afforded the opportunity to attack the calculations of the probation officer by presenting evidence and or prior cases to show that their position is the correct one. The probation officer of today has to be well-versed in statutes, rules, guideline application, the amendment process and law. The federal probation system has had to organize strategically to be as effective as possible in working with sentencing guidelines. Many districts have specialized where certain probation officers do only presentence investigations and reports while others handle the supervision of offenders responsibility. We have hired the best people available and have trained them extensively with the help of the Sentencing Commission. Probation officers are not intimidated by the guideline system and today are able to apply the guidelines to thousands of cases annually with no difficulty.

III. Complexity of the Guidelines

When the Sentencing Reform Act was implemented in November, 1987, the probation system perceived the guidelines as being somewhat complex but after learning the new system and working with it, the basics of guideline application became second nature. An application of a guideline in its purest form is much less complex today due to the refinements made by the Commission during the first six years of operation. Frankly, the most difficult aspect of the guidelines has been adjusting to the amendments each year. Most of the changes occurred during the first five years, which was predictable and contemplated by statute. In fact,

Chairman Wilkins and others made clear at the outset that the guideline system would be an evolutionary process. The original Commission noted that the governing statute combined with continuing research, experience and analysis would result in revisions through the amendment process. The fruits of that process have not come easy to probation officers because we have to consider the changes in view of the ex post facto rule and we cannot advance a sentencing recommendation to the court which punishes a defendant more harshly than the guideline in effect at the time the crime was committed. We must also consider statutory changes and occasionally confusion arises when both the guideline and the statute have changed.

Generally, the guidelines are as complex as the behavior of the criminal defendant to which they apply. Some are pretty simple, but as offenses become more sophisticated and prior records become extensive, the sentencing issues are more involved. Many of the defendants that we see in federal court today would present a sentencing dilemma under any system. Certainly, in many cases, more of the court's resources are spent in determining the appropriate sentence than under the old law. It was at the outset and still is reasonable to conclude that a system that strives to be equitable, fair, and honest will use more of its resources in time than a system without a mandate.

A good yard stick upon which to measure the complexity of the guidelines lies within the Sentencing Commission's own hot line, which as previously noted, was devised to answer questions from probation officers as they go about their daily responsibility of applying the guidelines and making recommendations to the court. The United States Sentencing Commission's 1994 Annual Report reflects that only about one call per month per district was made to the hot line by probation officers during that year. The federal probation system has developed a great deal of expertise in guideline application over the past several years. We do, however, recognize that many defense attorneys who do not practice regularly in federal court find that working with the guidelines is cumbersome and many are not comfortable in representing their clients. The federal probation system has played a role in assisting these attorneys with guideline application. In my own district, our court authorizes and supports the training of defense attorneys by probation officers and the Bar Association provides continuing legal education credits to attorneys for taking our courses. The United States Attorney's Office and the Federal Public Defender's Office assist in this endeavor. This has resulted in the defense bar becoming much more proficient in understanding and using the guidelines to the benefit of their clients.

IV. Circumvention of the Guidelines

The guidelines have made great strides in achieving the purposes of the Sentencing Reform Act but they are as effective as those charged with the responsibility of applying them. Many critics of the guidelines look to substantial assistance departures where upon on motion of the government a defendant receives reduction in his or her applicable guideline sentence based upon that person's assistance in the investigation or prosecution of another person who has committed an offense.

The United States Sentencing Commission's 1994 Annual Report reflects that 19.5% of sentences were below the guideline range due to substantial assistance motions made by the various U.S. Attorney's Offices and the courts. Critics argue that once a motion is made for substantial assistance departure, sentencing disparity is reintroduced into the equation. The Sentencing Commission is studying substantial assistance departures. The issue is a sensitive one in view of the effect that these departures have on criminal investigations.

Prosecutors are aggressively applying the guidelines for the most part; however, there are instances where the probation officer's preliminary findings are in conflict with a plea agreement which the prosecutor has made with the defense attorney. When this occurs, the probation officer's guideline recommendation is usually higher than that proposed by the attorneys. Given this circumstance, the court must resolve the issue and often sentencing hearings are protracted when the probation officer finds through the provision of relevant conduct that the amount of harm in a case is much greater than that described in the count of conviction or plea bargain agreement. The guideline system focuses on the full scope of the criminal behavior and is designed so that the true conduct of a defendant determines the sentence.

V. Other Issues

Aggressive prosecutors present evidence to prove by a preponderance of the evidence that, for example, in a drug case a certain amount of drugs were distributed by the defendant. In a minority of cases, sentencing hearings turn into mini-trials as these relevant sentencing issues are contested. Critics argue that valuable court resources are used in deciding the sentence. Others argue that the lower preponderance of the evidence standard is not appropriate for determining a sentence.

Much of the criticism of the guidelines system has to do with the length of the sentences. Mandatory minimum sentences are considered by many as obstacles to the guidelines. Federal sentences are tough on crime, a factor that many potential law violators and the public in general do not know. Better education through the media would be a recommendation to alleviate this situation.

Many argue that there is still widespread disparity in federal sentencing. Some say that given the skill and the fate of the investigation, coupled with the skill and commitment of the prosecutor to the guidelines are factors that result in continued disparity in federal sentencing. This same argument, that of a human element, in practice can be made for the success of federal sentencing guidelines. The current system is not perfect but it is unfair to compare it to a standard of perfection for one does not exist. But, compared to the previous system, it has resulted in vast improvements. Today, tough sentences are imposed much more evenly, consistently, and uniformly.

VI. Conclusion

Federal sentencing guidelines have accomplished several important goals in dealing with a wide variety of human behavior. First, they represent a fair standard by which behavior can

be judged and the standard applies to everyone who comes into federal court regardless of their socioeconomic background, race, or position in the community. Secondly, the guidelines and the Sentencing Reform Act represents a process which results in credible sentence practice. The process makes everyone remain attentive to the relevant issues critical to the appropriate disposition of a case. During each year's amendment cycle, these issues go through the amendment process to Congress and if not rejected, into law where the courts examine them and apply them to the facts of the case. The appellate courts, in turn, review many guideline application scenarios and today there is a body of law on practically every sentencing issue. Where circuits differ in their opinion, the cycle continues and the Sentencing Commission reconciles the issue. The process ensures that sentencing practices do not become sedentary and that those factors involving criminal behavior and prior record mandated by the Sentencing Reform Act remain fresh. Lastly, the federal court no longer operates in a cloud of uncertainty, Judges, attorneys, defendants, probation officers, and most importantly, defendants know what issues were considered in deciding the sentence and what the sentence means. If deterrence is achievable, then certainty of punishment and the severity of that punishment are elements that cannot be ignored. The federal sentencing guidelines provide these elements. In conclusion, it is clear to us in the field of federal criminal sentencing that the guidelines have gone far in fulfilling the purposes of sentencing.

I appreciate the opportunity that you have given me to be here. I will be happy to respond to any questions that the Committee might have.

TESTIMONY OF
ROBERT H. EDMUNDS, JR., ESQ.
STERN, GRAHAM AND KLEPFER
BEFORE THE
SUBCOMMITTEE ON CRIME
HOUSE JUDICIARY COMMITTEE

DECEMBER 14, 1995

This testimony deals with the evolution of Department of Justice policies regarding what charges to bring and what pleas to negotiate in federal criminal cases during my tenure as a United States Attorney between 1986 and 1993. The changes brought about by the Sentencing Reform Act of 1984 became effective in November, 1987. The Department responded by implementing new policies to direct the charging and pleading practices of line prosecutors.

A significant aspect the implementation of the Sentencing Reform Act of 1984 was the reallocation of discretion among the different parties involved in the administration of criminal justice. Prior to the effective date of the Act, United States Judges had sentencing powers limited only by the statutory penalties of the crime before them. If a Judge felt that the crime for which he or she was imposing sentence was more serious than was reflected in the formal count or counts of conviction, he or she could impose a sentence which reflected the judge's evaluation of the defendant's culpability⁷. The sentence imposed could not be appealed except on Constitutional grounds.

The enactment of the Sentencing Guidelines shifted a significant amount of discretion to the United States Attorney. The decisions of what charges to bring and what pleas to allow limited the sentencing power of a sentencing judge, who could only impose a sentence based on the offense of conviction. Although the guideline system is a "modified real offense system" which allows for enhanced sentences based on uncharged conduct, the power of a judge to impose a sentence that "felt right" was curtailed⁸. If a case resulted in a negotiated plea, often the only recourse available to a judge who felt the plea improper was to reject the agreement outright. If the case resulted in a trial and conviction, a judge who did not agree with the sentence dictated by the guidelines could only depart for reasons which were both stated on the record and subject to appeal⁹.

⁷It was, and remains, theoretically possible for the parties to enter into a plea agreement which, pursuant to Rule 11 (e) (1) (C), bind the Court. In the experience of the writer, however, few United States judges routinely accept such a plea agreement.

⁸The Sentencing Commission initially considered setting up a system where a sentence would have been controlled only by the count of conviction. This proposal was rejected in favor of the somewhat more flexible modified real offense system which does take into account all the relevant criminal behavior.

⁹The guidelines also enhanced the role of the Probation officers, who has the responsibility of preparing a Presentence Report In each case. These reports, provide the starting point for

It was the position of various Attorneys General under whom I served that the Sentencing Reform Act represented the will of a popularly elected Congress, and that while there might be parts of the system that were debatable, it was the duty of the federal prosecutors to honor the will of Congress and make the system work as intended. The Department therefore took steps to ensure that the intent of the Act was honored.

The Department's strategy was to focus on one of the three goals set out in the introduction to the Guidelines in Chapter 1, Part A. The three goals are honesty in sentencing, proportionality in sentencing, and uniformity in sentencing. The Department concentrated on this last goal. The first goal, honesty, automatically resulted from the fact that the Act abolished parole, so that a sentenced defendant would serve the time he or she was given. The second goal, proportionality, would result from the work of the sentencing Commission, which would set the offense levels for each crime. The third goal, uniformity, was one that the Department could address, and the implementation of this goal became a significant Departmental priority over time.

It was understood from the beginning that a strong guiding hand from the top was necessary. There is a natural tension between line prosecutors, who want full discretion to deal with the idiosyncrasies of each case, and the Department's determination to keep the exercise of that discretion within bounds in order to promote uniformity. If the Departmental leadership had shown indifference to the guidelines, or if individual prosecutors in the field had been given no direction as to how to handle cases under the guidelines, the goal of uniformity would almost certainly have failed. Therefore every United States Attorney General under whom I served not only gave strong verbal support to the guidelines, but also provided the resources necessary to educate line prosecutors and supervisors as to their duties and responsibilities under the new system.

This education was accomplished in several ways. The day that the guidelines became effective, an analysis of the guidelines was provided in a Departmental publication called the "Redbook." Two days later, Deputy Attorney General Steve Trott provided all federal prosecutors a memorandum defining interim Departmental policies. Certain core themes set out in these documents were that the United States would not allow plea agreements to frustrate or undermine the guidelines, that there would be full disclosure of all facts to the court, that prosecutors should charge the most serious offense or offenses consistent with the defendant's conduct, and that Departmental policies were to be uniformly applied.

Approximately two years later, Attorney General Thornburgh issued a bluesheet addition to the United States Attorneys' Manual. This document, known to all federal prosecutors as the "Thornburgh Memo", set out the Department's insistence on compliance with the guidelines. "It is vitally important that federal prosecutors understand these guidelines and make them work. Prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve ... Compliance with these policies is essential if federal criminal law is to be an effective deterrent and those who violate the law are to be justly punished."

sentencing, and the decisions made by the Probation officer regarding such issues as a defendant's role in the offense or acceptance of responsibility have an enormous effect on the ultimate sentence imposed. A full discussion of the role of the Probation Officer is beyond the scope of theme remarks.

The Thornburgh Memo set out several key Departmental policies, including that the most serious readily provable offense consistent with the defendant's conduct should be charged, that prosecutors should obtain approval before filing motions requesting a downward departure for substantial assistance, and that only truthful stipulations should be entered. The Memo advised prosecutors that there would be monitoring to assure compliance.

Early in 1988, Attorney General Meese established a subcommittee of the Attorney General's Advisory Committee to deal with guideline issues. I was a charter member of that subcommittee, as was Representative Barr, and our commission was to find out what was really going on in the field, identify problem areas, and make policy recommendations to the Department. Between 1988 and 1993, when I resigned as United States Attorney, this subcommittee undertook a number of projects to ensure that the Department's commitment to proper and wise exercise of the discretion given prosecutors under the guideline system was carried out in practice in the field. In many ways, this subcommittee carried out the monitoring function called for in the Thornburgh Memo.

Let me provide an example of the type of issue we saw and how we dealt with it. Under the controlled substances laws in Title 21, there is a provision which states that if the defendant has been previously convicted of a drug offense, the sentence for a second offense is substantially increased. However, this provision does not come into play unless the prosecutor files an information with the court giving notice of the prior conviction. Thus the prosecutor's decision whether to file such an information has a giant impact on the sentence a defendant faces. At one of the subcommittee meetings, the question was raised whether prosecutors routinely filed such an information. Among those at the meeting, there was no uniformity. Some always did, some sometimes did, some seldom did. Also, some would file but withdraw the filing in exchange for a plea. It was immediately clear that the goal of uniformity was not being met in this area because the practices of the particular district in which a defendant with a prior record was charged had a significant impact on his or her ultimate sentence. The subcommittee then polled all the United States Attorneys both as to their office policies and as to their recommendations, digested the results, drafted a proposed policy to deal with this issue, received Departmental approval, and promulgated that policy to all United States Attorneys on behalf of the Attorney General.

During my tenure with the subcommittee, numerous other projects were undertaken to ensure that the prosecutors were playing their intended role in the guideline system. At least twice questionnaires were sent to all United States Attorneys to discover information about practices in their districts. Members of the subcommittee traveled to and audited several offices which either had a reputation for not complying with Departmental policies or which stood out in the annual statistics published by the Sentencing Commission. Subcommittee members taught at training seminars for line prosecutors and supervisors. Training videotapes were prepared and sent to each office. The Department routinely sends teams to evaluate each district every two or three years; the subcommittee prepared questions specific to charging and pleading practices for those teams to ask of Assistant United States Attorneys, Probation Officers and Federal Judges. We found that the candid comments of the Probation Officers and Judges could be quite enlightening.

Over time, several policies were established by the Attorney General as a result of findings by the subcommittee. These policies were intended to ensure that federal prosecutors were exercising their charging and pleading duties responsibly and in accordance with the Department's goals. For example, one of the possible benefits a defendant can receive under guideline sentencing is a

downward departure for giving substantial assistance to the United States. The procedure calls for the prosecutor to file a motion for a downward departure pursuant to guideline 5K1.1. When the guidelines first went into effect, we found that in some offices any Assistant United States Attorney could file such a motion on his or her own initiative. Thus it

was a significant factor to a defendant in such a district who was assigned to handle a case. Since that finding was antithetical to the Department's goal of uniformity, a policy was established calling for approval of such a filing at a supervisory level. That same policy also required that the reasons for the departure be memorialized so that there would be a record of all such approved departures.

All this activity was designed to ensure that Department of Justice prosecutors properly and consistently exercised the discretion given them under the Guidelines. The question then becomes the extent to which this goal was met during my tenure with the Department. While there is no unequivocal answer, I am satisfied that there was substantial success. Several factors lead me to this belief.

There was initially a great deal of resistance to the guidelines from prosecutors. There is a saying familiar to trial attorneys, that they know what a case is worth. Often the guideline result was not consistent with the attorney's evaluation of the case, and therefore, at least at the beginning, many prosecutors looked for ways to manipulate the guidelines to reach a result that satisfied their long-held beliefs. A good example arose in the context of enhanced sentences for previously-convicted drug offenders upon filing of an information by the prosecutor, which I discussed above. At a regional seminar for prosecutors, a member of the subcommittee who was in the process of gathering information about the procedures being followed in different districts asked those attending whether or not such information were routinely filed. During the lively conversation which followed, a respected and experienced line prosecutor remarked that he knew which defendants needed such a filing and which did not. He felt that he did not need any Departmental policy to tell him his job. The fallacy of his position is that each prosecutor sees each case differently, and therefore Departmental policies, though often initially distasteful to the recipients, were necessary to achieve uniformity. As the Department consistently upheld its commitment to the guidelines, as education efforts continued, and as new prosecutors were hired who knew no other system, internal resistance steadily declined.

A second factor which leads me to the conclusion that the Department was generally successful in achieving its goal comes from the interaction of the Department with the Sentencing Commission. The Commission conducted its own studies and maintained its own sets of statistics, and freely shared that information with the Department and the subcommittee. The commission at one point identified approximately one hundred cases where it felt that Departmental policies had been violated and the purposes of the guidelines thwarted. Examples would be cases where the prosecutor filed a 5K1.1 motion allowing a downward departure for a defendant who did not provide assistance to the government, or where a defendant who was involved in a drug conspiracy was allowed to plead to a lesser count of using a telephone as part of a narcotics transaction, or where a gun charge was dismissed despite strong evidence to support the charge.

Several members of the subcommittee and the Department reexamined every case that the Commission identified. We found that in approximately one quarter of the cases, the Department's policies had in fact been violated. In approximately another quarter, we felt that the Commission staffers were mistaken and the case result met Departmental standards. In the remaining half of the identified cases, we found that the facts or circumstances of the case were such that the prosecutor's

handling of the case was defensible, most frequently because of unusual or ambiguous facts. While it would be preferable that there had been less deviation from policy norms, those of us who conducted this evaluation felt that most of the cases represented an effort to reach a result that was consistent both with the particular facts and the Department's goals.

While this Commission survey really only represented a snapshot of practices over a relatively short period, the encouraging results we found were consistent with other statistics provided by that organization. For instance, the percentage of cases where substantial assistance motions were filed tended to be about the same for most districts. While there were some districts which were out of line, there were often satisfactory reasons. For instance, in one district the judges prided themselves on imposing the most strict sentences in the nation. The prosecutors were significantly more generous than the average in filing motions to allow a downward departure, since not every case calls for a draconian sentence. Thus while uniformity was never reached in any absolute sense, there was a fairly steady and consistent movement toward that end.

Thirdly, I was impressed by the growing sophistication in sentencing areas shown by the United States Attorneys themselves. These men and women were mostly amenable to compliance with Departmental policies, and at every United States Attorneys conference I attended I observed an increased awareness of Departmental policies and familiarity with the nuances of the guidelines themselves. It was also apparent at training sessions for line prosecutors that this attitude of willing compliance on the part of most United States Attorneys was duly noted by the Assistants in those offices.

I must concede that there were some districts which struggled against the Department's guiding hand. Where the United States Attorney was hostile to the guidelines, that attitude was often reflected in the charge and plea practices there. Such districts remained a nagging problem. However, I felt that between 1988 and 1993 the guidelines were winning the hearts and minds of line prosecutors in most districts.

Since I am no longer with the Department of Justice, I am not in a position to testify about current policy. I do not mean my following observations as criticism. Each administration is entitled to set its own priorities. However, it does appear to me that sentencing issues are no longer a high Departmental priority. I have heard from several sources that, generally speaking, offices which had developed a tradition of compliance with Departmental policies have maintained that tradition, and that offices where the tradition was not so strong are now even less in compliance with the old policies. Consistent with that information, I will say that my former office, where I insisted on compliance with Departmental guidelines, is still very hard nosed.

I submit that the key to effective execution of the discretion granted to the prosecutors by the Sentencing Reform Act of 1984 in their charging and plea decisions is strong support from the very top. Attorneys General Meese, Thornburgh and Barr all vocally supported the guidelines and forcefully directed their prosecutors in how they should uniformly use their discretion. Equally important, they backed their words with actions. In addition to the initiatives I have already described, for instance, General Barr convened a conference for all United States Attorneys dedicated solely to guideline issues.

That portion of the United States Attorneys' Manual titled Principles of Federal Prosecution was redrafted to incorporate the charging and pleading policies set out as a result of the guidelines. Without this type of guidance from the top, there will inevitably be decreased uniformity as the

natural tendency of each prosecutor to follow his or her own muse reasserts itself . The resulting inequities, whether intended or not, may open the Department to charges that it is biased in favor of some racial, sexual or socio-economic groups.

It is worth noting in conclusion that the guidelines do not have any guaranteed defenders. It is the nature of defense counsel to try to circumvent any guideline sentencing system in his or her legitimate efforts to serve the client. Judges resist the loss of sentencing discretion that they previously enjoyed. Had the Department of Justice, through its prosecutors, not taken a forceful position consistent with the three stated goals of the guidelines, I question whether the system would have survived in any meaningful way. However, by its initial and ongoing support of the guidelines, and by its setting policies which directed the prosecutors in ways consistent with the guidelines, the Department, during the time I was there, demonstrated the viability of charging and pleading practices which responsibly contain and discharge the discretion granted prosecutors under the Sentencing Reform Act of 1984.

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