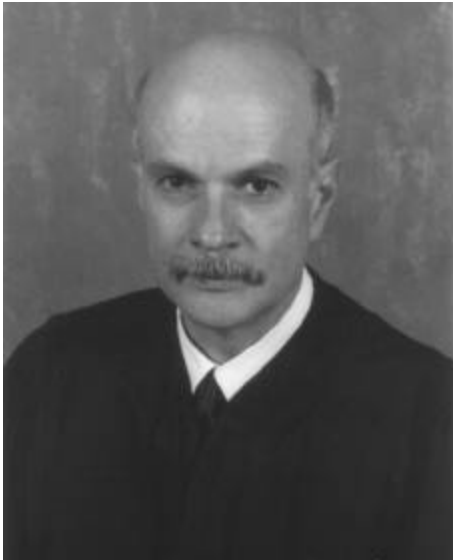




Guidelines

News from the U.S. Sentencing Commission

October 2004



Judge Ricardo H. Hinojosa of the Southern District of Texas is the Commission's new chair.

Judge Hinojosa Named to Chair U.S. Sentencing Commission

President George W. Bush on August 2, 2004, appointed U.S. District Court Judge Ricardo H. Hinojosa of McAllen, Texas, to be the new chair of the U.S. Sentencing Commission. Judge Hinojosa, a member of the Sentencing Commission since May of 2003, fills the vacancy created in January 2004 by the resignation of the former chair, Judge Diana E. Murphy of the U.S. Court of Appeals for the 8th Circuit.

Judge Hinojosa, who has served on the U.S. District Court for the Southern District of Texas since 1983, has also served as an adjunct professor at the University of Texas School of Law. From 1976 until 1983, he was an attorney with the Ewers & Toothaker Law Firm in McAllen, Texas, and was a partner at the time he became a judge. He graduated Phi Beta Kappa and with honors from the University of Texas at Austin in 1972, and earned his law degree from Harvard Law School in 1975. Judge Hinojosa received the Distinguished Alumnus Award from the University of Texas Ex-Students' Association in 2001. He served as member (1979-83) and chairman (1981-83) of the Pan American University Board of Regents (now University of Texas-Pan American), and in 1986 he received the Distinguished Service Award from the Pan American University Alumni Association. ■

Post-Blakely Developments

On June 24, 2004, the Supreme Court decided *Blakely v. Washington*, 124 S. Ct. 2531 (2004), which invalidated a sentence imposed under the Washington State sentencing guidelines statutes, holding that it violated the defendant's Sixth Amendment right to a jury trial. The Court stated that it expressed no opinion on the federal sentencing guidelines, which were not before it. Since the decision, however, circuit and district courts have reached varying opinions on the implications of the decision for federal sentencing. The Supreme Court has accepted for expedited review two federal sentencing guidelines cases, *United States v. Booker* and *United States v. Fanfan*, to clarify the implications of the decision for the federal sentencing guidelines (U. S. Supreme Court Order List: 542 U.S., August 2, 2004).

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Commission Submits Guideline Amendments to Congress

The United States Sentencing Commission on April 30, 2004, sent to Congress a package of amendments that will toughen the requirements for corporate compliance and ethics programs and will provide sentencing increases for a number of offenses, including public corruption offenses, possession of certain destructive devices, spamming offenses, mishandling hazardous materials offenses, trafficking in GHB, and fraudulently obtaining a U.S. passport.

Organizational Guidelines

The Commission amended the organizational guidelines to make even more stringent the guidelines' criteria for effective compliance and ethics programs.

Directors and executives of organizations who hope to mitigate criminal fines now must take an active leadership role in the content and operation of compliance and ethics programs. Companies must identify areas of risk where criminal violations may occur, train high-level officials as well as employees in relevant legal standards

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On July 13, 2004, Commission Vice Chairs John R. Steer and William K. Sessions III appeared before the United States Senate Committee on the Judiciary to present the Commission's views of the immediate impact of the *Blakely* decision on the federal sentencing guidelines. Citing the long line of cases upholding the constitutionality of the guidelines in a variety of contexts, Vice Chairs Steer and Sessions asserted the Commission's belief that the guidelines are constitutionally sound.

In addition to being represented by the Acting Solicitor General, the Commission has retained outside counsel from the firm of Cadwalader, Wickersham & Taft and has filed an *amicus* brief in the *Booker* and *Fanfan* cases. The brief recounts the history of the Sentencing Reform Act and the Commission and describes structural and other differences between the federal guidelines and the Washington State guidelines that were at issue in *Blakely*. The brief is available on the Commission's website at www.uscc.gov. ■

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One Columbus Circle, N.E.
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www.uscc.gov
(202) 502-4500
Fax: (202) 502-4699

Ricardo H. Hinojosa — Chair
Ruben Castillo — Vice Chair
William K. Sessions III — Vice Chair
John R. Steer — Vice Chair
Michael E. Horowitz — Commissioner
Michael E. O'Neill — Commissioner
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Editor — Michael Courlander
Production — Jeanne Doherty

Message from the Chair

Ricardo H. Hinojosa

I am honored to have been chosen by the President to serve as Chair of the U.S. Sentencing Commission, and I appreciate the opportunity given me to serve in this capacity.

Since January of this year, the Commission has been without a chair. To keep our operations running smoothly, the different responsibilities of the chair were divided up among the commissioners. I am grateful to my fellow commissioners who, by their diligent work, have made this transition easier.

I recognize that I have a hard act to follow because the position of chair was handled so well by my predecessors, Judges William W. Wilkins, Jr., Richard P. Conaboy, and Diana E. Murphy. Theirs are big shoes to fill, but I am excited to take on these responsibilities at what is a very challenging and opportune time. I take comfort knowing that my job will be made easier because of the knowledge, experience and collegiality that each member of the Commission brings to the table, and the expertise and dedication that the Commission staff bring to the work they perform.

The Commission looks forward to working with the courts, Congress, the executive branch, interested members of the legal profession and the public in general as we work together to ensure a fair and just sentencing system.

The Commission has published its list of priorities for the upcoming cycle and continues its statutory obligation and authority to canvass federal caseloads and recommend appropriate guideline changes.

With regards to the pending Supreme Court cases of *United States v. Booker* and *United States v. Fanfan*, the Commission's belief continues to be that the federal sentencing guidelines are constitutional. We have expressed that belief in our recent testimony before the Senate Judiciary Committee, and we have reasserted that viewpoint in an *amicus* brief that we filed with the Supreme Court of the United States on September 1. However, the Commission continues to monitor viewpoints of individuals and organizations from across the country for study, consideration, and implementation if it should ever become necessary. ■

Beryl A. Howell is Nominated to Sentencing Commission

On September 20, President Bush nominated Beryl A. Howell for appointment to the Sentencing Commission. Ms. Howell serves as managing director, general counsel of the Washington, D.C. Office of Stroz Friedberg, LLC. She is the former general counsel of the Senate Committee on the Judiciary, where she worked on a variety of criminal justice, technology and other issues before the Committee. Prior to her work on the Senate staff, Ms. Howell served as an assistant U.S. attorney and deputy chief of the Narcotics Section of the U.S. Attorney's office in the Eastern District of New York. She was formerly an associate at Schulte, Roth & Zabel in New York City and a clerk for the Honorable Dickinson R. Debevoise in the District of New Jersey. During her tenure on the Senate Judiciary Committee, Ms. Howell worked for Senator Patrick J. Leahy (D-VT) (chairman and ranking member on the full Committee), and for the Technology and the Law Subcommittee and the Antitrust, Business Rights and Competition Subcommittee. ■

Recidivism Studies Released

The Sentencing Commission's Recidivism Research Series has published its first two reports. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* examines the predictive nature of the criminal history guidelines. *Recidivism and the "First Offender"* focuses on recidivism rates for federal offenders who have little or no criminal history prior to their federal instant offense and uses three offender groupings suggested by earlier Commission staff policy teams. Both reports may be found on the Commission's web page at www.ussc.gov.

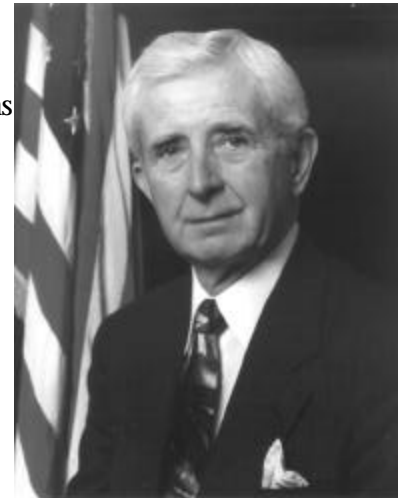
Research findings of the two Recidivism Research Series reports include the following:

- The guidelines' criminal history category predicts recidivism risk as it was intended and designed;
- The higher the criminal history category:
 - 1) the more likely an offender will recidivate and
 - 2) the more quickly an offender will recidivate;
- Nearly half of all recidivism events are supervision revocations; and
- "First offenders" have lower recidivism rates, regardless of how a first offender is defined within Criminal History Category I.

Several additional reports are planned for the Recidivism Research Series. The overall project design will permit the Commission to assess whether the current structure of the Chapter Four guidelines enables judges to target appropriate offenders for more severe punishment, and the project's findings may identify topics for Commission policy study. ■

Commissioner Reilly Honored as Kansan of the Year

U.S. Sentencing Commissioner and U.S. Parole Commission Chairman Edward F. Reilly, Jr. was honored as Kansan of the Year by the Kansas Society of Washington, D.C. Mr. Reilly joins a list of other distinguished Kansans who have received the award, including President Dwight D. Eisenhower, the Honorable Robert Dole, and the Honorable Nancy Landon Kassebaum.



Mr. Reilly, of Leavenworth, Kansas, was designated as chairman of the U.S. Parole Commission by President George W. Bush on May 31, 2001. The chair of the Parole Commission also sits as an *ex-officio* member of the U.S. Sentencing Commission. Prior to his appointment to the Parole Commission in 1992, Mr. Reilly served one year in the Kansas House of Representatives and 28 years in the Kansas Senate. In the Kansas legislature, he served as assistant majority leader, chairman of the Senate Committee on Federal and State Affairs, chairman of the Senate Insurance Subcommittee, and vice chairman of the Senate Elections Committee. Mr. Reilly has served four presidential administrations in various capacities. ■

Electronic Submission System in Development



Joyce Routt (IS Manager) and J. Deon Haynes (seated, Acting Director, Office of Monitoring) demo the user-friendly system.

On August 30, 2004, the U.S. Sentencing Commission met with five selected, representative probation offices and the Administrative Office of the U.S. Courts to introduce its Electronic Submission System that will be piloted this fall. The Electronic Submission System will provide probation offices with the capability to send electronically to the Commission all case-related sentencing documents. The system is designed to accept submissions that are transmitted in Adobe Portable Document Format (PDF) using the Administrative Office's Data Communication Network (DCN). By using the DCN, a transmission method is used that provides a direct link from probation offices to the Commission, thus avoiding the security issues associated with the Internet. Attendees were provided with a hands-on demonstration of an easy,

user-friendly system that simulates a transmittal letter by identifying the sender, defendant, case identifiers and documents sent.

The Commission will work closely with the five probation offices (Arizona; Idaho; Nebraska; Pennsylvania, Middle; and Texas, Southern) to test and fine tune the system. Additional court participants will be named in January 2005. ■

Amendments *continued from page 1*

and obligations, and give their compliance officers sufficient authority and resources to carry out their responsibilities. They must also promote an organizational culture that encourages a commitment to compliance with the law and ethical conduct.

Many of these modifications follow the recommendations of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines.

Public Corruption

The Commission increased sentences for all offenses involving bribery of or gratuities to public officials. The amended guidelines provide heightened penalties for public officials, elected public officials, or any other high-level officials.

To address homeland security concerns, the Commission also provided a new sentencing increase that applies specifically to those public officials who patrol the nation's borders and/or issue immigration or other "identification" documents.

MANPADS and Other Destructive Devices

The Commission increased the sentence for individuals possessing certain destructive devices, such as shoulder-fired missiles, rockets, and launchers, including MANPADS (man-portable air defense systems capable of destroying aircraft), LAWS (light anti-tank weapons) and RPGS (rocket-propelled grenades). Under the amendment, the guideline sentence is ten years' imprisonment, the statutory maximum penalty.

At the same time, the Commission provided an upward departure for unlawful possession of other destructive devices (such as pipe bombs, grenades, and Molotov cocktails) under circumstances that create a risk to the public. The Commission also issued a new guideline for violations of 18 U.S.C. § 931, which prohibits violent felons from purchasing, owning, or possessing body armor.

Spamming Offenses

Responding to passage of the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) of 2003, the Commission implemented a new offense that imposes criminal penalties on those who spam (*i.e.*, send out multiple commercial e-mail messages) by using another's computer without permission or by engaging in deceit concerning the source of the messages. The Commission referenced the new 18 U.S.C. § 1037 violations to guideline 2B1.1, added an enhancement if a defendant improperly obtains email addresses for the purpose of spamming, and

required the mass marketing enhancement to be applied in such cases.

Hazardous Material Offenses

In recognition of the inherent risks such offenses pose, the Commission added a new sentencing enhancement for offenders convicted of hazardous materials violations. The Commission also added a provision encouraging courts to sentence above the guideline range for hazardous materials transportation offenses committed with a terrorist intent.

Drug Offenses

The Commission increased penalties for GHB trafficking offenses. The amendment adds increases in the penalties for any drug trafficking crimes involving a drug facilitated sexual assault or use of the Internet to distribute drugs. The amendment also increases penalties for offenses involving the chemicals used to manufacture GHB. Finally, the amendment increases penalties for drug offenses involving the theft of anhydrous ammonia or transportation of stolen anhydrous ammonia, which is used in the manufacture of methamphetamine. The Commission also modified and reduced the sentence reduction available to certain defendants who qualify for a mitigating role adjustment in a drug conspiracy.

Passport Offenses

The Commission added a new 4-level enhancement for defendants who fraudulently obtain or use a United States passport.

Sex Offenses

Addressing several provisions in the PROTECT ACT, the Commission increased sentences for individuals who possess, receive, traffick in or produce images of child pornography. Furthermore, the amendment increases penalties for defendants who travel to engage in sexual activity with minors, and increases penalties for individuals who sexually abuse both minors and adults.

Other Crimes Against Persons

The Commission also increased the penalties for other crimes against persons, including second degree murder, attempted murder, voluntary manslaughter, and involuntary manslaughter involving reckless operation of a vehicle.

The amendments will take effect November 1, 2004, unless Congress disapproves them during a six-month review period.■