Only Suckers Pay the Sticker Price: The Effect of "Fast Track" Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System

Hearing: September 23, 2003

Written Statement of Frank O. Bowman, III
M. Dale Palmer Professor of Law
Indiana University School of Law – Indianapolis
Visiting Professor of Law (Fall 2003), Wake Forest Univ. School of Law

Judge Murphy, Members of the Commission. Thank you for your kind invitation to speak here today. As always, it is both a pleasure and an honor to appear before you.

Amid the many blows dealt to the Guidelines ship over the past year as it has tossed about on the sea of politics, the congressional command that you legitimize the Justice Department's so-called "fast-track" programs may seem only a small piece of flotsam bumping against the hull. I believe, however, that seen in context, this fast-track initiative is more akin to the iceberg that seemingly scraped gently alongside the hull of the Titanic. You may not yet see the damage it's doing. But in the end, it may sink, once and for all, the claim that the Guidelines stand for any principle other than administrative convenience.

The Federal Sentencing Guidelines were created with a number of objectives in mind. Primary among these was the objective of eliminating unwarranted disparity between the sentences of similarly situated defendants. In order to achieve that objective, the drafters of the Guidelines framed a modified real offense sentencing system, one in which the presumption is that defendants are to be sentenced based upon what they really did, rather than upon some version of events cobbled together by agreement of the parties in order to grease the skids of a plea bargain. In addition, the Guidelines system was

based on the idea of truth in sentencing – the notion that the sentence handed down by the judge on sentencing day would be the actual term a defendant would serve with only a modest discount for good behavior in prison. It was *because* the Guidelines were supposed to be a real offense system, and *because* the Guideline sentences announced in court were supposed to be the actual term to be served that the Commission has from the beginning paid the most scrupulous attention to the length of the sentences the Guidelines prescribe.

The fast-track component of the PROTECT Act represents a formal abandonment of the primary justification for the Guidelines - the objective of eliminating unwarranted disparity. In place of a system which at least strives for nationally uniform sentences for similarly situated offenders we are about to substitute a system where – <u>as a matter of law</u> – your sentence depends on the federal district in which you are prosecuted. Henceforward, if you smuggle Mexican aliens across the California border at Tijuana you are legally entitled to receive a lower sentence than if you smuggle the same number of Chinese aliens into the Port of San Francisco.

You may be saying to yourself, "No, that's not right. It won't be an entitlement as a matter of law. The Mexican alien smuggler only gets a lower sentence in San Diego if the U.S. Attorney grants him fast track status." And of course that's true, but it only makes matters worse. Henceforward, not only will interdistrict disparities be built into the law, but the mechanism for creating the disparities formally abandons the idea that ours is a real offense system in which sentences flow from facts determined by judge in favor of a system that legitimizes sentences based purely on deals made by the parties.

In addition, if we consider this fast-track provision in the context of other recent developments, it represents the abandonment of any pretense that the Guidelines as written have any necessary connection with the sentence a defendant will actually serve. Recall that the Protect Act has now granted the government a monopoly on initiating the third level reduction for acceptance, in addition to the power to make or withhold substantial assistance motions the government always had. Moreover, yesterday Attorney General Ashcroft issued his memorandum on plea bargaining policy. On the surface, it looks like a set of tough restrictions on plea bargains by AUSAs. If you read the fine print, the memo changes almost nothing. It reaffirms the government's power to make substantial assistance agreements, and its traditional right to charge bargain, as well as prosecutors' ability to make deals based on reassessments of the most readily proveable offense. And for the first time, it gives official DOJ sanction to fast-track plea bargains. In short, what it really says is, "Thou shalt not plea bargain unless you plea bargain using any of the plea bargaining methods you've always used in the past… plus fast track."[1]

And all this from an Administration whose public position is that public safety demands that there can be no retreat from the current lengthy sentences for federal crimes, particularly drug crimes. Moreover, says the Administration and its allies on the hill, the law is the law and must be enforced to the letter. And anyone, particularly any judge, who has the temerity to exercise discretion to reduce a sentence for federal felon is a lawbreaker himself who must be chastised, or according to some in Congress, impeached.

[1] In fairness to the authors of the Ashcroft memorandum, to the extent that the memo calls for increased central scrutiny of local prosecutorial plea bargaining practices with a view to reducing interdistrict disparity in those practices, it is entirely unobjectionable and arguably long overdue.

The fast-track provision of the PROTECT Act and the Department's plea bargaining policies are what happen when ideological purity and political posturing collide with the facts on the ground. Congress has set extraordinarily high sentences for drug and immigration crimes. These crimes have become ever more common on the Mexican border and elsewhere, and we have for years been beefing up enforcement and interdiction efforts on the border. At the same time, some US Attorney's Offices have, quite understandably, wanted to prosecute as felonies more of the offenders caught by the border law enforcement agencies. However, those caught are nominally subject to the very long sentences that the law mandates. They don't want to plead into those sentences, and the system lacks, or at least claims it lacks, the resources to try them.

So rather than setting sentences at levels commensurate with the seriousness of offenses and then letting justice take its course, with guilt determined by fair process, at the very least a process of complete discovery and pretrial motion practice, never mind an actual adversarial trial, what we've done is to set penalties at unsupportably high levels and then use those high penalties as the starting point for a program of huge sentencing discounts. A program consciously designed to ensure that any sane, competently advised, defendant against whom an even minimally credible case exists will plead guilty and plead guilty immediately, and if humanly possible will also cooperate against others. The result is that, at least as to drug and immigration offenses, in the districts where these offenses are most common and the allegedly essential deterrent effect of high sentences is most urgently required, virtually nobody is ever sentenced to the sentence the law says is the correct one. Putting it in commercial terms, the federal criminal justice system,

particularly along the border has now become the legal analog of a vast used car dealership in which only complete suckers ever pay the sticker price.

One view of fast-track programs is that they are a new, cynical application of free market theory to the halls of justice. Now defendants are neither evildoers in need of punishment nor fellow sinners in need of rehabilitation, but customers in the sentencing bazaar. For us, the legal rug merchants, the objective is neither retribution nor reformation, but productivity. Because (so we are told) we are in an era limited means, we must hold the line on both capital outlays in the form of additional courtrooms and labor costs for additional judges, courtroom personnel, prosecutors and defense lawyers. Thus, because our customer base has expanded, we must identify an optimum price differential between the nominal sentence for crime – the one you receive if you insist on exercising your rights – and the sale price of crime – the sentence you receive if you roll over fast. The optimum price differential is one large enough to ensure that the deals on offer are so attractive that a larger customer volume can be processed through the system without increased system costs.

Now I do not believe that the proponents of fast track are thinking in these rather cynical terms. The justifications offered by the Justice Department and the border judges for fast track programs are appealing, at least if viewed from a parochial local perspective. If you are the U.S. Attorney for the District of Arizona and waves of drug smugglers and illegal aliens are washing across the border and into your intake screening process, what are you supposed to do? If you are the Chief Judge of the same district, and the U.S. Attorney is indicting several thousand such cases, what are you supposed to do?

Let me offer some modest suggestions for things one might do before urging distortions of sentencing system:

1. Demand more resources: The sole justification for border fast track is the claim that border policemen are catching so many border criminals that, the existing number of border prosecutors and judges can't handle the caseload without fudging the law. If this is the problem, the Feeney Amendment should have contained a section authorizing new border courthouses, judgeships, and AUSA'a instead of a section legalizing fudging on the Guidelines. But due process costs money, and so…

2. If you can't or won't demand more resources, try using the ones you have. Again, the justification for fast track is the assertion that there are so many border defendants that we can't possibly try them all, and that if we don't offer extraordinary sentence discounts, so many as will demand trials that the system will collapse. Nonsense. No American jurisdiction tries everybody. Nor do you have to. What you have to do is have some sentencing discount for pleas, (e.g., the 3-level acceptance of responsibility adjustment that reduces the bottom of a defendant's guideline range by roughly 1/3 or more) and then try enough cases so that the loss of the discount is a plausible threat.

No one can deny that the border districts are loaded with cases. But there is reason to doubt they've ever even tried managing their caseloads with the resources they have without fudging the guidelines. How can I say that? Look at trial statistics.

1. In the District of Arizona, in 2001, the U.S. District Courts sentenced 3,120 defendants and conducted exactly 26 criminal trials.[2] According to the Court's website, there are thirteen sitting active District Court judges in Arizona, eight in Phoenix and five in Tucson, not counting

[2] U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, App. B (2002).

the six senior judges who still maintain chambers. In short, in 2001, in the District of Arizona, each non-senior judge conducted an average of exactly two trials apiece. If you count senior judges, the average was about 1.5 trials per judge PER YEAR.

2. In Arizona, there are some 220 people employed by the U.S. Attorney's Office.[3] If we assume that roughly one-third of them are AUSAs, this means that an Arizona AUSA goes to trial on average, *once every three years*.
3. The problem is not limited to Arizona. Nobody, particularly on the border, goes to trial any more. In 2001, in all five Mexican border districts, 16,833 defendants were sentenced. Exactly 267 of them went to trial.[4] By contrast, in 1993, when I was an AUSA in the Southern District of Florida, our district alone took 347 cases to trial.[5] Thus, in 1993, that one district tried eighty more cases than went to trial in 2001 in all five border districts put together.

This gaping chasm between what might be done and what is now done cries out for explanation: Why aren't the border districts trying hundreds of cases every year and using the threat of trials to force guideline compliance? At the least, why aren't U.S. Attorneys pounding on their Senators' doors demanding the resources to make the attempt?

Several reasons suggest themselves:

[3] See website of the U.S. Attorney's Office for the District of Arizona, http://www.usdoj.gov/usao/az/.
[4] U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, App. B (2002).
[5] U.S. SENTENCING COMMISSION, 1993 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, App. B (1994).

First, at a certain point the sheer numbers of cases does begin to cut into your ability to try cases. Past a certain point, even if you plead everything, the ministerial burden of processing the cases cuts down on available time for trials. To what degree that is now happening on the border I can't say. I can say that I don't think folks in Arizona are so overwhelmed that judges can only shoehorn in two criminal trials per year, and AUSA's one trial every third year.

Second, it's actually very hard for an office of career federal prosecutors to remain committed year after year to trying hundreds of repetitive, relatively low seriousness, cookie cutter cases. The lawyers get bored and it neither sharpens skills nor advances careers.

But in this second observation lies the seed of larger point – If the criminals at issue here were murderers or drug kingpins or thieving corporate titans, both prosecutors and judges would, I think, be working overtime and demanding the resources to prosecute and sentence them to the full extent of the law. I think fast-track exists and endures because neither judges nor prosecutors think that most of the cases to which fast track is being applied are that serious or that justice or public safety demands strict application of sentencing law. Instead, fast track is another manifestation of the quiet consensus among the front-line actors in the federal criminal system that justice will often be as well or better served by a sentence less than what the guidelines require.[6]

So what does all this mean for you as a commission? The fact is, like it or not, the Protect Act commands you to write a fast-track guideline. You may think as I do,

---

[6] *See* Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477 (2002).

that such a guideline spells the death of the Guidelines as a coherent, principled national sentencing system. But you have to write it anyway.

I am not sure that I have any very useful advice to give you on the particulars of the guideline you must now compose. My general advice, for what it may be worth, would be this – If you are most interested in minimizing the theoretical damage fast-track programs do to the Guidelines structure and to the ideal of a nationally uniform sentencing system, you will write a guideline that imposes strict conditions on the Attorney General's finding of necessity – insisting for example that a fast trade program address only crimes of a volume and type that present a genuine national policy concern. And you might write a guideline with very restrictive rules about when fast track departures are appropriate in individual cases.

On the other hand, if your overriding concern about the federal sentencing system today is with outcomes, if what really concerns you is that the Guidelines and statutory mandatory minimum sentences too often produce inappropriately long sentences, then you might step back and reflect that the real effect of fast-track is to reduce the sentences of thousands of defendants down to levels much closer to what many believe they should be. And if you think this way, you might choose to give the Justice Department and the Attorney General the widest possible leeway to create fast-track programs whenever and whenever it suits them.

If you take the latter course, you will at least have the private satisfaction of knowing that inevitably, if irregularly, the punitive and centralizing instincts of these now in control of Main Justice will be steadily, if irregularly, undermined by entropy that

slowly degrades all sets of unduly restrictive rules, as well as the pragmatism and basic decency of the judges and prosecutors who really do the work of federal criminal law.