

Statement of United States District Judge Emmet G. Sullivan
District of Columbia and
Chair, Criminal Law Committee Subcommittee on Legislation

on Behalf of the Judicial Conference of the United States
Committee on Criminal Law

Before
United States Sentencing Commission

November 16, 2004

Good afternoon, Judge Hinojosa and members of the Sentencing Commission. My name is Emmet G. Sullivan, and I am a United States District Judge for the District of Columbia. I am also a member of the Judicial Conference Committee on Criminal Law and serve as the Chair of its Legislative Subcommittee.

The Interests of the Committee on Criminal Law

On behalf of the Criminal Law Committee and its Chair, Judge Sim Lake, we are delighted to have this opportunity to appear today to express our views on potential changes in the federal sentencing guideline system regardless of the outcome of the *Booker* and *Fanfan* cases. Although Congress clearly has the authority to define crimes and prescribe criminal sentences, the judiciary has a vital interest in any changes made to the federal sentencing process. Our goal is to have a process that is fair, workable, transparent, and predictable, yet flexible.

We appreciate the fact that the Commission is holding these hearings on proposed changes to the system. Notwithstanding the Commission's exemplary work over the last two decades, it is apparent that the guidelines have become unduly complex. Sentencings have become increasingly complicated and have spawned unnecessary appeals, collateral sentencing challenges, and direct congressional intervention that diminishes the Commission's authority and ignores its expertise in sentencing issues. These hearings and the Commission's talent and hard work create an unprecedented opportunity for a thoughtful and deliberate refinement of the federal sentencing system.

The Criminal Law Committee is prepared to work with the Commission. The Committee's jurisdictional statement authorizes it, among other things, to monitor and analyze legislation affecting the administration of justice, oversee the implementation of the sentencing

guidelines, and recommend to the Conference proposed amendments to the guidelines, including proposals that would increase flexibility under the guidelines. Historically, the Committee has had a major role in shaping criminal law policy. The Committee, through the Judicial Conference, intends to be even more involved in addressing potential changes to the sentencing system regardless of the outcome in the *Booker* and *Fanfan* cases.

Judicial Conference Interests in Sentencing Policy

Over the past two decades, the Judicial Conference's positions on sentencing reflect the judiciary's opinion that sentencing must always be fair and equitable for all offenders.¹ This opinion was evident in March 1983 when the Conference endorsed a draft sentencing reform bill prepared by the then Committee on the Administration of the Probation System.²

The stated purposes of the Conference's bill were "(A) promoting fairness and certainty in sentencing; (B) eliminating unwarranted disparity in sentencing; and (C) improving the administration of justice."³ Guiding the Conference in acknowledging the need for sentencing guidelines was a recognition that the sentences judges impose must:

- (1) ensure adequate deterrence of criminal conduct;
- (2) protect the public from further crimes by convicted offenders;
- (3) reflect the relative seriousness of different offenses, promote respect for the law, and provide just punishment for criminal conduct;
- (4) provide restitution to victims of offenses; and

¹ JCUS-SEP 79, pp. 89-90.

² JCUS-MAR 83, pp. 28-29.

³ JCUS-MAR 1983, Comm. Rep. of the Committee on the Administration of the Probation System, Ex. B, at 7, § 3801.

(5) provide offenders with needed educational or vocational training, medical care, and other correctional treatment in the most effective manner.⁴

After Congress enacted the Sentencing Reform Act, the Committee on the Administration of the Probation System sought to make the system more workable by suggesting technical amendments to the Act. The Judicial Conference authorized the Committee to work with the AO and the Federal Judicial Center in drafting technical and conforming amendments to improve the operation of the guidelines.⁵ Many of the proposals were eventually adopted.

The Conference also created an ad hoc committee on sentencing guidelines to enable the Conference to react in a timely fashion to the guidelines that would be adopted by the Sentencing Commission. The ad hoc committee was created to assist district and circuit judges to revise sentencing concepts and procedures to conform with the guidelines and to facilitate the exchange of ideas about the guidelines.

Since the sentencing guidelines were implemented, the Committee and the Judicial Conference have only once comprehensively considered the sentencing guideline system. In September 1990, the Committee recommended, and the Judicial Conference agreed, to take no action on proposals from the Federal Courts Study Committee⁶ that would make fundamental changes to the sentencing guidelines.⁷

The Criminal Law Committee agreed with the Study Committee's underlying premise

⁴ *Id.* at 9-10, § 3802.

⁵ JCUS-MAR 85, p. 21.

⁶ As requested by Congress, the Chief Justice created the Federal Courts Study Committee to conduct a 15-month study in response to mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion.

⁷ JCUS-SEP 90, p. 71.

that more sentencing flexibility was needed, but opined that it was premature to ask Congress to modify the Sentencing Reform Act given that the guidelines system had been in place for less than one year. As an alternative, the Criminal Law Committee decided that it should develop recommendations to the Sentencing Commission that would give judges more sentencing flexibility within the constraints imposed by the Act. This approach was later reflected in the judiciary's 1995 Long Range Plan, which recommended that the Sentencing Commission afford sentencing judges the ability to impose more alternatives to imprisonment, encourage judges to depart from guideline levels where appropriate in light of factual circumstances, and enable them to consider a greater number of offender characteristics.⁸

Positive Working Relationship with the Sentencing Commission

During its September 1990 session, the Conference authorized the Criminal Law Committee to periodically submit proposals to the Sentencing Commission to amend the guidelines, including proposals that would increase the flexibility of the guidelines.⁹ Since then, the Committee has worked closely with the Commission to improve the sentencing guideline system.

The Committee has always enjoyed a good working relationship with the members of the Sentencing Commission. We benefit from your attendance at our Committee meetings. We

⁸ Judicial Conference of the United States, *Long Range Plan for the Federal Courts* Recommendation 30 (Dec. 1995).

⁹ JCUS-SEP 90, p. 69.

value your reports to the Committee and appreciate your willingness to always listen to our concerns and to value our input.

Guideline Simplification Efforts

In 1995, recognizing the complexity of the sentencing guideline system, and at the Committee's urging, the Commission undertook an extensive assessment of the sentencing guidelines to determine how they could be streamlined or simplified. Then Commission Chair Judge Conaboy determined a need for the Commission to take a hiatus from the amendment process to allow the Commission to focus on the assessment. Hearings were held in Washington and Denver, and Commission staff prepared a series of working papers to examine relevant conduct, the level of detail in specific offense guidelines, sentencing options, departures, and the Sentencing Reform Act itself. Due to turnover in commissioners, this review effort stalled. Perhaps efforts to simplify the guidelines can now be renewed.

The "Economic Crime Package"

The Committee also successfully collaborated with the Commission on the "economic crime package." These guideline amendments, which became effective on November 1, 2001, resulted from a six-year study of economic crime sentences by the Commission and other interested groups. Contributors included probation officers, defense counsel, the Department of Justice, and the Committee. The Commission conducted hearings and held a major symposium on this important issue. The economic crime package built upon and improved a draft proposal that, with the participation of Committee members, was successfully field-tested in 1998, and was found to surpass previous guideline amendment proposals in organization, workability, and resolution of circuit conflicts.

The economic crime package was the first comprehensive rewrite of the guidelines dealing with a major category of crime. It simplified and consolidated the theft, property, and fraud guidelines; revised the loss table for the consolidated guidelines and a similar tax offense table; and provided a revised definition of loss for the consolidated guidelines. These changes substantially increased penalties for moderate- and high-loss offenders while slightly reducing offense levels for low-loss offenders.

The Safety Valve

The Conference also recommended “safety valve” legislation initially proposed by then-Commission Chair Judge William Wilkins.¹⁰ While the recommendation did not specify statutory language, the Conference supported a statutory amendment that would authorize district judges to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense and no information to aid prosecutors that could result in a substantial assistance motion and downward departure from the sentencing guidelines.

After receiving input from the Committee in 2002, the Commission proposed an amendment to the guidelines to create a sentencing cap at a base offense level of 30 for drug traffickers who receive a mitigating role adjustment under U.S.S.G. §3B1.2. While some in Congress opposed the sentencing cap amendment, it was enacted in November 2002 after Congress failed to act. Although the Commission decided earlier this year to amend the mitigating role cap, the Committee opposed the proposed amendment because the application of the guideline was not problematic and we were unaware of any need for a change.

¹⁰ JCUS-SEP 91, p. 56.

Much of the Commission's time in recent years has been devoted to responding to congressional directives, including those that directly amend the guidelines. The Conference opposes direct congressional amendment to the sentencing guidelines because such amendments undermine the basic premise underlying the establishment of the Sentencing Commission—that an independent body of experts appointed by the President and confirmed by the Senate, operating with the benefit of the views of interested members of the public and both public and private institutions, is best suited to develop and refine sentencing guidelines. Therefore, the Conference's position is that Congress should direct the Sentencing Commission to study proposed amendments to any particular guideline and either adjust the guideline accordingly or report to Congress its basis for maintaining the existing guideline.¹¹

Positive Working Relationships with the Department of Justice

The Committee is responsible for assuring that working relations are maintained and developed with the Department of Justice and other agencies with respect to issues falling within the Committee's jurisdiction. The Committee has been working to improve the judiciary's relationship with the Department of Justice, and we believe these efforts have enhanced the lines of communication. The federal judiciary and the Department of Justice share a number of goals and concerns related to federal sentencing practices and procedures; as such, we have a mutual interest in working together to the extent practicable.

Judge Carolyn Dineen King, Chair of the Judicial Conference's Executive Committee, expressed this very sentiment to Attorney General John Ashcroft this past fall when the Executive Committee met with the Attorney General to discuss a number of areas of mutual

¹¹ JCUS-SEP 91, p. 45.

concern. This is one reason Judge Lake and I were delighted to meet with Department of Justice officials a few weeks ago to commence discussions on various legislative alternatives or interim pilot programs regardless of the outcome in *Booker* and *Fanfan*. We are hopeful that the lines of communication will remain open and that senior AO and DOJ staff will continue to meet regularly to discuss various proposals and ideas for changes to the federal sentencing system.

Blakely v. Washington

The Committee has been monitoring the courts' responses to the *Blakely* decision. In fact, it was during the Committee's June 2004 meeting in Atlanta, with most of the Sentencing Commissioners in attendance, when the Supreme Court announced its opinion. Since then the Committee has played an active role in keeping the courts informed.

After consulting with the Sentencing Commission and the Bureau of Prisons, the Committee issued important guidance to the courts with respect to alternative sentences. While recognizing that judges must make sentencing decisions based on their own reading of *Blakely* and in accordance with their own circuit's interpretation, district courts were encouraged to use a new form, the "Supplemental Statement of Reasons," to generally record how *Blakely* was applied in a case, to standardize data collection of sentencing guideline decisions, and to facilitate implementation of the courts' rulings until the Supreme Court decides the *Booker* and *Fanfan* cases.

Proposals for Changes to the Current Sentencing System

Like the Commission, the Committee is aware of a wide variety of proposals for changes to the federal sentencing system. We are not prepared today to convey a Judicial Conference position or offer an opinion on the various questions of law and policy presented by the various

proposals. The Committee is actively considering the future of the sentencing process so that the Judicial Conference can be prepared to quickly analyze any proposed legislation and to consider all of the various legislative proposals as they develop.

The Committee intends to explore the range of alternatives to the existing sentencing process in the event the Supreme Court, in deciding *Booker* and *Fanfan*, declares the sentencing guidelines unconstitutional in whole or in part. We will evaluate and, where appropriate, make recommendations to the Conference on any identified alternatives in terms of their legal soundness and their impact on judicial responsibilities, workload, and court administration. In the course of doing so, the Committee will be interested in receiving and considering the opinions and information from the bench and bar.

The Committee on Criminal Law is taking these steps because we believe we must fully evaluate what procedural protections should apply to the fact-finding necessary to increase guideline ranges and enhance sentences. Working with the relevant rules committees of the Judicial Conference, we also have to consider what changes to the federal statutes and the Federal Rules of Evidence and Criminal Procedure might become necessary in the wake of the *Booker* and *Fanfan* decision. We hope that the Sentencing Commission, Department of Justice, Congress, and others will act deliberately and thoughtfully once the Supreme Court issues its opinion.

Judges take their sentencing duties seriously. Most federal judges on the bench today did not serve during the proverbial “old days” of sentencing prior to the sentencing guidelines. They have sentenced defendants only according to our current sentencing guideline regime. While we all agree that improvements are needed to guideline sentencing, we understand that it

is neither desirable nor possible to design a sentencing system that provides for every possible contingency of human behavior. Moreover, we have to consider the important policies and directives articulated in 18 U.S.C. § 3553 and protect the vital principles of certainty and consistency in sentencing. Congress could have established a system of fixed penalties for broad categories of offenders when it enacted the Sentencing Reform Act, but it wisely chose to establish a more nuanced system. In doing so, Congress recognized that judicial discretion was an indispensable part of any fair sentencing regime.

We hope that the Sentencing Commission will be able to apply its expertise to make appropriate changes to conform the guidelines to the *Booker* and *Fanfan* decision. In so doing, we urge the Commission to simplify the sentencing guidelines, restore judicial discretion, and expand the “safety valve.” Any changes to the guidelines should be motivated by a desire to maximize the fairness, workability, transparency, predictability, and flexibility of our system of federal criminal sentencing.

We look forward to working with you.