



The Year In Review:
1997–1998



UNITED STATES SENTENCING COMMISSION



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F r o m t h e C o m m i s s i o n

This report highlights the accomplishments of the U.S. Sentencing Commission during 1997–1998, reflecting the dedication and determination of the Commission and its staff to ensure a fair and effective federal sentencing policy. The Commission is grateful to the members of Congress and their staffs, federal judges, attorneys, probation officers, and the many others who, during this past year, assisted in the task of improving the sentencing guideline system. Recognizing that this mission is an ongoing, evolutionary one, the Commission always welcomes suggestions on ways it can make federal sentencing policy more enlightened and effective, and on ways it can perform its multi-faceted duties more efficiently and helpfully.

Policy Development: The Year in Capsule

In fulfilling its statutory responsibility to periodically review and revise the guidelines during the 1997–1998 policy development cycle, the Commission:

- Followed through on the short-term agenda established in May 1997 by:
 - Adopting **rules of practice and procedure**;
 - Resolving a number of significant **circuit conflicts**; and
 - Conducting a systematic review of current federal sentencing policies on selected **economic crimes**.
- Updated the *Guidelines Manual* by:
 - Incorporating in the **general departure policy statement** the holding and key analytical points from the United States Supreme Court decision in ***Koon v. United States***; and
 - Adding new sentencing adjustments in response to recent **legislative enactments**.
- Made substantial progress on its medium-term agenda by:

- Completing an extensive study of federal sentencing practices for **voluntary and involuntary manslaughter**.

Policy Development

The U.S. Sentencing Commission has adopted a comprehensive, systematic, and deliberative approach to the development of a fair and effective sentencing policy.

This past year, the Commission set a carefully considered agenda that focused on a limited number of high priority issues. The policy development process differed from past years as the Commission tried to address practitioner concerns about simplifying guideline application by reducing the number of amendments. The Commission used a decision-making model that included: (1) the solicitation of informed input from agencies and groups knowledgeable about the issues; (2) the review of public comment submitted by all interested parties; (3) public hearings on the issues and possible amendments; (4) a review of pertinent legislation and case law; and (5) statistical analyses of nationwide federal sentencing data, including the projected impact of any proposed changes. The process concluded in April as the Commission considered and voted on guideline amendments to send to Congress. These guideline amendments were submitted to Congress on May 1.

In 1997-1998, the issues facing the Commission included:

- Numerous conflicting appellate court decisions interpreting guideline provisions;
- Recent congressional enactments affecting crime and criminal penalties;
- Concerns that white collar offenders convicted of high-dollar-value fraud, theft, and tax offenses were receiving ineffective sentences;
- Concerns regarding ineffective and lenient sentences for telemarketing fraud and similar offenses; and
- Whether and how to update the general guideline departure provision to reflect the new standard of appellate review announced in the United States Supreme Court decision, *Koon v. United States*.

Input from Agencies and Groups

During the 1997-1998 amendment process, the Commission continued to collaborate with the:

- Department of Justice,

- federal judiciary (in particular, the Criminal Law Committee of the Judicial Conference),
- defense attorneys,
- probation officers, and
- other interested groups.

In this regard, a Department of Justice representative serves as an *ex officio* member of the Commission. During 1997-1998, the Commission and the Department of Justice sustained an ongoing dialog on guideline issues. The Commission also met regularly with the Criminal Law Committee of the Judicial Conference of the United States to solicit this group's input. Additionally, the Commission's Probation Officers' Advisory Group and Defense Practitioners' Advisory Group provided the Commission with diverse perspectives and practical advice about guideline application issues and proposed policy changes.

Public Hearings

To help inform the decision-making process this past year, the Commission expanded the use of public hearings.

- In December 1997, the Commission held a focused mini-hearing on federal voluntary and involuntary manslaughter crimes at which representatives from the Department of Justice and defense bar testified.
- At a second such hearing in February, the Commission heard testimony on telemarketing fraud from victims' advocacy groups, the Association of Attorneys General, and the Department of Justice.
- In early March, the Commission held a hearing in San Francisco focusing on "Key Issues: Reassessing Sentences for Federal Theft, Fraud, and Tax Offenses." This hearing, addressing the issues involved in a proposed "economic crime" package of amendments, was held in conjunction with the American Bar Association White Collar Crime Institute.
- At the mid-March annual amendments hearing in Washington, D.C., numerous groups and individuals provided the Commission with information on the operation of the sentencing guidelines and the proposed amendments.

Rules of Practice and Procedure; Public Participation

In July 1997, the Commission adopted formal Rules of Practice and Procedure which emphasize the importance of public understanding and participation in the work of the agency. Consistent with this emphasis, the Commission: (1) held a series of hearings on important sentencing issues under consideration, including manslaughter, telemarketing fraud, and economic crimes; (2) enhanced its Internet web site to provide greater access to meeting materials and agendas; and (3) continued its outreach efforts to groups, such as the Ethics Officers Association, with an interest in the agency's work.

Resolving Circuit Conflicts

In May 1997, the Commission set as a priority the resolution of an additional number of conflicting appellate court interpretations of the guidelines. In so doing, the Commission acted to continue an important function recognized by the United States Supreme Court in *Braxton v. United States* and *Stinson v. United States*. In July, following a report from staff, the Commission narrowed its consideration to nine significant circuit conflicts. After receiving staff briefings and input from outside commentators on the policy implications of each issue, the Commission in December voted to publish for public comment options that would resolve each of the nine conflicts. Then, in April, following review of relevant data, policy implications, and public comment, the Commission approved amendments to resolve five of the nine circuit conflicts under consideration.

The following is a brief overview of the circuit conflicts resolved by the Commission:

- **Abuse of Position of Trust Guideline:** The Commission resolved a circuit conflict by deciding that the two-level sentence increase for abuse of a position of trust applies to an imposter as well as to a person who legitimately holds and abuses a position of trust. The action confirms the decisions of the First, Ninth, and Tenth Circuits, and necessarily will supercede the interpretation of the Second Circuit in *United States v. Echevarria*, 33 F.3d 175 (2d Cir. 1994). Under this amendment, for example, a defendant convicted of fraud who falsely claims to be a doctor, stockbroker, or lawyer would be eligible for the two-level sentence increase (assuming other requirements are met).
- **Obstruction of Justice Guideline:** The Commission resolved another circuit conflict by deciding that the two-level sentence increase for obstruction of justice applies to a defendant who obstructs justice in cases closely related to his own. The action affirms the decisions of the Third, Sixth, Ninth, and Tenth Circuits, and will change the more limited interpretations of the Second and Seventh Circuits. Under this amendment, for example, a defendant who willfully testifies falsely at the trial of a codefendant would receive the two-level sentence increase for obstruction of justice.

- **Obstruction of Justice Guideline:** The Commission resolved another circuit conflict by deciding that the two-level sentence increase for obstruction of justice does not apply to a defendant who falsely denies drug use while on pretrial release. The action affirms the decisions of the Third and Seventh Circuits in *United States v. Belletiere*, 971 F.2d 961 (3d Cir. 1992) and *United States v. Thompson*, 944 F.2d 1331 (7th Cir. 1994), respectively. The Commission chose not to follow the contrary interpretation by the Sixth Circuit in *United States v. Garcia*, 20 F.3d 670 (6th Cir. 1993), *cert. denied*, 573 U.S. 1159 (1995). In its amendment, the Commission notes that the court is permitted to consider the defendant's behavior in lying about drug use in deciding whether the defendant has accepted responsibility for the underlying offense.
- **Failure to Appear Guideline:** The Commission resolved another circuit conflict by clarifying the procedure for determining the sentence of a defendant convicted of both failure to appear and another offense. The amendment ensures a procedure that complies with the statutory mandate to impose a consecutive sentence on the failure to appear count. The action affirms the decisions of the First and Sixth Circuits in *United States v. Agoro*, 996 F.2d 1228 (1st Cir. 1993) and *United States v. Flores*, 23 F.3d 408 (6th Cir. 1994) (unpublished), respectively. In its amendment, the Commission effectively disagreed with the approach taken by the Fifth Circuit in *United States v. Packer*, 70 F.3d 357 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 75 (1996), which had held that "grouping" the two counts would not comply with the statutory requirement for a consecutive sentence. Additionally, the Commission made conforming changes to other similar guidelines.
- **Diminished Capacity Departure:** The Commission resolved another circuit conflict by clarifying the circumstances under which a departure below the guideline range is permitted for diminished capacity. Among the criteria specified in the amendment is a consideration of whether the offense involves actual violence or a substantial risk of violence. The amendment effectively overrides the interpretation that a departure categorically is not available for any defendant convicted of a "crime of violence," as that term is defined by the career offender guideline. Additionally, the Commission decided that the definition of diminished mental capacity means "the defendant is unable to (a) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (b) control behavior that the defendant knows is wrongful."

Appellate Review of Guideline Departures

Although the Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a), requires the district court to impose a sentence within the applicable guideline range in an ordinary case, it does not eliminate all of the district court's traditional sentencing discretion. Rather, the Act allows the court to make a departure from the guidelines range if the court finds "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” (18 U.S.C. § 3553(b)). Annually, about 30 percent of the sentences imposed in United States federal district courts are departures from the guideline range. Substantive and empirical developments in these departure sentences, which form an important part of the guideline system, are carefully monitored by the Commission.

The United States Supreme Court, in *Koon v. United States*, 116 S. Ct. 2035 (1996), examined the issue of the standard of review to be applied by appellate courts in assessing the district court’s decision to depart from the guidelines. The court unanimously joined in Justice Kennedy’s opinion that an appellate court should not substitute its opinion for the district court, but instead should ask whether the district court had abused its discretion in making the departure.

Following upon this landmark decision, and in an effort to make the *Guidelines Manual* more informative and complete for judges and practitioners, the Commission amended §5K2.0, the general departure policy statement, to add the holding and key analytical points from the *Koon* decision.

Legislative Initiatives

The Commission continues to respond to recent legislative initiatives and enactments by making appropriate changes to the *Guidelines Manual*. In 1998, the Commission’s work in this area continued with the following:

- **Telemarketing Fraud**—As part of its ongoing assessment of sentencing policy for fraud and related offenses, the Commission conducted a detailed study of the characteristics and sentencing of telemarketing fraud offenses, and sponsored a public hearing at which the Commission heard testimony from representatives of the Department of Justice, National Association of Attorneys General, and American Association of Retired Persons. The Commission’s study resulted in the following amendments to the sentencing guidelines:
 - a two-level enhancement (an approximate 25% increase) in the fraud guideline for offenses that are committed through **mass-marketing**.
 - a two-level enhancement, with a **minimum offense level of level 12**, for fraud offenses that involve conduct, such as **sophisticated concealment**, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offenders. The enhancement contains three alternative provisions: (1) relocating to another jurisdiction to avoid detection; (2) conducting operations outside of the United States; or (3) taking deliberate steps to make the offense, or its extent, difficult to detect.

- **Firearms**—The firearms guideline was amended to provide an increased penalty for anyone convicted of transferring a gun to a felon or any other person prohibited from owning a firearm.
- **Veterans' Cemetery Protection Act of 1997**—The theft, property destruction, and arson guidelines were amended to provide a two-level enhancement for theft from or destruction of the property of a national cemetery.
- **No Electronic Theft Act**—The Commission has requested public comment on three alternative proposals that would amend the copyright and trademark infringement guideline to ensure that copyright and trademark offenses are sufficiently and severely punished. During the past year, the Commission heard testimony from and solicited the input of a variety of outside groups on this issue and plans to make this issue a priority in the coming year.

Economic Crimes Package

In May 1997, the Commission set as another of its top priorities the systematic study and analysis of the guidelines for fraud, theft, and tax offenses. These offenses account for more than a quarter of all the cases sentenced in the United States federal district courts. The Commission had received testimony and survey results from the federal judiciary and the Department of Justice indicating that the sentences for these offenses were inadequate to appropriately punish defendants in cases in which the monetary loss was large. In March 1998, the Commission held a public hearing on these issues in San Francisco in conjunction with the American Bar Association White Collar Crime Institute.

After approximately a year of data collection, analyses, public comment, and public hearings, the Commission developed a comprehensive “economic crimes package” that would have:

- created a new loss table for fraud and theft offenses;
- consolidated the theft, fraud, and property destruction guidelines;
- clarified the definition of loss for selected economic crimes; and
- conformed other guidelines that reference the loss table in the fraud or theft guidelines.

Although all four Commissioners worked hard to achieve the necessary unanimity on the many difficult issues involved in the package, unfortunately, the package failed to gather the unanimous approval necessary.¹ The tremendous effort expended will not be lost, however, as the Commission is moving forward, in cooperation with the Judicial Conference Criminal Law Committee and others, to “field test” the proposed new loss definition.

Training and Education

In addition to its policy development activities, the Commission continued its commitment to provide high-quality training to judges, prosecutors, probation officers, and defense attorneys. As a result of its defense attorney initiative, this past year the Commission trained more defense counsel than ever in its history.

In May 1998, approximately 325 defense attorneys and probation officers attended a National Sentencing Seminar in Clearwater, Florida, jointly sponsored by the Commission and the Federal Bar Association.

To expand further the availability of training seminars, in the spring of 1998, the Commission launched a satellite television network as a joint project with the Federal Judicial Center and the Administrative Office of the U.S. Courts. The satellite network will allow the Commission to provide cutting-edge programming to an even broader audience. Persons unable to attend a sentencing seminar can access the Commission’s training and educational materials via the Internet at <http://www.ussc.gov>.

Research Studies

In 1997, the Commission refocused its efforts on maintaining high-quality databases and conducting in-depth sentencing research. The Commission instituted a new document receipt quality program that matches the sentencing records received at the Commission with those criminal filings reported by the Clerks of Court to the Administrative Office of the U.S. Courts. Lists of the missing case names are then forwarded to the appropriate office along with a request to forward the missing sentencing record. This effort resulted in the addition of several thousand more cases to the Commission’s sentencing database. Staff also completed major research projects on topics such as: substantial assistance

¹ With only four Commissioners serving, all four must agree on any amendment to the guidelines. 28 U.S.C. § 994 (a),(p).

departures, departures after *Koon v. United States*, and money laundering sentencing policy.

The Commission also instituted a data utilization program, a pilot research project patterned after similar programs at the National Institute of Justice and the Bureau of Justice Statistics. We hope the project will: (1) encourage the broader use of our datasets by policy researchers and academics; and (2) assist the agency in maximizing the use of our datasets to better inform public debate over sentencing issues.

Improving the Organization's Efficiency and Productivity

In the fall of 1997, the Commission initiated a project to assess its organizational goals, structures, and processes in order to best serve the judiciary, other court professionals, and the public generally. The Commission enlisted the consulting firm Price Waterhouse to contribute its organizational expertise to this process.

By December, a Commission interdisciplinary staff change team, working collaboratively with the consultants, had completed a review of current Commission operations. In January 1998, Price Waterhouse provided a comprehensive briefing to the Chairman, which included specific recommendations and improvement projects.

The Commission's next step was to establish four staff teams to examine these recommendations in the context of Commission priorities. These teams are in the midst of designing plans to implement concrete improvements in the following areas: (1) policy development; (2) data, statistics, and research; (3) human resource development and financial management; and (4) the orientation of new commissioners. The teams are scheduled to conclude their work in the summer of 1998, and the Commission plans a gradual implementation of these improvements.

Future Plans

On June 17, 1998, the Commission held a public hearing to seek comment on priority areas for its policy development work for 1998-1999. Preliminarily, the Commission has identified the following issues for further study:

- Revisions of the Fraud, Theft, and Tax guidelines (including the monetary tables used in these guidelines and other guidelines that reference those tables, consolidation of the theft, fraud, and property destruction guidelines, and the definition of "loss" in the theft and fraud guidelines);
- Review and assessment of the criminal history guidelines; and

- Review and assessment of the guidelines and sentences imposed for homicide offenses.

In addition, the Commission expects to address any new legislative enactments, such as: (1) the Wireless Telephone Protection Act, relating to cloning cellular telephones; (2) the No Electronic Theft Act; and (3) any other legislation affecting sentencing policy that may be enacted in the remainder of this congressional session. The topics, scope, and duration of the Commission's policy development activities during the coming year necessarily will be influenced considerably by the appointment of new commissioners and the timing of the appointments. ■

United States Sentencing Commission

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