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Louis C. Bechtle

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1986]

SENTENCING GUIDELINES

LOUIS C. BECHTLE†

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I. INTRODUCTION

IN response to the growing problem of sentencing disparity among federal trial judges, on October 12, 1984, Congress passed the Sentencing Act of 1984 ("Act"),¹ which amended the sentencing provisions of Title 18 of the United States Code. Because the majority of the Act will not become effective until November 1, 1986, and to better understand the effect of the new sentencing provisions, a general overview of the present sentencing procedures may be of interest to those concerned with the subject.

II. THE PRESENT SENTENCING STATUTE

Under the present statute, once a defendant is convicted of a crime, the court may impose a term of imprisonment, suspend the imposition or execution of a jail sentence and place the defendant on probation, or impose a fine.

A. *Incarceration*

If the court elects to impose a term of imprisonment, the present statute does not provide any general sentencing guidelines to help federal judges in their sentencing determination.

† Judge, United States District Court for the Eastern District of Pennsylvania.

1. Pub. L. No. 98-473, 98 Stat. 1987 (1984).

Under the current statute at least seventeen levels of confinement are authorized, ranging from thirty days to life imprisonment.² Additionally, special sentencing provisions exist for dangerous special offenders³ and dangerous special drug offenders.⁴

Release on parole is available to a defendant who has been sentenced in excess of one year.⁵ The court may “designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court,”⁶ or the court may fix the maximum sentence of imprisonment and specify that the Parole Commission is to determine when the prisoner is eligible for parole.⁷ When the court imposes a maximum sentence and leaves it to the Parole Commission to determine parole eligibility, the court is permitted, but not required, to articulate its reasons for so doing. Unless the court makes a statement on the record as to its reasons, the Parole Commission in making its parole determination has no way of assessing or consequently, effectuating the court’s sentencing intentions if it has any.

B. Probation

If the court elects to suspend the execution of a sentence, the defendant may be placed on probation “for such period and upon such terms and conditions as the court deems best.”⁸ Probation

2. See H.R. REP. NO. 1030 and S. REP. NO. 634, 98th Cong., 2d Sess. 75-76, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3182, 3294.

3. 18 U.S.C. § 3575 (1982). This section has often been challenged on grounds of vagueness, but has survived constitutional scrutiny. See, e.g., *United States v. Schell*, 692 F.2d 672 (10th Cir. 1982) (that Congress might have chosen more precise language did not render this section unconstitutionally vague, as long as people of ordinary intelligence weren’t required to guess at its meaning and differ as to its application).

4. 21 U.S.C. § 849 (1982 & Supp. II 1984). Both of these special sentencing provisions are repealed effective November 1, 1986, when the new Act takes effect.

5. 18 U.S.C. § 4205(a) (1982). Section 4205(a) states:
[w]henever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

6. 18 U.S.C. § 4205(b)(1) (1982).

7. 18 U.S.C. § 4205(b)(2) (1982). All prisoners sentenced to a term of more than one year are eligible for release or parole after serving ten years of a life sentence or of a sentence of over thirty years. *Id.* § 4205(a). This section is repealed effective November 1, 1986.

8. 18 U.S.C. § 3651 (1982 & Supp. II 1984).

may be used "whether the offense is punishable by fine or imprisonment or both,"⁹ but may not exceed a maximum term of five years.¹⁰ This section does not mandate imposition of any conditions of probation but does list specific conditions that the court may elect to require. For example, the defendant may have to pay a fine as a specific condition of probation, make restitution or reparation for actual damages, support persons for whom he is legally responsible, reside in a community treatment center, limit travel or participate in a drug treatment program."¹¹

The Senate Committee on the Judiciary ("Committee"), in examining various studies found many problems with the present sentencing statute including the principle evil of disparity. The Committee concluded that differences in traits and characteristics of various offenders are not the predominant reason for sentencing disparity. Rather, some judges, as a result of attitude or philosophy, tend to impose tough sentences while others are generally lenient in sentence imposition. Some judges are more harsh in respect to certain types of criminal activity or offenses. The Committee concluded that such differences, though presumably legal, are unjustified. Excessively high sentences in comparison with lesser sentences for similar offenders, especially for the same offense, are unfair to the defendant who receives the high sentence. An unjustifiably low sentence is correspondingly unfair to the public.¹²

The concern that many federal judges have voiced with respect to the imposition of a fine is that the maximum amounts are very low, thus ineffective in accomplishing the goals of sentencing. This problem is exacerbated by a large disparity between levels of fines permitted as criminal sanctions for essentially similar offenses.¹³ "By combining imprisonment and fine variations, some seventy-five different punishment levels may be isolated.

9. *Id.*

10. *Id.*

11. *Id.*

12. See 1984 U.S. CODE CONG. & AD. NEWS 3182, 3227-29.

13. *Id.* at 3286.

There exists today the anomalous situation in which a typical felony may be punishable on the one hand by a maximum of five years' imprisonment, and on the other hand by a maximum fine of only \$5,000 or \$10,000. Before the two facets of the stated penalty may be seriously considered as alternatives to one another, they must be of roughly equivalent severity. Yet today, five years of a person's freedom, even when measured according to the average individual's earning power above, carries a value in excess of \$50,000.

Id.

Comparison of punishment provisions for particular offenses leads to the exposure of numerous apparent inconsistencies.”¹⁴ In response to these and other perceived problems with the present sentencing statute, Congress passed the Sentencing Act of 1984.

III. THE SENTENCING ACT OF 1984

Under the new Act, chapters 227, 229, and 231 are repealed effective November 1, 1986, and new chapters are to be substituted. Most of the provisions contained in the new Act are to take effect November 1, 1986. The purpose of these new sentencing provisions is stated in 18 U.S.C. § 3553(a)(2):

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

These purposes pervade all of the sentencing options.

Under the new statute, when imposing a sentence the court is to consider the need for the sentence in terms of the above-stated purposes;¹⁵ the nature and circumstances of the committed offense; the defendant's previous criminal record;¹⁶ the types of sentences available;¹⁷ the sentencing range for that offense committed by that defendant;¹⁸ any policy statements in effect on the date the defendant is sentenced;¹⁹ and the need to avoid sentence disparities among similar defendants in similar circumstances.²⁰ The sentence must be imposed within guidelines set by the United States Sentencing Commission (“Sentencing Commission”).²¹ These guidelines were to be promulgated initially by

14. *Id.* at 3294.

15. 18 U.S.C. § 3553(a)(2) (Supp. II 1984).

16. *Id.* § 3553(a)(1).

17. *Id.* § 3553(a)(3).

18. *Id.* § 3553(a)(4).

19. *Id.* § 3553(a)(5).

20. *Id.* § 3553(a)(6).

21. The Sentencing Commission is comprised of seven voting members and one non-voting member. At least three of the members must be federal

April, 1986. The Sentencing Commission requested an extension of twelve months. On December 16, 1985, the House passed a bill delaying the deadline until April, 1987.²²

Offenses are classified into five classes of felony, three classes of misdemeanor and offenses based upon their maximum term of imprisonment.²³ The court may sentence an offender to a period of incarceration or, under certain circumstances, to a period of probation, or impose a fine separately or in conjunction with probation or imprisonment.²⁴ Additionally, where authorized, the court may enter an order of criminal forfeiture, an order of notice to victims, or an order of restitution.²⁵

A. *Incarceration*

As under present law, an offender may be sentenced to a term of imprisonment if he or she is convicted of committing certain crimes.²⁶ Subsection (b) lists nine categories (5 felony categories, 3 misdemeanor categories, 1 infraction category) of offenses and specifies the maximum term of imprisonment for each category.²⁷ These terms of imprisonment apply only to crimes which are listed in the statute. The Sentencing Commission has not yet delineated these categories of offenses. Therefore, in the interim the court must look to the term of imprisonment specified in the specific statute defining the offense.²⁸ When imposing a sentence, the court must consider the factors enumerated in section 3533(a)²⁹ to the extent applicable, keeping in mind that jail is not an appropriate means of promoting correction and rehabilitation.³⁰ This caution was added to

judges in regular active service and no more than four members shall be of the same political party. 28 U.S.C. § 991(a) (Supp. III 1985). On October 29, 1985, Judge William W. Wilkins, Jr. (D.S.C.) was sworn in as Chairman of the Sentencing Commission. *The Third Branch*, Vol. 18, No. 1, January 1986. The following are the members of the Sentencing Commission: Commissioner Michael K. Block, Judge Stephen G. Breyer, Commissioner Helen G. Corrothers, Judge George E. MacKinnon, Commissioner Ilene H. Nagel, and Commissioner Paul H. Robinson. Ex officio members are Benjamin F. Baer and Ronald L. Gainer.

22. *Id.*

23. 18 U.S.C. § 3559(a) (Supp. II 1984). For example, if the maximum term of imprisonment authorized is less than five years but more than one year, the offense is classified as a class E felony. *Id.* § 3559(a)(1)(E).

24. *Id.* § 3551(b), (c).

25. *Id.*

26. *Id.* § 3581(a).

27. *See id.* § 3581(b).

28. *Id.* § 3559(b)(2).

29. *Id.* § 3533(a).

30. *Id.* § 3582(a).

guard against imposition of a sentence of imprisonment on the sole ground that the prison has a program that may be of some benefit to the defendant.³¹

The sentence imposed by a judge pursuant to section 3581 will reflect the amount of time that a convicted offender will stay in prison subject to any credit, which will be discussed later. This use of determinate sentencing is a "substantial departure from the sentencing philosophy on which current law is based."³² That is, rehabilitation is no longer the basis of a parole release decision. The Committee concluded "that the indeterminate sentence no longer has a role to play in the context of a guideline sentencing system. The guideline sentencing system must totally supplant the indeterminate sentencing system in order to be successful. Accordingly, all sentences to imprisonment under the new system are determinate."³³

Guidelines concerning multiple sentences of imprisonment have been added to enable the court to decide whether to impose concurrent or consecutive terms.³⁴ The guidelines are expressed in section 3553(a).³⁵

Once a defendant is serving a term of imprisonment greater than one year, he may receive credit toward service of his sentence for satisfactory behavior. This "good time" provision applies to defendants with a sentence of greater than one year and less than life. A credit of fifty-four days is allowed at the end of each year after the first year of the term of the sentence has been served. The Bureau of Prisons may determine what amount, if any, is warranted by the prisoner's behavior.³⁶

Section 3583 provides that in addition to a term of imprison-

31. 1984 U.S. CODE CONG. & AD. NEWS 3182, 3302. Section 3582(a) specifies that the judge should recognize "that imprisonment is not an appropriate means of promoting correction and rehabilitation." *Id.* However, this does not mean that if a defendant is to be imprisoned for other purposes that the availability of rehabilitative programs should not be a factor in recommending a particular facility. *Id.*

32. *Id.* at 3298. When the original parole statutes were drafted, judicial sentences were to represent the maximum term that a defendant could be incarcerated. *Id.* It was the role of the Parole Commission to determine when in the course of that incarceration the defendant was sufficiently rehabilitated to safely return to society. *Id.* Although the rehabilitation model is no longer the basis of a parole release decision, the theory on which it is based still pervades federal sentencing statutes. *Id.*

33. *Id.*

34. 18 U.S.C. § 3584 (Supp. 1986).

35. *Id.* §§ 3584(b), 3553(a) (1982 & Supp. 1986).

36. *Id.* § 3624(b).

ment for a felony or misdemeanor, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. This decision for release is not dependent upon the amount of time served but upon the judge's decision that the defendant needs supervision after release. Subsection (b) specifies the maximum terms of supervised release.³⁷ The court is given a list of factors to be considered in determining if supervised release is to be included, for what period of time, and the conditions of such release.³⁸ These factors are set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5) and (a)(6). "In effect, the term of supervised release . . . takes the place of parole supervision under current law."³⁹

B. Probation

Probation may be used as a method of sentencing unless the offense is classified as a Class A or Class B felony,⁴⁰ or is an offense for which probation is precluded or if the defendant has been sentenced at the same time to prison for the same or different offense.⁴¹ Under the new Act, probation is a type of sentence in itself. It is not imposed as a substitute for, or as a result of a suspension of an imposed or executed jail sentence as it is in present law. In other words, a sentence on a single offense will no longer be split between a jail term on the one hand and a suspended sentence replaced by probation on the other.⁴² If proba-

37. 18 U.S.C. § 3583(b) states:

(b) Authorized terms of supervised release.—The authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than three years;
 (2) for a Class C or Class D felony, not more than two years; and
 (3) for a Class E felony, or for a misdemeanor, not more than one year.

38. *Id.* § 3583(c).

39. 1984 U.S. CODE CONG. & AD. NEWS 3182, 3308.

40. A felony is Class A if the maximum term of imprisonment authorized is life imprisonment or the maximum penalty is death. 18 U.S.C. § 3559(a)(1)(A). The maximum term of imprisonment for Class B felonies is 20 years or more. *Id.* § 3559(a)(1)(B). As previously discussed, if offenses are not classified, the maximum term of imprisonment stated in the statute defining the offense governs the classification.

41. *Id.* § 3561(a).

42. 1984 U.S. CODE CONG. & AD. NEWS 3182, 3272. Referring to 18 U.S.C. § 3561(a)(3), the legislative history states:

The provision will permit latitude in the specification of the time to be spent in the custody of the Bureau of Prisons and in the nature of the facility. It will also be more flexible than current law in permitting a sentence to imprisonment of any permissible length to be followed by a term during which the defendant receives street supervision. The

tion once imposed is later revoked, the court may impose any other sentence that was available at the time of the initial sentencing.⁴³ The court must impose at least one condition of probation if the offense is a misdemeanor or infraction and two conditions if the offense is a felony.⁴⁴ Under the present Act, conditions to probation are discretionary.

C. *Fines*⁴⁵

The revised fine section sets the maximum fine that may be imposed for the various offenses.⁴⁶ This restructuring shows the Committee's belief that fines can be an effective means of achieving the goals of the criminal justice system. By raising the amounts, the court can use fine imposition more effectively than it has in the past. The amount of the fine depends upon whether the defendant is an individual or an organization such as a corporation; and if the offense is a felony, misdemeanor or an infraction.⁴⁷

Committee is of the opinion that this flexibility will permit the court to formulate a sentence best suited to the individual needs of the defendant.

Id.

43. 18 U.S.C. § 3565(c)(2) (1982 & Supp. II 1984):

44. *Id.* § 3563(a).

45. These new fine provisions in the Act, although not to become effective until November 1, 1986, are essentially identical to the current fine provisions. Shortly after the passage of the Act, Congress passed the Criminal Fine Enforcement Act of 1984, Pub. L. 98-596, 98 Stat. 3134 (1984) which became effective December 31, 1984. *See, e.g.*, 18 U.S.C. §§ 3622, 3623 (Supp. II 1984). Although the Act's new fine provisions will supersede the provisions of the Criminal Fine Enforcement Act, since these provisions are identical, no substantive change will be effectuated. The policy decisions as articulated in the legislative history behind the enactment of both Acts are still beneficial to the understanding of the passage of these provisions. *See, e.g.*, 1984 U.S. CODE CONG. & AD. NEWS 5433 and 1984 U.S. CODE CONG. & AD. NEWS 3182.

46. *See* 18 U.S.C. § 3571(b) (1982). Section 3571(b) states:

(b) Authorized fines.—Except as otherwise provided in this chapter, the authorized fines are—

(1) if the defendant is an individual—

(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$250,000; (B) for any other misdemeanor, not more than \$25,000; and
(C) for an infraction, not more than \$1,000; and

(2) if the defendant is an organization—

(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$500,000;
(B) for any other misdemeanor, not more than \$100,000; and

...

(C) for an infraction, not more than \$10,000.

Id.

47. *Id.* § 3571.

When imposing a sentence of a fine, the court is to consider various factors, including the defendant's ability to pay in view of income, earning capacity and financial resources. If the defendant is an organization, the size of the organization is to be considered.⁴⁸ The court also must look at the nature of the burden on the defendant relative to the burden of alternate punishments; any restitution or reparation already made by the defendant to the victim, and any obligation of such restitution or reparation already imposed on the defendant. If the defendant is an organization, any measures taken by that organization to discipline employees or to insure against recurrence and other pertinent equitable considerations are expected to become part of the decision.⁴⁹ The new statute limits the amount of a fine imposed on a defendant for different offenses that arise from a common scheme to twice the amount imposed for the most serious of the offenses.⁵⁰ Section 3573 provides for modification or remission of a fine.⁵¹ Because the initial consideration involves the ability of the defendant to pay, any change in that ability may result in modification or remission of the fine.⁵²

A provision providing for a special assessment on convicted persons has been added to the general provisions of the Federal Rules of Criminal Procedure.⁵³ This provision assesses an amount to be paid by a convicted offender. In the case of a misdemeanor, the required assessment is \$25.00 for an individual defendant and \$100.00 for a defendant other than an individual.⁵⁴ For felonies, the required assessments are \$50.00 and \$200.00 respectively.⁵⁵

This special assessment is collected in the same manner as fines are collected in criminal cases.⁵⁶ There is no articulated exception for indigent defendants, nor is there an exception for petty offenses.⁵⁷ This provision took effect on November 11, 1984.

48. *Id.* § 3572(a)(1).

49. *Id.* § 3572(a)(2)-(5).

50. *Id.* § 3572(b).

51. *Id.* § 3573.

52. *Id.* § 3293.

53. *See id.* § 3013.

54. *Id.*

55. *Id.*

56. *Id.* § 3013(b). Section 3013(b) states that "such amount so assessed shall be collected in the manner that fines are collected in criminal cases." *Id.*

57. *See A. Partridge, The Sentencing Options of Federal District Judges*, Federal Judicial Center (June 1985 revision).

IV. CONCLUSION

We are squarely in the midst of a dramatic change in both the philosophy and the terms of the sentencing policy of the United States which will soon be carried forward in the federal courts. No doubt difficulties will surface, as some already have, as we enter into these rough and unpredictable waters, but this is to be expected in any new and extensive legal enactment. While it cannot be said that everyone associated with the research, development, enactment and implementation of the statute is in agreement that it will solve all of our present problems, it is safe to say that all are in agreement that our present system has not proved satisfactory and must be changed. With this as background, one thing is very clear and that is that the federal courts can be expected to enter upon their duty with typical dedication and resolve that the statute will be executed fairly, fully and justly.