

Deconstructing the Commission's Failure to Provide for Probation and Intermediate Sanctions

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In enacting the Sentencing Reform Act of 1984, Congress intended that “prison resources [would be], first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society,” and that “in cases of nonviolent and nonserious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and community service.”¹ Congress thus instructed the Commission to ensure “that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense,” and the “general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious injury.” 28 U.S.C. § 994(j).

Congress also intended that probation and intermediate sanctions would be used *more often* than they had been before the guidelines,² when about 38% of offenders were sentenced to probation.³ One of Congress's chief complaints about sentencing before the guidelines was that the law was not “particularly flexible in providing the sentencing judge with a range of options,” such that “a term of imprisonment may be imposed in some cases when it would not be if better alternatives were available,” or a “a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a long sentence.”⁴ In Congress's view, there was “too much reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty that results from imprisonment.”⁵ Congress believed that a term of imprisonment was *not* “necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine.”⁶ Congress believed that larger fines, probation with conditions, and alternatives to all or part of a prison term such as

¹ See Pub. L. No. 98-473, §§ 217(a), 239, 98 Stat. 1987, 2039 (1984).

² See S. Rep. No. 98-225, at 67, 172-76 & nn.531-32 (1983).

³ U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 43 (2004).

⁴ S. Rep. No. 98-225, at 50 (1983).

⁵ *Id.* at 59.

⁶ *Id.* at 55.

community service or intermittent confinement should be used more often,⁷ and that it would be up to the judge to determine whether the purposes of sentencing would best be served by probation or imprisonment,⁸ except that imprisonment was not appropriate to achieve the purpose of rehabilitation. *See* 18 U.S.C. § 3582(a). Congress thus authorized judges to impose probation for most offenses, *i.e.*, any offense with a statutory maximum below 25 years unless expressly precluded for the offense, *see* 18 U.S.C. § 3561(a), § 3559(a), treated probation as a “form of sentence” in its own right,⁹ *see* 18 U.S.C. § 3551(b)(1), § 3561(a), § 3562-3564, and directed the Commission to promulgate a guideline for the use of the courts in determining whether to impose a sentence of probation or a term of imprisonment, 28 U.S.C. § 994(a)(1)(A), and to reflect the general inappropriateness of imprisonment for the purpose of rehabilitation, 28 U.S.C. § 994(k).

The Commission avoided these directives by adopting a circular definition of “serious” and then applying it to all cases. It asserted that courts had been sentencing to probation “an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are ‘serious.’”¹⁰ Congress, however, indicated its view of “serious” as “a crime of violence that results in serious bodily injury.”¹¹ 28 U.S.C. § 994(j). The Commission also had a “view” that “the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.”¹² But the Commission offered no evidence to support this “view,” and actual evidence is to the contrary.¹³ Nonetheless, the Commission’s “solution” was

⁷ *Id.* at 50, 59.

⁸ *Id.* at 92, 119.

⁹ *Id.* at 59.

¹⁰ USSG, Ch. 1, Pt. A(1)(4)(d) (Original Introduction to the Guidelines Manual, Probation and Split Sentences) (2010).

¹¹ Nor did the offenses viewed as “serious” by the Commission meet any other criteria requiring prison in Congress’s view. *See* 28 U.S.C. § 994(i) (directing Commission to specify a term of imprisonment for offenders with two or more prior felony convictions committed on different occasions, offenses committed as part of a pattern of criminal conduct from which the offender derived a substantial portion of his/her income, offenders who manage or supervise racketeering conspiracies with three or more persons, offenders who commit a crime of violence that constitutes a felony while on supervision, and drug offenses involving a “substantial quantity.”); 28 U.S.C. § 994(h) (requiring Commission to specify a term of imprisonment at or near the maximum for certain third time drug and violent offenders)..

¹² USSG, Ch. 1, Pt. A(1)(4)(d) (Original Introduction to the Guidelines Manual, Probation and Split Sentences) (2010).

¹³ *See, e.g.,* David Weisburd, et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 *Criminology* 587 (1995) (finding no difference in deterrence of white collar offenders, presumably the most rational offenders, between imprisonment and probation).

to write guidelines “that classify as ‘serious’ (and therefore subject to mandatory prison sentences) many offenses for which probation is now frequently given.”¹⁴ Indeed, because the Commission decided without basis that white collar offenders should not be sentenced to probation, it classified all offenses as “serious” by writing guidelines that required prison or some other form of confinement for all offenders with a guideline range greater than 0-6 months.

Then Commissioner Breyer explained that “once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad,” and the “resulting compromises do not seem terribly severe.”¹⁵ Later Commissions acknowledged that the first offender directive was not implemented,¹⁶ and that the guidelines’ requirement of prison in nearly every case was unnecessary and counterproductive.¹⁷ Other research is in agreement.¹⁸

¹⁴ USSG, Ch. 1, Pt. A(1)(4)(d) (Original Introduction to the Guidelines Manual, Probation and Split Sentences) (2010).

¹⁵ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 23 (1988).

¹⁶ USSC, *Recidivism and the First Offender* at 3 (May 2004), http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf; USSC, Simplification Draft Paper, Chapter Four Criminal History, Part V (Nov. 1996), http://www.ussc.gov/Research/Working_Group_Reports/Simplification/CRIMHIST.HTM.

¹⁷ See USSC, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996) (finding that “[m]any federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release,” and “alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties.”); USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 2-3 (2009) (“alternatives to incarceration can provide a substitute for costly incarceration,” and “also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.”).

¹⁸ See Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol’y 589, 591-93 (2007) (“imprisonment causes harm to prisoners,” isolating them from families and friends, making it difficult to successfully reenter society, and “reinforc[ing] criminal identities” through contacts with other criminals); Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent’g Rep. 22 (1994) (“[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism.”); Laura Baber, *Results-based Framework for Post-conviction Supervision Recidivism Analysis*, Fed. Probation, Volume 74, Number 3 (2010) (study of 150,000 federal offenders showed 85% of people on probation and 77% of people on supervised release after a prison term remained arrest-free within the first three years of their term), <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/FederalCourts/PPS/Fedprob/2010-12/>

