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100TH CONGRESS
*1st Session*

HOUSE OF REPRESENTATIVES

REPORT
100-336

# SENTENCING GUIDELINES STAY OF IMPLEMENTATION ACT OF 1987

OCTOBER 2, 1987.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

## REPORT

[To accompany H.R. 3307]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3307) to provide for an orderly transition to the taking effect of the initial set of sentencing guidelines prescribed for criminal cases under section 994 of title 28, United States Code, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sentencing Guidelines Stay of Implementation Act of 1987".

SEC. 2. CONGRESSIONAL FINDINGS.

The Congress finds and declares that—

(1) the initial sentencing guidelines submitted to Congress by the United States Sentencing Commission are substantially workable and ready to take effect on November 1, 1987;

(2) the period for congressional review of the initial guidelines under section 235(a)(1) of the Sentencing Reform Act of 1984 need not be extended;

(3) the Congress has no intention or desire to undercut or disapprove the guidelines; and

(4) there is a need, however, for a brief period of additional time for the training of court personnel and others involved in the application of the guidelines, for further testing of the guidelines, and for the Commission to have an opportunity to further refine the guidelines before they are applied to criminal cases.

SEC. 3. STAY OF IMPLEMENTATION OF SENTENCING GUIDELINES.

Section 235(a)(1) of the Comprehensive Crime Control Act of 1984 is amended by striking out "36" and inserting "45" in lieu thereof.

SEC. 4. CLARIFICATION OF APPLICATION OF INITIAL GUIDELINES TO CONDUCT TAKING PLACE BEFORE EFFECTIVE DATE.

Section 235(a) of the Comprehensive Crime Control Act of 1984 is amended by adding at the end thereof the following:

"(3) The initial sentencing guidelines that take effect under this section shall apply only with respect to conduct occurring after such guidelines take effect.".

SEC. 5. EXPEDITED REVIEW.

(a) CIVIL ACTION.—Any person or entity aggrieved may commence a civil action in the United States District Court for the District of Columbia for declaratory judgment and injunctive relief on the ground that chapter 58 of title 28, United States Code, or any guideline submitted to Congress by the United States Sentencing Commission, violates the Constitution.

(b) THREE-JUDGE COURT.—Any action brought under subsection (a) shall be heard and determined by a three-judge court in accordance with section 2284 of title 28, United States Code.

(c) APPEAL TO SUPREME COURT.—Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under subsection (a) shall be reviewable by appeal directly to the Supreme Court.

(d) EFFECTIVE DATE.—This section shall take effect on the day the initial sentencing guidelines take effect under section 235(a) of the Comprehensive Crime Control Act of 1984.

SEC. 6. STANDARD FOR DEPARTURE.

(a) IN GENERAL.—Section 3553(b) of title 18, United States Code, is amended by striking out the first sentence and inserting in lieu thereof the following: "The court shall impose a sentence of the kind, and within the range set forth in the applicable sentencing guidelines unless the court finds that there is present in the case an aggravating or mitigating circumstance of a kind or degree not taken into account by such guidelines that provides a compelling reason for imposing a sentence different from a sentence called for by such guidelines, having due regard for the purposes of sentencing set forth in subsection (a)(2) of this section. In determining whether an aggravating or mitigating circumstance is of a kind or degree not taken into account by a sentencing guideline, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date such section 3553(b) takes effect.

## PURPOSE OF THE LEGISLATION

The purpose of this bill is to delay the implementation of the sentencing guidelines promulgated pursuant to the Sentencing Reform Act of 1984 for nine months, to clarify that the initial guidelines issued by the United States Sentencing Commission apply only to conduct occurring after the Sentencing Reform Act takes effect, to provide for expedited appellate review of an anticipated constitutional challenge to the Sentencing Reform Act, and to modify the standard governing when judges can depart from the guidelines.

## INTRODUCTION

The Sentencing Reform Act of 1984 ("SRA")[1] established the United States Sentencing Commission to promulgate guidelines for sentencing criminal defendants convicted of federal crimes. The SRA requires federal judges to impose the sentence called for by the guidelines "unless the court finds that an aggravating or miti-

[1] Public Law No. 98-473, title II, ch. 2, 98 Stat. 1987 (1984).

gating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." [2] On April 13, 1987 the Commission submitted the initial set of guidelines to Congress and on May 1, 1987 submitted several amendments to those guidelines. The guidelines and amendments have been pending since then and will take effect on November 1, 1987 unless Congress modifies, delays or rejects them.

## COMMITTEE REVIEW OF THE GUIDELINES

The Committee's Subcommittee on Criminal Justice held seven hearings on the sentencing guidelines, beginning on May 12, 1987 and continuing through July 29, 1987. The Subcommittee heard testimony from over thirty witnesses, including the members of the United States Sentencing Commission, a number of federal judges, bar organizations interested in sentencing issues, and some leading criminal law scholars. Many of the witnesses raised serious concerns and criticisms about the guidelines and the SRA. A number of these issues also trouble the Committee, and the Committee intends to continue to monitor the Commission's refinement and amendment of the guidelines. The major areas of criticism are discussed in the following sections.

### I. THE COMMISSION'S FAILURE TO ADOPT A COHERENT PHILOSOPHY

The Commission was criticized for failing to develop and adhere to a consistent sentencing philosophy. One of the main tasks confronting a sentencing commission is to articulate a philosophy to guide its many policy choices. The possible philosophies include a "just desert" model, in which the seriousness of the offense is the primary determinant of the sentence, and a "crime control" model, in which deterrence or the predicted risk that the defendant will commit further crimes are of primary concern.

Choosing among these differing philosophies is important because their penal aims can be in conflict. A sentence that is consistent with one rationale may be inappropriate under another. As noted by Professor Andrew von Hirsch of the Rutgers University School of Criminal Justice, an early advocate of guideline sentencing, it is possible for a single factor to push in opposite directions depending upon the sentencing philosophy being applied. For "just desert" purposes, an offender's youth may be a mitigating factor, yet may indicate a greater risk of recidivism and hence be an aggravating factor for crime control purposes.[3] Selecting a rationale may not be easy, but failure to do so may ensure that a system does not further any rational purpose.

Various other sentencing commissions have made the hard decision of what philosophy to adopt. Even if these commissions have not exclusively adopted one rationale to the exclusion of others, they have established a coherent philosophical framework which gives their guidelines a sound theoretical basis. For example, both

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[2] 18 U.S.C. 3553(b), enacted by SRA, Public Law No. 98-473, § 212(a)(2), 98 Stat. 1990.

[3] See statement of Professor Andrew von Hirsch, p. 3, Hearings on Sentencing Guidelines before the Subcom. on Crim. Justice of the House Com. on the Judiciary, 100th Cong., 1st Sess. [publication forthcoming] [hereinafter cited as "Hearings"].

the Minnesota and Washington commissions chose a modified version of just deserts.[4] The Minnesota commission decided that just deserts considerations would generally determine who is imprisoned, but that among those imprisoned, crime control considerations would determine the sentence length.

Critics of the United States Sentencing Commission, including Commissioner Paul Robinson, who dissented from the guidelines,[5] contend that the Commission never developed a coherent philosophy. Instead, they argue, the Commission simply determined the mathematical averages of present sentences and mirrored them with minor variations.[6] Current sentencing practices, though, do not represent any consistent approach. One judge may look primarily to deterrence, another to incapacitation, and still another to rehabilitation. Simply aggregating or averaging current law sentences may therefore produce a result that is not consistent with the aims of any sentencing philosophy.

The Commission acknowledges that it did not choose a single sentencing rationale, but defends this action.

> Adherents of ["just deserts" and crime control philosophies] have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find widespread acceptance . . . .[7]

The Commission also responds to its critics by arguing that the supposed differences in sentences that result from various philosophies are frequently less significant in reality than in theory.[8]

## II. THE GUIDELINES' USE OF ALTERNATIVES TO INCARCERATION

One of the most severe criticisms leveled against the Commission is its treatment of probation and other alternatives to incarceration. Many witnesses who testified before the Subcommittee on Criminal Justice claimed that the Commission, in violation of the applicable statutes and despite the widespread success of nonincarcerative punishment, has improperly and dramatically restricted the ability of judges to impose sentences other than imprisonment.

It is undisputed that the guidelines will result in a significant decline in the availability of probation. Under current practice, property offenders are sentenced to probation 60 percent of the time; according to the Commission's own estimates, the guidelines will reduce that figure to 33 percent.[9] Individuals convicted of drug of-

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[4] See A. von Hirsch, K. Knapp & M. Tonry, The Sentencing Commission and Its Guidelines, chs. 1, 5 (1987).

[5] See U.S. Sentencing Com'n, Dissenting Views of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission (May 1987).

[6] See Id. at 3–6.

[7] U.S. Sentencing Com'n, Sentencing Guidelines and Policy Statements at 1.3 (April 1987) [hereinafter cited as "Initial Guidelines"].

[8] See Initial Guidelines at 1.4.

[9] See U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements at 68, table 2 (June 1987) [hereinafter cited as "Supplementary Report"].

fenses currently are given probation in 20 percent of all cases; the guidelines will result in only five percent of drug offenders receiving probation. The statistics are similar for other offense types. The guidelines require that many defendants who now receive straight probation be sentenced to probation with conditions, such as periodic confinement, or be given prison terms.

The projected decrease in the availability of probation is primarily the result of two factors. First, the Commission made a philosophical decision to reduce the number of straight probation sentences.[10] The Commission clearly believes that prison terms are appropriate in more cases than current practice indicates.

The second factor in the decreased availability of probation is the Commission's interpretation of 28 U.S.C. 994(b), which provides that "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months . . . ." The Commission interprets probation to be equivalent to a zero month prison term. This interpretation led the Commission to conclude that probation is only available if the maximum sentence in a guideline range is six months of imprisonment or less.[11]

Critics have attacked both the philosophical and statutory interpretation bases of the Commission's decision to restrict probation. The American Bar Association, the Federal Public and Community Defenders, and the National Association of Criminal Defense Lawyers, among others, maintain that the applicable statutory provisions require the Commission to give judges more latitude to choose probation as the appropriate sentence. They point first to language enacted by the Sentencing Reform Act requiring the Commission to "insure 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." [12] The dramatic predicted reduction in probation indicates that the Commission may have violated this provision. By defining virtually all offenses as serious, the Commission may have limited probation beyond Congress' intent.

It is also argued that the Commission's decision to restrict probation is inconsistent with 18 U.S.C. 3561(b), which provides that "a defendant who has been found guilty of an offense may be sentenced to a term of probation unless (1) the offense is a Class A or Class B felony; (2) the offense is an offense for which probation has been expressly precluded; or (3) the defendant is sentenced at the same time to a term of imprisonment for the same or different offense." [13] Thus Congress precluded probation only for offenses pun-

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[10] "Under present sentencing practice, courts sentence 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.' If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective." Initial Guidelines at 1.8.

[11] See Initial Guidelines § 5B1.1(a)(2), at 5.3.

[12] 28 U.S.C. 994(j).

[13] The maximum terms of imprisonment for Class A and B felonies are life or twenty years or more, respectively. 18 U.S.C. 3359.

ishable by imprisonment of twenty years of more, not the six months or more dictated by the Commission's interpretation of 28 U.S.C. 994(b).

There is also philosophical opposition to the Commission's treatment of alternatives to incarceration. A number of witnesses who appeared before the Subcommittee on Criminal Justice testified that sanctions such as probation, restitution, fines, community service, home detention, electronic monitoring and the like can protect the public and satisfy the purposes of sentencing. These alternatives are less costly and more humane than imprisonment. A number of states have been experimenting successfully with these forms of punishment. At a time of great prison overcrowding and a move in the states away from incarceration, it is peculiar that the Commission chose to limit dramatically the use of alternative forms of punishment in the federal system. The Commission should reconsider its primary reliance on imprisonment and should make greater use of alternatives to incarceration.

### III. PRISON IMPACT

Another major area of concern is the impact of the sentencing guidelines on prison overcrowding. There are at present approximately 4,000 inmates in federal prisons, a figure that puts the federal system approximately fifty-nine percent over capacity.[14] The Commission estimates that by 1992, five years after the guidelines go into effect, there will be between 67,000 and 83,000 inmates; by 1997 between 78,000 and 125,000; and by 2002 between 83,000 and 165,000.[15] This represents an increase in the prison population over the next fifteen years of up to almost 400 percent.

These estimates anticipate an enormous increase in the population of an already overburdened prison system. Many of the witnesses who testified at the Subcommittee on Criminal Justice's hearings argued that public safety does not require such a dramatic increase and the consequent vast expenditures on prison construction. There is also potential for disastrous deterioration in prison conditions. Based on these estimates it is unclear whether the Commission has abided by the mandate of the Sentencing Reform Act that the guidelines "be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." [16]

The Commission's response is that although the projected increase in prison population is indeed dramatic, only a small portion of it is due to the guidelines. The Commission estimates that less than ten percent of the increase is attributable to the guidelines.[17] The remaining ninety percent or more of the increase, according to the Commission, is the result of the mandatory minimum sentences contained in the Anti-Drug Abuse Act of 1986 and the career criminal provision of the Sentencing Reform Act.

Due to the speculative nature of projections regarding prison population, the full extent of the guidelines' impact on prison popu-

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[14] See U.S. Dep't. of Justice, Fed. Prison System, Monday Morning Highlights (Sept. 28, 1987).
[15] See Supplementary Report at 71-75, Tables 4-6.
[16] 28 U.S.C. 994(g).
[17] See Initial Guidelines at 1.11; Supplementary Report at 53-75.

NOTICE: IN LIEU OF A STAR PRINT, ERRATA IS PRINTED TO INDICATE A CORRECTION TO THE ORIGINAL REPORT

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## ERRATA

Page 6, under III, PRISON IMPACT, line 3, change 4,000 to 44,000.

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lation remains unclear. However, the Commission's prison impact estimates have raised many questions. For example, the guidelines do account for an increase in prison time served for almost every category of offense. It seems apparent that if cases affected by the mandatory minimum provisions are excluded, the guidelines' impact on the remaining cases will be an increase in prison term lengths of more than ten percent. It is unknown how much greater this impact will be.

The effort to examine critically the Commission's estimates has been hampered. The guidelines have been public only a short time and much essential evidence of the Commission's work has been unavailable. The General Accounting Office, charged with reporting to Congress on the issue, had time to do little more than review the Commission's methodology.[18] The efforts of the G.A.O. and others examining the prison impact issue have also been hurt by the unavailability of the Commission's technical report on its prison impact estimates. This report, which was expected in the spring, has yet to be released.

## IV. PLEA BARGAINING AND PROSECUTORIAL DISCRETION

As the Commission notes in the Supplementary Report, because the vast majority of federal criminal convictions result from guilty pleas, the application of the guidelines to such cases is of great importance.[19] Recognizing the possibility that plea bargaining could undermine the objectives of sentencing guidelines, the Sentencing Reform Act directs the Commission to prepare policy statements concerning the acceptance and effect of plea agreements.[20] The Commission did issue several policy statements concerning plea agreements. However, "The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices." [21]

A number of experts who have followed the development of the guidelines are concerned with the relationship between the guidelines and undisturbed plea bargaining. Specifically, they fear that the guidelines will result in a significant increase in plea bargaining and a resulting shift in sentencing discretion and authority from judges to prosecutors.

In a guideline system the ability of the attorneys to agree to the dismissal of charges is a powerful tool for controlling the sentence imposed by the court. The Commission has issued a guideline authorizing courts to accept plea agreements including the dismissal of charges if "the remaining charges adequately reflect the seriousness of the actual offense behavior . . . ." [22] This broad language is unlikely to lead to the rejection of many plea agreements. Once a plea has been accepted, a judge will be unlikely to impose a sentence outside of the guideline range made applicable by the plea.

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[18] Based on this review, the G.A.O. found that the Commission's methodology for estimating the guidelines' prison impact appeared to be reasonable. See Hearings, Statement of Arnold P. Jones, p. 11.

[19] See Supplementary Report at 48.

[20] 28 U.S.C. 994(a)(2)(E).

[21] Initial Guidelines at 1.8.

[22] Initial Guidelines § 6B1.2.

Thus the ability to determine the charges pleaded to carries with it the power essentially to determine the sentence to be imposed.

Even "sentence bargains" (plea agreements including a specific sentence) may be broadly tolerated under the guidelines. The Commission's policy statement referring to the guideline section just discussed states that sentence bargains may be accepted by the court if the recommended sentence is within the applicable guideline range, or if it departs from that range for "justifiable reasons."

A number of experts feel that the Commission's treatment of plea bargaining will undercut the effectiveness of the guidelines and result in the prosecutor having greater authority. Obviously the ability to make a recommendation of a sentence that is likely to be followed can be a powerful inducement to plea bargaining. This concern is magnified because the guidelines, in general, call for severe penalties—in most cases including terms of imprisonment. In many instances, then, the only way in which an accused offender can avoid the prospect of a long prison term is to enter into a plea bargain to a lesser charge. This combination of harsh penalties and the ability to circumvent them through agreement with the prosecution will give defendants great incentive to enter pleas. As a result, according to these experts, the prosecution will have increased leverage over the defendant. Some have predicted that as the power of the prosecutor actually to determine the sentence increases, so will the number of plea bargains.

## V. DUE PROCESS CONSIDERATIONS

Another potential problem with the guidelines is that they may adversely affect the due process rights of defendants. This problem arises because unadjudicated conduct can have a significant impact on the sentence imposed, and this conduct must be determined by a fact-finding process not detailed by the Sentencing Reform Act or the guidelines.

Under the guidelines, only a portion of the sentence to be imposed is determined by the offense of conviction. Each offense is given a guideline "level". Additional levels are added for the presence of various factors (the use of a weapon, injury to the victim, the dollar amount involved in the offense, etc.), which are not necessarily elements of the offense itself. In some instances these "add-ons" can account for a greater percentage of the sentence than the base offense.

Conduct that is relevant for sentencing purposes, but that is not part of the offense of conviction, will not have been determined in reaching a guilty verdict. Nevertheless, these relevant facts will be relied upon by the court in deciding on the appropriate sentence. Neither the SRA nor the guidelines specify the nature of the fact-finding inquiry by which the court will weigh this conduct. Such essential issues as the applicable evidentiary standard, whether the rules of evidence apply, and the distribution of the burden of proof are not resolved.[23]

[23] The Commission has given some guidance on these questions. For example, the Commentary to guideline § 6A1.3 (at 6.3 states: "In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact

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It has been left to the courts to determine these issues in a manner consistent with defendants' due process rights. Some witnesses at the Subcommittee on Criminal Justice's hearings, including the Federal Public and Community Defenders, have suggested that either Congress or the Commission clarify that disputed questions of fact which will bear on the sentence must be determined after a hearing at which the parties can present evidence and cross-examine witnesses, and that the party seeking to establish a disputed fact must do so by clear and convincing evidence.

### VI. THE EFFECT OF THE GUIDELINES ON JUDICIAL RESOURCES

A great concern of the federal judiciary is the burden the guidelines will impose on district judges, appellate courts and probation officers. District judges and probation officers will have to spend a great deal of time on the extensive fact-finding necessitated by the guidelines. Although it is impossible accurately to predict the degree of this burden, and to what extent this burden will diminish the longer the guidelines are in use, the problem is a real one. Judge Robert Sweet of the United States District Court for the Southern District of New York estimates that the guidelines will require each judge to spend four additional hours per sentence imposed.[24]

In addition, the introduction of appellate review of sentences will increase the courts' workload. Some judges are concerned that the Courts of Appeals will be flooded with additional appeals. Virtually every sentence imposed under the guidelines will involve multiple appealable issues. Particularly during the initial period of use of the guidelines, judges and probation officers will probably be prone to errors in calculation or misapplication of the guidelines, which will result in appealable issues. Even sentences imposed after guilty pleas will be appealable. Judge Edward Becker of the United States Court of Appeals for the Third Circuit estimates that the appellate courts' workload may double.[25]

### COMMITTEE CONSIDERATION OF A DELAY

The most pressing need, according to most of the witnesses who testified before the Subcommittee on Criminal Justice, is for the implementation of the guidelines to be delayed.[26] These calls for a

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that particular offense and offender characteristics rarely have a highly specific or required sentence consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See *United States* v. *Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law." Failure of the SRA to provide for appropriate procedures is likely to engender much litigation.

[24] See Hearings, Statement of Judge Robert Sweet, p. 21.

[25] See Hearings, Statement of Judge Edward Becker, p. 6.

[26] Some observers have called for the effective date of the Sentencing Reform Act to be delayed; others have suggested staying the implementation of the guidelines. There is, in reality,

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delay came from supporters and opponents of the guidelines alike. The federal judiciary, in particular, has been virtually unanimous on this issue. The Judicial Conference of the United States and various circuits of the United States Court of Appeals have adopted resolutions calling for a delay. Furthermore, the Sentencing Commission itself requested a nine-month delay when it submitted the guidelines in April.

The suggested reasons for a delay have been almost as varied as the sources of the recommendations. The Committee believes, however, that several rationales in particular support a delay. These include the need for training, testing, further public comment and revision of the guidelines.

### I. TRAINING

There is a great need for training judges, lawyers and probation officers if a chaotic period of implementation of the guidelines is to be avoided. Sentencing guidelines represent a dramatic change in federal criminal sentencing. Probation officers will have new responsibilities and increased workloads. District judges will be required to hold new hearings and for the first time explain, on the record, their reasons for imposing a particular sentence. Appellate judges will be hearing appeals of sentences for the first time and will have the difficult task of interpreting and applying the Sentencing Reform Act and the guidelines. Lawyers, both prosecutors and defense counsel, must thoroughly understand the operation of the guidelines and will have to devote additional time to the sentencing process.

All of these persons involved in the criminal justice process need training in the guidelines. Inadequate training could result in numerous errors in application of the guidelines and defendants being inadequately represented at sentencing. This in turn could lead to many sentences being overturned on appeal and could undermine support for the guidelines.

Some training has already taken place. However, given the complexity of the guidelines and the large number of people who will be involved in applying them, much more is needed. Comprehensive training should be a priority during any delay period.

### II. TESTING

The goal of field testing would be to identify problems in the application of the guidelines. Field tests will help the Commission to structure the training programs to reduce misunderstandings or misapplications of the guidelines. The Commission could also use the data generated by field tests to identify areas of the guidelines that need to be changed prior to implementation.

There are a variety of ways in which field testing could be structured. Either entire districts or selected courts within each district could be involved in the testing. Judges, probation officers and attorneys would go through the exercise of applying the guidelines,

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no difference between these two recommendations. In either case, the guidelines would have no legal force until the end of the delay, at which time they would automatically take effect unless Congress passed another law delaying, modifying or rejecting the guidelines. H.R. 3307 simply delays the effective date of the Sentencing Reform Act.

but actual sentencing would be imposed under current law. Records would be kept and analyzed. This data may demonstrate common errors in the application of the guidelines and ways in which the guideline results differ from the Commission's expectations. Procedures could be developed to avoid trouble areas, commentary could be written to address problems and, where neces sary, the Commission could amend the guidelines.

### III. CHANGES IN THE GUIDELINES

A delay in the effective date of the guidelines will also allow the Commission to make some useful changes in the guidelines. Reportedly the Commission already has some further amendments it would like to propose. The Subcommittee on Criminal Justice's hearings raised a variety of issues, many of which have been discussed earlier in this Report, which the Commission should consider addressing. Finally, the training and testing periods during a delay may reveal other problems that should be remedied.

The Sentencing Commission is a permanent body and the amendment process is to be a continuing one. The process of testing, evaluating and amendment could go on forever, with the guidelines never actually taking effect. Some argue that the guidelines should take effect on November 1 and the Commission can then continue its work with actual results to guide them. However, several factors indicate that the appropriate course of action is to permit further amendment before the guidelines are implemented.

It has been widely reported that the guidelines submitted on April 13 were hastily drafted at the "eleventh hour" to meet the Commission's deadline.[27] There was no public comment period and no hearings on the draft transmitted to Congress last April 13. In addition, the guidelines transmitted to Congress represented a substantial change from the Commission's earlier efforts. Thus it has only been since April 13 that the guidelines pending before Congress have been held up to public scrutiny. Given the far-reaching changes the guidelines will bring about, and the great deal of public comment inspired by the earlier drafts, it is appropriate that the Commission be given the opportunity to consider making one additional set of amendments before the guidelines are applied to real cases.

### IV. HOW LONG A DELAY?

The suggested length of a delay has ranged widely. In addition to the Commission's call for a nine month delay, periods from six months to two years were suggested. For example, the Judicial Conference of the United States adopted a resolution calling for a twelve month delay. The American Bar Association proposed a twenty-four month delay and presented a detailed plan for field testing, feedback to the Commission, amendments to the guidelines and additional Congressional review. The A.B.A. plan is thoughtful and comprehensive and would likely lead to significantly improved guidelines.

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[27] See, e.g., Hearings, Statement of Kenneth Feinberg, App. B, p. 7.

The Committee believes that it would be unwise for guidelines that may be ambiguous, unclear, incomplete, or inappropriate to take effect. Such guidelines would not only generate litigation that could be avoided, but would also breed disrespect for the guidelines and the Sentencing Reform Act. Because of concerns that have been expressed about a lengthy delay, the Committee has decided to provide for the shortest possible delay that will still give the Commission the opportunity to draft amendments that can take effect at the same time as the initial guidelines. Since guideline amendments take effect 6 months after they have been transmitted to Congress,[28] the Committee believes that a 9 month delay is appropriate. Such a delay gives the Commission only 3 months in which to draft amendments.

## Other Provisions of the Bill

The bill also addresses two constitutional issues raised at the Subcommittee on Criminal Justice's hearings. The SRA and its legislative history are ambiguous as to whether the guidelines apply to sentences imposed or to conduct occurring after the SRA's effective date. Application of the guidelines to conduct occurring before the guidelines take effect would violate the ex post facto clause of the United States Constitution whenever the guidelines result in harsher penalties than would be imposed under the law in effect at the time of the conduct.[29] Given the broad discretion judges presently have in imposing sentence, though, it may be difficult for courts to determine when a guideline is harsher than prior law and is, therefore an ex post facto violation. To avoid these difficulties, H.R. 3307 establishes an unambiguous rule by clarifying that the guidelines do not apply to offenses committed before the SRA's effective date.[30]

The Subcommittee on Criminal Justice also heard testimony concerning a possible violation of the constitutionally-mandated separation of powers by the SRA. Several witnesses contended that the structure of the Commission and the membership of federal judges offends this principle and invalidates the sentencing guidelines.[31] Although the Committee does not now express an opinion on this issue, the question is a substantial one and is certain to be litigated.[32]

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[28] U.S.C. 994(o), enacted by the Sentencing Reform Act of 1984, Public Law No. 98-473, § 217(a), 98 Stat. 2023.

[29] A judge could constitutionally apply a guideline that was not in effect at the time of the conduct if the guideline calls for a sentence that is less severe than the sentence that would have been imposed under the law in effect at the time of the conduct.

[30] Another ex post facto issue was raised at the Subcommittee's hearings. A judge is required by 18 U.S.C. 3553(a)(4) to impose sentence based on the guidelines "that are in effect on the date the defendant is sentenced." Where a guideline has been amended, and the amendment imposes a harsher penalty than the guideline in effect when the defendant committed the offense, application of the amended guideline violates the ex post facto clause. See *Miller* v. *Florida*, —U.S.—, 41 Cr. L. Rept. 3269 (1987). This section should be amended to ensure its constitutionality. The Committee intends to take this issue up in the near future.

[31] See Hearings, Statements of Alan Morrison, Burt Neuborne and Lewis Liman; see also Liman, "The Constitutional Infirmities of the United States Sentencing Commission," 96 Yale L.J. 1363 (1987).

[32] It has been suggested that the Congress could remedy any separation of powers problem by affirmatively enacting the guidelines. The Commission's work, then, would have been merely advisory, and would not implicate separation of powers issues. The Committee has not taken this approach, and H.R. 3307 does not enact the guidelines.

The existence of this controversy could severely disrupt the federal criminal justice system. Should the lower courts split on the question of the constitutionality of the SRA, there would in effect be a dual sentencing system, some courts applying the guidelines and others continuing to sentence convicted defendants under current law. If the Supreme Court ultimately invalidates the SRA, all defendants sentenced under the guidelines will have to be resentenced. To limit these potential disruptions, H.R. 3307 provides for expedited appellate review of the separation of powers challenge to the SRA.

Several aspects of the expedited review provision should be clarified. First, the provision is intended to accomplish expeditious determination of those constitutional challenges which would, if sustained, result in the striking down of the SRA or the guidelines in their entirety. For example, as noted above, it is expected that the SRA will be attacked on separation of powers grounds. Such an attack, if successful, would invalidate the guidelines and is the type of challenge intended to be covered by the expedited review provision. On the other hand, challenges to the SRA or individual guidelines that do not implicate the integrity of the SRA or guidelines as a whole should be handled by the courts in the ordinary manner.

Second, when the Committee marked-up H.R. 3307, it deleted a section of the expedited review provision requiring courts to advance on their dockets cases brought under this provision. This section was deleted as unnecessary because 28 U.S.C. 1657 already requires a court to expedite the consideration of any action for which "good cause" is shown. Good cause is shown under section 1657 "if a right under the Constitution . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit." Since a constitutional challenge leading to the striking down of the SRA or the guidelines in their entirety would seriously disrupt the federal criminal justice system, the Committee expects that any such challenge, such as a separation of powers challenge, constitutes good cause under 28 U.S.C. 1657 and will be expedited by the courts until the issue is authoritatively determined by the Supreme Court.

Third, the expedited review provision only takes effect upon the taking effect of the sentencing guidelines. However, by so providing the Committee does not express a view on whether a person may have standing to challenge the SRA or the guidelines prior to that date. It is only the mechanism established by this section that is unavailable until the guidelines take effect.[33]

The final section of the bill modifies the standard for departure from the guidelines. The SRA presently authorizes judges to depart from the applicable guidelines only where there is an aggravating or mitigating circumstance present which was not "adequately taken into consideration by the Sentencing Commission in formulating the guidelines." This provision is overly vague and susceptible to inconsistent interpretations of when judges can depart from the guidelines. In fact, a narrow reading would allow virtually no

[33] A case raising a constitutional challenge to the SRA, brought by a litigant with standing to sue prior to the effective date of the guidelines, can be considered eligible for expedition under 28 U.S.C. 1657.

departures. Moreover, since the provision makes relevant not only what factors the Commission considered, but the extent to which the Commission considered a factor, the Commission's records, and members of the Commission are liable to subpoena.

H.R. 3307 modifies the departure language in two ways. The bill authorizes a judge to depart from the guidelines where there is present an aggravating or mitigating factor "of a kind or degree not taken into account" by the guidelines that provides a "compelling reason" for departing. The term "kind of degree" authorizes departures where the guidelines have not addressed a factor or where the factor is present to a greater or lesser extent than the guidelines anticipate. The requirement that a factor be compelling means that judges must consider whether the aggravating or mitigatng circumstance is significant enough to render a guideline range inappropriate.

H.R. 3307's other change is to require that in determining whether a factor justifies a departure, the court look only to the sentencing guidelines, policy statements, and official commentary. This is to ensure that the Commission's records need not be subpoenaed in determining whether a departure is appropriate.

## SECTION-BY-SECTION ANALYSIS

### SECTION 1

Section 1 of the bill as reported provides that the short title of the legislation is "Sentencing Guidelines Stay of Implementation Act of 1987".

### SECTION 2

Section 2 of the bill as reported contains four nonbinding Congressional findings concerning the initial guidelines and the need for a delay in the implementation of the sentencing guidelines. The first finding states that the guidelines are substantially ready to take effect on November 1. The second finding indicates that the primary purpose of a delay is not to enable further Congressional review of the guidelines. However, nothing in H.R. 3307 restricts Congress' ability to continue reviewing the guidelines during or after a delay. The third finding states that the legislation is not intended to express disapproval of the guidelines. The fourth finding states that there is a need for a period of delay for training, testing and further refinement of the guidelines before they take effect.

### SECTION 3

Section 3 of the bill as reported amends the effective date provision of the Sentencing Reform Act to delay that effective date for nine months, until August 1, 1988.

### SECTION 4

Section 4 of the bill as reported clarifies that the initial sentencing guidelines apply only to conduct occurring after the Sentencing Reform Act takes effect.

SECTION 5

Section 5 of the bill as reported provides for expedited review of actions challenging the constitutionality of the Sentencing Reform Act or the guidelines on separation of powers grounds. This section also declares that the expedited review provision takes effect when the initial sentencing guidelines take effect.

SECTION 6

Section 6 of the bill as reported modifies 18 U.S.C. 3553(b), which describes when a judge may impose a sentence other than a sentence called for by the guidelines.

## OVERSIGHT FINDING

The Committee makes no oversight findings with respect to this legislation.

In regard to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to this Committee by the Committee on Government Operations.

## NEW BUDGET AUTHORITY

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, H.R. 3307 creates no new budget authority or increased tax expenditures for the Federal Government.

## INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the bill will have no inflationary impact on prices or costs in the operation of the national economy.

## FEDERAL ADVISORY COMMITTEE ACT OF 1972

The Committee finds that this legislation does not create any new advisory committee within the meaning of the Federal Advisory Committee Act of 1972.

## STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, October 2, 1987.*

Hon. PETER W. RODINO, Jr.,
*Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3307, the Sentencing Guidelines Stay of Implementation Act of 1987, as ordered reported by the House Committee on the Judiciary, September 29, 1987. CBO estimates that enactment of this bill could result in some savings to the federal government, and would result in no cost to state or local governments.

H.R. 3307 would delay the effective date of sentencing guidelines developed by the United States Sentencing Commission for nine

months, from November 1, 1987 to August 1, 1988. The bill would clarify that the guidelines apply only to actions that occur after the guidelines take effect, and would provide for a district court and Supreme Court review of an anticipated constitutional challenge to the sentencing guidelines. H.R. 3307 would also clarify the method for determining whether there are aggravating or mitigating circumstances present that would lead a court to impose a sentence different from a sentence called for by the guideline.

CBO estimates that enactment of H.R. 3307 could result in savings to the federal government; such savings would depend on subsequent appropriation actions and there is no clear basis for projecting their magnitude. Based on information from the General Accounting Office, the Administrative Office of the U.S. Courts, the Department of Justice and the U.S. Sentencing Commission, we expect that implementation of the sentencing guidelines will result in additional costs to the federal court system and the federal prison system. Such additional costs would be small initially and would grow over time, but we cannot presently estimate the amount of such costs. To the extent that additional costs would be delayed for nine months by this bill, there would be a savings to the federal government. However, some of the additional spending—on training, for example—would probably not be delayed. Because the effects of the guidelines would be small initially, the impact of this bill in 1988 is not likely to be substantial.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

JAMES BLUM,
(for Edward M. Gramlich, Acting Director).

## COST ESTIMATE

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressional Budget Office.

## COMMITTEE VOTE

The Committee reported H.R. 3307 on September 30, 1987 by voice vote, a quorum being present.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of the rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 235 OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984

EFFECTIVE DATE

SEC. 235. (a)(1) This chapter shall take effect on the first day of the first calendar month beginning [36] *45* months after the date of enactment, except that—

(A) the repeal of chapter 402 of title 18, United States Code, shall take effect on the date of enactment;

* * * * * * *

*(3) The initial sentencing guidelines that take effect under this section shall apply only with respect to conduct occurring after such guidelines take effect.*

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SECTION 3553 OF TITLE 18, UNITED STATES CODE

**§ 3553. Imposition of a sentence**

(a) * * *

(b) Application of guidelines in imposing a sentence.

[The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.] *The court shall impose a sentence of the kind, and within the range set forth in the applicable sentencing guidelines unless the court finds that there is present in the case an aggravating or mitigating circumstance of a kind or degree not taken into account by such guidelines that provides a compelling reason for imposing a sentence different from a sentence called for by such guidelines, having due regard for the purposes of sentencing set forth in subsection (a)(2) of this section. In determining whether an aggravating or mitigating circumstance is of a kind or degree not taken into account by a sentencing guideline, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.* In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission, and the purposes of sentencing set forth in subsection (a)(2).

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