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Fall 1999

## Practical Magic: A Few Down-to-Earth Suggestions for the New Sentencing Commission

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### Recommended Citation

Frank O. Bowman III, Practical Magic: A Few Down-to-Earth Suggestions for the New Sentencing Commission, 12 Fed. Sent. R. 101 (1999)

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# Practical Magic: A Few Down-to-Earth Suggestions for the New Sentencing Commission

Most of the contributions to this outpouring of advice to the new Sentencing Commissioners have to do with the substance of the Guidelines. What follows here is far more prosaic — some suggestions not about *what* the Commission should do, but about *how* the Commission should work. I make these suggestions with some trepidation, recognizing the difficulty of the task the new members have undertaken. However, I hope the perspective of one who practiced before and after the Guidelines as a federal prosecutor, participated in the internal workings of the Commission as Special Counsel in 1995–96, and has been a careful observer of the Commission from the academy for the last four years, will at least provide food for thought.

The Commission and the Guidelines have been widely criticized, and occasionally ridiculed, over the past decade. Much of the criticism has been undeserved,<sup>1</sup> but there is no denying that a once-vibrant and influential agency had slipped into a state of institutional near-paralysis. For the new Commissioners, for at least the first year or two of their terms, the task of revitalizing the U.S. Sentencing Commission will have less to do with grand debates over matters of sentencing policy than with the pragmatic demands of reinvigorating a government organization that has been in suspended animation. Hence, these suggestions.

## 1. Review your professional commitments.

Being a United States Sentencing Commissioner is a full-time job, with at least three components: (a) Agency administrator; (b) Rulemaker; (c) Political activist and educator. I'll address each of these components in a moment, but before doing so, I say again, *being a United States Sentencing Commissioner is a full-time job*. A good number of the Commission's difficulties in past years are traceable to the fact that many (though by no means all) members of the Commission could not, or would not, give the position the attention it requires. Even the most diligent and best-intentioned Commissioners have been hobbled by the fact that the Commission has almost invariably been the second of two jobs, a position physically (because in Washington, D.C.) and emotionally separated from the consuming day-to-day concerns of one's "real job" being a federal judge, or practicing lawyer, or full-time teacher.

The work of the Commission is too complex, and too important to the judicial system and the country, to be managed on the fly by busy people who drop into Washington once a month for two or three days, make hurried decisions, and then return to their other lives.

At the outset of their terms, the new Commissioners will need to make some difficult management choices about the structure and operation of the agency they now head. That will require investigation, personnel evaluations, discussion, and deliberation. After the initial round of managerial work, the administration of the agency will continue to demand some amount of time and attention from individual Commissioners virtually every month. As for the substance of the Commission's rulemaking function, the issues require careful, in-depth study and reflection. Commissioners will have to read extensively, ask innumerable questions, organize in-house research, and solicit outside input. Finally, if the Commission's decisions are to be both substantively wise and politically acceptable, the members of the Commission will need to seek out and engage the opinion-makers among its various constituencies — the bench, the defense bar, the Justice Department, the White House, Congress, the academy, the public. Taken all in all, this is not an agenda for a group of hobbyists.

The problem, of course, is that all but one of the incoming Commissioners have other full-time jobs. Five are federal judges, and one a law professor. (The Commission is fortunate to have as its seventh member John Steer, long-time General Counsel to the Commission, who will work full-time on site in Washington.) Naturally, neither the judges nor Professor O'Neill can be expected to surrender their other positions.<sup>2</sup> The obvious, and apparently simple, solution is for Commissioners to reduce dramatically their commitments to the duties of their other jobs. In practice, this simple solution is unlikely to prove simple to execute, particularly because so many of the incoming Commissioners are judges. Past experience suggests the federal courts at every level are so short-handed that the judge-members of the Commission will find it difficult to make or sustain serious caseload reductions. Pressure from overburdened colleagues, or a feeling of obligation to pull one's own weight "back home," will inevitably tug Commissioner-judges toward over-commitment to judging with a concomitant reduction in the time available for Commission work. With full recognition of the tensions it creates, I nonetheless implore new Commissioners with other jobs to reduce, and reduce significantly, their commitments in those jobs, and to steel themselves to resist the overt and subtle pressures to relax the discipline required to maintain such reductions.

## 2. Work as a team. Accept leadership. Delegate.

The truth is that, with the best will in the world, most



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judicial members of the Commission will be unable to reduce their other commitments to the degree that would be desirable for optimum performance of the Sentencing Commission. Given that reality, the Commissioners need to think hard about institutional arrangements that will allow them to maximize their limited personal time. The precise shape of those arrangements will necessarily depend on individual considerations into which I have no insight, but several lessons from the past may be useful.

First, the Commission should give the Chair a strong leadership and management role. For better or worse, the Commission's enabling legislation gave the Chair little formal authority. She is, so far as her legal powers are concerned, no more than first among equals. In the past, the weak-Chair structure of the Commission has sometimes been an impediment to progress. The valuable time of the entire Commission was expended on relatively minor matters of personnel or administration. Important initiatives were stalled by the opposition of one or two Commissioners. The Commission may be well advised to agree among themselves, either formally or informally, to grant the Chair substantial authority in the conduct of the day-to-day business of the agency, particularly regarding staffing, budgetary, and other administrative matters.

Second, if all Commissioners try to do everything, very little will be done, and even less will be done well. Some decisions necessarily must be made as a collective, but a great deal of the Commission's work could be broken into segments and allocated to single Commissioners or subgroups. The allocation might take the form of subcommittees of the whole to address particular problems. It might take advantage of the particular talents and circumstances of particular Commissioners (as for example John Steer's full-time status and long service as General Counsel, or Professor O'Neill's experience on the Hill and residence in the Washington area). The specifics are not as important as the notion that the Commission should steer away from the model of having everybody do everything. Instead, the group should delegate responsibilities among themselves to reduce overall workload and improve decision quality.

### **3. Invigorate the Commission staff.**

The personal dedication and effective organization of Commissioners is a necessary, but not sufficient, condition for institutional success. Ultimately, the success or failure of the new Commission will depend largely on the quality of the Commission's staff. Overall staff quality will in turn depend on three key appointments: Staff Director, General Counsel, and Research Director.<sup>3</sup>

**Staff Director:** The person who really runs the Sentencing Commission on a daily basis is the Staff Director. A bad one will doom the best Commission initiatives to confusion and failure. And as Tim McGrath

has demonstrated over the past year, a competent person can keep the place operating in the absence of any direction whatever. The Staff Director should be given sufficient authority to manage the day-to-day operation of the Commission with only general directives from the Chair and the Commission. The pitfall Commissioners should particularly avoid is the inevitable temptation to micro-manage personnel and other routine matters.

**General Counsel:** Commissioner John Steer, following his well-deserved promotion from General Counsel to Commissioner, will be the person best suited to advise his colleagues on the desirable qualifications for his successor. Among those qualifications might be Washington political experience, an extensive background in federal criminal law (as either a prosecutor or defense lawyer), and an existing familiarity with the Guidelines. If the General Counsel's Office has had a weakness in the past, it has been the dearth of lawyers with significant federal criminal courtroom experience. Those charged with analyzing and recommending changes to the federal criminal system are inevitably handicapped if they have no practical experience with that system. Not every lawyer in the General Counsel's Office need be an old trial hound, but at least some should be.

**Research Director:** The research arm of the Sentencing Commission has been troubled for a long time. It has a dual function, first, to collect data on the operation of the federal sentencing system, and second, to apply social science methods to analyze that data in aid of policy development. So far as a non-specialist like myself can tell, the data collection half of the job is done well enough. But the social science research arm of the Commission is a shambles. Since the initial burst of work in the early 1990's evaluating the newly-enacted Guidelines, the Commission has produced precious few meaningful studies. Commission staff have assembled some useful reports in response to congressional requests or directives, and one or two individual researchers at the Commission have routinely generated valuable insights.<sup>4</sup> But the Commission's larger research efforts have invariably been mired in methodological or organizational or political disputes, and have emerged only after interminable delays noteworthy even in a government bureaucracy.

The same pattern of disputes and delays has plagued both purely internal studies and studies contracted out to outside academic researchers. Consider, for example, the so-called "Just Punishment Study," authored by two outside researchers, Peter Rossi and Richard Berk, under contract with the Commission. The study was based on surveys taken in the Fall of 1993 and Spring of 1994.<sup>5</sup> Berk and Rossi presented a draft final report to the Commission on October 30, 1995.<sup>6</sup> The Commission accepted their report as meet-

ing the terms of the contract but has never published it under the aegis of the Commission. Instead, because Commission staff and the two academics could never agree on the final form of the product, Commission researchers performed their own reanalysis of the Berk-Rossi data which ultimately appeared in a ten-page "Research Bulletin" published in March 1997, seventeen months after Berk and Rossi submitted their "final" report.<sup>7</sup>

Equal or greater difficulties have plagued the Commission's in-house research projects. The most notable recent example is the Commission's report on substantial assistance practices. The data for this study was collected in 1994 and early 1995. A "Draft Final Report" to the Commission was prepared in October 1995. In response to pointed internal criticisms, Commission staff then spent the next eighteen months revising the draft "final" report, finally producing a final, final staff report dated May 1997. The essential findings of that report did not reach the public until January 1998, in the form of a carefully edited summary authored by Linda Maxfield and John Kramer. To this day, the actual underlying staff report can be obtained only by going to the Sentencing Commission office in Washington, D.C., and inspecting it on site or borrowing it for twenty-four hours.<sup>8</sup>

The successful candidate for Research Director should have well-established social science credentials, ideally with an existing national reputation in criminology and/or sentencing research, thus bringing to the research operation a credibility it has for some years lacked. It would also be highly desirable that the Research Director have an existing familiarity with federal criminal system and the Guidelines. The leader of the Commission's research effort should not be obliged to spend the first year or two of his (or her) tenure figuring out the basics of the system whose subtleties he is supposed to be studying. The Commission should, in consultation with the newly-appointed director, map out a concrete research agenda, and then give the Director the autonomy and resources to carry it through. This will undoubtedly require hiring additional Ph.D.-level researchers (the Commission presently has only three) and support staff, and on occasion funding contracts for outside research. The key to success will be selecting, and thereafter supporting, a Research Director who will demand analytical rigor and accept nothing less than excellence in every Commission research product.

#### **4. Transform the Commission into a politically effective institution.**

One of the justifications advanced for creating a Sentencing Commission in the first place was the conceit that such a commission of neutral experts would be free to pursue just results insulated from the politics of

crime and criminal justice. Of all the expectations for the Guidelines system, this may perhaps have been the most unrealistic. Crime and punishment have been staples of political controversy since Cain and Abel. There was never the slightest chance that the executive or legislative branches would consent to remain permanently aloof from decisions about criminal sentencing in the federal courts.

Not only was the hope of keeping sentencing out of the political arena unrealistic, it was fundamentally misguided. In our era, to call any process "political" is to affix a pejorative label connoting cynicism, demagoguery, and interest group manipulation. While modern politics may indeed display some of these features (in common with the politics of every age of human history), an effort to "remove an issue from politics" in America is nothing less than an effort to remove it from the arena of democratic choice. The prevention and punishment of crime is one of the core functions of government. Criminal law, particularly including the law allocating criminal punishment, is only legitimate when promulgated by democratically accountable institutions. Criminal laws, particularly those inflicting punishment, will only be effective when they comport, at least roughly, with the public's sense of justice. Hence, an effort to permanently objectify and bureaucratize the process of making sentencing law risks being perceived as illegitimate because it is undemocratic, and risks being ineffective to the extent it is out of touch with the popular will.

By placing the Sentencing Commission in the judicial branch, requiring that roughly half its members be sitting judges, and exempting the Commission from norms of openness and procedural regularity required of executive agencies, the Sentencing Reform Act sought to insulate sentencing reform from politics. The Federal Sentencing Guidelines, though far from perfect, are a remarkable achievement, and there can be no doubt that the early isolation of the Commission from direct political pressure contributed significantly to the Commission's success in producing anything at all. But the next phase of Guidelines development, the phase we have been in since 1987, the process of studying, explaining, evaluating, amending, and improving on the original structure, demands a more open, transparent, participatory, "political" process. Nonetheless, the Act assigns this highly visible political task to an agency whose institutional ethos is predisposed toward the secretive and apolitical mindset of the judiciary.

I suggest that, at this point in the history of the Guidelines experiment, a Sentencing Commission will function best, not when it acts in secret as an insular cell of technocrats, but when it functions most openly, most "politically." When formulating policy, the new Commission should actively seek cooperation and input from the public, and from public and private

institutions most interested in federal criminal law – the judiciary, the Department of Justice, the defense bar, the Congress, the academy. Observers of the Commission have been advising for some time that Guidelines changes are likely to be both substantively better and more readily accepted when they are the product of a broadly consultative process.<sup>9</sup> The new Commission should follow in the footsteps of its immediate predecessors, at least insofar as the last Commission began developing more open, inclusive procedures for developing and refining guideline amendments. The work done on the so-called “economic crime package” by Commission staff, judges, probation officers, prosecutors, and academics over the last two years has illustrated the value (as well as some of the drawbacks) of a more transparent process.<sup>10</sup>

In addition, the Commission, as an institution and as individuals, should begin immediately to cultivate working relationships with essential opinion leaders and decision makers in the federal sentencing community, notably including congressional leaders on both sides of the aisle. The Commission may be able to discover what is *desirable* through research, consultation, and reflection. But the limits of the *possible* are set by Congress, as the Commission discovered to its embarrassment several years ago when the legislature rejected amendments on crack and money laundering. The crack/money laundering debacle could have been avoided by a Commission that was politically aware and politically active.

I do not mean to suggest that the Commission operate as a congressional weather vane, proposing only initiatives preordained to receive reflexive support from the legislative majority. Rather, the Commission should become a full participant in the political process in a way it has not for some years. This certainly entails cultivating a sensitive appreciation of the limits of political possibility, but equally importantly, it requires a Commission acting as educators and advocates, in public and private, to change the boundaries of the debate and so to expand the limits of what is possible.

As but one example of how each component of the Commission’s rebuilding effort affects the other, the political success of the Commission’s educational advocacy will hinge in large measure on the success of its internal project of strengthening its research and policy analysis arm. As the enduring influence of the General Accounting Office and the Congressional Budget Office demonstrate, nonpartisan analytically rigorous reporting and policy analysis are politically powerful. The more the Commission is perceived as basing its decisions on impartial, methodologically unimpeachable analysis, the greater will be its political leverage.

I recognize that the vision of Sentencing Commissioners as energetic political actors may be jarring, particularly to those new members of the panel who are

judges. The ethos of judging ordinarily requires abstention from overt political involvement. The placement of the Commission in the judicial branch tempts even its non-judges to see themselves as a breed of cloistered jurists. But the hybrid character of the Commission has always created an inherent tension, particularly for those playing the dual role of judge-Commissioner. By accepting appointment as Commissioners, the new members, particularly the judges, accepted the challenge of balancing the conflicting demands of two jobs. The final modest suggestion of this article is that those who have taken up the challenge should enter into their new role aware of its political dimension and prepared build a Sentencing Commission which can act vigorously in the political arena.

## Notes

<sup>1</sup> See generally Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons In Learning to Love the Federal Sentencing Guidelines*, 1996 Wisc. L. Rev. 679 (discussing the common critiques of the Federal Sentencing Guidelines).

<sup>2</sup> And in the case of the judges, even if they were disposed to resign as judges to be Sentencing Commissioners, the statute creating the Commission requires that at least three Commissioners be sitting federal judges. See 28 U.S.C. § 991(a).

<sup>3</sup> The following discussion should not be read as favoring or excluding any particular potential candidate, or class of candidates, for the positions at issue. For example, the searches for each position should not exclude internal candidates, as viable internal candidates do exist for all three positions discussed here.

<sup>4</sup> For example, Dr. Paul J. Hofer has authored or co-authored a steady stream of important short papers (often published in the *Federal Sentencing Reporter*). See, e.g., Christine Kitchens & Paul J. Hofer, *Pre-Arrest Drug and Alcohol Abuse Among Federal Offenders*, 11 FED. SENT. R. 100 (1998); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 FED. SENT. R. 16 (1997); Paul J. Hofer, Willie Martin & Pamela Montgomery, *Departure Rates and Reasons after Koon v. United States*, 9 FED. SENT. R. 284 (1997); Paul J. Hofer, *Discretion to Depart after Koon v. United States*, 9 FED. SENT. R. 8 (1996).

<sup>5</sup> Linda Drazga Maxfield, et al., *Research Bulletin: Just Punishment: Public Perceptions and the Federal Sentencing Guidelines*, 2 n.3 (available at the Sentencing Commission website, <http://www.ussc.gov>).

<sup>6</sup> Memorandum from Phyllis J. Newton, Staff Director, to Chairman Richard Conaboy, October 30, 1995 (on file with author).

<sup>7</sup> Maxfield, et al., *supra* note 5.

<sup>8</sup> See U.S. Sentencing Commission, 1999–2000 GUIDE TO PUBLICATIONS AND RESOURCES 4, 26 (1999) (available at the Sentencing Commission website, <http://www.ussc.gov>).

<sup>9</sup> See, e.g., Marc. L. Miller & Ronald F. Wright, *Your Cheatin’ Heart(Land): The Long Search for Administrative Sentencing Justice*, 2 BUFFALO CRIM. L. REV. 723 (1999).

<sup>10</sup> For discussion of the ongoing project of re-examining the economic crime provisions of the Guidelines, see Vol. 10, No. 3 of the *Federal Sentencing Reporter*, an issue devoted to *Rethinking “Loss” in Fraud and Theft Cases*, and United States Sentencing Commission, *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines* (October 20, 1998) (available at <http://www.ussc.gov>).