

The Integral Role of Federal Probation Officers in the Guidelines System

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WHEN THE ORIGINAL United States Sentencing Commission (the Commission) began the daunting task of creating the initial *Guidelines Manual* in the mid-1980s, the first commissioners quickly realized the critically important role that federal probation officers would play in the development and implementation of the sentencing guidelines. Indeed, as discussed below, one of the first Commission staff members, Rusty Burress, was a federal probation officer brought to the Commission on what was supposed to be a temporary detail but which blossomed into an ongoing, 32-year distinguished career at the Commission. Furthermore, during the three decades that followed the promulgation of the initial manual in 1987, the Commission has relied heavily on the federal probation officer community in several important ways in the implementation of the guidelines system.

This article discusses the integral role that probation officers have played in the federal guidelines system. Part I highlights their role in helping create the initial guidelines. Part II discusses their role in the implementation of the guidelines since 1987, including in the process of frequently amending the guidelines over the years. Part III offers some concluding thoughts.

I. Probation Officers' Critical Role in Helping the Commission Develop the Sentencing Guidelines

Federal probation officers were integral in the development of the guidelines in two main ways. First, they collected the vast amount of empirical data about offense and offender characteristics on which the original Commission would model a majority of the guidelines. Second, probation officers served as close advisors to the original Commissioners and Commission staff as they drafted the initial set of guidelines.

Building an Empirical Basis for the Guidelines

In the Sentencing Reform Act of 1984 (SRA), which created the Commission and directed it to promulgate sentencing guidelines,² Congress instructed the Commission that it should begin the process of creating guidelines by examining existing sentencing data:

The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and

in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.³

The original Commission implemented this directive by collecting and analyzing data about sentences imposed in nearly 100,000 federal felony and Class A misdemeanor cases from 1983 to 1985, which was contained on a large computer file provided to the Commission by the Administrative Office of the United States Courts.⁴ After receiving that dataset, the Commission then decided to closely analyze a representative sample of 10,500 of those cases from 1984 and 1985.⁵ Because the sentencing data concerning the cases provided by the Administrative Office was somewhat limited, the Commission decided to engage in a special coding project to collect additional, detailed information about those 10,500 cases from presentence reports and other documents in the cases. The Commission's staff at that point was small, so

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² See 28 U.S.C. § 991 et seq.

³ 28 U.S.C. § 994(m).

⁴ U.S. Sent. Comm., Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 21 (1987). The data concerning those nearly 100,000 cases was obtained from the Federal Probation Sentencing and Supervision Information System (FPSIS). *Id.* at 16, 21.

⁵ *Id.* at 21.

the Commission asked federal probation officers to code their own presentence reports and related documents (e.g., judgments) for the additional data. The probation officers enthusiastically obliged and, using a set of coding instructions provided by the Commission, the probation officers collected a large amount of extra data that the Commission needed to create a sophisticated sentencing dataset.⁶ That dataset was then merged with corresponding data from the Federal Bureau of Prisons and the United States Parole Commission, which allowed the Sentencing Commission to determine (or, in cases where offenders were still serving prison sentences, estimate) the actual amount of imprisonment served by those offenders for whom the district court imposed a sentence of imprisonment.⁷

That robust dataset allowed the Commission to identify a wide variety of aggravating, mitigating, and other factors that appeared to have influenced sentencing decisions of federal district judges in the pre-guidelines era.⁸ The Commission used that data in creating guidelines for most offense types. Judge William W. Wilkins, Jr., the first chair of the Commission, observed that the guidelines were thus designed to “appl[y] in a manner similar to the thought process of a judge determining an appropriate sentence.”⁹ Using the dataset, the Commission also was able to set penalty levels—in the form of guideline ranges—for a wide variety of federal offense types, including for various gradations of the same offense types with different combinations of aggravating and mitigating factors.¹⁰ Except for drug-trafficking cases and certain white-collar and violent offenses—for which Congress had expressed its intent for higher penalties than in the pre-guidelines

era¹¹—the Commission generally set penalty levels in the 1987 sentencing guidelines based on the pre-guidelines average sentences for the different federal offense types.¹²

This important work of the original Commission could not have been accomplished without the dedicated service of federal probation officers. That work continues to have major significance three decades later, in the post-Booker era.¹³ In holding that the now-advisory guidelines still play a key role in the federal sentencing process, the Supreme Court stressed that, “even though the Guidelines are advisory rather than mandatory, they [must be given serious consideration by sentencing judges because they] are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”¹⁴ That extensive empirical evidence was primarily the product of federal probation officers.

Key Advisors to the Original Commission

Not only did federal probation officers help the Commission build an empirical basis for the guidelines, they also provided important real-world policy advice to the original Commissioners during the 18-month period

¹¹ See U.S. Sent. Comm., 2 *The Federal Sentencing Guidelines: A Report on the Operation of the Guideline System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 365 (1991) (“Congress ensured incarceration rates would increase under the guidelines as a result of specific and general directives to the Commission in the [SRA] to increase the use of imprisonment for certain classes of offenses and offenders.”); *id.* at 384 (“Congress sent a strong message that sentences for certain types of offenses and offenders would be increased”).

¹² See Supplementary Report, *supra* note 4, at 16-19.

¹³ See *United States v. Booker*, 543 U.S. 220 (2005) (holding that the former “mandatory” guidelines were unconstitutional and, as a remedy, declaring that the guidelines were to be “advisory” in the future).

¹⁴ *Gall v. United States*, 552 U.S. 38, 46 (2007) (“It is also clear that a district judge must give serious consideration to the extent of any departure [or variance] from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”).

from October 1985 to April 1987, when they created the guidelines. In the summer and fall of 1986, when the Commissioners were hammering out the original drafts of the Guidelines Manual, the Commission convened a “working group” of 14 federal probation officers from all parts of the country to offer advice about the drafts. The working group met with the Commissioners in Washington, D.C., in the summer of 1986, but maintained regular communication during the next year with the Commission’s in-house probation officer, Rusty Burrell, who conveyed the group’s input about the guidelines drafts to the Commissioners.¹⁵ Among their advice to the original Commission, the working group of probation officers stressed the need to avoid overly complex guidelines¹⁶—a recurring theme during the ensuing three decades.¹⁷

In addition to having the working group serve as a sounding board, the Commissioners also elicited formal testimony about the draft guidelines from individual probation officers, the director of the Probation Division of the Administrative Office, and a representative from the Federal Probation Officers Association at the multiple public hearings held by the original Commission in 1986 and 1987.¹⁸ Federal probation officers also “field-tested” different iterations of draft guidelines, which provided valuable feedback to the original Commission.¹⁹ Fully realizing that federal probation officers would be perhaps the most important “guidelines constituency”—besides judges themselves—the original Commission listened carefully to what probation officers had to say.

¹⁵ See, e.g., Memorandum from Rusty Burrell to Commissioners, Oct. 14, 1986 (entitled, “Responses from the U.S. Probation Officer Working Group to the Preliminary Draft”).

¹⁶ See *id.* at 1 (“[E]ach of these officers . . . expressed concern over the complexity and workability of” an initial draft of the guidelines).

¹⁷ See, e.g., William H. Pryor, Jr., *Returning to Marvin Frankel’s First Principles in Federal Sentencing*, 29 Fed. Sent’g Rptr. 95 (Dec. 2016/Jan. 2017) (arguing for simplification in the federal sentencing guideline system).

¹⁸ See Supplementary Report, *supra* note 4, Appendix A, at 1-10.

¹⁹ See, e.g., Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,121, 18125 n.44 (May 18, 1987) (noting field testing of guidelines by federal probation officers).

⁶ *Id.* (“The Probation Division’s response was overwhelming. It provided the Commission with 10,500 responses, complete with corresponding [PSRs]. As a result, the Commission has had ready access to qualitative and quantitative information in the form of 10,500 computer records and even more detailed information in the form of 10,500 [PSRs]”).

⁷ *Id.* That dataset and the code-book used by the federal probation officers is available at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/9664>.

⁸ *Id.* At 22-24, 35-39 tbl.1(b).

⁹ William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 Wake Forest L. Rev. 181, 185 (1988).

¹⁰ See Supplementary Report, *supra* note 4, at 27-34 tbl.1(a).

II. Probation Officers' Critical Role in the Implementation of the Sentencing Guidelines During the Past Three Decades

After the initial Guidelines Manual was promulgated by the Commission and went into effect on November 1, 1987, the Commission had its work cut out for it. Federal judges all around the country decried the new guidelines' curtailment of what previously had been virtually unbridled sentencing discretion, and over 200 district judges declared that the guidelines were unconstitutional before the Supreme Court eventually upheld their constitutionality in 1989.²⁰ The Commission sought to get buy-in from the federal judiciary in two main ways: first, through education and training about the guidelines; and, second, in a series of amendments to the Guidelines Manual seeking to improve them based on feedback from the field. Federal probation officers proved to be an important ally to the Commission in both areas.

Education and Training

The original Commission knew that its first task after promulgating the new guidelines was to educate the federal judiciary about them. And the best way to educate district judges was to educate their federal probation officers,²¹ who have always been deemed "arms of the court" in the federal sentencing process.²² For that task, the original Commission turned to Rusty Burress and other Commission training staff.²³ They not only trained probation officers about the new guidelines but also trained federal judges and have continued to do so for three decades. Virtually every federal district judge since 1987 who has attended the Federal Judicial Center's Seminar for Newly Appointed District Judges (which judges affectionately call "baby judges school") has been trained about the guidelines by Burress. Although he had come to the Commission in 1985 on a temporary detail from his job as a federal

probation officer in South Carolina, Burress eventually was hired as the Commission's Principal Training Advisor. Several former federal probation officers likewise have joined the Commission's training staff over the years.

Although having Commission staff train judges and other stakeholders in the federal criminal justice system was considered important, the Commission understood that probation officers themselves would be the best source of education about the new guidelines. As Judge Wilkins, the original chair of the Commission, recounted:

[W]e figured we'd try to train judges . . . but kn[ew] full well that if the probation officers knew how the system worked then they would be a nucleus in the courthouse for the prosecutors, defense attorneys, and the judges, to learn the guidelines. So we had this extensive training program, training probation officers. Train-the-trainers is what we called it. We brought them in and we'd train them [in D.C.] and there would [be] regional training and they would go out and train and[,] those trainers would go out and teach [other probation officers] and so it was kind of an inverted pyramid of training. You start off with a small nucleus, they'd train a few more, then they would train a few more until finally we got it throughout the country.²⁴

Presentence Reports

Presentence reports were an important part of the federal sentencing process before the advent of the sentencing guidelines but became even more important afterwards. In enacting the Sentencing Reform Act, Congress envisioned the integral role of federal probation officers in preparing presentence reports in the guidelines system.²⁵ In response to the creation of the sentencing guidelines, Federal Rule of Criminal Procedure 32(c)—which

required a presentence investigation by a probation officer, culminating with a presentence report—was amended in 1987 to require the presentence report to set forth all offense and offender factors relevant to the guidelines calculation as well as the guideline sentencing range.²⁶ Presentence reports thus became the epicenter of the guidelines sentencing process. Presentence reports after the guidelines were created became very different documents from pre-guidelines presentence reports, which had been more of a "diagnostic tool" than a "legal document" in the former "indeterminate" federal sentencing system.²⁷

During the guidelines' three decades, federal probation officers—often called "presentence investigators"²⁸—have written presentence reports in over 1.7 million cases in which the guidelines have been applied.²⁹ In the process, they have developed a remarkable expertise in the guidelines and the case law interpreting it. Those presentence reports have provided the Commission with a rich source of data from which to evaluate the manner in which the guidelines and federal sentencing statutes³⁰ have been applied and on which to amend the guidelines.³¹ The data

²⁶ Fed. R. Crim. P. 32(c)(2) (1988) (eff. Nov. 1, 1987).

²⁷ Jerry D. Denzlinger & David E. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, 55 Fed. Prob. 49, 51 (1991).

²⁸ See, e.g., *id.* at 49-50.

²⁹ As of March 31, 2017, over 1.7 million federal offenders had been sentenced under the federal sentencing guidelines. U.S. Sentencing Comm'n, 1995 Annual Report 41 (1995) (including caseload data from 1989 through 1995); U.S. Sentencing Comm'n, Annual Report 21 (1988) (including caseload data from 1987 through 1988); U.S. Sentencing Comm'n, Sourcebooks of Federal Sentencing Statistics 2 (1996-2016) (listing annual caseload data); U.S. Sentencing Comm'n, *2nd Quarter Release Preliminary Fiscal Year 2017 Data Through March 31, 2017*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_2nd_FY17.pdf (listing caseload data through first two quarters of FY17).

³⁰ See, e.g., U.S. Sent. Comm., *Illegal Reentry Offenses* (2015), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf; U.S. Sent. Comm., *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (2012), available at <http://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing>.

³¹ Virtually all significant amendments to the *Guidelines Manual* not required by statute have been significantly informed by Commission data.

²⁰ Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 906 (1990); see also *Mistretta v. United States*, 488 U.S. 361 (1989).

²¹ See Interview with William W. Wilkins, Jr., Judge, at 30 (Sept. 20, 1994) (on file with author) (stating that he "was firmly convinced that education [about how the guidelines worked] was the key to success" in getting courts to buy into the new guidelines).

²² See, e.g., *United States v. Gonzalez*, 765 F.2d 1393, 1398 (9th Cir. 1985).

²³ See Wilkins Interview, *supra* note 21, at 30-31 (praising Rusty Burress for his role in educating probation officers as part of that process).

²⁴ Wilkins Interview, *supra* note 21, at 31.

²⁵ See S. Rep. No. 98-225, at 53 (1983) ("Under a sentencing guidelines system, the judge is directed to impose a sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender. This examination is made on the basis of a presentence report that notes the presence or absence of each relevant offense and offender characteristic. This will assure that the probation officer and the sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature.")

derived from presentence reports and other sentencing documents (such as the Statement of Reasons form) also has been used in other important ways, such as in the Commission's recidivism studies³² and reports recommending statutory changes to Congress.³³

Just as does the federal sentencing process, the Commission's massive database of federal guidelines cases revolves around the presentence report. Although the Act requires district courts to send five sentencing documents to the Commission within 30 days of entry of judgment,³⁴ the Commission garners the majority of its sentencing data in each case from presentence reports.³⁵ Suffice it to say

See, e.g., USSG, App. C, amend. 802 (Nov. 1, 2016) (amendment to §2L1.2, the illegal reentry guideline, which "reflects extensive data collection and analysis relating to immigration offenses and offenders") & amend. 798 (amendment to definition of "crime of violence" in §4B1.2, which reflected the Commission's analysis of "a range of sentencing data, including a study of the sentences relative to the guidelines [range] for the career offender guidelines").

³² *See, e.g.,* U.S. Sent. Comm., A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score (2005), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf; U.S. Sent. Comm., Recidivism Among Federal Offenders: A Comprehensive Overview (2016), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

³³ *See, e.g.,* U.S. Sent. Comm., Report to Congress: Career Offender Enhancements (2016), available at <http://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements>; U.S. Sent. Comm., A Report to Congress: Child Pornography Offenses (2012), available at <http://www.ussc.gov/research/congressional-reports/2012-report-congress-federal-child-pornography-offenses>; U.S. Sent. Comm., A Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011), available at <http://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

³⁴ Pursuant to 28 U.S.C. § 994(w), federal district courts must send to the Commission the following five documents in all felony and Class A misdemeanor cases: the indictment or other charging instrument, the judgment, the statement of reasons form, the presentence report, and the plea agreement (if applicable).

³⁵ *See* Christine Kitchens, *Introduction to the Collection of Individual Offender Data by the United States Sentencing Commission*, at 2 (USSC May 2009) (discussing how the Commission extracts data from PSRs), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/200905_Research_Notes.pdf.

that the Commission's statutory mission could not be fulfilled without presentence reports written by federal probation officers.

Continuous Sounding Board for the Commission

Many in the federal probation officer community have continued to be important advisors to the Commission as it has amended the guidelines several hundreds of times since 1987. The Commission's own Probation Officers Advisory Group³⁶ as well as the Chief Probation Officers Advisory Group and the Probation and Pretrial Services Office of the Administrative Office have proved to be invaluable sources of information about how the guidelines have worked in practice and how they could be improved. The Commission also regularly has a visiting probation officer on a detail, who provides the Commission with an important real-world perspective.

During the Commission's annual guidelines "amendment cycle"—which runs from May through April of each year³⁷—the Commission receives significant input from the federal probation officer community. Initially, at the Commission's annual planning session in the early summer, the Commissioners hear from Commission staff about issues to consider addressing in guideline amendments and reports. Often staff convey ideas coming from federal probation officers in the field as well as from the Probation and Pretrial Services Office. After the Commission has published its tentative priorities for the amendment cycle, the Commission often receives important feedback from the Criminal Law Committee of the Judicial Conference (which is staffed by the Probation and Pretrial Services Office), as well as from the Commission's Probation Officer Advisory Group. The same is true when the Commission publishes proposed guidelines amendments for public comment.

Finally, without the assistance of federal

www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/200905_Research_Notes.pdf.

³⁶ The Probation Officers Advisory Group's charter, current members, and its comment about the Commission's annual priorities and proposed guideline amendments are available at <http://www.ussc.gov/new/probation-officers-advisory-group>. The group's members also regularly testify before the Commission.

³⁷ *See* U.S. Sent. Comm., Federal Sentencing: The Basics 25 (2015) (describing the Commission's annual amendment cycle).

probation officers, some of the most significant retroactive amendments³⁸—most notably, the amendments to the drug-trafficking guidelines known as "crack -2"³⁹ and "drugs -2"⁴⁰—would not have been implemented so successfully. Both of those retroactive amendments affected several thousands of federal prisoners and required the careful coordination of courts, attorneys, and the Federal Bureau of Prisons. The Commission relied heavily on federal probation officers to help implement those amendments in the 94 federal districts. A critical part of coordinating the efforts of the various stakeholders in the implementation of the retroactive amendments involved regional "summits" organized by probation offices at which stakeholder representatives from around the country brainstormed about how to effectively and efficiently implement the retroactive amendments.⁴¹ The planning paid off. The retroactive implementation of those amendments has been widely praised as an effective use of government resources.⁴²

³⁸ Under 28 U.S.C. § 994(u), when the Commission reduces a guideline range, it must specify whether, and in what circumstances, the reduction should apply to offenders who had been sentenced under the previous, higher version of the guideline.

³⁹ *See* USSG App. C, amend. 713 (effective March 3, 2008) (retroactively applying the Commission's 2007 amendment to the guideline for cocaine base ("crack" cocaine), which reduced the guideline ranges for most offenders by two levels).

⁴⁰ *See* USSG App. C, amend. 788 (effective Nov. 1, 2014) (retroactively applying the Commission's 2014 amendment to the Drug Quantity Table at USSG §2D1.1 so as to reduce most drug defendants' guidelines by two levels).

⁴¹ *See* Transcript of Testimony of Deputy Chief U.S. Probation Officer Quincy Avinger (D. S.C.) Before the Sentencing Commission, at 81 (June 10, 2014), http://www.ussc.gov/sites/default/files/transcript_1.pdf.

⁴² *See, e.g.,* Written Statement of Hon. Reggie B. Walton Submitted to the U.S. Sentencing Commission, at 3 (June 1, 2011) ("While the concerns about the workload associated with considering sentencing reductions for nearly 20,000 inmates were real and justified, this workload was managed surprisingly well. This would not have been the case without the tremendous efforts of our judges, attorneys, probation officers, and court staff. In the months leading up to the March 2008 effective date of the ['crack -2'] amendment, two national summits were hosted, new national forms were created, information technology systems were updated, and local policies and procedures were developed—all of which allowed for the smooth implementation of the amendment."), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Reggie_Walton.pdf.

III. Conclusion

Federal probation officers have sometimes been called the “guardians of the guidelines”⁴³ based on their neutral, unbiased role in implementing the guidelines sentencing regime in

⁴³ See, e.g., Douglas A. Berman, *Is Fact Bargaining Undermining the Sentencing Guidelines?*, 8 Fed. Sent. Rptr. 300, 301 (1996) (“Probation officers are often called guardians of the guidelines, in part because they set the framework for sentencing disputes with their findings and calculations in presentence reports.”).

our adversarial system. I believe that it is an appropriate appellation, with the important qualifier that probation officers should not be considered “blindly allegiant” guardians.⁴⁴

⁴⁴ Charles E. Varnon, a former chief federal probation officer and original member of the Commission’s “working group” of federal probation officers, once commented that, “[p]robation officers do not think they are blindly allegiant guardians of the guidelines.” Charles E. Varnon, *The Role of the Probation Officer in the Guideline System*, 4 Fed. Sent. Rptr. 63, 64 (1991). He correctly

Their involvement with the Commission—from its first days through the present time—has been critically important to the Commission’s three-decade mission of carrying out the directives of the Sentencing Reform Act of 1984 through the promulgation of and regular amendments to the sentencing guidelines.

pointed out that, when federal probation officers perceive an error or injustice in the guidelines, they call it to the Commission’s attention and seek a correction. See *id.*