

'Draft X' sentencing plan draws praise and suspicion

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A U.S. Sentencing Commission plan to eliminate disparities in federal sentences — a plan currently labeled "Draft X" — drew mixed reviews Tuesday from members of the Bay Area legal community.

The proposed guidelines would establish a so-called "determinate" sentencing system in the federal courts, linking definite sentences to specific crimes, and would eliminate the parole system.

"The commission has had assigned to it a very difficult task, and they have very conscientiously attempted to carry out the directive of Congress," said Chief U.S. District Judge Robert F. Peckham. "They have had to strike a balance between judicial discretion to tailor sentencing to individual offenders, and the attempt to eliminate disparities in sentencing."

"None of us favor disparity, of course," Peckham said, "but there are differences between defendants, and there does have to

be some latitude given to judges. The commission was very sensitive to this."

The most recent Draft X unveiled Monday by the commission would allow judges more sentencing discretion than the commission reportedly had originally proposed. The commission was created by Congress in 1984 to address sentencing disparities and more precisely define the length of time an individual would serve for a given crime.

In a significant, last-minute amendment to the commission draft, judges were given unlimited discretion to depart from the guidelines for any "aggravating or mitigating circumstances," so long as they specify their reasons in writing.

The Draft X recommendations must be approved by Congress, and the commission has reportedly asked for a further nine-month delay so the guidelines can be tested by judges and refined.

Prosecutorial approval

Joseph P. Russoniello, U.S. attorney for the Northern District of

California in San Francisco, said the proposed new guidelines are "a step in the right direction" — a necessary limitation "on the ability of a court, any court, to act arbitrarily."

"Under the present system, a court could be persuaded that a defendant should not get prison," Russoniello said. "Whenever a judge is inclined to act in a capricious way, it gives the impression that punishment is not being meted out as it should be."

The new guidelines, he said, would "limit that discretion and require the court to give its reasons for going outside [the guidelines]."

"We have judges who are much more tolerant of white collar crime," he said, "or judges who are not tough on drugs but who are tough on white collar crime. [These guidelines] are designed to mandate equivalency, and that's healthy. It gives some certainty to the process and some assurance to criminals that they will be punished in a predictable way."

Russoniello said the guidelines
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are also "practical enough to recognize that the prosecutor needs significant discretion in charging in order to penetrate crime cartels."

Peckham, Russoniello and others emphasized that they have not seen the final Draft X and cannot comment on its specific language, although they are familiar with the general thrust of the recommendations.

Federal public defender James Hewitt was unavailable for comment. Chief assistant federal public defender Barry Portman declined detailed comment until because he had not seen Draft X.

But Portman was skeptical of the new provisions.

"Draft X is basically a whitewash of Congress' intent, as long as a judge puts in writing the reasons" for departing from the guideline, Portman said.

Universally unhappy

Robert Breakstone, a San Francisco criminal defense attorney with Breakstone & Cotsirilos, who formerly headed the U.S. Attorney's northern district criminal division, was less reticent. "Universally, defense attorneys are unhappy, and that would be an understatement," Breakstone said.

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The guidelines will also "put more people in prison for longer periods of time," Breakstone said. That, he said, could exacerbate the already severe problem of overcrowding in federal prisons — a concern echoed by other national authorities on prison overcrowding and by commission staff.

Alvin J. Bronstein, executive director of the American Civil Liberties Union's National Prison Project, told the New York Times that he opposed the new guidelines because they would increase the number of inmates, "certainly many, many times more than 10 percent."

"I would project that in five years, you could be 200-percent over capacity unless there was a massive prison building campaign," Bronstein said.

U.S. Circuit Judge William W. Wilkins Jr., chairman of the sentencing commission, said at a news conference Monday that the new guidelines would "provide a significant increase in prison population." The commission staff estimated the recommendations would increase inmate population about 10 percent over the next decade, he said.

Patrick Korten, a spokesman in Washington for the U.S. Justice Department, which oversees the federal Bureau of Prisons, said the federal prison population stands at 42,600 — "definitely over capacity." He said a major prison building program is planned for 1988, with \$35 million proposed for facilities to accommodate 2,300 more inmates.

Korten said that "extensive prison construction program" represents "a higher level of [construction] than in the last 50 years."

According to federal prison statistics, the current population in the federal prisons is a 75-percent increase over 1980 populations.

Kathleen Morse, a spokeswoman for the Bureau of Prisons, said the prison system now houses 53 percent more inmates than it was designed for. A projected 10-percent increase estimated by commission staff under the proposed guidelines "would be very serious," she said.

When Congress created the commission in 1984, it cited numerous problems with the existing federal sentencing system. Not only were sentences disparate, but white collar criminals too often received light sentences, critics charged.

Under the commission proposal, all federal crimes would fall into one of 43 different categories for purposes of sentencing. Three crimes — first-degree murder, aircraft hijacking resulting in a death and treason — were assigned "level 43," bringing a life sentence. Burglary of a residence is "level 17," with a sentence of 24 to 30 months. Sexual exploitation of a minor "by production of sexually explicit visual or printed material" is a "level 25" offense, with a sentence of 57 to 71 months.

Justice J. Anthony Kline of the California First District Court of Appeal in San Francisco said he reviewed an earlier draft of the commission report and found its recommendations to be "well-motivated and long-overdue."

Kline was legal affairs secretary to former Gov. Edmund G. Brown Jr. and was active in the development of 1976 legislation establishing a determinate sentencing system in California.

Kline called disparities in sentencing "one of the most pernicious aspects of the criminal justice system."