



U.S. Department of Justice

Office of Legal Policy

Litigation Strategy Working Group

Washington, D.C. 20530

MEMORANDUM

October 3, 1986

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FROM: Donald B. Ayer
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Attorney-Advisor

SUBJECT: Litigation Strategy Working Group:
Alternative Sentencing Guidelines

Attached please find a draft of the Alternative Sentencing Guidelines that incorporates the comments we received from Ron Gainer, the Antitrust Division, and the Criminal Division. As we agreed at the last LSWG meeting, we have deleted the previously proposed guideline that would have established a centralized review function at main Justice.

Please let us have your comments and suggestions concerning the attached draft by Tuesday, October 14, 1986.

Attachment

cc: W. Hickman Ewing, Jr.
All Assistant Attorneys General (Litigation Divisions)

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: Edwin Meese III
Attorney General

SUBJECT: Department Policy Regarding Conditions
of Probation and "Alternative Sentences"

This memorandum expresses the policy of the Department of Justice with respect to conditions of probation and "alternative sentences" imposed in criminal cases. To implement that policy, the memorandum sets forth guidelines that limit in certain respects the conditions of probation and other criminal sanctions that the Department will approve. The guidelines apply in all cases over which the Attorney General has authority.

I. Factual Background

It has become increasingly common in recent years for federal district courts to suspend the imposition or execution of criminal sentences and to impose conditions of probation that have little to do with the goals of sentencing, but very much to do with the courts' own views of what is generally good for society at large. For example, in the context of monetary conditions of probation, a court in one case imposed a

substantial fine and then suspended nearly three-fourths of it on the condition that the defendant use the money to establish a chair in ethics at the local university. In another case, the sentencing judge required as a condition of probation that the defendant contribute \$175,000 to a jobs program sponsored by the local city government.

Federal district courts also have pursued their own general policy preferences with respect to non-monetary conditions of probation as well. For example, one court required a defendant to continue certain volunteer work for a local youth camp that he had been performing prior to sentencing, which included serving as an advisor and as an administrative officer of the camp. Other courts have required defendants to coordinate an annual rodeo for a charity and to organize a golf tournament fund-raiser for a charity as conditions of probation.

The authority of federal courts to place criminal defendants on probation and to determine the conditions of their probation is not inherent, but arises only by virtue of Congressional enactment. 1/ Court abuse of that authority by imposing conditions of probation and alternative sentences based on judicial policy preferences presumes -- at least implicitly --

1/ See, e.g., Affronti v. United States, 350 U.S. 79, 83 (1955); United States v. Missouri Valley Construction Co., 741 F.2d 1542, 1546 (8th Cir. 1984).

that the federal courts have a roving commission to do good at large. As the following discussion will demonstrate, this presumption unduly expands judicial power at the expense of the legislature.

II. Discussion

A. Conditions of Probation and Alternative Sentences Under the Current Probation Statute

The current federal probation statute, 18 U.S.C. § 3651, authorizes the sentencing court, when the ends of justice and the best interests of the public and the defendant will be served thereby, to suspend the imposition or execution of sentence and place the defendant on probation "for such period and upon such terms and conditions as the court deems best." Section 3651 also provides that among the conditions of probation a court may impose, the defendant:

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

Section 3651 will remain in effect until November 1, 1987, when the probation provisions of the Sentencing Reform Act of 1984 will become operative. 2/

1. Monetary Conditions of Probation
Under the Current Probation Statute

Under the current probation statute, Congress has expressly authorized courts to impose only three types of monetary conditions of probation: a fine, restitution to aggrieved parties for actual losses caused by the offense, and support payments for which the defendant is legally responsible. Given this specific restrictive language, it would be improper to conclude that the more general language in Section 3651, which permits a court to impose probation "upon such terms and conditions as the court deems best," authorizes courts to impose other monetary conditions of probation as well. This is especially true in the present context because courts should not lightly infer congressional delegation of constitutional power, such as the power of appropriation implicated here by conditions of probation that transfer to various recipients money which otherwise would have gone to the United States government. 3/ Consequently, as all the federal courts of appeals addressing the

2/ See 18 U.S.C.A. § 3551 (Supp. 1986). The relevant probation provisions of the Sentencing Reform Act of 1984 are discussed in more detail at pp. 7-9, infra.

3/ See U.S. Const. Art I, § 9, cl. 7 (granting power over appropriations to the legislative branch).

issue have concluded, 4/ a federal court has no authority to impose monetary conditions of probation other than fines, reimbursement to victims, or legally-required support payments.

Even if a federal court were to have such authority, it would be unwise for the court to exercise that authority because doing so would require it to choose between countless worthy causes in determining the recipients of its largesse. As should be evident, this is a function that courts are ill-equipped to perform and that would be rife with the potential for conflicts of interest and for provoking undesirable criticism of the judiciary.

2. Non-Monetary Conditions of Probation
Under the Current Probation Statute

As previously noted, the current probation statute authorizes courts to suspend the imposition or execution of sentence and place the defendant on probation "when . . . the ends of justice and the best interest of the public as well as the defendant will be served thereby." 18 U.S.C. § 3651. The courts have interpreted this language to authorize only those

4/ See United States v. Haile, 795 F.2d 489 (5th Cir. 1986); United States v. John A. Beck Co., 770 F.2d 83 (6th Cir. 1985); United States v. John Scher Presents, Inc., 746 F.2d 959 (3d Cir. 1984); United States v. Missouri Valley Construction Co., 741 F.2d 1542 (8th Cir. 1984); United States v. Wright Contracting Co., 728 F.2d 648 (4th Cir. 1984); United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982).

non-monetary conditions of probation (commonly referred to as community service sentences) that are reasonably related to rehabilitation of the probationer, deterrence of future misconduct, or deserved punishment. 5/

Non-monetary conditions of probation are most often justified as "rehabilitative." Rehabilitation is entirely proper as a goal of sentencing when it is understood to mean ensuring the defendant's future compliance with the law. By contrast, when that goal is expansively construed by a court to encompass consideration of the social utility of the required conduct, it becomes a vehicle for unauthorized judicial policy-making.

Whether a particular non-monetary condition of probation is reasonably related to the goal of rehabilitation will depend on the facts and circumstances of each particular defendant's case. The appropriateness of various non-monetary conditions of probation under such facts and circumstances should be evaluated by focusing solely on their probable effect on the defendant's future compliance with the law. Examples of non-monetary conditions of probation that may be appropriate in various instances include requiring the defendant to undergo vocational training, educational training, or medical treatment.

5/ See, e.g., United States v. John Scher Presents, Inc., 746 F.2d at 962.

B. Conditions of Probation and Alternative Sentences
Under the Sentencing Reform Act of 1984

As previously mentioned, the current probation statute will be replaced by the probation provisions of the Sentencing Reform Act of 1984 effective November 1, 1987. The 1984 Act specifies certain mandatory conditions that courts must include when imposing certain sentences of probation, and also provides a list of twenty "discretionary conditions" of probation that courts may impose in their own best judgment. ^{6/} The twentieth discretionary condition states that the court may require the defendant to "satisfy such other conditions as the court may impose." 18 U.S.C.A. § 3563 (b) (20).

The 1984 Act also creates a Sentencing Commission charged with the the task of promulgating sentencing guidelines and policy statements to implement the provisions of the Act. See 28 U.S.C.A. § 994, et. seq. The Sentencing Commission's first set of guidelines and policy statements, which are due on

^{6/} See 18 U.S.C.A. § 3563. Under this Section, every sentence of probation must include a requirement that the defendant not commit another federal, state, or local crime during the term of probation. 18 U.S.C.A. § 3563 (a) (1). In addition, Section 3563 specifies that every sentence of probation for a felony offense must include a requirement that the defendant either pay a fine, make restitution to a victim of his offense, or work in community service as directed by the court. 18 U.S.C.A. § 3563 (a) (2).

April 1, 1987, will become effective on November 1, 1987 unless Congress acts to the contrary. 7/

There is nothing in terms of the 1984 Act that will change the legal and policy considerations pertaining to monetary and non-monetary conditions of probation previously discussed in the context of the current probation statute. Specifically, the 1984 Act does not explicitly delegate to the courts authority to impose monetary conditions of probation other than to pay a fine, reimburse crime victims, or support legal dependents, 8/ nor does it provide any judicially manageable standards by which a court could decide which charities or other organizations are most deserving of its generosity. Neither does the 1984 Act suggest that courts have any authority to impose non-monetary conditions of probation that are not reasonably related to rehabilitation, deterrence, incapacitation, or appropriate punishment. In fact,

7/ See 18 U.S.C.A. § 3551 (Supp. 1986); 28 U.S.C.A. § 994 (c) (Supp. 1986).

8/ As the courts of appeals have unanimously held, such an explicit delegation would be necessary in this context because of the important constitutional and policy considerations involved. See pp. 4-5, *supra*. Although the 1984 Act includes the above-mentioned monetary conditions of probation in a list of discretionary conditions of probation that by its terms is not exclusive, see 18 U.S.C.A. § 3563 (b), this is insufficient, in the Department's view, to constitute such an express delegation of congressional authority.

the 1984 Act makes explicit the above limitations, which had been only implicit under the current probation statute. 9/

Finally, there is no likelihood that the Sentencing Commission's forthcoming sentencing guidelines and policy statements will undermine the force of the legal and policy conclusions stated above. This is true because the 1984 Act authorizes the Commission to issue guidelines and policy statements only as consistent with the statutory provisions of the Act, 10/ which, as previously discussed, neither explicitly or implicitly undermine the legal bases of those conclusions.

9/ See 18 U.S.C.A. § 3563 (b); 18 U.S.C.A. § 3553 (a)(2). The legislative history of the 1984 Act explains this point in the following terms:

Unlike current law, [Section 3563(b)] specifically states that the conditions must be reasonably related to the factors set forth in sections 3553 (a)(1) and (a)(2), and that any condition that involves a restriction of liberty must be reasonably necessary to the purposes of sentencing set forth in section 3553(a)(2).

See 1984 U.S. Code Cong. & Ad. News, p. 3282. Section 3553 (a)(1) of the 1984 Act directs the court to consider the nature and circumstances of the offense and the history and characteristics of the defendant. Section 3553 (a)(2) directs the court also to consider the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

10/ See 28 U.S.C.A. § 994 (a).

III. Department Policy and Guidelines Concerning
Conditions of Probation and Alternative Sentences

Based on the foregoing analysis, the Department of Justice hereby adopts the following guidelines as its policy with respect to conditions of probation and alternative sentences. Attorneys for the government are expected to follow these guidelines and to advocate the principles they reflect in all relevant stages of the criminal litigation process, both under current law and after the 1984 Sentencing Reform Act becomes effective.

1. The attorney for the government should oppose the imposition of any monetary condition of probation or alternative sentence other than to pay a fine, to make restitution to a victim of the offense, or to provide support for the defendant's family and other legal dependents.

2. The attorney for the government should oppose the imposition of any non-monetary condition of probation or alternative sentence that is not reasonably related to the goals of appropriate punishment, deterrence of criminal conduct, incapacitation, or rehabilitation in the sense of ensuring the defendant's future compliance with the law. Any non-monetary condition of probation imposed for the purpose of rehabilitating the defendant that does not directly act to ensure the defendant's

future compliance with the law, but instead is imposed to achieve some other social, community, or charitable purpose, should be considered unauthorized and improper. Examples of conditions of probation that may be appropriate to rehabilitate the defendant in various cases include vocational training, educational training, and medical treatment.