Federal Probation

The Sentencing Reform Act of 1984 and Sentencing Guidelines

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This Issue in Brief

YEARS FROM now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice. The Sentencing Reform Act of 1984 which brought about the sentencing guidelines sent ripples in the pool of the Federal court system that affected all who participate in the sentencing process. Certainly the day-to-day work of judges, both district and appellate, prosecutors, attorneys, probation officers, and correctional personnel has been altered significantly, and the course of careers has changed. This special issue of *Federal Probation* gives a voice to those who have been working in the midst of such historic change.

Federal Probation invited eminent jurists and prominent sentencing experts to prepare articles reflecting their thoughts and perspectives regarding the Sentencing Reform Act and the sentencing guidelines. The first three articles comprise thoughtful, varied perspectives from the bench. The articles that follow are by authors representing other critical roles in sentencing. The articles are organized by profession in the order that each author would typically become involved in the sentencing process.

Ever since the Federal sentencing guidelines went into effect, judges and commentators have criticized the guidelines for placing excessive restrictions on judicial discretion. The Honorable Gerald Bard Tjoflat, chief judge of the U.S. Court of Appeals for the Eleventh Circuit, asserts that critics fail to appreciate the significant discretion that the judge retains. In **"The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel,"** Judge Tjoflat addresses the failure of attorneys to appropriately exploit judicial discretion within the guidelines structure. Advice for attorneys is offered regarding how to develop proper arguments to guide the sentencing judge's discretion in a particular case. Providing substantial background information, the article describes the congressional purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines.

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The Sentencing Guidelines: Two Views From the Bench

At the invitation of Federal Probation, *the Honorable Andrew J. Kleinfeld and the Honorable G. Thomas Eisele respond to the proposition: "Sentencing Guidelines Have Been Beneficial to the Federal Courts in Sentencing Defendants."*

The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.

BY G. THOMAS EISELE

Senior Judge, United States District Court, Eastern District of Arkansas

WITH RELUCTANCE I agreed to attempt to articulate the "disagree" position with respect to the proposition: "Sentencing Guidelines Have Been Beneficial to the Federal Courts in Sentencing Defendants." "Reluctant" because it would be presumptuous to attempt to state the many different reasons of the United States district judges who disagree with that proposition. But *not* reluctant because of any doubt or lack of conviction: I do sincerely, with heart and mind, oppose this alien, pseudo-scientific so-called "guidelines" system.

First, the proposition as stated is essentially irrelevant. The question should not be whether the present guideline system is "beneficial to the Federal courts," but whether it is beneficial to the people of this Nation. Does this system reflect policies consistent with that which is best in our Nation's traditions? Does it work as advertised? Fortunately there is no conflict here. One can state without hesitation that the guidelines system is not beneficial to the Federal courts and that it is not beneficial to the people of this Nation.

When this system was first proposed, it was apparent that it raised serious constitutional issues. Many opponents were so confident that the system could not meet constitutional muster that they were content to sit back and await court action striking down the whole terrible idea. That has not yet happened, and the people of this Nation are the losers. I suggest we should not look to the Supreme Court to deliver us from this evil. We must turn to the legislative branch.

The time has come for the Congress to revisit this subject and to carefully examine how the guideline system has operated in the field for these past 4 years. If an objective assessment is made, I am confident that Congress will then adopt a new, fairer, more rational, and more effective sentencing regime.

I do not now favor returning to the pre-November 1987 system, although I unhesitatingly assert that that system was far, far superior to the present one. And it was a good system. But we can do better. I will

(Continued, p. 20)

(Eisele—Cont'd from p. 16)

suggest the outlines of a new and better system, one that will achieve the objectives Congress had in mind when it enacted the Sentencing Reform Act.

In my 21 years on the bench I cannot recall any legislation that has so pervasively affected, and disrupted, the Federal courts of this Nation—both trial and appellate—and so bogged those courts down in meaningless, time-consuming, mechanical nonsense,[1] while at the same time diverting attention from the flaws, the unfairness, and the injustice caused by that very legislation.

I have characterized this system as a dark, sinister, and cynical crime management program. It is in effect a reincarnation of those systems prevalent in Central and Eastern European countries 150 years ago. It has a certain Kafkaesque aura about it. The real sentencing power in such systems is in the hands of the police and the prosecutor. Even those citizens who believe judges are too soft on criminals should pause before embracing a system so at odds with traditional American values.[2]

And what has been accomplished? It is my belief that there is now more disparity in sentences than ever, but most of this is concealed because the decisions that truly affect sentences are not being made in the open courtroom, but in the offices of the Sentencing Commission, prosecutors, probation officers, police departments, and even by law enforcement officers on the street. Early on, many predicted we would regret the day the sentencing power was taken out of the hands of independent judicial officers— judges. That prediction has turned into reality. Judges, lawyers, law professors, and even prosecutors, people of all political persuasions, from the right, left, and middle are asking: What have we wrought? More specifically, what has the Congress wrought?

The Outcry

How pervasive is the dissatisfaction with the present guidelines system? The Federal Courts Study Committee held public hearings on the guidelines throughout the Nation. It studied the system and then recommended a "careful and in-depth reevaluation by Congress of federal sentencing policy and, in particular, the sentencing guidelines." *Report of the Federal Courts Study Committee*, p. 135.

The Federal Courts Study Committee made this "study" recommendation *at the urging of three members of the Sentencing Commission.* But a minority of the Study Committee expressed its dissatisfaction with this "go slow" approach in the light of the overwhelming evidence showing dissatisfaction with the system. Judge Keep stated:

> The federal sentencing guidelines are not working. According to the legislative history, the goal of the guidelines was honesty, uniformity, and proportionality in sentencing. The guidelines are failing miserably in achieving any of these goals.

Id. at 141.

Judge Keep identified the Federal Courts Study Committee's tentative recommendation that the Sentencing Reform Act be amended "to state clearly that the guidelines . . . are general standards . . . not compulsory rules," and then she pointed out:

> In nine public hearings, with 270 persons testifying, only four persons spoke against this proposal: three present or former Sentencing Commission members and the Attorney General of the United States. Essentially, their testimony was that the guidelines are working well and more time should be allowed before there is any congressional tinkering with them.
>
> The guidelines are not working well—and more time will not cure the defects noted herein.

Id. at 142.

Think of it! Two hundred seventy persons testified, 266 against the present compulsory system and four in favor of that system. And we know who cast the four "for" votes!

Judge Cabranes of Connecticut, another member of the Federal Courts Study Committee, was asked why the Committee's preliminary report was stronger than the final report. Note a part of his reply:

> I think in some ways our final report was actually a far more significant recommendation than our original one. Our original recommendation was for a very specific change. It would arguably have been cast aside as premature. Our final recommendation, in fact, is a sweeping statement, a collection of the complaints and grievances stated by a very broad cross-section of the legal community—district judges, prosecutors, probation officers, defense lawyers.
>
> This is one of these issues, by the way, very much like some of the others, the division is not conservatives versus liberals, Democrats versus Republicans, those who are soft on crime versus those who are tough on crime. The fact is that anyone you talk to, other than those most directly concerned with the system as now established, will express the most serious misgivings about the sentencing guideline structure that we have.

Judge Cabranes goes on:

> I have come now not to accept the basic premise of the legislation or of the proponents of this system, which is somehow that something terrible was happening before this system came into effect. This notion that the exercise of discretion of federal judges is a terrible thing was, in effect, discovered about 15 or 20 years ago and it reflects an extraordinary fear of discretionary authority and, for that matter, a fear of authority generally.
>
> What we have now is a system, a kind of Rube Goldberg like system. . . .
>
> Nothing is more disconcerting to me as a District Judge than to watch a defendant and his family and others sitting in a courtroom, literally bewildered by 30 to 60 minutes of conversations about matrices, computations, adding, deducting, excluding, including, departing, not departing. This is not justice and the federal district judges in this country know that and no amount of pseudo-science, no amount of technology introduced into this process, is going to alter this fact.

134 F.R.D. 321, 474-475.

And in the summer issue (1991) of the *Judges Journal* published by the Judicial Administrative Division of the American Bar Association (ABA), Judge Marvin Aspen of the Northern District of Illinois, chairperson of the National Conference of Federal Trial Judges, writes:

> Many federal trial judges are dissatisfied with the U.S. Sentencing Guidelines under which we work. At least one federal judge has resigned from the bench primarily because of dissatisfaction with them.
>
> * * *
>
> The ABA Federal Judicial Improvements Committee . . . would urge the Federal Courts Study Committee to reinstate an earlier recommendation *that questions the bona fides of federal guidelines sentences.* The ABA committee's report urges the Judicial Conference to examine not only whether the sentencing guidelines system is accomplishing the legislative goals of reducing disparity but also whether some of the initial concerns of the opponents of guidelines sentencing have materialized.
>
> * * *
>
> The proposed Judicial Conference Study Committee should ascertain *whether the enactment of the federal guideline sentencing scheme has been a mistake,* and if such has been the case, propose prompt and appropriate remedies. (Emphasis added.)

Last October, Judge Don Lay, in reflecting on his 25 years on the bench, observed that the implementation of the guidelines system "is the greatest travesty of justice in our legal system in this century" and that that system has "inundated the courts with wasteful procedures and created a far greater disparity of sentencing than previously existed."

Each district judge has his or her own reasons for disliking the guidelines system. Some see it principally as a time-consuming, inefficient system that is wreaking havoc with the dockets of our Federal trial and appellate courts. Some see it as a stressful contest in which conscientious judges spend hours of thought and research in attempts to find lawful ways around the unfairness and irrationality of that system. Some criticize the individual guidelines as they try to make sense out of them, one by one. Some in despair look to the parties to cut their deals, and the probation officers to go along, so the judge can simply sign off on them and thereby be able to turn his or her efforts to the other business of the court—business worthy of the attention of a judge. For, after all, has not the Congress in effect said this is not such business?

But most, I believe, have come to the conclusion that the system is fundamentally flawed; that it can and must be changed; and that the time has come to speak out. What are those flaws?

Remaining Constitutional Issues: Plain Words

This guidelines system turns our constitutionally based criminal justice system on its head. Look at some of the plain words of that Constitution:

> ***Article III, Section 1:*** The judicial Power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.
>
> ***Article III, Section 2:*** The trial of all crimes, except in cases of impeachment, shall be by jury; . . . .
>
> ***Amendment V:*** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .; nor shall any person . . . be deprived of life, liberty or property without due process of law. . . .
>
> ***Amendment VI:*** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Judge Gerald W. Heaney of the Eighth Circuit Court of Appeals—in his article, "The Reality of Guidelines Sentencing: No End to Disparity,"[3] just published in 28 *American Criminal Law Review,* 161 (1991) (Georgetown Law School)—identifies the serious due process issues raised by the guidelines as follows:

> . . . adequate notice of the charges by indictment or information; the standard of proof with respect to uncharged conduct which will significantly affect the length of a sentence; the right to confront and cross-examine witnesses with respect to uncharged conduct; the right to a jury trial with respect to uncharged conduct; and the right to testify.

Id. at 208.

Many of these problems arise out of the requirement of the guidelines to impose specific penalties on the basis of "relevant conduct" which is not charged in the indictment or admitted by the defendant. By failing to acknowledge that such "relevant conduct" is simply a euphemism for what is in fact *a crime,* all sorts of abuses are justified.

If one must be confined to prison for a specific period of time upon proof of such "relevant conduct," it must be because that conduct is a "crime" or an element thereof.

In *Baldwin* v. *New York,* 399 U.S. 66 (1970), the Supreme Court held that the defendant was entitled to a jury trial for "jostling" because, under the city ordinance, there was the *possibility* that the sentence could exceed 6 months! And under the guidelines we are not even talking about such non-specific sentencing discretion; we are talking specific increases in "offense levels" based on non-charged conduct which translate directly into *specific, non-discretionary, additional* increments of imprisonment, creating thereby not only the *possibility* of additional imprisonment exceeding 6 months but, in *most* instances, a *requirement* of such additional incarceration, ranging up to life imprisonment. Under the guidelines this may all come about without indictment, without jury trial, without lawful evidence or the other rights which spring to life under our Constitution when it is acknowledged that one is being charged with a "crime."

With such required, specifically linked, penal consequences, should it make any difference that one is accused of a "specific offense characteristic" instead of a "crime"? No, a crime is a crime, is a crime! We play games with such terms at great peril to our liberty, which, the Constitution says, we should not be deprived of without due process. And the appropriate due process in the context of such criminal sanctions is, fortunately, clearly spelled out in our Bill of Rights. Read the plain words of the fifth and sixth amendments.

It is unfortunate, but true, that we are more likely to lose the freedoms and the benefits of our constitutional form of government through the acts of our friends than from the acts of our enemies; more because of the acts of well-intentioned, well-motivated people who, through their myopic support of some *lesser* goal, unwittingly undercut the larger, broader principles of our national life.

Back in 1987 I wrote a tract on the proposed guideline system to illustrate how non-charged conduct could dramatically affect a sentence; how, in effect, the tail wagged the dog. I used the example of a person who was charged with robbing a bank. Through various assumptions it was demonstrated how the guidelines system worked:

> In other words for the crime for which he was convicted, the defendant could get a maximum sentence of 33 months. For conduct for which he was not convicted, he could get an additional sentence of 135 months (168 minus 33). Stated otherwise, the sentence would be quadrupled because of findings by a single district judge (i.e. no jury) involving uncharged conduct, with that judge applying some standard less than that of "beyond a reasonable doubt," without the formalities of a trial, and without the necessity of applying even civil trial evidentiary standards. . . . It is one of the fine ironies of this Guidelines System that while it takes away the legitimate judicial sentencing discretion which should rightfully repose in the district judge, it also grants immense illegitimate "Star Chamber" fact-finding powers to that same judge, contrary to American ideals and traditions in the Criminal Justice field.

The United States Supreme Court has yet to rule on most of the due process, and other, constitutional issues arising out of this use of uncharged conduct.

It is submitted that those courts of appeals that have upheld the guidelines in the face of such due process challenges have simply misread and misinterpreted pre-guideline practice. They appear to accept as gospel that judges, prior to the guidelines, would penalize a defendant at sentencing on the basis of uncharged and unadmitted conduct. On this assumption they in effect say, "So what's new? This is the way it has always been done." I attempted to answer that in my opinion in *U.S.* v. *Brittman*, 687 F. Supp 1329, 1335:

> . . . it is clear that under current practice there is nothing that *requires* a judge *to add a specific penalty on the basis of a finding of any particular uncharged fact.* This will not be so under the guidelines. The Guidelines System creates an entirely new system. The Commission acknowledges this when it states in its Commentary:
>
> > The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing 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.
>
> . . . This is "what is new" beyond any doubt. Even if some judges under the old system would take into consideration such uncharged and denied conduct—and this is doubted—still the consequence thereof, if any, in the overall chemistry of sentencing would ordinarily be unascertainable.

Id., at 1336.

Before the enactment of the guidelines system the Government had only to prove the elements of the crime in order to release the congressionally conferred judicial sentencing discretion. The Congress relied upon the good judgment of judges to fix the penalty within the statutory limits taking into consideration all of the pertinent facts and circumstances concerning the crimes and the criminal. The situation is completely changed under the guidelines. The old discretion system has been replaced with a mandatory, fact-based system of penalty enhancements. Under the new system the statutory limits are usually of no importance. The sentence is determined by *mandatory* "guideline" regulations. Now facts, *in addition to the elements of the crime,* must be proved. And the proof of those facts *requires specific penalties.* Again, this is what is new. The new system deals not only with "sentencing"—it deals with *the establishment of* ***criminal liability*** *based upon the proof of uncharged facts.* Can anyone doubt that we are therefore dealing with "crimes" and "criminal prosecutions" within the meaning of the fifth and sixth amendments?

Judge Heaney's excellent analysis of the precedents in this area gives hope. He notes that the key courts of appeals decisions that held that the Constitution did not prevent such use of "relevant conduct," and holding that the Government was not required to establish same beyond a reasonable doubt, relied upon a line of pre-guidelines cases that does not provide a sound basis for these holdings. He points out the critical differences between the pre-guidelines "discretionary sentencing model" and the "enhancement sentencing model" which has been adopted as part and parcel of the guidelines system. I will not go through his well-reasoned analysis but I will quote his conclusion:

> In sum, the circuit courts erred in mechanically applying *Williams* and *McMillian* to reach their conclusions. It is true that sentencing courts have long been permitted to make a broad inquiry, largely unlimited as to the kind and source of information considered. It is also true that pre-guidelines sentencing cases developed a strong distinction between procedures and degrees of proof required at trial and those at sentencing. That distinction, however, made sense only in the context of the pre-guidelines discretionary sentencing system. The rationales of *Williams*

and *McMillian* do not support the courts' conclusions. In fact, the preceding analysis shows that the reasoning of those cases supports the opposite conclusion: that courts should require relevant conduct to be charged in the indictment. This requirement would trigger other constitutional requirements, for example, notice, trial by jury, and proof beyond a reasonable doubt.

Heaney, p. 220.

Disparity

How else is this system flawed? Answer: by holding out a false promise that it will reduce or eliminate disparity in sentences when the opposite is true. Disparity may be caused by discretionary decisions. But it is also true that through a wise use of a broadly conferred *judicial* discretion, disparity in sentencing can be reduced. Let me explain.

Under the old system there was some disparity in sentences. But that disparity was happenstantial and infrequent. Even more important: It was played out in the open courtroom and on the record. Now we have a system which *creates* disparity, institutionalizes it, and then conceals it. This new disparity arises out of the unrestricted discretion of others along the line before we independent judges ever see the defendant. As stated by Judge Heaney:

> By the time the district court passes sentence, the police officer, the case agent, the prosecutor and the probation officer, and even the defense attorney have already exercised most of the discretion that determines the offender's final sentence. The exercise of that discretion necessarily results in disparity between similarly situated offenders, even under a guidelines system that limits the sentencing discretion of the district judge.

The truth is that awareness of the guidelines system and how it works is pervasive throughout the state and Federal law enforcement establishment. And this awareness definitely influences police and prosecutorial decisions. Again as stated by Judge Heaney:

> Hidden disparities also can arise from the investigative and pre-prosecution practices of law enforcement personnel. One such practice used by drug enforcement agents appears to have been inspired by the structure of the guidelines and the statutory mandatory minimum penalties for drug trafficking. Under guidelines section 2D1.1 and 21 U.S.C. § 841(b), the length of a drug offender's sentence turns on the quantity of drugs he participated in buying or selling. Accordingly, some drug enforcement agents attempt to persuade suspects to buy or sell drugs in amounts large enough to trigger statutory minimum penalties even if the suspect is unable to afford or acquire the trigger quantity.
>
> Similarly agents may postpone arresting suspects until they have bought or sold aggregate drug quantities sufficient to trigger a statutory minimum penalty. Agents also may prolong transactions with a relatively minor suspect in an effort to apprehend higher-level criminals.... Regardless of the basis on which choice of forum decisions are made, the harshness of federal statutory and guidelines sentences in comparison to many state drug penalties means that similar drug offenders, arrested by the same law enforcement agents for the same crimes, may face sentences that vary widely based only on their being prosecuted in different courts. These sentence inequities are exacerbated rather than reduced by the guidelines' weight-driven sanctions for drug offenders. They also constitute the kind of hidden sentence disparity that studies of guidelines compliance and departure rates will never reveal.

But the most dramatic impact of the guidelines on executive branch discretion derives from the power given to the Federal prosecutor to control the sentences imposed. The discretion to decide who to charge and what the charge should be, when coupled with the ability to effectively control the factual information presented to the court, translates into the power to largely set the parameters of the ultimate sentence. And, of course, the prosecutor's power under the guidelines to control the sentence provides immense leverage in plea bargaining.

Finally, we must take into consideration the new role of probation officers under the guidelines system.[4] Of course, that role differs from district to district depending upon the attitude of the judges. And these differing approaches in turn translate into different sentences. Most districts apparently use probation officers as fact-finders, even where the facts are in controversy. Our district does not. Some districts instruct their probation officers to make an effort to verify the information they get from the prosecutor's office. Some do not.

In all of the above situations, discretion is exercised by fallible human beings of differing intellect, differing knowledge, training, and experience, differing value systems, indeed differing biases, which can ultimately affect the sentences imposed, often dramatically.

Congress apparently was led to believe that if it restricted the discretion of independent Federal judges it would do away with disparity in the sentences imposed in our Federal courts. How completely misled it was! Judge Cirillo writing about the Pennsylvania guidelines system in 31 *Villanova Law Review* quotes Judge Scirica as follows:

> "No legal system can function without the exercise of discretion. To eliminate discretion from the courts where it is visible, is to reconstitute it in the police and prosecutors where it is invisible."

Cirillo, *Windows for Discretion in the Pennsylvania Sentencing Guidelines*, 31 Vill. L. Rev. 1309 (1986).

A case can be made for the proposition that the broad discretion exercised by Federal judges under the pre-guidelines sentencing system *prevented* the unfairness and much of the disparity which is inherent in the nature of law enforcement. This is in stark contrast to the egregious disparity which now occurs under the guidelines system where judicial discretion in sentencing is so restricted. By placing very broad power and discretion in the hands of independent Federal judges, the old system provided the opportunity—the last best chance—to ensure fairness and to do justice in the sentences imposed. By the time a defendant appeared for sentencing before an independent Article III judge, disparities of various kinds

and degrees would naturally have already been "built into" the case. Given the comprehensive information then provided by the probation officers to the court, the judge was able to learn the prior history of the defendant, and of the case itself, and, through the exercise of broad discretion, was able to smooth out the results of the differing discretionary decisions made previously by others along the line.

The wisdom of giving broad sentencing discretion to the independent judicial officer who must impose the sentence should be obvious. But information developed by Judge Heaney reinforces this truth, which we all know intuitively.

Congress in passing the Sentencing Reform Act made clear its intention that race should play no part in determining an offender's sentence. But the data recently developed by Judge Heaney show that race has had a significant impact on sentences under the guidelines, *whereas it had a negligible effect on pre-guideline sentences.* For example, Judge Heaney has found that guideline sentences for males age 18-35 in 1989 were 40 months longer for black males and 19 months longer for white males than were pre-guideline sentences. But he also found that *pre-guideline* sentences for this age group were roughly equivalent for all males, black and white! Is that not revealing?

Powers No Longer Separated

The judiciary will soon have a new building in Washington, DC. Located near, and to the east of, Union Station, it promises to be a magnificent facility in which L. Ralph Mecham, Director of the Administrative Office of the United States Courts, will be able to bring his presently scattered forces together into what should be a much more efficient operation. But we now learn that the Sentencing Commission and its entire bureaucracy will also be moving in under the same roof. To me that is appalling. But it is a symbolic consequence of the Supreme Court's decision in *Mistretta* and yet another visible confirmation of its error. As stated in *Brittman, supra:*

> If the authority and role of the Sentencing Commission are ultimately upheld, the Judicial Branch will thereafter be the servant of an administrative agency in this most sensitive area of individual human rights. The relation will become one of close symbiotic co-existence in which the agency monitors and controls the actions of Article III judges on a daily basis. The concept of judicial independence will suffer a devastating blow. And the effect of such a precedent would be ominous indeed.

The lines between the legislative, executive, and judicial branches have been blurred as never before. *Item*: Two of the leading opinions upholding the guidelines against due process challenges were written by circuit judges, *who also served as members of the Sentencing Commission* which promulgated the very guidelines that were under attack! *Item*: We should not be surprised that law enforcement personnel know so much about the guidelines. *The Sentencing Commission teaches them*! On September 30, 1991, Marcia Chambers, a former legal affairs reporter for the *New York Times*, wrote in *The National Law Journal*, an article entitled "Unwelcome Blurring of Boundaries." In it she states:

> There used to be a clear separation between what the police did and what judges did. The police found and arrested criminals. Judges presided at plea or trial and sentenced them. Whereas the police understandably are out to catch the criminals, the judge is supposed to be the balance wheel between prosecution and defense—not an agent for either side.
>
> But in the past two years, the separation between policing and sentencing appears to have blurred. In the interest of education, the U.S. Sentencing Commission now is training FBI and IRS agents, and Treasury agents from the Bureau of Alcohol, Tobacco and Firearms, in sentencing procedures.
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> • • •
>
> The first question is, why do federal agents need to know about sentencing when their job is to investigate and arrest criminals?

The answer, as Ms. Chambers points out, is that police tactics determine not only who is arrested, but, under the guidelines, the time spent in prison by those arrested. She points out "Federal judges are no longer in control of the process. Federal prosecutors, and by extension, their agents, are actually in charge now." And then Ms. Chambers concludes:

> It's one thing to implement a vast new sentencing structure in order to end disparity. But when the very system removes discretion from a federal judge only to give it to the federal prosecutor and his agents, then it seems to this observer that one has created the likelihood of the very disparity the law was designed to end. It is discretion and sentencing by law enforcement in the field rather than by judges in the courtroom. And that, I think, is scary.

"Scary", indeed!

Item: The parents of a young man who was sentenced under the guidelines sent me a copy of a letter they received from their U.S. senator. This senator (and erstwhile governor), it should be said, is one of the most intelligent and able senators around. Here are two paragraphs from his letter:

> I agree that the federal sentencing guidelines take away some of the discretion of the judges in matters of sentencing but there were such wide variances in the sentences for like crimes that, after many studies and conferences, the *Judiciary adopted the guidelines* which are now in effect.
>
> • • • •
>
> As you know, *the sentencing guidelines are not established by the Congress but by the Judiciary*, and since I was first elected Governor, I have had a firm policy of not involving myself or intervening in any way in judicial proceedings. (Emphasis supplied)

Startling? Yes. But I believe *most* senators and congressmen have distanced themselves from the evils of the system by just such clinically correct logic. Congress needs to be reminded that it was the Congress' decision that got us into this situation. And, barring

some new insight and understanding on the part of the Supreme Court, only the Congress can offer deliverance.

Yes, *Mistretta* has let the genie out of the bottle. But Congress can put it back. Now that it knows that the Supreme Court will let it do pretty much what it wants in the area of delegation, it can choose to give substance to values which *should be* protected by the Separation of Powers doctrine. It can do this by creating a true guidelines system.

It is time to put the sentencing power and discretion back in the hands of independent judicial officers—judges. It is time for the Congress to realize that it should not delegate to an independent agency its authority to define crimes and punishment— even if it may. It is time for Congress to abolish the Sentencing Commission and establish its own true guidelines to help inform judicial discretion. It is time to make our criminal justice system reflect our American values.

One Proposal

The *first* step along this road of reform is obvious: Abolish the Sentencing Commission and reject its mandatory, mechanical, level-specific guidelines.

Second: Reaffirm the principle that the exercise of legislatively established sentencing discretion is a judicial power and responsibility. Such discretion should be exercised only by independent judges.

Third: Establish an offense-of-conviction model. This would provide Congress the opportunity to include elements which would add to the possible penalties. Congress knows how to do this. Note for example the bank robbery statute, 18 U.S.C. Sections 2113 (a) and 2113(b). This, in turn, would eliminate most of the due process and confrontation problems which inhere in the present system.

Fourth: Establish the range of permissible sentences for each crime within which range the judge, in the exercise of his or her discretion, could fix the penalty. The range could be as narrow or broad as Congress deems proper. But we judges should urge Congress to confer broad discretion as a matter of wise policy.

Fifth: Establish true guidelines or sentencing principles which the *Congress*—not some administrative agency—desires judges, in the exercise of that discretion, to consider and apply, and then require an explanation on the record for any sentencing decision contrary thereto or inconsistent therewith.

Sixth: Adopt a rule requiring the sentencing judge to state on the record the rationale of his or her sentence and the significant factors forming the basis thereof.

Seventh: Compile and make available to sentencing judges data showing the average sentence imposed in similar cases.

Eighth: Recognize the right of appeal by permitting same when the sentence imposed deviates from the average by a certain percent or when the sentence is contrary to sentencing guidelines or principles established by the Congress. The appellate court could then determine if the deviation or failure to follow the guidelines was adequately explained and justified by the sentencing judge.

Ninth: Continue the policy of determinate sentences and phase out the Parole Commission over a period of several years while providing a larger range of good time credits and while urging the President to establish an executive clemency-type board to deal with egregious cases of sentencing unfairness.

What a wonderful, fair, rational, and simple new world it can be! And the Constitution, once again, would mean what it says.

NOTES

[1]I am not the only one who uses this term. See "The Failure of Sentencing Guidelines: A Plea for Less Aggregation" 58 Univ. of Chicago Law Review 901 (1991) and particularly the section captioned "Equal Nonsense for All," starting at p. 918. (Hereinafter cited as *Alschuler*). Professor Alschuler's article is a "must-read" for anyone wishing to understand how the guidelines system is playing out in real life. See also Judge Harry Edwards' concurring opinion in *U.S.A. v. Harrington*, U.S. Court of Appeals for the District of Columbia, No. 90-3176, decided October 15, 1991, which is both entertaining and informative in its analysis of the guidelines system.

[2]Even prior to the guidelines the United States sent a greater proportion of its convicted criminals to prison for longer sentences than any other country in the Western World except South Africa. Now we are Number One. See *Alschuler*, 929.

[3]Judge Heaney's article deserves close attention by all who are interested in this subject. His careful research, the data he has obtained, his analysis, and his conclusions should make even the staunchest supporters of the present guidelines system stop and reflect. It will be cited herein as *Heaney*.

[4]As predicted, the role of our probation officers has been dramatically changed by the sentencing guidelines system. These highly motivated professionals, trained to assist troubled people to return to the body of society, are more and more finding themselves operating as agents for the U.S. attorneys offices across the land; or as investigators in an adversarial relationship with the U.S. attorneys and defense counsel; or as surrogate judges resolving factual issues for real judges. It is worth a comment that at the last meeting of chief district judges in Naples, Florida, earlier this year, there was spontaneous applause for the suggestion that, if things did not change, the probation offices should simply be transferred to the executive branch in order to more closely reflect the realities of the situation.