

The Sentencing Reform Act of 1984 and Sentencing Guidelines

The Untapped Potential for Judicial Discretion Under the
Federal Sentencing Guidelines: Advice for Counsel *Gerald Bard Tjoflat*

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Guidelines Regime *Edward R. Becker*

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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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Fact-Finding Under the Sentencing Guidelines

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- Quality of evidence and standard of proof required to establish guideline-relevant facts

The United States Sentencing Commission: Its Many Missions

BY WILLIAM W. WILKINS, JR.

*Chairman, United States Sentencing Commission
Judge, United States Court of Appeals for the Fourth Circuit*

There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members. . . .¹

TUCKED AWAY in the Crime Control Act of 1990 amidst legislation regarding asset forfeiture, international money laundering, and rural drug enforcement is a provision directing the U.S. Sentencing Commission to conduct a comprehensive study of the effect of mandatory minimum sentencing statutes on the Federal criminal justice system. This study, completed in the summer of 1991, examined the compatibility of these provisions with the sentencing guidelines and the effect of mandatory minimums on unwarranted disparity and plea negotiation practices.

A review of the Federal Criminal Code identified 60 statutes carrying mandatory minimum terms of imprisonment as of July 1, 1991. Further research revealed that while mandatory sentencing provisions were most utilized in drug and weapons offenses, for the last 7 years 37 of the 60 mandatory minimum provisions had virtually no convictions associated with them.

The Commission's research found that only 59 percent of defendants with criminal behavior warranting application of mandatory minimum provisions were actually convicted under these statutes. It is difficult to fully explain why the remaining 41 percent were not convicted under mandatory minimum provisions, although evidentiary problems and plea negotiation strategies are certainly factors. Interestingly, the Commission study also found a sharp decrease in the proportions of guilty pleas when mandatory minimums are present (from 87.1 percent for all guideline defendants to 70.9 percent for guideline defendants convicted under mandatory minimum provisions).

Beyond the substantive importance of this particular study is the broader congressional recognition of the United States Sentencing Commission and its role as the expert body in issues related to Federal sentencing. At the heart of the Sentencing Commission are the guidelines themselves and all the rigorous activity that accompanies their development and refinement. However, it is important not to lose sight of the Commission's significant ongoing responsibilities such as research, sentence monitoring, evaluation, and training, as well as serving as a clearinghouse of sentencing

information for Congress, criminal justice practitioners, and the public.

Data Collection and Research Studies

The Sentencing Commission maintains a comprehensive, computerized data collection system to track application of the guidelines and provide support for other Commission activities. This system contains data on guideline cases sentenced since November 1, 1987, and provides the most complete description of Federal sentencing practices ever assembled. Data from presentence reports, judgment of conviction orders, statements of reasons, written plea agreements, and guideline worksheets are extracted and coded for input into various data bases. The types of data entered into the system include individual identifying information about the offender, statutes cited for each count of conviction, relevant statutory minima and maxima, type of sentence, length of imprisonment, length of probation or supervised release, conditions of supervision, and use of sentencing alternatives. The Commission's monitoring unit also codes such variables as guideline range as determined by the court, departure status, reasons for departure, offense level, and information on real offense conduct and criminal history.

In keeping with legislative intent, much of the data entered into this system are, by necessity, specific in nature. However, the Commission's primary interests lie with the broad patterns of Federal sentencing and guideline implementation and not with the sentencing decisions of particular judges, attorneys, or probation officers.

The oversight would not involve any role for the Commission in second-guessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.²

The Commission's monitoring system is designed to report on these general sentencing trends. The massive data collection undertaking has produced a data file that now contains more than 72,000 records.³ The Commission makes these data available to the public

in two ways: first, through the Commission's annual report that provides basic descriptive data organized by district; and second, through raw data files stripped of identifying information that are available through the Inter-University Consortium for Political and Social Research at the University of Michigan.

In addition to congressional reporting requirements, the monitoring data serve a multitude of functions. This data base serves as an empirical basis for review and revision of guidelines and policy statements. The Commission generates numerous reports in response to specific requests for information from members of Congress in connection with proposed legislation and various criminal justice research projects. The Commission also uses these data to answer requests from the various judicial districts and from internal Commission working groups.

These data permit examination of a wide variety of criminal justice topics, including mode of conviction and departures from the guideline range. For example, monitoring statistics show that there has been minimal change in the rate of guilty pleas versus trials since implementation of the guidelines. In 1988, 88.6 percent of all defendants sentenced under the guidelines pleaded guilty; in 1989, this rate was 88.9 percent; and in fiscal year 1990, the plea rate was 88.5 percent. The monitoring data also enable the Commission to track departure rates from the guidelines. The data indicate that departure rates have remained steady over the last 3 years.

In addition to the monitoring and reporting functions, the Commission conducts research on other criminal justice issues, including recidivism, incapacitation, prison impact, and offense severity. In keeping with congressional goals, these studies are undertaken to assist the criminal justice community in gaining a broad perspective on significant issues, to examine criminological theory, and to test and assist with the practical application of criminal justice concepts.

In 1987, the Commission, together with the Federal Bureau of Prisons, projected the impact of the initial guidelines on the size of the Federal prison population 5, 10, and 15 years into the future. That projected impact allows the Commission to understand the effect on prison capacity a change in the guidelines may produce. In the past, such analyses used pre-guideline data and relied on pre-guideline estimates of sentences, plea bargaining, and departure conviction rates. The Commission now uses its monitoring data to support its prison population projections. As data become available, the Commission plans to expand its efforts in this area and look at prison impact as it relates to the revocation of probation and supervised release.

Efforts are under way to study the effects of the guidelines on the general concepts of just deserts and offense severity. In this study, the Commission plans to examine changes in public attitudes toward the seriousness of different types of offenses. In particular, the project is designed to assess the extent to which there have been discernable shifts over time in public attitudes about what constitutes just punishment.

Evaluation Studies

Perhaps the most important, intermediate-term research directive to the Commission in the Sentencing Reform Act is the 4-year evaluation of the sentencing guidelines due to the General Accounting Office in December 1991. Congress envisioned the evaluation to be a comprehensive look at the impact the guidelines have had on the Federal criminal justice system. Because the guidelines were not implemented nationally until constitutional questions were resolved in the *Mistretta*⁴ decision, the evaluation does not represent a complete 4-year examination of their impact. These longer range effects will be studied in future research efforts.

This in-house evaluation was designed to be an objective assessment of the guidelines, focusing on four major areas of interest: implementation of the guidelines, use of incarceration, disparity in sentencing, and prosecutorial discretion and plea bargaining. Recognizing the difficulties associated with self-evaluation, the Commission has gone to great lengths to ensure an objective examination. Employing an outside advisory group composed of noted academicians and practitioners, the Commission hoped to ensure the greatest degree of independence and integrity in its evaluation effort. This group, assembled at the project's inception, has advised the Commission on both methodological and substantive issues throughout the duration of the project.

For the evaluation, the Commission utilized a variety of data sources. It collected data through interviews with court personnel at 12 selected sites across the country and through a national survey of district court judges, probation officers, assistant U.S. attorneys, assistant Federal defenders, and private attorneys. In addition to the Commission's monitoring data, several pre-existing datasets maintained by the Administrative Office of the U.S. Courts, the Department of Justice, the U.S. Parole Commission, and the Federal Bureau of Prisons were utilized.

The study of the guidelines' implementation contains both qualitative and quantitative components. Qualitative data were obtained through interviews with judges, probation officers, prosecutors, and defense counsel. This portion of the evaluation examines

such issues as: 1) how the sentencing guidelines are operating in actual practice; 2) how the implementation of the guidelines has affected the way in which criminal justice professionals perform their jobs; and 3) the opinions and observations of those in the field about mandatory minimum sentencing. Quantitative data, extracted from the national survey, focus on such issues as unwarranted sentencing disparity, plea agreements, and departures from the sentencing guidelines.

The evaluation of disparity, use of incarceration, and plea negotiation and prosecutorial discretion represents a quantitative effort to discern the impact of the guidelines. These impact studies rely primarily on data obtained from various automated information systems. For example, the use of incarceration study employs data from 1984 to 1990, and focuses on changes over time in the frequency and average time that offenders are sent to prison.

Sentencing disparity looks at sentences both pre- and post-guideline implementation. The analysis focuses on the impact of the offense, offender's criminal history, and offender characteristics (e.g., race, gender, age), on whether an individual receives a prison sentence, and the length of the prison term for those sent to prison.

Finally, the evaluation examines prosecutorial discretion and how it influences the sentencing process. Various types of prosecutorial decisions (e.g., accepting pleas, charging patterns) are examined for changes over time to assess the impact of the guidelines and mandatory minimum sentences.

Training, Education, and Technical Assistance

The Sentencing Reform Act authorizes the Commission to "devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field" and to "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process. . . ."⁵

In accordance with these directives, the Commission continues to devote substantial resources to guideline training as a steady influx of new criminal justice professionals, an evolving guideline system, and new legislation produce an ongoing need for effective training programs and materials. This effort began in October 1987 when the Commission launched its guideline application training program by conducting three nationwide "train-the-trainer" programs. Judges, probation officers, and others involved in the sentencing process participated in these programs and a similar nationwide training seminar in 1989. Since its inception, the Commission has conducted hundreds

of in-district training sessions for judges, probation officers, assistant U.S. attorneys and other Department of Justice personnel, Federal public defenders, private defense attorneys, investigative case agents, congressional staff members, law clerks, and other government agency staff members. To date, the Commission has provided training to more than 10,000 individuals at 319 training sessions across the country. In fulfillment of its important service role, the Commission plans to conduct a third nationwide training program in early 1992 that will address sanctions for organizations, policy statements for probation and supervised release revocation, and recent amendments to the guidelines.

On a more individual basis, the Commission provides guideline application assistance and training through its technical assistance program (hotline). Since its inception in November 1987, the hotline has provided judges and probation officers with assistance in guideline application and receives on average 200 calls per month. Many hotline calls involve questions requiring subjective determinations by the judge (e.g., whether or not the defendant accepted responsibility or whether actions constituted obstruction of justice). In such instances, hotline staff educate the caller in the use of the *Guidelines Manual* by directing the caller to pertinent guidelines, commentary, or policy statements. A separate hotline for prosecutors and defense attorneys operates within the Commission's legal staff. This attorney hotline has been recently expanded in an effort to provide more comprehensive service. Because these two hotlines are the Commission's closest daily links to the field, they are a valuable source of information in the Commission's consideration of new amendments.

As part of its continuing education and self-education efforts, the Commission has established important outreach programs to Federal probation officers, assistant U.S. attorneys, and assistant Federal defenders. These programs call for these Federal practitioners to spend varying lengths of time at the Commission on detail, joining in the ongoing activities of the Commission and developing expertise in guideline application. For example, probation officers on detail work on the hotline assist in the development of training materials and become involved in the guideline amendment process through working group activities and review of selected cases. This temporary assignment program is particularly valuable because the highly trained probation officers return to their districts and serve as guideline application resources for their colleagues. To date, approximately one-third of all districts have sent probation officers to the Commission on these 6-week details.

The assistant U.S. attorneys and Federal public defenders on temporary assignment to the Commission assist with a variety of legal and research projects while lending their expertise, insights, and perspectives to the agency. In turn, these attorneys gain valuable guideline application experience that they can take back and share in their individual offices. The average attorney detail lasts 6 months, enabling attorneys to participate fully in the work of the Commission.

In connection with its technical assistance functions, each month the Commission reviews cases submitted to the Commission to monitor the way in which probation officers apply the guidelines. Information obtained from this project helps the Commission pinpoint areas of the sentencing guidelines that appear problematic in terms of application. For example, this review pointed to difficulties experienced in the calculation of guideline fine ranges. This information, in turn, contributed to the Commission's decision to amend and simplify the guidelines' fine provisions.

Special Projects

The Commission provides technical assistance to practitioners through ASSYST, a Commission-developed software program designed to aid judges, probation officers, and attorneys in applying the guidelines. ASSYST is basically a computerized version of the Commission's guideline worksheets that are used by probation officers across the country in preparing presentence investigation reports. ASSYST also makes readily accessible to the user the entire text of the *Guidelines Manual* including guideline commentary. It provides time-saving benefits through its rapid calculations of drug quantity conversions and ready recall of critical time periods for criminal history application.

Additional assistance is provided to the field through a new computer software program called SC HELP (Sentencing Commission Hotline Extended Library Program). Based on a comprehensive data base of answers provided in the Commission publication, "Questions Most Frequently Asked About the Sentencing Guidelines," this program provides easy access to answers previously provided to the field by hotline staff. SC HELP also allows users to add their own questions and answers to the data base, building a district-specific guideline application tool.

Advisory and Working Groups

The Commission annually convenes interdisciplinary staff working groups to examine specific priority guideline issues. The subjects for these groups vary widely and include such topics as acceptance of responsibility, alternatives to imprisonment, criminal

history, departures, drug offenses, fine guidelines for organizations committing environmental offenses, and sexual offenses involving child victims.

To broaden input on these critical issues, the Commission works closely with a practitioners' advisory group composed of members of the defense bar. This group of defense attorneys provides formal and informal input to the Commission on pertinent guideline issues from often diverse perspectives.

As it strives to develop the most practical and sound set of guidelines, the Sentencing Commission has called upon the expertise of other practitioners and has convened working groups composed of judges, probation officers, defense attorneys, and prosecutors to advise the Commission on numerous occasions. For example, the Commission convened a group of probation officers in March 1991 to apply the draft organizational guidelines to actual cases so that the Commission could benefit from the officers' practical expertise. In addition, during the same time period, the Commission sought the advice of a working group of Federal judges as organizational guidelines were being developed.

This utilization of advisory groups constitutes an important part of the guideline amendment process, a process designed to be structured, yet very open. The process, which is cyclical in nature, begins in early summer with the designation of various topics as priority areas for study. Information obtained from in-house research, developing case law, legislation, contacts with the field via the hotline and temporary assignment programs, advisory groups, public comment, position papers, and testimony provide the base for identifying potential amendment topics. Once potential issues have been identified, the Commission requests public comment through an announcement in the *Federal Register*. The Commission uses the feedback from this process to finalize the topics that will be addressed by the in-house working groups.

The working groups study their respective issues and propose various options to the Commission for addressing problems in the guidelines. The Commission then decides which topics should translate into amendments and assigns them to the Commission drafting staff. After approval by the Commission, drafts of the proposed amendments are published in the *Federal Register* in January and distributed to interested groups. After a public comment period of approximately 60 days, the Commission conducts a public hearing on the proposed amendments to gain additional feedback. Following the public hearing, the Commission weighs all the information it has gathered and submits any proposed amendments to Congress by May 1.

Publications and Dissemination of Information

The Commission's major publications include the *Guidelines Manual*, its annual report, and a publication entitled "Questions Most Frequently Asked About the Sentencing Guidelines." The *Guidelines Manual* contains the sentencing guidelines and policy statements, selected sentencing statutes, and a compendium of amendments to the guidelines. The annual report presents an overview of the Commission's activities of the prior year and contains descriptive statistical information on guideline sentencing. Some of these data are national, while other data are organized by district. Variables of interest include offense type, type of sentence, average length of sentence, average fine amounts, mode of conviction, and defendant's sex and race. The report also includes such information as 1) a comparison of guideline and pre-guideline defendants by circuit and district; 2) departure statistics; 3) plea rates for sentenced cases; and 4) offense level by criminal history category. "Questions Most Frequently Asked" is an instructional publication that contains questions and answers about guideline application. The monograph is widely distributed to criminal justice professionals and is publicly available.

Finally, the Commission receives hundreds of calls and letters each year from interested individuals and

organizations. Viewing its mission from a service perspective, the Commission provides information and assistance to this wide variety of requesting parties.

Conclusion

The United States Sentencing Commission was created by Congress to promulgate and refine sentencing guidelines, to serve as the expert research agency in the area of Federal sentencing, and to provide technical assistance and information to Congress, the criminal justice community, and the public. The Commission is dedicated to fulfilling each of its many missions, with the hope that by so doing it can significantly improve the quality of justice in this country.

NOTES

¹28 U.S.C. § 991 (a).

²*Comprehensive Crime Control Act of 1983: Report of the Committee on the Judiciary, United States Senate, on S. 1762, 98th Cong., 1st Sess. 178 (1983).*

³A record is defined as one defendant in one sentencing event.

⁴*Mistretta v. United States*, 109 S. Ct. 647 (1989).

⁵28 U.S.C. §§ 995 (a)(17), (a)(18).