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THE UNITED STATES SENTENCING COMMISSION: STARTING UP AGAIN

THE HONORABLE DIANA E. MURPHY*

I am pleased to be in St. Louis today to talk with you about the United States Sentencing Commission, and particularly about our newly minted Commission. The tie that binds all of us at this Conference is our mutual interest in justice, and it is of special significance to me that our first outside dialogue on the Federal Sentencing Guidelines is here at Saint Louis University in the city where my court is headquartered and where I have so many friends and colleagues.

After a lengthy political process involving both the White House and the Senate, a full Commission was appointed by President Clinton on November 15, 1999.¹ We went to work immediately upon appointment, meeting in Washington the next two days, to set a priority short-term agenda for the agency and to begin addressing some substantive sentencing issues.² We also began to consider how we might best structure our own deliberations for addressing policy areas.³

After our meeting on November 16 and 17, 1999, we met two days in December and four days in early January. Our agenda naturally included organizational and administrative matters in addition to a number of possible Guideline amendments on some of the most pressing sentencing issues.⁴ As a

* Chair, United States Sentencing Commission. United States Circuit Judge for the Eighth Circuit (1994 -); United States District Judge for the District of Minnesota (1979-1994); Chief Judge (1992-1994).

1. See 28 U.S.C. § 991 (1994 & Supp. II 1996).

2. On December 8, 1999, the Commission published in the Federal Register a notice identifying the congressional directives, other crime legislation, and the circuit conflicts we will address in this amendment cycle. See 64 Fed. Reg. 68,715 (1999).

3. As an agency engaged in “informal rulemaking” under the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, the Commission has considerable flexibility on how it structures its own internal deliberations, as well as its communications with various external groups interested in federal sentencing. See generally, JEFFREY LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 225-44 (3d ed. 1998); *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

4. In December, the Commission voted in a public meeting to publish Guideline amendment proposals in the Federal Register on two of the policy items on its agenda, namely

result of our earlier planning, we were able very quickly and unanimously to publish several amendment proposals in the Federal Register. We look forward to receiving comments and reaction from the interested public.

Perhaps at this point it would be helpful to give you a bit of background information about who the new commissioners are, how these policy issues came to be on our agenda, and how it is that we have been able to start addressing them so promptly.

THE NEW COMMISSION

Under the Sentencing Reform Act, the Commission is made up of seven voting members, appointed by the President and confirmed by the Senate. At least three of the voting members must be federal judges and not more than four may belong to the same political party.⁵ The new commissioners are all well qualified. The three vice chairs are Judge Ruben Castillo of the Northern District of Illinois, Judge William Sessions of the District of Vermont, and Mr. John Steer, for many years past the General Counsel of the Commission. The other commissioners are Judge Sterling Johnson of the Eastern District of New York, Judge Joe Kendall of the Northern District of Texas, and Professor Michael O'Neill, assistant professor at George Mason University School of Law and previously General Counsel for the Senate Judiciary Committee. Under our organic statute, there are also two nonvoting, ex officio members of the Commission,⁶ presently Michael Gaines, the Chairman of the United States Parole Commission, and Laird Kirkpatrick, Assistant Attorney General in the Criminal Division of the Department of Justice. Five of the commissioners are federal judges who have all actually applied the Guidelines in sentencing individuals, three have had prosecutorial experience and two have had criminal defense experience, two are former police officers, and several previously worked as congressional staff. In short, the new commissioners bring a wealth of experience and several different perspectives, just as the Sentencing Reform Act intended.

We began to get to know each other in the summer of 1999 when it appeared we all might be appointed at any time. I took the initiative to set up several conference calls with the other possible appointees and Tim McGrath, the interim staff director of the Commission. We were not presumptuous about

copyright and trademark infringement and telemarketing fraud. *See* 64 Fed. Reg. 72,129 (1999). In January, the Commission voted to publish Guideline proposals in the Federal Register with respect to methamphetamine trafficking offenses and identity theft offenses. *See* 65 Fed. Reg. 2,663 (1999). Throughout the spring of 2000, the Commission hopes to meet with a number of groups that are interested in the federal criminal justice system as it begins addressing these and the other priority policy issues. The Commission has planned a public hearing for March 23, 2000, in Washington, D.C.

5. *See* 28 U.S.C. §§ 991, 992 (1994 & Supp. II 1996).

6. *Id.*

our potential nominations, but we wanted to be able to function effectively if we were appointed. These preliminary discussions were particularly geared toward how we might best get started and oriented if appointed and toward saving some dates on our calendars for possible meeting times. I am not sure we realized at the time just how helpful these preliminary discussions would turn out to be. When the appointment process took longer than anticipated, we were grateful that we were prepared to start immediately after we officially took office in mid November. That preliminary work positioned us to hit the ground running the very next day after appointment.

Throughout this process, the capable staff at the Commission has been invaluable. The staff is dedicated and talented and includes attorneys who analyze issues and do legal drafting, social scientists who do research, former probation officers who provide training and telephone helpline assistance on Guideline application, and data entry employees and analysts who extract and analyze data collected from all cases sentenced under the Guidelines each year. The staff's good work to prepare for our arrival is particularly remarkable because it was done without any direction from commissioners. The absence of voting commissioners for a long period had the unfortunate effect of decreased appropriations for the Commission and staffing shortages that have gone unaddressed. In order to meet our responsibilities, the new Commission must get the budget and staff fully restored. Otherwise we cannot fulfill all of our statutory obligations.

The essential responsibility that could not be carried out in the absence of commissioners was of course the agency's duty to promulgate and modify the Guidelines. With no voting commissioners for thirteen months, from October 1998 through mid November 1999, the Commission could not make any changes to the Guidelines during its regular amendment cycle in 1999. Even in 1997 and 1998, the Commission found it difficult to make changes to the Guidelines because it operated with only four voting members for much of that time, which meant that a unanimous vote was necessary before any amendments could be promulgated.⁷

As a result of these chronic commissioner vacancies, important sentencing policy issues have gone unaddressed over the past few years. Those policy issues arose in a number of contexts. Recently enacted crime legislation specifically directed the Commission to make changes to the Sentencing Guidelines for a number of criminal offenses, most notably in the areas of intellectual property infringement, telemarketing fraud, fraudulent cloning of wireless telephones, unlawful identity theft, and criminal sexual offenses against children. Other recently enacted crime legislation did not contain express instructions to the Commission but did make changes in the

7. Four affirmative votes are needed to promulgate Guidelines and Guideline amendments. *See* 28 U.S.C. § 994(a) (1994).

substantive criminal law, such as in the areas of firearms and methamphetamine offenses. The Commission must carefully review those changes to determine whether amendments should be incorporated into the Guidelines. In addition, a variety of circuit conflicts on the application of the Guidelines also went unresolved, and under *Braxton v. United States*,⁸ the Commission has the responsibility to resolve these circuit conflicts on Guideline interpretation.

THE GUIDELINE AMENDMENT CYCLE

Adding to the difficulty of addressing this significant backlog of policy issues is the fact that the new commissioners are confronting a very abbreviated time frame this year in which to begin addressing them. The time is short because the Commission operates under an annual cycle for amending the Guidelines that is governed by a number of procedural requirements. Those requirements, including provisions of the Administrative Procedure Act⁹ that require public notice of any proposed amendments and an opportunity for the public to comment on them, are set forth in the Sentencing Reform Act and in the Commission's Rules of Practice and Procedure.¹⁰ Under those requirements, when the Commission wants to amend the Guidelines, it must first submit the amendments to Congress for a 180-day review period. The deadline for submitting them is May 1 in any given year.

The May 1 submission to Congress is the culmination of a process that typically starts in June or July of the previous year. At that time, the Commission begins to work with its staff and various groups involved in the federal criminal justice system to inform itself of the policy issues at hand. As a result of this work, the Commission usually develops proposals for Guideline amendments by December or January. Those proposals, if they receive the affirmative vote of three commissioners, are published in the Federal Register. It is this publication that gives the public notice of the proposals and an opportunity to comment on them. The Commission then typically conducts a public hearing on the issues in March. By April, the Commission has refined its proposed Guideline amendments, and then takes a final vote on whether to adopt them. Not later than May 1, the Commission sends the promulgated amendments to Congress, together with a statement of reasons for the amendments. This entire process is commonly referred to as the "Guideline amendment cycle."

The point I want to emphasize is that the Guideline amendment cycle is a deliberative process. It builds in sufficient time for the thoughtful

8. 500 U.S. 344 (1991).

9. See 5 U.S.C. § 553 (1994).

10. See generally 28 U.S.C. § 994 (1994); 5 U.S.C. § 553 (1994); USSC Rules of Practice and Procedure.

development of fair and effective sentencing policy. You see the challenge we face by being appointed in mid-November, well into that cycle. All of the new commissioners are mindful of the many important and unaddressed policy issues on our plate and the need to respond to congressional directives to amend the Guidelines for particular criminal offenses. We know we can strengthen the agency's credibility and good working relationship with Congress and others in the federal criminal justice community by responding to these directives as soon as possible. We are also strongly committed to ensuring that the sentencing policies we ultimately adopt and implement are of the highest quality, that they are workable, fit well within the existing Guidelines framework, and serve the purposes of sentencing identified in the Sentencing Reform Act.

COMMISSION RESPONSIBILITIES UNDER THE SENTENCING REFORM ACT

In enacting the Sentencing Reform Act, Congress gave the Commission the responsibility to establish and maintain federal sentencing guidelines. The first set of Guidelines became effective on November 1, 1987, and have now been used to sentence over 400,000 defendants. These Guidelines are required under the Act to serve four purposes of sentencing: just punishment, deterrence, protection of the public from further criminal conduct, and rehabilitation of criminal offenders.¹¹ Congress also intended that the Guidelines reduce unwarranted sentencing disparity and provide for sentences appropriate for the particular offense involved. Another major object was to create real-time sentencing by eliminating the parole system;¹² time given was to be time served. Judicial discretion before the Guidelines had not been unconstrained because the United States Parole Commission, not the sentencing judge, ultimately determined how much time an offender actually spent in prison, and prosecutorial discretion in charging decisions has always been great.

Congress also gave the Commission another key mission: to serve as an expert agency on federal sentencing matters and criminal policy. In order to fulfill this part of its mission, the Commission was given continuing responsibility under the Sentencing Reform Act in many areas, including:

(1) establishing sentencing policies and practices that assure that the purposes of sentencing are met, that provide certainty and fairness in meeting those purposes, that avoid unwarranted sentencing disparities while maintaining enough flexibility for individualized sentences when those are

11. See 28 U.S.C. § 991(b)(1)(A) (1994 & Supp. II 1996).

12. See § 218(a)(5) of the Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 2027, which repealed chapter 311 of title 18, United States Code, relating to parole.

warranted, and that reflect advancements in our knowledge of human behavior as it relates to the criminal justice process;¹³

(2) developing means to measure the effectiveness of sentencing, penal, and correctional practices in meeting the purposes of sentencing;¹⁴

(3) promulgating and updating Sentencing Guidelines for federal offenders;¹⁵

(4) monitoring the performance of probation officers on sentencing recommendations, including application of the Guidelines;¹⁶

(5) issuing instructions to probation officers concerning the application of the Guidelines;¹⁷

(6) establishing a research and development program within the Commission¹⁸ to serve as a clearinghouse for information on federal sentencing practices;

(7) consulting with federal courts, departments, and agencies in developing, maintaining, and coordinating sound sentencing practices;

(8) systematically collecting data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;¹⁹

(9) publishing data concerning the sentencing process;²⁰

(10) systematically collecting and disseminating information concerning sentences actually imposed on the over 50,000 cases sentenced in the district courts each year (and on over 750 reported appellate opinions on sentencing), and the relationship of those sentences to the factors judges are required to consider under 18 U.S.C. § 3553(a);²¹

(11) systematically collecting and disseminating information regarding effectiveness of sentences imposed;²²

(12) conducting seminars and workshops around the country to provide continuing studies for people engaged in the sentencing field;²³

13. See 28 U.S.C. § 991(b)(1) (1994 & Supp. II 1996).

14. See 28 U.S.C. § 991(b)(2) (1994 & Supp. II 1996).

15. See 28 U.S.C. § 994 (1994). Under the statute, the Commission must meet a host of substantive and procedural requirements in making these Guidelines. For example, under 28 U.S.C. § 994(s) (1994), the Commission must give due consideration to petitions submitted by federal prisoners who would like the Commission to modify the Guidelines under which those prisoners were sentenced.

16. See 28 U.S.C. § 995 (a)(9) (1994).

17. See 28 U.S.C. § 995 (a)(10) (1994).

18. See 28 U.S.C. § 995 (a)(12) (1994).

19. See 28 U.S.C. § 995 (a)(13) (1994).

20. See 28 U.S.C. § 995 (a)(14) (1994).

21. See 28 U.S.C. § 995 (a)(15) (1994).

22. See 28 U.S.C. § 995 (a)(16) (1994).

23. See 28 U.S.C. § 995 (a)(17) (1994).

(13) conducting periodic training programs for judicial and probation personnel and other persons connected with the sentencing process;²⁴

(14) studying the feasibility of developing Guidelines for juvenile offenders;²⁵

(15) making recommendations to Congress on changes that might be made to statutes relating to sentencing, penal, and correctional matters that would help to carry out effective, humane, and rational sentencing policy;²⁶

(16) holding hearings and calling witnesses to assist the Commission in the exercise of its powers and duties;²⁷

(17) performing any other functions necessary to permit federal courts and others in the federal criminal justice system to meet their responsibilities in the sentencing area;²⁸ and

(18) recommending any changes in prison facilities that may be necessary because of the Guidelines.²⁹

LEGISLATIVE DIRECTIVES TO THE COMMISSION

Balancing all of this continuing responsibility with the immediate concerns of an abbreviated amendment cycle this year and the significant backlog of pending policy work, the new Commission decided to focus in the short term on implementing congressional directives and other crime legislation and on resolving a number of circuit conflicts regarding sentencing application. Responding to directives is a principal priority, but there are a number of directives currently outstanding in a variety of areas.

In the **No Electronic Theft (NET) Act of 1997**,³⁰ Congress expanded the scope of the criminal copyright infringement provisions to include infringement that occurs through electronic means, regardless of whether the defendant benefited financially or commercially from the crime. In addition, Congress directed the Commission to ensure that the Guideline penalties for all intellectual property offenses generally provide sufficient deterrence and specifically provide for consideration of the retail value and quantity of

24. See 28 U.S.C. § 995 (a)(18) (1994).

25. See 28 U.S.C. § 995 (a)(19) (1994). The Commission examined the issue of Guidelines for juvenile offenders early on but recently has begun to focus on juvenile justice again, particularly in light of legislation, still pending in Congress, that would require the Commission to develop Guidelines for juvenile offenders.

26. See 28 U.S.C. § 995 (a)(20) (1994).

27. See 28 U.S.C. § 995 (a)(21) (1994). The Commission usually holds a hearing on pending Guideline amendments in March of each year. It also periodically holds meetings and symposia on particular sentencing issues, usually in Washington but also in other parts of the country.

28. See 28 U.S.C. § 995 (a)(22) (1994).

29. See 28 U.S.C. § 994 (g) (1994 & Supp. II 1996).

30. Pub. L. 105-147, 111 Stat. 2678 (1997).

infringed items. In enacting the NET Act, Congress expressed concern that the existing infringement Guideline neither sufficiently deters these offenses nor adequately accounts for the pecuniary harm they cause, particularly with respect to online electronic infringement. What we have found so far is that quantifying the pecuniary harm caused by these offenses is difficult, making it a challenge to develop the most appropriate response to the directive. Moreover, Congress recently passed legislation, the Digital Theft Deterrence and Copyright Damages Improvement Act,³¹ that requires us to take action by April 6 of this year. We have been working very hard on our response to this directive during the past few months and at the December public meeting, just one month after we were appointed, we voted to publish in the Federal Register a number of options for how we might respond.³²

In the **Telemarketing Fraud Prevention Act of 1998**,³³ Congress strengthened criminal statutes relating to fraud against consumers, particularly the elderly. In addition to providing enhanced penalties for conspiracies to commit fraud offenses that involve telemarketing, the Act required criminal forfeiture of telemarketing fraud proceeds. The Act also directed the Commission to take action on an expedited basis (and by that I mean outside the May 1 amendment cycle) to provide substantially increased penalties for persons convicted of telemarketing offenses. In doing so, Congress specifically directed the Commission to provide increased sentences for cases involving sophisticated means and for telemarketing fraud cases in which a large number of vulnerable victims are affected by the fraudulent scheme. Like Congress, the Commission for some time had been concerned with the growing seriousness and frequency of telemarketing frauds, particularly those perpetrated against the elderly.

In May 1998, even before enactment of the Act, the previous Commission had adopted amendments to increase sentences for telemarketing fraud offenses and for other fraud offenses that use mass marketing. In response to the Act, the previous Commission also made expedited Guideline amendments that expanded upon these earlier amendments. Because they were made on an expedited basis, the later amendments were only temporary, however, and they must be passed again in the coming amendment cycle in order to become permanent changes to the Guidelines.³⁴ At our December public meeting, we

31. Pub. L. 106-160, 113 Stat. 1774 (1999).

32. See 64 Fed. Reg. 72,129 (1999).

33. Pub. L. 105-184, 112 Stat. 520 (1998).

34. The requirement to repromulgate an emergency amendment in order for the amendment to remain in effect derives from section 21(a) of the Sentencing Act of 1987, Pub. L. 100-182, 101 Stat. 1271 (1987). The authority under that Act formed the basis for the authority to promulgate emergency amendments in the Telemarketing Fraud Prevention Act of 1998.

voted to publish in the Federal Register a notice of our intent to make those amendments permanent.³⁵

The **Wireless Telephone Protection Act of 1998**,³⁶ among other things, eliminated the intent to defraud element for defendants who knowingly use, produce, or traffic in certain equipment used to clone cellular telephones, and it clarified the statutory penalty provisions for cellular telephone cloning offenses. Congress also directed the Commission to review and, if appropriate, amend the Guidelines to provide an appropriate penalty for offenses involving the fraudulent cloning of wireless telephones. In passing this legislation, Congress expressed its concern over the increasing fraudulent cloning of wireless telephones. In particular, Congress was aware of the substantial economic harm to the wireless telephone industry and the prevalent use of cloned wireless telephones to commit other crimes.

The **Identity Theft and Assumption Deterrence Act of 1998**³⁷ criminalized the use or transfer of an individual's social security number, date of birth, credit cards, and any other identification means (including unique biometric data), without that individual's authorization to do so, in order to commit any federal or state felony. The Act also provided maximum statutory penalties of up to three, fifteen, twenty, or twenty-five years, depending on the presence of certain enumerated factors. Another key change was to expand the scope of victims affected by such offenses to include the individuals whose names or other identification means were misused, not just the financial institutions that may have sustained economic losses as a result of these crimes. In addition, Congress directed the Commission to review and, if appropriate, amend the Guidelines to provide an appropriate penalty for each offense under 18 U.S.C. § 1028, relating to fraud in connection with identification means. Tailoring an appropriate response to address the conduct that Congress seemed most concerned about is difficult because the Act implicates a wide range of offense conduct prosecuted under numerous existing statutes and covered by a variety of Sentencing Guidelines.

The **Protection of Children from Sexual Predators Act of 1998**³⁸ created two new crimes: (1) the transmittal of information identifying minors for criminal sexual purposes; and (2) the distribution of obscene materials to minors. The Act provided increased statutory penalties for existing crimes that address sexual activity with minors and child pornography. It also expressed Congress's zero tolerance for the sexual abuse and exploitation of children. In addition, Congress directed the Commission to: (1) provide an increased sentence for offenses relating to the transportation of individuals for illegal

35. See 64 Fed. Reg. 72,129 (1999).

36. Pub. L. 105-172, 112 Stat. 53 (1998).

37. Pub. L. 105-318, 112 Stat. 3007 (1998).

38. Pub. L. 105-314, 112 Stat. 2974 (1998).

sexual activity; (2) provide an increased sentence if the defendant used a computer in connection with a sexual offense against a minor; (3) provide an increased sentence if the defendant knowingly misrepresented the defendant's identity in connection with a sexual offense against a minor; (4) increase the penalties in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor; and (5) amend the Guidelines to clarify that the term "distribution of pornography" in the Guidelines relating to distribution of child pornography applies to distribution for both pecuniary and non pecuniary interests. Many of these requirements directly respond to recommendations the Commission made a few years ago in a report to Congress on sexual abuse and exploitation.

In addition to directives to the Commission, Congress has enacted several pieces of crime legislation that have implications for the Sentencing Guidelines. For example, the **Methamphetamine Trafficking Control Act of 1998**³⁹ increased the penalties for manufacturing, importing, or trafficking in methamphetamine by reducing by one half the quantity of pure substance and methamphetamine mixture required to trigger the separate five and ten year mandatory minimum sentences in the drug statutes. In 1997, the Commission amended the drug Guidelines to reduce by half the quantity of methamphetamine mixture required to receive five and ten year sentences under the Guidelines. This was a response to congressional directives enacted the year before. In light of this most recent Act, it may be appropriate to amend the Guidelines similarly to reduce by half the amount of pure substance required to receive those five and ten year sentences under the Guidelines.

Congress addressed certain serious firearms offenses in **Public Law 105-386**,⁴⁰ which amended 18 U.S.C. § 924(c) to create a tiered system of sentencing enhancement ranges. Each range has a mandatory minimum and presumed life maximum for cases in which a firearm is involved in a crime of violence or drug trafficking offense. The pertinent minimum sentence in that tiered system is dependent on whether the firearm was possessed, brandished, or discharged. The Act also changed the mandatory minimum for second or subsequent convictions under § 924(c) from twenty to twenty-five years, and it broadly defined the term "brandish." These legislative changes will require a number of amendments to the Guidelines, including amendments that incorporate the tiered statutory sentencing scheme into the Guideline pertaining to § 924(c). The Guideline in its current form does not contemplate a tiered system of punishment; in a "flat" fashion, it simply calls for a term of imprisonment as "required by statute." In PUBLIC LAW 105-277,⁴¹ Congress amended 18 U.S.C. § 922 to prohibit an alien who is lawfully present in the

39. Pub. L. 105-277, 112 Stat. 2681 (1998).

40. 112 Stat. 3469 (1998).

41. 112 Stat. 2681 (1998).

United States under a non-immigrant visa from possessing or otherwise being involved in a firearms offense. A conforming change to the definition of prohibited persons for purposes of the firearms Guidelines is appropriate.

CONFLICTS IN GUIDELINES INTERPRETATION BY
THE CIRCUIT COURTS OF APPEAL

Another very important responsibility, delegated to the Commission by the Supreme Court,⁴² is to resolve conflicts among the circuit courts of appeal regarding Sentencing Guideline issues. We have decided to address five of the most pressing conflicts this year.

The circuit courts are split on what can pass as a “single act of aberrant behavior” for purposes of downward departure under the Guidelines.⁴³ Seven circuits have held that the departure should be narrowly defined to include only a spontaneous and thoughtless act by the defendant, not multiple acts occurring over a period of time. Four circuits define this departure more broadly to include consideration of the totality of the circumstances.⁴⁴

There is also a circuit conflict regarding whether the fraud Guideline enhancement in § 2F1.1(b)(4)(B), for violation of a judicial or administrative order, injunction, decree, or process, applies to falsely completing bankruptcy schedules and forms. Six circuits view fraudulent bankruptcy court filings as violations of judicial orders or process. Two circuits require that a defendant have violated a specific order from a prior proceeding before applying the enhancement.⁴⁵

The circuits disagree on whether exceptional post sentence rehabilitation can permit downward departure on resentencing after a remand. Five circuits have held that it can. The Eighth Circuit holds, however, that a departure on

42. *See Braxton*, 500 U.S. at 348-49.

43. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A.4 (d) (1999).

44. *Compare* *United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996) (adopting totality of circumstances test); *Zecevic v. United States Parole Comm'n*, 163 F.3d 731 (2d Cir. 1998); *United States v. Takai*, 941 F.2d 738 (9th Cir. 1991); *United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991); *with* *United States v. Marcello*, 13 F.3d 752 (3d Cir. 1994) (single act of aberrant behavior requires a spontaneous, thoughtless, single act involving lack of planning); *United States v. Glick*, 946 F.2d 335 (4th Cir. 1991); *United States v. Williams*, 974 F.2d 25 (5th Cir. 1992); *United States v. Carey*, 895 F.2d 318 (7th Cir. 1990); *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991); *United States v. Withrow*, 85 F.3d 527 (11th Cir. 1996); *United States v. Dyce*, 78 F.3d 610 (D.C. Cir. 1996), *amended by* 91 F.3d 1462 (D.C. Cir. 1996).

45. *Compare* *United States v. Saacks*, 131 F.3d 540 (5th Cir. 1997) (bankruptcy fraud implicates the violation of a judicial or administrative order or process within the meaning of §2F1.1 (b)(3)(B)); *United States v. Michalek*, 54 F.3d 325 (7th Cir. 1995); *United States v. Lloyd*, 947 F.2d 339 (8th Cir. 1991); *United States v. Welch*, 103 F.3d 906 (9th Cir. 1996); *United States v. Messner*, 107 F.3d 1448 (10th Cir. 1997); *United States v. Bellew*, 35 F.3d 518 (11th Cir. 1994); *with* *United States v. Shaddock*, 112 F.3d 523 (1st Cir. 1997); *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997).

this ground unfairly differentiates between classes of defendants, with some of those defendants benefiting because of an unrelated legal error in their original sentencing, and that it also duplicates good time credits awarded by the Bureau of Prisons.⁴⁶

Another circuit conflict deals with enhanced sentences for drug offenses occurring near locations such as schools or involving children or pregnant women. Three circuits hold the view that the enhancement applies only when a defendant is convicted of such an offense. Three other circuits take the broader view that the enhanced sentences apply whenever a defendant's relevant conduct included drug sales in a protected location or to a protected individual.⁴⁷

There is also a circuit split regarding whether a court can base an upward departure on conduct that was dismissed or uncharged in connection with a plea agreement in the case. Six circuits allow an upward departure based on such conduct, while three others do not.⁴⁸

ADMINISTRATION AND POLICY MAKING AFTER *MISTRETTA*

As you can see, the Commission has a lot to do even in the short term, and no sooner was I in office than it was time to submit the budget for fiscal year

46. Compare *United States v. Rhodes*, 145 F.3d 1375, 1379 (D.C. Cir. 1998) (postconviction rehabilitation is not a prohibited factor and, therefore, sentencing courts may consider it as a possible ground for downward departure at resentencing); *United States v. Core*, 125 F.3d 74, 75 (2d Cir. 1997); *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997); *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997); *United States v. Rudolph*, 190 F.3d 720, 723 (6th Cir. 1999); *United States v. Green*, 152 F.3d 1202, 1207 (9th Cir. 1998); with *United States v. Sims*, 174 F.3d 911 (8th Cir. 1999) (district court lacks authority at resentencing following an appeal to depart of ground of postconviction rehabilitation which occurred after the original sentencing).

47. Compare *United States v. Chandler*, 125 F.3d 892, 897-98 (5th Cir. 1997) (the sentencing court should determine the offense Guideline section most applicable to the offense of conviction using Appendix A, then, once the appropriate Guideline is identified, a court can take relevant conduct into account only as it relates to factors set forth in that Guideline); *United States v. Locklear*, 24 F.3d 641 (4th Cir. 1994); *United States v. Saavedra*, 148 F.3d 1311 (11th Cir. 1998); with *United States v. Clay*, 117 F.3d 317 (6th Cir.), cert. denied, 118 S. Ct. 395 (1997) (applying § 2D1.2 to defendant convicted only of possession with intent to distribute under 21 U.S.C. § 841 (but not convicted of any statute referenced to § 2D1.2) based on underlying facts indicating defendant involved a juvenile in drug sales); *United States v. Oppedahl*, 998 F.2d 584 (8th Cir. 1993); *United States v. Robles*, 814 F. Supp. 1249 (E.D. Pa), aff'd, 8 F.3d 814 (3d Cir. 1993) (court looks to relevant conduct to determine appropriate Guideline).

48. Compare *United States v. Figaro*, 935 F.2d 4 (1st Cir. 1991) (allowing upward departure based on uncharged conduct); *United States v. Kim*, 896 F.2d 678 (2d Cir. 1990); *United States v. Baird*, 109 F.3d 856 (3d Cir.), cert. denied, 118 S. Ct. 243 (1997); *United States v. Cross*, 121 F.3d 234 (6th Cir. 1997); *United States v. Ashburn*, 38 F.3d 803 (5th Cir. 1994); *United States v. Big Medicine*, 73 F.3d 994 (10th Cir. 1995); with *United States v. Ruffin*, 997 F.2d 343 (7th Cir. 1993); *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995); *United States v. Faulkner*, 952 F.2d 1066 (9th Cir. 1991).

2001. The Chair of the Commission has the statutory responsibility to direct the preparation of requests for appropriations and to direct the use of appropriated funds.⁴⁹ The appropriations request is especially critical this year because the budget was decreased and staff reduced during the time when the Commission had no voting members. All of this is complicated and requires much communication.

Before coming to St. Louis, I decided to step back from the ongoing work to take another look at *Mistretta v. United States*⁵⁰ to see exactly what the Supreme Court had said there about the Commission and policy. I was surprised to see how closely Justice Blackmun's 1989 description of the Commission as an institution paralleled my own observations during the past few months. The Court referred to the "significantly political nature of the Commission's work[.]"⁵¹ and I have seen what a different experience it is from judging. The commissioners were described as policy makers and administrators who exercise "political judgment about crime and criminality[.]"⁵² Justice Blackmun also wrote that "[t]he Sentencing Commission unquestionably is a peculiar institution within the framework of our Government[.]"⁵³ being a "political or quasi-legislative"⁵⁴ agency within the Judicial Branch. It is "an independent agency . . . fully accountable to Congress"⁵⁵ with "rulemaking [power] . . . subject to the notice and comment requirements of the Administrative Procedure Act, 28 U.S.C. § 994(x)."⁵⁶

One of the first things I wanted to do after appointment was to contact people with experience to learn how the Commission deliberates and reaches decision under the Administrative Procedure Act. For judges this is a very different kind of decision making, and one paragraph in *Mistretta* describes the contrast well:

The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs. Such power as these judges wield as Commissioners is not judicial power; it is administrative power derived from the enabling legislation. Just as the nonjudicial members of the Commission act as administrators, bringing their experience and wisdom to bear on the problems of sentencing disparity, so too the judges, uniquely qualified on the subject of sentencing, assume a wholly administrative role upon entering into the deliberations of the Commission. In other words, the Constitution, at least

49. 28 U.S.C. § 993 (b)(2) (1994).

50. 488 U.S. 361 (1989).

51. *Id.* at 393.

52. *Id.*

53. *Id.* at 384.

54. *Id.* at 393.

55. *Mistretta*, 488 U.S. at 393.

56. *Id.* at 394.

as a per se matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.⁵⁷

I understand exactly what Justice Blackmun meant about not wearing two hats at the same time, but I have to confess that I feel like I am wearing at least two hats on any given day, with all of the things there are to do as an active judge and as Chair of the Commission. But I draw strength from both the policy goals in the Sentencing Reform Act and the eloquent discussion in *Mistretta* about the importance of the Commission's work. They answer the question frequently asked as to why anyone would willingly take on these responsibilities.

In closing I can assure you that we are committed to work thoughtfully to accomplish as much as we reasonably can during this abbreviated amendment cycle. It is our great hope that in demonstrating our commitment to addressing the issues before us as soon as we reasonably can, we will strengthen the Commission's credibility and its working relationship with Congress and others interested in federal sentencing. We want to reach out to all who have an interest in the federal criminal justice system and to listen to their views about the Sentencing Guidelines and related issues and to engage in an ongoing dialogue. We have to come to meetings like this. We have to listen to problems that people are having with the Guidelines and to their suggestions for change.

The Sentencing Reform Act has very noble goals, and we aim to try to meet them and hope over the long term to make an increasingly meaningful contribution to fair and effective sentencing policy.

57. *Id.* at 404.