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Sentencing Guidelines: Where We Are and How We Got Here

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I want to start by responding to a question that was put to me before the panel began this morning. Someone asked me whether I was bitter over the fact that I was not reappointed to the Commission. Apparently, based on my performance, the Democrats thought that I was far too conservative and the Republicans thought that I was way too liberal. Consequently, I made no one happy, and so here I sit.

Let me acknowledge at the outset that the Guidelines certainly have not been popular. Indeed, recently I did a Lexis search of articles on the Sentencing Guidelines. More than 600 have been written and very few have been favorable. Far more common than any favorable articles are those with titles that contain terms such as, "failure," "mess," "unacceptable," "death," "disease," and "flawed." Judge Cabranes certainly characterized them as a dismissal failure.

Not to be discouraged, I conducted a Westlaw search looking for articles whose terms combined the words "guidelines" and "love." Now you may laugh, but this triggered one response by former commission staffer, now Professor of Law, Frank Bowman. Encouraged by this response, I then searched Westlaw combining the terms "guidelines" and "cheer." This, too, produced a single response, "One Cheer for the Guidelines" by Federal Judge Stewart Dallzell from the Eastern District of Pennsylvania. I was, however, unable to find any other articles entitled two cheers or more cheers for the Guidelines.

The Guidelines certainly have not been popular among the bench or among the academic community. At the same time, I think it is important to recognize that, before the Guidelines were implemented, many defendants trembled at the thought that the law is what the judge had for breakfast.

Certain culinary items suggested light sentences geared toward ehabilitation. For example, eggs over easy, instant oatmeal, Sweet 'n Low,

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Lucky Charms, and Cheerios. But others evoked images of harsher treatment of retribution, deterrence, and incapacitation. For example, hard-boiled eggs, bacon – extra crisp, and especially, Total, Life, or any type of toast. And of course, if the judge had dined on waffles or Fruit Loops, as often seem to be the case, then all bets were off.

So Congress responded to this problem by enacting the Sentencing Guidelines. It is true, as Kate Stith says, that the Guidelines really are not guidelines, they are mandatory in many respects. They are not nearly as tough as mandatory minimums that the Congress has implemented in recent years, however, and I think these mandatory minimums are the source of many of the overly severe sentences that we see in the criminal justice system.

By way of background, I should tell you that when I was appointed to the Commission, I did not offer myself as an expert on sentencing in general or the Guidelines in particular. And in fact, as a practitioner in my consulting practice, prior to my appointment, I more or less specialized in trying to avoid the application of the Guidelines. I found that one way of doing this was by getting my clients, on occasion, to plead guilty to pre-Guideline felonies. So, I would arrive at an arbitrary date before the enactment of the Guidelines, plead the client guilty to a crime committed during that time period, and then the court would have complete discretion. That became a diminishing area of specialty as time went by. But nevertheless, I did whatever I could to avoid the impact of the Guidelines.

I did not try to sell myself as a Guidelines expert. Instead, when I met with those in the administration interviewing me, I essentially said that I was offering a fresh perspective on this. I offered a clean slate in a sense.

In any event, with that in mind, when I was finally appointed I really approached the Guidelines with an open mind and I was surprised. Many of the criticisms that I had read and heard about I felt were over-stated. I did not necessarily reach that conclusion after a month or two on the Commission, but certainly after four years on the Commission I had come to believe that the Guidelines work and that they work quite well.

And indeed, I think in support of that notion, I could cite to a poll conducted by the Federal Judicial Center, a poll of federal judges asking the judges -- among other things -- to evaluate guideline sentencing on a one to five scale with “five” being sentences that are overly severe, “one” being sentences being too light, and “three” being essentially a perfect sentence or as close to perfect as you can achieve. Several hundred federal judges responded to the survey and the mean response of guidelines sentences, in their view, was 3.05. So whatever criticisms we have of the guideline system, fairness of sentence is not a criticism in the eyes of federal judges. And this comes from a group that has been traditionally very critical of the Guidelines for taking away their discretion.

I do not want to get into a long debate about the merits of the Guidelines system at this point. I think that it is true that in the early days of the Guidelines, the first commission focused on those provisions in the statute that had been put there by the "law and order conservatives" and used those provisions to impose sentences that were very severe and also to constrain judicial discretion.

I felt, frankly, that the mandate of the Conaboy Commission was quite different and I can tell you that the Conaboy Commission struggled with ways to return some discretion to the judges. An earlier panelist suggested that the Guidelines really have not been structured in a manner designed to confer additional discretion to the court, and that that could be done by the Sentencing Commission. Well, I think that the Commission, at least between 1994 and 1998, would have been eager to come up with ways to return discretion to the judges in a manner afforded by the statute itself. The difficulty was that the Sentencing Reform Act contained so many constraints that the commission is limited obviously by those constraints and was, therefore, not in a position to return additional discretion to the judges more than it did.

The Conaboy Commission viewed the Guidelines as appropriate and useful. At the same time, I think it is fair to say, that while the Commission did not want to let a judge place his or her thumb on the scales of justice—maybe a pinky was acceptable—something to return some discretion to the court. Indeed, on one occasion, when we met with Senator Hatch, he essentially said to us, "Find some way to give the court some more discretion." And this coming from a man who, I think it is fair to say, has been skeptical of federal judges' tendency to impose sentences which he has viewed as being unduly short.

So I think that the Commission has been criticized for not returning discretion in the face of real efforts, by at least the most recent Commission, to do exactly that. The Commission has tried to return discretion and also, frankly, to fight off efforts by the Congress to impose additional mandatory minimums. These minimums have taken the form of legislative directives to the Commission telling it exactly what offense levels to establish for certain offenses rather than letting the Commission itself make an independent determination of what the sentences ought to be.

There was a very big change in the composition of the Commission when the Conaboy group came on and I think they honestly wanted to come up with an approach that was fair and that we would give the courts more discretion to impose appropriate sentences.

The principal difficulty encountered by the Conaboy Commission, which explains in large part why the Commission is where it is today, occurred with our first major policy matter that we addressed in 1995. That matter involved the crack-cocaine policy. The Commission issued a report at the time, unanimously criticizing the 100-to-1, quantity-based ratio between crack and

powder cocaine, under which crack penalties were much more severe than powder penalties.

In the aftermath of that report, the Commission voted 4-to-3 to return the quantity-based ratio from 100-to-1 to 1-to-1, thereby drastically reducing penalties for crack-cocaine.

In the face of that vote, in a tight 4-to-3 split (I voted with the dissenters), as you might expect, a very conservative Congress rejected that proposal. And it was a rejection that was not just something that occurred as a matter of law, but as a matter of politics. That rejection constituted a severe rebuff of the Sentencing Commission. Congress no longer trusted the Commission. Frankly, it felt that, if the majority of the Commission could vote to reduce crack penalties to such an extent, the Commission was goofy. And in the aftermath of that vote, the Commission would have to spend considerable efforts trying to re-win the trust of Congress.

I am not sure that it ever succeeded, and indeed I believe that the difficulties that Congress had in installing a new set of commissioners occurred in part because Congress did not trust the Commission. Congress does not even want the Commission, necessarily. They would like to simply have a Commission so that they can say that there is an independent agency, but whenever possible they would like to issue legislative directives telling this group what level to set certain sentencing guidelines.

So, the task facing the new Commission is to rebuild trust with the Congress and to rebuild trust with the criminal justice community. Moreover, I think the word has to get out that the Guidelines, for all the criticism that has been leveled at them, are working rather well.

The federal judges view them to be fair, and beyond that, the Guidelines are not as complex or burdensome as they have been made out to be. When you actually sit and take the time to engage in the intolerable labor of thought, and you read the manual, you realize it is not all that complicated.