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Sentencing Guidelines: Where We Are and How We Got Here

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Let me start off by saying that before the Sentencing Reform Act took effect nearly half of all offenders sentenced had their punishment determined by a guideline system that took into account their criminal history and the severity of the offense. It was a grid that is similar to, but not as complex as, the grid in the back of the Sentencing Guidelines book. That grid was administered by the United States Parole Commission. The effect of the Sentencing Reform Act was to move the guideline decision from the end of the punishment process to the beginning of the punishment process. There were consequences that flowed from that change and Judge Heaney has pointed out some of those consequences. There has been a shift in the relative power, for some of the participants in the system.[1]

The Sentencing Reform Act was a delegation to the Sentencing Commission by Congress of congressional power over sentencing. Congress could enact guidelines, but I think that Congress wanted to distance itself from the process. For one thing, most members of Congress do not view themselves as being elected to sit down and go through pre-sentence reports to determine what sort of factors ought to go into imposing sentence. They want to focus on broad public policy issues. The Sentencing Committee was to be a body of experts who would fine tune and craft guidelines that were detailed and that were intellectually honest and consistent—tasks that Congress, itself, did not want to undertake.

Unfortunately, almost after enacting the Guidelines system, Congress made the task of the Commission more difficult by enacting mandatory

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1. Editor's note: *See* Judge Heaney's comments, 44 ST. LOUIS U. L.J. 398-401 (2000), in this issue.

minimums. That presented the Commission with some questions. In the drug area, where mandatory minimums are based on quantity? If the Commission is going to have a drug guideline for trafficking offenses that is based on quantity, does the Commission ignore entirely the Congressional views of severity as expressed in the mandatory minimums and craft guidelines that it thinks appropriate and let the mandatory minimums override the Guidelines if the Commission's view of severity does not coincide with Congress's view? Or does the Commission take the Congressional numbers and work them into the Guidelines? The consequences of the latter might be much higher sentences than the Sentencing Commission, left to its own devices, might have come up with.

Congress, over the years, not only proposed and frequently enacted mandatory minimums, but also has started to enact directives of varying sorts for the Commission. Some of the directives were general, for example, to consider certain factors. Some of them were far more particular, for example, to enhance by a certain number of levels for certain kinds of conduct. I think that Professor Goldsmith has correctly stated that one of the serious problems confronting the new Commission is its relationship with Congress.[2]

The relationship between the Commission and Congress is a two-way street. The leadership of both parties in both Houses has to be educated about how the Guidelines work and what the Commission is seeking to accomplish. And the leadership, on both sides of the isle, in both Houses, has to be responsible and restrain some of the more hot-headed members of the body from enacting laws that are not sound public policy.

I think that Commissioner Goldsmith is correct that the crack episode damaged the Commission's credibility with the Hill and that relationship is going to have to be repaired.

I do not share Professor Goldsmith's view, however, of how judges made sentencing decisions before the Guidelines came into effect. I do not think the freakish way that he described was typical. In fact, I think, it was just the opposite.

Judges were thoughtful in their imposition of sentences. But, I think it also undeniable, and certainly Congress found it undeniable, that the result of having – at the time the Sentencing Reform Act was passed and enacted into law – over 500 independent decision-makers led to what Judge Heaney has called "inter-judge disparity."[3] Congress was interested in eliminating that disparity but not in eliminating discretion entirely. Congress wanted to leave some room for discretion, and the issue is how much room has been left. I

2. Editor's note: *See* Professor Goldsmith's comments, 44 ST. LOUIS U. L.J. 394, 397 (2000), in this issue.

3. Editor's note: *See* Judge Heaney's comments, 44 ST. LOUIS U. L.J. 398, 398 (2000), in this issue.

think the early Commission was perceived as wanting to discourage departures. Every time a court would depart, it seemed, there would be a proposed amendment addressing that departure ground and saying it was no longer a basis for departure.

If the new Commission wants to encourage judicial discretion and to give greater room for judges to exercise judgment (as Judge Heaney points out, judges are appointed for lifetime and given a great deal of power), the Commission ought to be encouraged.

I was not encouraged to hear Mr. McCloskey's description of prosecutorial discretion when he said his office rarely deviates from the strictures of the Guidelines.[4] To me that is not the exercise of discretion; that is the antithesis of discretion. To say that there is no gun case that could ever arise in his district that would not be something that you would plea bargain over means, to me, that you are not exercising discretion, but you are declining to exercise discretion.

My bottom line is that the Commission's first task is to repair its relations with Congress so that Congress can be educated into more constructive modes of legislating in the crime area rather than in some of the directions it has gone in the past.

4. Editor's note: *See* Mr. McCloskey's comments, 44 ST. LOUIS U. L.J. 391, 391 (2000), in this issue.