

Chapter One:

Introduction to the Sentencing Reform Act

A. The History of the Sentencing Reform Act

The history of the Sentencing Reform Act [SRA] has been described in the Commission's Four-Year Evaluation (USSC, 1991a), as well as in numerous articles and books listed in the bibliography in Appendix A (*see, e.g.*, Stith & Cabranes, 1998; Miller & Wright, 1999). This history will not be recounted in detail here. Instead, this section briefly sketches the historical context of sentencing reform, the legislative history of the SRA, and the initial development of the sentencing guidelines for those who are unfamiliar with other sources, with an emphasis on aspects that are valuable for understanding the workings of the guidelines system today.

1. *The Roots of Reform*

Federal sentencing reform has been described as another in a line of twentieth century legal reform movements that reflect two sometimes-competing American themes of Progressivism and Populism (Brooks, 2002). In the realm of government, the Progressive spirit has generally favored formation of public policy by expert agencies empowered to conduct research. By contrast, the Populist spirit has generally favored formation of public policy based on common sense and public sentiment.

The heritage of Progressivism can be seen in the SRA's emphasis on creation of an expert and independent agency, the United States Sentencing Commission. The SRA created a bipartisan commission in the judicial branch of government, and directed it to establish a "research and development program" (28 U.S.C. § 995 (a)(12)) that can "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(2). The Commission is to establish sentencing policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process . . ." 28 U.S.C. § 991(b)(1)(C). These sections all reflect the Progressive impulse, articulated by such early twentieth century reformers as John Dewey, to develop a scientific approach to social problems. Creation of independent commissions was a favorite tool of Progressive reformers intent on bringing expertise to public policymaking insulated from the passions of politics.

Early in the twentieth century, the Progressive impulse in criminal justice was expressed through the growth of indeterminate sentencing and the rise of the rehabilitative ideal (Rothman, 1983). Prisons were re-conceptualized from places of penance and punishment to institutions for the transformation of offenders into law-abiding citizens. Parole release and probation supervision were invented as central components of the new approach. Medical and social-psychological experts were called upon to design treatment and supervision programs, and indeterminate sentences allowed the

length of incarceration to be tailored to each offender’s progress toward rehabilitation, as judged by expert evaluators.

By the 1970s, faith in the rehabilitative ideal had declined (Allen, 1981), but faith in expert commissions remained. Progressive-minded reformers were led to a search for alternatives to indeterminate sentencing by growing mistrust of a “therapeutic state” and the dangers to liberty and fairness it potentially posed (Kittrie, 1971; Twentieth Century Fund Task Force on Criminal Sentencing, 1976), and by the lack of strong evidence for the effectiveness of correctional treatment programs (Martinson, 1974). Several proposals to rationalize the federal criminal code (ALI, 1962; ABA, 1968, 1979; Nat’l Comm. on Reform of Federal Criminal Law, 1971) included proposals for sentencing reform. Judge Marvin Frankel’s influential book, *Criminal Sentences: Law Without Order* (1972), called for creation of an independent sentencing commission that could replace judicial and parole board discretion with sentencing guidelines. In this new Progressive vision, the medical model of rehabilitation was replaced with legal and technocratic expertise, which could fashion penalties that were calibrated to the seriousness of the crime (Von Hirsch, 1976) or that were optimal for maximizing the control of crime while minimizing the costs of criminal justice (Becker, 1968).

Alongside the sections of the SRA that reflect a Progressive spirit, however, are sections that reflect a Populist distrust of both elite “experts” and politically unaccountable judges. The sentencing guidelines were intended most importantly to curtail judicial and Parole Commission discretion, which was viewed as “arbitrary and capricious” and an ineffective deterrent to crime.¹ The Sentencing Commission was also ordered to eliminate sentences that, in the view of Congress, “in many cases . . . do not accurately reflect the seriousness of the offense.” 28 U.S.C. § 994(m). The SRA contains dozens of other detailed instructions to the Commission, including directives to consider “the community view of the gravity of the offense;” and “the public concern generated by the offense” 28 U.S.C. § 994(c). Most importantly, while the Commission is charged with developing and amending the guidelines, the SRA ensures that the people’s elected representatives in Congress have an opportunity to review the Commission’s work before it becomes law. Congress reserved to itself the power, each year, to “modify or disapprove” any of the Commission’s amendments to the guidelines. 28 U.S.C. § 994(p).

Distrust of judges is a recurring theme of Populism, voiced early in the twentieth century by Nebraska Senator George Norris (1922), who declared that “Federal judges are not responsive to the pulsations of humanity” (Brooks, 2002). On two major occasions in the second half of the twentieth century, this distrust led to a very different type of determinate sentencing reform—a proliferation of mandatory minimum penalty statutes. Fixed mandatory penalties had been common in Colonial times but grew increasingly rare during the nineteenth century (Lowenthal, 1993). In 1956, however, Congress enacted the Narcotic Control Act, also known as the “Boggs Act,” which established minimum terms of imprisonment without parole for certain drug trafficking offenses. Finding that

¹ S. REP. NO. 225, 98th Cong., 2nd Sess. (1984), at 65 [hereinafter SENATE REPORT].

increases in sentence length “had not shown the expected overall reduction in drug law violations”² Congress pulled back from statutory minimum penalties with passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which repealed virtually all of the mandatory sentencing provisions. But beginning again in 1984, with expansions in 1986 and 1988, Congress enacted a series of mandatory penalties targeted at firearm, drug, and sex offenses, and at repeat offenders. Over one hundred such statutory penalties exist today alongside the sentencing guidelines, and more mandatory penalty provisions continue to be proposed in almost every session.

The tension between Commission developed guidelines and Congress enacted mandatory minimum penalty statutes greatly complicates the task of sentencing reform, as discussed in the Commission’s *Special Report to Congress: Mandatory Penalties in the Federal Criminal Justice System* (USSC, 1991b). The root tension between Progressive and Populist reform—between delegation to experts and popular oversight—also contributed to a lengthy process of public debate and legislative development before final passage of the SRA in 1984. These tensions resulted in legislation that reflects aspects of both movements, and thus, compromises and contradictions in both the goals to be achieved by sentencing reform and in the mechanisms created to achieve them.

2. *Legislative Development of the SRA*

The legislative history of the SRA has been subject to widely varying interpretations. Some scholars view the legislation as a thoughtful blueprint for rationalizing the sentencing process, with significant liberal elements meant to reduce over-reliance on imprisonment and preserve significant judicial discretion, albeit with some compromise of these principles as the legislation took final shape (Miller & Wright, 1999). Others believe the SRA was subtly transformed from the liberal blueprint originally introduced by Senator Edward Kennedy in 1975 into a law-and-order measure designed to increase the severity of punishment and virtually eliminate judges’ discretion to consider individual offender characteristics (Stith & Koh, 1993). Most agree, however, that the legislation that emerged from nearly a decade of deliberation and compromise contained important ambiguities, which left the original Sentencing Commission with significant administrative discretion to shape the guidelines system it was directed to create (Feinberg, 1993; Miller & Wright, 1999; Hofer & Allenbaugh, 2003).

The legislation that ultimately became the SRA survived the introduction of competing proposals in both the House and Senate. It was repeatedly amended over a decade of development before enactment, somewhat surprisingly, on October 12, 1984, as part of an omnibus continuing appropriations measure. The final version differed from the bill that was originally introduced and from competing proposals in many important respects.

² S. REP. NO. 613, 91st Cong., 1st Sess. 2 (1969).

Sentencing Reform Act Time Line

- Jan. 1971** National Commission on Reform of Federal Criminal Laws (the “Brown Commission”) issues report. The commission recommends classification and grading of offenses, concise listing of authorized sentences, limits on the cumulation of punishment for multiple offenses, parole following longer periods of imprisonment, and limited appellate review.
- Nov. 1971** U.S. District Judge Marvin E. Frankel (S.D.N.Y.) delivers lectures at the University of Cincinnati Law School, calling for a national commission to study sentencing, corrections, and parole; formulate laws and rules on the basis of the research; and enact rules subject to congressional veto.
- 1971-1974** Senate Subcommittee on Criminal Laws and Procedures considers Brown Commission proposals. The subcommittee holds hearings during the 92nd Congress and in the 93rd focuses on two legislative proposals: (1) S. 1, the Criminal Justice Codification, Revision, and Reform Act of 1973 and S. 1400, the Criminal Code Reform Act of 1973. The bills include large-scale criminal code re-codification. No mention is made of a sentencing commission or sentencing guidelines.
- 1975** Yale Law School professors (with support of the Guggenheim Foundation) advocate creation of a sentencing commission to issue sentencing guidelines, appellate review of sentences, and the abolition of parole.
- Nov. 1975** Sen. Edward Kennedy introduces bill during the 94th Congress (S. 2699) to form United States Commission on Sentencing to issue sentencing guidelines and to reduce numerous statutory maximum sentences.
- May 1976** The Parole Commission and Reorganization Act of 1976 (Pub. L. No. 94-233, 90 Stat. 219 (May 14, 1976)) is enacted. The act codifies the Parole Commission’s program that applied guidelines to all parole decisions beginning in 1974.
- 1977-78** In the 95th Congress, Senator McClellan and Sen. Kennedy sponsor S. 1437 to re-codify federal criminal laws, restrict parole, and to establish a sentencing commission to draft sentencing guidelines. An amended S. 1437 passes the Senate. The Subcommittee on Criminal Justice of the House Judiciary Committee subsequently conducts hearings on the bill and an alternative proposal, but reports a number of problems and takes no further action.

Sentencing Reform Act Time Line (Continued)

1979-1980 During the 96th Congress, S. 1722, the Criminal Code Reform Act of 1979 is introduced, which is similar to S. 1437 and creates a sentencing commission, but abolishes parole and adds the concept of supervised release. The House Judiciary Committee approves a sentencing bill (H.R. 6915) that proposes promulgation of guidelines by a seven-member, part-time, Judicial Conference Committee on Sentencing; authorizes greater flexibility to depart from those guidelines; and retains parole. Neither chamber acts on its version of the legislation.

1982 During the 97th Congress, Senate Judiciary Committee, reports a comprehensive criminal code revision bill, S. 1630, but no Senate action occurs on the proposal. A nearly identical sentencing reform package, S. 2572, passes the Senate, but gets deleted from the House version of the bill.

1983-1984 Senators Strom Thurmond and Paul Laxalt, during the 98th Congress, introduce S. 829, comprehensive crime control legislation that contains sentencing reform as Title II. Senate Judiciary Committee holds hearings and breaks S. 829 into several bills, including S. 1762, the Comprehensive Crime Control Act of 1983, which contained a major section on sentencing reform, and S. 668, a bill by Sen. Kennedy virtually identical to Title II. Both bills pass the Senate in 1984.

The House Judiciary Committee reports out H.R. 6012 that calls for determinate parole terms and the creation of a part-time commission within the Judicial Conference to draft advisory sentencing guidelines. The bill is not considered by the full House.

An amended Comprehensive Crime Control Act is made part of a continuing appropriations bill, is passed by both chambers of Congress, and is signed into law by President Reagan on October 12, 1984. The portion of the act creating the United States Sentencing Commission and instructing it to create sentencing guidelines for the federal courts is termed the Sentencing Reform Act of 1984.

Away from judicial control of guidelines development. The bill originally introduced by Sen. Kennedy³ and subsequent competing proposals in the House⁴ called for development of sentencing guidelines within the existing administrative structure of the judiciary. Some proposals called for guidelines to be developed by a committee of the Judicial Conference of the United States. Sen. Kennedy's bill called for a commission whose members would be chosen entirely by the Judicial Conference. But over its years of development, the idea of the Sentencing Commission was transformed from a judge-dominated agency to an agency whose membership is more closely connected to the Executive and Legislative branches. Under the terms of the SRA, as finally enacted, all commissioners are to be chosen by the President with the advice and consent of the Senate. 28 U.S.C. § 991(a). The role of the Judicial Conference was reduced from choosing the commissioners, to recommending a list of judges from which the President would be required to choose, to recommending a list of six judges which the President is required only to "consider." The SRA required just three of seven voting commissioners to be active federal judges. The PROTECT Act recently further changed the Commission structure to eliminate the requirement of a minimum judicial presence on the Commission and set the maximum number of judge-members at three.

Proponents of judicial involvement had argued that the judiciary already had the capacity for guidelines development, which was similar to their existing responsibility for developing rules of practice and procedure for the courts. Some members of the House believed that "[j]udges who have had a strong

The U.S. Sentencing Commissioners

The seven voting members on the Commission are appointed by the President, confirmed by the Senate, and serve staggered six-year terms. The Commission has always included federal judges, which are selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. The Commission has a chair and three vice chairs.

No more than four commissioners, or two vice chairs, may belong to the same political party. The Attorney General or his/her designee is a non-voting, *ex-officio* member of the Commission, as is the chair of the U.S. Parole Commission. No commissioner may serve more than two full terms. When an appointment expires, the commissioner may continue to serve until Congress adjourns sine die or a new commissioner is appointed. Four affirmative votes are necessary for the Commission to pass sentencing policy.

Since its inception there have been four Commission chairs: Judge William W. Wilkins, Jr., U.S. Court of Appeals, Fourth Circuit; Judge Richard P. Conaboy, U.S. District Court, Middle District of Pennsylvania; Judge Diana E. Murphy, U.S. Court of Appeals, Eighth Circuit; and the present chair, Judge Ricardo H. Hinojosa, U.S. District Court, Southern District of Texas.

³ S. 1437, 95th Cong., 1st Sess. (1977).

⁴ H.R. 6915, 96th Cong., 2nd Sess. (1980).

voice in developing the guidelines will be more likely to consistently and fairly apply them.”⁵ But the prevailing opinion was “a reluctance to have the people in the middle of the problem try to solve it.”⁶ Rather than retain even tighter control over sentencing—as some states such as California had with legislatively drafted determinate sentences, and as Congress itself did when enacting mandatory minimum penalties—Congress instead opted for an independent Commission within the Judiciary with close connections to the Legislative and Executive Branches.

Away from voluntary guidelines. As it developed, sentencing reform legislation shifted from a model that continued significant discretion for sentencing judges toward a model of sharply limited discretion. Sentencing guidelines systems in the states range along a continuum from “voluntary” or “advisory,” to “presumptive,” to “mandatory” (BJA, 1998). The differences among them are marked by the standards governing when a judge may depart from the recommended guideline range, and the extent of appellate review of those departures. The original federal legislation called for advisory guidelines with limited appellate review. During Senate debates in 1978 however a standard was added requiring that judges sentence within the prescribed guideline range unless “the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Commission in formulating the guidelines and that should result in a different sentence.”⁷ This was intended to ensure that the guidelines were treated as “presumptive” rather than “voluntary” (Miller & Wright, 1999). Subsequent attempts to loosen the departure standard in the Senate and the House were defeated (Stith & Koh, 1993).

The final SRA also provided for an automatic right-of-appeal if a judge sentences outside the prescribed guideline range. 18 U.S.C. § 3742. Defendants have an automatic right-of-appeal if a judge departs upward (imposes a sentence that is longer than the top of the guideline range). The government has an automatic right-of-appeal if the judge departs downward. Sentences may also be appealed by either party based on a misapplication of the guidelines.

As the guidelines were taking effect in 1987, the departure standard was again revisited and revised slightly:

The court shall impose a sentence of the kind, and within the range [required by the guidelines] unless the court finds that there exists an aggravating or mitigating circumstance *of a kind, or to a degree*, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described” (new language italicized). 18 U.S.C. § 3553(b).

The author of this amendment, Rep. John Conyers, apparently intended it to expand the discretion of the sentencing judge to depart from the guidelines. However, a “joint explanation” inserted into the Congressional Record by several senators contradicted this analysis (Miller & Wright, 1999).

⁵ H.R. REP. NO. 1017, 98th Congress, 2nd Session, at 93-94 (1984).

⁶ CONG. Q., 1983, at 339.

⁷ 124 CONG. REC. 382-83 (1978) (unprinted amend. No. 1100, adopted Jan. 23, 1978).

Thus, the legislative history and final text of the SRA are somewhat ambiguous as to just how restrictive the departure standard was intended to be, particularly in combination with other provisions of the Act. Ultimately, actions of the Commission, the appellate courts, and Congress shaped where the federal guidelines fall on the continuum between presumptive and mandatory. Prior to the

Blakely v. Washington: A New Challenge for Federal Sentencing Reform

On June 24, 2004, the Supreme Court decided *Blakely v. Washington*, 124 S.Ct. 2531 (2004), a case with potentially profound consequences for the federal sentencing guidelines and for the sentencing reform movement. The court invalidated a sentence imposed under the Washington State sentencing guidelines because it violated the defendant's rights under the Sixth Amendment to the United States Constitution. The judge in the case had departed from the standard sentencing range, set out by the legislature in the state's sentencing statutes, based on an aggravating factor that had not been admitted by the defendant as part of his guilty plea nor proven to a jury beyond a reasonable doubt.

Although the majority opinion made clear that the court was not passing judgment on the constitutionality of the federal sentencing guidelines, which were not before the court, some of the dissenting justices and numerous commentators argued that the decision raised questions about the constitutionality of the federal guidelines or the procedures used to enhance sentences under them. District judges and circuit courts have reached varying opinions on the implications of the decision for federal sentencing. The Supreme Court has accepted certiorari in two cases in order to clarify the implications of *Blakely*, if any, for the federal sentencing guidelines. Oral arguments were given in *United States v. Booker* (375 F.3d 508 (7th Cir. 2004)) and *United States v. Fanfan* (2004 U.S. Dist. LEXIS 18593 (D.Me. June 28, 2004)) on October 4, 2004, the first day of the court's 2004-2005 term, with a decision in the case expected later in the year.

Until these questions are resolved, the ultimate status of the federal sentencing guidelines will remain uncertain. In the meantime, numerous observers have hoped that the *Blakely* decision will inaugurate a renewed national conversation about the state of federal sentencing and the sentencing guidelines. (Testimony of witnesses at a hearing before the Senate Judiciary Committee, "*Blakely v. Washington* and the Future of the Federal Sentencing Guidelines," July 13, 2004.) The Commission will be part of this conversation and believes that the results of the Fifteen-Year Evaluation of the guidelines can make an important contribution to understanding and improving federal sentencing.

Supreme Court's decision in June, 2004, in the case of *Blakely v. Washington*,⁸ which again raised questions about the constitutionality of the federal guidelines, all observers agreed that the federal guidelines were far from voluntary. Judges were legally bound to apply them unless a departure could be justified to the appellate court if the case were appealed. But whether the guidelines were sufficiently mandatory was a source of continuing debate.

In 2003, Congress concluded that the governing standards for appellate review of departures had resulted in an unacceptably high downward departure rate, particularly in the area of sex offenses against children. For these latter offenses, the PROTECT Act of 2003 eliminated judicial departures for all reasons except those specifically authorized in Chapter Five, Part K, of the *Guidelines Manual*. For other downward departures, the PROTECT Act established *de novo* review upon appeal. The Act also directed the Sentencing Commission to amend the guidelines and policy statements in order to substantially reduce the incidence of downward departures. The Commission implemented this directive in amendment 651, which narrowed the circumstances in which departure is authorized. Results of a Commission study of downward departures was published simultaneously with the amendment (USSC, 2003b).

The PROTECT Act made other changes to sentencing policies and practices that will be discussed further where appropriate in the remainder of this report. It also established requirements for reporting sentencing and departure information to the Commission and, upon their request, to the Department and Congress. Data from these new reporting requirements are not available at the time this report is being written, but departures will continue to be closely monitored by the Commission.

Toward greater sentencing severity. Changes in the legislation through its decade of development also encouraged the Commission, and in some cases required it, to increase sentence severity. Provisions designed to control or reduce the use of imprisonment were weakened. For example, the bill as originally introduced directed the Commission to assure that the capacity of the federal prisons “will not be exceeded.”⁹ But, in the final SRA the Commission is required only to “minimize the likelihood” that prison capacity will be exceeded. 28 U.S.C. § 994(g). Similarly, while the original legislation encouraged the Commission to be guided by the prison terms then typically served for various types of crime, the final Act specifically directed the Commission to use then-current practice only as a “starting point.” The Commission was to “insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.” 28 U.S.C. § 994(m).

As described above, the SRA contains other provisions reflecting a Populist belief that judges tend toward leniency and should be constrained by “guidelines and policy statements that have teeth in them.”¹⁰ The final SRA also contained an early type of “Three-Strikes-You’re-Out” provision that requires a term “at or near the maximum term authorized” for repeat drug and violent offenders.

⁸ 124 S.Ct. 2531 (June 24, 2004).

⁹ S. 1437, *supra* note 3, at § 124.

¹⁰ 130 CONG. REC. 1644, 838 (1984)(statement of Sen. Strom Thurmond).

28 U.S.C. § 994(h). As will be shown in Chapter Two, the SRA ultimately resulted in guidelines that have contributed to a doubling of the average prison time served by federal felony offenders.

Toward regulation of plea bargaining. Finally, concern that charge selection and plea bargaining could limit or thwart the goals of sentencing reform surfaced early in scholarly writings (Twentieth Century Fund, 1976; Zimring, 1976) and in congressional debates (*see* Schulhofer & Nagel, 1989). Reform skeptics pointed out that prosecutors had considerable discretion to select charges and structure plea agreements, but that in the preguidelines era judges and the Parole Commission, in setting sentences and release dates, could temper the effects of prior prosecutorial decisions. Binding sentencing guidelines, without parole, could eliminate these checks, and prosecutors could conceivably exercise considerable control over sentences through the charges they bring and the facts they prove at sentencing. The result would be a shift of discretion toward prosecutors, which could perpetuate disparity and reduce the certainty of punishment.

In 1978, in response to these concerns, the Federal Judicial Center [hereinafter FJC] undertook a study of the interaction of prosecutorial discretion and sentencing (FJC, 1979). It concluded that in the preguidelines era, judges could control the impact of plea bargaining in various ways. Under sentencing guidelines, however, discretion could be transferred to prosecutors. Further, the exercise of prosecutorial discretion would be relatively invisible; unless some judicial mechanism were found to control it, plea bargaining would be subject to supervision only within the Department of Justice and each U. S. attorney's office. The report recommended that the sentencing reform bills then pending before Congress should be amended by adding a directive to the Sentencing Commission to issue guidelines for judges to use when deciding whether to accept a guilty plea.

The FJC report heightened congressional concern that sentencing reform might actually increase disparities in federal sentencing by shifting discretion to prosecutors (*see* Schulhofer & Nagel, 1989). To address this possibility, Congress adopted a slightly weakened version of the mechanism recommended in the report. The Senate amended the pending bill to direct the Sentencing Commission to issue *policy statements*, instead of binding *guidelines*, governing the acceptance of plea agreements. This provision was included in the SRA as 28 U.S.C. § 994(a)(2)(E), which ordered the Commission to promulgate policy statements to all courts regarding the appropriate use of "the authority granted under Rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement" The *Senate Report* accompanying the SRA confidently asserted that "this guidance will assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines."¹¹

By the time the SRA was signed into law by President Reagan in 1984, it had undergone nearly ten years of development. It was designed to revamp a federal sentencing system Congress described as "ripe for reform."¹²

¹¹ SENATE REPORT, *supra* note 1, at 63.

¹² *Id.*

B. Goals and Purposes of the SRA

The goals identified in the SRA for the new system provide the best criteria for judging whether sentencing reform has been successful. These goals can be divided into two groups. The first group, the goals of sentencing reform itself, include certainty and transparency in punishment and the elimination of unwarranted disparity. Research on the effectiveness of the system at achieving these goals is the subject of the remaining chapters of this report. The second group, establishment of policies that will best accomplish the purposes of sentencing—which are usually summarized as just punishment, deterrence, incapacitation, and rehabilitation—is the subject of previous Commission-sponsored research (*see* Rossi & Berk, 1996) as well as ongoing research at the Commission. Results of this work will be addressed in future installments of the research series on the recidivism of federal offenders and other commission reports.

1. *The Goals of Sentencing Reform*

Reducing unwarranted disparity. The “first and foremost” goal of sentencing reform is avoiding unwarranted sentencing disparity (Feinberg, 1993). Much has been written defining unwarranted disparity (Blumstein, 1983). Obviously, not all different treatment of offenders is unfair, so long as it reflects differences in the seriousness of their crimes or in other relevant case or offender characteristics. But sentencing reform aimed to:

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities *among defendants with similar records who have been found guilty of similar criminal conduct* while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; 28 U.S.C. § 991(b)(1)(B) (emphasis added).

Section 994(f) reiterates this goal of “providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.”

The possibility that different racial or ethnic groups might receive unfair treatment was part of the motivation for the SRA, and it remains the subject of much public and scholarly interest. Research investigating the role of race, ethnicity, and gender in federal sentencing is presented and discussed in Chapter Four of this report. The legislative history of the Act clearly shows, however, that different treatment by different judges was the chief problem the Act was designed to address, as well as regional differences in sentencing.¹³ The success of the guidelines at reducing inter-judge and regional sentencing disparities will be discussed in Chapter Three of this report.

Assuring certainty and severity of punishment. In a narrow sense, the success of the guidelines at achieving certainty of punishment has never been an issue, because the establishment of truth-in-sentencing through the elimination of parole accomplished it at a stroke. In a broader

¹³ SENATE REPORT, *supra* note 1, at 41-46.

sense, however, certainty of punishment is weakened when defendants are not held accountable for all of the criminal acts they actually committed. Charging or plea bargaining practices that allow defendants to avoid punishment for some acts, can undermine the certainty of punishment in this sense. Existing evidence regarding the effects of charging decisions, plea bargaining, and guideline avoidance on the certainty of punishment and on sentencing disparity will be reviewed in Chapter Three of this report.

The SRA also called for increased sentence severity for many types of offenses. The effect of the guidelines on the use of probation and the length of time served for various types of crime will be discussed in Chapter Two of this report.

Increased rationality and transparency of punishment. Finally, the SRA aimed to increase the rationality and transparency of sentences. By replacing the unguided discretion of the preguidelines era with a system of binding legal rules that specify in advance the effect of most offense circumstances the predictability of sentences was increased. Rationality was further advanced by requiring the Commission to develop policies and practices that “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process” (28 U.S.C. § 991(b)(1)(C)) and to “develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.” 28 U.S.C. § 991(b)(2). Transparency was advanced by requiring each judge to “state in open court the reason for its imposition of the particular sentence” and to provide a written record of these reasons. 18 U.S.C. 3553(c). Disclosure of the presentence report, with its preliminary application of the guidelines to each case, at least ten days before the sentencing hearing, further reduces the possibility of surprise and confusion regarding the reasons for the sentence ultimately imposed. 18 U.S.C. § 3552(d). The increased rationality, transparency, and predictability of the guidelines system will be discussed in Chapter Five of this report.

2. The Purposes of Punishment

In addition to these goals of sentencing reform, the SRA directed the Commission to: “(1) establish sentencing policies and practices for the Federal criminal justice system that—(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of Title 18, United States Code.” 28 U.S.C. § 991(b)(1). That section lists the purposes as:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

Proportionality: Making the Punishment Fit the Crime. The vast majority of the sentencing guidelines, particularly in Chapters Two and Three of the *Guidelines Manual*, are aimed at assuring that the severity of punishment is proportional to the seriousness of the crime. Each crime is assigned a “base offense level” as a starting point in grading the seriousness of the offense. Guideline

adjustments then increase or decrease this score to account for aggravating or mitigating factors that differentiate degrees of harm of different offenses and the varying culpability in each case. The Commission has used a wide variety of information to assess crime seriousness, including survey data on public perceptions of the gravity of different offenses, analysis of various crimes' economic impacts, and medical and psychological data on the harm caused by drug trafficking, sexual assaults, pollution, and other offenses.

Crime control through incapacitation and deterrence. The original Commission recognized crime control as the ultimate objective of the criminal law and of sentencing policy (*Guidelines Manual*, Historical Introduction, at 2). It also recognized that proportionate punishment can control crime through a deterrent effect. It followed the practice of most state guideline systems (Kauder, et al., 1997) and the federal Parole Commission—which had developed a “Salient Factor Score” to help predict the recidivism risk of various offenders—by increasing the term of imprisonment for offenders who were at a greater risk of recidivism (Hoffman & Beck, 1997). To minimize conflict with the other purposes of punishment, the Commission chose to predict risk using only the offender's criminal history (Hofer & Allenbaugh, 2003). Chapter Four of the *Guidelines Manual* provides rules for assigning each offender to a “criminal history category” which, along with the offense level, determines the range of imprisonment and sentencing options available to the judge.

As part of the Fifteen-Year Evaluation, the Commission has undertaken a major empirical study of the recidivism of federal offenders. The results of this study, published as Release 1 in the Research Series on the Recidivism of Federal Guideline Offenders, have reconfirmed the validity of the criminal history score as a measure of recidivism risk (USSC, 2004). Further analysis of these data will allow the Commission to refine the criminal history category to make it an even more accurate predictor of risk. Additional research is also underway to assess the deterrent effect of various terms of imprisonment and other aspects of the guidelines' efforts at crime control.

Rehabilitation. The SRA directs judges to consider each defendant's need for educational and treatment services when imposing sentence. However, the SRA and the guidelines make rehabilitation a lower priority than other sentencing goals (*see* Hofer & Allenbaugh, 2003). For example, the Commission was directed to ensure that “the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant.” 28 U.S.C. § 994(k). Despite the relatively low priority given rehabilitation, judges are still required to assess a defendant's need for treatment or training when they decide whether to impose any special conditions of probation or supervised release. *See* USSG §5D1.3(d). (Supervised release has replaced parole as the means to provide offenders with post-imprisonment supervision.) Because prison rehabilitation programs are administered by the Bureau of Prisons and post-imprisonment programs are administered by the probation service of the Administrative Office of the United States Court, these agencies have conducted the most extensive research on the effectiveness of treatment and training programs (BOP, 1997).

C. The Commission's Implementation of the SRA

A number of articles by original commissioners have described in detail how they set about implementing the directives in the SRA (Breyer, 1988; Nagel, 1990; Wilkins, 1992a; Corrothers, 1992). The details of these efforts will not be repeated here, but a brief summary of the guideline development process is provided for readers unfamiliar with the history of the Commission. An introduction to how the guidelines determine the sentence is also provided for those unacquainted with the guidelines' operation.

1. *Guidelines Drafting Procedures*

Sentencing Philosophy. The SRA directed the Commission to develop guidelines that would advance all of the goals of sentencing reform and all the purposes of sentencing reviewed above. Sentencing philosophy was a source of much discussion among the original Commissioners. For the first 18 months of its existence, competing versions of the Guidelines were developed and debated, each built on different theoretical principles, such as just desert theory or the economics-based theory of optimal penalties (Nagel, 1990). None of these proposals gained sufficient support to win acceptance, so the Commission decided to use an empirical approach instead (*see* Breyer, 1988, for a fuller discussion of these developments).

Although the Commission has never explicitly articulated a philosophy of sentencing, the guidelines rules themselves reflect a fairly clear ordering (Bowman, 1996; Hofer & Allenbaugh, 2003). Like guideline systems in the states, the federal guidelines reflect the current "consensus model of criminal punishment" (Frase, 2003), a form of "limiting retributivism" (Morris, 1977). This approach places primary emphasis on punishment proportionate to the seriousness of the crime and, within the broad parameters of this retributivism, lengthier incarceration for offenders who are most likely to recidivate. Some scholars call this approach "modified just desert" (Monahan, 1982). The Commission approvingly cited scholars working within this model in the *Supplementary Report* that accompanied promulgation of the guidelines (USSC, 1987, p. 16).

The use of data on past practices and recidivism. The original Commission based the guidelines on many considerations, including distinctions made in the substantive criminal statutes, the United States Parole Commission's guidelines, and public commentary. However, an important starting point in the deliberations was a statistical analysis of preguidelines sentencing practices. The Commission analyzed detailed data drawn from more than 10,000 reports of offenders sentenced in 1985 and additional data from approximately 100,000 more federal convictions. The Commission determined the average prison term likely to be served for each generic type of crime. These averages established offense levels for each crime, which were directly linked to a recommended imprisonment range. Aggravating and mitigating factors that significantly correlated with increases or decreases in sentences were also determined statistically, along with each factor's magnitude (USSC, 1987). These formed the bases for "specific offense characteristics" for each type of crime, which adjusted the base offense level upward or downward.

The Commission used the statistical results as a starting point for deliberations, departing from past practice when a majority of the Commissioners agreed there was a reason to do so. Guidelines for most crimes were based on past practices, but important considerations led the Commission to depart from past practices for certain crimes such as fraud and drug trafficking. Some of these considerations were driven by statute. The SRA required that the Commission provide “a substantial term of imprisonment” for certain categories of offender,¹⁴ and statutory minimum penalties, enacted as the guidelines were being drafted, dictated many terms of the drug trafficking guidelines. The Commission also sought to correct past under-punishment of crimes, such as “white collar” crimes.

In addition to the offense level, the guidelines take into account each offender’s criminal history. The offender’s “criminal history score,” designed to predict recidivism, is based on the frequency, seriousness, and recency of prior criminal convictions, and whether the offender was under criminal justice supervision at the time of the present offense. The rules the Commission developed were based on factors that prior research had found to be empirically related to the likelihood of future criminal behavior (Hoffman & Beck, 1997). The criminal history score was designed to predict recidivism, but uses only criminal history to do so (as opposed to also using employment or drug use history, as had the Parole Commission’s salient factor score). In this way, the Commission sought to reduce the tension between preventing future crime and just punishment for the current crime. Offenders with prior convictions were shown to be more likely to recidivate, and also were viewed as more culpable and therefore more deserving of punishment.

The necessary level of detail. One important question in developing the guidelines was how much detail to build into the system, that is, how many different offense level adjustments and criminal history categories were needed to adequately differentiate among crimes and offenders. A very simple system could produce sentence uniformity, but at the expense of proportionality. A few general categories might make the guidelines easy to administer, but at the cost of lumping together offenders who are very different in important respects. This problem arises in statutory minimum penalties that require the same penalty for very different offenders—for example, at least ten years imprisonment for all offenders who traffic in a certain quantity of drug, regardless of the mitigating factors that may be present in some of the cases (USSC, 1991(b)).

On the other hand, a sentencing system that attempts to account for every conceivable offense and offender characteristic relevant to sentencing could quickly become unworkable. As the number and complexity of decisions needed to apply the guidelines increase, so do the resources required for investigations and sentencing hearings, as well as the risk that different judges will apply the guidelines differently (Ruback & Wroblewski, 2001). In the end, the original Commission balanced these concerns and devised a Sentencing Table with 43 offense levels and 6 criminal history categories with overlapping ranges of imprisonment. In creating this table the Commission was guided by the provision in the SRA, sometimes called the “25 percent rule,” which requires that the maximum of each recommended sentencing range exceed the minimum of the range by no more than six months or 25 percent of the minimum range, whichever is greater.¹⁵ This rule requires guidelines of sufficient detail to assign offenders to relatively narrow ranges of recommended prison terms.

¹⁴ 28 U.S.C. § 994(i).

¹⁵ 28 U.S.C. § 994(b)(2).

2. *How the Guidelines Determine the Presumptive Sentence*

The federal sentencing *Guidelines Manual* sets out the rules that determine the presumptive guideline range in every case and contains additional policy statements, background commentary, and application notes to assist courts in applying the guidelines as intended. The manual is revised annually, and all versions can be found at the Commission’s website www.ussc.gov. The basic structure of the guidelines, has remained constant throughout the guidelines era.

General application principles. Chapter One of the manual lays out the steps to be followed in determining each offender’s guideline range. The process begins with deciding which guideline from Chapter Two best applies to each count of conviction or group of closely related counts. (Counts that are closely related—for example, fraud and conspiracy to commit the fraud, or multiple drug sales that are part of an ongoing common scheme—are treated as single offenses and sentenced under the same Chapter Two guideline according to the “Multiple Count” rules in Chapter Three, Part D.) If a plea agreement stipulates a more serious offense than the offense of conviction, the Chapter Two guideline for the more serious offense is used. USSG §1B1.2.

A preliminary offense level is then determined under Chapters Two and Three for each count or group of counts. In determining which base offense level, specific offense characteristics, cross-references among guidelines, or other special instructions apply, the court considers all “relevant conduct.” The relevant conduct rule has been called the “cornerstone” of the guidelines system (Wilkins & Steer, 1990) and it is described in greater detail later in this chapter. After the offense levels for all counts or groups have been determined, a “combined offense level” is determined according to the multiple count rules found in Chapter Three, Part D. This offense level may be reduced by two or three levels if the offender qualifies for a reduction under the “acceptance of responsibility” guideline found in Chapter Three, Part E. The court then determines the offender’s criminal history score and placement in a Criminal History Category. Together, the offense level and criminal history category determine where the defendant’s case falls in the Sentencing Table.

The offense level. Each guideline contains a base offense level, which is the starting point for ranking the seriousness of each particular offense. More serious types of crime have higher base offense levels; for example, trespass has a base offense level of 4, while kidnaping has a base offense level of 32. Most guidelines include a number of specific offense characteristics, which can increase or decrease the offense level. For example, the guideline for theft increases the offense level based on the amount of loss involved in the offense. The guideline for robbery increases the offense level by five if a firearm was brandished or possessed, and by seven if a firearm was discharged.

Chapter Three contains additional offense level adjustments that pertain to all kinds of offenses. Categories of adjustments include: victim-related adjustments, the offender’s role in the offense, and obstruction of justice. For example, if the offender knew that the victim was unusually vulnerable due to age or physical or mental condition, the offense level is increased by two levels. If the offender was a minimal participant in the offense, the offense level is decreased by four levels. If the offender obstructed justice, the offense level is increased by two levels. Chapter Three also includes the multiple counts rules and the adjustment for the offender’s acceptance of responsibility.

The Sentencing Table

The Sentencing Table is found in Chapter Five, Part A, of the *Guidelines Manual*. The range of recommended sentences for every offender is given in the cell of the table at which the offender’s final offense level and the criminal history category intersect. The table provides 43 levels of offense seriousness and six criminal history categories, making a total of 258 cells.

In the following excerpt from the table, an offender with a criminal history category of I and a final offense level of 20 would have a guideline range of 33 to 41 months.

Sentencing Table (excerpt)

(in months of imprisonment)

Criminal History Category

Offense Level	I	II	III	IV	V	VI
...
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
...

The lowest level of the table is divided into four zones, which define the alternatives to imprisonment that are available to the judge. In Zone A, involving ranges of 0-6 months, judges may impose any sentencing option from probation to imprisonment. In Zones B and C, certain more restrictive alternatives to imprisonment are available (*see* accompanying text). In Zone D, which includes 206 of the cells, only sentences of imprisonment are available. At offense level 43, life imprisonment is required.

Criminal History. Chapter Four contains the rules that assign offenders to one of the six criminal history categories. Criminal History Category I is for offenders with the least serious criminal record and includes many first-time offenders. Criminal History Category VI is for offenders with the most extensive criminal records. The chapter also contains a special provision for “Career Offenders,” USSG §4B1.1, which implements the directive in the SRA that requires the Commission to provide a sentence “at or near the maximum term authorized” for certain categories of violent and drug trafficking offenders with two or more prior offenses. (28 U.S.C. § 994(h). Other provisions apply to “Armed Career Criminals” USSG §4B1.4, who are subject to a statutorily enhanced sentence under 18 U.S.C. § 924(e), and to “Repeat and Dangerous Sex Offender Against Minors” USSG §4B1.5.

Determining the final sentence.

Judges must impose a sentence within the guideline range unless a reason for departure can be identified and stated on the record. For offenders convicted of less serious offenses with relatively little criminal history, Chapter Five, Part F provides sentencing options other than imprisonment. The Sentencing Table is divided into four zones, A through D. Offenders in all zones *may* receive a sentence of imprisonment, but offenders in Zone D, which is the great majority of the Sentencing Table, *must* receive a term of imprisonment equal to at least the minimum of the guideline range. In Zones A through C judges have the option of imposing alternative sentences, depending on the particular zone in which the defendant falls.

Zone A (offenders with sentencing ranges of 0-6 months):

- probation;
- probation with confinement conditions (*i.e.*, intermittent confinement, community confinement, or home detention).

_____ *Zone B (offenders with sentencing ranges of 1-12 months):*

- probation with a condition that substitutes intermittent confinement, community confinement, or home detention for at least the minimum of the guideline range;
- imprisonment of at least one month plus supervised release with a condition that requires community confinement or home detention to be served for the remainder of the minimum term specified in the guideline range.

Zone C (offenders with minimum terms of 8-16 months):

- imprisonment of at least one-half of the minimum term plus supervised release with a condition requiring community confinement or home detention to be served for the remainder of the minimum term specified in the guideline range.

Chapter Five, Part D, contains provisions governing the use of “supervised release,” which is a period of supervision following release from prison. Supervised release provides the opportunity for the managed re-entry of an offender back into the community, as was once provided by parole release. (Chapter Seven of the *Guidelines Manual* contains policy statements for the revocation of probation or supervised release if an offender fails to abide by the conditions of his or her supervision.) Chapter Five, Part E, establishes guidelines for the imposition of fines, restitution, assessments, and forfeitures. Other provisions of Chapter Five provide rules for the use of consecutive or concurrent sentences and other sentencing matters. Parts K and H establish policies regarding departure from the guidelines for various reasons, as discussed further below.

D. Components of the Reformed Sentencing System

The SRA contained a long list of specific goals for sentencing reform. Inherent in these goals is the preservation of American values, such as fundamental fairness, due process of law, and the efficient administration of criminal justice. Congress recognized that to achieve all of this, more than just the promulgation of sentencing guidelines would be needed. A new and coordinated federal sentencing *system* involving all three branches of government was required. The components of this new system can be divided into two stages: *policy development* and *policy implementation*. In this section, we explore the components of these stages and illustrate how they were intended to work together to realize Congress’s goals for federal sentencing.

1. Components of Guidelines Development

- ***Collaboration among policymakers, implementers, and other stakeholders***
- ***Utilization of specialized criminological and sentencing expertise***
- ***Political accountability through Executive participation and Legislative directives and review***

Collaboration among policymakers, implementers, and other stakeholders. The SRA contemplates the development of sentencing policy and practices through a process of collaboration between the Commission and all major “stakeholders” in the federal criminal justice system, as well as input from interested observers and the general public.

The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines. . . . In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the federal Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the U. S. Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission’s guidelines suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission’s work.
28 U.S.C. § 994(o).

Clearly, the SRA envisions a highly collaborative process of guideline development and revision.

The Commission heeded these instructions and “decided early in its deliberations that the only way to develop practical sentencing guidelines was through an open process that involved as many interested individuals and groups as possible. By tapping the expertise and experience of those who work in the system, the Commission ensured that its guidelines would be grounded in reason and practicality” (USSC, 1987). The Commission conducted nationwide hearings and met with representatives of a wide range of federal agencies, even beyond the list contained in the SRA.

Through the years, the Commission has been advised by Standing Advisory Groups of Probation Officers and Attorney Practitioners, as well as by Special Advisory Groups on research, organizational crimes, environmental crimes, Native Americans, and a variety of other topics. The Department of Justice, through its *ex-officio* member of the Commission, and with the help of the Sentencing Subcommittee of the Attorney General’s United States Attorneys Advisory Committee, provides important feedback on Commission priorities and proposed amendments. The Commission

collaborates with the Judicial Conference of the United States through meetings with the Conference and its Committee on Criminal Law, which has a Subcommittee on Sentencing.

The SRA directs the Commission to comply with the “notice and comment” provisions of the Administrative Procedures Act. 28 U.S.C. § 994(x). In addition, the Commission adopted its own Rules of Practice and Procedure, which were revised in 2001 (USSC, 2001c). These rules provide for the annual publication of a Notice of Priorities, the timely publication of Issues for Comment and Proposed Amendments in the Federal Register and through the Commission’s own website. The rules also provide for a period of public comment, all of which is reviewed prior to any Commission action. The Commission conducts almost-monthly public meetings and annual public hearings where it receives testimony from concerned interest groups and citizens.

These extensive mechanisms for obtaining input from interested parties are both required by law and recommended by experience. Research on program change and evaluation has consistently demonstrated that for sentencing reform to succeed, it must enjoy the confidence of those charged with implementing the new policy (Von Hirsch, et al., 1987). Open collaboration with key stakeholders is intended to obtain “buy in” from the essential participants in the federal sentencing system to help ensure that the guidelines are perceived as legitimate and credible.

Utilization of specialized criminological and sentencing expertise. The SRA envisions policymaking informed by a research program that can “develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.” 28 U.S.C. § 991(b)(2). This ongoing research helps ensure that the guidelines “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. . . .” 28 U.S.C. § 991(b)(1)(C). The Commission serves as a “clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices” (28 U.S.C. § 995(a)(12)(A)), and to “collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process. . . .” 28 U.S.C. § 995(a)(15).

The Commission responded to these mandates by developing a large data collection and policy analysis facility. Documents, including presentence reports, written plea agreements, and Judgment and Conviction orders, are received from courts throughout the country on virtually every federal defendant sentenced under the guidelines. Data from these documents are extracted and entered into the Commission’s Monitoring Database, the most extensive collection of information on federal crimes, offenders, and sentences collected by any agency. The Commission’s annual *Sourcebook of Federal Sentencing Statistics* (USSC, 2002) is based on these data, and contains descriptions of the types of crimes and sentences imposed for each federal judicial district. The Commission also houses a library containing an extensive collection of books and articles relevant to federal sentencing and sentencing guidelines. This material is available to the public through Commission publications and the release of datasets through the Inter-University Consortium for Political and Social Research (USSC, 2003). Additional information is gathered through the Commission’s Helpline, training sessions, and through specialized research projects.

All of these sources of data inform guidelines development and revision through the use of multi-disciplinary Policy Development Teams, whose work is described in the Commission's *Annual Reports* (USSC, 2002b). These teams engage in a wide variety of research projects relevant to their assigned topics, including, for example, consultation with psychologists on the recidivism of sex offenders or with economists on the financial impact of copyright infringement or corporate crime. In addition, as required by statute 18 U.S.C. § 4047, the Commission uses a statistical Prison Impact Model to estimate the effects of any proposed change in the guidelines on the types and lengths of sentences imposed under the revised guidelines, and the fiscal impact of such changes on the Bureau of Prisons.

Political accountability through Executive participation and Legislative directives and review. The final component of policy development provides political accountability for the Commission's actions. The Commission's authority is derived from Congress. For this delegation of legislative power to be Constitutional, Congress must provide minimum "intelligible principles" to guide the Commission's work.¹⁶ Congress did so in the SRA which provides the foundational principles governing the Commission's guideline development process. In addition, the SRA provides mechanisms for Congressional direction and oversight.

The most important mechanism for political accountability of the Commission, however, is the SRA's provision for a period of review for guideline amendments prior to an amendment's effective date. Under the normal amendment procedures outlined in the SRA, the Commission must submit proposed amendments to Congress no later than the first day of May, together with a statement of the reasons for the amendment. The Commission must specify an effective date for the change that is not earlier than 180 days after submission to Congress and no later than the first day of November. Congress can modify or disapprove the amendment during this period of review. Two amendments (regarding guidelines for trafficking in crack cocaine and money laundering) out of 674 were disapproved in this manner in the first fifteen years of the guidelines.

The advent of the guidelines system has provided new opportunities and mechanisms for Congress to work with and through the Commission to influence sentencing policy. The advantages and disadvantages of many of these mechanisms was first discussed in the Commission's 1991 report *Mandatory Minimum Penalties in the Federal Criminal Justice System*. In addition to formal oversight hearings, informal communication with individual commissioners or with the Commission's Office of Legislative Affairs is possible. Congress has also shaped policy by changing the statutory maximums applicable to a particular crime, at times in conjunction with Sense of Congress resolutions indicating its intention that the Commission amend the relevant guidelines.

Most commonly, Congress has influenced and controlled sentencing policy through formal statutory directives to the Commission, supplementing the directives contained in the SRA itself. Appendix B describes these directives—which by 2004 numbered over eighty-five separate enactments, many containing multiple directives—and indicates the dates they were enacted and the types of crime with which they were concerned. The most common area for directives has been drug

¹⁶ *Mistretta v. United States*, 488 U.S. 361 (1989).

trafficking crimes, which have been the subject of 22 directives, followed by economic crimes with 16 directives, and sex offenses with 15 directives. The directives have varied along a continuum from general to specific, leaving more or less discretion to the Commission to finalize the details of the policy change. General directives obviously permit a greater role for collaboration and research in policy development than do specific directives. The most general directives instruct the Commission to study a problem and report back to Congress with any recommendations or guideline amendments the Commission views as appropriate.¹⁷ More specific are directives to increase the offense level applicable to a particular crime. At other times, Congress has directed that a certain offense level be increased by a specific number of levels, or that specific offense adjustments be added to a guideline.¹⁸ In the PROTECT Act of 2003, Congress for the first time directly amended the *Guidelines Manual* itself.

Congress, of course, retains authority to control sentencing policy directly through a mechanism completely outside the framework established by the SRA—enactment of new statutory minimum penalty statutes or amendment of existing ones. Some commentators view mandatory minimum penalties as inconsistent with the guidelines system (Lowenthal, 1993; Wallace, 1994). Others view mandatory penalties as superfluous given the tough, binding, sentencing guidelines (Cassell, 2004). The legislative history of the SRA lends some support to the view that the guidelines system and mandatory minimum penalty provisions are “sentencing policies in conflict” (USSC, 1991b). Yet, Congress enacted mandatory minimum penalties for firearm and drug offenses the very same year it enacted the SRA, and more mandatory minimum penalties for drug offenses were added in 1986 while the guidelines were being developed. Additional mandatory minimums for drugs and other types of offenses have been added or increased several times since guidelines implementation.

The SRA envisions multiple mechanisms for Legislative and Executive influence over sentencing policy within a framework that also assures input from the front-line actors charged with implementing the policies in the courts, and in light of the best in criminological research. Mechanisms for direct control over the guidelines bypass these other components of sentencing policy development envisioned by the SRA.

2. *Components of Guidelines Implementation*

- *Uniform charging of readily provable offenses*
- *Transparent plea agreements consistent with the goals of the SRA*

¹⁷ See, e.g., Pub. L. No. 103-322, § 250003, 108 Stat. 1796 (Sept. 13, 1994). This statute directed the Commission to review and, if necessary, amend the guidelines to ensure that sentence enhancements for frauds committed against the elderly were adequate, and to report to Congress on the reasons for the Commission’s actions. *Id.*

¹⁸ See, e.g., Pub. L. No. 106-310, § 3663, 114 Stat. 1101 (Oct. 17, 2000). This Act directed the Commission to provide enhanced punishment for traffickers in MDMA, otherwise known as the club drug “ecstasy.” *Id.*

- *Reliable fact-finding regarding real offense conduct and criminal history*
- *Conscientious application of the guidelines to the facts*
- *Departure when needed to achieve the purposes of sentencing*
- *Appellate review*

Uniform charging of readily provable offenses. Prosecutors and defense attorneys alike recognize that the advent of the guidelines has made the *sentencing consequences* of their *presentencing* decisions a central focus of the entire federal criminal justice process. In the words of one defense attorney: “In federal criminal practice, almost all strategic decisions of the defense attorney should initially flow from federal sentencing guidelines analysis” (Wisenberg, 2003). Because the guidelines are designed to bind judges to particular sentencing consequences for particular proven facts, even law enforcement officers have been trained to anticipate the sentencing impact of their criminal investigations (Berlin, 1993). Observers have recognized that uniform charging of offenders’ criminal conduct will be needed if unwarranted sentencing disparity is to be eliminated (Schulhofer & Nagel, 1989; Edmunds, 1996).

From the beginning of guidelines implementation, Department policies have recognized that prosecutors’ charging and plea agreement practices could have a major impact on the success of sentencing reform.¹⁹

Under the new system, the nature of the charge to which a defendant pleads is particularly important because it will more precisely than ever determine the defendant’s actual sentence. . . . [I]f prosecutors consult the guidelines at the charging stage in an effort to achieve the most appropriate sentence for the conduct committed, the purpose of the SRA of eliminating unwarranted disparity in sentencing will be served since similar conduct should result in the bringing of similar charges, which will form the bases for similar sentencing.²⁰

The Department clearly recognized that charging decisions would have a significant impact on sentencing, and on the success of sentencing reform.

¹⁹ William F. Weld, Assistant Attorney General, U. S. Department of Justice [DOJ], “Prosecutors Handbook on Sentencing Guidelines” [hereinafter Redbook], Nov. 1, 1987. *Excerpts reprinted in* 6 FED. SENT. REP. 333 [hereinafter FSR] (1994).

²⁰ Memorandum from Stephen Trott, Associate Attorney General, DOJ, to All United States Attorneys, regarding “Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines” [hereinafter Trott Memo], Nov. 3, 1987. *Reprinted in* 6 FSR 342 (1994).

To advance the goal of similar charging of similar conduct, the Department directed prosecutors to “initially charge the most serious, readily provable offense or offenses consistent with the defendant’s conduct.”²¹ Limited exceptions to this rule were permitted, for example, if there was a need to protect the identity of a witness. But the long-standing principle that prosecutors should select “the most serious offense that is consistent with the nature of the defendant’s criminal conduct, that is likely to result in a sustainable conviction,”²² was recognized in Department policies as important to the success of sentencing reform. These national policies set by the Department were met with skepticism by some district offices, who argued that varying local conditions required that they retain discretion and flexibility (Braniff, 1993). Clarification of the policy in 1993 was perceived by some as granting local prosecutors more flexibility, in that it authorized prosecutors to consider the proportionality of sentences resulting from their charging decisions (Beale, 1994).²³

The PROTECT Act of 2003 again highlighted the importance of sentencing consistency and the need for Department guidance to prosecutors in the field. Subsequent to its passage, the Attorney General issued further guidance to federal prosecutors concerning Department charging and plea agreement policies.

The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department’s decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.²⁴

This latest guidance reiterates that prosecutors “must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case” except in limited, enumerated, circumstances.

A first look at real offense sentencing. Because sentencing uniformity is crucially dependent on charging uniformity, the original Commission was concerned that continuing unevenness in

²¹ Memorandum from Richard Thornburgh, Attorney General, DOJ, to All United States Attorneys, regarding “Plea Policy for Federal Prosecutors, Plea Bargaining Under the Sentencing Reform Act” [hereinafter Thornburgh Blue Sheet], March 13, 1989. *Reprinted in* 6 FSR 347 (1994).

²² DOJ, “Principles of Federal Prosecution,” 9-27.310, July 1980. *Excerpts reprinted in* 6 FSR 317-329 (1994).

²³ Memorandum from Janet Reno, Attorney General, DOJ, to All Holders of U.S. Attorneys’ Manual, Title 9, regarding “Principles of Federal Prosecution” [hereinafter Reno Bluesheet], Oct. 12, 1993. *Reprinted in* 6 FSR 350 (1994).

²⁴ Memorandum from John Ashcroft, Attorney General, DOJ, to All Federal Prosecutors, regarding “Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing” [hereinafter Ashcroft Charging Memo], Sept. 22, 2003.

charging could undermine sentencing reform despite the Department’s efforts to control it. The Commission sought to build mechanisms into the guidelines themselves that would help to ameliorate some of the effects of uneven charging. These mechanisms include: 1) the multiple count rule, found in Part D, Chapter Three of the *Guidelines Manual*, 2) cross-references among guidelines, and 3) the relevant conduct rule found at USSG §1B1.3. Together, these mechanisms make the federal guidelines a significantly *real offense*, as opposed to *charge offense*, sentencing system. (The relevant conduct rule and real offense sentencing is discussed further in a text box later in this section.)

The original Commission explained the need to consider aspects of the real offense committed by defendants instead of only the charges of conviction. First, the statute-defined elements of many federal crimes fail to provide sufficient detail about the *manner* in which the crime was committed to permit individualized sentences that reflect the varying seriousness of different violations. “[T]he hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language.”²⁵ The Commission recognized that in the pre-guidelines system judges and the Parole Commission took into account many details of offenders’ actual conduct. “A pure charge system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.” *Id.*

Furthermore, the Commission remained concerned that the charges to which defendants were subject would continue to depend to some extent on which prosecutors were assigned to each case or in which district the offense was prosecuted, leading to unwarranted sentencing disparity. “The Commission recognized that a charge offense system has drawbacks. . . . One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in the indictment.” The Commission created rules for grouping multiple counts to help control excessive severity that could arise from charging what was essentially a single criminal act as multiple counts. And the Commission created the relevant conduct rule and cross-references among guidelines to prevent excessive leniency that could arise from prosecutors failing to charge all of the offender’s conduct, or failing to charge the most serious of the conduct.

The Commission’s approach to multiple count convictions was discussed in the original introduction to the *Guidelines Manual* in Chapter One, Part A4(e), which is reproduced for historical reference in the current edition of the manual. (*See also* Breyer, 1988.) The rules are designed to reduce some of the sentencing disparity that can result from charging variations. For example, charging *both* a criminal act and conspiracy to commit that act results in the same sentence as charging *only* the act or the conspiracy. Similarly, a kidnapping involving an assault is sentenced the same if charged and convicted only as a kidnapping or as one count of kidnapping and one count of assault. For offenses involving fungible quantities, such as drugs or money, sentences are based on the total amount involved in the ongoing offense, not on how many counts involving various transactions or acts are charged or convicted. Indeed, for these offenses sentences are based on all relevant conduct, whether or not all of the conduct is charged or conviction is obtained.

²⁵ USSG, Ch. 1, Pt. A, sec. 4(a).

Real Offense Sentencing and the Relevant Conduct Rule, USSG §1B1.3

The relevant conduct rule is the guideline that defines the scope of a defendant's criminal behavior that is used by the court in applying the Chapters Two and Three guidelines. The rule allows the court to consider facts beyond those specified in the indictment or in the elements of the offense of conviction. Relevant conduct includes details about the manner in which the offense was committed. It can also include other criminal conduct that was not charged, that was described in counts that were dismissed prior to sentencing, conduct of accomplices, and even conduct for which the defendant was acquitted at trial.

In determining an offense level, judges generally use Appendix A of the *Guidelines Manual* to identify the guideline applicable to the offense of conviction (unless a plea agreement stipulates a more serious offense—*see* section 1B1.2). The court then uses all relevant conduct to determine the base offense level, the specific offense adjustments, and whether any cross-references to other guidelines should be applied. Relevant conduct includes acts the defendant personally committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused if the acts occurred during the offense of conviction, in preparation for that offense, or in avoiding detection or responsibility for the offense. It also includes acts within the same time context that were committed by the defendant's accomplices, if those acts took place within the scope of a joint undertaking with the defendant and were reasonably foreseeable to the defendant. Any harms resulting from the relevant acts of the defendant and accomplices are also relevant.

In certain offenses, primarily those where the guidelines determine the offense level based on fungible items, such as quantities of drugs or amounts of money involved in the offense, the acts of the defendant and accomplices as analyzed above are expanded to include those acts and resulting harms within the context of the "same course of conduct or common scheme or plan as the offense of conviction." This means, for example, that a defendant convicted of selling drugs to an undercover officer on one occasion is sentenced under USSG §1D1.1 for the amount of drugs involved in *all* the drug trafficking known to the court that was part of the same course of conduct or common scheme or plan as that one sale. Because the standard of proof used in the determination of relevant conduct, as with any sentencing factor, has been the preponderance of evidence, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *United States v. Watts*, 117 S. Ct. 633, 638 (1997).

Cross-references among guidelines, which are applied based on all relevant conduct, also serve to reduce the impact of charging variations. An offender convicted of criminal sexual abuse of a minor under the age of sixteen (statutory rape), but whose conduct actually involved the more serious offense of forcible rape, will be sentenced under the more severe guideline for the more serious offense pursuant to the cross-reference from the statutory rape guideline, section 2A3.2 to the sexual abuse guideline, section 2A3.1. The *Guidelines Manual* contains many cross-references, many of which were added after promulgation of the initial guidelines in light of evidence that undercharging of offenses was resulting in significant sentencing disparity and disproportionately lenient sentences.²⁶

These mechanisms were designed to reduce sentencing disparity resulting from uneven charging decisions, but they were never intended to eliminate it altogether. The guidelines retain some characteristics of a charge offense system, particularly for offenses that do not involve fungible goods like drugs or money. For example, the guideline rules take into account only those robberies for which a conviction is obtained, and not other robberies committed by the defendant that may come to the attention of the court at sentencing. Policy statement USSG §5K2.21 permits judges to take uncharged or dismissed conduct, such as additional bank robberies, into account through upward departure, but the relevant conduct rule itself does not require consideration of such conduct as it does uncharged conduct involving fungible harms. In addition, statutory minimum penalties and sentencing enhancements continue to give prosecutors considerable control over final sentences in many cases, because prosecutors determine whether the statutory minimum penalties are invoked. Chapter Three presents data on the effects of these charging decisions on unwarranted sentencing disparity.

Transparent plea agreements consistent with the goals of the SRA. The need for efficient administration of justice has led to a recognition of plea agreements as a common method for securing convictions in American courts. In the forty years prior to the guidelines, between 85 and 90 percent of all convictions in the federal courts annually involved pleas of guilty or nolo contendere (BJS, *Sourcebook*, 1987; AO, *Annual Report*, 1987). If the guidelines system is to be workable, it must accommodate plea bargaining and provide incentives for defendants to plead guilty. In the pre-guidelines era, these incentives were provided when prosecutors agreed not to bring charges, or to dismiss charges, or to make various sentencing recommendations to the judge. But, as a general rule, these agreements only loosely bound the court (FJC, 1979).

In the guidelines era, both the goals and the dynamics of the system have changed. Congress has now defined reduction of unwarranted sentencing disparity as an important goal of the system. The guidelines bind judges more tightly to the sentencing consequences of the charges of conviction and the guideline-relevant facts proven at sentencing. Given all this, the first component of guidelines implementation—uniform charging—cannot ensure uniform sentencing if plea bargaining results in the dismissal of provable charges that would affect the applicable guideline range, or stipulations to misleading facts, or other agreements that result in sentences different from those required by complete and proper application of the guidelines to offenders' criminal conduct.

²⁶ See, e.g., USSG, App. C, Amends. 313, 323 (Nov. 1, 1990); Amend. 444 (Nov. 1, 1992).

Congress directed the Commission to develop policy statements governing judges' acceptance and rejection of plea agreements in the hope that "judicial review of plea bargaining under such policy statements should alleviate any potential problem in the area."²⁷ These policy statements are found in Chapter Six, part B of the *Guidelines Manual*. The Commission believed that if judicial power to reject plea agreements "were properly exercised, undue shifting of authority [from judges to prosecutors] will not occur." (USSC, 1987, p. 49). Some commentators believed the Commission's initial policy statements sent mixed signals regarding how strictly judges should monitor agreements. Accordingly, the *Guidelines Manual* was amended in 1992 to make clear "the Commission's policy that plea agreements should not undermine the sentencing guidelines."²⁸

The policy statements address the various types of plea agreements that are contemplated by Federal Rules of Criminal Procedure, Rule 11(e), which include agreements to dismiss or not bring charges, and various types of binding and non-binding sentencing recommendations. (This rule has itself been recently amended to reflect new types of agreements made possible by implementation of the guidelines, such as agreements that a particular provision of the guidelines does or does not apply. It is now denoted as Rule 11(c).) Despite variations in the types of agreements, the policy statements all adopt a simple principle: plea agreements should be accepted by the judge only if the resulting sentence is within the applicable guideline range or departs from the range for a reason that can be justified according to the normal departure standard at 18 U.S.C. § 3553(b).²⁹ The fact of an agreement itself should not be used to impose a sentence outside the range otherwise required by the guidelines. This principle has recently been reinforced by an amendment to the policy statements reiterating that "the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense."³⁰ Other policy statements in Chapter Six require that plea agreements be disclosed to the court (USSG §1B1.1; *see also* F. R. Crim. P. 11(c)(2)), and that any factual stipulations accompanying the agreement shall set forth the "circumstances of the actual offense conduct and offender characteristics" and "shall not contain misleading facts."³¹

To implement judicial review of plea agreements, some mechanism for judges to compare the agreement with the offender's actual conduct was needed. This was provided through changes to the presentence investigation and report, which are discussed in the following section Federal Rules of Criminal Procedure, Rule 11(c)(3) allows judges to defer acceptance or rejection of a plea agreement "until the court has reviewed the presentence report." USSG §6B1.1, p.s., goes further, stating that the court "shall defer" its decision "until there has been an opportunity to consider the report."

²⁷ SENATE REPORT, *supra* note 1, at 63; *see* sec. A.2 (discussing move toward regulation of plea bargaining during the legislative development of the SRA).

²⁸ USSG, App. C, Amend. 467 (Nov. 1, 1992).

²⁹ *See* USSG §6B1.2.

³⁰ USSG, App. C, Amend. 651 (final provision) (Oct. 27, 2003).

³¹ USSG §6B1.4.

Even with the help of the probation officer's investigation and report, it was recognized that the judiciary and the Commission would have limited power and resources with which to police plea bargaining. "It will be up to the government to insure that inconsistencies in the treatment of plea agreements do not frustrate the purpose of the Guidelines" (Trott Memo, Nov. 3, 1987). To that end, the Department adopted strict policies regarding plea agreements. "The overriding principle governing the conduct of plea negotiations is that plea agreements should not be used to circumvent the guidelines" (Redbook, Nov. 1, 1987). The Department recognized that, as a practical matter, judges would be tempted to accept plea agreements outside the guideline range, since appeals of bargained-for sentences would be unlikely. But the Department instructed prosecutors to ensure that plea bargains result in imposition of a sentence within the guideline range unless a departure could be justified. The policies made clear that the existence of a plea agreement alone was not enough to justify a departure. Further, the Department reinforced the Commission's policy statement on factual stipulations: "The Department's policy is only to stipulate to facts that accurately represent the defendant's conduct" (Thornburgh Bluesheet, 1989).

In 2003, following passage of the PROTECT Act, the Department again reiterated the importance of consistency in the manner charges are disposed of and the importance of adherence to the sentencing guidelines when entering into plea agreements. To achieve "honesty in sentencing"

[a]ny sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.³²

"This policy applies fully to sentencing recommendations that are contained in plea agreements."³³ Thus, these new policies reinforce the Department's commitment to the goals of sentencing reform.

The Commission recognized that defendants would need *some* incentive to plead guilty if trial rates were to be kept within manageable limits. Research on sentencing practices in the preguidelines era had demonstrated that offenders typically received a sentence discount for sparing the government the time and expense of a trial. The original Commission sought to maintain this benefit so that defendants retained sufficient incentive to plead guilty and "the number of trials facing an already overburdened federal court system" would not be increased.³⁴ At the same time, the Commission sought to regularize the guilty plea benefit in order to reduce disparity. "The Commission considered, but rejected, a proposal to give the sentencing judge considerable latitude to give a sizeable sentence reduction because of the entry of a guilty plea. Doing so would have risked the introduction of

³² Memorandum from John Ashcroft, Attorney General, DOJ, to All Federal Prosecutors, regarding "Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals," July 28, 2003.

³³ Ashcroft Charging Memo, *supra* note 24, September 22, 2003, at 5.

³⁴ USSC, SUPPLEMENTARY REPORT, at 49 (1987).

considerable unwarranted disparity and unpredictability into the system.”³⁵ The Commission decided to balance competing concerns regarding plea bargaining by relying on judges to police bargains that could undermine the guidelines and by allowing various types of prosecutors’ recommendations—for example, that the judge sentence at the bottom of the guideline range or depart for a justifiable reason.

The Commission provided an explicit incentive to plead guilty in USSG §3E1.1, the “Acceptance of Responsibility” guideline. This guideline was designed both as a reward for offenders who plead guilty and also as a recognition of the reduced culpability of offenders who acknowledge guilt and take steps to mitigate the harm caused by their offense. The guideline provides a reduction in the offender’s offense level “[i]f the defendant clearly demonstrates “acceptance of responsibility for his offense.” The first factor judges are directed to consider when deciding whether to grant this reduction is the defendant’s “[t]ruthfully admitting the conduct comprising the offense(s) of conviction.”³⁶ Data show that 94 percent of offenders who plead guilty receive the acceptance of responsibility reduction. Later amendments to this guideline increased its utility as an incentive for defendants to provide helpful information to prosecutors and to enter pleas in a timely manner so that the government may avoid wasting resources in trial preparation.³⁷

It is clear from the data that plea bargaining has continued, and even expanded, in the guidelines era. Guilty plea rates steadily increased from 87 percent in the years preceding the guidelines to 96.6 percent in 2001. However, the system of regularized incentives for guilty pleas that was put in place by the original Commission has never operated in isolation from statutory minimum penalties. Department policies allow prosecutors to invoke statutory minimum penalties and statutory enhancements as further incentives for guilty pleas, even barring their declination or dismissal except as part of a plea agreement (DOJ, 2003).

Reliable fact-finding regarding real offense conduct and criminal history. It was apparent from the beginning of the guidelines era that the reformed sentencing system would require new procedures to establish facts relevant to application of the guidelines. Rule 32 of the Federal Rules of Criminal Procedure, which concerns sentencing procedures, was amended by the SRA itself. Additional procedures needed to make guideline sentencing fair and efficient were the subject of much thought by the Sentencing Commission and by various committees of the Judicial Conference of the United States. The procedures ultimately put in place emphasized the role of the probation officer in investigating the relevant facts, recommending the guidelines applicable to the case, and identifying any remaining disputes for resolution by the judge at a sentencing hearing. Each district also retained discretion to fashion local rules and informal procedures that were tuned to local conditions.

³⁵ *Id.*

³⁶ USSG §3E1.1, comment. n.1(a).

³⁷ USSG, App. C, Amends. 459 (Nov. 1, 1992) & 649 (Sept. 30, 2003). The latter amendment was pursuant to a directive to the Commission contained in the PROTECT Act.

Amended Rule 32 requires a presentence report in virtually all guidelines cases and establishes a timeline for its completion, its disclosure to the parties, and for any party to the file objections to its contents. The rule also specifies matters to be included in the report, including the probation officer's determination of how the guidelines apply in the case. The Judicial Conference provides more detailed instructions and training to probation officers about how to conduct the presentence investigation and write the report. These policies are contained in Publication 107 (Administrative Office of the U.S. Courts, last revision 2001), which was extensively revised at the time of guidelines implementation. Procedures for the presentence report have recently again become a topic of concern to the judiciary as growing caseloads and budgetary constraints make detailed presentence investigations in every case increasingly difficult.

At the dawn of the guidelines era, the presentence report was redesigned to make it effective in assisting judges in application of the guidelines, and to support judicial review of plea agreements. Probation officers were instructed to provide a "concise but complete description" of all information relevant to application of the guidelines, including the "offense(s) of conviction and all relevant conduct" and all verifiable criminal history. An "Impact of the Plea Agreement" section was developed to assist the court in evaluating the effects of "counts to be dismissed, stipulations, or any other factors in the plea agreement that may affect the guideline range or the sentence to be imposed" (AO, Publication 107, II-79). Inclusion of an "Impact of the Plea Agreement" section in the presentence report demonstrates that courts, like Congress, anticipated plea agreements that would sometimes understate the offender's real offense conduct. As described above, the relevant conduct rule instructs courts to look beyond the counts of conviction to the offender's actual criminal conduct, including conduct that was never charged or was specified in counts that were subsequently dismissed. The aim was to ensure that a judge's fact finding—and not just the prosecutor's charging and bargaining decisions—would determine the sentence (Breyer, 1988; Wilkins & Steer, 1990).

While offering fewer procedural protections than fact finding at trial, fact finding at sentencing under the guidelines is subject to more formal procedures than was fact finding in the preguidelines era. "The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair." USSG §6A1.3 p.s., comment. In addition to disclosure of the presentence report and taking of objections, amended Rule 32(I) gives counsel an opportunity to comment on the probation officer's findings. The court may permit the parties to introduce testimony and other evidence at an evidentiary hearing. The court must rule on any disputed fact that affects the sentence and append a record of its rulings to the presentence report, which is then made available to the Bureau of Prisons and the Sentencing Commission. However, Commission policy statements permit courts to "consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3(a) p.s. Courts have held that, in most circumstances, sentencing facts must be proven to the judge only by a preponderance of the evidence (FJC, 2002, p. 484).

Conscientious application of the guidelines to the facts. The core of the new system is the judge's imposition of a sentence "of a kind, and within the range" established by the guidelines for the circumstances of the offense and the offender's criminal history. 18 U.S.C. § 3553(b). In most situations, guideline application is straightforward, but it could break down in several ways.

Probation officers and judges could make mistakes due to confusing or complex guidelines (Ruback & Wroblewski, 2002). The guidelines could be circumvented, explicitly or covertly, through manipulation of the facts found to be present in the case, through strained guidelines interpretations, or through the granting of departures for unjustifiable reasons. Pressure to find a way around the guidelines can be acute if a judge finds the guidelines-required sentence unjust (Weinstein, 1992, p. 365; Stith & Cabranes, 1998, p. 90) and the parties agree that a sentence outside the guideline range is acceptable. Enforcement of 18 U.S.C. § 3553(b) relies on each judge's duty to follow the law in good faith, and on the provisions for appellate review created by the SRA, discussed below.

To improve comprehension of the guidelines and help avoid mistakes, the Commission, on its own and in conjunction with the Federal Judicial Center, the Administrative Office of the U. S. Courts, the Federal Bar Association, and other groups, participates in extensive training of probation officers, judges, defense attorneys, and prosecutors. The Commission also maintains a "HelpLine" available to court personnel who have specific questions about guidelines applications. To reduce pressure to circumvent the guidelines, the Commission communicates with judges through conferences, seminars, and newsletters, and seeks to improve "buy in" among those charged with implementing the guidelines through collaborative guidelines development.

Departure when needed to achieve the purposes of sentencing. Congress recognized that the Commission could not anticipate and describe in general guidelines every possible circumstance relevant to sentencing in every case. It included a provision in the SRA permitting departure from the guideline range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). In implementing this provision the original Commission instructed judges to

treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.³⁸

The Commission also encourages, discourages, or flatly prohibits departures in various circumstances in commentary throughout the *Guidelines Manual* and in policy statements in Chapter Five, Parts H and K. The Supreme Court reaffirmed the importance of the Commission's role in regulating departures in *United States v. Koon*, 518 U.S. 81 (1996). In the PROTECT Act of 2003, Congress directed the Commission to review these provisions and amend them "to ensure that the incidence of downward departures are substantially reduced."³⁹ The results of the Commission's

³⁸ USSG, Ch. 1, Pt. A.4(b). (This provision was transferred to an Editorial Note at the end of sec. 1A1.1 as part of the Commission's implementation of the PROTECT Act of 2003.)

³⁹ PROTECT Act, Pub. L. No. 108-21 § 401(m)(2)(a), 117 Stat. 650 (April 30, 2003).

review were published in *Downward Departures from the Federal Sentencing Guidelines* (USSC, 2003) and the amendments to the *Guidelines Manual* became effective on October 27, 2003.⁴⁰

Departures serve several functions in the sentencing system established by the SRA. They help maintain “sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices” 28 U.S.C. § 991(b)(1)(B). They allow fine-tuning of sentences when literal application of a guideline would fail to achieve the guideline’s intended purpose (Hofer & Allenbaugh, 2003). And they provide a feedback mechanism to the Commission. “By monitoring when courts depart from the guidelines and analyzing their stated reasons for doing so, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.”⁴¹

Sections 5K1.1 and 5K3.1 departures. The guidelines also provide for additional types of departure to reward defendants who assist the government in various ways. The first of these—often called 5K1.1 departures, after the policy statement that governs them—was not part of the SRA itself but was added in response to the Anti-Drug Abuse Act of 1986 (ADAA),⁴² which also established mandatory minimum penalties for a wide variety of drug trafficking crimes. The ADAA permits waiver of statutory minimum penalties for persons who assist the government in the “investigation or prosecution of another person who has committed an offense” 18 U.S.C. § 3553(e). It also directs the Commission to “assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant’s substantial assistance.” 28 U.S.C. § 994(n). The Commission implemented this provision by issuing a policy statement encouraging judges to depart in such cases “upon motion of the government.” USSG §5K1.1 p.s.

The Department of Justice recognized that “[t]his departure provides federal prosecutors with an enormous range of options in the course of plea negotiations” (Thornburgh Bluesheet, 1989). Later concern that charging and plea bargaining might be undermining sentencing reform led to changes in Department procedures involving section 5K1.1 motions.⁴³ Authority to approve the filing of such motions was limited to top management in each U. S. Attorney’s office, and documentation of the facts justifying a motion to depart from the guidelines on these grounds was required.

⁴⁰ USSG, App. C, Amend. 651 (Oct. 27, 2003).

⁴¹ USSG, §1A1.1, Ed. Note, Ch. 1, Pt. A.4(b).

⁴² Pub. L. No. 99-570, §§ 1007, 1008, 100 Stat. 3207 (Oct. 27, 1986).

⁴³ Memorandum from George J. Terwilliger, III, Acting Deputy Attorney General, DOJ, to Holders of United States Attorneys’ Manual Title 9, regarding “Indictment and Plea Procedure Under Guideline Sentencing” [hereinafter Terwilliger Bluesheet], Feb. 7, 1992. *Reprinted in* 6 FSR 350 (1994).

In the PROTECT Act, Congress directed the Commission to promulgate a policy statement authorizing a new ground for downward departure. The Commission's response was to add USSG, §5K3.1 p.s., which became effective October 27, 2003.⁴⁴ If the Government files a motion, an offender may receive a departure of no more than four offense levels for participating in an early disposition program authorized by the Attorney General and the United States Attorney.⁴⁵ This provision was created to help regularize so-called "fast-track" departures that had developed in a number of districts in recent years to accommodate overwhelming caseloads that outstrip both prosecutorial and judicial resources. The new departure provision rewards offenders for pleading guilty early in the process and waiving certain procedural rights, such as the right of appeal, most rights to challenge a conviction under 28 U.S.C. § 2255 (the federal habeas corpus provision), and any of the motions described in the Federal Rule of Criminal Procedure 12(b)(3), such as motions for discovery or to suppress evidence.

The Department issued a memorandum outlining its criteria for authorization of early disposition programs on September 22, 2003. The memorandum stressed that the programs were "properly reserved for exceptional circumstances . . . [and] are not to be used simply to avoid the ordinary application of the guidelines to a particular class of cases."⁴⁶ In addition to downward departures, the Department's policies contemplate that some districts may reward offenders for participation in early disposition programs by agreeing not to charge or pursue all readily provable criminal conduct. Results of the Commission's review of early disposition programs, and implications of the new departure provision, were discussed further in the Commission's report *Downward Departures from the Federal Sentencing Guidelines* (2003).

Appellate review. Appellate review of sentences, which the SRA codified for the first time at 18 U.S.C. § 3742, was intended by Congress to "reduce materially any remaining unwarranted disparities by granting the right to appeal a sentence outside the guidelines and by providing a mechanism to assure that sentences inside the guidelines are based on correct application."⁴⁷ Any party may appeal a sentence that they allege "was imposed in violation of law" or "as a result of an incorrect application of the sentencing guidelines."⁴⁸ The government may appeal any sentence resulting from a departure below the guideline range, and the defense may appeal an upward departure. The SRA directed appellate courts to accept the district court's findings of fact unless they were clearly erroneous, and to give due deference to the district court's application of the guidelines

⁴⁴ USSG, App. C, Amend. 651 (Oct. 27, 2003).

⁴⁵ PROTECT Act, Pub. L. No. 108-21 § 401(m)(2)(B), 117 Stat. 650 (April 30, 2003).

⁴⁶ Memorandum from Attorney General John Ashcroft, DOJ, to All United States Attorneys, regarding "Department Principles for Implementing an Expedited Disposition or 'Fast-Track' Prosecution Program in a District" [hereinafter Ashcroft Fast-Track Memo], Sept. 22, 2003, at 5.

⁴⁷ SENATE REPORT, *supra* note 1, at 86.

⁴⁸ 18 U.S.C. § 3742

to the facts. In the case of an appeal of a departure, the appellate court determines if the sentencing judge's stated reasons for departure were reasonable, and met the standards set out in 18 U.S.C. § 3553, described above. The U.S. Supreme Court further clarified the standards for judicial review of departures in *Koon v. United States*.⁴⁹

In early 2003, the Department of Justice cited with alarm the increasing rate of downward departures. The Department's representatives testified before Congress that "[m]uch of the damage is traceable to the Supreme Court's decision in *Koon v. United States*."⁵⁰ That decision had established "abuse of discretion" as the proper standard for review of departures and had also cautioned appellate courts against categorically prohibiting departures on grounds not specifically prohibited by the Sentencing Commission. In the view of the Department, these holdings had made it difficult to appeal unjustified downward departures, thereby contributing to their increasing rate. The Department called for *Koon* to be effectively overruled by statute. It encouraged legislation that would both 1) establish *de novo* review as the proper standard for review of departures, and 2) prohibit departures on any grounds not affirmatively encouraged by the Commission. As ultimately enacted, the PROTECT Act prohibited departures on grounds not affirmatively encouraged by the Commission only for offenders convicted of sex crimes against children. However, the Act did change the standard of review for all departures to *de novo*.

Some early advocates of sentencing reform (Morris, 1977), and some recent commentators (Berman, 1999), have envisioned appellate review as making substantial contributions to the development of a principled "common law of sentencing." Others have noted the inherent weaknesses in such a vision, however, and have argued that the "enforcement function" of appellate review—ensuring that sentencing courts faithfully implement the guidelines system—has emerged as more important than any "lawmaking function" (Reitz, 1997).

In any event, the legislative history of the SRA makes clear that Congress's primary purpose in establishing appellate review was to ensure that unwarranted disparity did not re-emerge through misapplication of the guidelines or through unjustified departure. Appellate review has also helped alert the Commission to important ambiguities in the guidelines and other problems of guidelines application. It has identified areas in need of guideline amendments to resolve circuit conflicts and help control sentencing disparity (Wilkins & Steer, 1993).

The appellate courts cannot perform their assigned functions without the cooperation of other participants in the system. Appellate review depends on clear fact findings and statements of reasons by the sentencing courts to provide a sufficient record for review. And, of course, correction of

⁴⁹ 518 U.S. 81 (1996).

⁵⁰ *The Child Abduction Prevention Act and The Child Obscenity & Pornography Prevention Act of 2003; Hearing on H. R. 1004 and H.R. 1161 Before the House Subcomm. on Crime, Terrorism, and Homeland Security, of the House Comm. on the Judiciary, 108th Cong., 1st Sess. 38 (March 11, 2003) (statement of Daniel P. Collins, Associate Deputy Attorney General, DOJ).*

guidelines errors or improper departures depends on appeal of the sentence by at least one of the parties to the case.

E. From Theory to Practice

This detailed description of the components of the reformed sentencing system shows how much was changed by enactment of the SRA. The Sentencing Commission, the Department of Justice, and the Judicial Conference of the United States all responded by establishing new policies and procedures to support the SRA's objectives. This systemic perspective shows how implementation of each component is needed for Congress's goals for sentencing reform to be fully realized. Changes to the system and departure from the original vision of the SRA—including enactment of statutory mandatory minimum penalties, the PROTECT Act, and application of *Blakely v. Washington* to the federal guidelines—could change the dynamics of federal sentencing and upset the interaction of components needed to achieve Congress's goals for sentencing reform. A quick contrast between the system as envisioned and the ways it might function in practice reveals what is at stake.

Guidelines development. If the Commission develops policy informed by its research and by “advancement in knowledge of human behavior” (28 U.S.C. §991(b)(c)), we would expect the guidelines to achieve the purposes of sentencing as effectively as current criminological knowledge will allow. If collaborative guidelines development obtains “buy in” from the courts and practitioners, then those charged with implementing the system would have a stake in its success. Practices that could undermine or circumvent the guidelines would be avoided, and implementers would undertake their new duties and responsibilities conscientiously. If collaborative guidelines development and political accountability were harmonized, then direct congressional intervention in sentencing outside the guidelines framework, through mandatory minimum legislation or other specific directives, could be avoided.

If, however, there were a breakdown in any of these components, we could expect negative consequences for the system. If research weren't utilized, correctional resources could be squandered on ineffective sentences. If guidelines were imposed from above rather than developed through collaboration, implementers might shirk their new responsibilities, leading to circumvention and disparity. If the Commission failed to be accountable to Congress, legislative micro-management through specific directives or statutory minimum penalties would be more likely.

Guidelines implementation. If prosecutors charge uniformly and obtain plea agreements that fully account for each offender's criminal conduct, then sentencing uniformity will be advanced. But if prosecutors charge statutory penalties that trump the guideline range and don't permit consideration of the guidelines' mitigating adjustments, then different offenders will be treated similarly. On the other hand, if prosecutors don't pursue all relevant conduct, then independent probation officer investigations into offense conduct is needed to inform judicial review of plea agreements. But if judges accept plea agreements that undermine the guidelines, or depart for unwarranted reasons, or misapply the guideline provisions, then unfair and disparate sentences can result. If appellate courts

correct mistaken guideline applications or unjustified departures, uniformity would be restored. But if neither party appeals the sentence, then the corrective and enforcement functions of appellate review cannot operate.

The role of empirical research. There are many ways the system could fail to reach its ambitious goals. Reforms this comprehensive, requiring coordinated actions among all three branches of government, present a formidable challenge. It may be unreasonable to expect this new system to be fully implemented at a stroke. The original commissioners recognized that sentencing reform would have to be incremental. They wrote that “[t]he Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements. . . . The Commission will collect data on . . . whether plea agreement practices are undermining the intent of the [SRA]” in order to seek corrective actions as needed.⁵¹ The Commission also contemplated “monitoring when the courts depart from the guidelines and . . . analyzing their stated reasons for doing so” in order to “refine the guidelines to specify more precisely when departures should and should not be permitted.”⁵² And guideline amendments, informed by research and appellate review, was expected to help reduce ambiguities, circuit conflicts, and problematic guidelines provisions (Wilkins & Steer, 1993).

Further research and guideline revisions were anticipated in many other areas. Data collection was planned to evaluate the validity and “crime-control benefits” of the criminal history score (*Supplementary Report*, 1987, at 44). The Four-Year Evaluation called for additional research on the effects of the guidelines on sentence length and the use of incarceration, and on sentencing disparity, especially “in the area of departures and the interaction of the guidelines with mandatory minimum penalties” (USSC, 1991a, at 54).

Because the guidelines had been fully implemented for only a short time, the statutorily mandated Four-Year Evaluation was recognized as “a preliminary examination of the short-term effects of the guidelines during the first few years of implementation” (USSC, 1991a, at 1). Much more data is available today. While the guidelines have been the subject of a large critical literature, and anecdotal reports from the field suggest breakdowns in some of the key components of the system, objective evaluation must be based on empirical evidence. This report seeks to use all the available research from both inside and outside the Commission to answer two sets of questions:

- *Evaluative questions: Are the goals of the SRA being met? Have certainty, severity, rationality and transparency increased, and unwarranted disparity decreased?*
- *Diagnostic questions: Are the components being implemented? And if not, how has this affected the system’s ability to reach its goals?*

⁵¹ USSG §1A1.1, Ed. Note, Ch. 1, Pt. A.4(c).

⁵² *Id.* at Pt. A.4(b).