# Federal Probation

## The Sentencing Reform Act of 1984 and Sentencing Guidelines





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## This Issue in Brief

YEARS FROM now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice. The Sentencing Reform Act of 1984 which brought about the sentencing guidelines sent ripples in the pool of the Federal court system that affected all who participate in the sentencing process. Certainly the day-to-day work of judges, both district and appellate, prosecutors, attorneys, probation officers, and correctional personnel has been altered significantly, and the course of careers has changed. This special issue of *Federal Probation* gives a voice to those who have been working in the midst of such historic change.

*Federal Probation* invited eminent jurists and prominent sentencing experts to prepare articles reflecting their thoughts and perspectives regarding the Sentencing Reform Act and the sentencing guidelines. The first three articles comprise thoughtful, varied perspectives from the bench. The articles that follow are by authors representing other critical roles in sentencing. The articles are organized by profession in the order that each author would typically become involved in the sentencing process.

Ever since the Federal sentencing guidelines went into effect, judges and commentators have criticized the guidelines for placing excessive restrictions on judicial discretion. The Honorable Gerald Bard Tjoflat, chief judge of the U.S. Court of Appeals for the Eleventh Circuit, asserts that critics fail to appreciate the significant discretion that the judge retains. In **"The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel,"** Judge Tjoflat addresses the failure of attorneys to appropriately exploit judicial discretion within the guidelines structure. Advice for attorneys is offered regarding how to develop proper arguments to guide the sentencing judge's discretion in a particular case. Providing substantial background information, the article describes the congressional purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines.

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# Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime

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DURING MY 3-year term as Chairman of the Judicial Conference Committee on Criminal Law and Probation Administration, it became clear to me that the sentencing guidelines are a source of great discomfort to many Federal judges and probation officers. Their discomfort stems from two complementary concerns. First, the judges and officers believe that, under the *pre*-guidelines sentencing regime, their exercise of discretion in fashioning or recommending a sentence that balanced the nature of the offense, the individual characteristics of the defendant, and the interest of the public was their most important function, indeed their "finest hour." Concomitantly, they believe that, while the guidelines may have largely accomplished the congressional purpose of reducing sentencing disparity, they have made it difficult in many situations for judges to administer what they, based on long experience, consider to be just sentences. The restriction in sentencing discretion wrought by the guidelines has unfortunately engendered in some judges and probation officers a mood of fatalism and resignation based upon a perception of the guidelines as a harsh, mechanical system that affords the sentencing court a bare minimum of flexibility and discretion.

I acknowledge, as any fair observer must, that the prized sentencing discretion of Federal judges has been drastically curtailed and in many areas completely eliminated by the guidelines. I nonetheless believe that there is still considerable room for flexibility and discretion thereunder. The purpose of this article is to highlight these areas, to encourage their cultivation, and to dispel the notion that the judges and probation officers have become veritable automatons in the sentencing field. Having in mind that the guidelines sentencing judge is both fact finder and law finder, the theses of this article are twofold. First, flexibility exists in the spheres of both law and fact. Second, flexibility comes at a price—the often considerable time and energy involved in developing a record, in making detailed fact findings, and in carefully analyzing the governing statutes and their intersection with the guidelines.

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### *Departures*

The most widely recognized avenue of flexibility under the guidelines is the sentencing judge's ability to depart from the prescribed sentencing range. Although the critical role of departure in the guidelines scheme and the rationale behind it have been discussed frequently in judicial opinions and in guidelines seminars, this role and rationale cannot be repeated too often:

> The Commission intends the sentencing courts 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.[1]

Both the Sentencing Commission and Congress have made clear that the ultimate success of the ambitious project undertaken in the Sentencing Reform Act of 1984 ("SRA")[2] depends on the Commission's ability to refine the initial guidelines as their imperfections become apparent through experience.[3] Otherwise, we would be saddled forever with broad discretion to depart, or mandatory but imprecise rules, or some combination of the two. Recognizing this point, Congress created the Sentencing Commission as a permanent body,[4] charged not merely with developing an initial set of sentencing guidelines,[5] but also with monitoring and evaluating those guidelines on an ongoing basis.[6] Thus the Commission is required to review the guidelines periodically[7] and empowered to submit proposed amendments to the guidelines to Congress.[8] Only through this process of continually amending and refining the guidelines as their imperfections become apparent from experience, can the alternative problems arising from broad departure power versus mandated enforcement of imperfect rules be combatted simultaneously and eventually minimized.

The Sentencing Commission itself recognized the unavoidable imperfections in its initial set of guidelines and the resulting need to give judges and probation officers sufficient latitude to contribute to the continuing evolution of the guidelines. For example, although the Commission possesses authority to prohibit departures by declaring in advance that it had

considered various factors and found them irrelevant for sentencing purposes,[9] it chose not to exercise this authority in large part because it recognized

> the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite the guidelines, with progressive changes, over many years. *By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so*, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.[10]

Given this background, it is evident that Congress and the Commission intended that departures play a critical role in the ongoing process begun by the SRA. Quite simply, departures provide the Sentencing Commission with the feedback it needs to refine the guidelines over time. Departures bring specific cases where "a particular guideline linguistically applies but where conduct significantly differs from the norm"[11] to the Commission's attention; without them, the Commission would be hampered significantly in its ongoing mission to develop an ever-improving code of Federal sentencing.[12]

Despite the Commission's invitation to depart and the central importance of departure to the development of sentencing law, the number of occasions in which judges have departed thus far appears to be modest. According to the 1990 Annual Report of the Sentencing Commission, 83.4 percent of the sentences imposed between October 1, 1989, and September 30, 1990, were within the guidelines range. Leaving aside those sentences that were below the guidelines range because the defendant provided substantial assistance to the Government, departure above and below the guidelines range occurred during that year in only 9.2 percent of the cases.[13] This modest departure rate indicates either that the Sentencing Commission was more prescient than it claimed to be in drafting its initial guidelines or that courts generally are too reluctant to depart from the prescribed sentencing range.

In my view, the sharp variation in guidelines departure rates among district courts counsels against accepting the explanation of Commission prescience. For example, in the Third Circuit, in which I sit, there were downward departures in 16 percent of the cases in the Eastern District of Pennsylvania during the measured period, but in only 1 percent of the cases in the District of New Jersey and in only 2.6 percent of the cases in the Middle District of Pennsylvania.[14] A similarly disparate downward departure rate exists for the same period among district courts in other circuits as well.

In the Second Circuit, there were downward departures in over 11 percent of the cases in the Eastern District of New York and in the District of Connecticut, but in only 2.8 percent of the cases in the Northern District of New York.[15] In the Fifth Circuit, there were downward departures in 14.3 percent of the cases in the Eastern District of Texas, but in only 4.8 percent of the cases in the Western District of Texas and in only 2.6 percent of the cases in the Southern District of Mississippi.[16] In the Eighth Circuit, the downward departure rate was high in both the District of Nebraska (at 16.2 percent) and in the District of South Dakota (at 14.3 percent); but in the Western District of Missouri and in the Western District of Arkansas, it was 0.0 percent; and in the District of North Dakota, it was 2.7 percent.[17] In the Ninth Circuit, the downward departure range varied from 25 percent in the District of Arizona to 3 percent in the Eastern District of California.[18] In the Tenth Circuit, the District of Utah's downward departure rate was 12.3 percent, but the District of New Mexico's rate was only 2.8 percent.[19]

Upward departure disparity, although less pronounced, is nonetheless also significant. In the Fifth Circuit, for instance, the Eastern District of Texas departed upward in 8.2 percent of the cases, but the rest of the districts in that circuit departed upward only in about 3 percent or less of the cases.[20] Similarly, in the Ninth Circuit, although the Southern District of California departed upward in 11.2 percent of the cases, the other three California district courts did so in only 0.5 to 2.3 percent of the cases.[21]

While the national figures lie between these extremes, to some extent the wide disparity among districts reflects the different attitudes toward departure held by various district judges.[22] In view of the foregoing data, it appears that the districts with high departure rates (up or down) are either acting cavalierly (and, I presume, with impunity in terms of the failure of the Government to appeal downward departures) or that they are acting appropriately, while other districts are being passive. Assuming that the truth lies somewhere in between, the figures suggest to me that many of the district courts are overly reluctant to depart.[23]

Some believe that this reluctance is attributable to the developing jurisprudence of the courts of appeals, which are alleged in some quarters to be less than hospitable to departures. This article will not analyze that jurisprudence or assess that theory. My purpose is instead to emphasize and to underscore, for the benefit of probation officers, who must make the initial foray into the record and the initial recommendation as to departure, and for the benefit of Federal judges as well, that the Sentencing Commission and Congress, as explained above, have *invited* departure in

appropriate cases.

The critical importance of the judiciary's acceptance of this invitation is underscored by the Supreme Court's emerging attitude toward resolving circuit splits on guidelines issues, i.e., it appears that the court will generally decline to exercise its certiorari power and leave it to the Sentencing Commission to resolve them. Speaking for the Court in *Braxton* v. *United States*,[24] Justice Scalia stated:

> After we had granted Braxton's petition for certiorari, the Commission requested public comment on whether § 1B1.2(a) should be "amended to provide expressly that such a stipulation must be as part of a formal plea agreement," 56 Fed. Reg. 1891 (1991), which is the precise question raised by the first part of Braxton's petition here. The Commission took this action pursuant to its statutory duty "periodically [to] review and revise" the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decision might suggest. This congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts; but there is even further indication that we ought to adopt that course. In addition to the duty to review and revise the guidelines, Congress has granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u). . . .[25]

Finally, in view of the centrality of departures to the guidelines sentencing scheme, I stress the importance of reporting in detail the reasons for departures to the Sentencing Commission. At minimum, the statement-of-reasons form supplied to the court along with the judgment form should be executed and sent to the Commission. It is hoped that, more often, the court will elaborate on the completed form in either a written or oral statement (transcribed by the court reporting service) and, in appropriate cases, in a written opinion. Only if we give the Commission our views can it properly fulfill its statutorily assigned duty to monitor the guidelines and revise them from time to time. Our obligation to report fully to the Commission is underscored by the Supreme Court's language in *Braxton, supra.*

Evidence that the Commission is listening may be found in several lines of cases. For example, the First Circuit reluctantly reversed downward departures from the guidelines in two recent cases involving the receipt of child pornography.[26] Although the sentencing courts found that both defendants were not a risk to the community, were only "passive" participants in the offense who desired rehabilitation, and that the Bureau of Prisons lacked treatment programs, the court held that these findings did not justify departure.[27] Significantly, in one case the court specifically commended the district judge for forwarding his comments regarding the guidelines to the Sentencing Commission.[28] The Commission apparently considered these comments because, in the amendments to the guidelines transmitted to Congress on May 1, 1991, the Commission reduced the sentence recommended under the guidelines for mere receipt or possession of child pornography.

The Sentencing Commission also paid attention to the Second Circuit's decision that a downward departure was justified when the defendant's youthful appearance and admitted bisexuality made him particularly vulnerable to victimization in prison.[29] In its May 1991 amendments, the Commission modified 5H1.4 by adding that appearance, including physique, is not ordinarily relevant in determining whether a sentence outside the guidelines is justified. The Commission explained the reason for this amendment as follows:

> In several cases, court[sic] have departed based upon the defendant's alleged vulnerability to sexual assault in prison due to youthful appearance and slender physique. This amendment expresses the Commission's position that such grounds are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

56 Federal Register 1846 (Jan. 17, 1991).

The Commission's January 17, 1991, publication of proposed amendments in the Federal Register makes many other references to the case law. One notable example is its explanation of the amendment to the policy statement concerning Substantial Assistance to Authorities, 5K1.1. Also notable are the Amendments to Guidelines § 2K2.1, revamping the section and increasing base offense levels for prohibited transactions involving firearms; these were made, according to the Commission, in response to comments received from judges, probation officers, and practitioners. In sum, there is abundant evidence that the Sentencing Commission is engaged in a dialogue with the courts and frequently responds when judges depart or articulate their concerns about their inability to depart. It is to be hoped that judges will continue to articulate their concerns forthrightly and often.

### *The (Forgotten) Hegemony of the Enabling Legislation*

As a regular reader of district court and court of appeals decisions applying the guidelines, I am struck by the frequency with which the authors of those decisions focus solely on the provisions of the guidelines themselves, to the exclusion, even in relevant cases, of the two statutes that form the basic charter for the creation of the guidelines: 28 U.S.C. § 991, *et seq.*, the Act creating the Sentencing Commission and providing it with directions as to the manner of constructing the guidelines; and 18 U.S.C. § 3551, *et seq.*, the SRA, which provides the courts with sentencing instructions.

It is well settled that when a body to which Congress has delegated rulemaking power promulgates a regulation that is inconsistent with Congress' intent as embodied in a Federal statute, a court must apply the statute.[30] Despite its formal location within the judicial branch,[31] the Sentencing Commission functions just like any other independent agency to which Congress has delegated rulemaking authority.[32] Thus the guidelines are no different from rules and regulations promulgated by other independent agencies, at least in terms of the fundamental requirement that they be consistent with their organic statute. Whenever a guideline is inconsistent with the enabling statute(s), the court must strike it down.[33] Although such power must be exercised with restraint, probation officers and the courts should be alert to the possibility of inconsistencies between the enabling legislation and the guidelines.[34]

### *Fact-Finding Discretion*

The most obvious, and yet seemingly least appreciated, area of discretion in guidelines application lies in the judge's fact-finding role and the deference due the judge in applying the law to the facts.[35] There are numerous examples of this fact-finding discretion. Of particular importance are the adjustments for role in the offense and for acceptance of responsibility, and for specific offense characteristics such as the amount of loss (in offenses involving property) and the quantity of drugs (in offenses involving controlled substances). These specific offense characteristics are especially important in view of the automatic upward ratcheting of the sentence that occurs as the amount of property lost or drugs involved increases.

Thus it is obviously imperative that the sentencing judge and probation officer expend effort in making factual determinations. A good example is a case in which the defendant is charged with committing fraud on a bank by securing a loan with false representations. Assume that the Government argues that, for purposes of sentencing, the "loss" is the full amount of the loan.[36] Assume further that the defendant contends that he or she genuinely expected to repay the entire loan and, therefore, that the "loss" is some lesser amount such as out-of-pocket expenses or lost profits.[37] Developing the correct figure—especially if the Government's "simple theory" is eschewed and the defendant's measures are adopted—may be time-consuming for the probation officer and the court (and, of course, for the parties). In my view, however, it is a necessary and worthwhile expenditure and, depending on the legal positions of the parties, a quintessential area for the exercise of discretion. And this example is but the tip of the iceberg.

### *Other Areas of Sentencing Discretion*

There are, of course, a number of areas where sentencing discretion is a part of the guidelines warp and woof. Determining where to sentence within the guideline range is the most obvious.[38] Determining how far below the guidelines range to go in the case of a § 5K1.1 departure for substantial assistance (or in the case of any departure for that matter) is another. And determining whether to pursue alternatives to incarceration, including home confinement, as well as the conditions of probation and supervised release, are still others. These are all enormous and highly important areas of discretion.

The provision of the SRA that primarily informs the exercise of sentencing discretion under the guidelines, a section too often overlooked, also bears mention. Title 18, United States Code § 3553(a), which prescribes the factors to be considered in imposing a sentence, exists to give guidance to probation officers and sentencing judges.[39] Analysis of the factors listed in § 3553(a) and § 3553(b), which deal with the application of the guidelines, is beyond the scope of this article.[40] For present purposes, it is sufficient to underscore the importance of § 3553(a) in the many situations when the guidelines are inapplicable.

### *Conclusion*

The details of the guideline sentencing regime, like the world in Wordsworth's poem, are "too much with us." Analysis of these details has consumed a good deal of the limited resources of Federal judges and probation officers. Having concentrated for so long on hacking our way through the trees, we now need to stand back and to look at the forest. When we do, we will see that there is more room for discretion and flexibility than we first realized. To take advantage of this leeway, however, we must abjure the perception of the guidelines as a totally mechanical scheme. Instead, we must seek out the areas in which rigorous analysis of the law and careful development of the facts can make a difference. In so doing, we will serve the cause of justice. Furthermore, by informing the Sentencing Commission of our decisionmaking process, we will contribute to the development—and change—of sentencing law as well. In other words, I believe that *we* can make a difference and that over the long haul, the Commission will be responsive to our work.

NOTES

[1]U.S. Sentencing Comm'n, Federal Sentencing Guidelines Manual § 1A4(b) (Nov. 1990) [hereinafter Guidelines].

[2]Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (1984), codified at 18 U.S.C. § 3551, *et seq.*

[3]Much of the next three paragraphs is drawn from my dissenting opinion in *United States* v. *Denardi*, 892 F.2d 269, 280-81 (3d Cir. 1989) (Becker, J., dissenting in part).

[4]*See* 28 U.S.C. §§ 991-992 (1988).

[5]*See id.* § 991(b)(1) (1988).

[6]*See id.* § 991(b)(2) (1988).

[7]*See id.* § 994(o) (1988).

[8]*See id.* § 994(p) (1988).

[9]*See* 18 U.S.C. § 3553(b) (1988); 28 U.S.C. § 994(c), 994(d) (1988).

[10]Guidelines, *supra* n.3, § 1A.4(b) (emphasis added).

[11]*Id.*

[12]Indeed, I have argued that, in certain cases, departure is actually required. *See Denardi*, 892 F.2d at 272 (Becker, J., dissenting in part). Because the fulfillment of this central purpose of the SRA clearly depends on departures, especially at a stage when everyone concedes that the guidelines still contain significant room for improvement, I believe that the notion of a legally required departure is perfectly consistent with the purposes that underlie, and the spirit that animates, the SRA itself. In particular, in cases that fall far enough outside the "heartland," a district court's refusal to depart cannot be squared with the overall sentencing scheme envisioned by Congress when it enacted the SRA.

[13]In 6.9 percent of these cases, the sentence was below the guidelines range. The remaining 2.3 percent were above the guidelines range.

[14]*See* U.S. Sentencing Comm'n, 1990 Annual Report Table C-5, Guideline Departure Rate By Circuit And District (October 1, 1989, through September 30, 1990).

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18]*Id.*

[19]*Id.*

[20]*Id.*

[21]*See also* Karle and Sager, *Are The Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical And Case Law Analysis*, 40 Emory Law Journal 393, 409 (1991), in which Professors Karle and Sager demonstrate vast disparities within different districts of the Fifth Circuit for the same crime.

[22]Undoubtedly there are other facts at work as well, particularly differing plea bargaining practices in different districts. The Commission has also documented widely disparate plea rates in various districts, see, 1990 Report of the Sentencing Commission at Table I. *See also* Karle and Sager, n.14, *supra*, at 403 *et seq.*

[23]The court's opinion in *Burns* v. *United States*, 111 S. Ct. 2181 (1991), holds that before a district court can depart upward from the applicable guidelines range on a ground not identified as a ground for such departure either in the presentence report or in a prehearing submission by the Government, Fed. R. Cr. Proc. 32 requires that the court give the parties reasonable notice that it is contemplating such a ruling, specifically identifying the ground for the departure. This holding makes it important for the probation officer to inform the court of all possible departure options in the presentence report.

[24]49 Cr. L. Rep. 2190.

[25]*Id.* at 2191.

[26]*United States* v. *Studley*, 907 F.2d 254 (2d Cir. 1990), and *United States* v. *Deane*, 914 F.2d 11 (2d Cir. 1990).

[27]Compare *United States* v. *Bierley*, 922 F.2d 1061 (3d Cir. 1990) (downward departure in child pornography case which involved a government sting operation may be justified by analogy to role adjustments).

[28]*Deane*, 914 F.2d at 15 ("We commend the court for forwarding its comments to the chairman of the Sentencing Commission, a practice we strongly encourage when judges encounter what they perceive to be flaws in the mandated sentencing ranges.").

[29]*United States* v. *Lara*, 905 F.2d 599, 603-04 (2d Cir. 1990).

[30]*See Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on the issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

[31]*See* 28 U.S.C. § 991(a) (1988).

[32]*See Mistretta* v. *United States*,___ U.S.___, ___ , 109 S. Ct. 647, 665-66 (1989); *id.* at ___ , 109 S. Ct. at 680-82 (Scalia, J., dissenting).

[33]*See* Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 1, 47 (1991) ("A court that must impose a sentence according to law cannot blindly apply a guideline that is based on a misinterpretation of the underlying statute.").

[34]*Compare United States* v. *Lee*, 887 F.2d 888 (8th Cir. 1989) (invalidating Guidelines § 2J1.6, as applied to the facts of that case, as inconsistent with the Commission's statutory authority, 28 U.S.C. §§ 994, 991(b)(1)), *with United States* v. *Harper*, 932 F.2d 1073 (5th Cir. 1991) (rejecting the Eighth Circuit's reasoning in *Lee*).

[35]18 U.S.C. § 3742(e).

[36]*See* Guidelines, *supra* note 3, § 2F1.1.

[37]*See United States* v. *Schneider*, 930 F.2d 555, 559 (7th Cir. 1991) (rejecting the Government's definition of "loss"); *United States* v. *Whitehead*, 912 F.2d 448, 452 (10th Cir. 1990) (similarly rejecting the Government's definition of "loss").

[38]The same sort of discretion is called for in determining fines, as well as sentences, and in setting the term of supervised releases.

[39]Section 3553 provides in pertinent part:

**§ 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—