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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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A Prosecutor's View of the Sentencing Guidelines

By Thomas E. Zeno
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NOTWITHSTANDING RUMORS to the contrary, the function of Federal prosecutors—the investigation and prosecution of criminal offenders—remains essentially unaltered under the sentencing guidelines and Department of Justice policy implementing them. Even where we have new responsibilities because of the guidelines and related Department policy, the resulting changes are not as profound as has been reported. For instance, we have not become substitutes for district judges nor have we been otherwise loosed to affect criminal sentencing any way we choose. That being said, however, we discharge our duties somewhat differently in the era of the guidelines.

This article examines some core concepts underlying the guidelines and related Department policy from the perspective of an individual assistant United States attorney.[1] Beginning with problems of sentencing under pre-guidelines practice, the article will discuss the reasons for sentencing reform, the effects of both mandatory minimum sentences and the guidelines on prosecutorial discretion, and the importance of the Thornburgh Memorandum on plea bargaining.[2] The article will also discuss some practical effects of the guidelines on the work of prosecutors as well as implementation of the substantial assistance departure under § 5K1.1.

Problems With Past Practice

Anyone connected with the criminal justice system prior to the guidelines knew that sentences varied with the spin of an assignment wheel, even though defendants had similar backgrounds and had committed similar offenses in a similar manner. This disparity arose because of the vastly different sentencing philosophies held by those in the criminal justice system about which sentencing factors were aggravating, mitigating, or even relevant. Some judges routinely gave defendants second and third chances on probation, while other judges—appropriately nicknamed "long ball hitters"—just as routinely incarcerated first offenders. Nor was this disparity limited to judges. Prosecutors also held widely varied opinions as to the kinds of sentences which were "better" or "fairer." We could, and sometimes did, influence a defendant's sentence by our selection of charges, our plea offers, and our allocution at sentencing.

The problem with past practice was not necessarily the sentence which any particular judge imposed on any particular defendant; the problem was the system itself. It was wrong, and unwarranted, to allow the identity of the sentencing judge (and sometimes the prosecutor) to matter so much in determining a defendant's sentence. In fact, contrary to the view that pre-guidelines sentences were individually tailored to a defendant's conduct and background, the past system really provided little protection for the defendant. Rather, a defendant's fate hinged on the individual predispositions of the prosecutor and sentencing judge. Furthermore, once a sentence was imposed, no matter how harsh or lenient, it was virtually immune from appellate review on the ground of disparity from that of similarly situated defendants. Accordingly, the only consistency under past sentencing practice was the lottery fashion by which the case was assigned initially.

A simple sentencing scenario (referred to occasionally in this article) helps to focus the problem created under pre-guidelines sentencing practice. Suppose a bank officer was charged with two counts of bank fraud, and the evidence was overwhelming that the defendant took $15,000 on day one and $500,000 on day two. Faced with this situation a prosecutor could offer a plea to the first count or to the second count, or require a plea to both counts. Even if the defendant pled guilty to just the $15,000 offense, however, one judge could impose a sentence based on only that amount of loss whereas another judge could impose a greater sentence because $515,000 actually had been taken. What rationale could justify these results? None could, and hence the unwarranted nature of the disparity in sentencing. It should not be surprising that Congress decided to impose some order on this erratic process by mitigating the significance of personal sentencing philosophy in determining a sentence.[3]

Effects of Mandatory Minimum Penalties on Prosecutorial Discretion

Congress established some consistency in sentencing by passing statutes that require judges to impose mandatory minimum penalties on defendants convicted of certain offenses. Although judges may increase sentences above mandatory minimum levels, they cannot reduce the minimum to reflect relevant mitigating characteristics as they can under the

guidelines.[4] Thus, mandatory minimum offenses, which have been uniformly upheld as a legitimate exercise of Congress' authority over sentencing, actually encroach further into the domain of judicial discretion than do the guidelines.

In contrast, mandatory minimum sentences actually increase the prosecutor's discretion. Not only do they add to the number and type of charges which a prosecutor can bring, but they also increase our control over sentencing. This control, which has always existed to some extent, is most evident when we decide not to prosecute a defendant at all even though a crime has been committed. Further, we always determine the maximum possible sentence that a court can impose by our selection of charges. For instance, when we charge only a misdemeanor, the sentence cannot exceed 1 year's incarceration no matter how seriously the judge views the defendant's conduct. Mandatory minimum offenses magnify the importance of our charging discretion, however. If we select a mandatory minimum charge and it is proven, the judge is bound to impose the minimum sentence regardless of mitigating factors.

Following the establishment of the guidelines, some have sought repeal of mandatory minimums on the ground that they are inconsistent with guideline sentencing. In fact, there is no necessary conflict between a guideline system and a mandatory minimum system. The guidelines are already subject to the statutory maximum penalties established by Congress for each offense, and it is certainly as permissible for Congress to establish a floor below which the guidelines cannot fall as it is for Congress to establish a ceiling above which they cannot rise. Nonetheless, guideline sentencing provides Congress with the opportunity to experiment with the form of mandatory sentences. Congress could, for instance, establish base offense levels rather than mandatory minimums. These base offense levels would be subject to the same mitigating adjustments otherwise found in the guidelines, something not possible with a mandatory minimum sentence. Congress could even legislate merely that incarceration is appropriate for everyone convicted of a certain offense while allowing the Commission to sort out the factors which should determine the term of imprisonment. Such instructions would reflect the congressional will while allowing the Commission to implement that will in individual cases.[5]

Effects of the Guidelines on Prosecutorial Discretion

Contrary to popular misconceptions, the guidelines did not transfer authority over sentencing from judges to prosecutors. Judges retain the exclusive power to accept or reject plea bargains, to find facts upon which the sentence will be based, and to decide the precise sentence within the guideline range.[6] Furthermore, even when a departure may be appropriate, it is the court which decides both whether to allow the departure and the extent of the departure.

In addition to preserving these aspects of judicial authority over sentencing, the Sentencing Commission actually curbed the prosecutor's power to "influence sentences by increasing or decreasing the number of counts in an indictment" when it wrote multiple count rules "with an eye toward eliminating unfair treatment that might flow from count manipulation." United States Sentencing Commission, *Guidelines Manual* (Nov. 1991) at page 5.[7] This limitation on our power to influence a sentence by adding or dropping charges furthered the Commission's goal to eliminate unwarranted disparity. Returning to the bank fraud example, the defendant's sentence should be the same regardless of whether the prosecutor charges two counts of bank fraud in amounts of $15,000 and $500,000 or whether the prosecutor joins them in one count totaling $515,000. Thus, the Commission narrowed the effect of prosecutorial discretion on sentencing in a manner similar to that in which judicial discretion had been limited.

Although similar, the limits on prosecutors are not exactly the same as those on judges. While the Commission set a ceiling on the effect of our charging decision, there is no floor.[8] Nothing prevents prosecutors from introducing unwarranted disparity into the system by charging one defendant less severely than another, for reasons decided upon solely by the prosecutor. Admittedly, the idea of needing to curb prosecutorial lenity seems unusual; but the Department of Justice anticipated precisely this problem when the guidelines were promulgated.

Effects of the Thornburgh Memorandum on Prosecutorial Discretion

The Thornburgh Memorandum articulates the core policy on plea bargaining: "[A] federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct." *Memorandum, supra* n.2, at 11-88.[9] As a corollary, the memorandum prohibits adding charges merely to gain leverage against a defendant or dropping charges just to obtain a guilty plea. *Id.* By requiring all prosecutors to charge and plea bargain alike, the memorandum attempts to eliminate the unwarranted disparity in sentencing which could occur as a result of inconsistent charging practices among individual prosecutors.

Once readily provable charges are determined,[10] they may be dropped through plea bargaining in two instances. First, readily provable charges may be

dropped when the resulting guideline sentence would be unaffected. *Id.* at 11-89. This exception, which is premised on the operation of the relevant conduct and multiple count rules, permits a prosecutor to offer a plea to only the count or counts necessary to ensure a sentence within the guideline range and at or above an applicable mandatory minimum. Returning to the bank fraud example, the memorandum permits a prosecutor to offer a plea to a $15,000 count of bank fraud, a $500,000 count, both of these counts, or a single $515,000 count because the resulting offense level is 20 for each of these pleas. Even if the defendant has a criminal history category of VI, the most serious,[11] the resulting guideline range for any of the pleas is 70-87 months, well within the statutory maximum for even a single count of bank fraud.[12] As typified by the bank fraud example, this exception is criticized for providing only the same benefit for pleading guilty as the adjustment for acceptance of responsibility. Such criticism misses the point because the exception is not intended to create a loophole to the guidelines. The exception can be valuable, however, for defendants who wish to limit the number or type of offenses for which they are convicted.

Suppose that a defendant commits a $1 million bank fraud by directing six persons to use false credit cards more than a hundred times. There are myriad ways in which we can indict enough counts of bank fraud and credit card fraud so that the defendant will be facing an immense aggregate maximum sentence. Even if the defendant has a substantial criminal record (say, 18 criminal history points[13]), however, the resulting guideline range will be only 92-115 months.[14] Given the likelihood that a judge might want to depart upward from that guideline range,[15] the Thornburgh Memorandum permits a prosecutor to offer the defendant a considerable benefit: a plea to just one count of credit card fraud, which has only a 10-year (120-month) statutory maximum. Although this plea places no limitation on the court's discretion to choose a sentence within the guideline range, it assures the defendant that, even if the court decides to depart upward, the sentence will not exceed 120 months. A prosecutor is permitted to offer this plea because the memorandum requires only that the plea offer be sufficient to allow imposition of the guidelines sentence; the plea need be great enough to encompass upward departures. If the defendant is convicted of numerous counts at trial, on the other hand, the court can aggregate the maximum sentences of several counts of conviction and then depart upward well beyond 120 months.

Similarly, in the very low guideline ranges, this exception permits a plea offer to one or two misdemeanors rather than a felony. For example, if the top of the guideline range is 24 months, we can offer a plea to two misdemeanors. Although such a plea does not reduce the guideline range, it can be of considerable significance to an offender who wants to avoid the stigma of a felony conviction.

The second instance in which the Government may drop readily provable charges under the memorandum is with the specific, written approval of the United States attorney or a designated supervisory Department official. Such approval is reserved for unusual cases in which "critical aspects of the federal criminal justice system" would suffer if the requirements of the guidelines have to be met. *Id.* at 11-90. The example of this exception given in the memorandum is:

> [A]pproval to drop charges in a particular case might be given because the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.

Id. This exception is likely to be invoked so rarely that it need not be discussed further in this article.

The Thornburgh Memorandum thus confines prosecutors in parallel with the new strictures on judges. With the limited exceptions of not readily provable charges or written supervisory approval, prosecutors must offer pleas equivalent to conviction on all the most serious conduct. Courts can monitor adherence to the memorandum by applying the standards for accepting a guilty plea set forth in § 6B1.2(a), which requires that the justification for a plea offer be stated on the record.[16] Because the Thornburgh Memorandum is specifically drafted to be compatible with the guidelines, any plea appropriate under the memorandum will also be acceptable under § 6B1.2(a). As long as we can justify a plea offer under both the guidelines and the memorandum, there will be no unwarranted disparity in sentencing attributable to prosecutors.

Yet not every prosecutor agrees with the result of the guidelines calculation in every case, and a prosecutor can be tempted to enter into a plea bargain which misrepresents facts in order to achieve a downward departure to a sentence which the prosecutor considers "fair." This practice would return unwarranted disparity to sentencing by allowing prosecutors to decide when the guidelines sentence should be imposed and when it should not. Anticipating this problem, the memorandum contains a specific (and seemingly self-evident) admonition: "Stipulations to untrue facts are unethical." *Id.* at 11-91.[17] Similarly, "hidden" downward departures are strictly forbidden in either the pre-indictment or post-indictment stage. *Id.* at 11-88 - 11-89.[18]

Practicalities of Prosecution Under the Guidelines

The Charging Decision

In most respects the guidelines and Department policy have had no significant impact on the daily life of a prosecutor. It takes only a few minutes for a prosecutor to compute the likely guideline range—and concomitant plea offer—in the typical fraud or drug case. Even in complicated cases, it rarely requires more than an hour or so to project the likely guideline range. Further, because the guidelines do not change elements of proof or require new indictment language, investigations and presentations to grand juries are largely unaffected by them.

The concern is exaggerated that the guidelines will encourage prosecutors routinely to charge only minor offenses. The fear is that we will obtain a conviction beyond a reasonable doubt on a minor offense and then seek to increase the sentence based on relevant conduct of more serious crimes which can be proved at sentencing under a mere preponderance of the evidence standard. This is an unlikely scenario. Typically, prosecutors will charge the essential criminal conduct because carving the case into minute bits creates a significant risk of jury confusion and nullification. Nevertheless, there will be situations when, for evidentiary reasons or in order to conserve prosecutorial resources, we will charge conduct not fully reflective of the extent of a defendant's criminal activity. *See,* for an extreme example, *United States* v. *Kikumura,* 918 F.2d 1084 (3d Cir. 1990).[19]

This is not a change from past practice attributable to the guidelines, however. Prosecutors have long structured indictments for such reasons. It is undeniable, for example, that the Government prosecuted Al Capone more intensely than a run-of-the-mill tax cheat. Under the guidelines, at least, there are rules about how to calculate the sentence in such a situation, and the defendant will be permitted to appeal the sentence. In *Kikumura,* for instance, the appellate court held that the extent of the departure was improperly calculated and ordered that the sentence be reduced from 360 months to no more than 262 months. *Id.* at 1119. Under pre-guidelines practice, a trial court's sentence would have been immune from review unless the sentence violated constitutional safeguards.

Plea Bargaining

Because the Thornburgh Memorandum requires that plea bargains be equivalent to conviction on the most serious readily provable offense(s), plea discussions in the typical case focus on the adjustment for acceptance of responsibility (§ 3E1.1) and the recommendation about placement of the sentence within the guideline range.[20] Early in the pre-indictment stage, it is more likely that we will agree to the two-level reduction for acceptance of responsibility and to sentencing at the bottom of the range. This is so because a plea at this stage provides the greatest benefit to the prosecutor in terms of conservation of investigative and judicial resources and provides strong evidence that the defendant actually accepts responsibility for the criminal conduct. These early guilty pleas generally deserve the maximum reductions permitted by the guidelines.

Because sentencing is more predictable under the guidelines, however, some defendants may be reluctant to enter into pre-indictment bargains under which they are certain to go to prison. We may find an increase from pre-guidelines practice in the number of defendants who will delay entering a guilty plea until faced with an indictment.[21] In a complex case where this delay causes us to expend significant prosecutorial resources to obtain an indictment, the prosecutor is likely to allocute for a sentence higher in the guideline range. This should not be surprising because the timing of a guilty plea should make a tangible difference in the defendant's sentence.[22] The lowest sentence, at the bottom of a guideline range which has been reduced two levels for acceptance of responsibility, should be reserved for those who have shown remorse and saved valuable investigative and judicial resources by pleading guilty immediately upon discovery of their crime. Those who await indictment and exhaust hours of court time in status and motions hearings before pleading guilty generally should not receive the same benefit as those who plead before indictment. The longer a defendant waits to plead, the more difficult it will be to convince the prosecutor to accept the adjustment for acceptance of responsibility and a sentence at the bottom of the guideline range.[23]

Although the two-level downward adjustment for acceptance of responsibility has been criticized as insufficient to induce guilty pleas, there is approximately a 20 percent difference between the top of the guideline range without the adjustment and the top of the range two levels below. The difference is even greater between the top of the range without the adjustment and the bottom of the range two levels below, which is where the defendant can hope to be sentenced for a prompt plea. These are reasonable incentives. More importantly, we know from experience with mandatory minimum sentences that defendants will plead guilty if they realize that the two-level benefit and a sentence at the bottom of the range are the best deal available. When mandatory minimums were introduced, many thought that no defendant would plead guilty knowing that prison was inevitable. Yet pleas continued because it became clear that

an early plea was the best way to get merely the mandatory sentence. Conviction after trial usually meant a sentence above the minimum. Realizing that the lowest sentence results from an early plea, the defendant will likely take it.[24]

Finally, although limited to low level offenses, significant plea negotiation can occur whenever the possible sentence includes alternatives to prison. For example, at offense levels 10 and below for first offenders, the guideline range permits more than just a reduced period of imprisonment; it allows the court to forego prison entirely in favor of probation, home detention, or community confinement. A defendant should be willing to enter an early guilty plea in exchange for our recommendation in favor of probation or home detention. This is particularly true for a defendant who needs the adjustment for acceptance of responsibility just to be eligible for a range which does not require a prison sentence, as, for example, a first offender with an adjusted offense level of 11 or 12 who faces imprisonment without the two-level reduction.

Presentence Investigation

Because of the importance of fact-finding proposed in the presentence report, a prosecutor spends considerably more time in contact with the probation officer who writes the report than in pre-guidelines practice. We not only provide detailed justifications for our proposed findings, but we also discuss the legal basis for application of adjustments. It is even fairly common to provide case law to the probation officer in support of our positions. Furthermore, we can no longer delay review of the report until a day or two before sentencing. Court rules allow our objections to be barred unless we examine the report and file objections to it well before the sentencing hearing. These responsibilities are somewhat more time-consuming than prior practice, but they do not significantly increase the average amount of time we spend preparing for sentencing.

Sentencing Hearing

The dire predictions about incredibly lengthy sentencing hearings have not proven true. Certainly, in some sentencings virtually every fact is contested vigorously and protractedly. Typically, however, the court's resolution of disputed facts takes only slightly longer than before the guidelines when facts were contested by the parties. As long as prosecutors and defense counsel define the relevant issues during the presentence investigation, the increased time spent in most sentencing hearings will not be remarkable.

The Substantial Assistance Departure

In order to encourage cooperation with the Government, Congress permitted a reduced sentence, even below a mandatory minimum, for a defendant who provides substantial assistance in the investigation or prosecution of another. 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n). As with most guidelines provisions, this sentencing departure is not new; defendants have long received reduced sentences for assisting the Government. This departure differs from past practice, however, because it can be invoked only "[u]pon motion of the Government." *Guidelines Manual*, § 5K1.1. Although frequently challenged, the reservation of this power to the Government has been uniformly upheld by courts of appeals, subject to review under the same standards of bad faith or impermissible selectivity applicable to the initial decision to prosecute. *See generally*, *United States* v. *Doe*, 934 F.2d 353, 361 (D.C. Cir. 1991).

Unfortunately, this unique power can inject unwarranted disparity back into sentencing if individual prosecutors are permitted to act autonomously when filing the motion. For example, prosecutors could differ over whether to file a motion in the following circumstances. Suppose a drug courier is arrested in possession of 50 grams of crack cocaine but, promptly after arrest, the courier tells the police everything the courier knows about a drug organization. The courier's information justifies one search warrant which, when executed, results in the arrest of one person for possession with intent to distribute 900 grams of marijuana. Whatever differences individual prosecutors may have about whether this constitutes substantial assistance, the decision to file a motion should not vary depending upon which prosecutor is assigned to the case. In order to prevent inconsistent use of the substantial assistance motion, the Department strongly recommends that only supervisors or a committee of senior prosecutors have the power to file a substantial assistance motion.

In the District of Columbia, for example, individual prosecutors are not permitted to acquiesce in any downward departure, file a motion for substantial assistance pursuant to § 5K1.1, or request an upward departure without approval of the Departure Committee. Further, any defense request for a downward departure must be presented to the Committee, even if the prosecutor deems it frivolous. The Committee, composed of three senior prosecutors,[25] decides each request with the specific goal of ensuring that departure decisions are made consistently. While the views of the individual prosecutor assigned to the case are, of course, given significant weight, the Committee is not a "rubber stamp." It frequently asks the line prosecutor for more information about proposals made to it, accepts submissions from defense counsel, and has even required the departure motion to be filed over the vigorous objection of the line prosecutor.

Even when the substantial assistance motion is uniformly applied, critics object to it because low level offenders often do not know enough to provide substantial assistance in the prosecution of other persons. Although this criticism seems to pinpoint an inequality, it does not. The § 5K1.1 departure is premised on the ability of the defendant to give "substantial assistance in the investigation or prosecution of another person." The fact that some defendants cannot provide the kind of assistance necessary to invoke the departure is no different than the situation for any other departure: It applies to some defendants but not to others. For instance, the diminished capacity departure, § 5K2.13, should not be eliminated merely because few defendants qualify for it.

Concomitant with this complaint is a more serious one: that high level offenders who provide substantial assistance can reduce their sentences below those of their subordinates. To the extent that this situation occurs, however, it poses a problem appropriately redressed by the sentencing judge, not by the prosecutor who files a departure motion. After all, it is the judge who determines whether to grant the motion as well as the extent of the departure for an individual defendant. In order to maintain the principle of proportional sentencing, the sentences of more culpable offenders (who provide substantial assistance) ordinarily should not be reduced below those of less culpable codefendants who, because of their more limited roles, could not provide substantial assistance. This sentencing structure should be relatively easy to achieve because defendants involved in significant criminal activity likely will fall within a higher guideline range than their subordinates.[26]

Two Final Comments

The guidelines are frequently criticized because a judge cannot depart, upward or downward, when the judge believes the penalties prescribed in the guidelines are not appropriate. This criticism overlooks the departure concept entirely. If a case falls outside the "heartland" of typical cases described by the guidelines, *Guidelines Manual at p. 5,* a departure is justified and the court can adjust the sentence. In doing so, however, the court must consider more than its impression of what the correct sentence should be. The court must explain the departure objectively, in a way that properly evaluates relevant sentencing factors. If it can do so, the departure will be sustained. *See, e.g., United States* v. *Takai,* 941 F.2d 738 (9th Cir. 1991).[27] If it cannot, the departure will be reversed. *See, e.g., United States* v. *Brewer,* 899 F.2d 503 (6th Cir.), *cert. denied,* 111 S.Ct. 127 (1990).[28] The requirement that departures be objectively reasonable and explicable is hardly a basis on which to criticize the guidelines.

Finally, a major complaint against guideline sentencing is simply that it takes too much time. Of course, even after the guidelines have been learned, sentencing in even the average case is more time-consuming than pre-guidelines practice. In unusual cases, the guidelines will be considerably more time-consuming than prior practice. This complaint rings quite hollow, however, in light of the results. How can it be argued that we should not spend some extra time in the effort to achieve a better and fairer sentence for a defendant and the community? This is not to say that the guidelines are perfect. They are not. Furthermore, the guidelines will almost certainly be changed over time to reflect changing theories of penology and societal goals. The benefit of a guideline system, however, is that these changes will be applied uniformly to each defendant, something sorely lacking before November 1, 1987.

NOTES

[1]These comments do not necessarily represent the position of the Department of Justice or the United States Attorney's Office for the District of Columbia.

[2]Former Attorney General Dick Thornburgh's March 13, 1989, memorandum on plea bargaining under the guidelines. *See Memorandum of the Attorney General to Federal Prosecutors Concerning Plea Bargaining Under the Sentencing Reform Act* (hereafter "Thornburgh Memorandum" or "memorandum"), reprinted in G. MCFADDEN, J. CLARKE & J. STANIELS, FEDERAL SENTENCING MANUAL, App. 11B, at 11-87 (1991).

[3]Under § 1B1.3, the relevant conduct provision of the guidelines, the defendant's base offense level is determined upon the entire $515,000 regardless of the count of conviction. Theoretically, of course, the Sentencing Commission could have structured the guidelines so that they do not consider dismissed counts when determining a sentence. The advantage of guideline sentencing, however, is not how it resolves such issues, but the consistency it imposes regardless of the judge, prosecutor, defense counsel, or defendant involved.

[4]The substantial assistance departure codified at 18 U.S.C. § 3553(e) has changed the "mandatory" nature of a mandatory sentence to some degree. This is discussed later in the article.

[5]Although some contend that mandatory minimums should be abolished because they are excessively long, this argument has nothing to do with the merits of guideline sentencing. The essence of a guideline system is consistency. It is a political question for Congress or the Commission whether the effect of that consistency is too strict or too lenient.

[6]The court's discretion within a guideline range can be limited when the defendant is convicted of a mandatory minimum offense with a penalty which falls in between the bottom and the top of the applicable guideline range. In this circumstance, the court is required to sentence only at or above the mandatory sentence.

[7]In its Introduction to the Guidelines, the Commission rightly described this as one part of its "Resolution of Major Issues." *Id.* at p. 4.

[8]In another resolution of a major policy issue, the Commission decided that even though it might be leaving a "'loophole' large enough to undo the good that sentencing guidelines would bring," it would not make major changes in plea practices. *Id.* at p. 7. Rather, the Commission adopted general policy statements intended to prevent circumvention of the guidelines. *Id.* .

[9]The Thornburgh Memorandum confirms Department policy as enunciated by Associate Attorney General (now Judge of the Ninth Circuit Court of Appeals) Stephen S. Trott in his memorandum of November 3, 1987. *See, Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines*, reprinted in P. BAMBERGER, PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES, Ch. 17, Part B, at 389 (1991).

[10]A readily provable charge is one that the Government expects to win at a trial. *Id.* at 11-89. A charge that is not readily provable need not be maintained and may be bargained to a lesser offense. *Id.* For example, a plea bargain to a less serious charge is permitted when conviction depends upon the testimony of a cooperating witness whom the Government does not wish to reveal because of a larger, ongoing investigation in which the witness is involved. *Id.* at 11-88.

[11]The severity of the defendant's criminal history can be rated from a low of category I to a high of category VI. *See* Sentencing Table, Chapter Five, Part A.

[12]This example presumes an adjusted offense level of 20 for bank fraud arrived at in the following manner: § 2F1.1(a) — base offense level of 6; § 2F1.1(b)(1)(K) — plus 10 levels for more than $500,000 of loss; § 2F1.1(b)(2)(A) — plus 2 levels for more than minimal planning; and § 3B1.3 — plus 2 levels for abuse of position of trust. With criminal category VI, the defendant's guideline range is 70-87 months incarceration. This is well below the statutory maximum of 30 years (360 months) set for bank fraud in 18 U.S.C. § 1344.

[13]The 18 criminal history points, assigned as prescribed in § 4A1.1, place defendant in criminal history category VI. Because category VI begins with 13 points (*see* Sentencing Table), this defendant has an unusually serious record.

[14]This example presumes an adjusted offense level of 23 for bank fraud and credit card fraud arrived at in the following manner: § 2F1.1(a) — base offense level of 6; § 2F1.1(b)(1)(L) — plus 11 levels for more than $800,000 of loss; § 2F1.1(b)(2)(A) — plus 2 levels for more than minimal planning; and § 3B1.1(a) — plus 4 levels for organizer role involving five or more participants.

[15]A judge might decide that defendant's 18 criminal history points qualify for a departure because it takes only 13 points to qualify for category VI. Section 4A1.3 permits an upward departure when a defendant's criminal history category "does not adequately reflect the seriousness of defendant's past criminal conduct or the likelihood that the defendant will commit other crimes."

[16]The court may request an explanation of the prosecutor's plea offer even when the offer is made because a greater count is not readily provable. *United States* v. *Adonis*, 891 F.2d 300, 304 (D.C. Cir. 1989).

[17]This supplements § 6B1.4(a)(2) which requires that stipulations shall "not contain misleading facts."

[18]At 11-88 the memorandum states:

> Whether bargaining takes place before or after indictment, the Department policy is the same: any departure from the guidelines should be openly identified rather than hidden between the lines of a plea agreement.

At page 11-89 the memorandum states:

> But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.

[19]Kikumura was convicted of firearms and passport offenses subjecting him to a guideline range of 27-33 months. At sentencing the Government sought an upward departure because Kikumura, a member of the Japanese Red Army, had manufactured homemade bombs in preparation for a terrorist attack. The trial court agreed and imposed a sentence of 30 years, an upward departure of 327 months. The appellate court found most of the departure justified, although finding that a clear and convincing standard of proof applies when such radical departures are imposed.

[20]The substantial assistance departure is not part of a standard plea offer. It is discussed below.

[21]Preindictment pleas can also be more time-consuming than in past practice because prosecutors and defense counsel will spend time negotiating the exact details of factual proffers to be made to the court. Even when the result of such negotiations is only an agreement to disagree about certain facts, they are rarely burdensome.

[22]Application Note 1(g) to § 3E1.1 provides that "the timeliness of the defendant's conduct in manifesting the acceptance of responsibility" is an appropriate consideration in whether to grant the adjustment.

[23]Of course, granting the benefit of a reduced sentence to a defendant who pleads guilty is not the same as punishing a defendant who pursues the right to indictment and trial. *See, e.g., United States* v. *Parker*, 903 F.2d 91, 105 (2d Cir. 1990).

[24]There are some instances when an early plea provides little tangible benefit. For instance, violent recidivists can still face what amounts to a life sentence even with an early plea. These types of cases used to go to trial before the guidelines, and the fact that they continue to go to trial under the guidelines will not unduly increase the trial calendar.

[25]The author is a member of the Committee.

[26]There may be rare instances when the substantial assistance is so great that the more culpable defendant should receive a sentence below that of a subordinate.

[27]In *Takai*, the trial court's downward departure was upheld because the guidelines did not account for the circumstances that defendants received no financial or personal benefit from their bribes, one defendant performed outstanding acts of benevolence, and the Government agent induced the defendants, who had no prior criminal convictions, not to withdraw from the bribery scheme.

[28]In *Brewer*, the trial court's downward departure was reversed because, under the facts of the case, the guidelines took into account the degree of community support for the defendant, the defendant's family responsibilities, the degree of defendant's remorse, the defendant's prompt payment of restitution, the defendant's lack of criminal history, the need to incarcerate defendant, and the victim's recommendation for clemency.