The Federal Sentencing Guidelines

A Troubling Historical Perspective

Prosecution-run courtrooms, punishing a race and not a crime, spying on the judiciary, and deciding how much time is enough.

Has sentencing reform gone too far?

By Marcia G. Shein and Matthew Doherty

"Our resources are misspent, our punishments too severe, our sentences too long."[1]

Justice Anthony M. Kennedy
2003 ABA Annual Meeting

We have reached the precipice of 20 years of debate and dissent surrounding sentencing reform and the Federal Sentencing Guidelines. Numerous advocates for sentencing reform have pleaded their positions to Congress, to the bar, and to the public.[2] We have seen the devastating effects that mandatory minimum sentences and the death of judicial discretion have had on the huge increase in prison populations. In both state and federal prisons, the inmate population has increased from approximately 400,000 inmates in 1984 to an estimated 1.4 million at the beginning of 2004.[3] While numerous reasons likely are behind this increase, the guidelines and the shift from judicial to prosecutorial discretion have had a significant impact on these numbers. No longer are judges able to address a defendant with full knowledge that the imposed sentence will be a just one. The guidelines channel concepts of mercy and humanity into a grid plotted by an accountant-like judge. What started as an admirable goal of eliminating disparities in sentencing procedures has been transformed by Congress into a tool that is used more often for political gain than for the realization of policy goals in sentencing. Since 1984, Article III has been pushed by the wayside, and the traditional role of judges as decision-makers has been legislated away. In its stead, we have prosecutors determining the fate of the accused. The recently enacted PROTECT Act and Attorney General John Ashcroft's memo to federal prosecutors may be the proverbial "straw that broke the camel's back."[4] Thomas S. Kuhn, the author of *The Structure of Scientific Revolutions*, would recognize that the law is reaching a critical impasse: It is time for a "paradigm shift" in the way we think about sentencing.[5]

The evolution of the guidelines from their enactment to the Ashcroft era has severely damaged our criminal justice system and the Constitution. The $64,000 question is: What can be done to restore the policy goals of the sentencing reform act as initially enacted? Eliminating the guidelines is not necessary; however, we must return the guidelines to a system of guided judicial discretion and humanity in sentencing.[6] This system should take into account the severity of the offense but allow the most informed individual in the court — the judge — to make the final decision in sentencing the accused as a human being and not as a series of formulas neatly placed inside a grid. Some sentencing factors cannot or should not be taken into account by the guidelines. Prescribing factors that cover every potential human conduct relevant to a judge's sentencing decision is simply too difficult. Criminal defense counsel can use effective strategies to challenge the current system of sentencing, specifically the effects of the PROTECT Act. However limited they may be, situations still exist that require downward departures and creative arguments to lower sentences.

Where We Started

Since the dawn of our republic and the creation of the federal court system, the role of sentencing has traditionally been at the discretion of the judiciary. The Constitution mandates the legislature to enact the laws guided by the will of the people and the judiciary to decide "cases and controversies." Intuitively speaking, this makes sense. A judge, by definition, weighs the equities of a case, makes a decision on the merits, and issues a sentence. Up until the early 1980s, our criminal justice system had followed this simple wisdom of the common law.

In 1984, Congress had a vision to revamp the federal criminal justice system. As part of a wave of reform produced by growing public concern over the increase of crime and recidivism rates, Congress, wanting to appease constituents before re-election and show that it was tough on crime, enacted the Comprehensive Crime Control Act of 1984.[7] Among the many reforms of this act was the Sentencing Reform Act of 1984,[8] which created an "independent commission in the judicial branch." Sentencing reform soon became a political football for crime prevention efforts when Congress created the most powerful agency in the history of the federal criminal justice system: the U.S. Sentencing Commission.

The initial policy goals of sentencing were admirable. As codified in 28 U.S.C. § 991, the primary purpose in creating the commission was for the promulgation of sentencing procedures in order to ensure that the "ends of justice" are properly and equally met. The procedures were said to be designed for the following purposes:

> [P]rovide 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.[9]

The commission was also charged with the development of a means to measure the degree of punishment that would be meted out for the variety of federal crimes

committed.[10] Through the establishment of offense categories based on particular criminal statutes and the application of "specific offense characteristics" inherent in the offenses, the commission came up with certain ranges of punishment that were deemed appropriate for those convicted under a federal statute.[11]

The authority granted to the commission was substantial. Congress gave the commission the duty of periodically reviewing and revising the guidelines,[12] as well as the authority to submit amendments to the guidelines directly to Congress.[13] The commission was also expected to draft guidelines and develop policy statements that would eliminate disparities and leave federal judges with sufficient flexibility to impose individualized sentences warranted by mitigating or aggravating factors not taken into consideration in the general sentencing guidelines.[14]

Many individuals were outraged by the substantial powers given to the commission and the infringement the guidelines had on the independence of the federal judiciary. They argued that the commission violated the separation of powers doctrine. Immediately upon the release of the first set of guidelines, challenges were made to the constitutionality of the guidelines and the Sentencing Commission itself.[15] However, in 1989, the Supreme Court in *Mistretta v. United States*[16] upheld the constitutionality of the guidelines to the disappointment of many defense attorneys and federal judges, including Justice Scalia, who wrote a vehement dissent.

The Politics of Sentencing

The noble aspirations of the guidelines quickly succumbed to a political game on both the left and right.[17] This resulted in a double assault on the policies of sentencing reform and the use of the guidelines as a means to a political end. Once sentencing reform became a political free-for-all, it was doomed to be nothing more than an election sideshow. The effects of political maneuvering and manipulation have fundamentally changed the face of the judiciary.

Since the guidelines took effect in 1987, the commission has used its power to amend the guidelines almost every year — 1999 being the only exception. A quick glance at the early guideline manuals shows how prolific the commission and Congress have been at creating new rules to the guidelines. The first Sentencing Guideline Manual included approximately 300 pages; the current version consists of more than 1,500 pages. The 1987 edition offered very limited information as to the application of the specific guideline sections. As such, skillful defense attorneys were often able to use the open-ended guideline interpretations in creating gray areas in the sentencing procedure that, when argued successfully, provided an offset to the rigidity of the guidelines. The most prevalent of these offsets came in the area of downward departures for the defense and upward departures for the government. The power to depart downward for matters not covered by the heartland of the guidelines significantly mitigated the impact of the sentencing judge's lack of discretion in fashioning the sentence.

A glaring example of political manipulation of the guidelines occurred over the issue of the disparity between punishments for offenses involving cocaine and those involving crack cocaine. In 1995, the commission, acting well within its authority, found that the congressional decision to treat powder and crack cocaine differently arose primarily from members' beliefs, not from facts, that crack cocaine was significantly more dangerous than powder cocaine was. Finding little support for a 100 to 1 disparity, the commission proposed to eliminate the differential treatment between offenses involving crack and powder cocaine.

On Oct. 18, 1995, Congress rejected this proposal. This was the first time that Congress failed to adopt the commission's proposed guideline amendments. Congress asked the commission to take another look at the issue and report back — this time offering nonbinding recommendations.

In April 1997, the commission submitted the requested second report. Again, the Sentencing Commission unanimously reiterated its previous finding that the 100:1 ratio was not justified. However, complying with Congress's directive that crack cocaine penalties continued to exceed the penalties for like offenses involving powder cocaine, the commission recommended a ratio of 5:1. This led Sentencing Commission Vice Chair Michael S. Gelacak to call the new recommendation "better than simply choosing to ignore the problem." Congress, however, still guided by the perceived political hysteria surrounding crack, disapproved the recommendations of the commission. At least one District Court in Virginia presented an intellectually honest assessment of this racially biased sentencing and statutory scheme.[18]

This is not an issue of being soft on crime but, rather, one of fair and just punishment. Congress and the higher courts should recognize this fact before the adversarial nature of federal sentencing procedures is totally eliminated. Since the seminal case of *Mistretta* declared the guidelines to be constitutional, the Supreme Court, at least in small part, appears to have taken some notice of the pro-prosecution evolution of federal punishments, both in the guidelines and in the statutes.

Post-*Mistretta* cases have recognized a change in the Supreme Court's view of how to interpret the guidelines. In *Koon v. United States*,[19] the Supreme Court appeared to give some discretion back to the sentencing judge when considering factors for departing from a guideline sentence. Justice Kennedy, writing for the Court, noted that the guidelines did not remove all discretion from sentencing and that it is the "federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings. …"[20]

The future of mandatory minimum sentences may be on shaky constitutional ground in light of the Court's decision in *Apprendi v. New Jersey*.[21] More recently yet, Justice Thomas' views appeared to gain the support of fellow Justices Stevens, Souter, and Ginsburg, as the three joined the dissenting opinion in *Harris v. United States*.[22] In this

opinion, calling for a change in mandatory minimum application as a result of the *Apprendi* decision, Justice Thomas stated that "adherence to *stare decisis* in this case would require infidelity to our constitutional values."[23] While not a huge breakthrough in the way of federal sentencing, the attitudes of Justice Thomas represent a pathway to a truer sense of fairness when the punishments for federal offenses are determined.

As an original member of the Sentencing Commission, Justice Breyer has also spoken out against the current sentencing guidelines that he helped create. In a 1998 lecture, Breyer suggested that mandatory minimum sentences should be repealed and that the current guidelines were too long and confusing as currently written.[24] He reiterated his dissent of mandatory minimums in *Harris*.[25]

Chief Justice Rehnquist, writing on behalf of the Judicial Conference in response to the PROTECT Act, noted in a letter to Sen. Patrick Leahy (D-VT): "this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences."[26]

Of all the recent dissenting opinions by Supreme Court justices, it was Justice Kennedy's recent remarks at an annual American Bar Association meeting on Aug. 9, 2003, that caused the most controversy. Kennedy stated that the guidelines were too harsh and called upon the bar to reform the guidelines.[27] Kennedy argued that lawyers should confront Congress with the problems of mandatory minimums and noted that "it is a grave mistake to retain a policy just because a court finds it constitutional."[28] He called upon criminal defense lawyers to ask the relevant executive branch for pardons in cases where the prosecution unjustly used the guidelines for overly long sentences.

In contrast to Justice Kennedy's recent remarks is the position of Attorney General John Ashcroft. The attorney general's comments have caused a stir of constitutional proportions equal to the controversy over the initial debate over the constitutionality of the guidelines themselves. In response to a directive in the recently enacted PROTECT Act, Ashcroft issued a memorandum on July 28, 2003, directing federal prosecutors to oppose sentencing adjustments and departures "that are not supported by the facts and the law." The memorandum also amends § 9-2.170(B) of the U.S. Attorney's Manual so that it now requires prosecutors to report the following categories of "adverse" decisions (*i.e.,* decisions that the prosecutor opposed) to the Appellate Section of the Criminal Division of the Department of Justice for possible appeal:

1. Departures that change the zone in the sentencing table *and* result in no term of imprisonment.
2. Departures based on criminal history where the extent of the departure is two or more criminal history categories or the equivalent.
3. Departures based on discouraged or unmentioned factors where the offense level before departure is 16 or more, *and* the departure is three or more offense levels.
4. Departures in child victim or sexual abuse cases.
5. Third-level adjustments for acceptance of responsibility, where there was no government motion.
6. Departures on remand, where the court ignored the limits in the PROTECT Act.
7. Recurring illegal departures, where (a) the court improperly departed *and* (b) the basis for the departure has become prevalent in the district or with a particular judge.
8. Sentences below a statutory minimum.
9. Any other adverse sentencing decision that the U.S. attorney's office wishes to appeal.[29]

The PROTECT Act initially received bipartisan support as part of the Amber Alert program, but an amendment to the act, known commonly as the Feeney Amendment, was added to the PROTECT Act with little notice to the federal judiciary, the U.S. Sentencing Commission, the defense bar, or the legal academic community.[30] Thus, the public debate and the legislative history regarding the amendment was minimal because of the manner in which the legislation was enacted. A frenzied attempt to defeat the Feeney Amendment ensued, including a letter from Chief Justice Rehnquist urging the Senate Judiciary Committee to allow for a meaningful debate before severally limiting over 15 years of sentencing law under the guidelines. Despite these efforts, the Feeney Amendment passed in a somewhat less sweeping version. The JUDGES Act, which would eliminate the most egregious portions of the Feeney Amendment, is still circulating through Congress.

The PROTECT Act has manipulated the Sentencing Commission into responding, eliminating, or severally limiting any human departure considerations. Most notably, the act overruled *Koon* in part by changing the standard of appellate review for downward departures, from abuse of discretion to de novo review for all offenses. Besides the "McCarthyist list monitoring system" discussed below, the act also made departure more burdensome for judges by requiring them to explain with specificity their reasons for departure.

One of the many troubling provisions of the PROTECT Act concerns the review of all downward departures by federal judges throughout the country. One portion of the law provides for the collection of such information on an individualized judge-by-judge basis. This seems to be nothing more than an attempt to intimidate and threaten federal judges into refusing to depart downward.[31] This provision could eventually eliminate the use of all downward departures.[32]

These changes to the guidelines seem to violate the separation of powers doctrine. Our justice system depends on a fair and impartial judiciary that is free from intimidation by the other branches of government. However, recent comments by the attorney general suggest that he is attempting to breach this precious doctrine.

The future of federal sentencing could get rather interesting in the next few years. Attitudes favoring changes to the guidelines have gained support among Supreme Court

justices. With the proper case, renewed challenges to the constitutionality of mandatory minimums or the PROTECT Act reporting provision could very likely be successful with the current Supreme Court.

Collateral Effects of Guidelines Sentencing

Changes in sentencing law and policy can explain the sixfold increase in the national prison population since the early 1970s. The mechanical approach to sentencing a federal defendant, effectuated by the enactment of the guidelines, has gradually eliminated considerations as to the individuality of the particular defendant. By being pigeonholed into a specific guideline range, defendants are no longer treated as individuals but as case numbers.

Treating a defendant as a number rather than a human being has resulted in some disturbing decisions. For example, one case saw a refusal to depart where the defendant was 55 years old, suffered from high blood pressure, had cancer (in remission), had a drug dependency, and had an amputated left leg.[33] Although some might suggest that the Bureau of Prisons can handle such medical problems, research suggests otherwise. Medical treatment in prisons is substandard at best. As a result of severe sentences, our prison population is becoming geriatric, and the medical needs of an aging prison population simply are not being met.[34]

While the war on drug-related crimes has not slowed the influx of federal prisoners into the system, the harsher federal penalties have worked to keep prisoners incarcerated longer. The sentencing guidelines have also had a significant impact on prison overcrowding.

Justice Kennedy has recognized that both mandatory minimum sentences and sentencing guidelines have contributed to lengthier prison sentences for people charged with federal crimes. Justice Kennedy said in his speech to the ABA opening assembly: “It is no defense if our current prison system is more the product of neglect than of purpose. … Out of sight, out of mind is an unacceptable excuse for a prison system. …”[35] While prison issues should be studied further, “[i]t does seem justified to say this: Our resources are misspent, our punishments too severe, our sentences too long.”[36]

A Practioner’s View

As the courts move to a prosecutorially run judicial system, judges or attorneys may easily feel defeated, and judicial discretion may seem limited. We must continue to look at other strategic responsibilities in finding themes in cases that may serve to reduce a defendant’s exposure before he or she reaches sentencing. Appealing adverse decisions and standing firmly when the government appeals a sentence will likely create some favorable decisions as the courts seek new avenues of relief from the sentencing strictures.

The Sentencing Commission responded to the PROTECT Act by creating the following limitations or opportunities — depending on how you view these changes — on downward departures:

1. Family ties are not eliminated. The question presented is whether or not the person, whose family ties create a request for downward departure, is irreplaceable in service to that family member. A substantial hardship or direct loss of caretaking or the financial support must exist; or the loss exceeds the harm normally found due to incarceration; or the defendant’s caretaking or financial support is irreplaceable. If a departure is given, the departure must effectively address the loss of caretaking or financial support.
2. Community ties are deleted completely. This may no longer be used for downward departures.
3. Addiction to gambling is no longer a downward departure. However, post-offense rehabilitation — rehabilitation that occurs immediately after arrest and before conviction — has not been eliminated. The question arises of whether or not this affects any other types of addiction.
4. Multiple circumstances (a combination of factors) are not eliminated altogether, but they are eliminated in child crimes and sexual offenses. This departure for multiple circumstances must now be sufficiently different and permitted only if the degree is not adequately considered in the guidelines, based on being substantially different. Unmentioned circumstances may no longer be used as a reason for departure. The circumstances for a combination of factors for a departure must be identified in the offender characteristics and other circumstances of *mentioned* departures.
5. Other *forbidden* departures are those that give more point consideration than is available in the guidelines, such as for the role or extraordinary acceptance of responsibility.
6. If the plea agreement departs from the guidelines, specific reasons are required and relevant conduct under U.S.S.G. 1B1.3 and other numbers games within the contents of specific offenses may be used. Sentencing memorandums with specific facts and case law supporting a request for a different outcome are critical for a favorable decision in this regard.
7. Aberrant behavior departures are eliminated entirely for drug cases with minimum mandatory sentences of five years or more even if the safety valve applies to violations other than simple possession violations of 18 U.S.C. 844. It is not applicable to anyone with any significant prior record.
8. U.S.S.G. 5K2.10 now requires that coercion and arrest be proportional and reasonable to the defendant’s response to the victim.
9. Diminished capacity has simply been extended to require a showing of diminished capacity was a *direct contribution* to the actual crime and not merely a state of being.
10. The PROTECT Act has added U.S.S.G. 5K3.1 where, upon motion of the government, a departure downward may be given up to four levels. This is pursuant to an early disposition program authorizing the attorney general of the District Court in which the defendant resides. This particular change is subject to

abuse of discretion regarding the prosecutor's attitude toward the defendant and what constitutes fast tracking. For example, a defendant may be willing to plead guilty immediately, but because many other co-defendants are involved, the case may drag on for some time pending final disposition. Defense counsel should be conscious of the fast tracking option and make sure the option is at least identified in the plea agreement or identified as a factor that the government should consider for purposes of mitigation. More importantly, the fast tracking issue is not related to 5K1.1, which allows for a departure at the sole discretion of the government for successful cooperation and substantial assistance. U.S.S.G. 5K3.1 and 5K1.1 should not be tied together. If the government attempts to do so, counsel should argue against such conduct as an abuse of discretion.

11. Departures for the defendant's criminal history score are eliminated entirely for the Armed Career Criminal Act, repeat offenders, and dangerous sex offenders against minors. A departure for a career offender is only one level. Judges must also give factual reasons for any departure in this area.
12. Finally, the third point for acceptance of responsibility now requires a government motion, which is different from 5K1.1 or 5K3.1. The government now has three options and three motions it can give for mitigation up to five points, not including the two points generally given for plea disposition and acceptance of responsibility, pursuant to U.S.S.G. 3E1.1. Many appeals on 5K3.1 and the additional acceptance point government motions based on the criteria and potential for abuse of discretion and bad faith are suspected.

Awareness of certain trial themes will better help attorneys protect their defendants awaiting trial from certain guideline enhancements and relevant conduct conditions. If a case is believed to be difficult to try but trial is the only option, the attorney should work toward reducing the exposure of the client as it relates to such issues as relevant conduct (amount of drugs or money involved), role adjustment, etc. Use cross-examination to effectively prove that the relevant conduct is not as much as that of a cooperating witness and to further indict the cooperating witness in relationship to his or her role in the offense versus the defendant's. Create themes surrounding the puffery of the cooperating witnesses. Focus on limiting relevant conduct to the time period that the defendant was specifically involved with other co-defendants. Use trial transcripts at sentencing to argue guideline adjustments. Relevant conduct enhancements above the base offense level may become more flexible for judges who seek to find mitigating options. It may also become more prudent to *not* negotiate in the plea every conflicting guideline issue, because some judges will want flexibility in the sentencing process and will give more consideration to the defendant as a way of offsetting prosecution-run courtrooms. Make U.S.S.G. 1B1.3 your friend. Use knowledge and foreseeability as a tool for mitigation.

Be aware that any downward departures that judges make will be under the strict scrutiny of the Department of Justice and will likely be appealed. Judges may also be disinclined to grant departures because of the increased burden that judges have on giving detailed rationales for their departure pursuant to the PROTECT Act. Prepare a detailed sentencing memorandum on guideline issues, explaining with specificity the reasons for the departure and supporting case law for other crime adjustments.

What Now?

The attorney general and Congress, when dissatisfied with the Supreme Court, simply change the rule of law. *Koon* appears to have been only partially overruled by the PROTECT Act so that all appeals will be reviewed de novo instead of according to the unitary abuse of discretion standard. Despite the presently dark landscape, hope remains. 18 U.S.C. § 3553 is statutory. Regardless of Congress's attempt to take over the sentencing power of the federal judiciary, the true constitutional power will forever remain in Article III. As Justice John Marshall proclaimed in *Marbury v. Madison*, "it is emphatically the province and duty of the judicial department to say what the law is."

No matter how loudly the academic world calls for reform, true reform will only come through individual lawyers contesting the validity of the guidelines from the ground up. As one jurist has recently noted, "The theoretical uplands, where democratic and judicial ideals are debated, tend to be arid and overgrazed; the empirical lowlands are fertile but rarely cultivated."[37] The death of judicial discretion is upon us, and in its wake we have the empirical duty to show that the policy goals behind the Sentencing Reform Act of 1984 are not being met. **TFL**

Marcia. G. Shein is a nationally known federal criminal defense attorney and sentencing consultant. Matthew Doherty is a second-year law student at Valparasio University whose research was invaluable to this article.

Endnotes

[1]If you have not read or heard Kennedy's speech in its entirety, you should. Its elegant prose is comparable to King Henry V's "Once more unto the Breach" speech. For an online version of the speech see, speech given at the American Bar Association Annual Meeting, Supreme Court Justice Anthony M. Kennedy Appeals for Reduced Incarceration and Less Severe Sentencing (Aug. 9, 2003) at www.sentencingproject.org/pdfs/Kennedy-ABA.pdf (hereinafter Kennedy Speech).

[2]Judge Myron H. Bright of the Eighth Circuit has consistently been vocal with his dissenting views of the guidelines. *See United States v. Alatorre*, 207 F.3d 1078, 1080 (8th Cir.2000) (Bright, J., concurring); *United States v. Flores*, 336 F.3d 760, 767 n.7 (8th Cir. 2003) (Bright, J.,

concurring) (citing a long list of cases where Justice Bright has challenged the validity of the guidelines). Judge Bright continues his opinion in *Flores* by making a plea for district judges to express their dissenting views with the guidelines in their opinions. *Flores*, 336 F.3d at 768. Judge Bright concludes that "the time has come for major reform in the system. I say in this concurring opinion, as I have said in other sentencing opinions that I have written, 'Is anyone out there listening?'" *Id.*

[3]*See* Marc Mauer, assistant director of The Sentencing Project, "Comparative International Rates of Incarceration: An Examination of Causes and Trends," Presented to the U.S. Commission of Civil Rights (June 20, 2003), at www.sentencingproject.org/pdfs/pub9036.pdf.

[4]There are a multitude of anecdotal stories from criminal defense practitioners and the voices of the federal judiciary to support these positions. For example, U.S. District Court Judge John S. Martin's resignation from the bench in response to the enactment of the PROTECT Act, or Justice Rehnquist's letter to Sen. Leahy, or Mark H. Allenbaugh's June article.

[5]Thomas S. Kuhn, The Structure of Scientific Revolutions (University of Chicago Press, 3d ed. 1996).

[6]The idea of guided judicial discretion in sentencing is certainly not novel to this article. *See*, *e.g*., Charles J. Ogletree Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1956 (1988) (arguing for a guided discretion model that would take into account individual characteristics and the underlying purposes behind sentencing).

[7]Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1837, 1976 (1984).

[8]Id. (codified at 18 U.S.C. §§ 3551–3673 (2003); 28 U.S.C. §§ 991–998 (2003)).

[9]28 U.S.C. § 991(b)(1)(B).

[10]Id.. § 991(b)(2).

[11]*See generally* 28 U.S.C. § 994(a)–(n).

[12]Id. § 994(o).

[13]Id. § 994(p).

[14]18 U.S.C. § 3553(b).

[15]*See* Lewis J. Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 Yale L.J. 1363 (1987) (arguing, pre-*Mistretta*, that the Sentencing Reform Act, by creating the U.S.S.C., violates the separation of powers doctrine and vests more legislative authority in one agency than is constitutionally allowable).

[16]488 U.S. 361 (1989).

[17]As Justice Kennedy spoke of in his ABA address, Professor James Whitman in Harsh Justice argued that one explanation of harsh sentences is the coalescence of two political ideologies: one side warning not to be soft on crime and the other urging a uniform, consistent approach to sentencing. *See Kennedy Speech, supra* note 2, at 5.

[18]*United States v. Peterson*, 143 F.Supp.2d 569 (E.D. Va. 2001). In this opinion, District Court Judge Lewis F. Powell Jr. took a comprehensive view of the disparities between crack and cocaine and determined that, although he felt the disparities illogical and perhaps unconstitutional, he was required to follow the standards and approaches taken by the Supreme Court and the governing Court of Appeals. A District Court was simply not empowered to make the necessary changes.

[19]518 U.S. 81 (1996).

[20]*Id.* at 113.

[21]530 U.S. 466 (2000).

[22]536 U.S. 545 (2002).

[23]*Id.* at 583 (Thomas, J. dissenting).

[24]Justice Breyer, Address to the University of Nebraska College of Law, "Federal Sentencing Guidelines Revisited," (Nov. 18, 1998), at www.pbs.org/wgbh/pages/frontline/shows/snitch/readings/breyer.html.

[25]536 U.S. 545, 570 (Breyer, J., concurring in part and concurring in the judgment).

[26]Letter from Chief Justice Rehnquist to Sen. Patrick Leahy (April 2003) available at www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/Rehnquist_letter.pdf.

[27]Kennedy Speech*, supra* note 2, at 5–6.

[28]*Id.* at 6. Kennedy is likely referring to the *Mistretta* case that upheld the constitutionality of the guidelines.

[29]The U.S. Attorney's Manual (including the revised section 9-2.170, reporting policy) is available on the Department's Web site, www.usdoj.gov.

[30]*See* Felicia Sarner, *Highlights of the "Feeney Amendment" and the Protect Act of 2003*, The Liberty Legend, vol. II, no. 7, Summer 2003, available at www.federaldefenders.org/ll_sum2003.pdf.

[31]*See* Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear or Judicial Sentencing Discretion may Undermine a Generation of Reform*, 27 Champion 6, 9 (June 2003).

[32]If the Court were to depart, the assistant U.S. attorney would be required to report that departure to the U.S. attorney, who would in turn be required to report to the attorney general. The attorney general would then report the departure to Congress, and Congress could call the judge to testify and attempt to justify each and every departure.

[33]*United States v. Guajardo*, 950 F.2d 203 (5th Cir. 1991).

[34]As part of six-part series beginning on June 25, 1989, Olive Talley of *The Dallas Morning News* investigated in great detail the poor quality of medical treatment available to inmates due in part to the growing prison population. *See* Olive Talley, *Bad Medicine Imperils Federal Inmates Staff Shortages, Crowding Hurt Quality of Care Series: Care and Punishment: Medicine Behind Bars*, Dallas Morning News, June 25, 1989, 1A, available at 1989 WL 6111471.

[35]Kennedy Speech*, supra* note 2, at 7.

[36]Kennedy Speech*, supra* note 2, at 4.

[37]*See* Richard Posner, Law, Pragmatism and Democracy 5–6 (2003).