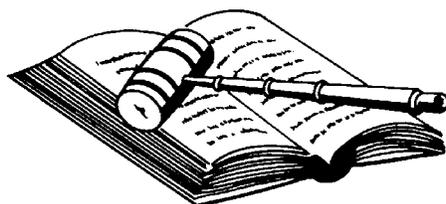


American College  
of  
Trial Lawyers



UNITED STATES SENTENCING GUIDELINES 2004:  
AN EXPERIMENT THAT HAS FAILED

Approved by the Board of Regents  
September 2004



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American College of Trial Lawyers  
19900 MacArthur Boulevard, Suite 610  
Irvine, California 92612  
Telephone: (949) 752-1801  
Facsimile: (949) 752-1674  
E-Mail: [nationaloffice@actl.com](mailto:nationaloffice@actl.com)  
Website: [www.actl.com](http://www.actl.com)

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**TABLE OF CONTENTS**

**SUMMARY .....1**

**I. INTRODUCTION .....2**

**II. HISTORICAL PERSPECTIVE .....3**

**A. The Federal Criminal Justice System Rejected Determinate Sentencing and Placed Its Trust In The Exercise of Discretion by an Independent Judiciary.....3**

**B. The Federal Criminal System Reconsiders Indeterminate Sentencing and Moves to a Guideline Regime .....6**

**III. THE SENTENCING GUIDELINES AND MANDATORY MINIMUM.....9**

**A. The Sentencing Guidelines Generally .....9**

**B. Application of the Guidelines ..... 11**

**C. Mandatory Minimums ..... 12**

**IV. THE IMPACT OF THE SENTENCING GUIDELINES.....14**

**A. The Shift of Discretion From the Judge to the Prosecutor ..... 14**

**B. The Increase in Downward Departures.....17**

**C. Inconsistent Application of Complex Guidelines .....18**

**D. Variations in Prosecutorial Practice.....22**

**E. State Sentencing Guidelines.....23**

**V. RECENT LEGISLATION AND AMENDMENTS .....24**

**A. The Feeney Amendment.....24**

**B. The 2003 Amendments to the Guidelines .....27**

**C. The Ashcroft Memorandum .....29**

**VI. THE JUDICIARY SPEAKS OUT AGAINST THE GUIDELINES .....31**

**VII. CONCLUSION .....35**

# UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED

[I]n my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. The policy gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Justice Anthony M. Kennedy,  
Speech at the American Bar Association Annual Meeting  
(Aug. 9, 2003).<sup>1</sup>

## SUMMARY

Efforts to eliminate disparity in sentencing have resulted in an incursion on the independence of the federal judiciary, a transfer of power from the judiciary to prosecutors and a proliferation of unjustifiably harsh individual sentences. They have not, as was the hope when these efforts began more than twenty years ago, eliminated disparity in sentencing. Fairness in sentencing, which is essential to our criminal justice system, requires judicial discretion. The federal government should review and modify its sentencing policies to ensure that judges retain sufficient discretion to impose fair and just sentences under the circumstances of a particular case. A recent Supreme Court case, *Blakely v. Washington*, No. 02-1632, 2004 WL 1402697 (June 24, 2004), has cast the Constitutional validity of the United States Sentencing Guidelines (“Guidelines”) into question. This Fall, the Court will hear argument in cases that directly address the Constitutionality of the Guidelines. It is hoped that this Report will act as a guide to a review and revision of the current Guidelines whether that is mandated by the decision of the Court or, should the Guidelines be upheld, in the ordinary course by Congress and the Executive Branch.

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<sup>1</sup> A copy of Justice Kennedy’s speech is available at <http://www.november.org/stayinfo/breaking/Kennedyspeech.html>.

## **I. Introduction**

Historically, federal judges have had a significant amount of discretion in sentencing criminal defendants. This discretion afforded judges an opportunity to evaluate the sentence to be imposed in each individual defendant's case. Beginning in the 1950s, critics began to express dissatisfaction with entrusting federal judges with such wide discretion. In particular, it was argued that allowing judges wide discretion led to unwarranted disparities in sentences.

In an effort to create greater uniformity, Congress passed the Sentencing Reform Act of 1984, which established the United States Sentencing Commission (the "Sentencing Commission") and charged it with developing sentencing guidelines. In 1987, the Sentencing Commission promulgated the Guidelines. Under these Guidelines, a federal district court judge must impose a sentence within the narrow range set forth in the Guidelines unless the specific facts of the case make it extraordinary. Sentences outside the Guidelines, or which rely on certain factors to set the Guideline range, are subject to appeal by both the government and the defendant.

The Guidelines, together with statutes imposing mandatory minimum sentences, have significantly impaired the current role of judges in sentencing. The judiciary's power and discretion have largely been shifted to prosecutors, altering the balance in a way that threatens the independence of the judiciary and the effectiveness of the adversary process. Judicial discretion has been reduced even further over the last year as a result of Congressional, Department of Justice and Sentencing Commission policies that restrict judicial autonomy and increase the likelihood of harsher sentences.

The shift of discretion, together with the mechanistic application of the complex Guidelines, has resulted in a system that unduly favors the appearance of uniformity over individualized justice. In an effort to eliminate disparity in sentencing, the Guidelines require judges to impose a sentence within a range, regardless of the unique circumstances of each individual case. As a result, over the last seventeen years, judges throughout the country have had no choice but to impose unfair and unwarranted sentences in particular cases that offend the most basic sense of justice. Accordingly, to achieve the laudable goal of reducing the disparity that existed before the promulgation of the Guidelines the College recommends, whether the Guidelines pass Constitutional muster this Fall or not, that the federal government review and modify its policies related to sentencing to ensure that judges retain sufficient discretion to impose a fair and just sentence in each case.

The College recommends that Congress replace the existing Sentencing Guidelines with a simpler, flexible framework from which judges are free to depart in the exercise of their discretion and with the reasons for such departures clearly stated on the record both at the time of sentencing and in the judgment and commitment order. Sentencing decisions should be subject to appellate review under the abuse of discretion standard that takes into account the suggested guideline range and the unique facts of the case. Congress should repeal the Feeny Amendment<sup>2</sup> and most, if not all, mandatory minimum sentencing provisions.<sup>3</sup>

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<sup>2</sup> PROTECT Act, Pub. L. No. 108-21, 117 Stat 650 (2003).

<sup>3</sup> On June 23, 2004, the American Bar Association Justice Kennedy Commission issued a series of reports that contain similar recommendations. The Kennedy Commission also studied the important issue of racial disparity in sentencing, which is beyond the scope of this Report. The Kennedy Commission's Reports are available at [www.abanews.org](http://www.abanews.org).

The Supreme Court's decision last Term in *Blakely* changed the legal landscape. *Blakely* held that Washington State's statutory guideline system violated the Sixth Amendment because it permitted courts to impose enhanced sentences based on facts not found by a jury beyond a reasonable doubt or admitted by the defendant. The impact of *Blakely* on the federal guidelines has already split the lower federal courts. While the majority of courts have held that *Blakely* applies to the federal guidelines, there is broader disagreement as to whether the Guidelines are severable such that any portion of the existing system can survive, particularly in cases that do not involve enhancements.

These issues are on a fast track to the Supreme Court. The Solicitor General has filed petitions for certiorari in two cases and requested an expedited oral argument, and the Supreme Court has granted certiorari and scheduled an oral argument for October 4, 2004. Congress held hearings on *Blakely* and passed a resolution calling on the Supreme Court to resolve the issue quickly. And the Second Circuit, sitting *en banc*, certified questions to the Court. Regardless of how the Supreme Court ultimately decides these questions, however, the issues of judicial discretion in sentencing addressed in this Report will remain. Once the application of *Blakely* and the Sixth Amendment to the federal guidelines is resolved, Congress should reconsider the choices it made in the Sentencing Reform Act and recent enactments and restore the ability of courts to impose fair and just sentences in each case.

If, as is likely, the Supreme Court were to apply *Blakely* to the federal guidelines, thus enhancing the jury's role, and Congress were to maintain the restrictive Feeney Amendment of 2003, the role of the judge in sentencing would be further marginalized. This potential result led Judge Nancy Gertner of the District of Massachusetts to ask "[a]t what point is there constitutional significance to the effective absence of a judicial role in sentencing?"<sup>4</sup> The College recommends, for important historical and policy reasons, that Congress enact appropriate reforms to avoid a system that poses such a threat to individual liberty.

## **II. Historical Perspective**

### **A. The Federal Criminal Justice System Rejected Determinate Sentencing and Placed Its Trust In The Exercise of Discretion by an Independent Judiciary**

From its inception, our nation has recognized the critical importance of an independent judiciary. As early as 1776, John Adams remarked:

The dignity and stability of government in all its branches, the morals of the people and every blessing of society depend so much upon an upright and skilful [sic] administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent . . . , so that it may be a check upon both, as both should be checks upon that.<sup>5</sup>

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<sup>4</sup> *United States v. Mueffleman*, No. 01-CR-10387-NG, 2004 WL 1672320, at \*11 (D. Mass. July 26, 2004).

<sup>5</sup> *The Revolutionary Writings of John Adams* 291 (C. Bradley Thompson, ed., 2000).

Thomas Jefferson further observed that the judiciary, “if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.”<sup>6</sup> Finally, in his celebrated speech before the First Congress on June 8, 1789, James Madison noted that “[i]f [rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive [branches] . . . .”<sup>7</sup>

It is the very independence of the courts that enables them to earn their title as “tribunals of justice” for, as the Founding Fathers, Congress, the judiciary and scholars have long recognized, judicial independence is a means to an end—*justice* in the individual case.

In federal sentencing, this justice has historically been achieved by the exercise of discretion by an independent judiciary. Although federal sentencing “never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government,”<sup>8</sup> our criminal justice system has historically recognized the importance of judicial discretion in sentencing. Indeed, not long after our Nation’s founding, the English practice of determinate sentencing – one sentence for each offense – was rejected because it was deemed to embody an absolutist mentality that was contrary to fundamental American values and concepts of justice.<sup>9</sup>

The system of indeterminate sentencing began with the states that, from the late eighteenth to late nineteenth centuries, decreased the number of crimes punishable by death, built new penitentiaries aimed at reforming offenders, and enacted parole laws.<sup>10</sup> The federal government soon followed this approach; Congress abandoned “fixed-sentence rigidity” and “put in place a system of ranges within which the sentencer could choose the precise punishment.”<sup>11</sup> By 1910, the federal government had established several federal penitentiaries and a system of federal parole.<sup>12</sup> “Thus, under

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<sup>6</sup> See Akhil Reed Amar, *The Bill of Rights* 130 (1998) (quoting Thomas Jefferson).

<sup>7</sup> *Id.* at 129-30; see also Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *Ind. L.J.* 233, 268 (1990) (“judges free of congressional and executive control will be in a position to determine whether the assertion of power against the citizen is consistent with law . . . .”); William H. Rehnquist, *The Future of the Federal Courts*, 46 *Am. U. L. Rev.* 263, 273-74 (1996) (describing judicial independence as “one of the crown jewels of our system of government”).

<sup>8</sup> *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

<sup>9</sup> Susan R. Klein and Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 *Sup. Ct. Rev.* 223, 227 (2002) (“After only a few years, amid the widespread view that whipping and capital punishment had lost their deterrent power, the desire to mitigate ‘pious perjury,’ the belief that death was a disproportionate penalty for some crimes, and the new philosophy that solitude and hard labor in a penitentiary would reform the criminal, the trend toward mandatory capital offenses began to reverse.”).

<sup>10</sup> *Id.*; see Adam Jay Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* 8-14 (1992); Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 16-18 (1998) [hereinafter Stith & Cabranes].

<sup>11</sup> *Mistretta*, 488 U.S. at 364.

<sup>12</sup> Stith & Cabranes, *supra* note 10, at 10, 18.

the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which usually could be replaced by probation), and the Executive Branch's parole official eventually determined the actual duration of the imprisonment."<sup>13</sup>

Within these sentencing ranges, judges have been able to independently and judiciously evaluate and sentence defendants, based on the totality of circumstances of each individual case. As the Supreme Court has noted, "[i]t has been uniform and constant in 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 that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."<sup>14</sup>

Consequently, while federal statutes generally specified the potential penalties for crimes, they also provided the sentencing courts with a wide range of sentencing options, including the discretion to impose incarceration, to determine the duration of incarceration, and to determine whether to impose lesser sanctions including fines and probation or suspension of the sentence.<sup>15</sup>

In exercising their discretion, sentencing courts applied more flexible procedures in receiving and evaluating potentially relevant evidence.<sup>16</sup> This flexibility made sense in the pre-Guidelines era, when courts had free rein to determine the relative weight to give disputed facts in the sentencing calculus.<sup>17</sup> Indeed, the sentencing judge, due to his/her unique position to evaluate each defendant and the offense, has been described as able to "see[] more and sense[] more," "enjoy[ing] the 'superiority of his nether position.'"<sup>18</sup> As a result, a court's determination as to what sentence was appropriate "met with virtually unconditional deference on appeal."<sup>19</sup> There was no meaningful mechanism to correct cases where a district judge abused sentencing discretion or to develop a common law of sentencing to guide district judges in future cases.<sup>20</sup>

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<sup>13</sup> *Mistretta*, 488 U.S. at 365; see also *United States v. Grayson*, 438 U.S. 41, 45-46 (1978) ("In the early days of the Republic, when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature....The 'excessive rigidity of the [mandatory or fixed sentence] system' soon gave way in some jurisdictions, however, to a scheme permitting the sentencing judge – or jury – ... to select a sentence within a range defined by the legislature.") (citations omitted); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 225 (1993) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion .... The great majority of federal criminal statutes have stated only a maximum term of years ... permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximums.") [hereinafter Stith & Koh].

<sup>14</sup> *Koon v. United States*, 518 U.S. 81, 113 (1996).

<sup>15</sup> See *Apprendi v. New Jersey*, 530 U.S. 449-50 (2000); *Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

<sup>16</sup> See *Williams*, 337 U.S. at 247-50; Stith & Cabranes, *supra* note 10, at 150-51.

<sup>17</sup> These flexible rules have been carried over into the Guidelines regime with unfortunate results. Courts, at least until the *Blakely* decision in June of 2004 raised Constitutional questions about the validity, make findings of fact based on relaxed evidentiary procedures and the minimal burden of proof by preponderance of the evidence. Courts are then bound to follow the Guidelines in determining the sentencing range based on those facts, even when a court would have given a disputed fact less weight due to its relative unreliability. See Stith & Cabranes, *supra* note 10, at 149-52.

<sup>18</sup> *Mistretta*, 488 U.S. at 364.

<sup>19</sup> *Id.*

<sup>20</sup> Stith & Cabranes, *supra* note 10, at 170-72.

## B. The Federal Criminal System Reconsiders Indeterminate Sentencing and Moves to a Guideline Regime

The system of indeterminate sentencing, which included the establishment of parole boards to determine the actual release date of certain offenders,<sup>21</sup> was based on the concept of rehabilitation.<sup>22</sup> By the 1950s, both liberal and conservative thinkers began questioning rehabilitation as a sound penological theory.<sup>23</sup> Prisoners' rights advocates criticized indeterminate sentencing and parole as ineffective tools for rehabilitating offenders, and the source of much anxiety among inmates about release dates.<sup>24</sup> The American Civil Liberties Union and others also stressed that judges inappropriately relied on race, sex, or socio-economic factors in determining an offender's prison term, leading to a clear bias against minority offenders.<sup>25</sup> Finally, conservative commentators believed that sentences for offenders with significant records or convictions for violent crimes were excessively lenient.<sup>26</sup> Conservatives proposed penological goals such as general deterrence and isolation from society to replace rehabilitation.<sup>27</sup>

Throughout the 1960s and 1970s, as crime rates rose significantly, various groups undertook numerous studies aimed at eradicating the perceived disparity between sentences for similarly-situated offenders. In most cases, the proposed reforms considered ways to achieve uniformity in the exercise of judicial discretion,<sup>28</sup> assuming that disparity was a direct result of unchecked judicial discretion. In 1962, the American Law Institute published model penal and sentencing codes with a presumption against incarcerative sentences.<sup>29</sup> In 1966, President Johnson commissioned a panel to study possible reforms of federal criminal laws and the parole system. Six years later, then Judge Marvin E. Frankel published *Criminal Sentences: Law Without Order*, which challenged the unfettered sentencing authority he and his peer judges at the time exercised as federal district judges.

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<sup>21</sup> *Mistretta*, 488 U.S. at 364-65.

<sup>22</sup> *Id.* at 363.

<sup>23</sup> *Id.* at 365; see also S. Rep. No. 98-225 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3221 ("In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. . . . [A]most everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting."); Stith & Koh, *supra* note 13, at 227 (describing liberal and conservative dissatisfaction with rehabilitation).

<sup>24</sup> Stith & Koh, *supra* note 13, at 227.

<sup>25</sup> Stith & Koh, *supra* note 13, at 231.

<sup>26</sup> See, e.g., *Project: Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L. J. 810, 823 (1975).

<sup>27</sup> Stith & Koh, *supra* note 13, at 227.

<sup>28</sup> H.R. Rep. No. 98-1017, at 252-53 (1984) ("Sentencing disparity of truly alarming proportions exists today largely because individual trial judges are permitted unfettered discretion in sentencing.").

<sup>29</sup> See generally Model Penal Code § 7.01 (Proposed Official Draft 1962) (prescribing that courts should not impose imprisonment unless certain conditions are met); see also Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. Pa. L. Rev. 465, 469 (1961) ("[A]rbitrariness . . . may inhere not only in distinctions drawn among offenses or offenders upon insufficient grounds but also in the absence of distinctions when substantial grounds for making them arise.").

On November 20, 1975, Senator Edward Kennedy introduced a sentencing bill.<sup>30</sup> The bill, which was prompted by discussions with leading sentencing reformers, proposed a federal sentencing commission to structure “advisory” sentencing principles for judges, a drastically reduced use of parole, and substantial reductions in the maximum periods of imprisonment authorized for crimes. While liberal senators supported the bill, Senator Kennedy was able to obtain additional support for his bill by allying with Strom Thurmond, the ranking Republican on the Senate Judiciary Committee, as well as by jointly presenting sentencing reform with Senator John L. McClellan’s conservative proposal to recodify the federal criminal code.<sup>31</sup>

Over the next several years, the Senate Judiciary Committee reported numerous sentencing reform bills out to the full Senate. Each bill was increasingly more restrictive of judges’ sentencing discretion. The Senate proposal eliminated parole and proposed a sentencing commission appointed by the President to promulgate very specific sentencing guidelines with narrow ranges in allowable terms.<sup>32</sup> In addition, the proposal “expect[ed] the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor and with various combinations of factors.”<sup>33</sup> A party on the “losing” side of a judge’s departure from the guidelines range was given an automatic right to appeal.<sup>34</sup> Moreover, the Senate encouraged the sentencing commission and sentencing judge to consider alternatives to imprisonment.<sup>35</sup> However, the Senate did not offer the sentencing commission or the sentencing judge a particular philosophy of penology or a method for choosing when to emphasize one of several competing philosophies in a particular case.<sup>36</sup>

The Senate proposal initially allowed indeterminate sentencing in limited cases. It also maintained significant judicial discretion to depart from the guidelines by allowing flexibility by both the Sentencing Commission and the sentencing judge in considering mitigating or aggravating personal characteristics of the defendants.<sup>37</sup> However, over the next few years, the restraints imposed by the Senate proposal increased. In 1978, Senator Gary Hart proposed a key amendment that allowed a court to depart only where aggravating and mitigating circumstances were not “adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a different sentence.”<sup>38</sup>

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<sup>30</sup> S. 2699, 94<sup>th</sup> Cong. (1975); *see generally* Stith & Koh, *supra* note 13, at 230-57.

<sup>31</sup> *See* Stith & Koh, *supra* note 13, at 232-35. The criminal statute reform bill (“S. 1”) contained several provisions anathema to liberal legislators, and sentencing reform was largely viewed as a “sweetener” to gain their support. *Id.*

<sup>32</sup> 124 Cong. Rec. 14 (1978); S. 1437, 95<sup>th</sup> Cong. (1978).

<sup>33</sup> S. Rep. No. 95-605, at 1167 (1977).

<sup>34</sup> 124 Cong. Rec. 1460 (1978).

<sup>35</sup> *See* Stith & Koh, *supra* note 13, at 242-43.

<sup>36</sup> *See id.* at 239-42. S. 1437 identified retribution, deterrence, incapacitation, and rehabilitation as the four factors for a sentencing court to consider. Subsequently, in S. 1722, the Senate directed that imprisonment should not be imposed for rehabilitative purposes. Other than this clarification, the Senate “refuse[d] to address which of the criminal sentencing purposes should predominate [and it] failed clearly to direct the commission to do so—either generally, or in specific types of cases.” *Id.* at 240-41.

<sup>37</sup> *See* 124 Cong. Rec. 1463 (1978); S. 1437, 95<sup>th</sup> Cong., 2d Sess. (1978).

<sup>38</sup> 124 Cong. Rec. 382-83 (1978).

Reform proponents in the House of Representatives questioned the bill—stressing their view that judicial discretion is the “cornerstone” of the criminal justice system, and their fears that the Senate proposals would “virtually deprive” the judiciary of its ability to tailor prison terms to the individual offender’s circumstances.<sup>39</sup> In contrast to the Senate proposals, the House proposal provided for purely advisory guidelines, promulgated directly by members of the Judicial Conference rather than by members of a commission appointed by the President.<sup>40</sup> In addition, the House proposal left substantial latitude for judges to depart from the recommended guideline range, allowing departures when, due to “the particular characteristics of offense and offender, the guideline sentence does not fulfill the requirements” set forth as the reasons for sentencing.<sup>41</sup> The House bill directed judges to consider “less severe” alternatives to incarceration before imposing a prison term, and contained no presumption that departures would be either rare or reserved for factors not addressed by the commission.<sup>42</sup>

Thus, the Senate’s and House of Representative’s visions of sentencing reform differed in fundamental ways. Although both the House and Senate agreed that a guidelines system was the preferred means of reducing disparity in sentences, the chambers did not agree on the extent to which the guidelines would be advisory or mandatory for federal judges. These major differences were never directly resolved through a conference committee or other deliberative process. Instead, the Senate approach gained approval through a back-door procedural tactic devised by House supporters of a Senate anti-crime bill. The Senate sentencing reform bill, together with a larger crime control package, was attached to an emergency omnibus appropriations bill and brought to a vote. The package passed the House on September 25, 1984, and the Senate on October 4, 1984, and was signed into law by President Reagan on October 12, 1984.

The Sentencing Reform Act of 1984 (the “Act” or the “Sentencing Reform Act”) resulted in broad changes to the federal sentencing process. The Sentencing Reform Act abolished parole and created a Sentencing Commission to devise guidelines to be used by courts for sentencing decisions.<sup>43</sup> The Act also made the guidelines binding on the courts. The final law structured the discretion of sentencing judges, with the view that “unwarranted disparity would surely decrease.”<sup>44</sup>

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<sup>39</sup> See Stith & Koh, *supra* note 13, at 236 (citing H.R. Rep. No. 99-1396 at 489 (1980)). House members emphasized the importance of vesting the judiciary itself with power to promulgate the flexible guidelines: “[A] presidentially-appointed panel can too easily be dominated by political interests. The temptation to seek public approval by appearing tough on crime and therefore to propose standards biased in favor of prosecution and incarceration might prove too great.” Peter W. Rodino, Jr., *Federal Criminal Sentencing Reform*, 11 J. Legis. 218, 231 (1984).

<sup>40</sup> See Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim L. Rev. 723, 742 (1999); Stith & Koh, *supra* note 13, at 262.

<sup>41</sup> H.R. Rep. No. 98-1017, at 42.

<sup>42</sup> *Id.*

<sup>43</sup> *Mistretta*, 488 U.S. at 367.

<sup>44</sup> See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1689 (1992).

The Act contained the language from the Hart Amendment that limited a district judge’s authority to depart from the guidelines to cases containing “aggravating or mitigating circumstances not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.”<sup>45</sup>

Despite these restrictions on judicial discretion, Congress claimed it was rejecting strict determinate sentencing<sup>46</sup> and emphasized that it did not seek to eliminate sentencing discretion.<sup>47</sup> As the Senate report explained:

The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.<sup>48</sup>

### **III. The Sentencing Guidelines And Mandatory Minimums**

#### **A. The Sentencing Guidelines Generally**

The Sentencing Commission created by the Sentencing Reform Act of 1984 was charged with developing a comprehensive, binding set of sentencing guidelines. The first set of Guidelines was submitted to Congress on April 13, 1987 and became effective on November 1, 1987. At the same time, Congress engaged in a series of lengthy debates culminating in the Sentencing Act of 1987, which further refined the federal guideline system.

The Guidelines promulgated by the Sentencing Commission specified “an appropriate [sentencing range] for each class of convicted persons” based on factors specific to the offense and the offender.<sup>49</sup> The Guidelines were binding on district judges to the extent that the case before the court was “ordinary,” *i.e.*, fully contemplated by the Sentencing Commission in developing the Guideline range. While a district judge was bound to impose a sentence determined by the Guidelines on a defendant in the “ordinary” case, the judge remained free to decide that a case was “unusual” or “atypical” and required individualized treatment.

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<sup>45</sup> United States Sentencing Commission, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines, app. B, at B-12 (2003) (quoting Pub. L. No. 98-473, 98 Stat. 1837, 1990 (1984)), available at <http://www.ussc.gov/departprt03/departprt03.pdf>.

<sup>46</sup> *Mistretta*, 488 U.S. at 367.

<sup>47</sup> S. Rep. No. 225-98 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3234 (noting that sentencing guidelines system “will not remove all of the judge’s sentencing discretion.”).

<sup>48</sup> *Id.* at 3235.

<sup>49</sup> United States Sentencing Guidelines Manual §1A1.1, cmt. background 2.

The extent to which judges would be allowed to depart below the Guidelines became one of the most highly-debated issues over the summer and fall of 1987.<sup>50</sup> The House advocated a broader approach to departures, suggesting that the Sentencing Reform Act provided for departures whenever the judge determined that the Guidelines range was too severe.<sup>51</sup> The Senate’s position, set forth by Senator Hatch, required adherence to the Guidelines “except in those rare and particularly unusual instances in which the court concludes that there is present in the case an aggravating or mitigating circumstance of a kind or to a degree not included in the guidelines, and that the presence of this circumstance should result in a sentence different from that described.”<sup>52</sup>

The Sentencing Commission also weighed in and sought an amendment of Section 3553(b) that would substitute the phrase “not adequately considered by the Commission” with language that focused the inquiry not on the sufficiency with which the Commission may have debated a particular factor but on whether the factor was or was not taken into account or included within the group of factors built into a particular Guideline.<sup>53</sup> Congress rejected this proposed amendment, and the Senate’s version of sentencing reform refinements, S.1822, was signed into law on December 7, 1987.<sup>54</sup> Despite the significant debate, the Sentencing Act of 1987 and its legislative history confirmed that the sole authority for judges to depart from the Guidelines was contained in 18 U.S.C. 3553(b) and that such authority was limited.<sup>55</sup>

The 1987 Act amended Section 3553(b) to provide that a court could depart from the Guidelines range when “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”<sup>56</sup> The Sentencing Commission has clarified the meaning of this statement:

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.<sup>57</sup>

In addition, the 1987 Act specified that in determining whether a particular factor or circumstance was adequately considered by the Sentencing Commission, courts were permitted to “consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.”<sup>58</sup>

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<sup>50</sup> *Id.* at B-15.

<sup>51</sup> *Id.* at B-17.

<sup>52</sup> *Id.* at B-18 (quoting 133 Cong. Rec. S16644) (daily ed. Nov. 20, 1987) (statement of Sen. Hatch).

<sup>53</sup> *Id.* at B-19, 20 (citations omitted).

<sup>54</sup> *Id.* at B-20.

<sup>55</sup> *Id.*

<sup>56</sup> 18 U.S.C. § 3553(b) (emphasis added).

<sup>57</sup> U.S. Sentencing Guidelines Manual § 1A1.1, cmt. background 4(b) (2003).

<sup>58</sup> 18 U.S.C. § 3553(b)(1).

The Sentencing Commission barred courts from departing based on considerations of: race, sex, national origin, creed, religion, socioeconomic status, lack of guidance as a youth, drug or alcohol dependence, and economic hardship.<sup>59</sup> The Commission also enumerated a series of “not ordinarily relevant” factors, which courts could consider only in exceptional cases.<sup>60</sup> These “not ordinarily relevant” factors, more commonly referred to as “discouraged” factors, include a defendant’s family ties and responsibilities; education and vocational skills; employment record; military, civic, charitable or public service record; and mental and emotional conditions.<sup>61</sup>

With these exceptions, the Sentencing Commission did “not intend to limit the kinds of factors, whether or not mentioned anywhere else in the Guidelines, which could constitute grounds for departure in an unusual case.”<sup>62</sup> The Sentencing Commission recognized that it could not “prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision;” the Commission envisaged that future revisions of the Guidelines would take into account factors left out in the initial version.<sup>63</sup> The Sentencing Commission also recognized the “courts’ legal freedom to depart from the guidelines.”<sup>64</sup> More recently, the Sentencing Commission noted that “as repeatedly expressed throughout the legislative history of the various bills leading up to the enactment of the Sentencing Reform Act, Congress considered departures from the guideline system to be an integral part of the sentencing guidelines system.”<sup>65</sup> Nonetheless, whatever residual discretion remained with the courts in 1987 has been significantly reduced over time by the fact that the Commission has now purported to consider nearly every factor relevant to a sentencing decision.<sup>66</sup>

## **B. Application of the Guidelines**

Under the Sentencing Guidelines, a court is obligated to sentence a defendant within a particular “guideline range.” The range results from the combination of two numerical values: the offense level, which is meant to reflect the seriousness of the defendant’s offense, and the criminal history category, reflecting the defendant’s criminal history. The two numerical values constitute the axes of a grid described as the “sentencing table.” The point where the two values intersect on the grid determines the applicable range, which is expressed in months. The Guidelines contain 43 levels of offense seriousness. More serious crimes are accorded higher offense levels. The final offense level is a combination of a base offense level assigned to the crime in general, as well as certain specific offense characteristics and adjustments that generally increase, and in certain instances decrease, the base offense level.

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<sup>59</sup> *Id.* at §§ 5H1.10; 5H1.12, 5H1.4.

<sup>60</sup> *Id.* at § 5H, introductory cmt.

<sup>61</sup> *Id.* at §§ 5H1.6; 5H1.2; 5H1.5; 5H1.11; 5H1.3.

<sup>62</sup> *Id.* at cmt. background 4(b).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* The Commission believed, however, that despite the freedom to depart, courts would not do so “very often.” *Id.*

<sup>65</sup> United States Sentencing Commission, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines, *supra* note 45, at B-13.

<sup>66</sup> See Stith & Cabranes, *supra* note 10, at 102.

The specific offense characteristics take into consideration factors related to the manner in which the actual crime was carried out. For instance, although robbery has a base offense level of 20, the ultimate offense level for the particular robbery in question can increase to 25 if a firearm was displayed or to 27 if a firearm was discharged. The final offense level is also impacted by “adjustments,” which constitute factors applicable to any offense, such as victim-related adjustments, the defendant’s role in the offense, and obstruction of justice. In addition, when there are multiple counts of conviction, the Guidelines provide for adjustments that allow for a “combined offense level,” which uses the most serious offense as a floor and increases the offense level based on the seriousness of the additional criminal conduct. Finally, the Guidelines allow the court to consider making adjustments based on the defendant’s acceptance of responsibility.

The Guidelines provide six criminal history categories based on the defendant’s past crimes and whether they were committed recently. If information indicates that the criminal history category does not adequately reflect the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence that departs upward or downward from the otherwise applicable guideline range.

The Guidelines contain a table with a range of determinate sentences based on the offense level and the criminal history category. Judges must select a sentence within the range set forth in the Guidelines. The maximum of the range may not exceed the minimum by more than the greater of 25% or six months.<sup>67</sup>

Accordingly, judges determine the sentencing range by a mechanistic application of numbers on a grid, and they have little discretion within the range set forth in the Guidelines. Although the process of determining the applicable sentencing range might appear to be straightforward, it is often a complex and ambiguous process. The attempt to cover every possible factor has made the Guidelines excessively long and complicated. Indeed, the Guidelines manual is approximately 500 pages long (not including the appendices). As a result, the process of determining the appropriate sentence can be time-consuming. Significantly, the focus of the endeavor has changed from reaching a just result to properly interpreting the numerous potentially relevant provisions in the Guidelines.<sup>68</sup> The complexity of the Guidelines has introduced a new form of sentencing disparity as courts struggle to interpret and apply the Guidelines’ text and cross-references.

### **C. Mandatory Minimums**

There is even less room for judicial discretion if a mandatory minimum statute applies. The concept of mandatory minimum penalties has existed in federal criminal law for two hundred years, but until the latter half of the twentieth century, such penalties had generally been the exception rather than the norm.<sup>69</sup> After 1984, mandatory minimum penalties became much more common as

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<sup>67</sup> 28 USC § 994(b)(2) (2000).

<sup>68</sup> Stith & Cabranes, *supra* note 10, at 82-83.

<sup>69</sup> Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199, 200-01 (1993).

Congress enacted mandatory minimums for numerous drug offenses.<sup>70</sup> Over the next six years, the existing minimums were stiffened, and more were enacted.<sup>71</sup>

Mandatory minimums require the judge to impose a specific minimum sentence upon conviction for a specified charge.<sup>72</sup> There is no judicial discretion to depart below the minimum, although upon a motion by the government pursuant to 18 U.S.C. § 3553(e), the court can impose a sentence below the statutory minimum to reflect a defendant's substantial assistance in the investigation or prosecution of another defendant. If a mandatory minimum applies, the Guidelines range automatically shifts upwards to satisfy the statute. Thus, under the Guidelines, a prosecutor who chooses to press a charge with a mandatory minimum penalty effectively determines the defendant's sentence.<sup>73</sup> As the United States Sentencing Commission has acknowledged:

Mandatory minimums, [...], are wholly dependent upon defendants being charged and convicted of the specified offense under the mandatory minimum statute. Since the power to determine the charge of conviction rests exclusively with the prosecution for the 85 percent of the cases that do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecution.<sup>74</sup>

Prosecutors are able to and do use mandatory minimums as a “bargaining chip,” a practice that results in disparities and injustices in sentencing. Mandatory minimums also give prosecutors the power to determine sentences through charging, motion and plea negotiations. Since “the sentencing rules are known in advance, prosecutors may greatly influence the ultimate sentence through their decisions on charges, plea agreements, and motions to depart for substantial assistance to law enforcement authorities.”<sup>75</sup> Prosecutors often threaten to seek mandatory minimums in order to obtain guilty pleas and cooperation from defendants.<sup>76</sup> Indeed, as the Sentencing Commission's own reports have found, 97.1% of charged offenses resulted in guilty pleas.<sup>77</sup>

The Sentencing Commission and numerous other organizations have concluded that mandatory minimums have not been applied uniformly and have resulted in unjust sentences.<sup>78</sup> Indeed,

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<sup>70</sup> *Id.* at 201.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 202.

<sup>73</sup> Gerard E. Lynch, *Criminal Law: Sentencing Eddie*, 91 J. Crim L. & Criminology 547, 563-64 (2001).

<sup>74</sup> United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Aug. 1991), available at [http://www.uscc.gov/r\\_congress/MANMIN.pdf](http://www.uscc.gov/r_congress/MANMIN.pdf).

<sup>75</sup> Stith & Cabranes, *supra* note 10, at 145.

<sup>76</sup> Schulhofer, *supra* note 69, at 202.

<sup>77</sup> United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, Figure C & Table 10, available at <http://www.uscc.gov/ANNRPT/2002/SBTOC02.htm>.

<sup>78</sup> United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, *supra* note 74, at i-iv.

<sup>79</sup> *Id.* at ii-iii.

the United States Sentencing Commission’s Special Report to Congress found that the lack of uniform application in mandatory minimums has created unwarranted disparity in sentencing.<sup>79</sup> Moreover, the report concluded that the “mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.”<sup>80</sup>

#### **IV. The Impact of The Sentencing Guidelines**

The most glaring change imposed by this sentencing system over the last decade and a half has been the shift in sentencing discretion from the judge to the prosecutor.<sup>81</sup> There have been a growing number of downward departures granted by judges, most often at the prosecutor’s request and at times at the judge’s own initiative, in an attempt to avoid the unjust results of a strict application of the Guidelines. These departures, coupled with the difficulty in uniformly applying the multiple and complex provisions of the Guidelines and the variations in prosecutorial practice, have resulted in disparate sentences imposed under the same Guideline provisions.

##### **A. The Shift of Discretion From the Judge to the Prosecutor**

The Supreme Court upheld the constitutionality of the Guidelines in *Mistretta v. United States*, finding that Congress had not delegated excessive authority to the Sentencing Commission under the non-delegation doctrine and that the Act did not violate separation of powers principles.<sup>82</sup> The Court held that the Constitution does not prohibit Congress from delegating to an expert body within the Judicial Branch the task of formulating sentencing guidelines. However, it did not consider whether limitations on judicial discretion would violate separation of powers principles.

In *Koon v. United States*, the Supreme Court emphasized that the Sentencing Reform Act “did not eliminate all of the district court’s discretion” but rather, “[a]cknowledging the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances... Congress allows district courts to depart from the applicable Guideline range if ‘the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . .’”<sup>83</sup> Furthermore, the Court reiterated that a “district court’s decision to depart from the Guidelines, . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.”<sup>84</sup>

Despite the Supreme Court’s affirmation in *Koon* that district courts retain their traditional exercise of discretion in sentencing, the Guidelines have in practice had a crippling effect on that discretion. Moreover, the Guidelines have created a sentencing system wherein the power to make decisions about sentencing has effectively been transferred from the judge to the prosecutor.

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<sup>80</sup> *Id.* at iv.

<sup>81</sup> Stith & Cabranes, *supra* note 10, at 126, 130.

<sup>82</sup> *Mistretta v. United States*, 488 U.S. 361, 361 (1989).

<sup>83</sup> 518 U.S. 81, 92 (1996) (internal citations omitted).

<sup>84</sup> *Koon*, 518 U.S. at 98.

While prosecutors have always had some effect on sentencing through nearly unfettered discretion in the charging decision, the enactment of the Guidelines has significantly increased the prosecutors' ability to shape or determine a defendant's sentence. Prosecutors exercise this discretion in four ways. First, and most importantly, prosecutors exercise discretion in choosing what crime to charge.

For example, in a drug case, they can choose to bring charges against a defendant for only a single drug sale, or they can allege that the defendant is involved in a conspiracy involving vast amounts he may never have seen. In a fraud case, they may bring both conspiracy and substantive charges and make use of the Guidelines' provision that sentences must run consecutively if a single statutory maximum precludes the court from reaching a higher range.<sup>85</sup> They are free to charge the most serious offense available, even where the facts would support a lesser-included offense, and courts generally are powerless to check this discretion.<sup>86</sup> In addition, federal law imposes criminal liability on a co-conspirator or an aider and abettor for a substantive crime committed in furtherance of the conspiracy or in which the defendants may have aided and abetted.<sup>87</sup> The federal prosecutor is free to include or exclude these additional charges in the indictment.

Furthermore, although prosecutors are required to disclose favorable information relevant to punishment, many prosecutors consider the right to favorable evidence to exist only at the guilt or trial phase rather than at the plea stage.<sup>88</sup> As a result, some prosecutors may withhold information that could lessen a defendant's culpability or lower the offense level under the Guidelines, thereby significantly impacting the length of the defendant's sentence.<sup>89</sup>

Second, by using the severe sentences prescribed by mandatory minimums and the Guidelines as a lever, prosecutors can compel defendants to cooperate in exchange for the only exception to a Guidelines sentence that has a potentially unlimited effect – a “substantial assistance” downward departure under Section 5K1.1 of the Guidelines authorized only on motion of the prosecution. *See infra*.

Third, prosecutors control the “facts” that may be presented to the court at the time of sentence by negotiating with the defendant as to what arguments they may make to mitigate sentence, if they wish to accept the government's plea proposal. It is a common practice that the government will only allow pleas, on relatively favorable terms, if the defendants agree to forego those arguments which might lead to downward departures under the existing guidelines provisions, such as minor

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<sup>85</sup> See U.S. Sentencing Guidelines Manual § 5G1.2(d) (2003).

<sup>86</sup> Stephanos Bibas, *Apprendi and the Dynamics of Guilty Pleas*, 54 Stan. L. Rev. 311, 313 & n.8 (2001); *see also United States v. Duarte*, 246 F.3d 56, 62 n.4 (1st Cir. 2001) (consecutive sentences may be imposed to avoid Apprendi error where there was no jury finding on sentencing enhancements).

<sup>87</sup> See *Pinkerton v. United States*, 328 U.S. 640 (1946); 18 U.S.C. § 2 (2000).

<sup>88</sup> See The American College of Trial Lawyers Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16, at 1 *available at* <http://www.actl.com/PDFs/CRIMPROC11and16.pdf>.

<sup>89</sup> *Id.*

roles, diminished capacity and family circumstances. The court is thus denied the opportunity to even consider arguments which the defendant might otherwise put forth were the defendant not pressured “to accept” the government’s plea requirements.

Fourth, by controlling the facts presented to the court, prosecutors can make use of the Guidelines’ requirement that the court take into account “relevant conduct” in determining the applicable range. “To the extent that prosecutorial discretion is exercised with preference to some and not to others, and to the extent that some are convicted of conduct carrying a mandatory minimum penalty while others who engage in the same or similar conduct are not so convicted, disparity is reintroduced.”<sup>90</sup>

The result is a cruel anomaly. Those defendants who are most culpable, and therefore have the most information to offer prosecutors, receive the greatest benefit from their cooperation. Prosecutors are free to charge them with offenses carrying a lesser sentence under the Guidelines to induce cooperation, and to reward them with a substantial assistance motion. Those least culpable and with less to offer end up serving the longer sentences.<sup>91</sup>

For example, in *United States v. Rodriguez*, the government prosecuted five members of a drug conspiracy.<sup>92</sup> Three pleaded guilty and cooperated with the government. The charges brought against them were based only on the amount of drugs each actually handled.<sup>93</sup> After the trial of the remaining two, the three cooperators were sentenced to 17 months, time served, and 60 months respectively.<sup>94</sup> The remaining two co-conspirators also were convicted. At their trial, the U.S. Attorney introduced evidence against them of the full amount of drugs involved in the conspiracy as a whole.<sup>95</sup> These two co-conspirators were sentenced to 235 months and 260 months.<sup>96</sup>

In upholding these sentences, the First Circuit noted that prosecutors in the federal system “have always enjoyed great discretion in deciding what cases to pursue and what charges to bring.”<sup>97</sup> The court conceded that, as a result, it is “within the government’s discretion to charge similarly situated defendants differently. Only when a prosecutor discriminates against defendants based on impermissible criteria such as race or religion is a prosecutor’s discretion subject to review and rebuke.”<sup>98</sup> The court acknowledged that the plea bargains in *Rodriguez* “led to the enormous sentencing disparity for the defendants who chose to put the government to its burden in proving its case” but

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<sup>90</sup> U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, *supra* note 74, at iii-iv.

<sup>91</sup> See The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines, *reprinted in* 38 Am. Crim. L. Rev. 1503, 1524-25 (2001) [hereinafter ACTL § 5K1.1 Report].

<sup>92</sup> 162 F.3d 135, 141 (1st Cir. 1998).

<sup>93</sup> *Id.* at 150-51.

<sup>94</sup> *Id.* at 150.

<sup>95</sup> *Id.* at 150-51.

<sup>96</sup> *Id.* at 150.

<sup>97</sup> *Id.* at 151 (quoting Stith & Cabranes, *supra* note 10, at 140-41).

<sup>98</sup> *Id.* at 153.

noted that “the law allows the government to do this, even if it results in sentences of such disparity as would strike many as unfair.”<sup>99</sup> Indeed, Chief Judge William G. Young of the District of Massachusetts commented: “[F]or me, Rodriguez represents a sad epiphany. If fact bargaining is acceptable, then the entire moral and intellectual basis for the Sentencing Guidelines is rendered essentially meaningless. If ‘facts’ don’t really matter, neither does ‘judging’ contribute anything to a just sentence.”<sup>100</sup>

The change wrought by the Guidelines is that the charge selected by the prosecution now carries with it a default sentence. In this way, the power of selecting, if not imposing the sentence, has shifted from the court to the prosecution.

## **B. The Increase In Downward Departures**

Since the adoption of the Guidelines, there has been a steady increase in the rate of departures from the Guidelines. The vast majority of those departures have been “downward departures,” which result in sentences lower than those otherwise required by the Guidelines.<sup>101</sup> Downward departures are largely controlled by the prosecution and are given for “substantial assistance” based on a defendant’s cooperation with law enforcement authorities. While a number of judicially-initiated departures exist, most “non-substantial assistance” departures are granted in very limited circumstances in a few jurisdictions, primarily relating to immigration offenses. According to the Sentencing Commission, in 2001 the nationwide downward departure rate was approximately 10.9%, excluding substantial assistance motions and government-initiated non-substantial assistance departures.<sup>102</sup>

Pursuant to Section 5K1.1 of the Guidelines, substantial assistance departures may be granted by the court “upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”<sup>103</sup> Significantly, this provision allows the court to grant a substantial assistance departure only upon motion by the government, resulting in a significant shift in sentencing discretion from judges to prosecutors.<sup>104</sup> The Commission further empowered prosecutors by failing to define “substantial assistance” and instead leaving that definition to the government and by failing to supply any provision in Section 5K1.1 for the review of a prosecutor’s determination not to file a motion for a substantial assistance departure.<sup>105</sup>

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<sup>99</sup> *Id.* at 152.

<sup>100</sup> *Berthoff v. United States*, 140 F. Supp. 2d 50, 66 (D. Mass 2001).

<sup>101</sup> See Kirby D. Behre and A. Jeff Ifrah, *You Be the Judge: The Success of Fifteen Years of Sentencing Under the United States Sentencing Guidelines*, 40 Am. Crim. L. Rev. 5, 7 (2003); see also *Recent Legislation: Criminal Law - Federal Sentencing Guidelines - Congress Amends the Sentencing Guidelines in an Attempt to Reduce Disparities*, 117 Harv. L. Rev. 751, 753 (2003).

<sup>102</sup> United States Sentencing Commission, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines, *supra* note 45, at iv-v.

<sup>103</sup> See ACTL § 5K1.1 Report, *supra* note 91, at 1506, quoting United States Sentencing Guidelines § 5K1.1. (1998).

<sup>104</sup> See *id.* at 1506-08.

<sup>105</sup> See *id.* at 1507.

Between 1991 and 2001, the rate of substantial assistance departures increased from 11.9 percent to 17.4 percent.<sup>106</sup> This increase has spawned widespread sentencing disparity, particularly as a result of the inconsistent definitions of “substantial assistance” among prosecutors.<sup>107</sup> According to a recent report by the Sentencing Commission, “substantial assistance departure rates vary widely by district.”<sup>108</sup>

Non-substantial assistance departures have also steadily grown, increasing from 5.8 percent in 1991 to 18.1 percent in 2001.<sup>109</sup> Much of this increase, however, results from an increase in the proportion of immigration offenses, which more than doubled from 6.9 percent in 1991 to 17.5 percent in 2001.<sup>110</sup> While the rate of downward departures for some offenses doubled or even tripled over that period, those increases pale in comparison to the 1,171 percent increase in the rate of downward departures for immigration offenses.<sup>111</sup> By 2001, downward departures for immigration offenses constituted one-third of all downward departures.<sup>112</sup>

Partially as a result of this offense-specific increase, the increase in the rate of downward departures has varied widely among federal districts. Significantly, the rate of downward departures has remained at or under 10 percent in most districts, with the overall increase in departures merely reflective of a drastic increase in departures by a few districts that have been particularly affected by the increase in immigration offenses (the District of Arizona, the Eastern District of Washington, the Western District of Texas, and the Southern District of California).<sup>113</sup> In 2001, 54% of all downward departures granted by district courts were based on plea agreements, criminal history, and general mitigating circumstances (nearly half of which were initiated by the government).<sup>114</sup>

### C. Inconsistent Application of Complex Guidelines

The current Guidelines are approximately 500 pages long and reflect changes resulting from more than 600 amendments over the last fifteen years.<sup>115</sup> Since the Sentencing Commission has attempted to cover every aggravating and mitigating factor that might be considered in sentencing, the Guidelines have become a dense thicket of frequently convoluted provisions.<sup>116</sup> As a result, many sections of the Guidelines are “inordinately difficult to apply uniformly because of their abstractness,

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<sup>106</sup> United States Sentencing Commission, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines, *supra* note 45, at 31.

<sup>107</sup> See ACTL § 5K1.1 Report, *supra* note 91, at 1513-14 (2001).

<sup>108</sup> United States Sentencing Commission, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines, *supra* note 45, at 68.

<sup>109</sup> *Id.* at 31.

<sup>110</sup> *Id.* at 37.

<sup>111</sup> *Id.* at 38.

<sup>112</sup> *Id.* at 40.

<sup>113</sup> *Id.* at 32.

<sup>114</sup> *Id.* at 42-45.

<sup>115</sup> Behre & Ifrah, *supra* note 101, at 5.

<sup>116</sup> *Id.* at 5-6.

complexity, and ambiguity.”<sup>117</sup> Because of the length and complexity of the Guidelines, individual prosecutors may interpret or apply the Guidelines differently. This complexity has introduced a new form of disparity into the federal sentencing system.

As an extreme example, in one two-week period in 1996, three different appellate panels gave three different answers to the question of how to calculate a sentence for a witness convicted of criminal contempt for refusing to testify at a trial due to the Guidelines’ cross-reference to “the most analogous offense guideline” for criminal contempt sentencing.<sup>118</sup> Each panel selected a different analogous offense, with a different sentencing effect. Moreover, two of the panels were from the same court of appeals, reviewing two sentencing decisions by the same district judge in the same prosecution, with the net effect that one panel reversed the district court’s selection of the most analogous offense while the other, issuing its opinion one day later, affirmed the district court’s choice of the most analogous offense.<sup>119</sup>

One of the major causes of the complexity and unwieldiness of the Guidelines is the “real-offense” feature of the federal criminal system, which makes the Guidelines even more intricate and restrictive.<sup>120</sup> This feature requires not merely that the Guidelines delineate the appropriate treatment for each crime, but further requires that the Guidelines actually anticipate the broad spectrum of “real offense conduct” or “relevant conduct” that judges might encounter and specify the particular adjustments that would need to be made to a sentence based on each variation in conduct.<sup>121</sup> Before *Blakely*, in “real offense” sentencing, relevant conduct need not have been charged or proved at trial or through a guilty plea.<sup>122</sup> In a further significant intrusion into judicial discretion in sentencing, the court must sentence based on the relevant conduct, once established, even if that conduct was not charged, was charged and later dismissed, or even was the subject of a not guilty verdict for the defense.<sup>123</sup> In the current system, relevant conduct, rather than the offense of conviction, is often the primary determinant of the length of a sentence.<sup>124</sup>

The standard for establishing relevant conduct under the Guidelines has been a preponderance of the evidence.<sup>125</sup> The Supreme Court has imposed some constitutional limits on the

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<sup>117</sup> Stith & Cabranes, *supra* note 10, at 118.

<sup>118</sup> Stith & Cabranes, *supra* note 10, at 97.

<sup>119</sup> *Id.* at 97.

<sup>120</sup> Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 Yale L.J. 1355, 1368 (1999) (book review).

<sup>121</sup> *Id.*

<sup>122</sup> See The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines, reprinted in 38 Am. Crim. L. Rev. 1463, 1464 (2001) [hereinafter ACTL Relevant Conduct Report].

<sup>123</sup> See The American College of Trial Lawyers, The Law of Evidence in Federal Sentencing Proceedings 1-2 (1997), available at <http://www.actl.com/PDFs/LawofEvidenceinFederalSentencing.pdf>. [hereinafter ACTL Evidence in Sentencing Report].

<sup>124</sup> See ACTL Relevant Conduct Report, *supra* note 122, at 1464. As set forth in more detail below, the impact of relevant conduct may change as a result of the Supreme Court’s decision in *Blakely v. Washington*, No. 02-1632, 2004 WL 1402697 (June 24, 2004).

<sup>125</sup> See *United States v. Watts*, 519 U.S. 148, 149 (1997). The American College of Trial Lawyers has recommended use of a clear and convincing standard instead of the current preponderance standard, at least “(i) when the government seeks to increase defendant’s sentence by any amount using uncharged ‘relevant conduct’; and (ii) when defendant’s sentence, regardless of the circumstances, would be substantially increased based on evidence presented at sentencing.” See The ACTL Evidence in Sentencing Report, *supra* note 123, at 16. The American Bar Association advocates the use of a beyond a reasonable doubt standard. See ABA Standards for Criminal Justice Sentencing Standard 18-3.6, commentary (3d ed. 1994) (“[I]nfliction of punishment for a given crime ought to be preceded by conviction for that crime.”).

power of sentencing judges to consider “relevant conduct.” In the landmark case of *Apprendi v. New Jersey*, the Supreme Court held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>126</sup> Until this past Supreme Court Term, in applying *Apprendi*, courts have stressed that it only affects cases where the defendant’s sentence exceeds the statutory maximum.<sup>127</sup> Because *Apprendi* limits the ability of judges to increase a defendant’s Guidelines sentence based on relevant conduct beyond the substantive statutory maximum, Congress has taken steps to mitigate the effect of *Apprendi* by increasing statutory maximums for substantive offenses. For example, Congress significantly increased the statutory maximum for certain frequently charged white-collar crimes, such as mail and wire fraud, in the Sarbanes-Oxley Act of 2002.<sup>128</sup>

In June 2004, the Supreme Court issued a decision in *Blakely v. Washington* invalidating a sentence imposed under the Washington State sentencing guidelines based on the rule announced in *Apprendi*.<sup>129</sup> The Supreme Court held that an increased sentence imposed by a judge based on facts not considered by the jury violated the defendant’s Sixth Amendment right to be tried by a jury, even if the sentence is below the maximum sentence provided in the relevant statute. In striking down the sentence, the Court held that the “statutory maximum” for *Apprendi* purposes is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”<sup>130</sup> The *Blakely* decision states in a footnote that “the Federal Guidelines are not before us and we express no opinion on them.”<sup>131</sup> Nonetheless, the lower federal courts are split on whether and how *Blakely* applies to the federal Guidelines. In a memorandum to all prosecutors, the Deputy Attorney General set forth the Government’s position that *Blakely* did not apply to the Guidelines, but if it did, the Guidelines were not severable and should be found non-binding in their entirety.<sup>132</sup>

In *United States v. Mooney*, the Eighth Circuit held that *Blakely* applied to the federal system and rendered the defendant’s sentence unconstitutional.<sup>133</sup> The court remanded the case for

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<sup>126</sup> 530 U.S. 466, 490 (2000).

<sup>127</sup> See, e.g., *United States v. Goodine*, 326 F.3d 26, 33 (1<sup>st</sup> Cir. 2003); *United States v. Luciano*, 311 F.3d 146, 150-52 (2d Cir. 2002). On June 18, 2004, before the *Blakely* decision was issued, Chief Judge Young of the District of Massachusetts ruled, in a group of cases that was on appeal to the First Circuit, that the Guidelines violate *Apprendi*. *United States v. Green*, 2004 WL 1381101 (D. Mass June 18, 2004).

<sup>128</sup> Pub. L. No. 107-204, §§ 902-904, 116 Stat. 745, 805 (2002).

<sup>129</sup> *Blakely v. Washington*, No. 02-1632, 2004 WL 1402697 (June 24, 2004).

<sup>130</sup> *Id.* at \*4.

<sup>131</sup> *Id.*

<sup>132</sup> See “Departmental Legal Positions and Policies in Light of *Blakely v. Washington*,” Memorandum to All Federal Prosecutors from James Comey, Deputy Attorney General of the United States, at 3 (July 2, 2004). The Comey Memorandum also announced possible prospective actions for prosecutors including the issuance of more detailed superseding indictments, requesting from the court detailed jury interrogatories, and requesting *Blakely*-waivers from defendants as part of plea agreements. See *id.*

<sup>133</sup> *United States v. Mooney*, No. 02-3388, 2004 WL 1636960, at \*12 (8<sup>th</sup> Cir. July 23, 2004).

resentencing and directed the district court to treat the Guidelines as “non-binding but advisory.”<sup>134</sup> On August 6, 2004, the Eighth Circuit vacated the *Mooney* decision and granted a rehearing en banc.<sup>135</sup> In *United States v. Booker*, the Seventh Circuit also held that *Blakely* applied to federal sentences in which there was a judicial sentencing enhancement, but declined to rule on the severability of the Guidelines.<sup>136</sup> In *United States v. Ameline*, the Ninth Circuit reached a similar result as the Seventh Circuit but, unlike that court, went on to hold that the Guidelines are severable.<sup>137</sup> By contrast, the Fifth Circuit held that *Blakely* does not apply to the Guidelines.<sup>138</sup> The Second Circuit initially declined to address the issue and instead certified questions to the Supreme Court.<sup>139</sup> However, in *United States v. Mincey*, the Second Circuit held that “[u]nless and until the Supreme Court rules otherwise” the law in the Second Circuit remains the same as it did before *Blakely* such that judicial fact finding under the Guidelines does not violate the Sixth Amendment.<sup>140</sup>

On August 2, 2004, the Supreme Court granted certiorari in two cases that appear to address the impact of *Blakely* on the Guidelines. Oral argument in both cases is scheduled for October 4, 2004.<sup>141</sup>

In addition to the Sixth Amendment issue, the “real-offense” feature of federal sentencing greatly exacerbates unfettered prosecutorial discretion and promotes questionable prosecutorial practices, including the practice referred to as “fact-bargaining.” Fact-bargaining, which is a particular outgrowth of the Guidelines, entails an agreement between the prosecution and the defense that the defendant will be sentenced according to agreed-upon facts that, assuming they are accepted by the judge, will position the defendant to obtain a lower – or at least a certain – sentencing range.<sup>142</sup>

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<sup>134</sup> *Id.* at \*13. The Eighth Circuit adopted the sentencing procedure proposed by Judge Paul Cassell of the District of Utah in *United States v. Croxford*, No. 2:02-CR-00302PGC, 2004 WL 1462111 (D. Utah June 29, 2004). In *United States v. Marrero*, No. 04 Cr. 0086, 2004 WL 1621410, at \*3-\*4 (S.D.N.Y. July 21, 2004), Judge Rakoff recommended viewing the Sentencing Commission as “a source of helpful guidance in the form of detailed but non-binding Guidelines, [of which] the overwhelming majority of federal judges would take meaningful account . . . while being more flexible and more attuned to the individual circumstances of each case.”

<sup>135</sup> *United States v. Mooney*, No. 02-3388, 2004 WL 1636960 (8<sup>th</sup> Cir. Aug. 6, 2004).

<sup>136</sup> *United States v. Booker*, No. 03-4225, 2004 WL 1535858, at \*6 (7<sup>th</sup> Cir. July 9, 2004).

<sup>137</sup> *United States v. Ameline*, No. 02-30326, 2004 WL 1635808, at \*11-13 (9<sup>th</sup> Cir. July 21, 2004).

<sup>138</sup> *United States v. Pineiro*, No. 03-30437, 2004 WL 1543170, at \*9 (5<sup>th</sup> Cir. July 12, 2004).

<sup>139</sup> *United States v. Penaranda*, Nos. 03-1055(L), 03-1062, 2004 WL 1551369, at \* 7-8 (2d. Cir. July 12, 2004). A panel of the Sixth Circuit held that Guidelines were unconstitutional and not severable, but the decision was vacated and the court will rehear the case *en banc*. See *United States v. Montgomery*, No. 03-5256, 2004 WL 1562904 (6<sup>th</sup> Cir. July 14, 2004). In *United States v. Mueffleman*, Judge Gertner reviewed the existing case law and found that district courts are roughly evenly split on the severability issue, “if not tilted towards finding that the Guidelines are not severable.” No. CRIM 01-CR-10387-NG, CRIM. 02-CR-10201-NG, CRIM 03-CR-10310-NG, CRIM. 04-CR-10048-NG, 2004 WL 1672320, at \*11, n.35 (D. Mass. July 26, 2004). Judge Gertner went on to hold that the Guidelines are unconstitutional and not severable. *Id.* at 12. Several websites have been established to track *Blakely* developments, briefing and commentary, including: [www.ussguide.com/members/BulletinBoard/Blakely](http://www.ussguide.com/members/BulletinBoard/Blakely), and [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy](http://sentencing.typepad.com/sentencing_law_and_policy).

<sup>140</sup> *United States v. Mincey*, Nos. 03-1419L, 03-1520(CON), (2d. Cir. Aug. 12, 2004).

<sup>141</sup> *United States v. Booker*, No. 04-104, 2004 WL 1713654 (Aug. 2, 2004); *United States v. Fanfan*, No. 04-105, 2004 WL 1713655 (Aug. 2, 2004).

<sup>142</sup> Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87, 96 n.41 (2003).

In some cases, the agreement will simply reflect a compromise between prosecutor and defendant on facts about which the parties disagree and the prosecutor does not have sufficient proof. In these cases, the agreement demonstrates both the inherent difficulties in proving certain factual aspects of a case, as well as the prosecutor's sense of what a case is "worth" in light of his available evidence. A more egregious or "sinister" type of fact-bargaining involves a prosecutor and defendant agreeing, for example, that a defendant possessed or delivered a certain amount or type of narcotic, despite both sides' knowledge that the defendant in fact possessed or delivered a quantity or type of drugs requiring a different (usually greater) punishment under the Guidelines.<sup>143</sup>

Fact-bargaining is a recognition that the facts as decided by the prosecution determine the number of months or years a defendant who pleads guilty to a crime will spend in prison. Thus, the prosecution must persuade the court that its factual position is correct in order to obtain the already agreed upon plea and sentence. Since the presence of particular facts will result in a mandatory adjustment in a sentence, prosecutors who have obtained a plea bargain have an incentive to persuade the judge of the agreed-upon facts in order to have the plea accepted by the court and to influence the sentence.<sup>144</sup> Significant dangers of manipulative and controlling fact-bargaining arise from this process.<sup>145</sup> Probation officers are particularly concerned with the impact of this practice and often seek to inform the judge of any "shading" of the facts that may result.<sup>146</sup>

#### **D. Variations in Prosecutorial Practice**

The exercise of discretion by the prosecutor in charging, plea bargaining and motion practice varies greatly among U.S. Attorney Offices both within and among the circuits. As Professor Stith and Judge Cabranes note:

Instead of fewer than 800 federal district judges making these rough-and-ready determinations of overall sentencing fairness in an open process, they are now made by more than 3,000 Assistant United States Attorneys behind closed doors. Prosecutorial charging, plea, and motion practice are thus a well-spring of sentencing disparity.<sup>147</sup>

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<sup>143</sup> Felicia Sarner, *Fact Bargaining Under the Sentencing Guidelines: The Role of the Probation Department*, 8 Fed. Sentencing R. 328 (1996).

<sup>144</sup> Wright, *supra* note 120, at 1368 n.51.

<sup>145</sup> See ACTL Relevant Conduct Report, *supra* note 122, at 1493.

<sup>146</sup> Sarner, *supra* note 143. Studies suggest that as probation officers increasingly call misleading facts to the court's attention, purely inaccurate factual stipulations may now be less common, or may simply be more cleverly disguised. See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 Nw. U. L. Rev. 1284, 1292 (1997).

<sup>147</sup> Stith & Cabranes, *supra* note 10, at 140.

There are 94 U.S. Attorney Offices throughout the country. Each of these offices has its own policies and practices related to charging and sentencing. For example, some offices oppose all downward departures as a matter of course, while others review each downward departure request on an individualized basis.<sup>148</sup> In addition, there is wide disparity in the number of substantial assistance departures granted across different districts.<sup>149</sup> Given the differences between U.S. Attorney Offices and between Assistant United States Attorneys within each office, there is no way to assure that similarly situated defendants are treated the same. As between offices, similar treatment is likely to be inconsistent.

### E. State Sentencing Guidelines

State sentencing systems have managed to avoid some of the problems that have resulted under the federal Guidelines. Although state guidelines systems differ from each other in several respects, many share certain key characteristics that have enabled them to achieve the success that has eluded the federal Guidelines. Significantly, the state guidelines are much more flexible than their federal counterpart.<sup>150</sup> They also tend to be short and relatively simple to apply.<sup>151</sup> Furthermore, they have not fallen prey to the federal Guidelines' misguided attempt "to structure and define every single decision."<sup>152</sup> In some states, the guidelines are not binding on trial courts and are not subject to effective appellate review.<sup>153</sup> Indeed, several states explicitly provide that their guidelines are "voluntary" and not subject to appeal.<sup>154</sup>

State guidelines systems have generally proved more successful because they "regulate but do not eliminate discretion."<sup>155</sup> As an American Law Institute report found, "in the better guideline structures, the goal is not to eliminate the authority of the courts to individualize sentences to the needs of unusual cases, but to provide an overall framework in which that discretion may be exercised."<sup>156</sup>

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<sup>148</sup> See *United States v. Vieke*, 348 F.3d 811, 813 (9<sup>th</sup> Cir. 2003) (stating that it was the policy of the United States Attorney's Office to object to downward departures and that Assistant United States Attorney no longer had "any discretion in making recommendations to the court with respect to downward departures").

<sup>149</sup> See United States Sentencing Commission, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines, *supra* note 45, at 30 (finding wide variations in the rate of downward departures across districts in 2001, with downward departure rates ranging from 1.4% in the Eastern District of Kentucky to 62.6% in the District of Arizona); ACTL § 5K1.1 Report, *supra* note 91 (finding in 1996, the percentage of Section 5K1.1 departures granted as a percentage of all sentences in the Eastern District of Pennsylvania was 47.5% while the Eastern District of Oklahoma had a rate of 4.4%).

<sup>150</sup> Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St. Louis L.J. 425, 426 (2000).

<sup>151</sup> See *id.* For example, the Minnesota Guidelines have proven to be relatively simple to apply, even in light of the changes they have undergone over the last two decades. See Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 Wake Forest L. Rev. 345 (1993).

<sup>152</sup> Frase, *supra* note 150, at 426.

<sup>153</sup> Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 Fed. Sent. R. 69 (Sept./Oct. 1999).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 443.

<sup>156</sup> American Law Institute, Report: Model Penal Code: Sentencing at 51-52 (Apr. 11, 2003).

## V. Recent Legislation and Amendments

In an effort to reduce the number of downward departures from the Guidelines, Congress, the Department of Justice and the Sentencing Commission have recently enacted policies that further curb judicial discretion and increase the likelihood of harsher and unjust sentences in particular cases. These policies compound the threat to judicial autonomy and independence.

### A. **The Feeney Amendment**

Congress originally enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (“PROTECT”) Act in an effort to protect children from pornography, sexual abuse and kidnapping.<sup>157</sup> However, during final consideration of the PROTECT Act in the House of Representatives, Representative Feeney from Florida introduced an amendment designed to “address[] long-standing and increasing problems of downward departures from the Federal Sentencing Guidelines.”<sup>158</sup> Although the Feeney Amendment contained several significant provisions related to federal sentencing, neither the Judiciary, the Sentencing Commission nor the federal bar were consulted prior to its introduction. Despite the fact that the new legislation contained the most far-reaching changes to the federal sentencing laws since the creation of the Guidelines, the House held only one hearing at the subcommittee level on part of the bill and the Senate held no hearings on the bill.<sup>159</sup> Nor were the views of others solicited. It was adopted by the House overwhelmingly, after only twenty minutes of debate.<sup>160</sup>

The House’s adoption of the Feeney Amendment was widely and publicly criticized. The Judicial Conference of the United States sent a letter to the Senate Judiciary Committee stating that the proposed legislation “undermine[s] the basic structure of the sentencing system and impair[s] the ability of courts to impose just and responsible sentences.”<sup>161</sup> Because of these concerns, Congress did make some revisions to the Feeney Amendment. Nevertheless, on April 10, 2003, Congress overwhelmingly passed the new legislation, which dramatically reduces federal judges’ ability to depart from the Sentencing Guidelines and imposes a set of reporting requirements on downward departures that subject the judiciary to scrutiny and pressure. President Bush signed the bill into law on April 30, 2003.

In adopting the Feeney Amendment, Congress expressly ordered the Sentencing Commission to restrict the authorized reasons for downward departures for defendants convicted of child abduction or sex offenses. PROTECT Act § 401(b)(2)-(5). In addition, rather than direct the Commission to amend the Sentencing Guidelines, Congress took the unprecedented step of directly amending them itself. Specifically, Section 401(b) of the PROTECT Act expressly requires the Sentencing Commission to “amend” Section 5K2.0 and insert language drafted by Congress that

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<sup>157</sup> PROTECT Act, Pub. L. No. 108-21, 117 Stat 650, (2003).

<sup>158</sup> See 149 Cong. Rec. H2422 (daily ed. Mar. 27, 2003).

<sup>159</sup> Letter from Judicial Conference of the United States to Orrin G. Hatch (Apr. 3, 2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a648525bbbd6000daa79/departures/\\$FILE/judconf\\_feeney.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a648525bbbd6000daa79/departures/$FILE/judconf_feeney.pdf).

<sup>160</sup> The Feeney Amendment passed the House on March 27, 2003, by a vote of 357 to 58. See 149 Cong. Rec. S5115 (daily ed. Apr. 10, 2003).

<sup>161</sup> Letter from Judicial Conference of the United States to Orrin G. Hatch, *supra* note 159.

prohibits a number of grounds of downward departures, including family ties and responsibilities, community ties, and/or military, civic, or charitable public service, in certain child-victim, sexual abuse and obscenity cases. *Id.* § 401(b)(2)-(5). In addition, the Feeney Amendment prevents the Sentencing Commission from adding any new grounds for downward departures in certain cases until May 2005. *Id.* § 401(b)(2)-(5) and (j)(2).

The restrictions imposed by the Feeney Amendment were largely fueled by the Justice Department's claim that judges were routinely granting unwarranted departures. However, in 2002, the last fiscal year for which statistics are available, the Justice Department appealed only twenty-six cases involving a departure under Section 5K2.<sup>162</sup>

Significantly, the Feeney Amendment changes the standard of appellate review for departure decisions from abuse of discretion to de novo,<sup>163</sup> and further limits the grounds on which a departure may be granted on remand from an appeal.<sup>164</sup> The change in the standard of appellate review is problematic because it requires an appellate court that has not seen and heard the defendant to review on a paper record the sentence imposed by a district court judge who has done so.<sup>165</sup> Judge Jack Weinstein of the Eastern District of New York has responded to this change by announcing that he will include in the appellate record of each criminal case in which a sentence is imposed a videotape of the sentencing hearing.<sup>166</sup>

Most controversial, the Feeney Amendment establishes a set of unprecedented reporting requirements. Specifically, the Amendment requires the chief judge of each district court, within 30 days of the entry of a judgment in a criminal case, to submit a written report of the sentence to the Sentencing Commission including the reasons for the sentence imposed, any downward departures, and the name of the sentencing judge.<sup>167</sup> The Sentencing Commission is directed to make these reports, as well as the underlying records accompanying them, available to the House and Senate Judiciary Committees.<sup>168</sup> Moreover, the Feeney Amendment directed the Attorney General either to (1) report any downward departures (except downward departures for substantial assistance) within 15 days of the departure to the House and Senate Judiciary Committees, including the identity of the district court judge,<sup>169</sup> or (2)

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<sup>162</sup> United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, tbl. 58, available at <http://www.ussc.gov/ANNRPT/2002/table58.pdf>.

<sup>163</sup> PROTECT Act § 401(d)(2).

<sup>164</sup> *Id.* at § 401(e).

<sup>165</sup> See, e.g., *United States v. Thurston*, 358 F.3d 51, 70 (1<sup>st</sup> Cir. 2004) (explaining that under the PROTECT Act, courts must review the application of guidelines to the facts under a de novo standard).

<sup>166</sup> Leonard Post, *Two U.S. Judges Fire at 'Feeney'; Videotaped Sentencings in Brooklyn and Resignation in Pittsburgh*, Nat'l L.J., Feb. 9, 2004, at 4.

<sup>167</sup> PROTECT Act § 401(h).

<sup>168</sup> *Id.*

<sup>169</sup> The Feeney Amendment specifically states that "[n]ot later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities . . . the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing": "(i) the case; (ii) the facts involved; (iii) the identity of the district court judge; (iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and (v) the position of the parties with respect to the downward departure, whether or not the United States has filed or intends to file, a motion for reconsideration." *Id.* at § 401(l)(2)(A)(B).

submit a detailed report to the House and Senate Judiciary Committees, within 90 days of enactment of the PROTECT Act, setting forth the Justice Department's policies and procedures adopted subsequent to enactment of the PROTECT Act.<sup>170</sup>

Attorney General Ashcroft chose the latter option and, in order to track internally data on judges who downwardly depart from the Guidelines, distributed a July 2003 memorandum that instructs “[d]epartment attorneys [to] promptly notify the appropriate division at the Department of Justice in Washington (‘Main Justice’),” when a judge grants a departure in one of several categories of cases, including departures based on criminal history, acceptance of responsibility, and any departure premised on a “discouraged” or “unmentioned” factor. Furthermore, Ashcroft asserted that U.S. Attorneys “have an affirmative obligation” to oppose any sentencing adjustments, including downward departures, that are not supported by the facts and the law. The reporting provisions require the sharing of confidential information with Congress and the creation of a list of judges who depart downward. This list of such judges has already been referred to by the media and others as a “black-list.”<sup>171</sup>

The new reporting provisions of the Feeney Amendment may be seen as a heavy-handed attempt to intimidate the federal judiciary and thereby further compromise the independence of the judiciary and threaten the separation of powers. The targeting of individual judges compromises the decision-making, independence, and objectivity of the federal judiciary. In addition, such oversight can only compromise public confidence in the judiciary. Although federal judges enjoy life tenure, the integrity and independence of the judicial branch is eroded by a system that allows judges to be called before Congress should they impose in certain sentences in the future.

Even though the reporting requirements have only been in effect for a matter of months, their consequences have been dire.<sup>172</sup> At least one federal judge has refused to grant a downward departure because of the Congressional and Executive oversight associated with such departures.<sup>173</sup> Another judge, Judge John S. Martin of the Southern District of New York, resigned because he “no longer want[ed] to be part of our unjust criminal justice system.”<sup>174</sup> Judge Sterling Johnson Jr. of the Eastern District of New York recently placed a blanket seal on all sentencing documents in cases before him in response to Congress’ reporting requirements.<sup>175</sup>

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<sup>170</sup> *Id.* at § 401(l)(1)-(3).

<sup>171</sup> See Alan Vinegrad, *Outside Counsel: The Judiciary's Response to the PROTECT Act*, N.Y.L.J., Jan. 8, 2004 at 4 (describing the identification of individual judges who choose to depart downward as a judicial “black-list” and noting judicial criticism of this effort); Jennifer C. Kerr, *Rehnquist Scolds Congress on Sentencing*, Associated Press Online, January 1, 2004 (same).

<sup>172</sup> See *United States v. Kim*, No. 03 Crim. 413(RPP), 2003 WL 22391190, at \*8 (S.D.N.Y. Oct. 20, 2003) (noting that the new reporting requirements will compromise the public’s “confidence . . . that the courts play an independent and fair role in the dispensation of justice . . . [at which point the] system of justice will be regarded as subservient to the other branches of government - - the system that prevailed for so many years behind the Iron Curtain”); Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. Times, December 8, 2003 at B1 (noting that New York’s federal judges “have been surprisingly vocal in their criticism of [the Feeney Amendment which] they say represents a breach in the separation of powers and bullies them into handing down harsher sentences”); Remarks of Chief Justice William Rehnquist, Federal Judges Association Board of Directors Meeting (May 25, 2003), available at <http://www.nacdl.org/departures> (noting that the “collection of [information about sentencing practices] on an individualized judge-by-judge basis . . . is [ ] troubling”).

<sup>173</sup> See *United States v. Kirsch*, No. CR.02-288 1 PAM/RLE, 2003 WL 22384760, at \*1 (D. Minn. Oct. 17, 2003) (noting that court’s refusal to downwardly depart was a result of policies designed by Congress and the Attorney General “to intimidate and threaten judges into refusing to depart downward and those policies are working”; moreover, the court feared that “[i]f the Court were to depart . . . Congress could call the undersigned to testify and attempt to justify the departure”).

<sup>174</sup> See John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. Times, June 24, 2003, at A31.

<sup>175</sup> See Urbina, *supra* note 172.

Judges have voiced strong opposition to the Feeney Amendment. The Judicial Conference of the United States, the federal courts' policy-making body, which is headed by Chief Justice Rehnquist and comprised of 26 other federal judges, including the Chief Judge from each circuit, voted to support the repeal of several key provisions of the Feeney Amendment.<sup>176</sup> In addition, Chief Justice Rehnquist recently noted, “[t]here can be no doubt that . . . target[ing] the judicial decisions of individual federal judges could amount to an unwarranted and ill-considered effort to intimidate judges to perform their judicial duties.”<sup>177</sup> Certain members of Congress have spoken out against the Feeney Amendment as well. Senator Edward Kennedy and Congressman John Conyers, Jr. have introduced The Judicial Use of Discretion to Guarantee Equity in Sentencing Act (the “JUDGES Act”), which would repeal many of the controversial parts of the PROTECT Act related to judicial discretion in sentencing.<sup>178</sup>

Courts have recently started to address whether or not the Feeney Amendment is constitutional. Judge Dickran Tevzian of the Central District of California ruled that the reporting requirements set forth in § 401(l)(1)-(3) of the Feeney Amendment are unconstitutional.<sup>179</sup> Judge Tevzian explained that the separation of powers analysis requires the court to consider the “practical consequences” of the provision, or provisions, in question.<sup>180</sup> Because the practical consequences of the reporting requirements contained in § 401(l)(1)-(3) are so severe – they intolerably “chill[] and stifle[] judicial independence” – the court struck them down.<sup>181</sup>

## **B. The 2003 Amendments to the Guidelines**

The Feeney Amendment also directed the Sentencing Commission to promulgate amendments to the Guidelines “to ensure that the incidence of downward departures are substantially reduced.”<sup>182</sup> In response to this directive, on October 8, 2003, the Sentencing Commission adopted a package of amendments to the Sentencing Guidelines that significantly alters the scope of downward

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<sup>176</sup> See News Release, Administrative Office of the U.S. Courts, Judicial Conference Seeks Restoration of Judges’ Sentencing Authority I (Sept. 23, 2003), available at [http://uscourts.gov/Press\\_Releases/jc903.pdf](http://uscourts.gov/Press_Releases/jc903.pdf). Specifically, the Judicial Conference expressed its support for repeal of “[1] [t]he requirement that directs the Sentencing Commission to make available to the House and Senate Judiciary Committees all underlying documents and records it receives from the courts without established standards on how these sensitive and confidential documents will be handled and protected from inappropriate disclosure; [2] [t]he requirement that the Sentencing Commission release data files containing judge-specific information to the Attorney General; [3] [t]he requirement that the Department of Justice submit judge-specific sentencing guideline departure information to the House and Senate Judiciary Committees; [4] [t]he requirement that the Sentencing Commission promulgate guidelines and policy statements to limit departures; [5] [t]he requirement that the Sentencing Commission promulgate a policy statement limiting the authority of the courts and U.S. Attorneys’ Offices to develop and implement early disposition programs; and [6] the amendment of 28 U.S.C. §991(a) to limit the number of judges who may be members of the Sentencing Commission.”

<sup>177</sup> Rehnquist, *supra* note 172.

<sup>178</sup> See Vinegrad, *supra* note 171.

<sup>179</sup> See *United States v. Mendoza*, No. CR 03-730 DT, 2004 U.S. Dist. LEXIS 1449, at \*18 (C.D. Cal. Jan. 13, 2004).

<sup>180</sup> *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 393 (1989)).

<sup>181</sup> *Id.* But see *United States v. Schnepfer*, 302 F. Supp. 2d 1170, 1198 (D. Haw. 2004) (upholding the constitutionality of the Feeney Amendment and asserting that “judges are not endowed with such malleable wills as to be improperly swayed by the opinions of the Executive or Congress”).

<sup>182</sup> PROTECT Act § 401(m)(2)(A).

departures. The new amendments, which became effective on October 27, 2003, include the following measures:

- Prohibition on departures based solely on the existence of a plea agreement;
- Limitation on a number of existing grounds for downward departures, including acceptance of responsibility, minor role in the offense, gambling addiction, and legally required restitution;
- Limitation on the availability of a departure based on family ties and responsibilities, aberrant behavior, and similar circumstances;
- Limitation on the availability and the extent of departures permissible for certain offenders with substantial criminal history;
- Implementation of a directive authorizing limited departures pursuant to early disposition (fast track) programs authorized by the Attorney General and the U.S. Attorney.<sup>183</sup>

In addition, throughout the amendments, the Commission emphasized the requirement that courts, in order to comply with the PROTECT Act and to facilitate the Commission's ongoing monitoring of departures and appellate review, state with specificity their reasons for departure.<sup>184</sup>

The newly prohibited grounds for departure, when added to previous downward departure restrictions, further erode what little judicial discretion remains in sentencing. The current sentencing limitations may well contravene the "*obligation* [of a federal judge] to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case."<sup>185</sup>

These sentencing restrictions effectively eliminate the historic role of judges in the most significant aspect of criminal cases. Over ninety-five percent of federal criminal cases are resolved by a guilty plea negotiated in an agreement with the government and without trial. In many districts, prosecutors require defendants who plead guilty to waive their right to appeal their sentence.<sup>186</sup> This policy undermines one of the basic tenets of the Guidelines: sentencing by a trial judge within the

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<sup>183</sup> See News Release, U.S. Sentencing Commission, Sentencing Commission Acts to Reduce Number of Sentences Below the Guidelines (Oct. 8, 2003), available at <http://www.ussc.gov/PRESS/rel100803a.htm>.

<sup>184</sup> See *id.*

<sup>185</sup> S. Rep. No. 98-225, at 53 (1984); see *Koon v. United States*, 518 U.S. 81, 92 (noting "the *necessity* of sentencing procedures that take into account individual circumstances") (emphasis added).

<sup>186</sup> See Lucien B. Campbell and Henry J. Bemporad, An Introduction to Federal Guideline Sentencing, 5 No. 2 Crim. Prac. Guide 2 (March/April 2004); *United States v. Raynor*, 989 F. Supp. 43 (D. D.C. 1997) (discussing Department of Justice policy requiring waiver of appeal in plea agreements).

Guidelines and an opportunity to appeal if the judge violates the Guidelines or departs from them. Whatever limited incursion may be imposed on the independent role of the judiciary, that limit is exceeded when judges have been eliminated from the sentencing process.<sup>187</sup>

### C. The Ashcroft Memorandum

Separate from the efforts of Congress and the Sentencing Commission to curtail downward departures and reduce the exercise of judicial discretion, the Justice Department has recently promulgated new policies to combat what it sees as overly lenient charging and sentencing practices by some federal prosecutors. Most significantly, Attorney General John Ashcroft has made it tougher for federal prosecutors to strike plea bargains with criminal defendants for anything less than a plea to the most serious offense. In a September 22, 2003 memorandum to federal prosecutors “Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing” (the “Ashcroft Memo”), Ashcroft instructed prosecutors to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.”<sup>188</sup>

The September 2003 Ashcroft Memo supercedes the original instructions for prosecuting cases under the Guidelines developed by Attorney General Richard Thornburgh in 1989<sup>189</sup> and modified in 1993 by Attorney General Janet Reno.<sup>190</sup> The Thornburgh Memo, issued just two years after passage of the Sentencing Reform Act, required that prosecutors “initially” were to “charge the most serious, readily provable offense.”<sup>191</sup> However, “recogniz[ing] that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the federal criminal justice system,” subsequent charge bargaining was allowed “[s]hould a prosecutor determine in good faith after indictment that . . . an indictment exaggerates the seriousness of an offense or offenses . . .”<sup>192</sup> The Thornburgh Memo explicitly permitted prosecutors to “seek to depart from the guidelines” as long as the reasons for a departure were on the record.<sup>193</sup> Thus, the Justice Department’s policy under Attorney General Thornburgh was that “plea bargaining, both charge bargaining and sentence bargaining, is legitimate” as long as it “honestly reflect[s] the totality and seriousness of the defendant’s conduct and any departure to which the prosecutor is agreeing, and [is] accomplished through appropriate guideline provisions.”<sup>194</sup>

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<sup>187</sup> See *Mistretta*, 488 U.S. at 382-83 (1986) (although courts should adopt a “flexible understanding of the separation of powers,” the “undermin[ing] of authority and independence of one or another coordinate Branch” is unconstitutional). The Sentencing Commission is “an independent agency in every relevant sense.” See *id.* at 393. The Commission’s status as an administrative agency located in the judicial branch does not authorize it to promulgate unconstitutional regulations that undermine the judiciary’s independence.

<sup>188</sup> See Memorandum from Attorney General John Ashcroft, to all Federal Prosecutors, 2 (Sept. 22, 2003), available at <http://www.fdpaw.org/pdf/doj-plea-memo.pdf> [hereinafter Ashcroft Memo].

<sup>189</sup> See Memorandum from Attorney General Thornburgh, to United States Department of Justice: Plea Policy for Federal Prosecutors (Mar. 13, 1989), reprinted in 1 Fed. Sentencing R. 421 (1989) [hereinafter Thornburgh Memo].

<sup>190</sup> See Bluesheet on Charging and Plea Decisions from Attorney General Reno, to Holders of U.S. Attorneys’ Manual, Title 9 (Oct. 12, 1993), reprinted in 6 Fed. Sentencing R. 347 (1994) [hereinafter Reno Memo].

<sup>191</sup> Thornburgh Memo, *supra* note 189.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

During the subsequent Administration, the policies set forth in the Thornburgh Memo were relaxed. On February 7, 1992, George J. Terwilliger III, as Acting Deputy Attorney General, issued a Justice Department “bluesheet” as a “clarification of the procedures” in Thornburgh’s earlier memorandum.<sup>195</sup> Terwilliger created an explicit exception to the requirement that sentencing enhancements for prior convictions be sought in all cases “in the context of a negotiated plea,” limited only by the requirement that an appropriate supervisor approve the agreement.<sup>196</sup> In 1993, Attorney General Reno explicitly gave federal prosecutors even more discretion in charging and charge bargaining:

[A] faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime.<sup>197</sup>

In deciding what charges to bring, and whether to enter into plea agreements, prosecutors were authorized to:

consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.<sup>198</sup>

Thus, in the prior Administration, prosecutors were free to do what judges increasingly may not: consider the offense, the offender, and the goals of sentencing in carrying out their responsibilities.

The Ashcroft Memo has removed that discretion. It requires that “federal prosecutors charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case” except in extremely limited circumstances.<sup>199</sup> Whereas Attorney General Reno endorsed the assessment of a range of factors in selecting charges, Attorney General Ashcroft requires that charges “that generate the most substantial sentence under the Sentencing Guidelines” must be brought.<sup>200</sup>

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<sup>195</sup> Bluesheet on Plea Bargaining from the Office of Acting Deputy Attorney General Terwilliger III, to Holders of U.S. Attorneys’ Manual Title 9 (Feb. 7, 1992), *reprinted* in 6 Fed. Sentencing R. 347 (1994). Terwilliger referred both to the Thornburgh Memo cited herein and another, dealing with the charging of sentencing enhancements for prior convictions. *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Reno Memo, *supra* note 190.

<sup>198</sup> *Id.*

<sup>199</sup> Ashcroft Memo, *supra* note 188, at 2.

<sup>200</sup> *Id.*

The exceptions set forth in the Ashcroft Memo apply only to cases in which sentences would not be affected, “fast track” programs, unprovable charges, or substantial assistance.<sup>201</sup> The Ashcroft Memo also requires prosecutors to “take affirmative steps to ensure that the increased penalties resulting from specific enhancements. . . are sought in all appropriate cases.”<sup>202</sup> The only exception to this requirement applies in those cases where the enhanced statutory sentence would exceed the applicable guideline range, thus depriving the defendant of any benefit of a plea and any incentive to plead guilty.<sup>203</sup> Additionally, federal prosecutors “must not request or accede to a downward departure except . . . with authorization” and they must “not agree to ‘stand silent’ with respect to such departures.”<sup>204</sup>

## **VI. The Judiciary Speaks Out Against The Guidelines**

There has been widespread criticism of the current sentencing Guidelines and their implementation. Several Justices of the Supreme Court have joined a growing number of district judges in voicing their concerns with the flaws inherent in the current sentencing system. As noted, one district court judge has resigned from the bench at least in part because of his concern about the impact of the Guidelines on the criminal justice system.<sup>205</sup> At least one other district judge decided not to continue to draw criminal cases because “under the Sentencing Commission Guidelines the power to impose a sentence has been virtually transferred from the court to the government.”<sup>206</sup>

Justice Breyer, who served on the initial Sentencing Commission and has been dubbed by some the “father of the Sentencing Guidelines,” recently acknowledged the problematic nature of a sentencing system that overemphasizes uniformity and explained that “the sentencing guidelines were set up with an idea of uniformity in the average case, but non-uniformity in the special cases.”<sup>207</sup>

According to Justice Breyer, Congress’ imposition of mandatory minimums that leave “no room for flexibility on the down side. . . is not a helpful thing to do” since it “is not going to advance the cause of law enforcement . . . and it is going to set back the cause of fairness in sentencing.”<sup>208</sup> Indeed, as the following examples demonstrate, mandatory minimums often result in harsh and unjust sentences that leave many judges frustrated:

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<sup>201</sup> *See id.* at 2-5.

<sup>202</sup> *Id.* at 4.

<sup>203</sup> *See id.*

<sup>204</sup> *Id.* at 6.

<sup>205</sup> In 2003, Judge John Martin resigned from the Southern District of New York stating that: “Every sentence imposed affects a human life and, in most cases, the lives of several innocent family members who suffer as a result of a defendant’s incarceration. For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice. When I took my oath of office 13 years ago I never thought that I would leave the federal bench. . . I no longer want to be part of our unjust criminal justice system.” Judge Martin, *supra* note 174.

<sup>206</sup> On June 19, 2001, in *United States v. Sidhom*, 144 F.Supp.2d 41 (D. Mass. 2001), Senior United States District Judge Edward Harrington announced that he would not continue to draw criminal cases. However, on July 21, 2004, Judge Harrington announced that he would recommence drawing criminal cases in view of the Supreme Court’s decision in *Blakely* and would treat the Guidelines as unconstitutional in all cases. *United States v. Sisson*, CR. No. 01-10185-EHF, 2004 U.S. Dist. Lexis 14162 (D. Mass. July 21, 2004).

<sup>207</sup> A Conversation with Stephen Breyer, John F. Kennedy Library and Foundation (Sept. 21, 2003), available at [http://www.jfklibrary.org/forum\\_breyer.html](http://www.jfklibrary.org/forum_breyer.html). The Sentencing Commission has also questioned the appropriateness of mandatory minimums and has gone so far as to recommend that federal mandatory minimums be widely repealed. *See* Notes to ALI Report: *Model Penal Code: Sentencing*, App. B, at 119 n.168 (2003).

- Defendant, a 19-year-old with no prior criminal record, was sentenced to 12 years and 7 months in prison for conspiracy to sell cocaine when she gave a ride to her roommate’s stepmother, a drug dealer who needed the ride to make a drug transaction. The drug offense carried a mandatory minimum of ten years in prison, but defendant was sentenced to additional time, because the woman to whom she gave the ride possessed a concealed firearm. At sentencing, the district court judge stated, “[t]his case is the perfect example of why the minimum mandatory sentences and the sentencing guidelines are not only absurd, but an insult to justice.”<sup>209</sup>
- Defendant, a 27-year-old first time offender, attempted to send by Federal Express a package containing crack cocaine from Los Angeles to Dallas. Defendant who was under financial pressures accepted \$500 from a neighbor to mail the package. Reluctantly sentencing defendant to the mandatory minimum, the district court judge observed: “It is hard to imagine that there is any other nation in which a convicted rapist with a long and unsavory history of prior misconduct can be sentenced by the judge who presides over his trial to a sentence which will make him eligible for parole in less than three years, while defendant, a first time offender with a spotless prior record, stands to be sentenced by a Congress who has never seen him and never judged him to a minimum sentence of ten years, without the possibility of parole.”<sup>210</sup>
- Defendant was sentenced to a mandatory minimum 15-year sentence for being a felon in possession of a firearm. When defendant was 24 years old, he pled guilty to three charges of selling methamphetamine to an undercover officer. Fourteen years later, defendant purchased 2 revolvers for personal protection. Because the defendant had three prior drug convictions, the court was compelled to give him a 15-year sentence despite recognizing the injustice of the sentence: “So it doesn't matter how compelling your circumstances may be, it doesn't matter how long ago those convictions were, and it doesn't matter how good your record has been since those prior convictions. 924(e) requires in your case that you receive a sentence of fifteen years...[I]t seems to me this sentence is just completely out of proportion to the defendant's conduct in this case...[I]t just seems to me this is not what Congress had in mind.”<sup>211</sup>

Because of prison sentences like these, Justice Breyer concluded that “mandatory minimums are bad policy” both because they are unfair and because they fail to lower crime.<sup>212</sup> Ultimately,

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<sup>208</sup> *Id.*

<sup>209</sup> *See* More Than They Deserve, at [www.cbsnews.com/stories/2003/12/31/60minutes.shtml](http://www.cbsnews.com/stories/2003/12/31/60minutes.shtml) (Jan. 4, 2004); Families Against Mandatory Minimums, Profiles of Injustice, at [www.famm.org/Federal%20prisoner%20profiles%20women/brenda\\_valencia\\_profile.htm](http://www.famm.org/Federal%20prisoner%20profiles%20women/brenda_valencia_profile.htm).

<sup>210</sup> *United States v. Patillo*, 817 F.Supp. 839, 843-44 (C.D. Cal. 1993).

<sup>211</sup> *See* Families Against Mandatory Minimums, Profiles of Injustice, at [http://www.famm.org/Fed%20men/michael\\_mahoney\\_profile.htm](http://www.famm.org/Fed%20men/michael_mahoney_profile.htm).

<sup>212</sup> Justice Stephen Breyer, Remarks at John F. Kennedy Library and Foundation (Sept. 21, 2003), *available at* [http://www.jfklibrary.org/forum\\_breyer.html](http://www.jfklibrary.org/forum_breyer.html).

the same can be said for the Guidelines because the “Sentencing Commission drafted the new guidelines to accommodate these mandatory minimum provisions by anchoring the guidelines to them.”<sup>213</sup>

Justice Anthony M. Kennedy has been even more critical of the sentencing system and has called for a downward revision of the Guidelines and the repeal of mandatory minimum sentences. In a speech before the American Bar Association, Justice Kennedy stated:

While I accept and endorse the necessity and the fairness of the guidelines, *if revised downward*, I accept neither the wisdom, the justice nor the necessity of mandatory minimums. In all too many cases they are unjust.<sup>214</sup> (emphasis added).

In addition to criticizing the overly harsh sentences and the inherent injustice of mandatory minimums, Justice Kennedy emphasized the grave problems generated by the transfer of sentencing discretion from judges to prosecutors:

[I]n my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. The policy gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.<sup>215</sup>

Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit framed the issue in a recent appellate hearing during which he expressed concern over the exercise of discretion by prosecutors who lack the independence and experience of judges.<sup>216</sup> The case involved a defendant who brandished a gun at a former informant and pled guilty to gun possession.<sup>217</sup> The defendant was sentenced to 15 years in prison based on three prior convictions as a teenager.<sup>218</sup> Addressing the Assistant U.S. Attorney, Judge Calabresi commented on the current sentencing system “which removes discretion from the judges” and concluded that the case was “a perfect example of you telling me that your office made some decisions with respect to what is right and just and true, and the district court is thereby prohibited from having any say in the matter...”<sup>219</sup> According to Judge Calabresi, a crucial

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<sup>213</sup> United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, *supra* note 74.

<sup>214</sup> Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (emphasis added), available at <http://www.november.org/stayinfo/breaking/Kennedyspeech.html>.

<sup>215</sup> *Id.*; see also Stith & Cabranes, *supra* note 10, at 140.

<sup>216</sup> See Tom Perrotta, *Panel Laments Lack of Discretion*, N.Y.L.J., October 28, 2003 at 1; see also Urbina, *supra* note 172.

<sup>217</sup> See Perrotta, *supra* note 216.

<sup>218</sup> *Id.*

<sup>219</sup> See *id.*; see also Urbina, *supra* note 172.

problem with the sentencing system is that “it takes discretion from independent courts and gives it to dependent prosecutors, who then have to answer to the attorney general and other political figures.”<sup>220</sup>

In yet another case, Judge Gerard Lynch of the Southern District of New York lamented the shift of discretion from the judge to the prosecutor, as he found himself obliged to impose an “unjust and harmful” sentence that he believed had “the potential to do disastrous damage to someone who himself is not much more than a child.”<sup>221</sup> The case involved a college freshman who sent images of child pornography to individuals who answered his advertisement in an Internet chat room. The crime of advertising for the distribution of child pornography carried a 10-year minimum sentence, and Judge Lynch was ultimately forced to impose this penalty, despite several attempts to avoid it.<sup>222</sup> Judge Lynch was particularly disturbed by the fact that the sentencing system required him “to accept some generalized fear about pedophilia as a substitute for careful evaluation of what we should expect from this particular individual and how he should be treated.”<sup>223</sup> He was also disturbed by the ironic fact that had the defendant actually molested a child, he would have faced a lesser sentence of about five years as opposed to ten.<sup>224</sup> Justice Lynch remarked that if prosecutors are to assume the role of sentencers, they have a moral obligation to do what a judge would do: carry out a “deep inquiry” into whether a sentence is just.<sup>225</sup>

Unfortunately, prosecutors are ill-equipped to carry out such inquiries, even if they were inclined to do so. Thus, against the backdrop of a federal tradition of lifetime appointment for judges, designed to invest qualified judicial candidates with the freedom and obligation to exercise discretion, Congress has created a system in which the exercise of judicial discretion has now been all but eliminated. “Both the Guidelines and statutory minimums are manifestations of the same trend – mandatory or ‘determinate’ sentencing.”<sup>226</sup> In a system of determinate sentencing, only the prosecutor, in control of the charging process and plea negotiations, is left to exercise his discretion.

As Professor Stith and Judge Cabranes observe:

Our concern is *not* that the exercise of prosecutorial discretion affects criminal sentences, nor are we troubled by the obvious fact that prosecutors sometimes exercise their discretion *in order* to affect the sentence....Our concern, rather, is that the exercise of broad prosecutorial authority over sentencing *within a system that severely limits the sentencing discretion of federal judges* means that the power of prosecutors is not subject to the traditional checks and balances that help prevent abuse of that power.<sup>227</sup>

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<sup>220</sup> See Perrotta, *supra* note 216.

<sup>221</sup> See Benjamin Weiser, *A Judge’s Struggle to Avoid Imposing a Penalty He Hated*, N.Y. Times at A1 (Jan. 13, 2004).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Pol’y Analysis No. 458, November 1, 2002, at 11 (Cato Institute, Wash. D.C.), available at <http://www.cato.org/pubs/pas/pa458.pdf> at 2.

<sup>227</sup> Stith & Cabranes, *supra* note 10, at 141 (emphasis in original).

## VII. Conclusion

Twenty years after the enactment of the Sentencing Reform Act, the current sentencing system is fundamentally flawed. While the goal of eliminating unfair disparity in federal sentences was laudable, the Guidelines themselves are an experiment that failed. The Guidelines, together with the increasing number of mandatory minimum sentences, have created a system that is too complex, rigid and mechanistic. The existing system places the goal of uniformity above all other policies and, most significantly, above the goal of justice in the individual case. The elimination of unfair disparity in sentencing, to the extent this has been accomplished, has been only superficial. In addition, the key role of the sentencing court has been marginalized and much of its independence cut away. In a 1993 law review article, Senator Hatch noted the criticisms of the Guidelines and suggested that “Congress may need to examine whether the most effective way of addressing these problems is to return a greater degree of flexibility to the judiciary.”<sup>228</sup> The College calls on the federal government to restore the historic discretion and independence of the sentencing court to evaluate the individual circumstances of a case and impose a just and fair criminal sanction. This in turn will significantly limit the inappropriate control by the prosecution of the sentencing process. This limitation should be reinforced by permitting the court to grant downward departures for substantial assistance not only by motion by the Government, but also on motion by the defendant and, sua sponte, by the Court.

The College recognizes that guidelines may play a useful role in providing a basic framework for sentencing decisions, particularly to reduce unwarranted disparity. At the same time, Congress must reevaluate the “real offense” nature of the current guideline system in light of the Supreme Court’s decision in *Blakely v. Washington* and the Court’s ruling this fall on the Constitutionality of the Guidelines. In addition, a more articulated and reasoned appellate review of sentencing decisions would foster the development of a common law and assist sentencing courts in exercising their discretion.

The College therefore proposes that the existing Guidelines be replaced with non-binding guidelines that judges may use to inform their sentencing discretion, but from which judges may depart for good reasons explained on the record and with the sentence subject to review on appeal for abuse of discretion. The new guidelines will also need to reform the “relevant conduct” provision to protect the defendant’s Sixth Amendment jury trial rights, and to assure that a defendant is sentenced for the crime for which he is convicted and not for conduct that was never charged, dismissed if charged, or for which he was acquitted. Under the new sentencing regime, the sentencing decision would focus more on the imposition of a just and fair sentence under the law and less on the technical interpretation of intricate guideline rules and cross-references. Sentencing decisions would be subject to appellate review on an abuse of discretion standard that takes into account both the guidelines and the particular circumstances of the individual case. The sentencing courts would retain meaningful discretion, in accordance with their historic role, while advancing the general policies of increased uniformity and predictability.

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<sup>228</sup> The Honorable Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Guidelines Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185, 197 (1993).

The College further proposes the repeal of all mandatory minimum sentences for drug and non-violent crimes and a careful reevaluation of all other mandatory minimums. While mandatory minimums may make sense for certain rare, but particularly significant crimes, such as the assassination of an elected federal official, as a general matter they are unnecessary, inappropriate and often lead to unjust results.

To the extent the Guidelines survive after *Blakley*, the College proposes the repeal of the Feeney Amendment and related Guideline amendments in their entirety. Congress enacted the substantial changes imposed by the Feeney Amendment without study or deliberation. The Amendment's reporting requirements set a dangerous precedent for legislative incursion on judicial independence. The Amendment also imposes unwarranted additional limitations on the discretion of sentencing courts and continues the inappropriate transfer of real sentencing power to the prosecution. The result is a constitutionally dubious and policy-wise wrong-headed further erosion of the ability of federal judges to provide a sentence that does justice in the individual case.

