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The Role of the United States Sentencing Commission in the Reform of Sentencing Procedures

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I. Introduction
The United States Sentencing Guidelines have brought about fundamental changes in the essential nature and function of the sentencing process. In the place of the largely indeterminate, broadly discretionary and rehabilitation-oriented sentencing process described by the Court in Williams v. New York, the Sentencing Reform Act has imposed a largely determinate, mandatory sentencing scheme, under which the adjudication of certain, sometimes contested, characteristics of the offense can have profound implications for the presumptive guidelines sentence.

Some contend that this fundamental change in the nature and goals of sentencing requires a corresponding increase in the procedural protections offered to offenders at sentencing. The proposals themselves vary. Some involve an increase in the standard of proof in sentencing proceedings, from the preponderance of the evidence standard currently in effect, to a "clear and convincing evidence" standard or even a "beyond a reasonable doubt" standard. Others involve limitations on the type of evidence that may be used to enhance an offender's sentence, such as elimination of the use of acquitted conduct or uncharged conduct evidence, or extending to sentencing hearings the Federal Rules of Evidence, in whole or in part. Still others focus on changes in the plea bargaining process, such as efforts to promote additional disclosure of potential sentence aggravators prior to entering guilty pleas.

While advocacy of such reforms to sentencing procedures under the Guidelines is not new, these calls for reform seem recently to have taken on a greater urgency, as the dedication of this issue of the RSS to these matters would seem to indicate. Some of the credit goes to two of the foremost commentators on contemporary sentencing issues, Professor Kate Stith and Judge Jose Cabranes, who have made the issue of procedural reform of sentencing procedures under the Guidelines a focus of some of their recent work. In addition, last November's confirmation of a new slate of Commissioners raises the possibility of a fresh look at the Guidelines, spurring a renewed sense of interest in re-evaluation of Guidelines policies and practices.

For the present, I will leave to others the task of debating the merits of particular procedural reform recommendations. Rather, I address in this essay the question of the proper forum in which such procedural issues are properly to be resolved. While the Commission might, at first blush, seem to be the obvious choice, some have questioned whether the Commission has the authority to enact certain types of significant procedural reforms. Moreover, even if such authority exists, some commentators have suggested that alternative mechanisms, such as formal amendment of applicable rules of evidence or procedure, or the adoption of additional procedural protections through interpretation of case law under the Constitution, Sentencing Reform Act or the Guidelines, might be superior to Commission action. In this essay, I argue that the Commission possesses the authority to enact reforms to sentencing procedures, and that it is well-positioned as a policy matter to evaluate proposals for such reforms.

II. The Commission's Statutory Authority to Regulate Sentencing Procedures
There are two concerns about the scope of the Commission's authority in the sentencing procedure arena, each of which tends to be associated with a different type of procedural reform. First, some commentators have pointed to the absence of express statutory authority for the Commission to enact certain types of reform, such as proposals to apply to sentencing proceedings all, or some subset of, the Federal Rules of Evidence. Professor Deborah Young, for example, has questioned whether the Commission has the statutory authority to issue evidentiary standards to govern sentencing proceedings, noting that the Sentencing Reform Act does not specifically empower the Commission to prescribe the evidentiary rules to be used in such proceedings.

Second, some commentators have pointed to express limits on the Commission's authority to enact certain kinds of procedural reforms. Proposals to alter the current real-offense emphasis of the Guidelines by limiting or prohibiting consideration of particular sentencing factors have been vulnerable to this argument. For example, some have suggested that the Commission's power to limit or bar the use of unadjudicated conduct is inconsistent with 18 U.S.C. § 3661, which provides in relevant part that "[i]n no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." In his concurring opinion in United States v. Watts, Justice Scalia relied on this provision in arguing that the Commission lacks the authority under the Sentencing Reform Act to bar the consideration of acquitted conduct evidence in guidelines sentencing.

In my view, however, neither of these putative limits on the Commission's authority withstands scrutiny.
The Sentencing Reform Act grants the Commission broad authority over both the substance and procedure of federal sentencing. Section 991, which establishes the Commission and sets forth its purposes, states that the Commission was created to "establish sentencing policies and practices for the Federal criminal justice system," that reflect the goals specified by Congress, including the goal of providing "certainty and fairness" in meeting Congress's specified sentencing purposes. Similarly, the duties of the Commission include the promulgation and distribution to the courts of "general policy statements regarding the application of the guidelines or any other aspect of sentencing or sentence implementation" that would further Congress's sentencing purposes. These broad grants of authority suggest an appropriate role for the Commission in fashioning the procedure, as well as the substance, of the Guidelines.

The Commission's approach to sentencing procedure under the Guidelines has long been consistent with this broad view of the enabling legislation. The Commission already has issued policy statements regulating various procedural aspects of sentencing. For example, the provisions governing plea agreements in Chapter Six impose requirements as to both timing of and standards for acceptance of plea agreements that go beyond the requirements of the Federal Rules of Criminal Procedure. Specifically, § 6B1.1 alters the traditional timing of acceptance of certain types of plea agreements, requiring the sentencing judge to defer acceptance of a plea agreement containing a sentencing recommendation until after the court has had an opportunity to consider the presentence report.

The provisions of § 6B1.2 impose further substantive requirements, designed to prevent charge bargaining and sentence bargaining, that must be fulfilled before judges may accept a plea agreement. Specifically, § 6B1.2(a) prohibits courts from accepting plea agreements that dismiss charges in a manner which results in a guilty plea which does not reflect the seriousness of the offender's real offense behavior. Similarly, §§ 6B1.2(b) and (c) bar sentencing judges from accepting a plea agreement containing a sentence recommendation that specifies a sentence inconsistent with the requirements of the Guidelines.

Nor is there a compelling reason to believe that the operation of section 3661 and its "no limitation" language substantially reduces the broad authority over Guidelines substance and procedure granted to the Commission in the Sentencing Reform Act. Section 3661, enacted some thirty-eight years before the Sentencing Reform Act, seems to have been designed to codify the rule of Williams v. New York, ensuring that judges could obtain the type of offender characteristic and criminal history evidence inadmissible at trial under the Federal Rules of Evidence. Read as literally as Justice Scalia apparently advocates, § 3661 is difficult to square with the Commission's restrictions on the consideration of a variety of offender characteristics, such factors as the offender's youth or drug or alcohol use, restrictions long ago accepted by Congress as an essential part of the Guidelines scheme. Indeed, a number of commentators have advocated restrictions on the use of acquitted conduct or unadjudicated conduct which would be impermissible under Justice Scalia's expansive reading of § 3661.

In short, Congress granted the Commission broad authority to prescribe rules and policies that govern both the substance and procedure of sentencing under the Guidelines, and the Commission long has exercised this authority to prescribe sentencing procedures. However, it is a separate question whether the Commission is the institution in the best position to evaluate and enact any of the reforms to Guidelines sentencing processes currently being discussed.

III. The Appropriateness of Commission-Initiated Procedural Reform

Even if the Commission has the authority to promulgate significant procedural sentencing reforms, it does not necessarily follow that the Commission is, as a policy matter, the best institutional actor to do so. Advocates of various procedural reforms have identified at least two other alternative reform mechanisms. Judge Edward Becker, for example, has argued that the courts themselves, relying on due process principles and related considerations, can fashion evidentiary rules for sentencing that are procedurally more fair than existing rules. Specifically, he has urged courts to interpret existing case law to create rules limiting the use of corroborated hearsay testimony to justify sentence enhancements.

Others have identified formal amendment of the Federal Rules of Evidence or the Federal Rules of Criminal Procedure as the best mechanism for considering enactment of procedural sentencing reform. Stith and Cabranes, for example, argue that the amendment process for the Federal Rules of Criminal Procedure makes those rules a superior forum for addressing procedural concerns in the sentencing system because the Federal Rules amendment process "is far more open and comprehensive" than the Guidelines amendment process, and thus "more likely to be responsive to a variety of perspectives and concerns," than is the Guidelines amendment process. Advocates of extension to sentencing proceedings of all or parts of the Federal Rules of Evidence may share these views with Stith and Cabranes, but have been less explicit in comparing the benefits of formal Rules amendment with Commission action, perhaps because of an implicit assumption that the Commission was unable or unwilling to extend the Rules to sentencing proceedings.
It is not clear, however, that these alternative sources of reform are superior to Commission action. Relying on judicial case law development risks an incomplete, ad hoc reform process that undermines the uniformity necessary for effective procedural reform. Stith and Cabranes argue persuasively that uniform rules would be superior to “the episodic and fact-particular pronouncements of the twelve regional federal appellate courts.”

Their claims for the superiority of formal Rule amendment to Commission action is, in my view, less persuasive. While the Federal Rules amendment process undoubtedly is exhaustive, and does benefit from broad input through the auspices of the Advisory Committee, the Commission’s amendment process possesses many of the same characteristics. Like amendments to the Federal Rules of Evidence and the Federal Rules of Criminal Procedure, amendments to the Guidelines are, ultimately, subject to review by Congress. Like the Rules amendment process, the Commission’s process is designed to solicit broad input from varying constituencies. A number of the Commission’s Rules of Practice and Procedure are designed to “involve interested members of the public in [the Commission’s] work to the maximum extent possible.”

The Sentencing Reform Act imposes upon the Commission an obligation, in its role as promulgator of guidelines and guidelines amendments to comply with Administrative Procedure Act requirements for Federal Register publication and public hearing procedure. The Commission, in its own rules, extends comparable requirements to policy statement and guideline commentary promulgation and amendment. Interested members of the public are encouraged to submit written comments on proposed amendments, which are maintained in public comment files by the Office of Legislative and Public Affairs. Members of the public also are permitted to attend and, at the Chair’s discretion, participate in the Commission’s public meetings.

In addition, a number of formal structural mechanisms are designed to facilitate input from the Commission’s various constituencies. Input from prosecutors is assured by the presence of an ex-officio Commission member from the Department, as well as by the practice of having rotating, visiting USA’s serve on the Commission’s staff. The defense bar is represented through the Practitioner’s Advisory Group, and by rotating, visiting representatives of the Federal Public Defender offices, who routinely provide both written and verbal comment on Commission activities. The Commission also routinely consults with representatives of the Judicial Conference, providing a voice for judges in the amendment process.

In short, the Commission’s processes are designed to gather input from a variety of sources. These efforts largely have been successful, as review of the public comment file or attendance at the Commission’s public meetings would attest. The concern expressed by Stith and Cabranes that the Commission’s process is less “likely to be responsive to a variety of perspectives and concerns,” than the comparable Rules amendment processes strikes me as grounded more in a distaste for the substance of some of the Commission’s prior decisions than in issues of institutional competence and open process.

Moreover, the Commission may be the institution best situated to understand the changes brought about by the Guidelines, and to evaluate what reforms, if any, best serve the underlying purposes of sentencing. If I am correct in my earlier analysis of the breadth of Congress’s grant of authority to the Commission, Congress seems to have contemplated that the Commission take the leading role evaluating and implementing both substantive and procedural elements of Guidelines sentencing policy, with the goal of effectuating the purposes of the Sentencing Reform Act. Indeed, that legislation specifically charges the Commission with the role of monitoring and revising the Guidelines. To the extent that potential procedural reforms interact with substantive sentencing policy, the Commission would appear to be well-situated to take a primary role in such reform efforts. After all, this discussion is not about general changes in the Federal Rules of Evidence or Federal Rules of Criminal Procedure that may happen to have some incidental impact on sentencing, but about alteration of practices specific to Guidelines sentencing.

Finally, in determining which institution is, as a policy matter, in the best position to take the lead on procedural reform, one must note the perception and, perhaps, the reality that the Commission needs to rebuild its credibility with Congress before undertaking any major reform initiatives. To the extent that this is true, it counsels in favor of alternative routes to procedural reform. However, procedural reforms, even those designed to benefit defendants in the form of increased fairness, are probably much less likely to generate congressional ire than would substantive changes or a fundamental re-evaluation of the Guidelines’ severity levels.

Notes
1 337 U.S. 241 (1949).
3 See, e.g., Yellen, supra note 2; Barry L. Johnson, If at First You Don’t Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing, 75 N.C. L. REV. 153 (1996).

3 See Kate Stith and Jose A. Cabranes, Fear of Judging, 159–62 (1998) (advocating a notice of sentencing allegations to ensure that the defendant is notified of potential sentence aggravators prior to entering a guilty plea).

4 See e.g., Young, supra note 4, at 371 (noting that the Commission’s “authority to issue guidelines governing evidentiary standards at sentencing is a matter of some debate”). See also Thomas W. Hutchinson and David Yellen, Federal Sentencing Law and Practice, 406 (1989) ("Nothing in 28 U.S.C. § 994 authorizes the Commission to prescribe evidentiary rules").


9 Id. (emphasis added).


11 See U.S.S.G. § 6B1.1 and commentary.

12 See U.S.S.G. § 6B1.2 and commentary.

13 See id.

14 See U.S.S.G. §§ 5H1.1 (age), 5H1.4 (drug or alcohol use).

15 See, e.g., Johnson, supra note 3; Yellen, supra note 3.

16 See Becker, supra note 4, at 26–30.

17 Fear of Judging, supra note 5, at 156. Stith and Cabranes explain that the Commission’s amendments are vetted through fewer bodies than are amendments to the Federal Rules, and that the Commission’s Policy Statements and Commentary are not statutorily required even to go through the notice and congressional review processes applicable to guidelines. See id.


19 Fear of Judging, supra note 5, at 153.

20 Rule 1.1, Rules of Practice and Procedure, United States Sentencing Commission (July 1997).

21 Id.


23 Some, including former Commissioner Michael Goldsmith, have observed that the Commission has been on thin ice with Congress since the 1995 rejection of the Commission’s proposed crack cocaine and money laundering amendments, and that this tension manifested itself in the long delay in confirming the new slate of Commissioners.