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ARTICLES

THE ROLE OF SENTENCING GUIDELINE AMENDMENTS IN REDUCING UNWARRANTED SENTENCING DISPARITY

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In *United States v. Dunnigan*, 113 S. Ct. 1111 (1993) the United States Supreme Court unanimously ruled that an obstruction enhancement under the federal sentencing guidelines for a defendant's perjurious trial testimony does not contravene the constitutional privilege of an accused to testify in her own behalf, provided the sentencing judge makes a proper, independent finding that the defendant in fact committed perjury at trial. The Court's decision reverses an earlier decision by the Fourth Circuit, *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), in which that appellate court had differed from other circuits regarding the constitutionality of the guidelines' enhancement for trial perjury. *Dunnigan* provides a classic illustration of the United States Supreme Court exercising its authority to resolve intercircuit conflicts and restore uniformity in the interpretation of applicable constitutional law. In contrast, when an intercircuit conflict entirely concerns differences in the interpretation of federal sentencing guidelines provisions, the Court has indicated it will look first to the United States Sentencing Commission to address such conflicts through the exercise of the Commission's amendment authority. *Braxton v. United States*, 111 S. Ct. 1854 (1991). In this article, the Chairman and General Counsel of the Commission describe how the Commission has exercised its amendment responsibility to achieve greater consistency among courts in sentencing under the guidelines.

I. INTRODUCTION

The transition from indeterminate sentencing to determinate, guideline-based sentencing, which began in November 1987 under the landmark Sentencing Reform Act (SRA),[1] was as dramatic a change for the federal

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1. Pub. L. No. 98-473, 98 Stat. 1838, 1987 (1984) (codified at 18 U.S.C. §§ 3551-3559 (1988); 28 U.S.C. §§ 991-998 (1988).

court system as any it has faced in the last century. After an initial fourteen-month period of uncertainty, the United States Supreme Court, in *Mistretta v. United States*,[2] laid to rest a series of constitutional challenges to the United States Sentencing Commission (Commission) and the guidelines, thus ensuring nationwide use of the new sentencing system.

Since that historic decision, federal courts have imposed guideline sentences in approximately 128,000 cases.[3] Moreover, the rate of guideline versus preguideline sentencing increased by the end of fiscal year 1992 to almost eighty-five percent of all federal criminal cases.[4] These numbers indicate that the federal courts are rapidly making the transition from a nonguideline to a guideline sentencing system.

Congress was motivated by several primary objectives in enacting sentencing reform legislation, but none was more important than increasing fairness and uniformity in sentencing.[5] Preliminary research by the Sentencing Commission,[6] generally confirmed by the General Accounting Office,[7] revealed that the guidelines reduced previously wide sentencing disparity for similarly situated offenders convicted of bank robbery,[8] heroin trafficking,[9] cocaine trafficking,[10] and bank embezzlement.[11] Additionally, tracking information on defendants subject to the guidelines shows that sentences within the applicable range are imposed in approximately seventy-eight percent of all cases; another fifteen percent of offenders receive a downward departure based on the government's motion recognizing substantial assistance provided in the investigation or prosecution of other cases; and seven percent are sentenced either above or below the guideline based on sundry, atypical mitigating or aggravating circumstances not adequately considered by the guidelines.[12]

The guidelines continue to evolve through the interaction among imposition of sentence in individual cases, appellate court decisions, and the

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2. 488 U.S. 361 (1989).

3. As of February 22, 1993, there were 127,740 cases in the Commission's data base of cases sentenced under the guidelines post-*Mistretta*, a number that grows by 3,000-3,500 cases monthly.

4. Pursuant to the Sentencing Act of 1987, Pub. L. No. 100-182, § 2, 101 Stat. 1266, the guidelines are applicable only to offenses occurring on or after November 1, 1987.

5. *See generally* 28 U.S.C. § 991(b)(1)(B); S. REP. No. 225, 98th Cong., 2d Sess. 39-56, 159-81 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3222-339, 3342-64.

6. *See generally* 2 U.S. SENTENCING COMM'N., THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 279-99 (1991).

7. U.S. GEN. ACCOUNTING OFFICE, SENTENCING GUIDELINES—CENTRAL QUESTIONS REMAIN UNANSWERED 11 (1992).

8. U.S. SENTENCING COMM'N, *supra* note 6, at 288.

9. *Id.* at 292.

10. *Id.* at 296.

11. *Id.* at 299. These four areas were selected by the Commission for disparity analysis because they represent offenses frequently prosecuted in federal court.

12. U.S. SENTENCING COMM'N, 1992 ANNUAL REPORT (forthcoming 1993).

Commission's yearly amendment process. As a permanent agency, the Commission has authority to send amendments to the guidelines or policy statements to Congress on or before each May first. After an 180-day review period, the proposed amendments—if not rejected by passage of legislation—take effect on a date specified by the Commission.[13]

The information that fuels this evolutionary process is rich and diverse. The Commission codes up to 262 pieces of information about each guideline sentencing that occurs in federal court. The resulting, steadily expanding data base is an invaluable source of information for the Commission as it monitors guideline application and refines the *Guidelines Manual*.[14] In addition, each year the Commission convenes interdisciplinary staff working groups to prepare detailed reports about priority issues it has previously identified. These reports cover various topics such as violent crime, money laundering, acceptance of responsibility, and sentencing of drug offenses. Federal judges, prosecutors, defense attorneys, probation officers, and other interested parties provide helpful input for the Commission's decision-making process through the submission of letters, position papers, and testimony at public hearings. Additionally, the Commission receives comment and amendment suggestions from a number of organizations, including the Judicial Conference of the United States, the Department of Justice, the American Bar Association, and ad hoc standing committees of defense attorneys and federal probation officers.

Two other important sources of information regularly considered by the Commission in its amendment process are district court statements of reasons for imposing sentence[15] and appellate court decisions on constitutional, statutory, and guideline application issues. While the Commission is not a party to individual sentencing proceedings, it closely monitors court decisions. As the evolving process of guideline application renders it necessary, the Commission exercises its statutory responsibility to amend the guidelines in response to court determinations of guideline issues.

This article explores a number of facets of the amendment process, placing particular emphasis on the manner in which the Commission uses appellate court opinions interpreting the guidelines[16] to formulate amend-

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13. 28 U.S.C. § 994(p) (1988).

14. U.S. SENTENCING COMM'N, GUIDELINES MANUAL (1992) [hereinafter GUIDELINES MANUAL].

15. District court statements of reasons for sentence, required by 18 U.S.C. § 3553(c), may be formal published opinions or informal oral statements from the bench during the course of sentencing proceedings. The latter are sent to the Commission as transcripts of court proceedings or, more commonly, are summarized by the court or probation officer on a form jointly developed by the Commission, the Administrative Office of the U.S. Courts, and the Judicial Conference's Criminal Law Committee.

16. The emphasis in this article on appellate court opinions is not to suggest that guideline application decisions of district courts and magistrate judges are less important in the amendment process developed by the Commission. To the contrary, under the authority of 28 U.S.C. §§ 994(w) and 995(a), the Commission, as heretofore explained, regularly receives and assimilates into a growing data base information relating to case-specific application of the guidelines

ments with a view toward promoting a greater degree of sentencing uniformity. The article first outlines the statutory and legislative history background relating to the interaction over time between court guideline decisions and the Commission's amendment process. A discussion of the United States Supreme Court's view of the Commission's amendment role follows. Against the backdrop of congressional and highest court pronouncements, the article examines Commission implementation of its amendment authority, both with respect to changes affecting guideline range determination and those relating to sentencing outside the range (that is, departures).

II. Role of Guideline Amendments Under the Sentencing Reform Act

A. The Statutory Mission and Congressional Expectations

As part of its SRA design, Congress established "an independent commission in the judicial branch"[17] to develop "sentencing policies and practices for the Federal criminal justice system."[18] It assigned the Commission the formidable task of developing, within eighteen months, an initial set of sentencing guidelines and policy statements and the responsibility for their subsequent revision. In fulfilling this latter assignment, the Commission was to be continuously engaged with other institutional components of the criminal justice system, interested groups and individuals, and Congress itself in a process of "constant refinement of sentencing policies and practices as more is learned about the effectiveness of different approaches."[19] Congress expected that the federal courts would be important, regular contributors to the continuing development of sentencing policy as they applied, interpreted, and added case law relating to the guidelines. While the Commission would not have any direct adjudicatory role "second-guessing individual judicial sentencing actions either at the trial or appellate level,"[20] it would be expected to monitor and evaluate court guideline decisions carefully. Indeed, the SRA called for the Commission continuously to examine "the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes."[21] In short, Congress foresaw the necessity for periodic amendment of the guidelines, envisioning

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and lower court sentencing decisions. It actively uses that information in the amendment process. In particular, the Commission assesses lower court decisions for their likely cumulative impact on sentencing policy over time and for the valuable insights such decisions provide regarding judges' views of whether the guidelines appropriately take into account offense and offender characteristics of actual cases.

17. 28 U.S.C. § 991(a) (1988).

18. 28 U.S.C. § 991(b) (1988).

19. S. Rep. No. 225, *supra* note 5, at 161, *reprinted in* 1984 U.S.C.C.A.N. at 3334.

20. *Id.* at 178, *reprinted in* 1984 U.S.C.C.A.N. at 3361.

21. *Id.*

a dynamic, progressive sentencing policy centered around guideline application experience.

B. Frequency of Amendments as a Policy Issue

As the SRA approaches the point in its history when members of the Sentencing Commission are slated to become part-time,[22] a recurrent topic of policy debate is the relative frequency with which further changes in the *Guidelines Manual* should be made, in response to both court decisions and other factors. Perhaps reality has furnished considerations different from, and more weighty than, those Congress anticipated.[23] Nonetheless, the congressional view of guideline amendment frequency, as evidenced by relevant statutory provisions and accompanying history, must be considered because of its particular relevance to this article's focus on Commission-court interaction through the amendment process. Pertinent statutory provisions and legislative history suggest that to the extent Congress had expectations about the relative frequency of amendments, it envisioned an active, vigorous amendment process, especially in the early years of guideline implementation. One structural indication in the statutory scheme supporting this view is the provision permitting multiple submissions of guideline amendments to Congress each year, albeit within the limited time frame following the opening of a session of Congress and ending May 1 of each year.[24] The SRA's limitation on submission of guideline amendments to the roughly four-month period at the beginning of each year, and the required 180-day wait prior to the amendments taking effect, appear to have been designed more for the congressional purpose of maintaining oversight of evolving Commission sentencing policies than as a check on the frequency of amendments.

Another structural indication of Congress' expectation that the guidelines would be subject to frequent change in their early implementation is

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22. *See* 28 U.S.C. § 992(c) (1988) (providing that voting members of Commission, except Chairman, shall hold part-time positions beginning November 1, 1993 (six years after initial implementation of guidelines)).

23. One eventuality not anticipated by Congress was that courts would interpret the ex post facto clause of the Constitution as constraining use of the most current set of sentencing guidelines, as Congress intended under 18 U.S.C. § 3553(a)(4) and (5). The courts of appeals have held uniformly that the guidelines in effect at the time of sentencing may not be used if they punish more severely than those in effect at the time of the defendant's offense. *See, e.g.*, United States v. Young, 932 F.2d 1035 (2d Cir. 1991); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991); United States v. Morrow, 925 F.2d 779 (4th Cir. 1991); United States v. Nagi, 947 F.2d 211 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2309 (1992); United States v. Sweeten, 933 F.2d 765 (9th Cir. 1991); United States v. Smith, 930 F.2d 1450 (10th Cir.), *cert. denied*, 112 S. Ct. 225 (1991); United States v. Lam Kwong-Wah, 924 F.2d 298 (D.C. Cir. 1991); United States v. Harotunian, 920 F.2d 1040 (1st Cir. 1990); United States v. Suarez, 911 F.2d 1016 (5th Cir. 1990); United States v. Swanger, 919 F.2d 94 (8th Cir. 1990) (*per curiam*); United States v. Worthy, 915 F.2d 1514 (11th Cir. 1990). This departure from congressional intent has created numerous guideline application difficulties that no doubt account for much of the concern over the frequency of guideline amendments.

24. 28 U.S.C. § 994(p) (1988).

that, contemporaneous with the initial implementation of the guidelines, Congress provided enhanced temporary amendment authority to the Commission.[25] Under this authority, the Commission could issue temporary amendments on an emergency basis in response to possible court invalidation of a guideline, a criminal offense statutory change, and any other reason regarding guideline application that the Commission determined to be "urgent and compelling."[26] Furthermore, pursuant to this delegation of authority, the Commission was empowered to amend the guidelines without the necessity of any "report and wait" procedure, although amendments issued under this "emergency guidelines promulgation authority," to be retained, of necessity thereafter had to be submitted to Congress in the course of a normal amendments cycle.[27]

Congress' purpose in conferring on the Commission this temporary, emergency amendment authority was to aid the initial process of guideline implementation when it was expected that the Commission might need to react quickly to guideline application problems and clarify Commission intent.[28] Regarding the provision that gave the Commission power to initiate amendments for urgent and compelling reasons, Representative Hamilton Fish, Republican floor manager for the bill in the House, stated, "[t]his latter catchall authority is meant to facilitate the operation of the first set of guidelines which nearly everyone recognizes will need quick technical and in some cases substantive amendments in order to succeed."[29]

Additionally, it should be noted that the expected need for continuing refinement of the guidelines and policy statements in response to court decisions and other developments was seen by the framers of the SRA as a principal justification for making the positions of Commissioners full-time for the first six years of guideline implementation.[30] In fact, Congress anticipated that "revision and refinement of the guidelines will represent the bulk of the Commission's work once the initial guidelines and policy statements are promulgated."[31] Thus, while the SRA also provided for a

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25. Sentencing Act of 1987, Pub. L. No. 100-182, § 21, 101 Stat. 1266, 1271.

26. *Id.*

27. *Id.* The open-ended authority for the Commission to initiate temporary amendments for any reason it deemed urgent and compelling expired May 1, 1988. *Id.* Additionally, the authority to amend guidelines in response to court invalidation decisions and statutory changes expired November 1, 1989. *Id.* The Commission subsequently converted all temporary, emergency amendments into permanent provisions by promulgating them through the regular amendment process.

28. 133 CONG. REC. H10021 (daily ed. Nov. 16, 1987) (statement of Rep. Fish).

29. *Id.* The Commission ultimately used its emergency amendment authority to issue 54 temporary amendments effective on January 15, 1988; eight temporary amendments effective on June 15, 1988; and three temporary amendments effective November 1, 1989. Thereafter, because the Commission believed the regular, annual amendment authority would be adequate to accomplish the SRA's desired guideline updating goals, it did not ask Congress to extend the emergency amendment authority beyond its November 1, 1989, expiration.

30. S. REP. No. 225, *supra* note 5, at 160, *reprinted in* 1984 U.S.C.C.A.N. at 3343.

31. *Id.* at 178, *reprinted in* 1984 U.S.C.C.A.N. at 3361.

number of important continuing research and education duties, in one fashion or another most of these responsibilities related to the fundamental congressional goal of achieving and perfecting a workable, effective guidelines system.

C. *Basic Goals to Be Furthered by Amendments*

Broadly speaking, the SRA envisions active use of the Commission's guideline amendment authority to further two basic goals, one idealistic and long term, the other more pragmatic and immediate. The longer term, ambitious hope was that sentencing policies prescribed by the Commission would evolve to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[32] The more immediate, pragmatic task—and one clearly of high priority—was that of reducing unwarranted sentencing disparity. Although court experience in applying and construing the guidelines is valuable in developing appropriate guideline amendments that further both goals, it is especially relevant with respect to the latter disparity-reduction goal. In its discussion of the SRA requirement that the Commission continually revise the guidelines, the Senate Judiciary Committee Report explained:

> Perhaps most importantly, this provision mandates that the Commission constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with. In a very substantial way, this subsection complements the appellate review section by providing effective oversight as to how well the guidelines are working.[33]

Therefore, putting aside for another day a discussion of the interactive Commission-court relationship as it relates to the longer term SRA goals, the balance of this article will focus on the relevance of the Commission's amendment authority in reducing unwarranted sentencing disparity.

1. Avoidance of Unwarranted Disparity—A Continuous Objective of the Courts and the Commission

The SRA places the avoidance of unwarranted disparity at the forefront of its directives to both the courts and the Commission. Among the factors courts must consider in the imposition of sentence is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[34] While the statute expressly directs that courts "shall" consider this objective in their sentencing decisions, the accompanying directives to sentence within the applicable guideline range or depart from the range based on reasons stated on the record,[35]

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32. 28 U.S.C. § 991(b)(1)(C) (1988).
33. S. REP. No. 225, *supra* note 5, at 178, *reprinted in* 1984 U.S.C.C.A.N. at 3361.
34. 18 U.S.C. § 3553(a)(6) (1988).
35. 18 U.S.C. § 3553(b)-(c) (1988).

together with the provision for appellate review,[36] are the SRA's principal means of assuring that court sentencing decisions will further disparity reduction goals. Furthermore, in keeping with the SRA's call for a progressive, evolving system of sentencing guidelines and policy statements, the Sentencing Commission was expected to glean important information from district court reasons for sentence[37] and appellate court opinions[38] that could assist in the continuing process of amending and improving the guideline system. Concerns for reasonable sentence uniformity, then, underlie both the day-to-day court application of the guidelines and their further development through the amendment process, based on the growing body of experience.

Review of the Commission's statutory charter[39] similarly reveals that "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct"[40] is a principal purpose of the Commission. The Commission is specifically directed, in crafting the guidelines and policy statements, to give "particular attention" to providing certainty, fairness, and reasonable uniformity in sentencing of similar offenders who commit similar crimes.[41] At the same time, the SRA and its legislative history describe another central goal, punishment proportionality and appropriate individualization of sentence,[42] that operates in constant tension with the objective of disparity avoidance. By prescribing a detailed guideline system that takes into account the most important and commonly occurring offense and offender characteristics, and by permitting courts to sentence outside the guidelines in cases with significant atypical features, the SRA seeks to reconcile competing goals of proportionality and uniformity.

2. Effect of Disparate Court Application—Enlarging the Guideline Range Beyond Congressional Intent

Critical to both proportionality and uniformity goals is the SRA's directive that the Commission construct guidelines that provide a *sentencing*

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36. 18 U.S.C. § 3742 (1988).

37. The statement of reasons required by 18 U.S.C. § 3553(c) was designed to further a number of purposes, including that of "assist[ing] the Sentencing Commission in its continuous reexamination of its guidelines and policy statements." S. REP. No. 225, *supra* note 5, at 80, *reprinted in* U.S.C.C.A.N. at 3263.

38. The process of appellate review of sentences was designed both to ensure the appropriate application of the law and guidelines in the particular case and to aid the development of sentencing policy. Among the policy objectives of the appellate review provisions was that of "assist[ing] the Sentencing Commission in refining the sentencing guidelines as the need arises." S. REP. No. 225, *supra* note 5, at 151, *reprinted in* U.S.C.C.A.N. at 3334.

39. 28 U.S.C. §§ 991-998 (1988).

40. 28 U.S.C. § 991(b)(1)(B).

41. 28 U.S.C. § 994(f).

42. *See* 18 U.S.C. §§ 3553(a)(1), (2)(A) (1988); 28 U.S.C. § 991(b)(1)(B).

range "for each category of offense involving each category of defendant,"[43] and that the width of the guidelines' imprisonment ranges not exceed "the greater of 25 percent or 6 months."[44] The Commission implemented these directives by making all imprisonment ranges as broad as statutorily permitted. This design decision maximizes within-guideline sentencing discretion in furtherance of the goal of individualized sentences. It also makes it unnecessary that guidelines include every conceivably significant offense and offender characteristic.

Yet, a guidelines system that uses a moderate number of important offense and offender characteristics to prescribe an applicable guideline range as broad as the statute will permit cannot successfully achieve the congressional goal of reasonable sentence uniformity unless the guidelines themselves are read and applied in a reasonably consistent manner. The foundation upon which the system was constructed was that defendants of similar characteristics who commit the same offense in a similar manner would be sentenced within the same guideline range, regardless of whether the defendants appeared before different sentencing judges in the same district or in districts geographically distant. This goal may not be met, however, when courts fail to apply guideline provisions consistently to like offenders convicted of like offenses. When measured against the SRA objective of guideline application uniformity for similar cases, one effect of differences in court interpretations of guideline provisions may be to enlarge the effective guideline imprisonment range applicable to defendants having like offense and offender characteristics significantly beyond the twenty-five percent or six-month maximum differential Congress intended. Consider, for example, the disparity resulting from a guideline interpretation by the courts in one judicial circuit that bank tellers routinely are to be considered vulnerable victims[45] in bank robbery offenses, thereby resulting in a two-level enhancement of the defendant's sentence. In contrast, consider that the courts in another circuit do not routinely characterize bank tellers as vulnerable victims. The net effect of such an intercircuit inconsistency is to enlarge the "within-guideline" potential difference in imprisonment sentences between defendants sentenced in one circuit, and similar defendants sentenced in the other circuit, from twenty-five to approximately fifty percent.[46]

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43. 28 U.S.C. § 994(b)(1).

44. 28 U.S.C. § 994(b)(2).

45. *See* U.S.S.G. § 3A1.1 (Vulnerable Victim). In United States v. Jones, 899 F.2d 1097, 1100 (11th Cir.), *cert. denied*, 111 S. Ct. 275 (1990), the court of appeals upheld a district court's finding that a bank teller was a vulnerable victim within the meaning of § 3A1.1. Subsequently, the Commission amended the application notes accompanying the guideline to state Commission intent that a bank teller was not to be considered an unusually vulnerable victim solely by virtue of performing a teller's job in a bank. *See* U.S.S.G. app. C, amend. 454. Thereafter, *Jones* was overruled. *See* United States v. Morrill, No. 91-8386 (11th Cir. Feb. 16, 1993) (en banc).

46. Suppose, for example, a bank robbery defendant without the § 3A1.1 vulnerable

Differences in court construction of guideline provisions therefore can lead to significant sentencing disparity. Anticipating that such application disparities would occur, the SRA requires the Sentencing Commission to monitor court sentencing decisions carefully for such significant variations in guideline application. And, given Congress' strongly stated view that the Commission use its amendment authority to further a reasonably uniform body of sentencing guideline law, the SRA confers upon the Commission the responsibility to employ that authority judiciously when necessary to effectuate Commission intent and fundamental SRA goals more clearly.

III. The Supreme Court's Message in *Braxton*: Reinforcing the Commission's Amendment Responsibilities; Commission Implementation of Those Responsibilities

The United States Supreme Court strongly affirmed the Sentencing Commission's role in resolving, through the guideline amendment process, intercircuit conflicts in the interpretation of guideline provisions. In *Braxton v. United States*,[47] Justice Scalia's opinion for a unanimous court observed that, under the SRA, the Commission has the initial and primary task of addressing intercircuit conflicts in guideline interpretation. The Court cited two principal reasons, evident from the SRA itself, for its conclusion. First, it noted that "in charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest."[48] Secondly, the Court cited[49] the provisions of the SRA that empower the Commission to make defendant-beneficial amendments retrospectively available to defendants who are still serving terms of imprisonment, subject to the discretion of the sentencing court.[50] Thus, as the Court saw it, the SRA provides for a primary Commission role in promoting a uniform regime of sentencing law and an auxiliary, remedial role with respect to particular defendants who may have been sentenced more severely than intended by the Commission.

One might speculate, of course, that the Court's decision in *Braxton*, leaving to the Sentencing Commission the primary task of resolving inter-

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victim enhancement is determined to have an offense level of 24 and criminal history category of I, which results in a guideline range of 51-63 months. If the vulnerable victim enhancement applies, the same defendant would have an offense level of 26 and guideline range of 63-78 months. The difference in length of imprisonment sentence between two defendants sentenced at the bottom and top, respectively, of the lower range is 12 months or 23.5%. However, the difference between two defendants, one of whom is sentenced at the bottom of the lower range and the other at the top of the higher range, is 27 months or 52.9%. Thus, disparate application of the vulnerable victim enhancement across circuits to otherwise similar cases can result in more than a doubling of the maximum imprisonment sentencing differential intended by the SRA.

47. 111 S. Ct. 1854 (1991).

48. *Id.* at 1857-58.

49. *Id.* at 1858.

50. 28 U.S.C. § 994(u) (1988); 18 U.S.C. § 3582(c)(2) (1988).

circuit conflicts in guideline language, is simply another manifestation of a general philosophy of judicial restraint, or that the decision was motivated by concerns of an increased caseload involving appeals of lower court guideline applications. More likely, *Braxton* represents a fundamentally pragmatic view that the Commission, as the source of the sentencing law embodied in the guidelines, ultimately is in the best position to know how it intended that law to be interpreted and applied, and to take amendment action to implement its intent. In any event, by interpreting the SRA as intending that the Commission address conflicting judicial decisions through its authority to make clarifying amendments, *Braxton* strongly affirms the above-described statutory view of a vigorous, continuing guideline amendment process in which the Commission, subject to the dictates of Congress, is the active architect of sentencing policy.[51]

A. Responding to Court Guideline Decisions—General Observations About the Amendment Process and Its Limitations

In reality, because it essentially reinforces a statutory mission upon which the Commission already was engaged, *Braxton* has not changed dramatically either the manner in which the Commission monitors court application of the guidelines or the nature of the guideline amendment task. It has led, however, to greater emphasis in the Commission's information-gathering, analysis, and amendment-promulgation process being placed on areas of pronounced disparity in guideline application.

Over the course of its brief history, the Commission has developed an approach to guideline review and revision that typically involves comprehensive reexamination of guidelines applicable to groups of related offenses (for example, drug trafficking offenses) or offender characteristics (for example, criminal history) by Commission staff working groups. Within the information assembled by these groups is an analysis of district and appellate court application and interpretation of the guidelines being examined, with intercircuit conflicts in guideline interpretation receiving special attention. Indeed, an early awareness of disparate court application of particular

51. That is not to say that the United States Supreme Court intends to play no role in the adjudication of guideline-related issues. Indeed, the Court has continued to grant writs of certiorari in a small number of guideline cases involving intercircuit conflicts on constitutional or statutory issues. *See, e.g.*, Wade v. United States, 112 S. Ct. 1840 (1992) (involving court review of prosecutorial refusal to file motion for substantial assistance downward departure under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1); Williams v. United States, 112 S. Ct. 1112 (1992) (involving construction of 18 U.S.C. § 3742, guidelines' appellate review statutory provisions); United States v. R.L.C., 112 S. Ct. 1329 (1992) (regarding applicability of guidelines to juvenile sentencings); United States v. Dunnigan, 113 S. Ct. 1111 (1993) (involving constitutionality of guidelines' obstruction of justice enhancement for defendant's perjurious trial testimony); Stinson v. United States, 943 F.2d 1268 (11th Cir. 1991), *reh'g denied*, 957 F.2d 813 (1992), *cert. granted*, 113 S. Ct. 459 (1992) (regarding ability of Commission to clarify its intent through commentary amendments). Obviously, the Commission is not in a position to resolve intercircuit conflicts involving issues of statutory or constitutional interpretation.

guidelines often has been a factor in Commission designation of guidelines for working group study.[52]

As the Commission goes about its amendment task, it encounters the inherent limitations incumbent upon any institutional body making it impossible in practice to formulate a perfect, or perfectly clear, set of rules. These limitations, together with realities of a federal criminal justice system that involves handling thousands of criminal cases by hundreds of judges, generate two "inevitables" with respect to the Commission's guideline amendment process. First, it is inevitable that the Commission's process will be largely reactive to court decisions and that it will constantly function in a "catch-up" mode. An amendment process, if it is to be thorough in its assessment of relevant information and ultimately effective in its objective, takes time. The statutory procedure requires public participation by interested groups, that in turn need time to study amendment proposals and comment on them in writing or orally at a Commission public hearing, and it requires 180 days for congressional review before guideline amendments may take effect. Also, due to court interpretations of the applicability of the Ex Post Facto Clause, amendments that punish more severely generally are applicable only to offenses occurring after their effective date. For these reasons, the Commission's amendment actions may not be perfectly synchronized with guideline application in the courtroom at any given moment.

Second, it must be kept in mind that application of the guidelines in the federal criminal justice system involves imposition of sentence annually in some 45,000 cases,[53] using a *Guidelines Manual* containing more than 200 guidelines,[54] with appeals of sentence (or conviction and sentence) annually in some 7,600 cases.[55] In this context, it is inevitable, no matter

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52. Typically, the Commission identifies broad topical guideline areas for priority study and possible amendment action in late spring or early summer, following submission of a previous set of amendments to Congress. Public comment then is sought on the Commission's tentatively-identified priorities. *See, e.g.*, 57 Fed. Reg. 32,246 (1992). Working groups are formed to examine the topical areas for study and the Commission determines whether the groups are to complete their work on a "one-" or "two-year" cycle. Those on the shorter time line actually have fewer than six months to complete reports and recommend amendment proposals because the Commission typically decides in December which amendments should be published in the Federal Register for comment. *See, e.g.*, 57 Fed. Reg. 62,832 (1992) (containing amendment proposals under consideration in current 1992-1993 cycle).

53. When fully phased in, it is estimated that the guidelines will apply to approximately 45,000 class A misdemeanor and felony cases each year. This volume may increase or, conceivably, decrease.

54. The 1992 *Guidelines Manual* contains nine directional guidelines in Chapter One, 179 offense conduct guidelines in Chapter Two, 15 general adjustment guidelines in Chapter Three, six criminal history-related guidelines in Chapter Four, and 12 sentence determination guidelines in Chapter Five. Additionally, there are a number of policy statements scattered throughout the *Manual* that instruct courts on application of the guidelines and other sentencing matters. There also is a separate Chapter Eight containing guidelines and policy statements for the sentencing of organizations. Of course, the number of guidelines actually applied in the sentencing of an individual case is but a fraction of the total number in the *Manual*.

55. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR,

how carefully the Commission chooses the words that appear in the *Guidelines Manual*, that courts will differ sometimes in their reading of guideline provisions and in their application of those provisions to the facts of varying cases. Consequently, "pockets" of disparity in guideline sentencing law will appear. Thus, the task of amending the guidelines to reduce unwarranted disparity is a continuing one.[56]

Turning to the manner in which guideline amendments address disparity concerns, it can be said that, broadly speaking, amendments that have a disparity reduction purpose fall into one of two categories: (1) amendments that relate to determination of the applicable guideline range and (2) amendments that relate to sentencing outside the guideline range. Both types have figured prominently in Commission amendment actions. While the latter departure-related category tends to garner more attention, amendments in the former category have been far more numerous.[57]

B. Use of Amendments to Promote More Consistent Guideline Application

In applying the federal sentencing guidelines, courts sometimes have differed both in their interpretations of guideline language and in their application of the guidelines to varying, often complex, sets of facts. While both can lead to sentencing disparity under a guideline system, it is the former disparate construction of guideline language that must be of primary concern to the Commission for several reasons. Fundamentally, as a matter of institutional and statutory responsibility, the Commission, as the originator of guideline language, has an obligation to address instances in which the words it writes to guide court discretion lead to pronounced differences in court interpretation of the intended meaning of those words. Additionally, when appellate courts construe specific passages of the guideline system,

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Table B-1 (1992); STATISTICS DIVISION, ADMIN. OFFICE OF THE U.S. COURTS, SUMMARY STATISTICS (1992) (unpublished, on file with the United States Sentencing Commission, Washington, D.C.). According to these unpublished statistics, during the 12 months ending September 30, 1992, appeals were filed in 9,597 guideline cases. Of these appeals, 1,566 involved an appeal of the conviction only. The balance were appeals of conviction and sentence (5,098 cases), sentence only (2,534 cases), or type unknown (399 cases).

56. A number of other factors contribute to the need for amendments. Among these are the creation of new criminal offenses, changes in statutory penalties, or enactment of directives to the Commission from Congress. The Commission also periodically reassesses and may amend guidelines to reflect more appropriately the seriousness of conduct, as determined by the Commission. Illustrative of the latter are amendments that adjusted the offense levels for robbery offenses (U.S.S.G. app. C, amend. 110, 365) and fraud offenses (*id.* at amend. 154).

57. Precise categorization of amendments is not possible because many have multiple parts and further more than one objective. In general, about one-half of the Commission's 473 amendments to date have been motivated by an intent to clarify guideline language, often in response to court decisions, and ease application problems. Another approximately 15% of the amendments have been precipitated directly by legislation; approximately 10% relate to departure issues; about 5% were Commission initiatives to adjust offense levels; and the balance involved a variety of technical or conforming changes.

they create rules of sentencing law that can profoundly affect both the punishment defendants receive in like cases as well as the larger policy objectives of the SRA.

Consider, for example, the issue of whether the offense of being a felon in possession of a firearm[58] constitutes a "crime of violence" for the purpose of applying the guidelines' enhanced penalty provisions for a "career offender."[59] Appellate courts have divided over this issue, both with respect to considering the defendant's underlying violent conduct in determining whether the offense is a crime of violence,[60] and with respect to whether a felon-in-possession offense is inherently a crime of violence under the definition of that term employed by the Commission in section 4B1.2.[61] For defendants convicted of 18 U.S.C. section 922(g) offenses, the difference in the length of imprisonment imposed could be substantial, depending solely on the circuit court's precedents.[62] This substantially different sentencing treatment, stemming from disparate court interpretation of guideline terminology, creates problems of sentencing fairness for individual defendants. Moreover, in the aggregate, it seriously impairs the achievement of SRA objectives. Consequently, the Commission has responded to the disparate court interpretation of felon-in-possession offenses vis-à-vis the career offender guidelines by amending section 4B1.2 and its accompanying commentary.[63] The amendments, which the appellate courts generally have

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58. 18 U.S.C. § 922(g) (1988).

59. *See* U.S.S.G. §§ 4B1.1, 4B1.2 (implementing statutory directive at 28 U.S.C. § 994(h) to assure that certain defendants convicted of third violent or drug trafficking offense are sentenced to imprisonment "at or near the maximum term authorized").

60. *Compare* United States v. Cornelius, 931 F.2d 490 (8th Cir. 1991) (stating that courts may consider underlying conduct in determining whether offense is crime of violence); United States v. Walker, 930 F.2d 789 (10th Cir. 1991) (same); United States v. Alvarez, 914 F.2d 915 (7th Cir. 1990) (same), *cert. denied*, 111 S. Ct. 2057 (1991); *and* United States v. Williams, 892 F.2d 296 (3d Cir. 1989) (same), *cert. denied*, 496 U.S. 939 (1990) *with* United States v. Bell, 966 F.2d 703 (1st Cir. 1992) (courts may only consider conduct charged in indictment) *and* United States v. Johnson, 953 F.2d 110 (4th Cir. 1992) (same).

61. *Compare* United States v. Stinson, 943 F.2d 1268 (11th Cir. 1991) (felon-in-possession is inherently crime of violence), *cert. granted in part*, 113 S. Ct. 459 (1992) *and* United States v. O'Neal, 910 F.2d 663 (9th Cir. 1990) (same), *amd. reh'g en banc denied*, 937 F.2d 1369 (1991), *overruled by* United States v. Sahakian, 965 F.2d 740 (9th Cir. 1992) *with Bell*, 966 F.2d at 703 (felon-in-possession is *not* inherently crime of violence) *and Johnson*, 953 F.2d at 115 (same).

62. For example, a defendant who pleads guilty to being a felon-in-possession and who also is subject to the enhancement under 18 U.S.C. § 924(e) as an "armed career criminal" would typically face a guideline range of 151-188 months under U.S.S.G. § 4B1.4 (offense level 33, reduced by 2 levels for acceptance of responsibility, criminal history category IV). If, however, the felon-in-possession offense is considered a crime of violence, the same defendant might be subject to an additional sentence enhancement under U.S.S.G. § 4B1.1 as a career offender and face a guideline range of 292-365 months (offense level 37, reduced by 2 levels for acceptance of responsibility, criminal history category VI). In this example, the determination of whether the section 922(g) offense is a crime of violence under the career offender guideline could translate into a sentencing difference on the order of 12 years or more.

63. U.S.S.G. app. C, amend. 433, 461.

recognized and applied,[64] are designed to make clear Commission intent that the 18 U.S.C. section 922(g) offense is not to be considered a crime of violence, although a defendant convicted of that offense will be subject to an enhanced punishment under the firearms offense guideline[65] and may be subject to further enhancement under the guideline applicable to armed career criminals.[66]

In contrast to disparate court construction of guideline language, differences in court application of guideline provisions with an agreed-upon meaning are of less immediate concern to the Commission. The SRA was neither intended nor could realistically hope to remove from the criminal justice system all disparities of this nature. The SRA scheme of appellate review is evidence of this greater tolerance of variations in sentencing court factual determinations that form the basis for applying the guidelines, as well as variations in judgment resulting from application of the guidelines to the facts of a case. Specifically, the statute instructs courts of appeals reviewing guideline sentences to "give due regard to the opportunity of the district court to judge the credibility of the witnesses, . . . [to] accept the findings of fact of the district court unless they are clearly erroneous and [to] give due deference to the district court's application of the guidelines to the facts."[67] Most appellate courts have interpreted the "due deference" standard as functionally equivalent to a "clearly erroneous" level of scrutiny of district court factual determinations, thereby engendering a greater tolerance of variations in guideline application by sentencing judges.[68]

Analogizing to the greater deference generally exhibited by the appellate courts in reviewing findings of fact made by district courts, the Commission's amendment authority can be exercised, consistent with the Sentencing

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64. *See* United States v. Bell, 966 F.2d 703 (1st Cir. (1992); United States v. Fitzhugh, 954 F.2d 253 (5th Cir. 1992); United States v. Sahakian, 965 F.2d 740 (9th Cir. 1992), *overruling* United States v. O'Neal, 910 F.2d 663 (1990), *amd. reh'g en banc denied*, 937 F.2d 1369 (1991). *But see* United States v. Stinson, 957 F.2d 813 (11th Cir. 1992).

65. U.S.S.G. § 2K2.1 provides an enhancement of at least two levels (approximately 25%) if the defendant is a "prohibited person," defined to include those convicted under 18 U.S.C. § 922(g).

66. U.S.S.G. § 4B1.4 provides for the offense level to be enhanced to a minimum of 33 and the criminal history category to be increased to a minimum of category IV for a defendant convicted of being a felon-in-possession who is subject to the enhanced penalty under 18 U.S.C. § 924(e) as an armed career criminal (generally defined as one who has three previous convictions for violent felonies or serious drug offenses).

67. 18 U.S.C. § 3742(e) (1988).

68. *See, e.g.*, United States v. Quan-Guerra, 929 F.2d 1425 (9th Cir. 1991); United States v. Medina-Saldana, 911 F.2d 1023 (5th Cir. 1990); United States v. Howard, 894 F.2d 1085 (9th Cir. 1990); United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 2182 (1991); United States v. McDowell, 888 F.2d 285 (3d Cir. 1989); United States v. Mejia-Orosco, 868 F.2d 807 (5th Cir. 1989); United States v. Barrett (Dolan), 890 F.2d 855 (6th Cir. 1989); *cf.* United States v. Anderson, 942 F.2d 606 (9th Cir. 1991), *vacating* 895 F.2d 641 (1990) (holding that due deference standard not new standard of review, but requires court to determine degree of factual inquiry involved and apply corresponding standard—clearly erroneous standard for purely factual inquiries, de novo for those closer to legal questions); *see also* William W. Wilkins, Jr., *Sentencing Reform and Appellate Review*, 46 WASH. & LEE L. REV. 429, 434-35 (1989).

Reform Act, in a more restrained fashion regarding differences in court application of guideline language to similar cases. The monitoring of district and appellate court application decisions over a period of time is the most effective and efficient approach in this area, and it is this course of action that the Commission generally has followed in its process of guideline review and revision. Accordingly, working groups established by the Commission to study specific topics are requested to present the Commission with both qualitative information about differences in court interpretation of relevant guidelines and also quantitative information indicating the extent to which courts are applying guideline provisions in a given manner to commonly occurring offense or offender characteristics. For example, a working group active in the 1991-1992 amendment cycle assessed for the Commission the frequency with which drug couriers were classified as minor or minimal participants under U.S.S.G. section 3B1.2, which provides a reduction of two, three, or four offense levels for mitigating role. Another working group, charged with examining the operation of U.S.S.G. section 3E1.1, the guideline providing a reduction of two or three levels for a defendant's acceptance of responsibility, assessed the frequency with which this reduction was given to defendants who were convicted after trial, as opposed to those who pleaded guilty.

Commission amendment actions to date have addressed both differences in court interpretation of guideline provisions and, to a lesser extent, differences in court application of guidelines about which there is no interpretive dispute. While examples of these amendment types can be seen in many provisions of the *Guidelines Manual*, amendments to U.S.S.G. section 1B1.3, the Relevant Conduct guideline, and other guideline provisions that operate in conjunction with it, appropriately illustrate how the Commission has used its amendment authority to promote a greater consistency in guideline application.

An understanding of section 1B1.3 and its relevance in applying other guideline provisions is central to the correct and consistent application of the guidelines.[69] Generally speaking, this guideline determines the scope of a defendant's offense conduct and that of others acting in concert with the defendant that will be used to determine the defendant's base offense level under applicable guideline(s) in Chapter Two of the *Manual*, any increases or decreases in that offense level from specific offense characteristics in Chapter Two guidelines, and any offense level adjustments from Chapter Three.[70]

Relatively early in the application history of this guideline, a difference arose among the courts of appeals over its construction with respect to whether inclusion of conduct outside the offense(s) of conviction was intended. Specifically, a panel of the United States Court of Appeals for

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69. *See generally* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

70. U.S.S.G. § 1B1.3(a).

the Ninth Circuit saw language inconsistencies between section 1B1.3 and the guidelines in Chapter Three, Part D, pertaining to the determination of a combined offense level in cases involving multiple counts of conviction.[71] The court resolved this "ambiguity" in the defendant's favor by not including conduct in counts of which the defendant was not convicted.[72] Although this ruling was later withdrawn and replaced with a decision that interpreted the guideline in a manner consistent with Commission intent and the decisions of other circuits,[73] the Commission reinforced its view in the interim by adopting clarifying amendments to the commentary of section 1B1.3 and section 3D1.2.[74]

More significantly, the Commission added language and illustrations to the relevant conduct guideline and its commentary in 1989[75] and 1992.[76] The principal objective of each effort was to clarify the scope of conduct covered by this key guideline. These amendments each followed a comprehensive examination of district and appellate court applications of the guideline and were motivated by Commission conclusions that amendments were needed to make its application more uniform.[77]

The Commission also has amended other guidelines to clarify that determinations under those guidelines are based on the scope of conduct found "relevant" under section 1B1.3. For example, after a series of appellate decisions that based role in the offense determinations under section 3B1.1 and section 3B1.2 solely upon conduct in the count of conviction,[78] the Commission revised the commentary introducing Chapter Three, Part B, to reinforce its intent that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of section 1B1.3 (Relevant Conduct), i.e., all conduct within the scope of section 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction."[79]

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71. United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989).

72. *Id.* at 786.

73. United Statse v. Restrepo, 946 F.2d 654 (9th Cir. 1991).

74. U.S.S.G. app. C, amend. 309.

75. *Id.* at amends. 76-78.

76. *Id.* at amend. 439.

77. For a discussion of application inconsistencies found by researchers outside the Commission, see Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of Relevant Conduct Guideline § 1B1.3*, 4 Fed. Sent. R. 330 (1992).

78. *See, e.g.*, United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990) (limiting "role in the offense" determination to offense of conviction); United States v. Rodriguez-Nuez, 919 F.2d 461 (7th Cir. 1990) (same); United States v. Williams, 891 F.2d 921 (D.C. Cir. 1989) (same); United States v. Lanese, 890 F.2d 1284 (2d Cir. 1989) (same). *But see* United States v. Fells, 920 F.2d 1179 (4th Cir. 1990) (allowing evidence of activity outside offense of conviction in "role in the offense" determination).

79. U.S.S.G. ch. 3, pt. B, intro. cmt., as amended by app. C, amend. 345, 456. The amended commentary emphasizes the application principle in § 1B1.3(a) stating that unless otherwise specified, adjustments in Chapter Three, of which role in the offense is one, are based upon the scope of conduct included within § 1B1.3.

C. *Use of Amendments to Redress Disparity in Relation to Sentences Outside the Guideline Range (Departures)*

Just as courts sometimes differ in interpreting guideline provisions used to determine the guideline range applicable in similar cases, they also may differ in their reading of provisions for sentencing outside the applicable range. Unwarranted sentence disparities arising from differences in departure jurisprudence, particularly among courts at the appellate level, also may warrant Commission amendment response. However, a number of considerations with respect to court departure decisions, on the whole, tend to lessen the need for Commission amendment action in this area.

The SRA authorizes a court to impose a sentence outside the applicable guideline range if it "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."[80] The statute further provides that a court, by looking only to the guidelines, policy statements, and official commentary within the *Guidelines Manual*,[81] shall determine whether a particular factor is adequately taken into account. This provision facilitates court departure determinations by focusing the inquiry on the relevant words of the guidelines under consideration, and on reasonable inferences that can be drawn from that language, rather than on the scope or adequacy of the Commission's internal deliberative processes.[82]

In applying this statutory departure authorization and the parallel provisions of 18 U.S.C. section 3742 that relate to appellate review of departure sentences, all of the courts of appeals with criminal jurisdiction have articulated certain criteria that sentences outside the guideline range must satisfy. For the most part, departure tests employed by the circuit courts are similar.[83] Most courts of appeals require a departure to be: (1) based on an appropriate factor "not adequately taken into consideration," (2) supported in the record by sufficient evidentiary findings, and (3) reasonable in its extent.[84]

The United States Supreme Court also construed the appellate review statute in *Williams v. United States*,[85] a decision that has relevance to the Commission's authority to affect future court departure decisions via amendments to the guidelines, policy statements, and commentary. Although addressing a number of issues, the *Williams* decision emphasizes the im-

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80. 18 U.S.C. § 3553(b) (1988).

81. *Id.*

82. *See* 133 CONG. REC. S16647-48 (daily ed. Nov. 20, 1987) (statements of Sens. Kennedy and Thurmond); *see also* United States v. Leroy, No. 92-5086 (10th Cir. Jan. 26, 1993) (denying defendant's request for discovery of information underlying Commission promulgation of drug offense guideline, § 2D1.1).

83. Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1 (1991).

84. *Id.* at 19-22.

85. 112 S. Ct. 1112 (1992).

portance of Commission policy statements that inform courts about the kind and degree of circumstances considered by the Commission in formulating applicable guidelines. Specifically, the Court stated that such policy statements constitute "an authoritative guide to the meaning of the applicable guideline," and "an error in interpreting such a policy statement could lead to an incorrect determination that a departure was appropriate."[86]

Williams complements the Court's earlier *Braxton* message by recognizing the central role of the Commission in regulating court departure decisions. In other words, it logically follows from *Braxton* and *Williams* that the Court expects the Commission to use its amendment authority appropriately to address inter-circuit conflicts in departure law to the extent such conflicts stem from differences in interpretation of *Guidelines Manual* language.[87]

The Commission to date has issued a modest number of amendments responding to court departure decisions. Among the approaches employed by the Commission after considering departure cases are: (1) incorporating departure factors into relevant guidelines, (2) expressly inviting future departures in certain circumstances, while on occasion also providing guidance as to the appropriate extent of such departures, (3) precluding departures based on particular factors except when such factors occur to an extraordinary degree, and (4) precluding departures based on stated factors absolutely. To this list of affirmative amendment actions, which will be further discussed below, should be added another alternative course: that of further studying an issue but taking no amendment action. In fact, although some have criticized the Commission for acting too hastily to constrain departure decisions,[88] in reality the Commission to date has taken no action—other than to continue gathering and analyzing data—with regard to most district court departure sentences and appellate decisions affirming departures.[89]

1. Incorporation of Departure Factors into Relevant Guidelines

As generally discussed above, Congress intended that the Commission use information gleaned from district court statements of reasons and

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86. *Id.* at 1119.

87. *Williams* presented a situation involving both a circuit conflict in interpretation of the sentence appellate review statute (regarding when remand is necessary in a case in which a departure was based on both proper and improper factors) and a conflict in the interpretation of provisions in the *Manual* (regarding whether a departure properly could be based on dated prior convictions not similar to the instant offense). The Court addressed the statutory issue but not the guideline dispute. Subsequently, the Commission clarified the latter by issuing amendment 472, effective November 1, 1992. This amendment states that dissimilar, serious prior offenses that occurred too long ago to be counted in the guidelines' criminal history score may be considered in determining whether an upward departure is warranted under U.S.S.G. § 4A1.3 (Adequacy of Criminal History Category).

88. *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

89. Currently, a Commission working group is engaged in a comprehensive two-year analysis of departures that could result in recommendations to the Commission, including possible amendments, in the latter part of 1993.

appellate court departure decisions to improve the "fit" between the guidelines and actual cases.[90] Amending the guidelines to address departure circumstances more comprehensively within the applicable guideline range in turn facilitates achievement of the SRA goal of reasonable sentence uniformity. In a number of instances, the Commission has issued amendments that further the disparity reduction objective by expressly incorporating a departure circumstance into the guideline. For example, an upward departure affirmed by the Fourth Circuit in *United States v. Hummer*[91] contributed to the Commission's amendment of the extortion offense guideline.[92] The amendment added specific offense characteristics suggested by aggravating factors present in that and other similar cases.[93] Amendment 320,[94] which tied the offense level of the guideline for "telephone count" drug offenses[95] to the quantity of controlled substance involved, provides another illustration of departure incorporation via an amendment that makes the guideline more comprehensive of possible mitigating or aggravating circumstances. This amendment was motivated largely by upward departures in a significant number of "telephone count" cases that involved large quantities of drugs, including several such cases that were considered on appeal.[96]

2. Invitations for Future Departures

The continuing Commission review of district and appellate cases also has contributed to a number of amendments that describe circumstances the Commission believes could warrant a sentence outside the guideline range. For example, in 1991, the Commission issued a new policy statement, section 5K2.15 (Terrorism),[97] partly in response to the type of criminal activity highlighted in *United States v. Kikumura*.[98] This policy statement invites a sentencing court to impose an above-guideline sentence if the defendant committed the offense in furtherance of a terroristic action.

The Commission also has used its amendment authority to express its view about the extent of departure appropriate for a specific circumstance. For example, in response to differences in appellate rulings regarding upward

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90. *See* S. REP. No. 225, *supra* note 5, at 79-80, 15-51, *reprinted in* 1984 U.S.C.C.A.N. at 3262-63, 3333-34.

91. 916 F.2d 186 (4th Cir. 1990).

92. U.S.S.G. § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

93. *See* U.S.S.G. app. C, amend. 366.

94. *Id.* amend. 320.

95. U.S.S.G. § 2D1.6 (Use of Communication Facility in Committing Drug Offense). This provision is applicable to offenses under 21 U.S.C. § 843(b).

96. *See, e.g.*, United States v. Feekes, 929 F.2d 334 (7th Cir. 1991); United States v. Anders, 899 F.2d 570 (6th Cir.), *cert. denied*, 111 S. Ct. 532 (1990); United States v. Williams, 895 F.2d 435 (8th Cir. 1990); United States v. Bennett, 900 F.2d 204 (9th Cir. 1990).

97. U.S.S.G. app. C, amend. 292.

98. 918 F.2d 1084 (3d Cir. 1990). The case involved an upward departure of 330 months based on evidence that the appellant had manufactured three lethal homemade fire bombs in preparation for a major terrorist attack in the United States.

departures above the most serious criminal history category applicable to defendants,[99] the Commission amended the section 4A1.3 commentary to outline an incremental approach tied to the sentencing table.[100]

Departure guidance is sometimes provided by Commission amendments that have other objectives as well. In fact, as the Commission reviews the application of offense conduct guidelines through its working group process of analysis, amendment revisions frequently reflect multiple purposes. For example, in a comprehensive amendment revision, the Commission may clarify guideline language to promote more uniform application, add provisions that more fully describe the "heartland" of conduct covered by the guideline,[101] and describe circumstances outside the heartland of the revised guideline that could warrant departure. The Commission's 1991 revisions of the extortion guideline[102] and the firearms offense guideline[103] illustrate this comprehensive revision approach. In both instances, the rewriting clarified terminology, adjusted punishment levels by taking into account additional offense characteristics, and added commentary inviting upward departures in certain circumstances.[104]

3. Limiting Departures to Extraordinary Cases

On a very few occasions, the Commission has issued new or amended policy statements that seek to limit, but not absolutely preclude, departures. These amendments have addressed departure use of the following offender characteristics: (1) youth,[105] (2) physical condition or appearance, including physique,[106] and (3) military, civic, charitable, or public service; employment-

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99. *Compare* United States v. Schmude, 901 F.2d 555, 559-60 (7th Cir. 1990) (prescribing procedure for extrapolating by analogy to Sentencing Table to reach sentence that more appropriately reflects seriousness of defendant's prior record) *and* United States v. Ferra, 900 F.2d 1057, 1062 (7th Cir. 1990) (same), *cert. denied*, 112 S. Ct. 1939 (1992) *with* United States v. Jackson, 921 F.2d 985, 993 (10th Cir. 1990) (approving *Schmude* approach as appropriate in some cases while not strictly mandating it) *and* United States v. Molina, 952 F.2d 514, 521-22 (D.C. Cir. 1992) (same), *and with* United States v. Ocasio, 914 F.2d 330, 336 (1st Cir. 1990) (rejecting bright-line, extrapolation-by-analogy rule because "reasonableness is a concept, not a constant").

100. U.S.S.G. app. C, amend. 460.

101. *See* U.S.S.G. ch. 1, pt. A4(b) (explaining Commission's general intent that courts "treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes").

102. U.S.S.G. app. C, amend. 366.

103. *Id.* at amend. 374.

104. *See* U.S.S.G. § 2B3.2, cmt. nn. 7, 8; *id.* § 2K2.1, cmt. nn. 10, 11.

105. U.S.S.G. app. C, amend. 386. A number of appellate decisions, construing policy statement § 5H1.6, had disapproved of basing a downward departure on a defendant's young age. *See, e.g.*, United States v. Shoupe, 929 F.2d 116 (3d Cir.), *cert. denied*, 112 S. Ct. 382 (1991); United States v. White, 945 F.2d 100 (5th Cir. 1991); United States v. Summers, 893 F.2d 63 (4th Cir. 1990).

106. U.S.S.G. app. C, amend. 386. This portion of the amendment can be said to express the Commission's view that a below-guideline sentence would not ordinarily be appropriate based on circumstances similar to those at issue in *United States v. Lara-Morales*, 905 F.2d 599 (2d Cir. 1990) (in which that court approved a downward departure for male defendant of effeminate appearance who allegedly had suffered abuse in jail prior to sentencing).

related contributions; record of prior good works.[107] In each of these cases, the Commission responded to court decisions by issuing an amendment expressing its view that these characteristics should be considered "not ordinarily relevant in determining whether a sentence should be outside the guideline range."[108]

4. Absolute Preclusion of Departures

To date, in only one instance has the Commission issued an amendment designed absolutely to preclude downward departures for a specific offender characteristic. That involved the issuance of policy statement section 5H1.12, in November 1992,[109] which states the Commission's view that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds" for a departure. A decision by the Ninth Circuit in *United States v. Floyd*[110] directly precipitated this Commission action. The amendment places these factors in the company of only a few others—substance abuse, personal financial hardship, and the constitutionally- or statutorily-prohibited factors of race, sex, national origin, creed, religion, and socioeconomic status[111]—that are absolutely precluded from departure consideration.

The strength of Commission disapproval of "lack of youthful guidance" as a basis for departure can be attributed to a number of factors. Among them was a concern that this particular label, amorphous as it is, potentially could be applied to an extremely large number of cases prosecuted in federal court, thereby permitting judges wide discretion to impose virtually any sentence they deemed appropriate (within or below the guidelines). The unwarranted disparity that could result from such a wide-open path around the guidelines was inconsistent with SRA objectives as the Commission understood them. Moreover, departures predicated on this factor could reintroduce into the sentencing equation considerations of a defendant's

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107. U.S.S.G. app. C, amend. 386. District court decisions involving departures for a defendant's good works and positive contributions played a prominent role in the issuance of this policy statement. Appellate courts have consistently remanded district court decisions that permit departure for these reasons. *See, e.g.*, United States v. McHan, 920 F.2d 244 (4th Cir. 1990) (sentencing court could not consider defendant's contributions to town through his real estate development company and his bank to depart downward from guideline); United States v. Neil, 903 F.2d 564 (8th Cir. 1990) (stability of defendant's family life, commendable military service, and his involvement in coaching young athletes did not justify downward departure from guidelines). However, the continued litigation involving these issues influenced the Commission to issue this new policy statement. The subsequent apparent decrease in appellate cases involving a departure for these reasons suggests that the policy statement effectively communicated Commission intent that departures based on offender "good citizen" characteristics rarely would be appropriate.

108. *See* U.S.S.G. §§ 5H1.1, 5H1.4, 5H1.11.

109. U.S.S.G. app. C, amend. 466.

110. 956 F.2d 203 (9th Cir. 1991).

111. U.S.S.G. ch. 1, pt. A4(b).

socioeconomic background and other personal characteristics that Congress clearly intended the guidelines to place off limits.[112]

5. Grounds for Amendment Restraint with Respect to Court Departure Decisions

Although the Commission on several occasions has used its amendment authority to address departure circumstances discussed in court decisions, its overall posture in this respect has been one of restraint.[113] Viewed in the context of SRA goals, at least two good reasons exist for a deliberate course of Commission amendment action in this area. One is that the SRA obviously contemplates some reasonable degree of sentencing outside guideline boundaries.[114] The other key structural consideration is that, under the SRA, departures are authorized but never mandated.

The appellate courts uniformly have held that as long as the sentencing judge properly understands the authority to depart, the informed exercise of discretion to impose a sentence within the applicable guideline range is not reviewable.[115] The fact that judges are not compelled to depart for circumstances that a particular court of appeals may have endorsed as departure-appropriate, and therefore may well decide to sentence within the guideline range, generally means that the Commission has less need for immediate concern about unwarranted disparity resulting from appellate departure decisions at variance with Commission intent. As previously indicated, the Commission has not elected to forbear in all such cases. Nevertheless, in general it can be said that appellate departure decisions, even if inconsistent, on the whole produce less need for amendment action than do inter-circuit conflicts over the interpretation of guideline language that removes discretion from the sentencing court to elect a different course.

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112. *See* 28 U.S.C. § 994(d) (1988) (mandating Commission to assure absolute neutrality under guidelines with respect to race, sex, national origin, creed, and socioeconomic status of offenders).

113. Through fiscal year 1991, courts sentenced below the guideline range for reasons other than a defendant's substantial assistance to law enforcement authorities in almost 5,000 cases. In comparison, the total number of amendments that relate to departures in some fashion is less than 50, and few of these were specifically designed to constrain downward departures. While these rough comparative numbers cannot be said to show definitively the number of actual departure cases that might have been affected by the amendments, they do not support the view that the Commission has been "quick on the draw" with amendments to constrain downward departures.

114. S. REP. No. 225, *supra* note 5, at 51-52, *reprinted in* 1984 U.S.C.C.A.N. at 3234-35.

115. *See, e.g.*, United States v. Ortez, 902 F.2d 61 (D.C. Cir. 1990); United States v. Ocasio, 914 F.2d 330 (1st Cir. 1990); United States v. Bayerle, 898 F.2d 28 (4th Cir.), *cert. denied*, 111 S. Ct. 65 (1990); United States v. Evidente, 894 F.2d 1000 (8th Cir.), *cert. denied*, 495 U.S. 922 (1990); United States v. Morales, 898 F.2d 99 (9th Cir. 1990); United States v. Davis, 900 F.2d 1524 (10th Cir.), *cert. denied*, 111 S. Ct. 155 (1990); United States v. Colon, 884 F.2d 1550 (2d Cir.), *cert. denied*, 493 U.S. 998 (1989).

IV. Balancing Competing Concerns

While this article attempts to describe SRA policy objectives that together prompt Commission amendment action when the issue of unwarranted sentencing disparity arises, a number of competing considerations warrant acknowledgement. Concerns voiced from time to time in opposition to the promulgation of additional amendments[116] include: (1) difficulties in staying apprised of guideline changes, (2) concerns about whether amendment language achieves the desired objective clearly and effectively, (3) problems in applying amendments in concert with a constantly changing body of case law, (4) difficulties in applying amendments consistent with ex post facto interpretations by the appellate courts, (5) disagreements with the substance of proposed amendments, and (6) general policy differences regarding the appropriate role of the Commission vis-à-vis the SRA charter, Congress, the courts, and others involved in the criminal justice system.

Full discussion of these issues is not possible here, but a few points are worthy of note. Staying current with changing law has always been a challenge for those involved in the criminal justice system. That task can be especially difficult for busy probation officers who have been thrust by the SRA into the forefront of guideline specialization. The Commission's strong commitment to continuing guideline education, carried out with the assistance of a full-time training and technical assistance staff, helps ameliorate this concern. Other agencies, including the Department of Justice, Federal Judicial Center, Administrative Office of the U.S. Courts, and private bar groups cooperate in this endeavor.

The Commission deserves to be faulted when its amendment efforts are less than clear and fail effectively to address problem areas in guideline application. While its "track record" in this regard may not be unblemished, complications in some amendments can be attributed to factors beyond the Commission's control, such as difficulties in reconciling mandatory minimum statutes with the guidelines.[117] On the whole, the Commission's clarifying amendments seem to have been well received by courts, probation officers, and others called upon to apply amended guideline language.[118]

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116. *See, e.g.*, Judge Frederic N. Smalkin, Remarks at the United States Sentencing Commission's Public Hearing on Proposed Amendments (Feb. 25, 1992) (on file with Commission); Paul D. Borman, Remarks on behalf of the American Bar Association, Criminal Justice Section, at the United States Sentencing Commission's Hearing on Proposed Amendments (Mar. 5, 1991) (on file with Commission).

117. *See, e.g.*, U.S.S.G. app. C., amend. 405 (amending application note 2 of commentary to § 2K2.4 entitled "Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes"). The rule expressed in the commentary has been criticized for its complexity. While the described procedure may be complicated, it is the practical impossibility of accommodating a fixed, flat statutory sentence, as required under 18 U.S.C. § 924(c), in a proportional guidelines system that is the root of the problem.

118. The Commission is in the process of developing an empirical data base of appellate decisions that will help it more effectively assess the effect of amendments on the volume of appeals relating to issues addressed by particular amendments. An examination of case law on particular issues, preamendment and postamendment, to a limited extent also can demonstrate the effectiveness of particular amendments.

Moreover, although applying the guidelines consistently with constantly evolving case law admittedly can be difficult, Commission clarifying amendments can ameliorate this difficulty by restoring greater uniformity of guideline law.

Problems inherent in applying amended guidelines consistent with ex post facto constraints are a matter of considerable concern to the Commission.[119] Congress anticipated this legal issue and stated its strong policy view that courts should apply the guidelines and policy statements in effect at the time of sentencing.[120] Were that uniformly the case, application of amended guidelines would be substantially less problematic. However, because of the near-unanimous view of the appellate courts that the Ex Post Facto Clause precludes application of postoffense amendments that increase punishment,[121] relief may be possible only if the United States Supreme Court has occasion to consider the issue of whether, given the unique features of the federal guidelines system,[122] amendments that alter a defendant's guideline exposure within unchanged statutory parameters can be fully applied as Congress intended under the SRA.[123]

V. Concluding Thoughts

No purpose was more important to Congress and the several Administrations that worked for years to enact the Sentencing Reform Act of 1984 than the avoidance of unwarranted disparity and resulting unfairness in the sentencing of similarly situated defendants. This noble goal, about which there is virtually unanimous agreement in principle, was one that Congress recognized would be constantly in tension with a changing body of sentencing law. The SRA therefore provided that the Sentencing Commission would function as a permanent, auxiliary agency in the Judicial Branch, and it mandated the Commission to amend the sentencing guidelines as necessary to promote the goal of reasonable sentencing uniformity. The

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119. *See* U.S.S.G. § 1B1.11 (providing guidance on application of amended guidelines when constrained by ex post facto clause); *see also* 57 Fed. Reg. 62, 832-33 (1992) (discussing proposed expansion of this policy statement to address multiple count cases).

120. 18 U.S.C. §§ 3553(a)(4), (5) (1988).

121. *See supra* note 23.

122. *See* Miller v. Florida, 482 U.S. 423 (1987).

123. It also has been suggested that Congress should amend 18 U.S.C. § 3553(a)(4) and (5) to direct courts to use guidelines and policy statements in effect at the time a defendant's offense was committed. While such a change might lessen somewhat the difficulties of applying amended guidelines vis-à-vis the Ex Post Facto Clause, it would not eliminate them. Courts would still need to address the issue of how amendments are to be applied in cases in which a defendant is convicted of multiple counts (in which amendments take effect between offenses). Courts also would still have to determine whether amendments taking effect after the date of an offense were clarifying changes that should be given effect. Moreover, from a policy standpoint, such a change would involve an about-face from the strongly stated congressional goal of structuring court discretion through the use of the most current, "sophisticated statements [of sentencing policy] available." *See* S. Rep. No. 225, *supra* note 5, at 77-78, *reprinted in* 1984 U.S.C.C.A.N. at 3260-61.

United States Supreme Court has strongly reaffirmed the appropriateness of that Commission role in the *Mistretta* and, more specifically, *Braxton* decisions. In turn, the Commission has sought to conduct its amendment responsibilities with the goal of reducing unwarranted disparity always in mind, but with sensitivity to competing concerns.

Developing sentencing policy is a highly controversial enterprise, and those active in this arena will no doubt continue vigorously to debate the Commission's proper role and level of activity in exercising its amendment authority. The Commission can and should carefully consider these concerns, but in the final analysis, it must take its cue from the statute and endeavor faithfully to execute the continuing mission Congress has prescribed.