Federal Sentencing Policy: Role of the Judicial Conference of the United States and the Administrative Office of the U.S. Courts

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I. Introduction

In November 1987, the Sentencing Reform Act of 1984 ("SRA") and the United States Sentencing Guidelines went into effect, dramatically changing how defendants are sentenced in the federal courts. Congress eliminated a model where defendants were sentenced to an indeterminate period with parole release, and instead created a determinate model where defendants knew at sentencing approximately how long they would serve. With the SRA, Congress also created the United States Sentencing Commission and required it to develop guidelines to structure judges' sentencing decisions. Prior to the SRA, judges were generally free to sentence defendants within wide statutory parameters. The Senate report accompanying the SRA emphasized the need for guidelines to curtail judicial sentencing discretion and reduce sentencing disparities among similar defendants convicted of the same crime.[1] At the same time, it stressed that guidelines are not intended to be imposed "in a mechanistic fashion" and that their purpose "is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate thoughtful imposition of individualized sentences."[2]

While the Sentencing Commission has been the primary agency charged with establishing sentencing policies and practices for the federal courts over the past 30 years, there are other national entities within the federal judiciary that play important roles in the development and implementation of sentencing policy. These include the Judicial Conference of the United States ("the Judicial Conference") and the Administrative Office of the U.S. Courts ("the Administrative Office"). The Judicial Conference, which was established by Congress in 1922, is the national policy-making body for the federal courts. Among other statutory obligations, it is required by statute to comprehensively survey business conditions in the courts and submit suggestions to the courts that promote uniform management procedures and the expeditious conduct of court business.[3]

The Judicial Conference operates through a network of committees that make policy recommendations to the Conference. One of the committees, the Committee on Criminal Law, has numerous responsibilities relevant to federal sentencing policy, including monitoring and analyzing for Judicial Conference consideration legislation affecting the administration of criminal justice; providing oversight of the implementation of the Sentencing Guidelines and making recommendations to the Judicial Conference on proposed amendments to the Guidelines, including proposals that would increase their flexibility; ensuring that working relationships are maintained and developed with the Sentencing Commission, Department of Justice, Bureau of Prisons, and United States Parole Commission; overseeing the federal probation and pretrial services system; and proposing policies and standards on issues affecting the probation system, presentence investigation procedures, disclosure of presentence reports, sentencing and Sentencing Guidelines, and the supervision of offenders released on probation, parole, and supervised release.

The Administrative Office, which was established in 1939, supports the constitutional and statutory mission of the federal judiciary to provide equal justice under the law as an independent and equal branch of government. Its responsibilities include providing counsel and support to the Judicial Conference and its committees and implementing Conference policies and decisions.[4] The Director of the Administrative Office, serving as secretary to the Judicial Conference, coordinates the activities of Administrative Office staff to support the Conference and its committees.[5]

[1] S. Rep. No. 98-225, at 38 (1983).

[2] *Id.* at 52. Indeed, under 18 U.S.C. § 3553, courts are required to impose sentences sufficient, but not greater than necessary, to comply with the purposes of sentencing, and in determining the particular sentence to be imposed, must consider the nature and circumstances of the specific offense and the history and characteristics of the individual defendant.

[3] 28 U.S.C. § 331. The Chief Justice of the United States is the presiding officer of the Judicial Conference. Membership comprises the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each regional judicial circuit.

[4] Other responsibilities of the Administrative Office include delivering financial, human resource, legal, statistical, technological, and other administrative and program services to the judiciary; addressing the needs of courts, judges, court executives, and other judiciary employees and organizations, and providing guidance and assistance to facilitate successful performance of their functions; and serving as liaison between the judiciary and legislative and executive branches of the federal government.

[5] *See* 18 U.S.C. § 3672. The Federal Judicial Center

Working with the chairs of the committees, Administrative Office staff prepare and assemble agendas and supporting material, conduct analyses and studies, identify cost implications of issues before the committees, accompany the committee chairs (or other designees) when called upon to testify before Congress or the Sentencing Commission, and visit with or work with members of the executive and legislative branches and other key policy-related entities.

This article describes the responsibilities of the Judicial Conference, the Committee on Criminal Law, and the Administrative Office in recommending, developing, and implementing federal sentencing policy. Although there are numerous examples of how these entities inform and implement sentencing policy, this article focuses on three areas. Specifically, it describes their role in: (1) creating and approving national policy guidance regarding the development of presentence investigation reports; (2) developing national judgment and statement of reasons forms for use by courts; and (3) providing judiciary feedback on proposed changes to sentencing legislation and the Sentencing Guidelines and implementing retroactive application of Guideline amendments.

II. National Policy Guidance on Presentence Investigation Reports

The selection of an appropriate sentence is one of the most important and difficult decisions made by federal judges, and the primary vehicle to assist them in fulfilling this responsibility is the presentence investigation report. The task of conducting presentence investigations and preparing presentence investigation reports is assigned to U.S. probation officers under 18 U.S.C. § 3552. These dedicated professionals use skills from various disciplines to investigate relevant facts about defendants; assess those facts in light of the purposes of sentencing; apply the appropriate Sentencing Guidelines, statutes, and rules to the available facts; and provide clear, concise, and objective reports that will assist the sentencing judges in determining appropriate sentences, aid the Bureau of Prisons in making classification, designation, and programming decisions, and assist the probation officer during supervision of the offender in the community.

Since the 1940s, the Administrative Office has developed, and the Judicial Conference has approved, national policies to assist local probation offices in preparing presentence investigation reports.[6] For most of the twentieth century, probation officers were guided in their presentence investigations by a philosophy that put a premium on understanding the causes of antisocial behavior and evaluating the possibilities of change. The national policy in effect prior to the SRA, for instance, explained that the presentence investigation report "describes the defendant's character and personality, evaluates his or her problems, helps the reader understand the world in which the defendant lives, reveals the nature of his or her relationships with people, and discloses those factors that underlie the defendant's specific offense and conduct in general."[7]

When the SRA went into effect, radical changes in the content and format of the presentence investigation report were necessary to accommodate the new sentencing model and process. The dominant task became applying a set of legal rules—the Sentencing Guidelines—to the facts of the case. The presentence investigation became guided largely by the need to resolve those factual questions that the Sentencing Guidelines treat as relevant. Soon after the SRA was enacted, a task force was convened under the auspices of the Committee on Criminal Law to examine the structure and content of the presentence investigation report. Membership consisted of staff from the Administrative Office, probation offices in 13 districts, the Federal Judicial Center, the Sentencing Commission, the Parole Commission, and the Bureau of Prisons. The task force undertook an examination of the efficiency and effectiveness of the presentence investigation report format in order to recommend improvements to the Committee on Criminal Law. In September 1987, a revised policy titled Publication 107, *Presentence Investigation Reports under the Sentencing Reform Act of 1984*, was issued based on the task force recommendations, which set forth guidance regarding the presentence investigation process and the format and content of the presentence investigation report.[8]

also provides research and other assistance to Conference committees. 28 U.S.C. § 620(a)(4).

[6] In 1943, the Administrative Office issued Publication 101, *The Presentence Investigation Report*, which was revised in 1965 as Publication 103. In 1974, Publication 104, *The Selective Presentence Investigation Report,* was produced. Those publications were prepared by committees of special consultants under the guidance of the Committee on Criminal Law and represented state-of-the-art professional judgment regarding the critical contents of the presentence investigation report. Subsequent developments in statutory and case law redefined the contents and use of the report, leading to development of the 1978 monograph titled Publication 105, *The Presentence Investigation Report*, subsequently updated in 1984.

[7] Publication 105, *supra* note 6, at 1. *See also* Publication No. 101, *supra* note 6, at 1 ("The presentence investigation [is] also known as the 'social investigation,' 'social diagnosis,' or 'preliminary investigation'. . . . Its primary object is to focus light on the character and personality of the defendant, to offer insight into his personality needs, to discover those factors underlying the specific offense and his conduct in general, and to aid the court in deciding whether probation or some other form of treatment is for the best interests of both the offender and society. In addition to the help they render the court in shaping sentence, the findings of the presentence investigation assist the probation officer in his rehabilitative efforts, and in the event of commitment, are helpful to the reformatories and penitentiaries in their institutional classification and treatment programs. The findings also aid the institutional authorities in parole selection and planning and are of assistance to the Federal probation officer when the parolee is returned to him under parole supervision."); Publication No. 103, *supra* note 6, at 2-3 ("In conducting the investigation and in writing the presentence report, the probation officer should be primarily concerned with how the defendant thinks, feels, and reacts. . . . A presentence report is more than a compilation of tangible facts. Facts about family composition, employment, health, and so on, have relatively little value unless they are interpreted in relation to the defendant and how he thinks, feels, and behaves. . . . How the defendant feels about those with whom he comes in daily contact, what he thinks about his family, his peers, and his coworkers—and what he believes they think about him—are essential to an understanding of his relationship with people. Also significant are his feelings about baffling problems in his life, including his offense and his reaction to opportunities, accomplishments, disappointments, and frustrations. His moral values, his beliefs and his convictions, his fears, prejudices, and hostilities explain the 'whys' and 'wherefores' of the more tangible elements in his life history. . . . Each [fact] should be interpreted in terms of the defendant's family, background, culture, and environment, and in relation to the groups with whom he has associated and is closely identified."); Publication No. 104, supra note 6, at 1 ("The objectives of the presentence report are to focus light on the character and personality of the defendant, to offer insight into his problems and needs, to help understand the world in which he lives, to learn about his relationships with people and to discover those salient factors that underlie his specific offense and his conduct in general and to suggest alternatives in the rehabilitative process.").

[8] Rule 32 of the Federal Rules of Criminal Procedure also requires that the presentence investigation

In January 2005, the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines were subject to the jury trial requirements of the Sixth Amendment of the U.S. Constitution and that the remedy was to sever the provisions of the SRA making the Guidelines mandatory. The Court's decision rendered the Sentencing Guidelines "effectively advisory."[9] After consulting with a working group of probation officers and representatives from the Bureau of Prisons, the Sentencing Commission, and the Federal Judicial Center, the Administrative Office proposed policy revisions to address the *Booker* decision. In March 2006, the Judicial Conference approved revisions to *Publication 107*, including a new section to reflect the courts' authority to impose a sentence outside the advisory guidelines system.

This year, at the request of the Committee on Criminal Law, the Administrative Office initiated a study of presentence investigation reports to assess the strengths and weaknesses of the report and suggest potential improvements. The study will involve focus groups and surveys of judges and probation officers to evaluate and recommend modifications to the investigation process and the format and content of the presentence investigation report. The Committee on Criminal Law and the Administrative Office will consider the stakeholder feedback to determine whether further changes to national policy should be made.

III. National Judgment and Statement of Reasons Forms

In 1988, the Judicial Conference recommended that sentencing courts use a series of national judgment forms to facilitate sentencing within a guideline system.[10] The same year, the Judicial Conference and the Sentencing Commission jointly introduced a separate statement of reasons form to alleviate the need to obtain and review sentencing transcripts to determine the reasons for sentences, which the court was required to provide pursuant to 18 U.S.C. § 3553(c); help meet the courts' obligation to report information to the Sentencing Commission under 28 U.S.C. § 994(w); aid the Sentencing Commission in exercising its authority under 28 U.S.C. § 995(a)(8) regarding sentencing data collection requirements; and assist the Bureau of Prisons in making inmate classification, designation, and programming decisions.

Over the years, the Committee on Criminal Law, in consultation with the Sentencing Commission and other stakeholders, has proposed revisions to the content and structure of the judgment forms and statement of reasons form to incorporate statutory changes and make improvements suggested by form users. In March 2001, for instance, the Judicial Conference approved the Committee's recommendation to attach the then-separate statement of reasons form to the judgment form; the Judicial Conference also designated the statement of reasons form as not for routine public disclosure, recognizing the need to protect sensitive information about whether a defendant's cooperation with the government in its efforts to prosecute others served as the basis for a reduced sentence.[11]

In April 2003, the importance of the statement of reasons form was further highlighted with the passage of the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003" ("PROTECT Act"), Pub. L. No. 108-21, which amended 18 U.S.C. § 3553(c) to require the court to describe with specificity on the written judgment the reasons relied on when departing from the applicable range in the Sentencing Guidelines. The PROTECT Act also amended 28 U.S.C. § 994(w) to require courts to submit the statement of reasons to the Sentencing Commission and to direct the Commission to report submission rates for these documents to Congress. Subsequently, at the recommendation of the Committee on Criminal Law, the Judicial Conference revised the statement of reasons form to provide a clearer description of the reasons for the sentence imposed; the Judicial Conference also designated the statement of reasons form as the mechanism by which courts would comply with the PROTECT Act's reporting requirements.[12] Additionally, at the request of the Committee on Criminal Law, the Federal Judicial Center, the education and research agency of the federal judiciary, developed educational programs and information for judges and court staff to assist them with using the revised statement of reasons form.

After the *Booker* decision in January 2005, the Committee on Criminal Law recognized that accurate data collection, analysis, and reporting would be even more critical to address congressional concerns and to meet the needs of the judiciary, the Sentencing Commission, and other stakeholders. It therefore recommended to the Judicial Conference that the Committee facilitate the reporting in the statement of reasons form of the detailed and specific facts relied upon in determining sentences that are outside the advisory sentencing guideline system. In March of 2005, the Judicial Conference delegated to the Committee on Criminal Law the authority to: develop educational programs, forms, and other similar guidance for judges and probation officers; work with the Sentencing Commission to improve the statement of reasons form and evaluate additional methods to ensure accurate and complete reporting of sentencing decisions; work with the Sentencing Commission to improve the Commission's data collection, analyses, and reporting to ensure that sentencing data meet the needs of the Commission, Congress, and the judiciary; and develop various strategies to pursue and promote the above-described Conference positions regarding post-*Booker* sentencing in discussion with the Sentencing Commission, Department of Justice, and Congress.[13] In September 2005 the Conference approved revisions to the statement of reasons form that were recommended by the Committee based on suggestions from the Sentencing Commission, judges, and court staff.[14] The revisions were designed to incorporate changes in the law as a result of *Booker,* make it easier for courts to report on sentencing decisions, and facilitate the Sentencing Commission's data collection, analysis, and reporting.[15]

In March 2006, the "USA PATRIOT Improvement and Reauthorization Act," Pub. L. No. 109-177, amended 28 U.S.C. § 994(w)

report include certain elements. The format of the presentence report is designed to satisfy the rule's requirements.

[9] *Booker*, 543 U.S. at 245.

[10] JCUS-MAR 88, p. 12.

[11] JCUS-MAR 01, p. 17. The complete judgment form, including the statement of reasons, continued to be forwarded to appropriate entities, such as the Sentencing Commission, the Bureau of Prisons, defense counsel, government attorneys, and the appellate courts.

[12] JCUS-SEP 03, p. 18.

[13] JCUS-MAR 05, p. 15.

[14] *Id*. at 20.

[15] For example, the revised form allowed courts to fully document (1) findings on statutory mandatory minimum penalties; (2) reasons for imposing sentences within the advisory sentencing guideline system, including any departure authorized by the Sentencing Guidelines; and (3) reasons for imposing sentences outside the advisory guideline system based on other sentencing factors in 18 U.S.C. § 3553(a).

to require that the statement of reasons be "stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." As a result of this legislation, the statement of reasons form, which was neither available to the public nor locally modifiable, became a required part of the judgment form, which was generally available to the public and could be modified locally. To address concerns about making the sensitive information in the statement of reasons form public, the Judicial Conference sought legislation that would authorize the recording of the statement of reasons in a document separate from the judgment form.[16] Congress subsequently enacted the Conference's proposal as part of the "Federal Judiciary Administrative Improvements Act of 2010," Pub. L. No. 111-174.

In September 2015, upon the Committee on Criminal Law's recommendation, the Judicial Conference issued a revised statement of reasons form, subject to the approval of the Sentencing Commission, pursuant to 28 U.S.C. § 994(w)(1)(B). The revisions were intended to provide the Commission with additional information about why courts impose sentences outside the advisory sentencing guidelines system.[17] The changes responded to feedback from judges, probation officers, court clerks, and others regarding sections that were confusing or difficult to apply. Among other changes, the revised form includes more checkboxes for sentencing outside the advisory guideline system that are explicitly associated with factors related to those listed in 18 U.S.C. § 3553(a).

Finally, in September 2016, on recommendation of the Committee on Criminal Law, the Judicial Conference approved revisions to the national judgment forms, including amendments to the standard conditions of probation and supervised release that were endorsed by the Criminal Law Committee and approved by the Sentencing Commission.[18] The Committee on Criminal Law and Administrative Office staff, with the assistance of a group of probation officers from throughout the country, collaborated closely with the Sentencing Commission and its staff and other stakeholders with the intent of harmonizing the standard conditions listed on the national judgment forms with those in the Sentencing Guidelines.[19]

IV. Feedback on Proposed Amendments to Sentencing Legislation and Sentencing Guidelines and Implementation of Retroactive Application of Amendments

The Judicial Conference, through the Committee on Criminal Law, has been active in providing feedback on behalf of the federal judiciary regarding proposed changes to sentencing legislation and the Sentencing Guidelines. The Conference and the Committee have also played a key role in recommending and implementing the retroactive application of amendments to the Sentencing Guidelines. Some examples of the Conference's involvement in these areas are highlighted below.

Feedback on Proposed Sentencing Legislation

The Judicial Conference, through the Committee, has regularly provided feedback to Congress on proposed sentencing legislation, particularly legislation that would limit judicial discretion and affect the court's ability to impose sentences that are individualized and satisfy the statutory purposes of sentencing. For over sixty years, the Conference has opposed statutory mandatory minimum sentences and has supported measures for their repeal or to ameliorate their effects.[20] It has criticized mandatory minimums on numerous grounds, including that they impair the efforts of the Sentencing Commission to fashion guidelines according to the principles of the SRA, that they are inherently rigid and often lead to sentences that are inconsistent and disproportionate, and that they unnecessarily increase the cost of prison and community supervision.[21]

In September 2003, in response to the PROTECT Act, the Judicial Conference "oppose[d] legislation that would eliminate the court's authority to depart downward in appropriate situations unless the grounds relied upon are specifically identified by the Sentencing Commission as permissible for departure."[22] In November 2003, in a letter from the Chief Justice to Congress, the Conference again opposed the "troubling" provisions of the PROTECT Act limiting the ability of judges to downwardly depart from the guideline range, arguing that the act would "undermine the basic structure of the sentencing system," "severely restrict the authority of the Sentencing Commission," and hamper judges' ability to impose "just and responsible sentences as individual circumstances and the facts of the case may warrant."[23] Moreover, "[s]tripping federal judges of needed flexibility through some of the sentencing provisions of the PROTECT Act often requires judges to give harsher sentences to the least culpable defendants resulting in the very disparity the Sentencing Reform Act was intended to eliminate."[24]

In March 2005, in the wake of *Booker*, the Judicial Conference resolved "that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[25] It further urged Congress "to take no immediate legislative action and instead to maintain an advisory sentencing guideline system."[26] In 2006, the Conference opposed the then-existing difference between mandatory minimum sentences for crack and powder cocaine and supported the reduction of that

[16] JCUS-MAR 07, p. 14.

[17] JCUS-SEP 15, pp. 14-15.

[18] JCUS-SEP 16, p. 13.

[19] The revisions were prompted in large part by recent circuit decisions striking down several of the standard conditions of supervision. For an overview of the developments that led to the revisions and the specific revisions, *see* Stephen E. Vance, *Conditions of Supervision in Federal Criminal Sentencing: A Review of Recent Changes*, 81 Fed. Probation 1, 3 (June 2017).

[20] JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45, 56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 95, p. 47; JCUS-MAR 09, pp. 16-17; JCUS-SEP 13, p. 17.

[21] *See, e.g., "Agency Perspectives": Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. On the Judiciary* (July 11, 2014) (statement of Chief Judge Irene M. Keeley, Chair, Committee on Criminal Law, Judicial Conference of the United States); Letter from John D. Bates, Secretary, Judicial Conference of the United States, to Honorable F. James Sensenbrenner, Jr., Chairman, Over-Criminalization Task Force of 2014, Committee on the Judiciary, U.S. House of Representatives (May 27, 2014); Letter from Judge Robert Holmes Bell, Chair, Committee on Criminal Law, to Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate (September 17, 2013).

[22] JCUS-SEP 03, p. 5.

[23] Letter from Chief Justice William Rehnquist, U.S. Supreme Court, to Senator Orrin Hatch, Chairman, Committee on the Judiciary, U.S. Senate (November 7, 2003).

[24] *Id.*

[25] JCUS-MAR 05, p 15.

[26] *Id.*

difference.[27] The Conference's position was based in part on the recognition, cited by the Commission and others, that the severity of the 100-1 ratio greatly impacted minority defendants and that the penalties needed to be reformed in order to preserve the public's confidence in the courts. Congress subsequently enacted the "Fair Sentencing Act of 2010," Public Law No. 111-220, which reduced the disparity between sentences for crack and powder cocaine offenses. Since 2013, the Judicial Conference has sought legislation such as the "Justice Safety Valve Act of 2013" (S. 619, 113th Cong)[28] and the "Smarter Sentencing Act of 2013" (S. 1675, 113th Cong),[29] which are designed to restore judges' sentencing discretion and avoid the costs associated with mandatory minimum sentences.

Feedback on Proposed Changes Related to Sentencing Guidelines

The Judicial Conference has also had an active role in providing feedback to the Sentencing Commission about proposed changes related to the Sentencing Guidelines. In 1990, it authorized the Committee on Criminal Law to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the Sentencing Guidelines, including proposals that would increase their flexibility.[30] Some of the most significant examples of the positions of the Conference and the Committee are highlighted below.

The *Long Range Plan for the Federal Courts* (1995), for instance, recommended that the Sentencing Commission afford judges the ability to impose more alternatives to imprisonment, encourage judges to depart from guideline levels where appropriate in light of factual circumstances, and enable them to consider a greater number of offender characteristics.[31] Additionally, the Conference and the Committee have repeatedly expressed the view that the sentencing ranges for drug offenses should be set irrespective of statutory mandatory minimum penalties so that the full array of aggravating and mitigating circumstances can be taken into account.[32]

In February 2012, Chief Circuit Judge Theodore McKee, United States District Judge Paul J. Barbadoro, and Chief United States District Judge M. Casey Rodgers testified on behalf of the Committee on Criminal Law before the Commission.[33] Their testimony addressed numerous issues relevant to the state of federal sentencing during the advisory guidelines era and proposals for legislative changes.[34] The Committee reiterated the Judicial Conference's longstanding and consistent support for flexibility in guidelines sentencing. Additionally, it discussed the Conference's position on various post-*Booker* sentencing options. In particular, the Conference has considered and rejected a number of potential legislative responses and concluded that there were no readily available

[27] JCUS-SEP 06, p. 18. Under the "Anti-Drug Abuse Act of 1986," Pub. L. No. 99-570, 100 times as much powder cocaine as crack cocaine was needed to trigger the same statutory mandatory minimum sentences.

[28] JCUS-SEP 13, p. 17. This proposed legislation would amend 18 U.S.C. § 3553 to permit a sentencing judge to impose a sentence below a statutory minimum "if the court finds that it is necessary to do so in order to avoid violating the requirements" of section 3553(a) (namely, the statutorily enumerated purposes of sentencing).

[29] JCUS-MAR 14, p. 16. This proposed legislation would expand the safety valve mechanism in 18 U.S.C. § 3553(f) to authorize more defendants to be sentenced below an applicable mandatory minimum penalty, lower mandatory minimum penalties in certain drug offenses, and make the "Fair Sentencing Act of 2010" applicable to inmates who were sentenced before the Act was passed.

[30] JCUS-SEP 90, p. 69.

[31] Judicial Conference of the United States, *Long Range Plan for the Federal Courts,* Recommendation 30 (Dec. 1995). The *Long Range Plan* was the first comprehensive long-range strategic plan for the federal judiciary.

[32] *See e.g.,* Letter from Chief Judge Irene B. Keeley, Chair, Committee on Criminal Law, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission (March 11, 2014) (supporting a proposed amendment to lower the drug offense levels in the Sentencing Guidelines based on the Committee's longstanding position that the Guidelines should be de-linked from mandatory minimums); Letter from Judge Robert Holmes Bell, Chair, Committee on Criminal Law, to Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate (September 17, 2013). ("Consideration of mandatory minimums in setting Guidelines' base offense levels normally eliminates any relevance of the aggravating and mitigating factors that the Commission has determined should be considered."); Letter from Judge Paul Cassell, Chair, Committee on Criminal Law to Judge Ricardo Hinojosa (March 16, 2007) ("If the Commission were to independently set the base offense level to reflect the seriousness of the offense, in its own expert opinion and irrespective of the mandatory minimum term of imprisonment, then the courts would have some benchmark to use when the mandatory minimum would not apply."); Letter from Judge Sim Lake, Chair, Committee on Criminal Law to members of the U.S Sentencing Commission (March 8, 2004) ("The Judicial Conference has repeatedly expressed concern with the subversion of the sentencing guideline scheme caused by mandatory minimum sentences, which skew the calibration and continuum of the guidelines and prevent the Commission from maintaining system-wide proportionality."); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary,* 103rd Cong. 66, 108 (July 28, 1993) (statement of former Criminal Law Committee Chair Vincent L. Broderick) ("[M]andatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well.").

[33] Judge McKee and Judge Barbadoro testified at a hearing on February 16, 2012, titled "Federal Sentencing Options after *Booker*." Judge McKee testified as part of a panel on "Restoring Mandatory Guidelines." Judge Barbadoro testified as part of a panel on the "Current State of Federal Sentencing." The purpose of the public hearing was for the Commission to gather testimony from invited witnesses on federal sentencing options pursuant to *United States v. Booker*. Judge Rodgers testified at a hearing on February 15, 2012, titled "Federal Child Pornography Crimes" as part of a panel on "Policy Perspectives from the Courts, the Executive, and the Defense Bar." The purpose of the public hearing was for the Commission to gather testimony from invited witnesses regarding the issue of penalties for child pornography offenses in federal sentencing.

[34] In October, 2011, Judge Patti B. Saris, then-Chair of the Sentencing Commission, testified before the U.S. House of Representatives regarding the state of federal sentencing since *Booker* and the Sentencing Commission's role in sentencing. *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Congress (2011) (statement of Hon. Patti Saris). The Commission proposed five statutory suggestions to "improve sentencing in light of *Booker* and its progeny." Specifically, it proposed that Congress enact a more robust appellate review standard; require that the greater the variance from the guideline range, the greater should be the sentencing court's justification; require a heightened standard of review of sentences imposed as a result of policy disagreements with the guidelines; clarify statutory directives regarding offender characteristics to sentencing courts (in 18 U.S.C. §3553(a)) and the Commission (in 28 U.S.C. § 994) that are "in tension"; and require that sentencing courts give "substantial weight" to the guidelines at sentencing, and codify the "three-step sentencing process," which requires the courts to: (1) calculate the appropriate guideline sentence; (2) consider any available departure provisions set forth in the Sentencing Guidelines; and (3) consider whether the sentence reached after steps one and two results in a sentence that is sufficient but not greater than necessary as mandated by 18 U.S.C. § 3553 (a) (2). These recommendations were subsequently included in the Commission's December 2012 report to Congress, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing.*

superior alternatives to an advisory guideline system.[35]

Finally, the Committee's testimony included an empirical assessment of the advisory system and concluded that it is working well, particularly when compared to available alternatives. It noted that the vast majority of district judges believe that the advisory guidelines system is the best available alternative because it provides judges with a starting place and initial benchmark to determine the sentence, but allows sufficient flexibility to deviate from the guideline recommendation to account for individual circumstances. As the committee members testified, the partnership between district judges (subject to appellate review) and the Sentencing Commission in an advisory guidelines system appears to be the most effective structure for achieving the statutory purposes of sentencing and maintaining the appropriate balance of discretion.

In November 2015, Chief Judge Irene M. Keeley, then-Chair of the Committee on Criminal Law, testified before the Sentencing Commission regarding proposed amendments to revise the Sentencing Guidelines' definition of "crime of violence" that is used to determine whether a defendant is subject to a longer sentence for a prior violent criminal history.[36] Judge Keeley testified that the Committee favored the proposed amendment because it would make the Guidelines more clear and workable. Finally, in February 2016 I testified before the Commission on behalf of the Committee on Criminal Law regarding proposed amendments to the Sentencing Guidelines concerning the conditions of probation and supervised release.[37] At the hearing, I expressed the Committee's support for the Commission's proposed amendments to revise, clarify, and re-arrange the conditions. These amendments were consistent with changes endorsed by the Committee after an exhaustive review by the Committee and Administrative Office staff with the assistance of a group of probation officers from throughout the country.[38] Additionally, they were the product of close collaboration between the Committee and the Sentencing Commission and were informed by the feedback of other stakeholders, including the Department of Justice, the Federal Defenders, and courts and probation offices in individual districts.

Implementation of Retroactive Guideline Amendments

The Committee on Criminal Law has provided feedback on, and assisted with the implementation of, retroactive application of amendments to the Sentencing Guidelines several times over the past 25 years.[39] Most recently, it has had an active role in the retroactive application of Sentencing Guidelines for drug offenses. In November 2007, the Committee recommended that amendments that lowered the guideline ranges in crack cocaine offenses should be applied retroactively by the Sentencing Commission. As explained in a letter to the Commission by former United States District Judge Paul G. Cassell, then-Chair of the Committee, the Committee was concerned about the "corrosive effect" of the disparity between crack and powder sentences, and it stated that "[w]hile concerned about the impact that retroactivity may have on the safety of communities, a majority of the Committee believes that the Commission's precedents, and a general sense of fairness, dictate retroactive application."[40] The Committee also noted that significant workload would result from the retroactive application of the amendment and should be addressed.[41] In the letter to the Commission, Judge Cassell summarized the Committee's approach to balancing the burdens on the courts with the benefits of making amendments retroactive:

> One possible countervailing consideration to . . . making the crack amendment retroactive . . . is the administrative burden upon the courts that would be associated with resentencing crack offenders whose sentences have previously been determined. The Criminal Law Committee believes that, in evaluating such considerations, an extremely serious administrative problem would have to exist to justify *not* applying the amendment retroactively. After all, some offenders are spending several additional years in prison because of the now-disavowed guideline level. Presumably this is why the Commission has frequently made its amendments to drug quantity guidelines retroactive in the past rather than have an offender spend substantial time in prison on a discredited guideline. More important, we believe that steps can be taken to reduce the amount of court time that will be required to resentence crack offenders who qualify for the reduction.[42]

[35] These potential responses include the "topless guidelines" proposal that would raise the top of sentencing guideline ranges to be coterminous with the statutory maximum, the expanded use of mandatory minimum sentences, and the "Blakelyization" of mandatory sentencing guidelines, which would incorporate the right to jury fact-finding in the sentencing guidelines system.

[36] The Commission held this hearing on November 5, 2015. Judge Keeley testified on a panel titled "Views from the Judiciary." Under the Armed Career Criminal Act (ACCA), a defendant with three prior convictions for a "violent felony" is subject to an increased prison term (18 U.S.C. § 924(e)(1)). The term "violent felony" is defined in 18 U.S.C. § 924(e)(2)(B), and the so-called "residual clause" found in subparagraph (ii) includes any felony that "involves conduct that presents a serious potential risk of physical injury to another." In its June 26, 2015, opinion in *Johnson v. United States*, 135 S.Ct. 2551 (2015), the Supreme Court held that the ACCA's residual clause was unconstitutionally vague and that an increased sentence under that provision violated the Constitution's guarantee of due process. On August 7, 2015, the Commission voted to publish for public comment proposed amendments to the Sentencing Guidelines. The proposed amendment, among other things, revised the definition of "crime of violence" that is found in the section of the Guidelines used in determining whether a defendant is a "career offender." Specifically, the amendment deleted from that section the same language in the ACCA's residual clause that the Supreme Court found to be unconstitutionally vague.

[37] The Commission held this hearing on February 16, 2016. I testified on a panel titled "Conditions of Supervision: Views from the Judiciary."

[38] *See* Stephen E. Vance, *supra* note 19.

[39] For a comprehensive overview of the Committee's past positions on retroactivity, *see* June 10, 2014 Public Hearing of the U.S. Sentencing Commission (statement of Chief Judge Irene M. Keeley, Chair, Committee on Criminal Law).

[40] Letter from Judge Paul Cassell, Chair, Committee on Criminal Law, to Judge Ricardo Hinojosa, Chair, U.S. Sentencing Commission (November 2, 2007).

[41] Reviewing each retroactivity petition consumes the resources of judges, clerks office staff, federal public defenders, and probation officers. If a reduction in the sentence is granted, Bureau of Prisons staff and probation officers must also begin the process of developing and implementing a release plan.

[42] *See also* November 13, 2007 Public Hearing of the U.S. Sentencing Commission (statement of Reggie B. Walton, Member, Committee on Criminal Law) ("[I]n my own deliberations on this matter, I was gravely concerned about the potential adverse impact that retroactivity could have on the courts, the probation and pretrial services system, and the communities into which offenders will return upon their release. Only after considering the procedures that can be implemented to mitigate the impact, and only after weighing the representation [of a chief

The Sentencing Commission ultimately voted to make the amendment retroactive, and the successful management of inmates released to the community was due to several factors. First, in many districts there was close coordination between probation officers, Bureau of Prisons staff, assistant U.S. attorneys, assistant federal public defenders, and the courts, which helped streamline procedures, prioritize cases, and allow for careful evaluation of inmates' petitions. Second, lists containing the names of inmates thought to be eligible were prepared and disseminated by the Sentencing Commission and others, making it easier for probation staff and others to pull case files, screen and prioritize cases, and track workload. Third, the Commission's decision to delay the effective date of the retroactive amendment gave the courts and the BOP time to develop plans and train staff in new procedures. Fourth, two national "summits" were conducted, led by the Committee on Criminal Law and in partnership with the Commission and Bureau of Prisons. The summits allowed districts to send a small group to hear from national agency representatives and share ideas on best practices. Finally, a new national judgment form was created by the Committee on Criminal Law in cooperation with the Sentencing Commission, which facilitated the reporting of the court's decision as well as the Commission's analysis of the outcomes. The lessons learned from the 2007 amendment proved to be helpful in managing the workload from subsequent retroactive applications of Sentencing Guideline amendments.

In February 2011, the Committee on Criminal Law again recommended to the Sentencing Commission that amendments that lowered the guideline ranges in crack cocaine offenses should be applied retroactively. In his testimony before the Commission on behalf of the Committee, Judge Reggie Walton noted that, while the workload associated with considering sentencing reductions in 2007 was well managed, steep reductions to discretionary spending in 2011 were expected to place a great deal of strain on the courts, including federal defenders, probation officers, and court staff.[43] The Committee reiterated, however, that "an extremely serious administrative problem would have to exist to justify *not* applying the amendment retroactively," and that such a problem did not exist.[44] Judge Walton concluded:

> [A]mendments that reduce . . . disparity should equally apply to offenders who were sentenced in the past as well as offenders who will be sentenced in the future . . . If the guideline is faulty and has been fixed for future cases, then we also need to undo past errors as well. Put another way, a crack offender's sentence should not turn on the happenstance of the date on which he or she was sentenced. Equity and fundamental fairness suggest that a crack offender who committed a crime in 2009 should be treated the same under the guidelines as a crack offender who committed exactly the same crime in 2011.[45]

Finally, in June 2014, the Committee on Criminal Law recommended that the Sentencing Commission apply an amendment reducing sentences for all drug types retroactively. As then-Chair of the Committee Judge Irene M. Keeley explained in her testimony before the Commission:

> The driving factor for the Committee's decision was fundamental fairness. We do not believe that the date a sentence was imposed should dictate the length of imprisonment; rather, it should be the defendant's conduct and characteristics that drive the sentence whenever possible. The retroactive application of the amendment in this case will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future. Another important consideration for the Committee's position is that the retroactive application of the amendment will further reduce the influence of mandatory minimums on the Sentencing Guidelines and, in turn, reduce the disproportionate effect of drug quantity on the sentence length.[46]

Judge Keeley noted, however, the diminishing resources of the probation and pretrial services system, the significant workload demands that flow from retroactivity of Guideline amendments, and the fact that there was no guarantee that sufficient resources would be available on the date the new amendment went into effect on November 1, 2014. She expressed the Committee's view, therefore, that there should be a delay in the date an inmate can be eligible for release.[47] The Sentencing Commission ultimately voted to make the amendment retroactive, but delay the release of any inmate whose sentence is reduced until November 1, 2015. As in past retroactivity efforts, the Sentencing Commission and the Committee—together with the Bureau of Prisons, the Department of Justice, the Federal Judicial Center, and other stakeholders—worked collaboratively to streamline procedures and prioritize cases in order to successfully manage the influx of inmates released to the community.

V. Conclusion

Beginning in the early part of the twentieth century, the Judicial Conference of the United States, its Committee on Criminal Law, and the Administrative Office of the U.S. Courts played a significant role in recommending, developing, and implementing sentencing policy in the federal courts. Since the implementation of the SRA thirty years ago, these entities have worked collaboratively with the United States Sentencing Commission and other stakeholders in numerous ways

probation officer] that probation offices can handle the anticipated increased workload, did I determine that under the circumstances, fundamental fairness compels retroactivity. . . . Fundamental fairness *does* compel retroactive application of the guideline amendment. . . . Therefore, if . . . the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act. . . . then the same logic applies to those who were sentenced last year, or five years ago, as to those who will be sentenced for crack tomorrow. . . . The legislative history of the Commission's retroactivity authority suggests that Congress conferred this authority to the Commission in order to cope with *precisely* this kind of situation. Retroactivity was not intended as an instrument to make isolated or minor adjustments; rather, it was meant as a means to make sweeping and serious changes: changes precisely like those associated with crack retroactivity.") (emphasis in original).

[43] June 1, 2011, Public Hearing of the U.S. Sentencing Commission (statement of Reggie B. Walton, Member, Committee on Criminal Law)

[44] *Id.*

[45] *Id.*

[46] *See* statement of Chief Judge Irene M. Keeley, Chair, Committee on Criminal Law, *supra* note 39.

[47] This delay, Judge Keeley explained, would allow the courts and probation offices across the country to first manage the influx of petitions and then, once the surge of petitions has been addressed, pivot available resources to deal with the increase in the number of offenders received for supervision to minimize the threat to community safety stemming from too many inmates being released without adequate planning and supervision.

to inform and implement sentencing policy. This article has highlighted several examples, including creating and approving national policy guidance regarding the development of presentence investigation reports; developing national judgment and statement of reasons forms for use by courts; and providing judiciary feedback on proposed changes to sentencing legislation and the Sentencing Guidelines and implementing retroactive application of Guideline amendments. In the future, the federal judiciary will continue to work collaboratively with the Sentencing Commission and other branches of government to pursue a just, fair, and effective sentencing system.