The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform

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COMMENT

THE PROCESS IS THE PROBLEM: LESSONS LEARNED
FROM UNITED STATES DRUG SENTENCING REFORM

Erik S. Siebert *

I. INTRODUCTION

The United States drug sentencing structure is one of the most complex, commonly used, and criticized systems in the federal courts. From its clear and focused origin, the federal sentencing system has morphed into a tangled mass of rules and regulations that few grasp and even fewer like. It has been criticized for being unfair and racially discriminatory, for being overly complex and cumbersome, and for intruding upon the judicial discretion inherent in judging. It is hard to identify any aspect of the federal

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sentencing system that has not met censure from some concerned dissident.

Yet, despite widespread criticisms of the federal sentencing system, few commentators have looked to the process of sentencing reform as an explanation for its failures. Particularly in the context of cocaine sentencing, the analysis has tended to take place at the end mark, ignoring the compromises and processes along the way. This is unfortunate, for the players and processes themselves provide a veritable gold mine of information, waiting to be extracted for a richer understanding of the problem and providing our only real chance for recovery.

This paper serves to fill that gap, using the history, players, and processes involved as a means to refocus sentencing reform. Part II provides a historical overview of drug sentencing from its conception to its current state. Part III looks at drug sentencing reforms, identifying the players involved and explaining their diverse motivations. Part IV presents lessons learned and proposes a moderate set of normative remedies. Relying on a host of self-interested institutional actors to institute change, reform measures thus far have managed to bring about a system totally void of direction, obscuring arguably the greatest obstacle in the road to an effective sentencing system: the process itself.

II. HISTORY OF UNITED STATES SENTENCING

The history of United States sentencing reform reveals eight significant changes, and numerous proposed alterations, since 1984. Much like a schizophrenic patient, sentencing reform has taken on multiple personalities over time and has now been left to wander the halls of federal courthouses with no clear focus, murmuring about its once clear past. In the discussion below, I illustrate this point by tracing the history of sentencing reform from its clear conception to its current confused state.

4. See generally 1997 COCAINE REPORT, supra note 1, at 1 (concurring opinion of Michael S. Gelacak) (analyzing the sentencing structure based on results rather than the process it took to determine the sentence); Nunn, supra note 1, at 397 (looking at the results of the sentencing rather than how those sentences came to be).
A. Pre-Sentencing Guideline Era

From 1776 until 1984, the United States federal sentencing system underwent relatively little reform. Until 1910, federal sentencing was largely based on a legislatively prescribed determinate sentencing system with virtually no appellate review.5 The first major federal sentencing reform occurred in 1910 and stemmed from the acceptance of the rehabilitation theory of punishment.6 Under this sentencing approach, which lasted in federal law until 1984,7 Congress devised a power-sharing scheme based on an indeterminate sentencing structure.8 This scheme called for Congress to set the maximum penalties, for judges to impose the appropriate sentences from a specific range, and for parole officials to determine the length of individual sentences.9 The length of a sentence rested on the length of time it would take a particular individual to reform, as determined by an individual judge and a parole board’s assessment.10

Support for the indeterminate system lasted until the mid-1970s when a growing public interest in the criminal justice system resulted in a wave of criminological research.11 From this research, empiricists claimed that offenders were not getting rehabilitated in the prison systems,12 and that discrimination in

5. See Ilene H. Nagel, Foreword, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. CRIM. L. & CRIMINOLOGY 883, 892–93 (1990). In a legislatively prescribed determinate sentencing system, a federal judge’s only discretion in sentencing is between appropriate ranges, as the period of incarceration for a particular crime is already determined by Congress. Id. at 892.
6. See id. at 893–95. The rehabilitation theory of punishment focuses on crime as a disease in which punishments are used to reform the criminal. Id. at 893. It was first brought to the country’s attention in 1870, causing many states to adopt an indeterminate judicially-imposed sentencing system. Id. at 893–94. Congress adopted this approach in 1910, which existed with popularity until the 1960s. Id. at 894–95.
7. Id. at 898–99.
8. Id. at 893–95.
9. Id. at 894–95; see also Act of June 25, 1910, ch. 387, 36 Stat. 819 (creating boards of parole at each United States penitentiary).
10. See Nagel, supra note 5, at 894–95; see also S. REP. NO. 98-225, at 38 (1983).
11. Nagel, supra note 5, at 895–96 (calling this public interest in the criminal judicial system “a crime research boom time” (quoting Leslie T. Wilkins, Disparity in Dispositions: The Early Ideals and Applications of Guidelines, in SENTENCING REFORM: GUIDANCE OR GUIDELINES? 7, 11 (Martin Wasik & Ken Pease eds., 1987))).
sentencing was at intolerable levels. The leading voice challenging the rehabilitation and indeterminate sentencing structures was judicial scholar Marvin Frankel. In the 1970s Judge Frankel’s written works and lectures gave credibility to critics of the sentencing system and sparked Congress to take a more serious look at reforming sentencing approaches.

With the theory of rehabilitation losing credibility and new disparities in sentencing exposed, Congress considered bold steps to reform the sentencing system. In 1976, Senator Edward Kennedy proposed a comprehensive bill to establish sentencing guidelines, with subsequent proposals introduced in the 95th, 96th, and 97th Congresses. These proposals ultimately culminated in the bipartisan introduction of the Sentencing Reform Act of

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14. See Nagel, supra note 5, at 899 (describing Judge Frankel’s series of key lectures at the University of Cincinnati Law School that led to a series of sentencing policy workshops at Yale Law School); see also Marvin E. Frankel, Criminal Sentences: Law Without Order (1973).


16. S. 2699, 94th Cong., 121 Cong. Rec. 37,563 (1976). The bill proposed that federal judges should be guided by uniform goals and purposes during the application of such guidelines. Id. at 37,563–64.

After this Act was introduced, the Reagan administration proposed its own bill in an effort to gain widespread congressional support. Later in 1983 the Senate Judiciary Committee filed a comprehensive report on sentencing reform, which concluded that the federal sentencing system “had failed, and most sentencing judges as well as the Parole Commission agree[d] that the rehabilitation model is not an appropriate basis for sentencing decisions.” This report also specified that “[t]he purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.” With bipartisan support against the indeterminate sentencing system, Congress moved to put these reform proposals into practice.

B. Sentencing Reform Act of 1984

The passage of the Sentencing Reform Act of 1984 (“SRA”), on October 12, 1984, marked the opening shots in a new battle for control over sentencing. In the SRA, Congress established the United States Sentencing Commission as an independent judicial agency to promulgate mandatory sentencing guidelines. In addition, the SRA eliminated parole and also instructed federal district judges to consider a variety of legislatively determined factors in sentencing. Upon taking over the general sentencing

21. Id. at 52.

(1) the nature and circumstances of the offense and the history and characte-
structure itself, Congress next moved to control specific hot button issues in criminal law.

C. Anti-Drug Abuse Act of 1986

By the mid-1980s, crack cocaine and the violence associated with the illegal drug trade became a widespread concern of the media and the public. With the 1986 election looming and the tragic death of basketball star Len Bias fresh in the public’s mind, Congress rallied for a swift and substantial legislative response. Various crack-to-cocaine sentencing disparity proposals were submitted over a two-month span, ranging from a 20-to-1 proposal introduced by the Reagan Administration, to a 50-to-1 proposal introduced by House Democrats, to a 100-to-1 proposal introduced by Senate Democrats. Ultimately, the House Democrats’ proposal was enacted as the Anti-Drug Abuse Act of 1986 (“1986 ADAA”), which established mandatory minimum sentences for trafficking in crack cocaine and powder cocaine. The mandatory minimums set by Congress identified two drug weight trigger points: (1) 5 grams of crack or 500 grams of powder for a five-year mandatory minimum sentence and (2) 50 grams of crack or 5000 grams of powder for a ten-year mandatory minimum sentence. With the mandatory minimum sentences set forth in the 1986 ADAA, Congress stepped aside and left the next moves in

**Id.**


29. Chanenson, supra note 27, at 557.


34. Id. § 1002, 100 Stat. at 3207-2 to 3207-3 (codified at 21 U.S.C. § 841(b)(1)(A)–(B) (2006)).
fulfilling the other reform promises made by the SRA to the Sentencing Commission.

D. Sentencing Guidelines of 1987

Based on the SRA’s directive to promulgate a system of detailed mandatory sentencing guidelines, the Sentencing Commission submitted to Congress its original Sentencing Guidelines and policy statements on April 13, 1987.\textsuperscript{35} Addressing drug sentencing levels, the Sentencing Commission used the designated drug quantity levels from the 1986 ADAA to impose a 100-to-1 crack-to-cocaine ratio in the Sentencing Guidelines.\textsuperscript{36} The Sentencing Commission also used the mandatory minimum sentences from the 1986 ADAA as a baseline to set proportionate sentences for the full range of other powder and crack cocaine quantities.\textsuperscript{37}

The Sentencing Commission’s guidelines, which became effective November 1, 1987, were not initially implemented due to constitutional challenges to the SRA.\textsuperscript{38} According to one study, of the nearly 300 challenges to the SRA heard by the district courts in 1988, 179 invalidated the guidelines, while 115 sustained the constitutionality of the guidelines.\textsuperscript{39} The basis for these challenges centered primarily on perceived violations of the delegation and separation of powers doctrines.\textsuperscript{40} This attack on the Sentencing Guidelines in the lower courts culminated in the Supreme Court’s decision in \textit{Mistretta v. United States}, which upheld the constitutionality of the SRA and the Sentencing Commission.\textsuperscript{41}

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\textsuperscript{37} See id.
\textsuperscript{39} Id. at 1403 & n.106.
\textsuperscript{40} See id.
\textsuperscript{41} 488 U.S. 361, 412 (1989) (“The Constitution’s structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory discretion as is present here.”).
\end{flushleft}
E. Anti-Drug Abuse Act of 1988

By 1988 drug-related violence was still rising as homicides and gang violence were increasing at record rates in many major urban areas. In an effort to address areas not specified in the 1986 ADAA, Congress considered a series of new mandatory penalties and strengthened some already in place. In the Anti-Drug Abuse Act of 1988 (“1988 ADAA”), Congress included a death penalty provision for drug-related convictions, created a “drug czar” to coordinate drug-related crime control measures, and expanded international drug control efforts.

F. Violent Crime Control and Law Enforcement Act of 1994

Faced with criticisms and concerns from its broad sentencing reform steps, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994 (“1994 Act”). Under the 1994 Act, the Sentencing Commission was required to issue a report to Congress “on issues relating to sentences applicable to offenses involving the possession or distribution of all forms of cocaine.” More specifically, the 1994 Act required the Sentencing Commission to “address the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Sentencing Commission may have for retention or modification of such differences in penalty levels.” With the passage of this new reporting system, Congress renewed its active role in the sentencing process.

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43. Id.
50. Id. tit. XXVIII, § 280006, 108 Stat. at 2097.
51. Id.
The 1994 Act’s passage forced the Sentencing Commission to issue reports to Congress recommending various sentencing reforms.52 Most noticeably, these reports conveyed the findings of Sentencing Commission hearings regarding the 100-to-1 crack-to-cocaine disparity and urged Congress to lower the disparity.53 However, as discussed below, the reports achieved little practical success other than to provide political cover for Congress.

1. 1995 Report

On February 28, 1995, the Sentencing Commission issued its first comprehensive report to Congress recommending changes to the current cocaine sentencing scheme, including a reduction in the 100-to-1 punishment ratio between crack and powder cocaine.54 Most importantly, however, the Sentencing Commission concluded that “the most efficient and effective way for Congress to direct cocaine sentencing policy is through the established process of sentencing guidelines, rather than relying solely on a statutory distinction between the two forms of the same drug.”55 Additionally, in 1995 the Sentencing Commission proposed several amendments to the Sentencing Guidelines.56 Most significantly, Amendment Five proposed an elimination of the 100-to-1 ratio in sentencing, abandoning the distinction between crack and powdered cocaine.57 Congress later rejected Amendment Five58 but directed the Sentencing Commission to make further recommendations regarding the crack-to-powder disparity.59
2. 1997 Report

The Sentencing Commission’s next report, issued in April 1997, reiterated that the 100-to-1 ratio “cannot be justified.” The Sentencing Commission recommended lowering the trigger for the five-year mandatory minimum sentence for cocaine and raising the trigger for crack, creating a 5-to-1 ratio for crack and cocaine sentences. Based on these findings, Attorney General Janet Reno and Drug Czar General Barry McCaffrey recommended a reduction in the guideline ratio triggers to 25 grams for crack and 250 grams for powder cocaine. The Clinton administration countered by publicly proposing a reduction of the ratio to 10-to-1, whereby possession of 25 grams of crack and 250 grams of powder cocaine would result in the five-year mandatory minimum sentence. Despite these various proposals, Congress introduced no bill.

3. 2002 Report

In May 2002 the Sentencing Commission issued a series of reports, recommending that Congress adopt a three-pronged approach for revising federal cocaine sentencing policy. The Sentencing Commission again recommended a substantial decrease in the 100-to-1 ratio, while essentially proposing a 20-to-1 ratio, which would be achieved by raising the thresholds for crack and

(and) (C) if the Government establishes that a [particular powder cocaine trafficker] has knowledge that such cocaine will be converted into crack cocaine . . . the [trafficker] should be treated at sentencing as though the [trafficker] had trafficked in crack cocaine”).

60. See 1997 COCAINE REPORT, supra note 1, at 2.
61. Id.
maintaining the thresholds for powder.66 Despite these recommendations, Congress failed to act.67

H. Feeney Amendment

The 2003 Feeney Amendment tightened the appellate standard of review for all departures from the Sentencing Guidelines,68 and, in particular, called on the Sentencing Commission to reduce the incidence of downward departures.69 Specifically, the Feeney Amendment required the United States Department of Justice ("DOJ") “to take a more aggressive role in policing guidelines compliance and resisting downward departures ‘not supported by the facts and the law.’”70 With Congress placing the DOJ in the position of monitoring individual sentencing decisions, it was only a matter of time before the judicial branch reacted.

I. Judicial Sentencing Reform

By the mid-1990s, the judiciary’s acceptance of the status quo seemed stable.71 Courts had rejected various constitutional challenges to the sentencing guidelines, grounded in the Fifth and Eighth Amendments, regarding the crack/powder sentencing disparity.72 But over a five-year span, the Supreme Court’s rulings on challenges to the constitutionality of the Sentencing Guide-

66. Id.
69. PROTECT Act of 2003, § 401(m), 117 Stat. at 675; see also Carol P. Getty, Twenty Years of Federal Criminology Sentencing, 7 J. INST. JUST. & INTL. STUD. 117, 121 (2007) (stating that the “[Feeney] [A]mendment required a district’s chief judge to submit a written explanation, with supporting documents such as the pre-sentencing report and plea agreement, to the Sentencing Commission within 30 days of a judge imposing a lenient sentence. Upon request, the Commission must pass along this data to the Justice Department and to the judiciary committees of both chambers of Congress.”).
71. Chanenson, supra note 27, at 565.
72. Id.
lines—based on the Sixth Amendment—would dramatically alter the sentencing landscape.  

1. *United States v. Booker*

In the landmark 2005 case, *United States v. Booker*, the Supreme Court held that mandatory federal sentencing guidelines violated the Constitution, requiring the guidelines to be strictly advisory in nature.  

In doing so, the Supreme Court recognized Congress’s basic statutory goal of creating a system that diminishes sentencing disparity. Thus, district court judges were directed to use a set of predetermined statutory factors, including the Sentencing Guidelines themselves, as their guiding principle. These factors required judges to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth” in 18 U.S.C. § 3553(a)(2). Having just upset the mandatory nature of the Sentencing Guidelines, the Supreme Court had an opportunity to deal directly with the cocaine sentencing laws.

2. *Kimbrough v. United States*

Two years after *Booker*, the Supreme Court in *Kimbrough v. United States* addressed the 100-to-1 crack-to-cocaine disparity by extending the advisory nature of the Sentencing Guidelines to the crack disparity guidelines. This decision gave federal district court judges discretion to brand policy decisions embedded in the

73. *Id.* The Sixth Amendment challenges to the Sentencing Guidelines questioned “the jury’s role in determining certain sentencing facts—facts that had previously been decided by a judge.” *Id.* See Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (holding that under a state sentencing guideline system, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings); Apprendi v. New Jersey, 530 U.S. 466, 476, 490 (2000) (holding that every fact that increases a defendant’s maximum potential sentence, other than a fact of a prior conviction, must be admitted by the defendant or proven to a jury beyond a reasonable doubt); Almendarez-Torres v. United States, 523 U.S. 224, 228–35 (1998) (holding that a defendant’s recidivism was not an element of the offense that could be determined by a judge at sentencing).


75. *Id.* at 250.

76. *Id.* at 264; see Chanenson, *supra* note 27, at 569.


Sentencing Guidelines as unreasonable when the result of a sentence conflicted with a list of statutory predetermined factors. However, the *Kimbrough* Court “strongly suggested that district courts do not enjoy the same sentencing discretion where Congress has unequivocally expressed its intent that the Sentencing Guidelines incorporate a particular policy choice.” Based on this decision, the Court ensured that the only truly binding aspect of a judge’s sentencing discretion in cocaine cases is the mandatory minimum sentence when the drug quantity triggers such a sentence.

3. *Gall v. United States*

In *Gall v. United States*, decided on the same day as *Kimbrough*, the Supreme Court identified abuse of discretion as the standard of review for federal criminal sentences. It also set forth a process for handling criminal sentencing appeals. In that process, the appellate court first must “ensure that the district court committed no significant procedural error,” and then must consider “the substantive reasonableness of the sentence imposed under an abuse of discretion standard.” By requiring district courts to follow procedure—meaning that the sentencing decision begins with the advisory Sentencing Guidelines or faces reversal—the *Gall* decision at least creates a uniform starting point.

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79. See *id.* at ___, 128 S. Ct. at 575.
81. See *Kimbrough*, 552 U.S. at ___, 128 S. Ct. at 572.
83. *Id.* at ___, 128 S. Ct. at 597.
84. *Id.* at ___, 128 S. Ct. at 597 (defining significant procedural error as “improperly calculating[ ] the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range”).
85. *Id.* at ___, 128 S. Ct. at 597 (stating that in conducting an abuse of discretion review, the court will “take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” (internal citation omitted)).
86. See *id.* at ___, 128 S. Ct. at 596; see also Hamilton, *supra* note 80, at 8 (suggesting
J. The Current Landscape

As a result of the judicial reform over the last few years, district courts are left with discretion they have not seen in decades.87 In addition, the Sentencing Commission in May 2007 issued a report urging Congress to shrink the 100-to-1 crack-to-powder disparity by requiring the possession of higher amounts of crack in order to trigger a mandatory minimum sentence.88 Supplementing this report was a proposed amendment, section 2D1.1, which asked for a reduction in the applicable sentencing ranges for all crack offenses by lowering the base offense score by two levels.89 On November 1, 2007 this amendment became law.90

Taking all these various reforms into account, it would appear that the only part of the SRA and the 1986 ADAA left untouched is the statutory mandatory minimum sentence for crack and cocaine offenders.91 As statutory law, these two acts will require further congressional action for reform. Absent that or the Supreme Court slowing it down, the shelf-life of these mandatory minimum statutes is indefinite.

III. Motivations and Players

As shown in Part II, the current sentencing process was not produced in one fell swoop; rather, it is a product of a number of different actors. This Part focuses on the actors and their motivations for revealing a problem in drug sentencing reform that other commentators have missed: the power struggles within the sentencing reform process. Two different types of power struggles have emerged. The first, which I call the struggle over “governing power,” concerns the authority to influence the overall sentencing

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87. See Hamilton, supra note 80, at 6–8 (describing the newly found discretion by way of the advisory nature of the Sentencing Guidelines (Booker), the 100-to-1 crack disparity (Kimbrough), and the process-driven appellate review (Gall)).
89. Id. at 9; see also U.S. SENTENCING GUIDELINES MANUAL 1156 (2007).
framework by defining the role and amount of influence for each governmental body involved. The second, which I call the struggle over “judgment power,” involves each actor’s control over the imposition of individual sentences. In simpler terms, by governing power, I mean the power to distribute authority to sentence, and by judgment power, I mean the power to actually sentence. Viewing sentencing reform as a series of power struggles reveals perhaps the most enduring, yet least recognized obstacle to serious sentencing reform: the process itself.

A. Executive Branch

The Executive Branch has primarily played a supporting role in sentencing reform over the last twenty-five years. Originally given a prominent place in determining the length of a prisoner’s sentence via the United States Parole Commission, the SRA eliminated parole and the Executive Branch’s primary role in the sentencing system. With no constitutional jurisdiction and little statutory authority to advocate decision-making roles—i.e., governing power—the Executive Branch has focused its attention on gaining greater influence in affecting individual sentences—i.e., judgment power—by aligning itself with Congress to achieve its goals.

1. Reagan Administration

The election of President Ronald Reagan marked a significant shift in crime policies, due largely to his belief that the drug problem and the larger crime epidemic were caused by “liberal judges who are unwilling to get tough with the criminal element in this

In order to limit the discretion of these “soft” judges, the Reagan Administration aligned with Congress to create a determinate sentencing system. Through the SRA, the Reagan administration was able to wipe out the indeterminate sentencing system and replace it with a determinate structure. With the creation of the Sentencing Commission and the Sentencing Guidelines, judicial discretion was constrained and a body comprised of members nominated by the President determined appropriate sentencing ranges. Reagan’s support for initiatives such as the 1986 ADAA and the 1988 ADAA, furthered his goal of taking away even more judicial discretion by imposing severe mandatory minimum sentences on specific drug crimes.

In addition, Reagan sharply criticized the belief that “big government” could solve social problems such as crime and shifted the blame onto individuals he held “responsible for their own destiny in this land of opportunity.” This shifting of responsibility for crimes to offenders explains another aspect of Reagan’s support for the SRA. More importantly, the SRA exemplified the end of the rehabilitation era by promulgating individualized factors for judges to consider in sentencing. As Assistant Attorney General Stephen S. Trott stated in reference to the new Sentencing Guidelines structure, “the particular history and characteristics of the defendant and the particular circumstances of the offense” will be taken into account during the sentencing process.


97. See generally 149 CONG. REC. 12, 357 (2003) (statement of Sen. Kennedy) (“The Sentencing Reform Act of 1984 was the result of extraordinary bipartisan cooperation. In the Senate Judiciary Committee, over a ten-year period, Senator Thurmond, Senator Hatch, Senator Biden, and I worked with the Carter and Reagan administrations to strike the best balance between the goal of consistent sentencing in Federal law and the need to give Federal judges discretion to make the sentence fit the crime in individual cases.”).


100. Miller, supra note 96, at 627–28 n.83 (quoting MARC MAUER, RACE TO INCARCERATE 60 (1999)).

In response to the rising political tide against drugs, and specifically crack, Reagan’s support for harsher drug penalties seemed a direct reaction to his feeling that the country must “go beyond efforts aimed at only affecting the supply of drugs; we must affect not only supply but demand.” The 1986 and 1988 ADAAs reflect this sentiment in that they impose heavy mandatory minimum sentences based on the quantity of drugs involved in the offense. More importantly, the Sentencing Guidelines gave DOJ prosecutors individual discretion in charging multiple offenses, charging mandatory sentencing provisions, and proving or abstaining from a list of aggravating or mitigating factors.

In sum, the Reagan administration saw changes in both governing power and judgment power. Governing power moved from the executive to the legislative branch via the SRA. On an individual basis, however, judgment power moved back to the executive branch via mandatory sentencing and prosecutorial discretion.

2. George H.W. Bush Administration

Continuing his predecessor’s campaign against drugs, President George H.W. Bush named the “War on Drugs” as his top domestic policy. Subsequently, President Bush’s administration is largely viewed in tandem with, or as the main implementer of, the Reagan sentencing reforms. Bush’s Reaganesque approach to the drug problem is evident in his 1992 National Drug Control

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103. See Wilkins, Jr. et al., supra note 42, at 315 (stating that opinion polls found that drug abuse was the number one public concern).


107. See Address to the Nation on the National Drug Control Strategy, 2 PUB. PAPERS 1136, 1136 (Sept. 4, 1989) (“[T]he gravest domestic threat facing our nation today is drugs.”).

Strategy Paper, which stated that “to explain the drug problem by pointing to social conditions is to ‘victimize’ drug users. . . . The drug problem reflects bad decisions by individuals with free wills.”

Despite the similarities, President Bush did differ with regard to the scope of the drug policies in his push for a national strategy. Unlike Reagan, Bush firmly encouraged a big-government approach by providing more funding, a larger criminal justice system, and more interaction between state and federal governments. Furthermore, Bush exercised influence over his own branch’s judgment power by centralizing and monitoring charge and pleading decisions within the DOJ. In the form of the Thornburgh Memorandum, Bush held all federal prosecutors to the Sentencing Guidelines’ structure of “real offense” sentencing and prohibited “fact bargaining” over sentencing enhancements. These moves reflected Bush’s belief in severe, yet uniform, sentences nationwide. Here, then, we see George H.W. Bush’s administration maintaining Reagan’s policies with regard to governing power, but attempting to further expand the Executive Branch’s judgment power.

3. Clinton Administration

The election of President Bill Clinton in 1992 marked a successful effort to cast Democrats as the party of “law and order.”

110. See Address to the Nation on the National Drug Control Strategy, supra note 107, at 1137 (“To win the war against addictive drugs like crack will take more than just a Federal strategy: It will take a national strategy, one that reaches into every school, every workplace, involving every family.”).
111. Id. at 1137–40.
113. David Yellen, Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 408 (1993) (defining a “real offense element” as any sentencing factor not included in the definition of the offense of conviction and either established at trial or admitted by the defendant as part of a guilty plea”).
115. Stith, supra note 112, at 1441.
By placing himself in the center of a major political divide on crime, Clinton promised “to ‘restore government [sic] as the upholder of basic law and order for crime-ravaged communities.’” In an effort to keep a political advantage on issues of crime, Clinton endorsed a wide variety of “tough on crime” provisions that placed the federal government in a more active role. In addition, throughout most of his administration, Clinton opposed the recommendations made by the Sentencing Commission in their reports regarding the 100-to-1 crack-to-cocaine disparity. Even with support for a reduction in the disparity by members of his own administration—namely Attorney General Janet Reno and Drug Czar Barry McCaffrey—Clinton did not act. Despite the expectations of many, Clinton’s need to prove his toughness on crime prohibited him from reforming any of the previous Republican administration drug sentencing laws. In turn, the status quo over the struggle for governing and judgment power remained.

4. George W. Bush Administration

President George W. Bush’s policies regarding drug sentencing largely concentrated on a continued centralization of judgment power and the monitoring of downward departures. President Bush’s centralization of judgment power was an outgrowth of his administration’s embrace of the unitary power theory. Under


118. See Natsu Taylor Saito, Interning the “Non-Alien” Other: The Illusory Protections of Citizenship, 68 LAW & CONTEMP. PROBS. 173, 200 (2005) (stating these provisions included placing an “additional 100,000 police officers on the streets, providing more funding for state prisons, adding a ‘three strikes’ mandatory life sentence provision, enhancing sentences for ‘gang members’ [and] directing the sentencing commission to increase penalties for offenses committed in newly designated ‘drug free zones’ . . .”).


120. See Christopher S. Wren, Reno and Top Drug Official Urge Smaller Gap in Cocaine Sentences, N.Y. TIMES, July 22, 1997, at A1 (noting, however, that Clinton privately signaled support for the recommendations that crack-cocaine sentencing disparities be reduced).


this theory, which provides that the Constitution grants the President the whole of executive power, President Bush justified and “subordinat[ed] all prosecutorial decision making to centralized control.” This centralization of judgment power is exemplified by Attorney General John Ashcroft’s 2003 memorandum, which enjoined all federal prosecutors to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney . . . .”

President Bush next persuaded Congress to pass the 2003 Feeney Amendment to monitor judicial discretion even further. Under this Act, Congress tasked the Executive Branch and the DOJ to monitor individual downward departures from the Sentencing Guidelines, adding an additional judgment power to the Executive Branch.

With regard to the crack sentencing disparity, Bush defied all expectations when he stated prior to his inauguration that the disparity “ought to be addressed by making sure the powder-cocaine and the crack-cocaine penalties are the same. I don’t believe we ought to be discriminatory.” However, this statement later conflicted with Bush administration statements. During 2002 testimony before the Sentencing Commission, Deputy Attorney General Larry D. Thompson stated that “[t]he current federal policy and guidelines for sentencing crackcocaine offenses are appropriate” and that crack “traffickers should be subject to significantly higher penalties than traffickers of like amounts of

124. Richman, supra note 122, at 1382.
powder [cocaine]."130 Despite the Bush administration’s stance, the Sentencing Commission proposed amending the Sentencing Guidelines in 2007 to eliminate the sentencing disparity.131

Here, then, we see significant changes in the nature of Executive power with regard to sentencing. With the initial transfer of governing power under Reagan from the Executive to Congress, subsequent administrations have worked to preserve that shift. Conversely, in terms of judgment power, the Executive has moved well past its original allotment, further expanding its control over individual sentencing.

B. Congressional Reform

Congress has played a pivotal role in the struggle for power in drug sentencing reform over the last twenty-five years.132 With the governing power to define federal crimes and establish the method and degree of punishment, sentencing reform has, until recently, been regarded as the exclusive domain of Congress. Congress’s decision to become involved in the federal sentencing scheme in the 1970s led to the overhaul of the indeterminate sentencing system and proved to be a massive power grab away from the judicial branch.133 The principal justification set forth by Congress for this grab centered on the ideological goal of uniformity.134 But as the opportunity for political gain became clear, both parties attempted to take the lead on issues regarding criminal enforcement.135

In dealing specifically with the drug sentencing laws, certain members of Congress have played the paradoxical role of taking a hardline stance on crack sentencing, yet protesting the effects of such an approach.136 Furthermore, both political parties aban-

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130. Id.
133. See id. at 1072.
135. See id. at 285.
doned traditional notions of platform ideology in an attempt to ensure their place at the forefront of “law and order” legislation.\(^{137}\) Playing on the public fears of lawlessness, racism, and unequal enforcement of the law, members of Congress have reshaped sentencing reform into a political weapon rather than a political objective. The following topics highlight the varying motivations behind congressional actors in their attempt to gain political advantage.

1. SRA

As mentioned earlier, the SRA originated from academic criticism of the indeterminate sentencing model which permitted judges and parole officials to exercise unguided discretion.\(^{138}\) This liberal criticism primarily focused on “unwarranted disparities,” including alleged bias against minorities,\(^{139}\) which it claimed was inherent in a judicial discretion model.\(^{140}\) Also unhappy with this judicial discretion model were critics from the political right, who condemned the perceived leniency of the sentencing structure and the rehabilitation system.\(^{141}\) With these two sides converging in a rejection of the indeterminate system, Senator Edward Kennedy saw a great opportunity for Congress to use its governing power to achieve a “net gain for civil liberties.”\(^{142}\)

To access the congressional governing power to implement reform, Senator Kennedy aligned himself with several powerful


\(^{139}\) 130 CONG. REC. 838–39 (1984) (statement of Sen. Joe Biden). Senator Biden, an important figure on the liberal side in enacting sentencing reform, stated that “most of the people who wind up in jail are people who are poor and people who are black and people who are from a minority, and some racists among us will say that is because that is how those folks are.” Id. at 839. He went on to note that “studies show the white middle-class guy gets a more lenient sentence than the black guy, and you know that is kind of disturbing.” Id. Senator Biden argued that judges were not making impartial decisions because they “are not color blind and judges do not leave their baggage at home.” Id.

\(^{140}\) See Stith & Koh, supra note 134, at 227.


\(^{142}\) See Reform of the Federal Criminal Laws: Hearing on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, 95th Cong. 9056 (1977) (statement of Alan Dershowitz, Professor, Harvard Law School). “Net gain for civil liberties” was a phrase coined by Professor Dershowitz, a consultant for Sen. Kennedy brought in to analyze a potential change in the indeterminate system. Id.
conservative senators, including conservative Democrat Senator John L. McClellan and Republican Senator Strom Thurmond.\footnote{Stith and Koh, supra note 134, at 232, 234.} Needing conservative support in the Senate, Senator Kennedy repeatedly compromised on a variety of legislation proposals calling for reform of the indeterminate system.\footnote{See id. at 286.} A complete passage of these sentencing reforms, however, was stalled due to the House Judiciary Committee’s fundamental belief that “judicial discretion in sentencing is a cornerstone of the criminal justice system . . . .”\footnote{H.R. Rep. No. 96-1396, at 489 (1980).} This stalemate within the legislature continued until 1984, when House Republican supporters of the Senate’s Comprehensive Crime Control Bill (which included Senator Kennedy’s Sentencing Reform Act) were able to attach the sentencing reform legislation to an urgent appropriations bill.\footnote{Stith & Koh, supra note 134, at 264 (citing Nadine Cohodas, Enactment of Crime Package Culmination of 11-Year Effort, 423 Cong. Q. 2752, 2752 (1984)).} Due to this surprising “parliamentary maneuver,” the SRA was passed by both houses of Congress and signed into law.\footnote{Id. at 277.}

House members’ resistance to these sentencing reform measures primarily focused on a rejection of the Senate’s underlying premise that the unjustified sentencing disparities were a result of judicial discretion.\footnote{See id. at 278 (citing S. Rep. No. 98-225, at 65 (1984)).} Opposition leaders in the House blamed these sentencing disparities on prosecutorial charging and sentencing practices.\footnote{See id. (citing S. Rep. No. 98-1017, at 34–35 & nn.34–35 (1984)).} But for the Senate leaders, a wide lack of confidence in the federal judiciary was the main motivation behind their efforts to reform the indeterminate system.\footnote{See id.\footnote{Nadine Cohodas, Guidelines for Judges: Sentencing Reform Measures Seek to Reduce Disparities, 41 Cong. Q. 337, 339 (1983).} As one Senate staff member stated, “If judges could fix the problem, why haven’t they? We’ve known for 12 years we’ve had a problem.”\footnote{Stith & Koh, supra note 134, at 279–80 (explaining how distrust of the judiciary resulted in only three judges receiving appointments to the Sentencing Commission).}} In short, distrust of the judiciary was the stimulus for the establishment of the Sentencing Commission and the strict Sentencing Guideline structure.
Due to the bipartisan approach in enacting the SRA, it should come as no surprise that both liberal and conservative influences on the new distribution of judgment power are present. Starting with Senator Kennedy’s early compromises with conservatives,\(^\text{153}\) the uniformity brought by the SRA has consistently been paired with tougher and harsher sentences in the Sentencing Guidelines.\(^\text{154}\) In addition, with the governing power regarding Sentencing Commission nominations largely in the hands of Republican administrations and a “law and order” Senate,\(^\text{155}\) the congressional intent behind the SRA, addressing “unwarranted disparities” and the leniency in sentences, has largely been fulfilled.\(^\text{156}\)

2. Racial Disparity

The passage of severe cocaine sentencing laws in the form of the 1986 and 1988 Anti-Drug Acts marks a “get tough” approach by Congress in dealing with drug crimes. Faced with tragic cocaine related deaths of famous athletes, polls showing drug abuse as the number one public concern, and regular reports on the issue by all forms of media, the government’s handling of drugs became a major political issue.\(^\text{157}\) Understandably vocal on the effect of drug abuse on their communities, many inner city leaders played an important role in encouraging drug legislation.\(^\text{158}\) This concern for drug abuse took the form of public statements by leaders of the African-American community in rallies held throughout the country.\(^\text{159}\) This public outcry made it difficult for any politician to resist reform out of fear of being labeled “soft on crime.”

\(^\text{153}\) See id. at 286.
\(^\text{154}\) See id. at 284–86.
\(^\text{155}\) See id. at 285.
\(^\text{156}\) See id. at 284.
\(^\text{157}\) See Wilkins, Jr. et al., supra note 42, at 315.
\(^\text{159}\) Actor Ossie Davis stated, “Just as in the past we fought slavery and we fought racism, we are going to fight drugs and the total indifference of those in power . . . . Unless the Federal, state and city governments are willing to put crack, other drugs and their attendant problems at the very top of their agendas, we are going to stay in the streets.” Id. at B1, B4.
Symbolic of this attitude among black leaders were numerous statements by Congressman Charles B. Rangel, a Democratic Representative from Harlem. Representative Rangel was particularly critical of the Reagan administration for what he perceived to be a lack of support for the “War on Drugs.” Prominent Democratic leaders used Representative Rangel’s outspokenness on the drug issue as a political opportunity to place white and black urban voters on the same side in the war on crime.

In addition to Representative Rangel, other political leaders argued for Congress to take action in addressing the crack epidemic using their judgment power. Faced with pressure from his own constituents, Speaker of the House Thomas P. “Tip” O’Neill, Jr., announced a five-week deadline for work on an omnibus anti-drug bill. Speaker O’Neill also called a Democratic leadership meeting in the House of Representatives to remind fellow Democrats that drugs would be a major issue in the 1986 mid-term elections. Assisting in the political effort to rally support for drug legislation was the House Democratic Leader Jim Wright, who felt the most pressing concern for Congress was to act before the media lost interest. On the Republican side, House Leader Robert H. Michel was largely concerned with the Democrat’s grabbing the drug issue and making it their own.

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161. Id. (quoting Rep. Rangel, who stated, “Even though the [Reagan] Administration claims to have declared a ‘war on drugs,’ the only evidence we find of this war are the casualties. . . . If indeed a war has been declared, I asked the question when was the last time we heard a statement in support of this war from our Commander in Chief.”).

162. See Joseph A. Califano, Jr., Tough Talk for Democrats, N.Y. TIMES MAG., Jan. 8, 1989, at 38 (describing a Democratic strategy to gain a political edge in crime by focusing on victims rather than criminal rights).

163. See Sterling, supra note 137, at 408.


165. See Peter Kerr, Anatomy of the Drug Issue: How, After Years, It Erupted, N.Y. TIMES, Nov. 17, 1986, at A1 (quoting Rep. Wright of Texas, who stated that “one of the unfortunate by-products of the television age is the short attention span of the American public. . . . We walk along fat, dumb, and happy until a crisis grabs us by the throat. Once it is off the front burner of nightly television coverage we go back to sleep”).

166. Id.
While the political climate advanced towards a tougher approach to drug sentencing, it did not take long before the same critics who called for the tough legislation began to question the effects. After the promulgation of the Sentencing Guidelines, various studies exposed the effects of the crack disparity legislation. A 1989 study comparing sentences between races found that African-Americans averaged seventy-one months incarceration compared with fifty months for whites and forty-eight months for Hispanics.\textsuperscript{167} Additional studies verified this trend, observing that between the years 1989 and 1992, not a single white person was tried for crack offenses in the federal courts of sixteen states.\textsuperscript{168} These revelations served as valuable political ammunition for critics of the mandatory minimum drug laws.

The first influential legislation attempting to eliminate the disparity between sentences for powder and crack was the Crack-Cocaine Equitable Sentencing Act of 1993, introduced by Representative Rangel.\textsuperscript{169} This bill, which made it to the floor of the House during debate on the omnibus crime bill in 1994, formed the basis of a congressional request for a study by the Sentencing Commission.\textsuperscript{170} Additional attempts at reform measures continued into the mid-90s.\textsuperscript{171} One stimulus for continued reforms was the case of Kemba Smith, who became an instant celebrity after receiving a twenty-four and one-half-year sentence as a non-violent first time drug offender.\textsuperscript{172} Smith’s conviction resulted from lying to federal prosecutors in an attempt to defend her drug-dealing boyfriend.\textsuperscript{173} Championing Smith’s cause were Representatives Robert C. Scott and Maxine Waters, who used this single African-American mother and former college student as an example of the


\textsuperscript{169} H.R. 3277, 103d Cong. (1993).


\textsuperscript{173} \textit{Id.}
unfairness in the disparity between crack and cocaine sentencing. 174

After repeated failed attempts, even under the Democratic Clinton administration, 175 advocates turned to a 2007 Sentencing Commission amendment in an attempt to achieve disparity reform. 176 This reform measure, although not eliminating the disparity, allowed for a deduction under the Sentencing Guidelines point system for crack offenders. 177 Emboldened by this latest effort, Representative Sheila Jackson-Lee, Senator Joseph R. Biden, and Representative Charlie Rangel all introduced bills seeking to eliminate the crack disparity in the 110th Congress. 178 None made it out of committee. 179 Despite widespread criticism, Congress appears to be unwilling to accept the political costs accompanying judgment power reform of the crack-to-cocaine sentencing disparity.

3. Requiring Sentencing Commission Reports

In direct response to the heavy criticism regarding the crack disparity issue, lawmakers were forced to pass legislation to address the differences in cocaine penalty levels in the form of the Violent Crime Control and Law Enforcement Act of 1994. 180 By calling for the Sentencing Commission to study the issue and

174. See id.
175. See Steven A. Holmes, Black Lawmakers Criticize Clinton Over Cocaine Sentencing, N.Y. TIMES, July 24, 1997, at A15 (documenting the Congressional Black Caucus’s harsh criticism of the Clinton Administration for not going far enough to convince Congress to cut the disparity between crack and powdered cocaine).
177. Id. § 201.1(c).
make a report, Congress used a separate non-elected entity to continue discussion of the disparity, while individual members could remain to appear tough on crime. However, despite years of Sentencing Commission recommendations in the form of reports and proposals to Congress against the crack disparity, congressional leaders refused to take a firm stand on the issue.\textsuperscript{181}

C. Sentencing Commission Reform

The Sentencing Commission’s position in this power struggle has depended on each of the three traditional branches of government. With Congress granting the Sentencing Commission the judgment power to study and recommend sentencing reforms, the Executive Branch nominating the Sentencing Commission members, and the Judicial Branch having a subscribed number of seats on the Sentencing Commission, this agency has primarily served as a battleground between the branches.\textsuperscript{182} Yet, because it possesses dominant governing power in the form of both ex post and ex ante oversight, Congress has always had the ability to punish and reward the Sentencing Commission based on its policy decisions.\textsuperscript{183} This oversight has left the Sentencing Commission susceptible to political pressure from Congress and ensured Congress’s control over the body.\textsuperscript{184}

1. Makeup of United States Sentencing Commission

Congress’s main objective for the makeup of the Sentencing Commission, promulgated in the SRA, was to create a sentencing body insulated from political pressure.\textsuperscript{185} To fulfill this goal, Congress envisioned creating an agency comprised of a group of experts who would set policy based on knowledge as opposed to politics.\textsuperscript{186} Seeing its own limitations in bringing about reform,

\begin{itemize}
  \item \textsuperscript{181} See Tison, \textit{supra} note 180, at 419–28.
  \item \textsuperscript{182} See Rachel E. Barkow, \textit{Administering Crime}, 52 UCLA L. Rev. 715, 758 (2005).
  \item \textsuperscript{183} See id. at 755.
  \item \textsuperscript{184} See id. at 754–57.
  \item \textsuperscript{185} See id. at 717–18.
  \item \textsuperscript{186} Id. at 717–18 (describing Sen. Kennedy as a leading proponent of the Sentencing Commission who argued for an independent body to take the guiding role in sentencing reform because it was not “likely that Congress could avoid politicizing the entire sentencing issue.”). See Edward M. Kennedy, \textit{Toward a New System of Criminal Sentencing: Law With Order}, 16 AM. CRIM. L. Rev. 353, 380 (1979).
\end{itemize}
Congress attempted to create a commission made of knowledgeable individuals, not dominated by one particular party, who served fixed terms and could not be removed but for good cause.\textsuperscript{187}

Although the push by Congress for an insulated commission was spun as an apolitical act by insightful public servants, Congress benefited greatly from the use of its governing power in developing the Sentencing Commission structure.\textsuperscript{188} First, in creating the Sentencing Commission as an independent body that would use its expertise to recommend solutions to the legislature, Congress could pass the difficult political issue of sentencing to the Sentencing Commission but keep up its tough on crime persona with the public.\textsuperscript{189} Second, Congress could legitimize the sentencing reforms by placing the Sentencing Commission in the Judicial Branch by allowing judges to serve as members, while giving the perception of cooperation in reform.\textsuperscript{190} Third, by creating a guideline-determinate system, Congress took judgment power away from individual judges and gave it to a body it perceived as strictly under its control.\textsuperscript{191} Fourth, Congress’s enactment of the SRA gave the Sentencing Commission clear tasks and instructions on its role, which left little room for independent maneuvering in actual reform.\textsuperscript{192}

While under heavy congressional influence, the Sentencing Commission’s makeup helps to explain the motivations behind drug sentencing reform. The Sentencing Commission is comprised of seven commissioners appointed by the president and confirmed by the Senate.\textsuperscript{193} These commissioners serve six-year terms and at least three commissioners are judges.\textsuperscript{194} Also included on the Sentencing Commission is an ex officio member, the

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\textsuperscript{187} See Barkow, supra note 182, at 757.
\textsuperscript{188} See id. at 760–62.
\textsuperscript{189} See id. at 759, 763–64.
\textsuperscript{190} See id. at 759.
\end{flushleft}
Attorney General, who has no voting power.\textsuperscript{195} The chair of the Sentencing Commission presides over meetings and directs funds.\textsuperscript{196}

Since its inception, the Sentencing Commission has had thirteen judges serve as commissioners, while every chairperson has come from the Judicial Branch.\textsuperscript{197} In addition, the only other professionals who have served on the Sentencing Commission are six attorneys, six law professors, and one Parole Commission member.\textsuperscript{198} This heavy slant towards legal professionals has hardly created a balanced group of experts.\textsuperscript{199} Blinded by institutional preference and lacking skills outside the purview of law, these experts bring nothing more than redundancy. More importantly, when judges serve on the Sentencing Commission, it seems reasonable to conclude that they would oppose any efforts to strip power away from judges.\textsuperscript{200}

2. Various United States Sentencing Commission Reports and Proposals

The judicial membership’s influence on the Sentencing Commission has manifested itself in numerous reports and proposals to Congress. Besides the strict limits set by Congress in the creation of the guideline system itself,\textsuperscript{201} the reports and proposals submitted by the Sentencing Commission have been unanimously against mandatory statutory penalties.\textsuperscript{202} The creation of the Sen-

\textsuperscript{197} U.S. Sentencing Comm’n, About the Commissioners, June 2009, http://www.ussc.gov/general/commbios99.htm [hereinafter Current Commissioners] (biographies of current commissioners); U.S. Sentencing Comm’n, Former Commissioners of the United States Sentencing Commission, http://www.ussc.gov/general/Oldcomms.htm (last visited Dec. 18, 2009) [hereinafter Former Commissioners]. Of the twenty-six people who have served on the Sentencing Commission, the following have served or are serving as the chair: Judge Diana Murphy, Judge Richard Conaboy, Judge William Wilkins, Jr., and Judge Ricardo Hinojosa. Current Commissioners, \textit{supra} note 197; Former Commissioners, \textit{supra}.
\textsuperscript{198} Current Commissioners, \textit{supra} note 197; Former Commissioners, \textit{supra} note 197.
\textsuperscript{199} Barkow, \textit{supra} note 182, at 763.
\textsuperscript{200} Id. at 759.
\textsuperscript{202} Chanenson, \textit{supra} note 27, at 563.
tencing Guidelines is an exception to this trend because, at the
time, the Sentencing Commission was a new organization which
wanted to earn Congress’s trust in accommodating statutory pe-
nalties. The Sentencing Commission reasoned that not taking
this initial step in earning Congress’s trust would lead to more
mandatory minimums and further diminish their judgment pow-
er in sentencing reform.

After implementation of the Sentencing Guidelines, the Sen-
tencing Commission began to realize the effect of the mandatory
minimum sentences on judicial discretion. Largely using the
crack-to-cocaine disparity problem as an example of the ineffi-
ciency of the mandatory minimum system, the Sentencing Com-
mision has consistently opposed the 100-to-1 ratio. Focusing on
such a politically and racially charged issue, the Sentencing
Commission has attempted to attack the mandatory minimum
sentencing structure as a whole. As early as 1991, the Sentencing
Commission issued a Special Report to Congress concluding that
there are numerous alternatives to a mandatory minimum sen-
tence system.

3. United States Sentencing Guideline § 2D1.1

Since Congress’s rejection of the 1995 amendment proposal ad-
dressing the crack disparity problem, the Sentencing Commission
has been reluctant to issue further amendments. However, with
the de-emphasis of crime as a national political issue and the
sweeping effect of Booker, the Sentencing Commission proposed
an amendment to United States Sentencing Guideline section
2D1.1 in 2007, which was enacted and served to lower the sen-
tencing ranges for all crack offenses. This first step in address-
ing the crack disparity issue allows individual judges to reduce a

203. Id. at 559 & n.41 (citing Hofer & Allenbaugh, supra note 201, at 35 n.68).
204. Hofer & Allenbaugh, supra note 201, at 35 n.68.
205. Chanenson, supra note 27, at 559.
206. Id. at 563–64.
207. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY
208. See Chanenson, supra note 27, at 564.
210. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2007).
crack offender’s base Guideline level.\textsuperscript{211} Although not as broad as the Sentencing Commission has recommended in the past,\textsuperscript{212} this marked the first instance of successful reformation of the crack-to-cocaine disparity issue.

D. Special Interest Reform

Of the many special interest groups lobbying Congress and the Sentencing Commission, the same general techniques have been relied upon to achieve sentencing reform. Lacking any formal power, these various special interest groups have relied on informal governing power to attempt to reform the sentencing system.\textsuperscript{213} This informal governing power has proved successful in changing the political landscape regarding tough crime measures, but has largely failed in specific attempts to lobby influential government power brokers.\textsuperscript{214} Using the media, extraordinary cases, public testimony, and education; special interest group successes have come when they focus on influencing the public, not politicians.

1. Families Against Mandatory Minimums

The greatest obstacle in the post-SRA phase of sentencing reform has been the reluctance by Congress to buck the “tough on crime” culture in America. Perhaps the largest symbol of this political trend has been the mandatory minimum sentences that took effect through the enactment of the 1986 and 1988 ADAA.\textsuperscript{215} Unhappy with the results of these new severe drug laws because of her own brother’s incarceration, Julie Stewart started the Families Against Mandatory Minimums (“FAMM”) in 1991.\textsuperscript{216} The

\begin{itemize}
\item \textsuperscript{213} Cf. Barkow, supra note 182, at 724–28 (describing how and why interest groups for sentencing reform do not have the same lobbying power as interest groups for other more traditional regulatory issues).
\item \textsuperscript{214} See infra notes 235–36 and accompanying text.
\item \textsuperscript{216} Families Against Mandatory Minimums, Julie Stewart Bio, http://www.famm.org/PressRoom/SpeakersBureauList/JulieStewartBio.aspx (last visited Dec. 18, 2009). Julie Stewart’s brother, “a nonviolent, first-time drug offender, was sentenced to five years in a
purpose of FAMM is to “shine a light on the human face of sentencing, advocate for state and federal sentencing reform, and mobilize thousands of individuals and families whose lives are adversely affected by unjust sentences.”

A large part of FAMM’s influence in the sentencing debate has come from its media publication and exposure. In 2009 alone, FAMM made the news over seventy-five times in the form of editorials or quotes in many major newspapers, including The Washington Post, The Wall Street Journal, The New York Times, and The Los Angeles Times. In addition, FAMM operates a website that posts all the news coverage regarding mandatory minimum sentences throughout the country, provides resources to families of incarcerated individuals, produces newsletters and brochures on the federal sentencing laws, and tracks sentencing reform bills in Congress. These numerous efforts at publicity are a direct campaign by FAMM to educate and transform the landscape of sentencing reform in America.

Although the results of FAMM’s influence on the public are difficult to measure, it is quite clear that until recently their effect on Congress has been minimal. With no change in the mandatory minimum sentencing laws by Congress, except in the recent crack-to-cocaine disparity amendment, Congress has largely voted to uphold the mandatory minimum sentence structure. Despite these setbacks, FAMM President Julie Stewart continues to insist that “Republicans and Democrats support change and that should encourage members of Congress to reach across the aisle next year and work together to reform mandatory minimums.”


220. See, e.g., Families Against Mandatory Minimums, New Poll: Americans Oppose Mandatory Minimums, Will Vote for Candidates Who Feel the Same (Sept. 24, 2008), available at http://www.famm.org/NewsAndInformation/PressReleases/CorrectingCourseReportAndPollRelease.aspx (citing a 2008 FAMM poll showing that nearly 60% of Americans oppose mandatory minimums for first time offenders, 78% of Americans “agree that courts—not Congress—should determine an individual’s prison sentence,” and 57% of Americans said “they would likely vote for a candidate for Congress who would eliminate all mandatory minimums for nonviolent crimes”).

221. Id.
However, this support for change has yet to manifest itself in actual legislation. On a more realistic level, it seems that, without noticeable public support, Congress will continue to lack the political courage to make the suggested reforms.

2. National Association of Criminal Defense Lawyers

Another special interest group which has lobbied hard for sentencing reform is the National Association of Criminal Defense Lawyers ("NACDL"). This group of criminal defense attorneys has a heavy stake in sentencing reform due to the impact reform has on their clients and their own professional objectives. Founded in 1958, NACDL consists of more than 12,800 direct members and another 35,000 affiliated members in 94 state and local organizations. NACDL is important to the sentencing reform power struggle because unlike other special interest groups, it takes an active part in the actual criminal justice system, giving it an indirect judgment power. As a nationally recognized entity, NACDL uses its judgment power in the court system to pressure both Congress and the Sentencing Commission on issues relating to governing power. Organized at the local, state, and national levels, NACDL’s reach extends beyond publications and newspaper articles. The organization’s grassroots support has given it greater sway with judges, legislators, and attorneys. Indicative of this group’s influence is the fact that “in every major case in which the Supreme Court and the appellate courts have been asked to rule on government overreaching, 

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223. See Nat’l Assoc. of Crim. Def. Lawyers, Bylaws, Article II: Missions and Purposes, http://www.nacdl.org/public.nsf/FreeForm/ByLaws?OpenDocument (last visited Dec. 18, 2009) (stating the NACDL objectives and purposes are to promote criminal defense law, disseminate techniques that support the field of criminal advocacy, sponsor meetings of the criminal bar, represent the Association before governmental bodies, preserve, protect and defend the adversary system of justice).


225. See id.

NACDL has been there with an amicus brief.”227 This “amicus effect” not only influences judicial decisions, it also provides the courts with an outside ally in their own efforts at sentencing reform.228 Additionally, NACDL uses the Sentencing Commission’s own testimony to attempt to persuade them regarding various issues.229 Using the popular target of crack-to-cocaine disparities to urge for a broader reform of the Sentencing Guideline structure, NACDL supplements this testimony with press releases, both praising the Sentencing Commission for actions which the NACDL supports and pushing for more reform.230

3. Cato Institute

Perhaps the greatest example of the varying motivations behind special interest groups in the sentencing reform debate is the involvement of the Cato Institute. This right-leaning, libertarian public policy organization, which was founded in 1977 to “increase the understanding of public policies based on the principles of limited government, free markets, individual liberty, and peace,” has fit well into the sentencing reform movement.231 Despite using the same techniques employed by other special interest groups, Cato’s role is unique in the motivations lying behind its involvement.

One such area that differentiates Cato from the other groups is in its fields of study. In particular, Cato has taken the unique ap-

228. See id.
proach of focusing on the effects of the current sentencing policy as applied to the prison system.\textsuperscript{232} Reporting widespread prison overcrowding due to the mandatory minimum sentences, Cato has concluded that imprisonment of drug offenders has taken precedence over violent crime offenders, who are the real threat to public safety.\textsuperscript{233} Cato insists that although the imprisonment of a violent crime offender incapacitates that individual from doing more harm, the structure of drug organizations allows another member to simply step into the place of the imprisoned drug dealer.\textsuperscript{234} Because of this, Cato has supported alternative methods to imprisonment such as supervised probation or parole, electronic monitoring, and boot camp systems.\textsuperscript{235} Another area in which Cato has advocated sentencing reform is in questioning the constitutionality of the federal guidelines system.\textsuperscript{236} A 2004 book published by Cato argues that “[t]he first and arguably dispositive problem is the delegation of lawmaking authority—specifically, the power to set punishment—from Congress to the commission,” which results in the “dubious constitutionality” of the guidelines system.\textsuperscript{237} These constitutional challenges by Cato seem a direct attempt to create “a new, vibrant, broad-based alliance firmly grounded in constitutional principles and shared goals.”\textsuperscript{238}

E. Judicial Reform

The last twenty-five years of sentencing reform represent a dramatic seizure of judgment power away from the Judicial Branch, followed by their resilient effort to recoup that power. In possession of the governing power of judicial review, the Judicial


\textsuperscript{233} Id.

\textsuperscript{234} See id.

\textsuperscript{235} See id.


\textsuperscript{237} Id. at 124.

Branch has at times hesitantly waged a battle with Congress for reclamation of their place in the sentencing world. With varying degrees of ideology in the judiciary, a group of judges has aligned itself with other reformers to reclaim control over sentencing power. Using both Supreme Court case law, which the judiciary must passively wait to reach the highest court, and public testimony, which is only as good as the impact it imposes on the lawmaker, it has taken years for judicial influence on sentencing reform to evolve. But in one fell swoop, the Supreme Court, in the landmark case United States v. Booker, fundamentally reconfigured the sentencing landscape by reestablishing judicial control in sentencing. Despite these recent gains in sentencing power, it remains to be seen whether the Judicial Branch’s governing power is formidable enough to gain back all of the judgment power it once possessed.

1. Case Law

As the highest and most powerful court, the Supreme Court of the United States has used its authority of judicial review to reclaim a portion of the Judicial Branch’s sentencing power. The primary vehicle behind the Court’s recouping of this power has been the expansion of the procedural rights of criminals as applied to sentencing. One indication that these rights are merely a path to reclaim sentencing power is that earlier precedent had consistently deferred directly to Congress or the Sentencing Commission with regard to governing power issues with sentenc-
In addition, the Court held in four cases that the guidelines regime did not violate a defendant's constitutional procedural rights.

Yet in the 1990s, with the same members on the Court, constitutional procedural problems “suddenly” appeared within the Court’s application of the guidelines system. Over the course of six years, the Supreme Court’s view of the Sentencing Guidelines shifted as it held that a legislature or delegate agency cannot ignore constitutional guarantees by transferring a part of the prosecution to the post-conviction sentencing phase. The culmination of these cases came in the landmark decision of Booker, which declared the mandatory nature of the guidelines system unconstitutional as a violation of the Fifth and Sixth Amendments.

In Booker, the Court relied on the argument that judicial fact-finding judgment power was too great in the post-conviction phase. In Justice Stevens’s majority opinion holding that the Sentencing Guidelines violated the Sixth Amendment, he claimed that the development of the Sentencing Guidelines and legislative regulation system “increase[d] the [sentencing] judge’s power and diminish[ed] that of the jury.” Although Justice Stevens’s argument may hold true in post-conviction judicial factfinding situations, it seems insincere to describe the post-SRA reform period as a time where the judiciary’s judgment power was increased.

244. See Mistretta v. United States, 488 U.S. 361, 371, 374, 390 (1989) (upholding the delegation of power to the Sentencing Commission to create “Guideline crimes” and rejecting the claim that this power was inappropriate for an agency in the judicial branch of the government); see also Stith, supra note 112, at 1474.

245. Edwards v. United States, 523 U.S. 511, 514 (1998) (requiring the punishment to be based on relevant conduct of which the defendant was not convicted); United States v. Watts, 519 U.S. 148, 156–57 (1997) (requiring enhancement of punishment on the basis of conduct of which the jury had acquitted the defendant); Witte v. United States, 515 U.S. 389, 406 (1995) (allowing double punishment of behavior that both is the basis for a Sentencing Guidelines enhancement and is separately prosecuted); United States v. Dunnigan, 507 U.S. 87, 98 (1993) (enhancing punishment on the basis of criminal behavior of which the defendant was not convicted); see also Stith, supra note 112, at 1475.

246. See Stith, supra note 112, at 1476.


249. Booker, 543 U.S. at 236.

250. Id.
Furthermore, the outcome of *Booker* was to give more judgment power to judges for all aspects of sentencing by recreating the guideline system as merely advisory.251

In fairness to Justice Stevens, it was the majority opinion of Justice Breyer that made the Sentencing Guidelines advisory.252 In this part opinion, the Court accepted the interpretation by Justice Stevens253 and took the dramatic step of creating a remedy to the Sixth Amendment violation in the Sentencing Guidelines.254 Relying on legislative intent, Justice Breyer's opinion severed the mandatory nature of the guideline system because a “legislatively unforeseen constitutional problem requires modification of a statutory provision as applied in a significant number of instances.”255 But lurking behind this remedy is the dramatic effect of increasing judicial discretion to counterbalance the Sentencing Commission and Congress. As Justice Scalia lamented in his dissent, “The majority's remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.”256

Aside from the effects of *Booker*, the most interesting aspect of the case lies in the power struggle within the Court itself. With justices taking sides based on their views concerning judicial discretion in sentencing, the *Booker* decision resulted in a fractured Court that disagreed as to the proper application of the Judicial Branch’s governing power. On one side was the centrist Breyer majority—Chief Justice Rehnquist joined by Justices O'Connor, Kennedy, and Ginsburg—which maintained that the mandatory

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252. *Booker*, 543 U.S. at 244–45.
253. Justices Breyer, O'Connor, Kennedy, Ginsburg, and Chief Justice Rehnquist accept Stevens's opinion regarding the unconstitutionality of the Sentencing Guidelines for the remedy aspect of their part majority opinion solely because it is the majority opinion. *Id.* at 245. But in a later part dissent, minus Justice Ginsburg, they argue against the constitutional analysis, stating, “I find nothing in the Sixth Amendment that forbids a sentencing judge to determine (as judges at sentencing have traditionally determined) the manner or way in which the offender carried out the crime of which he was convicted.” *Id.* at 326 (Breyer, J., dissenting in part).
254. *Id.* at 254, 265 (majority opinion).
255. *Id.* at 247.
256. *Id.* at 304 (Scalia, J. dissenting in part).
nature of the Sentencing Guidelines was unconstitutional.\textsuperscript{257} On the other side was a bloc of Justices Stevens, Souter, and Scalia who dissented in part, arguing that the Court did not have the governing power to repeal statutory provisions on Congress’s behalf.\textsuperscript{258}

As seen in the makeup of the \textit{Booker} voting blocs, traditional ideology was not the decisive factor.\textsuperscript{259} The Breyer majority seemed to undercut the notion that judicial power was ever taken away by Congress, but rather it was placed within a broad system of ranges.\textsuperscript{260} If viewed in this way, \textit{Booker} is purely a case which re-affirms the judgment power of judges in a broadly determinate sentencing system. However, this contrasts sharply with the Stevens dissenting bloc, who described the SRA and guideline reform movement as a “comprehensive overhaul” by Congress intended to eliminate sentencing disparity.\textsuperscript{261} Acknowledging Congress’s pre-SRA skepticism in regard to the Court’s judgment power in preventing disparities, the Stevens dissent seems to accept the supremacy of the governing power of Congress.\textsuperscript{262} Fortunately for judicial partisans, the triumphant Breyer bloc further strengthened the power of the courts in the sentencing struggle.

Due to the fractured opinion of the Supreme Court in \textit{Booker}, courts of appeals remained reluctant to allow lower courts to use this newfound discretion.\textsuperscript{263} In a series of cases following \textit{Booker}, the courts of appeals rejected numerous sentences as unreasonable because they did not believe the mitigating circumstances were enough to deviate from the guideline ranges.\textsuperscript{264} However, the dual cases of \textit{Gall v. United States} and \textit{Kimbrough v. United States}
States fulfilled the legacy of Booker to allow judges to use the full range of their judgment power.265

In Gall, the Court “reject[ed] an appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range” along with “the use of a rigid mathematical formula . . . as the standard for determining the strength of the justifications required for a specific sentence.”266 These invalidations of appellate review approaches remind appellate courts that even though the Sentencing Guidelines are a starting point, district courts must consider all of the other factors listed in 18 U.S.C. § 3553(a).267 Also, after considering all of these § 3553(a) factors, the appellate courts are required to review the sentence under the deferential abuse of discretion standard.268 The effect of such a review process is to ensure that as long as a district court provides rational reasons for a sentence, the sentence will likely survive appeal.269

Alongside Gall in representing the promises of Booker is the case of Kimbrough. In this decision, the Court held that a district court does not abuse its discretion when it bases a below-guideline sentence on disparities caused by the Sentencing Guidelines themselves.270 Specifically referring to the crack-to-cocaine disparity, the Court suggested that it may be possible for a defendant to obtain a lower non-guideline sentence by arguing that a particular guideline sentence would create unwarranted disparities.271 However, it is yet to be determined whether a variance from the Sentencing Guidelines based solely on the judges view

266. Gall, 552 U.S. at ___, 128 S. Ct. at 595.
267. Id. at ___, 128 S. Ct. at 596–97; see also Ellis & Feldman, Jr., supra note 263, at 48.
268. Gall, 552 U.S. at ___, 128 S. Ct. at 597; see also Ellis & Feldman, Jr., supra note 263, at 48.
270. Kimbrough, 552 U.S. at ___, 128 S. Ct. at 575–76; see also Ellis & Feldman, Jr., supra note 263, at 48.
that the guidelines range “fails properly to reflect § 3553(a) considerations” is acceptable to bypass appellate review.272

The two cases of Gall and Kimbrough provide the next step in the fulfillment of the Judicial Branch’s reclaiming of sentencing power. Representing the new approach taken by the Roberts Court, it seems the consequences of Booker are becoming much more solidified. In both cases, the majority consisted of Chief Justice Roberts, Justices Ginsburg, Stevens, Scalia, Kennedy, Souter, and Breyer.273 The two dissenting Justices were Thomas and Alito.274 Both cases represent the emerging consensus on the Court in interpreting Booker as a case that gives judges more discretion than they have had since pre-SRA days.275 Yet even with this increase in discretion, the Court continues to emphasize the role of the Sentencing Guidelines as a default provision.276 With this dual approach, the Court has taken a solid centrist position which has ensured a solid majority.

2. Public Statements and Positions of Judges

In addition to case law, individual judges have relied on public statements to fight back against the determinate sentencing system. These public statements come in two forms—testimonial and promotional. The first type, testimonial, has been used in front of both Congress and the Sentencing Commission. Testimonial public statements are delivered by judges either representing themselves or judicial organizations.277 The most vocal organization to

275. See Ellis & Feldman, Jr., supra note 263, at 51.
276. See Gall, 552 U.S. at ___, 128 S. Ct. at 594; Kimbrough, 552 U.S. at ___, 128 S. Ct. at 574.
use its testimonial statements to influence lawmakers has been the Judicial Conference of the United States (“Judicial Conference”). Organized as a centralized body which receives policy recommendations from subordinate committees, the Judicial Conference serves as the main policymaker within the federal court system. Encouraging judges “to consult with Congress to improve ‘the law, the legal system and the administration of justice,’ but to stay away from activities that might ‘undermine the public confidence in the integrity, impartiality, or independence of the judiciary,’” the Judicial Conference has proven itself as an influential judicial body. Yet on the issue of disparity in sentencing for crack and powder cocaine, the Judicial Conference voted “to oppose the existing difference between crack and powder cocaine sentences and support[ed] the reduction of that difference.” This clear statement by the Judicial Conference proves that in some matters, impartiality takes a back seat to efforts at influencing Congress.

One unique aspect of judicial testimony concerning sentencing reform is that the majority of testifying judges have attachments to judicial organizations. When testifying, judges routinely broadcast their affiliations with judicial organizations, whether expressing their own personal views or those of the organizations they represent.

281. See, e.g., Thomas F. Hogan, supra note 277 (“I speak today as an individual United States District Court judge and not on behalf of the Federal Judiciary, although I am a member of the Executive Committee to the Judicial Conference.”); Lawrence Pierisol, supra note 277 (“I also serve as the President of the Federal Judges Association. . . . I would like to address you from now on from my personal point of view.”); Emmet G. Sullivan, Judge, United States Dist. Court for D.C., Statement on Behalf of the Judicial Conference of the United States Committee on Criminal Law Before the United States Sentencing Commission (Nov. 16, 2004), available at http://www.uscc.gov/hearings/11_16_04/Sullivan.pdf (“I am a United States District Judge for the District of Columbia. I am also a member of the Judicial Conference Committee on Criminal Law and serve as the Chair of its Legislative Subcommittee.”); Reggie B. Walton, Testimony Presented to the United States Sentencing Commission on Sentencing Disparity for Crack and Powder Cocaine Offenses (Nov. 14, 2006), available at http://www.uscc.gov/hearings/11_15_06/JudgeWalton-testimony.pdf (“Thank you for affording me the opportunity to appear before you today on behalf of the Judicial Conference of the United States’ Criminal Law Committee. . . . What I indicate
in individualized lobbying, multiplies the power of their statements. However, these testimonial efforts have had little effect on lawmakers.282

Accompanying these testimonial statements are the various promotional attempts by the judiciary to voice its displeasure with the determinate system. One such promotional attempt includes participation in polls. In perhaps the most telling poll to date, federal judges were asked in 1996 “whether they agreed that Congress should allow judges greater discretion in sentencing.”283 The results showed that 81.5% of federal district judges and 79.7% of federal circuit judges agreed that judges deserve greater discretion in sentencing.284 Furthermore, 90% of federal judges surveyed were against mandatory minimum sentences for drug cases.285

Along with polls, judicial leaders have made direct appeals to the public at large. Perhaps the most powerful criticism of Congress from the Judicial Branch came from Justice Kennedy in his keynote address at the American Bar Association meeting in August 2003.286 In this address, Justice Kennedy spoke in detail about the effects of over-incarceration, and concluded that “our resources are misspent, our punishments too severe, our sentences too long.”287 Justice Kennedy also emphasized that “[t]he trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way.”288 Coming from a Supreme Court Justice, statements such as these tend to garner the most press and have the greatest impact.289

Unable to attract as much press, lower court judges have also begun to use their own courtrooms as a means to reach lawmak-

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284. See id.
285. Id. at 235 n.7.
287. Kennedy, supra note 286.
288. Id.
ers and the public. These promotional statements are utilized by individual judges who state on the record that if they were given the discretion, they would have imposed a lesser sentence than required by the Guidelines or the mandatory minimum statute. Unable to reach a wide audience, lower court judges seem to hope that by blaming the other branches, the public will be encouraged to voice “their displeasure with Congress, the President, and in the voting booth.”

IV. LESSONS AND IMPLICATIONS

As Part III revealed, the reformation of the United States drug sentencing system has been rife with struggle between competing players. With varying interests and motivations, these players have dramatically transformed the federal sentencing system into a political battlefield upon which institutional goals surpass public objectives. As political actors have become confused in their own bureaucratic fog of war, concern for public safety has become a lost cause that few truly represent. Left with a system in which the executive is functionally inept, Congress is too politically frightened to take action, and the judiciary continuously attempts to complicate, the current sentencing laws have taken on a lifeless form gasping for breath.

So what does this tell us? First and foremost, the first step in any attempt at resuscitation of the drug sentencing system must begin with a scholastic autopsy of the reformation process itself. As earlier described, the problem with the drug sentencing system does not stem from a lack of ideas or normative conclusions. Instead, the system’s failures derive from the inability to maintain a unifying message (such as concern for public safety) because of a political process which encourages separation rather than synthesis.

Second, although every reformation movement encounters similar flaws within the political process that take away from the overall success of the reform, the flaws brought forth here are

290. See id. at 263.
291. Id.
292. See id. at 264.
293. See discussion supra Part III.
294. Id.
magnified because of issues unique to drugs and sentencing. Due to the over-politicalization of the drug and sentencing issues, the multiplicity of the players involved, and the personalization of the motivations behind reform, the reform process has destroyed any coherent, unified message vital to the success of the sentencing system. By identifying these three problems, a diagnosis of the reform process can provide a reasonable basis for a set of successful remedies.

Third, among the lessons learned from such a destructive process, a few simple remedies could possibly refurbish a sentencing system badly needing reform. Although far from fixing every problem documented in the federal sentencing system, these proposals attack the core structural issues perpetuating the evils of the reform process. Considering the governing power and judgment power perspective of the sentencing reform struggle, these remedies supply portions of a vision which contain the capacity for success. With enough political courage, civic-minded leadership, and tempered patience, these remedies could serve as a starting place to bring sentencing back to its clear origins.

1. Over-Politicalization of the Issues

a. Identification of the Problem

In the beginning stages of the 1980s sentencing reform movement, strong evidence supported the idea that change was needed for an outdated system. Although far from unanimous, powerful forces from across the political spectrum advocated and instituted a coherent bipartisan message in dealing with the federal sentencing laws in the form of the SRA. But as the effects of the SRA and the Sentencing Guidelines played out, politics in abundance infected Congress’s attitude toward the reforms. With the emergence of crime, in particular drug crimes, as a central political issue throughout the 1980s, politicians facing reelection were forced to take action. Challenged by constituents, highlighted by constant media coverage, and offering the opportunity to gain a political advantage, the sentencing system became trapped in

295. See, e.g., supra notes 12 and 13 and accompanying text.
296. See Darmer, supra note 22, at 540.
297. See Chanenson, supra note 27, at 557.
an escalating race between politicians. As penalties for offenders increased and “tough on crime” platforms brought political success, the reform process began to grind away at the once unifying message. Adding insult to injury, many of the same supporters who strongly endorsed the tough sentencing laws when the political winds were favorable began to flip sides when their local politics became too difficult to stand.

With drug penalties being shaped by an overreaction to public needs for tough crime legislation, further incidents of over-politicalization of the sentencing issue developed. This time, however, politicalization came from opponents of the reform movement. Consistent with all reform processes, a counter-reformation effort sprang from congressional leaders and groups who saw political opportunity in opposing the new drug sentencing laws. Politicians representing minority districts, special interest groups concerned with individualized experiences, academics providing critiques of the new system, and governmental agencies tasked to study the issue, all contributed to this opposition. As sentencing reform became a tool for political advantage, public safety became a footnote in the sentencing debate.

Confronted with the political fears of being labeled soft on crime on one side and the oppositional forces revealing problematic aspects of the sentencing system on the other, Congress balked. Desperately needing to supplement certain aspects, but not requiring a complete overhaul of the sentencing system, Con-

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298. See Wilkins, Jr., et al., supra note 42, at 315.
299. See id. (noting Congress’s move away from simple reform toward bypassing the federal judiciary to prevent serious drug offenders from escaping lengthy prison terms).
300. See Tonry, supra note 119, at 62–63 (discussing the “self-interests” of pro-reform legislators).
301. See Devroy, supra note 119, at A1.
302. See, e.g., Steven A. Holmes, Black Lawmakers Criticize Clinton Over Cocaine Sentencing, N.Y. TIMES, July 24, 1997, at A15 (documenting the Congressional Black Caucus’s harsh criticism of the Clinton administration for not going far enough to convince Congress to cut the disparity between crack and powdered cocaine).
304. See, e.g., Kopel, supra note 232.
gress did what it does best—delegate. As a result of the reluctance by Congress and the infectious reformation process, a deficient status quo developed in the sentencing debate which allowed the system to stall and further delay progressional needs.

b. Remedy

The clear lesson concerning the over-politicalization of sentencing stems from a system placing governing power into the hands of a legislative branch which answers to both the general and local public will. Accepting politics as standard procedure for all forms of legislation, reformers should recognize that over-politicalization, not politics, is the problem. If congressional over-politicalization inhibits needed reform or encourages overzealous amendment, steps should be built into the system to reign in purely political influence. One obvious starting place is the responsibility for sentencing reform. Congress should either take full responsibility for sentencing issues themselves or grant the Sentencing Commission the independence to act as a confident and secure body. By using the Sentencing Commission as a shield to institute reform while meddling in its internal affairs, Congress is fooling no one. In this case, it appears the best cure for over-politicalization is transparency and debate conducted in an independent forum, free of political pollution.

2. Multiple Assailants

a. Identification of the Problem

The next lesson from the sentencing reform process deals with the assortment of players involved in the issue. In a political system that encourages free debate and open challenges, a wide variety of influential actors have contributed to the current state of the sentencing system. With multiple governmental branches possessing varying amounts of governing power, no single branch was left with the authority or responsibility to fix problems within the system. As each branch enters the mix and wields their

306. This cautionary approach is apparent in Congress's calls for further Sentencing Commission studies, inaction on Sentencing Commission proposals, and failure to address problems volleyed by the Supreme Court.
particular powers, the internal governmental actors have managed to neutralize each others’ efforts. Leaving no one to lead and no one to blame, these actors have made it impossible for any true reform to take place.

Accompanying the traditional governmental actors, who are decreasingly in possession of the greatest positions of power, outside forces have also entered the political fray. With multi-pronged attacks lobbying Congress, the Sentencing Commission, the executive branch, the judiciary, and the public, relatively weak groups have obtained a pulpit for themselves. In championing specific causes, such as mandatory minimum sentences or the crack disparity issue, minor organizations have come to dominate the external reform process. With each group narrowing its focus to different flaws in the system, defenders are left to face attacks from all fronts. Because of this overwhelming opposition against the system, it is likely that the enduring strengths in the current system will be overlooked.

b. Remedy

Without limiting the number of players involved in reform, it appears that the only successful strategy to thwart the multiple assailant phenomenon is to restore the government as the principal actor in sentencing. To do so, clear boundaries must be established by all three branches. In terms of judgment power, the bodies least vulnerable to public attack, such as the judiciary and executive, should become the central figures. Likewise, a truly independent body insulated from political pressure could take the lead in advising Congress on issues relating to the overall framework of the sentencing system. Thus, instead of the struggle over governing power taking place within the halls of Congress, battles should be fought at a lower level before a non-political body based on fact and debate. With special interest groups forced to provide real arguments rather than political threats, this independent body can refocus the importance of sentencing in terms of public safety rather than political power. In doing so, the reform process can be streamlined into a coherent course of action rather than a political free-for-all.

At the conclusion of careful and through investigation, Congress can then use its governing power to either accept or modify
the independent body’s suggestions. Although subject to political influences at this decision-making stage, any ill-reasoned deviation by Congress from the independent body’s recommendation will be judged by the public. Similar to the Securities and Exchange Commission, this new independent body could hold responsibility for studying, devising, and enforcing the sentencing laws of the United States government. 307 If given enough independence and legitimacy, unlike the current Sentencing Commission, this body’s recommendation could create a governing framework in which reasoned conclusions will balance political objectives.

3. Personalization of Reform

a. Identification of the Problem

The last lesson of the reform process examines the personalization of the motivations behind the sentencing laws. Stemming from the over-politicalization of the sentencing issue, non-elected actors saw opportunities to influence the process. Divided into governmental and non-governmental actors, these unelected groups have come close to overstepping their proper roles to further personal agendas.

Inside the government, the Supreme Court used the instrument of judicial review in cases such as Booker, Kimbrough, and Gall to gain back some of the power it had originally lost. 308 Representing the top of the judiciary both in the finality of their legal decisions and in political infighting, the Supreme Court stood embarrassingly silent during the implementation of a determinate sentencing system. 309 Facing widespread pressure from


308. See Ellis & Feldman, Jr., supra note 263, at 50 (discussing the effects of Kimbrough in protecting lower courts that deviate from the Sentencing Guidelines due to instances involving the problematic crack disparity issue); Olive, supra note 269, at 14 (highlighting the effects of Gall in insulating lower court guideline departures from appellate review); Tracey & Fiorelli, supra note 251, at 1226 (highlighting the Supreme Court’s changing of the Sentencing Guidelines from mandatory to advisory).

309. This loss of judicial power in sentencing is exemplified by the mandatory nature of the Sentencing Guidelines, the Feeney Amendment, and the harsh mandatory minimums of the Anti-Drug Abuse Act of 1986. The court waited twenty-one years from the imple-
lower court judges, the Supreme Court was forced to take action to legitimize itself as the leader of the judiciary. Unfortunately for the integrity of the political process, the Court, as seen in *Booker*, was forced to take on the role of policy maker in order to gain back lost power. This violation is further evidence of the personal incentives inherent in a faulty politicized reformation process.

Another governmental actor seeing an opportunity to gain a personal advantage was the Sentencing Commission. Created as subservient to Congress, the Sentencing Commission waited several years to establish itself as a credible body before beginning their own criticisms of the sentencing model. As an agency dominated by judges, the Sentencing Commission is similar to the Supreme Court in that it too had personal problems with a determinate sentencing system. Overriding these judicial goals, however, has been the Sentencing Commission’s need to safeguard its own survival. By making the tactical decision to limit their criticisms to politically correct subjects, the Sentencing Commission has managed to endure despite becoming a largely ineffective body.

Perhaps the strongest examples of entities placing individual interests before the public good are the special interest groups. Made to specifically address limited personal objectives, these groups have fractured the original reform message into component parts. By reframing reform into a movement about the individual, rather than the community, special interest groups have allowed a vocal minority to speak for the “people.” Given greater

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310. See Boylan, supra note 283, at 235 (revealing poll numbers which show unhappiness of the judiciary with the determinate sentencing system).
311. See United States v. Booker, 543 U.S. 220, 272 (2005) (Stevens, J., dissenting) (“The Court’s decision to [invalidate the mandatory nature of the Sentencing Guidelines] represents a policy choice that Congress has considered and decisively rejected. While it is perfectly clear that Congress has ample power to repeal these two statutory provisions if it so desires, this Court should not make that choice on Congress’s [sic] behalf.”).
312. See Chanenson, supra note 27, at 559.
313. See Former Commissioners, supra note 197.
314. See Barkow, supra note 182, at 759 (highlighting how a Sentencing Commission consisting of judges would have problems stripping away more judicial discretion).
315. The Sentencing Commission has continually advocated for reform within the Sentencing Guidelines system. Their criticisms have largely been toward mandatory minimum sentences and the crack disparity problem. Both issues take away from congressional determinate power and give discretion back to the courts.
access to power brokers because of specialization and tenacious advocacy, the special interest groups have elbowed their way into the political debate. Achieving little actual reform, the greatest effect of these groups has been their corruption of the process itself.

b. Remedy

Coupled with the remedies suggested earlier, the personalization of reform is best cured by a fair apportionment of power. Falling back upon the separation of powers scheme well known in our republican form of government, judgment power in sentencing should be divided between the executive and judicial branches. Done so only after responsible study and cooperative compromise prescribed by Congress, the Executive and Judicial Branches should be required to only use their sentencing powers as apportioned. Any deviation by either branch would then cause the independent body to petition Congress for sanctions in the form of a weakening of assigned judgment powers. Thus, with judgment power clearly and fairly divided between branches, well defined sanctions to combat political overreaching, and a provision supplying a supreme arbiter in Congress, judgment power issues will remain free from personalized power seeking.

V. CONCLUSION

The powers behind sentencing reform have engaged in a twenty-five year struggle to alter the federal drug sentencing laws. Initially successful in maintaining a coherent unified message, a variety of processional forces and self-serving actors have distorted the focus on public safety. By reviewing the schizophrenic history of reform, examining the motivations of influential players, and studying the reform process itself, a complex web of power provides an explanation for the paralysis of the current movement. Until the previous message or a rational substitute takes its place, further stagnation is on the horizon. Regardless of what remedies are offered, leaders must first overcome the excess of politics, limit reform to the proper authorities, and fairly divide power before any necessary reform will ever surface.