

1-1-2010

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Recommended Citation

Erik S. Siebert, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. Rich. L. Rev. 867 (2010). Available at: <https://scholarship.richmond.edu/lawreview/vol44/iss2/7>

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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,¹ for being overly complex and cumbersome,² and for intruding upon the judicial discretion inherent in judging.³ It is hard to identify any aspect of the federal

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1. See, e.g., U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1997) [hereinafter 1997 COCAINE REPORT]; Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War On Drugs" Was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 396–400 (2002).

2. See Matthew Jill, *One Small Step: The Past, Present, and Future of the Federal Sentencing System*, 44 CRIM. L. BULL. 91, 97 (2008) (criticizing the United States Sentencing Guidelines as “immensely complex, narrowly tailored, [and] restrictive”); David Yellen, *Saving Federal Sentencing Reform After Apprendi, Blakely and Booker*, 50 VILL. L. REV. 163, 178–79 (2005) (noting that critics of the Sentencing Guidelines “focus on the issues of complexity, rigidity, procedural and substantive unfairness and severity”).

3. See Rose Duffy, Comment, *The Return of Judicial Discretion*, 45 IDAHO L. REV. 223, 228–29 (2008) (criticizing the determinate sentencing system as too strictly limiting judges’ abilities to exercise discretion in sentencing).

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.⁴ 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))).

12. See, e.g., DOUGLAS LIPTON, ROBERT MARTINSON & JUDITH WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 88, 405-14, 518-21 (1975); James Robison & Gerald Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQ. 67, 80 (1971).

sentencing was at intolerable levels.¹³ 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.¹⁴

With the theory of rehabilitation losing credibility and new disparities in sentencing exposed, Congress considered bold steps to reform the sentencing system.¹⁵ In 1976, Senator Edward Kennedy proposed a comprehensive bill to establish sentencing guidelines,¹⁶ with subsequent proposals introduced in the 95th, 96th, and 97th Congresses.¹⁷ These proposals ultimately culminated in the bipartisan introduction of the Sentencing Reform Act of

13. See LESLIE WILKINS, ET AL., SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, REPORT ON THE FEASIBILITY STUDY 1 (1978); Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121, 121-22 (1975); see also William Austin & Thomas A. Williams, III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM. L. & CRIMINOLOGY 306, 306 (1977) (describing the sentencing disparity for similar offenses and similar offenders as being pervasive); Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109, 110-11 (1975) (stating that the costs of disparity are high and a concern to the criminal justice system as a whole); Andrew Hopkins, *Is There a Class Bias in Criminal Sentencing?*, 42 AM. SOC. REV. 176, 176 (1977) (explaining certain factors that might cause judges to discriminate); Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, 4 CRIME & JUST. 91, 129, 131 (1983) (describing gender discrimination within sentencing); George William Baab & William Royal Ferguson, Jr., Comment, *Texas Sentencing Practices: A Statistical Study*, 45 TEX. L. REV. 471, 471-72 (1967) (describing the disparity and discrimination within criminal sentences in Texas).

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).

15. See, e.g., Pub. L. No. 89-801, 80 Stat. 1516 (1966) (establishing the National Commission on Reform of Federal Criminal Laws); S. 1, 93d Cong. §§ 1-4A1 to 1-4A5 (1973) (describing Congress's proposed sentencing reform within the Criminal Justice Codification, Revision, and Reform Act of 1973); *Reform of the Federal Criminal Laws: Hearing on S. 1, S. 716, S. 1400, and S. 1401 Before the Subcomm. on Criminal Law and Procedure of the S. Comm. on the Judiciary*, 93d Cong. 4830-32 (1973) (statement of Sen. Roman Hruska, Member, S. Comm. on the Judiciary) (describing the actions that need to be taken to fix the broken sentencing system of the United States).

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.

17. See, e.g., Violent Crime and Drug Enforcement Improvement Act of 1982, S. 2572, 97th Cong., 128 CONG. REC. 11,817-24 (1982); Criminal Code Reform Act of 1979, S. 1722, 96th Cong., 125 CONG. REC. 23,537-45 (1980); Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 123 CONG. REC. 13,061-69 (1977).

1983.¹⁸ After this Act was introduced, the Reagan administration proposed its own bill in an effort to gain widespread congressional support.¹⁹ Later in 1983 the Senate Judiciary Committee filed a comprehensive report on sentencing reform, which concluded that the federal sentencing system “ha[d] 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.”²⁰ 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.”²¹ With bipartisan support against the indeterminate sentencing system, Congress moved to put these reform proposals into practice.²²

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.²³ In the SRA, Congress established the United States Sentencing Commission as an independent judicial agency to promulgate mandatory sentencing guidelines.²⁴ In addition, the SRA eliminated parole²⁵ and also instructed federal district judges to consider a variety of legislatively determined factors in sentencing.²⁶ Upon taking over the general sentencing

18. See S. 668, 98th Cong., 129 CONG. REC. 3,797–814 (1983). Co-sponsors of S. 668 included Senators Kennedy, Biden, Thurmond, Laxalt, Baucus, Hatch, Abdnor, Hawkins, Leahy, Cohen, D’Amato, Chiles, Glenn, Specter, Huddleston, Lugar, DeConcini, Zorinsky, Moynihan, Metzenbaum, Sasser, Simpson, and Stevens. *Id.* at 3797.

19. John Riley, *Criminal Code Reform Picks Up Steam*, NAT’L L.J., Dec. 12, 1983, at 1. See S. 829, 98th Cong. (1983); see also Comprehensive Crime Control Act of 1983, S. 829, 98th Cong., 129 CONG. REC. 5520, 5521–71 (1983).

20. S. REP. NO. 98-225, at 40 (1983).

21. *Id.* at 52.

22. M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 540 (2005).

23. See Pub. L. No. 98-473, tit. II, 98 Stat. 1987 (codified in scattered sections of 18 and 28 U.S.C.).

24. *Id.* § 217(a), 98 Stat. at 2017–18 (codified at 28 U.S.C. § 991(a)–(b)(1) (2006)).

25. *Id.* § 218(a), 98 Stat. at 2027 (repealing 18 U.S.C. §§ 4201–4218).

26. *Id.* § 212(a)(2), 98 Stat. at 1987, 1989–90 (codified at 18 U.S.C. § 3553(a) (2006)). These sentencing factors include, in part:

(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.²⁷ With the 1986 election looming and the tragic death of basketball star Len Bias fresh in the public's mind,²⁸ Congress rallied for a swift and substantial legislative response.²⁹ 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,³⁰ to a 50-to-1 proposal introduced by House Democrats,³¹ to a 100-to-1 proposal introduced by Senate Democrats.³² 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.³³ 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.³⁴ With the mandatory minimum sentences set forth in the 1986 ADAA, Congress stepped aside and left the next moves in

ristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Id.

27. See Steven L. Chanenson, *Booker on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL'Y 551, 557 (2006).

28. See generally *Examiner Confirms Cocaine Killed Bias*, N.Y. TIMES, June 25, 1986, at D25; Roy S. Johnson, *At Services for Bias, Tributes and Warnings are Offered*, N.Y. TIMES, June 24, 1986, at B5.

29. Chanenson, *supra* note 27, at 557.

30. See S. 2849, 99th Cong. (1986).

31. See H.R. 5484, 99th Cong. (1986).

32. See S. 2878, 99th Cong. (1986).

33. Pub. L. No. 99-570, tit. I, § 1002, 100 Stat. 3207, 3207-2 to 3207-4 (codified at 21 U.S.C. § 841(b)(1)(A)–(C) (2006)).

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, 1987.³⁵ 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.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.³⁷

The Sentencing Commission's guidelines, which became effective November 1, 1987, were not initially implemented due to constitutional challenges to the SRA.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.³⁹ The basis for these challenges centered primarily on perceived violations of the delegation and separation of powers doctrines.⁴⁰ This attack on the Sentencing Guidelines in the lower courts culminated in the Supreme Court's decision in *Mistretta v. United States*, which upheld the constitutionality of the SRA and the Sentencing Commission.⁴¹

35. See U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 1-2 (1987).

36. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1987).

37. *Id.*

38. See Gregory C. Sisk, Michael Heise & Andrew P. Morris, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1403 (1998).

39. *Id.* at 1403 & n.106.

40. See *id.*

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.").

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.⁴² 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.⁴³ In the Anti-Drug Abuse Act of 1988 ("1988 ADAA"),⁴⁴ Congress included a death penalty provision for drug-related convictions,⁴⁵ created a "drug czar" to coordinate drug-related crime control measures,⁴⁶ and expanded international drug control efforts.⁴⁷

F. *Violent Crime Control and Law Enforcement Act of 1994*

Faced with criticisms and concerns from its broad sentencing reform steps,⁴⁸ Congress enacted the Violent Crime Control and Law Enforcement Act of 1994 ("1994 Act").⁴⁹ 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."⁵⁰ 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."⁵¹ With the passage of this new reporting system, Congress renewed its active role in the sentencing process.

42. See William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 316 (1993).

43. *Id.*

44. Pub. L. No. 100-690, 102 Stat. 4181.

45. *Id.* tit. VII, 102 Stat. at 4387 (codified as amended at 21 U.S.C. § 848 (2006)).

46. See *id.* tit. I, 102 Stat. at 4181 (codified at 21 U.S.C. § 1501 (2006)).

47. *Id.* tit. IV, 102 Stat. at 4261-95 (codified as amended in scattered sections of 18, 21, 22, 31, 41, and 44 U.S.C.).

48. See 140 CONG. REC. 8121 (1994) (statement of Rep. Hughes); 140 CONG. REC. 8122 (1994) (statement of Rep. Conyers).

49. Pub. L. No. 103-322, 108 Stat. 1796.

50. *Id.* tit. XXVIII, § 280006, 108 Stat. at 2097.

51. *Id.*

G. Sentencing Commission Cocaine Reports to Congress

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

52. *See id.*

53. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 195-96 (1995) [hereinafter 1995 COCAINE REPORT].

54. *Id.* at xiv.

55. *Id.*

56. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074 (May 10, 1995).

57. *Id.* at 25,075 ("Cocaine base, for the purposes of this guideline, means crack [cocaine].").

58. *See* Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995).

59. *Id.* § 2(a)(1)(A)-(C), 109 Stat. at 334 (stating that the Sentencing Commission's recommendations "shall reflect the following considerations—(A) the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed trafficking in a like quantity of powder cocaine; (B) high-level wholesale cocaine traffickers . . . should generally receive longer sentences than low-level retail crack traffickers . . . ;

2. 1997 Report

The Sentencing Commission's next report, issued in April 1997, reiterated that the 100-to-1 ratio "cannot be justified."⁶⁰ 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.⁶¹ 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.⁶² 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.⁶³ Despite these various proposals, Congress introduced no bill.⁶⁴

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.⁶⁵ 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.*

62. Letter from Janet Reno and Barry R. McCaffrey: *Crack and Powder Cocaine Sentencing Policy in the Federal Criminal Justice System (July 1997)*, 10 FED. SENT'G REP. 192, 192 (1998).

63. See Peter Baker, *Clinton Would Cut Disparity in Some Cocaine Sentences*, WASH. POST, July 23, 1997, at A21.

64. JoinTogether.org, *Clinton Regrets Failure to Address Cocaine Sentencing Disparity During Presidency* (Mar. 5, 2008), <http://www.jointogether.org/news/headlines/inthe-news/2008/clinton-regrets-failure-to.html>.

65. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY viii (2002) [hereinafter 2002 COCAINE REPORT].

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.*

67. See Chanenson, *supra* note 27, at 564. For example, Senator Sessions introduced a bill adopting a 20-to-1 ratio, but the bill never made it out of committee. See Drug Sentencing Reform Act of 2001, S. 1874, 107th Cong. (2001).

68. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, tit. IV, § 401(d)(2), 117 Stat. 667 (codified as amended at 18 U.S.C. § 3742(e) (2006)). For a history of the Feeney Amendment to the PROTECT Act, see Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295–97 (2004).

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. & INT’L 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.”).

70. Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 789 (2006) (quoting PROTECT Act of 2003, § 401(l)(1), 117 Stat. at 674).

71. Chanenson, *supra* note 27, at 565.

72. *Id.*

lines—based on the Sixth Amendment—would dramatically alter the sentencing landscape.⁷³

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.⁷⁴ In doing so, the Supreme Court recognized Congress's basic statutory goal of creating a system that diminishes sentencing disparity.⁷⁵ Thus, district court judges were directed to use a set of predetermined statutory factors, including the Sentencing Guidelines themselves, as their guiding principle.⁷⁶ 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).⁷⁷ 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.⁷⁸ 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).

74. 543 U.S. 220, 245 (2005).

75. *Id.* at 250.

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

77. 18 U.S.C. § 3553(a) (2006).

78. 552 U.S. 85, ___, 128 S. Ct. 558, 564 (2007).

Sentencing Guidelines as unreasonable when the result of a sentence conflicted with a list of statutory predetermined factors.⁷⁹ 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.”⁸⁰ 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.⁸¹

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.⁸² It also set forth a process for handling criminal sentencing appeals.⁸³ In that process, the appellate court first must “ensure that the district court committed no significant procedural error,”⁸⁴ and then must consider “the substantive reasonableness of the sentence imposed under an abuse of discretion standard.”⁸⁵ 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.⁸⁶

79. See *id.* at ___, 128 S. Ct. at 575.

80. Patrick M. Hamilton, *Are the U.S. Sentencing Guidelines Dead?*, 52 BOSTON BAR J. 6, 7 (2008) (citing *Kimbrough*, 552 U.S. at ___, 128 S. Ct. at 571).

81. See *Kimbrough*, 552 U.S. at ___, 128 S. Ct. at 572.

82. 552 U.S. 38, ___, 128 S. Ct. 586, 591 (2007).

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 ADA A 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

that judges who agree with the Sentencing Guidelines will stick closely to the Sentencing Guidelines in sentencing, and judges who disagree will impose a different sentence but will strictly follow the process).

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 (*Kimrough*), and the process-driven appellate review (*Gall*)).

88. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 3, 8 (2007).

89. *Id.* at 9; see also U.S. SENTENCING GUIDELINES MANUAL 1156 (2007).

90. See U.S. SENTENCING GUIDELINES MANUAL 135 (2007).

91. See Michael Usleber, *Presumption of Unreasonableness: Crack Sentencing and § 3553(a)*, 10 BARRY L. REV. 43, 49 n.67 (2008).

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,⁹² the SRA eliminated parole and the Executive Branch’s primary role in the sentencing system.⁹³ With no constitutional jurisdiction and little statutory authority to advocate decision-making roles—i.e., governing power⁹⁴—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.⁹⁵

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

92. See *Mistretta v. United States*, 488 U.S. 361, 364–65 (1989).

93. See Pub. L. No. 98-473, tit. II, § 218(a), 98 Stat. 1987, 2027 (repealing 18 U.S.C. §§ 4201–18).

94. Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 243 (2005).

95. See, e.g., Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18 U.S.C. and 28 U.S.C.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

society.”⁹⁶ In order to limit the discretion of these “soft” judges, the Reagan Administration aligned with Congress to create a determinate sentencing system.⁹⁷ Through the SRA, the Reagan administration was able to wipe out the indeterminate sentencing system and replace it with a determinate structure.⁹⁸ 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.⁹⁹ 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.”¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

96. Remarks at a Campaign Rally for Senator James T. Broyhill in Raleigh, North Carolina, 2 PUB. PAPERS 1345, 1348 (Oct. 8, 1986); see Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 627 & n.83 (2003) (discussing the shift from “compassion fatigue” to Reagan’s “get tough approach”).

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.”).

98. See § 212(a), 98 Stat. at 1989-90 (codified at 18 U.S.C. § 3553 (2006)).

99. *Id.* § 217(a), 98 Stat. at 2017 (codified at 28 U.S.C. § 991 (2006)).

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

101. See § 212(a), 98 Stat. at 1989-90 (codified at 18 U.S.C. § 3553(a) (2006)).

102. *Federal Sentencing Revision: Hearing on H.R. 2013, H.R. 3128, H.R. 4554, and H.R. 4827 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 98th Cong. 802-04 (1984) (statement of Stephen S. Trott, Assistant Att’y Gen. of the United States).

In response to the rising political tide against drugs, and specifically crack,¹⁰³ 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."¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ Subsequently, President Bush's administration is largely viewed in tandem with, or as the main implementer of, the Reagan sentencing reforms.¹⁰⁸ Bush's Reaganesque approach to the drug problem is evident in his 1992 National Drug Control

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).

104. Remarks Announcing the Campaign Against Drug Abuse and a Question-and-Answer Session with Reporters, 2 PUB. PAPERS 1045, 1046 (Aug. 4, 1986).

105. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VI, § 6371, 102 Stat. 4181, 4370 (codified as amended at 21 U.S.C. § 844(a) (2006)) (providing increased penalties for certain serious crack possession offenses); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. I, § 1002, 100 Stat. 3207, 3207-2 to 3207-4 (codified as amended at 21 U.S.C. § 841(b)(1) (2006)) (providing increased penalties based on the quantity of drugs possessed); see also Wilkins, Jr. et al., *supra* note 42, at 315 ("By enacting mandatory penalty provisions, Congress believed serious drug offenders would have no escape from lengthy terms of imprisonment.").

106. Bowman, *supra* note 94, at 247-48.

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.").

108. See Andrew B. Whitford & Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs*, 65 J. POL. 995, 998 (2003).

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.”¹⁰⁹

Despite the similarities, President Bush did differ with regard to the scope of the drug policies in his push for a national strategy.¹¹⁰ 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.¹¹¹ Furthermore, Bush exercised influence over his own branch’s judgment power by centralizing and monitoring charge and pleading decisions within the DOJ.¹¹² In the form of the Thornburgh Memorandum, Bush held all federal prosecutors to the Sentencing Guidelines’ structure of “real offense” sentencing¹¹³ and prohibited “fact bargaining” over sentencing enhancements.¹¹⁴ These moves reflected Bush’s belief in severe, yet uniform, sentences nationwide.¹¹⁵ 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.”¹¹⁶

109. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: A NATION RESPONDS TO DRUG USE 2 (1992).

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.

112. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1440 (2008).

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”).

114. See 1989 Memorandum from Attorney General Richard Thornburgh to All U.S. Attorneys, 6 FED. SENT’G REP. 347, 347–49 (1994).

115. Stith, *supra* note 112, at 1441.

116. Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO L.J. 1385, 1407 (2006).

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.’”¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ 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.¹²¹ 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.¹²² Under

117. *Id.* (quoting Democratic Party Platform of 1992, A New Covenant with the American People, July 13, 1992, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29610>).

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’ . . .”).

119. See Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 *STAN. L. REV.* 37, 63 (2005); Ann Devroy, *Clinton Retains Tough Law on Crack Cocaine: Panel’s Call to End Disparity in Drug Sentencing Is Rejected*, *WASH. POST*, Oct. 31, 1995, at A1.

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).

121. See Julie Stewart, *Sentencing in the States: The Good, the Bad, and the Ugly*, 39 *OSGOODE HALL L.J.* 413, 424 (2001).

122. Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 *YALE L.J.* 1374, 1382 (2008).

this theory, which provides that the Constitution grants the President the whole of executive power,¹²³ President Bush justified and “subordinat[ed] all prosecutorial decision making to centralized control.”¹²⁴ 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”¹²⁵

President Bush next persuaded Congress to pass the 2003 Feeney Amendment to monitor judicial discretion even further.¹²⁶ Under this Act, Congress tasked the Executive Branch and the DOJ to monitor individual downward departures from the Sentencing Guidelines,¹²⁷ 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.”¹²⁸ However, this statement later conflicted with Bush administration statements.¹²⁹ 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

123. See, e.g., Adam M. Giuliano, *Emergency Federalism: Calling on the States in Perilous Times*, 40 U. MICH. J.L. REFORM 341, 354 n.74 (2007).

124. Richman, *supra* note 122, at 1382.

125. Memorandum from John Ashcroft, Att’y Gen. of the United States, to All Federal Prosecutors (Sept. 22, 2003), http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

126. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, tit. IV, § 401, 117 Stat. 650, 667–76 (codified as amended at 18 U.S.C. § 3553 (2006); 28 U.S.C. § 994 (2006)).

127. *Id.* § 401(l), 117 Stat. at 674–75 (codified at 18 U.S.C. § 3553 note (2006) (Report by Attorney General)).

128. *Inside Politics* (CNN television broadcast Jan. 18, 2001), transcript available at <http://transcripts.cnn.com/transcripts/0101/18/ip.01.html>.

129. Neil A. Lewis, *Justice Department Opposes Lower Jail Terms for Crack*, N.Y. TIMES, Mar. 20, 2002, at A24.

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-

130. *Id.*

131. See Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28,558, 28,571–73 (May 21, 2007).

132. See Robert Howell, *Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 1069, 1071 (2004).

133. See *id.* at 1072.

134. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 229 (1993).

135. See *id.* at 285.

136. See Randall Kennedy, *A Response to Professor Cole’s “Paradox of Race and Crime”*, 83 GEO L.J. 2573, 2574–75 (1995).

done 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

137. See Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 412-14 (1995).

138. Stith & Koh, *supra* note 134, at 227-28.

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.

141. *Id.* at 227-28 (citing Jonathan D. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, 236-37 (1984)).

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.¹⁴³ Needing conservative support in the Senate, Senator Kennedy repeatedly compromised on a variety of legislation proposals calling for reform of the indeterminate system.¹⁴⁴ 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"¹⁴⁵ 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.¹⁴⁶ Due to this surprising "parliamentary maneuver," the SRA was passed by both houses of Congress and signed into law.¹⁴⁷

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.¹⁴⁸ Opposition leaders in the House blamed these sentencing disparities on prosecutorial charging and sentencing practices.¹⁴⁹ 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.¹⁵⁰ 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."¹⁵¹ In short, distrust of the judiciary was the stimulus for the establishment of the Sentencing Commission and the strict Sentencing Guideline structure.¹⁵²

143. Stith and Koh, *supra* note 134, at 232, 234.

144. *See id.* at 286.

145. H.R. REP. NO. 96-1396, at 489 (1980).

146. 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)).

147. *Id.* at 277.

148. *See id.* at 278 (citing S. REP. NO. 98-225, at 65 (1984)).

149. *See id.* (citing S. REP. NO. 98-1017, at 34-35 & nn.34-35 (1984)).

150. *See id.*

151. Nadine Cohodas, *Guidelines for Judges: Sentencing Reform Measures Seek to Reduce Disparities*, 41 CONG. Q. 337, 339 (1983).

152. 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).

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,¹⁵³ the uniformity brought by the SRA has consistently been paired with tougher and harsher sentences in the Sentencing Guidelines.¹⁵⁴ In addition, with the governing power regarding Sentencing Commission nominations largely in the hands of Republican administrations and a "law and order" Senate,¹⁵⁵ the congressional intent behind the SRA, addressing "unwarranted disparities" and the leniency in sentences, has largely been fulfilled.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.¹⁵⁷ Understandably vocal on the effect of drug abuse on their communities, many inner city leaders played an important role in encouraging drug legislation.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.¹⁵⁹ This public outcry made it difficult for any politician to resist reform out of fear of being labeled "soft on crime."

153. *See id.* at 286.

154. *See id.* at 284-86.

155. *See id.* at 285.

156. *See id.* at 284.

157. *See Wilkins, Jr. et al., supra* note 42, at 315.

158. *See Gary Gately, On City Street Corners, Night of Antidrug Vigils*, N.Y. TIMES, July 22, 1986, at B1 (describing how leaders of 60 predominantly black churches in New York City declared crack and other drugs "a new form of genocide" in an all night vigil).

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.¹⁶⁰ Representative Rangel was particularly critical of the Reagan administration for what he perceived to be a lack of support for the "War on Drugs."¹⁶¹ 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.¹⁶²

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.¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶

160. See Lena Williams, *U.S. Drive on Drugs Urged*, N.Y. TIMES, June 26, 1986, at B9 (describing the June 25, 1986, press conference of Congressman Charles B. Rangel where Rangel used the death of athlete Len Bias to underscore the need for a national drive to combat drug abuse).

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.

164. Ran Zev Schijanovich, Note, *The Second Circuits' Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence*, 20 CARDOZO L. REV. 1275, 1321 n.289 (1999) (citing *Frontline: Snitch* (PBS television broadcast Jan. 12, 1999)).

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.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.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.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.¹⁷⁰ Additional attempts at reform measures continued into the mid-90s.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.¹⁷² Smith's conviction resulted from lying to federal prosecutors in an attempt to defend her drug-dealing boyfriend.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

167. Douglas C. McDonald & Kenneth E. Carlson, *Why Did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger Under the Guidelines?*, 6 FED. SENT'G, R. 223, 223 (1994).

168. Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at 15.

169. H.R. 3277, 103d Cong. (1993).

170. Carol A. Bergman, *The Politics of Federal Sentencing on Cocaine*, 10 FED. SENT'G R. 196, 197 (1998).

171. See Francis X. Clines, *After March, House Votes on Emotional Racial Issue*, N.Y. TIMES, Oct. 19, 1995, at B12.

172. See Michael P. Williams, *'Kemba's Nightmare': Young Mother Imprisoned Under Harsh Drug Laws Fighting for a New Trial*, RICH. TIMES-DISPATCH, Dec. 28, 1998, at A1.

173. *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).

176. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2007).

177. *Id.* § 201.1(c).

178. *See* Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, H.R. 4545, 110th Cong. (2007) (introduced by Rep. Jackson-Lee); Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, S. 1711, 110th Cong. (2007) (introduced by Sen. Biden); Crack-Cocaine Equitable Sentencing Act of 2007, H.R. 460, 110th Cong. (2007) (introduced by Rep. Rangel).

179. *See* H.R. 4545, 110th Cong. § 1-5 (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-4545> (last action was a referral to the Subcommittee on Health on Dec. 13, 2007); S. 1711, 110th Cong. § 1-5 (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-1711> (last action was a hearing held on Feb. 12, 2008); H.R. 460, 110th Cong. § 1-5 (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-460> (last action was introductory remarks on June 6, 2007).

180. *See* Pub. L. No. 103-332, tit. XXVIII, § 280006, 108 Stat. 1796, 2097; *see* Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses: The 100-to-1 Ratio is Not as "Cracked" Up as Some Suggest*, 27 S. ILL. U. L.J. 413, 419 (2003).

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.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.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.¹⁸³ This oversight has left the Sentencing Commission susceptible to political pressure from Congress and ensured Congress's control over the body.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.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.¹⁸⁶ Seeing its own limitations in bringing about reform,

181. See Tison, *supra* note 180, at 419–28.

182. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 758 (2005).

183. See *id.* at 755.

184. See *id.* at 754–57.

185. See *id.* at 717–18.

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, *Toward a New System of Criminal Sentencing: Law With Order*, 16 AM. CRIM. L. REV. 353, 380 (1979).

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.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.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.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.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.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.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.¹⁹³ These commissioners serve six-year terms and at least three commissioners are judges.¹⁹⁴ Also included on the Sentencing Commission is an ex officio member, the

187. See Barkow, *supra* note 182, at 757.

188. See *id.* at 760–62.

189. See *id.* at 759, 763–64.

190. See *id.* at 759.

191. See 28 U.S.C. § 994 (1988); Barkow, *supra* note 182, at 758–62.

192. See Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 189–93 (1993) (detailing the congressional direction to the Sentencing Commission in regards to the Sentencing Guidelines and the study of mandatory minimum sentences).

193. See 28 U.S.C. § 992(a) (2006).

194. *Id.*; Judicial Administration and Technical Amendments Act of 2008, Pub. L. No., 110-406, § 16, 122 Stat. 4291, 4295 (to be codified as amended at 28 U.S.C. § 991).

Attorney General, who has no voting power.¹⁹⁵ The chair of the Sentencing Commission presides over meetings and directs funds.¹⁹⁶

Since its inception, the Sentencing Commission has had thirteen judges serve as commissioners, while every chairperson has come from the Judicial Branch.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.¹⁹⁸ This heavy slant towards legal professionals has hardly created a balanced group of experts.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.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,²⁰¹ the reports and proposals submitted by the Sentencing Commission have been unanimously *against* mandatory statutory penalties.²⁰² The creation of the Sen-

195. 28 U.S.C. § 991 (2006).

196. 28 U.S.C. § 993 (2006).

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, *supra*; Former Commissioners, *supra*.

198. Current Commissioners, *supra* note 197; Former Commissioners, *supra* note 197.

199. Barkow, *supra* note 182, at 763.

200. *Id.* at 759.

201. Hatch, *supra* note 192, at 189–90, 192–93 (detailing the congressional direction to the Sentencing Commission with regard to the Sentencing Guidelines and the study of mandatory minimum sentences). See generally Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

202. Chanenson, *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 penalties.²⁰³ 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 power in sentencing reform.²⁰⁴

After implementation of the Sentencing Guidelines, the Sentencing Commission began to realize the effect of the mandatory minimum sentences on judicial discretion.²⁰⁵ Largely using the crack-to-cocaine disparity problem as an example of the inefficiency of the mandatory minimum system, the Sentencing Commission has consistently opposed the 100-to-1 ratio.²⁰⁶ 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 sentence system.²⁰⁷

3. United States Sentencing Guideline § 2D1.1

Since Congress's rejection of the 1995 amendment proposal addressing the crack disparity problem, the Sentencing Commission has been reluctant to issue further amendments.²⁰⁸ However, with the de-emphasis of crime as a national political issue and the sweeping effect of *Booker*,²⁰⁹ the Sentencing Commission proposed an amendment to United States Sentencing Guideline section 2D1.1 in 2007, which was enacted and served to lower the sentencing ranges for all crack offenses.²¹⁰ This first step in addressing 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 MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 124 (1991).

208. See Chanenson, *supra* note 27, at 564.

209. See *United States v. Booker*, 543 U.S. 220, 245 (2005).

210. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2007).

crack offender's base Guideline level.²¹¹ Although not as broad as the Sentencing Commission has recommended in the past,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.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.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.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 1991.²¹⁶ The

211. Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT'G REP. 291, 291 n.15 (2007).

212. 2002 COCAINE REPORT, *supra* note 65, at viii, 103–11; 1997 COCAINE REPORT, *supra* note 1, at 2; 1995 COCAINE REPORT, *supra* note 53, at xiv, 198.

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).

214. *See infra* notes 235–36 and accompanying text.

215. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

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.”²¹⁷

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*.²¹⁸ 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.²¹⁹ These numerous efforts at publicity are a direct campaign by FAMM to educate and transform the landscape of sentencing reform in America.²²⁰

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.”²²¹

federal prison for growing marijuana.” *Id.*

217. Families Against Mandatory Minimums, About FAMM, <http://www.famm.org/AboutFAMM.aspx> (last visited Dec. 18, 2009).

218. See Families Against Mandatory Minimums, FAMM in the News, <http://www.famm.org/Newsandinformation/FAMMintheNews.aspx> (last visited Dec. 18, 2009).

219. See Families Against Mandatory Minimums, <http://www.famm.org> (last visited Dec. 18, 2009).

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”).²²² 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.²²³ Founded in 1958, NACDL consists of more than 12,800 direct members and another 35,000 affiliated members in 94 state and local organizations.²²⁴ 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.²²⁵ The organization’s grassroots support has given it greater sway with judges, legislators, and attorneys.²²⁶ 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,

222. See Nat’l Assoc. of Crim. Def. Lawyers, Chronology of NACDL Letters and Member Testimony, <http://www.nacdl.org/public.nsf/freeform/Testimony?OpenDocument> (last visited Dec. 18, 2009) (listing at least twenty-one instances of member testimony and statements in front of Congress regarding sentencing reform or drug crime laws spanning from 1995 to 2008).

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).

224. See Nat’l Assoc. of Crim. Def. Lawyers, Who We Are, <http://www.nacdl.org/public.nsf/freeform/WhoWeAre?OpenDocument> (last visited Dec. 18, 2009).

225. See *id.*

226. Norman L. Reimer, *Inside NACDL*, 31 CHAMPION 43, 44 (2007) (remarks of Norman Reimer, executive director of NACDL, delivered in receipt of the Robert Louis Cohen Award).

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-

227. *Id.* In 2009 NACDL has submitted twenty-five amicus briefs. See Nat’l Assoc. of Crim. Def. Lawyers, Recent Amicus Briefs, <http://www.nacdl.org/public.nsf/newsissues/Amicus?OpenDocument> (last visited Dec. 18, 2009).

228. See *id.*

229. Carmen D. Hernandez, Nat’l Assoc. of Crim. Def. Lawyers, Written Statement to United States Sentencing Commission (Nov. 14, 2006), available at http://www.uscc.gov/hearings/11_15_06/Hernandez-NACDL-testimony.pdf (“I urge you to do the right thing. Propose long-overdue changes to the crack guidelines that are supported by every one of Commission’s reports and that are required by the statutory mandate—in 28 U.S.C. § 991—to establish sentencing guidelines that provide certainty and fairness while avoiding unwarranted sentencing disparities and that reflect empirical knowledge of human behavior.”); see Carmen D. Hernandez, Nat’l Assoc. of Crim. Def. Lawyers, Testimony before United States Sentencing Commission (Nov. 16, 2004), http://www.uscc.gov/hearings/11_16_04/hernandez.pdf.

230. See, e.g., News Release, Nat’l Assoc. of Crim. Def. Lawyers, “Crack” Guideline Long Overdue, Criminal Lawyers Say (Apr. 28, 2007), available at <http://www.nacdl.org/public.nsf/Newsreleases/2007mn012?OpenDocument>.

231. See Cato Institute, About Cato, <http://www.cato.org/about.php> (last visited Dec. 18, 2009).

proach of focusing on the effects of the current sentencing policy as applied to the prison system.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.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.²³⁴ Because of this, Cato has supported alternative methods to imprisonment such as supervised probation or parole, electronic monitoring, and boot camp systems.²³⁵

Another area in which Cato has advocated sentencing reform is in questioning the constitutionality of the federal guidelines system.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.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.”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

232. See David B. Kopel, *Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety*, Cato Policy Analysis No. 208 (May 17, 1994), available at <http://www.cato.org/pubs/pas/pa-208.html>.

233. *Id.*

234. See *id.*

235. See *id.*

236. See Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, in *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* 119 (Gene Healy ed., 2004).

237. *Id.* at 124.

238. See Malcolm C. Young, *Special Interests, Principles, and Sentencing Reform in America*, 96 J. CRIM. L. & CRIMINOLOGY 1509, 1531 (2006) (reviewing *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING*, *supra* note 236).

Branch has at times hesitantly waged a battle with Congress for reclamation of their place in the sentencing world.²³⁹ With varying degrees of ideology in the judiciary,²⁴⁰ a group of judges has aligned itself with other reformers to reclaim control over sentencing power.²⁴¹ 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.²⁴² 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.²⁴³ 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-

239. See generally Michael Tonry, *Judges and Sentencing Policy—The American Experience*, in SENTENCING, JUDICIAL DISCRETION AND TRAINING 137, 137 (C. Munro & M. Wasik eds., 1992) (discussing the problems that arise as a result of the opposing views held by policymakers and judges).

240. Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 742 (2008) ("There is considerable literature linking political ideology to decision outcomes").

241. See Marcia G. Shein, *Race and Crack Cocaine Offenses: Correcting a Troubling Injustice Post-Booker*, 31 CHAMPION 18, 18, 21 (2007) (discussing the judicial resistance to imposing the 100-to-1 disparity); see also *Cracked Justice—Addressing the Unfairness In Cocaine Sentencing, Hearing Before the Subcom. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 27 (2008) [hereinafter *Cracked Justice Hearing*] (written statement of Judge Reggie B. Walton) (stating that the U.S. Judicial Conferences have a "longstanding opposition to mandatory minimum penalties").

242. 543 U.S. 220, 246 (2005).

243. Stith, *supra* note 112, at 1473.

ing.²⁴⁴ In addition, the Court held in four cases that the guidelines regime did not violate a defendant's constitutional procedural rights.²⁴⁵

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.²⁴⁶ 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.²⁴⁷ 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.²⁴⁸

In *Booker*, the Court relied on the argument that judicial fact-finding judgment power was too great in the post-conviction phase.²⁴⁹ 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."²⁵⁰ 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. Dunningan*, 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.

247. See *Blakely v. Washington*, 542 U.S. 296, 304–05 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 251–52 (1999); see also Stith, *supra* note 112, at 1477.

248. *United States v. Booker*, 543 U.S. 220, 232 (2005); see also Stith, *supra* note 112, at 1477.

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

251. See Anne Marie Tracey & Paul Fiorelli, *Throwing the Book[er] at Congress: The Constitutionality and Prognosis of the Federal Sentencing Guidelines and Congressional Control in Light of United States v. Booker*, 2005 MICH. ST. L. REV. 1199, 1226 (2005).

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.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.²⁵⁸

As seen in the makeup of the *Booker* voting blocs, traditional ideology was not the decisive factor.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.²⁶⁰ If viewed in this way, *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.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.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 *Booker*, courts of appeals remained reluctant to allow lower courts to use this new found discretion.²⁶³ In a series of cases following *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.²⁶⁴ However, the dual cases of *Gall v. United States* and *Kimbrough v. United*

257. *Id.* at 245 (majority opinion).

258. *Id.* at 272 (Stevens, J., dissenting in part).

259. See Christopher E. Smith, Michael McCall, & Madhavi McCall, *Criminal Justice and the 2004-2005 United States Supreme Court Term*, 36 U. MEM. L. REV. 951, 959-60 & tbl. 3 (2006).

260. *Booker*, 543 U.S. at 251-52.

261. *Id.* at 292 (Stevens, J., dissenting in part).

262. See *id.* at 291-302.

263. Alan Ellis & James H. Feldman, Jr., *Supreme Court Finally Fulfills Promise of Booker*, 23 CRIM. JUST. 47, 47 (2008).

264. See *United States v. Gall*, 446 F.3d 884, 889 (8th Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006).

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

265. Ellis & Feldman, Jr., *supra* note 263, at 47; see *Gall v. United States*, 552 U.S. 38, ___, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 552 U.S. 85, ___, 128 S. Ct. 558 (2007).

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.

269. John D. Olive, *Federal Sentencing Landscape Post-Gall*, 31 WYO. LAW. 14, 14 (2008).

270. *Kimbrough*, 552 U.S. at ___, 128 S. Ct. at 575–76; see also Ellis & Feldman, Jr., *supra* note 263, at 48.

271. *Kimbrough*, 552 U.S. at ___, 128 S. Ct. at 575–76.

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

272. Ellis & Feldman, Jr., *supra* note 263, at 51 (quoting *Kimrough*, 552 U.S. at ___, 128 S. Ct. at 575, 577).

273. *Gall*, 552 U.S. at ___, 128 S. Ct. at 591; *Kimrough*, 552 U.S. at ___, 128 S. Ct. at 563.

274. *Gall*, 552 U.S. at ___, 128 S. Ct. at 591; *Kimrough*, 552 U.S. at ___, 128 S. Ct. at 577–78.

275. See Ellis & Feldman, Jr., *supra* note 263, at 51.

276. See *Gall*, 552 U.S. at ___, 128 S. Ct. at 594; *Kimrough*, 552 U.S. at ___, 128 S. Ct. at 574.

277. See, e.g., *Cracked Justice Hearing*, *supra* note 241, at 17–30; Thomas F. Hogan, Chief Judge, United States Dist. Court for D.C., Prepared Testimony before the United States Sentencing Commission (Feb. 15, 2005), available at http://www.usc.gov/hearings/02_15_05/Hogan-testimony.pdf (speaking as an individual U.S. District Court judge); Lawrence Piersol, Chief Judge, United States Dist. Court for the Dist. of S.D., Statement before the United States Sentencing Commission (Feb. 15, 2005), available at http://www.usc.gov/hearings/02_15_05/Piersol_testimony.pdf (speaking from his personal point of view).

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.²⁷⁸ 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.²⁷⁹ 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.”²⁸⁰ 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 This group response by the judicial branch, even

278. See U.S. Courts, Judicial Conference, Organization and Operating Procedures, http://www.uscourts.gov/judconf_organization.htm (last visited Dec. 18, 2009).

279. Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1161 (2007) (citing JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES 12–18 (2002)).

280. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (2006).

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 Piersol, *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.ussc.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.ussc.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-

below are my personal views on the matter.”).

282. David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 253 (2004).

283. Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231, 235 (2004).

284. *See id.*

285. *Id.* at 235 n.7.

286. Zlotnick, *supra* note 282, at 260 (citing Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html).

287. Kennedy, *supra* note 286.

288. *Id.*

289. Zlotnick, *supra* note 282, at 261–62.

ers and the public.²⁹⁰ 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.²⁹¹ 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.”²⁹²

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.²⁹³ 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.²⁹⁴

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.²⁹⁵ 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.²⁹⁶ 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.²⁹⁷ 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.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰

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.³⁰¹ 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.³⁰² Politicians representing minority districts, special interest groups concerned with individualized experiences,³⁰³ academics providing critiques of the new system,³⁰⁴ and governmental agencies tasked to study the issue,³⁰⁵ 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-

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).

303. See, e.g., Families Against Mandatory Minimums, About FAMM, <http://www.famm.org/AboutFAMM.aspx> (last visited Dec. 18, 2009) (quoting FAMM's mission statement).

304. See, e.g., Kopel, *supra* note 232.

305. See, e.g., McDonald & Carlson, *supra* note 167, at 225–26; see also 1995 COCAINE REPORT, *supra* note 53, at xiv–xv.

gress did what it does best—delegate.³⁰⁶ 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 thorough 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

307. See U.S. Securities and Exchange Comm'n, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml> (last visited Dec. 18, 2009).

308. See Ellis & Feldman, Jr., *supra* note 263, at 50 (discussing the effects of *Kim-brough* 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,³¹⁰ 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.³¹¹ 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.³¹² As an agency dominated by judges,³¹³ the Sentencing Commission is similar to the Supreme Court in that it too had personal problems with a determinate sentencing system.³¹⁴ 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.³¹⁵

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

mentation of the SRA to *Booker*.

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.