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Beyond Guidelines: The Commission as Sentencing Clearinghouse

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BEYOND GUIDELINES: THE COMMISSION AS SENTENCING CLEARINGHOUSE

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The United States Sentencing Commission, like most government agencies, has been assigned a variety of important tasks. One of its central responsibilities, of course, is to promulgate, monitor and amend the sentencing guidelines. But Congress also had other roles in mind for the Commission. Much of the Sentencing Reform Act is devoted to Congress's desire to see sentencing transformed from a hidden, idiosyncratic process to one that is open and informed by knowledge and experience. Congress sought to ensure that the Commission would serve as a clearinghouse for information and knowledge about the sentencing process, and would become engaged in an ongoing dialogue with all who might contribute to that store of information and knowledge.

A Commission committed to these goals could proceed in a number of ways. Frequent conferences, at which the Commission spends as much time listening to the views of others as defending its own, would be a good start. The Commission might issue paper series exploring issues in depth, invite scholars to work for a time with the Commission or encourage and support their independent projects, and make accessible to researchers as much of its data and information as possible.

Some less familiar provisions of the Sentencing Reform Act reveal other plans for the Commission. The Act directs the Commission to establish federal sentencing policies and practices that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[1] The Commission is instructed to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system."[2] To enable the Commission to achieve these goals, Congress authorizes it, inter alia, to:

> —enter into contracts or other agreements with "any public agency, or any person, firm, association, corporation, educational institution, or nonprofit organization."[3]
>
> —"utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities."[4]
>
> —"request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require."[5]
>
> —"establish a research and development program within the Commission for the purpose of—
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> (A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices."[6]
>
> —collect and publish data concerning the sentencing process.[7]
>
> —"collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(e) of title 18, United States Code."[8]
>
> —"collect systematically and disseminate information regarding effectiveness of sentences imposed."[9]
>
> —"devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field."[10]

Congress probably anticipated that several related benefits would flow from such a clearinghouse model: the quality of the Commission's work would be enhanced and the clearinghouse would stimulate further advances in the study of sentencing. In performing its guideline functions, the Commission could benefit from sustained input from judges, prosecutors, defense attorneys, probation officers, and scholars. Further, an open, receptive Commission could, by engaging in vigorous collaboration with other branches of government, and private individuals and organizations, become a national criminal justice resource center.

Measured against these aspirations, the Sentencing Commission has fallen noticeably short. Take, for example, the Commission's treatment of its monitoring data. The Commission has in its possession, in the case reports sentencing judges file with it, an extraordinarily abundant source of sentencing data. Independent assessment of the guidelines, and a wide range of sentencing studies generally, would be enhanced by the information contained in these reports. The Commission has instead adopted an unduly restrictive policy, citing administrative burden and a confidentiality clause in its agreement with the Administrative Office of the U.S. Courts[11]

These rationales are inadequate and suggest the Commission's reluctance to engage in serious debate. Although a government agency may legitimately have concerns with workload and administrative burden, the Commission's generous budget and staffing surely enable it to satisfy legitimate scholarly inquiries. As for the agreement with the A.O., much

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of what judges forward to the Commission pursuant to statute,[12] such as judgment and commitment orders, are public documents, available for inspection at federal courts around the country. Of course, digging through files in courthouse after courthouse, while a valuable research methodology for some types of studies, is wholly inadequate for broader empirical analysis. No legitimate purpose is served by denying researchers access to the one centralized source of such information. The Commission has apparently made no effort to work out an arrangement with the A.O. to facilitate scholarly access, thus effectively closing off examination of this data, except as the Commission chooses to present it.

There are other examples of the Commission's apparent determination to keep outside experts at arm's length. No transcripts are made of the public meetings and audio tapes of the meetings are destroyed. The correspondence files lack any indexing or useful description, rendering these documents virtually inaccessible. As if to shield its thought process, the Commission complies in a perfunctory manner with its obligation to include a statement of reasons for guideline amendments.[13]

Even such a mundane matter as mailing lists reveals the Commission's insularity. It can be a frustrating experience trying to keep abreast of developments at the Commission. The Commission maintains no regular mailing list One must either continually call the Commission to see if there are any new publications or activities of note, or rely on a network of colleagues. In my own case, a Commissioner promised to put my name on some sort of mailing list but I have rarely received information directly from the Commission. It would not require a huge reallocation of the Commission's resources to significantly improve its contacts with the small community seriously interested in sentencing.

There are some visible signs of accessibility and openness to debate and dialogue. Some Commissioners have been generous with their time in making public appearances to discuss the guidelines, often before hostile audiences. Any interested individual may testify at the Commission's public hearings. The Commission has at times constituted advisory groups on guideline issues. This year the Commission sponsored two conferences, on sentencing research, and drugs and violent crime.

Still, the overriding image of the Commission that comes to mind is a fortress: surrounded by a moat, gate up, armed guards ready to fight off "invaders." To some extent this is understandable. Most judges, defense lawyers and scholars have treated the guidelines harshly, with many calling for rejection of much of what the Commission has done. Members of the Commission react by meeting harsh criticism with mistrust and suspicion. Outside researchers are tolerated, not encouraged.

An "us vs. them" attitude shortchanges Congress's vision for the Commission. In its zeal to defend the guidelines the Commission has lost sight of the value of playing a central role in ongoing debates about sentencing. The Commission has an obligation to go beyond its role as a partisan political actor. Rather than reacting defensively, the Commission should reach out to even its most severe critics, recognizing that they too are searching for a more just and effective sentencing system.

With recent signs of political willingness to rethink some sentencing policies of the 1980s, this is an auspicious time for the Commission to rededicate itself to an educative function. It should not let this opportunity to improve its standing and support in the broader community, and to contribute more deeply to the advancement of knowledge about sentencing slip away.

FOOTNOTES

[1] 28 U.S.C. §991(b)(1)(C).
[2] 28 U.S.C. §994 (o).
[3] 28 U.S.C. §995(a)(6).
[4] 28 U.S.C. §995(a)(5).
[5] 28 U.S.C. §995(a)(8).
[6] 28 U.S.C. §995(a)(12).
[7] 28 U.S.C. §995(a)(13), (14).
[8] 28 U.S.C. §995(a)(15).
[9] 28 U.S.C. §995(a)(16).
[10] 28 U.S.C. §995(a)(1)(17).
[11] Public Access to Sentencing Commission Documents and Data, 54 Fed. Reg. 51279-01 (Dec. 13, 1989) (current policy); 2 Fed. Sent. R. 25 (June 1989), 54 Fed. Reg. 26132-02 (June 21, 1989) (proposed policy). In response to comments on its proposed draft, the Commission explained in its December 13, 1989, statement that it was not legally obligated to provide source documents, thus defining its access policy by the minimum required by law rather than the policy which would best contribute to research.
[12] 28 U.S.C. §994(w).
[13] *See* 28 U.S.C. §994(p).