

The Sentencing Reform Act of 1984 and Sentencing Guidelines

The Untapped Potential for Judicial Discretion Under the
Federal Sentencing Guidelines: Advice for Counsel *Gerald Bard Tjoflat*

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anagement *Mark H. Luttrell*

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YEARS FROM now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice. The Sentencing Reform Act of 1984 which brought about the sentencing guidelines sent ripples in the pool of the Federal court system that affected all who participate in the sentencing process. Certainly the day-to-day work of judges, both district and appellate, prosecutors, attorneys, probation officers, and correctional personnel has been altered significantly, and the course of careers has changed. This special issue of *Federal Probation* gives a voice to those who have been working in the midst of such historic change.

Federal Probation invited eminent jurists and prominent sentencing experts to prepare articles reflecting their thoughts and perspectives regarding the Sentencing Reform Act and the sentencing guidelines. The first three articles comprise thoughtful, varied perspectives from the bench. The articles that follow are by authors representing other critical roles in sentencing. The articles are organized by profession in the order that each author would typically become involved in the sentencing process.

Ever since the Federal sentencing guidelines went into effect, judges and commentators have criticized the guidelines for placing excessive restrictions on judicial discretion. The Honorable Gerald Bard Tjoflat, chief judge of the U.S. Court of Appeals for the Eleventh Circuit, asserts that critics fail to appreciate the significant discretion that the judge retains. In "The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel," Judge Tjoflat addresses the failure of attorneys to appropriately exploit judicial discretion within the guidelines structure. Advice for attorneys is offered regarding how to develop proper arguments to guide the sentencing judge's discretion in a particular case. Providing substantial background information, the article describes the congressional purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines.

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Fact-Finding Under the Sentencing Guidelines

- Role of the presentence report
- Burden of persuasion in challenging the presentence report
- Role of negotiated stipulations
- Quality of evidence and standard of proof required to establish guideline-relevant facts

The Impact of the Sentencing Reform Act on Prison Management

BY MARK H. LUTTRELL

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THE SENTENCING Reform Act (SRA) of 1984 has significantly affected correctional management in the Bureau of Prisons in a multitude of ways. On the surface, it would appear that the changes having the most impact would be those affecting inmates and inmate management. However, this law has created ripple effects which have extended to management of human and material resources. On the one hand, the disparity which existed in the past in terms of sentencing decisions has been diminished. There is now a strong level of predictability in terms of time to be served which assists staff in planning for an inmate's period of incarceration and eventual release. Furthermore, the Bureau's inmate population has changed as a result of longer sentences with virtually no parole terms. These changes have profoundly altered the Bureau's inmate profile. Additionally, they have necessitated an expansion of physical plants as well as prompted the Bureau to develop innovative means of housing inmates. Finally, the Bureau has experienced an unprecedented growth in staffing.

Sentencing Disparity and Time Served

Speaking on sentencing disparity, Judge William W. Wilkins, Jr., in his opening address to the American Correctional Association's 1991 Winter Conference, mentioned an example of two brothers who committed the crime of larceny together and were sentenced to prison, but they happened to appear before different judges for that same crime. One was sentenced to 1 year, and one was sentenced to 6 years. He also cited an example of a first offender who passed three counterfeit \$5 bills and was sentenced to 15 years and another who passed four \$20 bills who was a recidivist and was sentenced to 4 years.

The SRA has removed such disparity and, in doing so, has dissipated some of the tensions inmates experienced in the past. Under the old law, uncertainty of

time to be served remained of paramount importance to inmates, even after sentencing, for two reasons. The first of these is that inmates were often angered and frustrated by disparities in sentencing. The second is that inmates perceived the Parole Commission as the "real" sentencing authority in that it was charged with making the decisions about who should be paroled to the community and the length of time for which they should be paroled.

With sentencing disparity eliminated, inmate concern about the issue is no longer evidenced. This has been of some benefit to prison managers in their day-to-day work.

Another factor that has enhanced the management of inmates is the predictability of time to be served, based on changes in sentence computation procedures. Typically, sentences begin once inmates are sentenced and placed in a facility while awaiting transportation to their designated facilities. The Full Term Date or Maximum Release Date is then established by adding the term imposed by the court to the first day the defendant is placed in custody for service of his or her sentence. Time served in Federal custody in relation to the offense is credited towards the sentence, provided it has not been credited to another sentence.

Under the old law, this Full Term Date or Maximum Release Date was then reduced with the application of Statutory Good Time,¹ which was based on the length of the sentence imposed, to establish a Statutory Release Date. Under the old law, this Statutory Good Time could be forfeited or withheld during incarceration based on violation of rules and regulations within the institution. This deduction or forfeiture of Statutory Good Time could, after a predetermined required waiting period, be restored to the inmate. From this Statutory Release Date, institution staff would then deduct Industrial Good Time² or Meritorious Good Time,³ to determine a final time status. Thus, an inmate's projected release date could then change due to any of the variables discussed, causing confusion on the inmate's part, in terms of why he or she might not be released on the date originally received. Furthermore, the possibility of receiving parole, again changing this release date, leaves the inmate with an unpredictable term length and an inability to plan for proper use of his time.

Alternately, under the new law, the Full Term Date or Maximum Release Date is established in the same

*Statements contained in this article are the views of the author. Opinions expressed are not necessarily those of the Federal Bureau of Prisons and should not be construed as such.

This article was written as a collaborative effort of the author and the following sources, all affiliated with the Federal Bureau of Prisons: Hector Ledezma, Donald Roerick, and Jack Stone, all with the Federal Correctional Institution, Texarkana, Texas, and Bill Burlington, deputy general counsel, Washington, DC, and Gerald Gaes, chief, Research and Evaluation, Washington, DC.

manner as indicated above regarding credit for time in Federal custody. However, this date is then adjusted by applying Good Conduct Time credits that are limited to 54 days per year of time actually served in Federal custody. The last portion of the last year is then prorated to determine the amount of good conduct credits that will be applied for the actual time remaining to serve. This process establishes a final projected Good Conduct Release Date.

These Good Conduct days may be disallowed by the discipline hearing officer during the year for violations of the rules and regulations. Once these 54 days or portion of 54 days are deducted, the new projected final release date is established. Once awarded, these credits are vested, which reduces inmates' anxieties about possible changes to their release date. Once disallowed, Good Conduct days cannot be restored. Consequently, institution staff can, with more accuracy, plan an inmate's individualized program based on needs and time to be served.

While the new sentencing law is advantageous in this respect, it presents a very distinct disadvantage. As described above, under the new law, inmates are limited to earning a maximum Good Conduct Time amount of 54 days per calendar year which, in most cases, is much less than could be awarded or forfeited under the old law. The institution discipline hearing officer could take as much as 100 percent of their statutory good time for rules violations, depending on the severity of the offense. Consequently, inmates sentenced under the new law are very aware that they have very little to lose for misconduct. Staff, too, are aware they no longer have the leverage formerly available under the old law. Thus, inmate and staff perceptions of good time as a disciplinary tool have changed.

Programming for an Increasing Population

Population growth under the new law, if not managed appropriately, will generate increased inmate idleness. In an effort to minimize idleness, the Bureau has explored innovative approaches and made changes in a variety of its programs.

Educational programming has long been recognized as an important management tool. The Bureau has strengthened its educational opportunities for inmates by focusing on programs designed to augment inmates' academic, occupational, and recreational skills. The Bureau has upgraded the acceptable literacy standard for inmates from 8th grade to 12th grade. When the minimum standards have not been met, as determined by standardized tests, inmate enrollment in certain academic areas, with few exceptions, is a mandatory assignment. English as a Second Language is now a mandatory program for those inmates who are unable to speak English with a certain

amount of fluency, also as determined by standardized tests.

This mandatory requirement is applicable regardless of an inmate's nationality, but for the most part, applies to Spanish-speaking inmates. The Bureau's Hispanic inmate population has increased since 1988 from 11,784 to 16,447 inmates. Moreover, drug abuse programming has increased as the number of inmates incarcerated for drug offenses has almost doubled from 14,556 in 1988 to 27,908 in 1991.

Finally, Federal Prison Industries (trade name UNICOR) provides inmates with job training opportunities. Approximately 25 percent of the available working population is employed by UNICOR.

Changes in the SRA have compelled the Bureau of Prisons to more effectively plan an inmate's stay of incarceration. In addition to an inmate's work assignment, unit teams are charged with the responsibility of recommending a program for each inmate during his initial classification and also tracking progress in the program at each review thereafter. The unit team, comprised of a unit manager, case manager, counselor, education representative, psychologist, and correctional officer, focuses on the development of a comprehensive program which includes, to the necessary extent, opportunities for growth in academic and occupational education, organized leisure time activities, as well as participation in drug abuse programs.

These programs are then combined into half-day programming. The concept of half-day programming incorporates a half-day of work and a half-day of participation in any or a combination of the above activities. This concept, designed primarily as a tool to accommodate the growth the Bureau was experiencing, was piloted in 10 institutions in 1990. Sufficient resources for educational programming were allocated to participating institutions. Career counseling centers were developed to steer inmates in the right occupational direction based on a variety of exploratory examinations. Ultimately, these pilot programs were adopted, with modifications, in many of the Bureau's other facilities. Half-day programming has become a useful tool in constructively dealing with inmate idleness.

The Presentence Report

Another important management tool prison administrators have used extensively, and which has changed as a result of the new law, is the presentence investigation (PSI). This document, prepared by the U.S. probation office to assist the court during sentencing, is forwarded through the U.S. marshals office to the Bureau of Prisons. Its initial use in the prison system is to assist in the appropriate designation of a particular Federal facility. In its classification system,

the Bureau of Prisons attempts to place inmates in the least restrictive environment close to their homes, while considering such factors as severity of offense, length of sentence, history of escapes or violence, type of prior commitments, criminal history, propensity for violence, and administrative needs. The majority of the information used to determine an inmate's security needs is obtained from the PSI.

Once the type of facility that is required to house the inmate is determined, the PSI is forwarded to the facility where it becomes part of the inmate's institutional file. It subsequently serves as a valuable source document for the case manager, who is the person responsible for monitoring inmates assigned to the unit team. Prior to an inmate meeting with the initial classification team, the case manager reviews the PSI report and becomes familiar with the inmate's current offense, criminal history, work history, alcohol and drug abuse needs, educational needs, and other program needs as indicated in the report. After initial team classification, the inmate's case is reviewed on a routine schedule, and the report is referred to on many occasions when making management decisions concerning the inmate. This very valuable document becomes critical to administrators in making decisions regarding inmate participation in community activities, Community Corrections Center placement, or transfer from a Federal Correctional Institution to a Federal Prison Camp.

The decisions made are dependent, to a large extent, on information contained in the PSI portion of the inmate's central file. Under the old law, the information relied upon in this type of decision-making process was in narrative form and pertained to an inmate's past history of violence or sexual offenses. With the SRA, however, the format of this document has undergone drastic changes. The new PSI's present precise, less narrative accounts of an inmate's background.

During a sentencing institute in Fort Worth, Texas, in October 1990, on the subject of the SRA, the author had an opportunity to share, informally, some personal views on the PSI with a group of participants. The fact that Bureau of Prisons administrators use the PSI as a classification and prerelease management tool surprised some Federal judges. That a court document designed exclusively as a sentencing tool could be used extensively and effectively by correctional managers was a foreign concept to some. Suffice it to say, the PSI is a significant aid in a deliberate process to develop a comprehensive institutional program responsive to the correctional needs of the inmate and the demands of an ever watchful and sensitive society.

Some Statistics

The Bureau's inmate population profile is changing

drastically as a result of the SRA. Specifically, we are seeing inmates serving longer terms of incarceration. For example, Bureau of Prisons statistics show that the average time served for a robbery offense under the old law was 44.8 months, compared to 78.0 months under the new law. Similarly, the average time served for a drug offense was 23.1 months versus 58.0 months under the new law. Longer sentences translate into an aging inmate population, and the Bureau projects an increase in the average age of its inmate population. The implications will be a refocus on the structure of new facilities, recreational/wellness programs designed for the elderly, as well as additional medical services at an increased cost.

In June 1991, the bed capacity of the Bureau was 38,696 located in 67 facilities, while the inmate population was 62,057, with a projected population of 98,800 in 1995. As a result of the inmate population growth spurred by the implementation of the SRA, the Bureau was prompted to consider several options to manage overcrowding. The scope of options includes the expansion of existing facilities; when appropriate, the use of Community Corrections Centers (halfway houses); Intensive Confinement Centers; Federal Correctional Complexes; acquisition of surplus sites; military base conversions; and construction of new facilities.

The agency growth triggered by the SRA has created a need to expand in the areas of staff recruitment and training. The number of staff required is expected to double by the time this expansion program is complete. Work force forecasts and plans are critical components in the strategic management of the growth of the Bureau. From the end of fiscal year 1990 to the end of fiscal year 1995, the Bureau is expected to grow 108 percent from 19,194 to 39,900 employees. During this period, 81 percent of the new positions will be for new institutions, while 19 percent will be added to existing institutions.

The growth of the Bureau is scheduled to be relatively constant from the end of fiscal year 1990 to fiscal year 1995. It is projected that over 32,000 employees will either separate from the Bureau or move into other occupations in the Bureau during the period. Despite a growth of 20,796 positions, it is estimated the Bureau will need to recruit, develop, and train over 52,000 employees for its various occupations. Thus, with the creation of the National Recruitment Office and five regional recruitment officers, the Bureau has undertaken an aggressive approach to recruitment. Moreover, each institution is expected to do its own local recruitment, with a solid commitment to the Bureau's affirmative action program and Federal equal opportunity recruitment plans.

A management information system, Key Indicators,

was developed to assist in effectively managing the agency's growth. Key Indicators, a strategic support system which generates statistical data derived from numerous computer systems in the Bureau's field and administrative facilities, provides the agency with a wealth of demographic information about each of the Bureau's facilities, as well as combined groups of facilities. These data depict some of the transformations that the Bureau is currently experiencing as a result of the SRA. The following data reflect some of the changes that are occurring throughout the entire Bureau and may help to further illustrate some of the effects of the SRA. The total number of inmates in the Bureau of Prisons was 63,041 in March of 1991. In contrast, the total number of inmates was 44,842 in March 1988. In March 1990, 33 percent of inmates were sentenced under the SRA guidelines; by March 1991, the figure increased to 54 percent.

Conclusion

In essence, the SRA and resulting increases in Bureau population have presented the Bureau of Prisons with a multitude of new procedures and management issues. Thus far the Bureau has addressed the new challenges by intensifying its educational programs, drug abuse programs, and work programs. The Bureau must continually monitor and assess every aspect of its function to proactively meet the needs of a burgeoning inmate population. As this time of transi-

tion continues, the Bureau's priority is, and will continue to be, to find innovative approaches to meet the challenges which will surely continue.

NOTES

¹Statutory Good Time is time applied to reduce an inmate's Full Term Date and is based on the length of his or her sentence. This time could range from 5 days a month up to a maximum of 10 days a month.

²Industrial Good Time is time applied to reduce an inmate's Statutory Release Date. This time is awarded for his or her employment within Federal Prison Industries (UNICOR) at a rate of 3 days a month for the first year and 5 days a month thereafter.

³Meritorious Good Time is also time applied to reduce an inmate's Statutory Release Date. This time is awarded to an inmate for performing exceptional or meritorious duties within the institution at a rate of 3 days a month for the first year and 5 days a month thereafter.

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