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The United States Sentencing Commission

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Introduction

The United States Sentencing Commission was created as part of the *Sentencing Reform Act* of 1984.[1] It was supposed to bring order to federal sentencing by enacting national standards – guidelines – that were designed to eliminate "unwarranted disparity" among similarly situated defendants across the country, as well as to achieve other purposes of sentencing.[2] Significantly, increasing public participation in the criminal justice system was *not* a goal of the legislation. The public's punitive sensibilities were readily – some might say, too readily – reflected in the existing law.

Rather, the idea of reformers was that the Commission would be insulated from politics. It would be able to do what Congress had been unable to do, namely resist public pressure to punish disproportionately whatever the "crime du jour" happened to be. Its work would be accepted by all of the sentencing players – public, Congress, judges – precisely because of its independence from the political process and the extent to which it had an expertise that the other players lacked (Stith and Cabranes, 1998, p 48).

The reality was entirely different. In retrospect, the hopes of the reformers seemed almost naïve: the Commission was not insulated from politics. It became, in the words of the Supreme Court, a "junior varsity" legislature.[3] With a few exceptions, it was captive to the Congress and frequently to the federal prosecutor and the Department of Justice. Nor did its work reflect a unique sentencing expertise not otherwise found in the political process. Ironically, although it was extremely responsive to the people's representatives in Congress, it did not really reflect the public's will. The public was not remotely as punitive, remotely as vengeful – especially in *individual* cases – as Guideline sentences required.

For over 20 years the Commission has been widely criticised. Most recently, the Federal Sentencing Guidelines have been subject to a stark constitutional challenge.[4] When scholars from the American Law Institute, an esteemed American law reform organisation, sought to establish model sentencing laws, the message was clear: avoid the Federal Sentencing Guidelines regime at all costs (American Law Institute, 2004, p 2).

The purpose of this chapter is to attempt to explain why. For other jurisdictions seeking to implement sentencing reform through a sentencing commission, it is a cautionary tale.

21 Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub L No 108-21, 117 Stat 650 (codified as amended in scattered sections of 18 USC, 28 USC, and 42 USC).

22 United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 91 (2002) (hereinafter 2002 Report to Congress), <www.ussc.gov/r_congress/02crack/2002crackrpt.htm>. See also United States Sentencing Commission: Special Report to the Congress: Cocaine and Federal Sentencing Policy (1997), <www.ussc.gov/r_congress/NEW CRACK.PDF>; United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (1995), <www/ussc/gov/crack/execsum.pdf>.

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