Lots of Advice on Lots of Topics for the New (Post-Booker) U.S. Sentencing Commission

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Just before it adjourned at the very end of 2010, the U.S. Senate finally confirmed President Obama’s nominee for Chair of the U.S. Sentencing Commission, U.S. District Judge Patti B. Saris from the District of Massachusetts. Judge Saris joins a Commission on which both of the Vice Chairs were appointed in just the last three years and on which now two thirds of the members began their service after the Supreme Court’s landmark ruling in Booker.

Although the Sentencing Commission is still not exactly all new—District Judges Ricardo Hinojosa and Beryl Howell are in their seventh years on the Commission—the infusion of many new Commissioners is certain to bring novel perspectives and fresh concerns to the work of an institution that still has a profound impact on federal sentencing policy and practice. And, with federal sentencing policy and practice subject to myriad influences—ranging from the Supreme Court’s regular consideration of federal sentencing issues to Congress’s recent reworking of drug sentencing through passage of the Fair Sentencing Act—the new Commissioners likely know they need to hit the ground running in order to continue to have a potent and positive impact on federal sentencing developments.

To welcome the new Chair, the editors of Federal Sentencing Reporter decided to provide a forum for judges, lawyers and other sentencing practitioners, legal academics, sentencing researchers, and others to share advice for the U.S. Sentencing Commissioners. In the pages that follow, readers will find commentaries that tackle some big structural issues and some smaller technical concerns, some broad discussions of sentencing theories and procedures, and some focused suggestions on how to improve the operation of particular Guidelines.

Together with the original commentary, this issue also includes two fascinating primary documents that, both directly and indirectly, provide advice to the Commission from key players in the federal sentencing system. One document—a June 2010 letter from Jonathan Wroblewski, director of the Office of Policy and Legislation in the Department of Justice, to then U.S. Sentencing Commission chair William K. Sessions III—has many interesting facets, including an initial expression of concern “that federal sentencing practice is fragmenting into at least two distinct and very different sentencing regimes.”

According to this Justice Department letter, one regime “includes the cases sentenced by federal judges who continue to impose sentences within the applicable guideline range for most offenders and most offenses,” but another regime “has largely lost its moorings to the sentencing guidelines” because some judges “regularly impose sentences outside the applicable guideline range irrespective of offense type or nature of the offender [and] . . . certain offense types for which the guidelines have lost the respect of a large number of judges.” This letter, notably, calls on the Commission to prepare a comprehensive report on the state of federal sentencing “that [would] lay out a way forward to address systemic concerns and ensure that the principles of sentencing reform—predictability, elimination of unwarranted disparity, and justice—are achieved.”

The second primary document reprinted in this issue is a June 2010 publication by the U.S. Sentencing Commission descriptively titled Results of Survey of United States District Judges January 2010 through March 2010. As the introduction to this document indicates, the Sentencing Commission in early 2010 “undertook a survey of all United States district judges concerning their views and opinions...
on sentencing practices.” Covering a wide range of topics, this survey “asked questions grouped into five broad areas: (1) statutory and structural sentencing issues; (2) sentencing hearings; (3) guideline application issues; (4) departures; and (5) general assessments.” Though the results of the entire survey defy simple characterization, the final question provides perhaps the most salient take-away point: In response to a query about which kind of sentencing system they think “best achieves the purposes of sentencing,” a full 75 percent of the district judges responding to the survey indicated that the “current advisory guidelines system” does, whereas only 3 percent of those responding indicated that the “[m]andatory guidelines, such as the system in effect before the Supreme Court’s decision in United States v. Booker, 543 U.S. 220 (2005)” is best.

In other words, the two primary documents in this issue reveal that, although the Justice Department is deeply concerned that post-Booker “federal sentencing practice is fragmenting into . . . dichotomous regimes,” federal district judges believe that the post-Booker system may well be the best of all possible federal sentencing worlds. With these documents helping to frame the reality that different participants see different things about modern federal sentencing policy and practice, we hope that the commentaries from the diverse contributors to this special issue of FSR can help provide the Commissioners with many distinct ideas and different proposals for how they should tackle the challenging responsibilities in the months and years ahead.