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Notes


by

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I. Introduction

Since the creation of the Federal Sentencing Guidelines in 1987, [hereinafter, “the Guidelines”], they have been a subject rife with controversy, much of which has centered on the idea of “relevant conduct,” their supposed “cornerstone.” Relevant conduct, simply put, is a universally applicable provision in the Guidelines that allows a judge to take into account the peculiarities of the particular offense committed when sentencing a criminal defendant, as opposed to merely giving every criminal defendant the same sentence for the

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same statutory offense. The controversy surrounding the inclusion of relevant conduct in the Guidelines has focused on its apparent contrariness to the intent of Congress when it created the Commission.

When Congress embarked on its sentencing revolution in 1984, the hobgoblin which largely drove these legislative reforms was judicial discretion at sentencing. Conservatives and liberals alike found the unfettered role of the federal judge at sentencing to be disturbing, expressing "fundamental and widespread dissatisfaction with the uncertainties and disparities" of the indeterminate sentencing structure previously in place.²

After considering and rejecting several other sentencing options, Congress settled on a semi-mandatory guideline system as the ideal method to control the judicial role at sentencing.³ To promulgate the Guidelines, the Sentencing Commission was established as "an independent commission in the judicial branch of the United States."⁴ In 28 U.S.C. § 991(b)(1)(B), Congress outlined the purpose and authority of the Sentencing Commission, as establishing

sentencing policies and practices for the Federal criminal justice system that provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors taken into account in the establishment of general sentencing practices.⁵

In light of this congressional mandate, the Federal Sentencing Guidelines were born, created by the Sentencing Commission. The Guidelines were structured so that two central factors—the offense of conviction and criminal history—would be determinative in the sentence given to a defendant.⁶ However, despite the formulaic nature of the Guidelines, one little provision contained within the Guidelines seemed to open the door for judicial discretion to sneak back in: Section 1B1.3, Relevant Conduct.⁷ This provision allows a

³. See William W. Wilkins, Jr. & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. REV. 495, 501 (1990). According to Wilkins and Steer, the House version of sentencing reform legislation provided for an offense of conviction sentencing system, whereas the Senate version "seemed to lean toward a real offense system." Id.
⁵. Id. § 991(b)(1)(B).
⁷. See id. § 1B1.3. It can be argued, particularly after Koon v. United States, 518 U.S.
judge to increase a defendant's sentence, which is otherwise derived from the enumerated factors contained within the guideline for that offense, for any further criminal conduct related to the crime. Much has been written concerning the inclusion of relevant conduct in the Guidelines and the wisdom behind that decision.\(^8\)

However, this Note does not focus on the creation of the Guidelines or the choice to include relevant conduct per se. Instead, it focuses on the aftermath of the creation of the Guidelines and the inclusion of relevant conduct. It argues that peculiar, unintended consequences have largely been the result of this attempted reform. The inclusion of relevant conduct, despite its debatable connection to congressional intent, combined with a statute left over from pre-Guideline sentencing that mandates rampant judicial discretion at sentencing, has allowed the disparity-producing sentencing of old to creep back into the post-Guideline world. This time, however, the wide-ranging discretion to consider virtually any conduct at sentencing is comfortably hidden behind the curtain of agency discretion, making appellate review deferential at best and nonexistent at worst.

To better illustrate the current state of sentencing affairs, insight can be gained by focusing on a specific provision in the Guidelines, section 2G2.2(b)(4). Although this provision is a sentencing enhancement and therefore separate from the relevant conduct inquiry undertaken in section 1B1.3, it is a clear indication of how far beyond relevant conduct courts can now go and a warning about the possible future of federal criminal sentencing. Under section 2G2.2(b)(4), a five-level sentencing enhancement is added to a criminal defendant's conviction for possession of child pornography when a defendant has engaged in "a pattern of activity involving the sexual abuse or exploitation of a minor."9 This enhancement requires a sentencing judge, when deciding whether or not this particular enhancement applies to a criminal defendant, to look far beyond the confines of relevant conduct, which had previously been construed as limited to conduct factually and temporally related to the criminal conduct in question. Instead, the Commission expressly authorized sentencing judges to look at any instance of sexual abuse or exploitation of a minor that the defendant may have committed, regardless of whether or not this prior instance was connected with the criminal activity in question either factually or temporally. For the first time since the Guidelines were enacted, under section 2G2.2(b)(4), a judge again had the freedom to engage in the type of unfettered sentencing inquiry that existed in pre-Guideline sentencing, which ironically was the type of inquiry that Congress sought to control through the creation of the Guidelines.

This Note argues that the Commission has strayed far from its original mission of reducing disparities and creating certainty and fairness in federal criminal sentencing. The combination of substantive discretion at the sentencing level and procedural deference at the appellate level has created an environment that allows increasing indiscretion by the Sentencing Commission. Contrary to the desired goal of reducing sentencing disparities, the Commission now has the authority to mandate broad inquiries by a sentencing judge into any information about a defendant's past, which produces the effect of vastly different sentences for similar crimes. This sentencing enhancement is a glimpse of what could be the future of the Guidelines—the Sentencing Commission has become the equivalent of the pre-Guideline sentencing judge, giving out wildly disparate sentences on the basis of conduct completely unrelated to the offense of conviction.

Part I of this Note provides an overview of the sentencing discretion hidden within the post-Guideline world, through the

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simultaneous existence of the relevant conduct provision in the Guidelines and the continuing presence of a pre-Guideline statute, 18 U.S.C. § 3661, which endorses broad judicial discretion at sentencing. In Part I, the far-reaching growth of this discretion at sentencing will be illustrated through the example of section 2G2.2(b)(4). Part II will explore the lack of procedural checks on the Sentencing Commission, due to the increasingly deferential stance of the appellate courts towards the Guidelines. Once again, this will be illustrated through the example of section 2G2.2(b)(4). In Part III, I will argue that this is precisely the wrong direction for the Commission to be headed. Finally, Part IV will also present a few proposals for reigning in the Sentencing Commission so as to fulfill the purpose for which it was created.

II. A Brave New World? The Birth of Relevant Conduct and the Rebirth of Judicial Discretion

A. Relevant Conduct: Judicial Discretion Dressed in the Commission's Clothing

When Congress enacted the statutory framework for sentencing reform, the Commission was authorized to enact guidelines that determined "the appropriate length of a term . . . of imprisonment." These guidelines were to take into account "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense." Confusingly, Congress also left intact previous sentencing statutes, in which judges were given wide latitude in their sentencing inquiry. Within this statutory framework, the Commission was required to create the Guidelines, and it had no discretion to ignore these statutory directives. However, during implementation of these directives, the Commission wrestled with what the statutes actually required of them.

As then-Judge Stephen Breyer, a former Sentencing Commissioner at the time the Guidelines were created, explained, the debate concerning the structure of the Guidelines boiled down to a

11. Id. § 994(c)(2).
12. See id. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence.").
choice between two competing ideas: a "real offense" system, in which the circumstances of an offense were taken into account at sentencing, or a "charge offense" system, in which the sentence reflected only the crime charged. The rationale behind a "charge offense" system was the elimination of arbitrary and capricious disparities in sentencing, by tying punishments directly to the offense for which the defendant was convicted. "The basic premise underlying a 'charge offense' system is that the guideline punishment is presumed to reflect the severity of the corresponding statutory crime." Despite the fact that a charge offense system seemed to embody most closely the congressional vision of uniform sentences for similar crimes and similar defendants, this system was criticized as overly simplistic and incapable of recognizing the myriad of differences in how crimes are committed, "which in the past have made, and still should make, an important difference in terms of the punishment imposed."

On the other hand, a "real offense" system would require punishment to be based on the actual conduct that occurred during the commission of a crime. The criticism of this system involved the fact it would require a post-trial fact-finding procedure to determine the circumstances of the crime. This procedure could either involve trial-type procedures, in which case it would be entirely unmanageable, or it could be done informally, in which case it would run the risk of appearing unfair. More importantly, the larger risk inherent in a real-offense system was that it would result in a return to the "unfair, hidden nature of prior sentencing practices that the Guidelines set about to change."

As Judge Breyer summarized, "The upshot [was] a need for compromise... The Commission's system [made] such a compromise." The result of this compromise was a sentencing system falling somewhere in between a "real offense" system and a

15. See id. at 9.
16. Id.
17. Id.
18. See id.
19. See id.
20. Id. at 11.
21. Id. This statement has been criticized as inaccurately representing the proposals of the House and Senate. See United States v. Davern, 970 F.2d 1490, 1501 (6th Cir. 1992) (Merritt, C.J., dissenting) ("Although the Sentencing Commission and its chairman consistently refer to these 'relevant conduct' provisions as the 'cornerstone of the federal sentencing guidelines,' the Sentencing Reform Act of 1984, the Act which authorized the Guidelines does not expressly mention or authorize any such provisions.").
“charge offense” system, in which the offense charged secures the “base offense level” and then “real” aggravating or mitigating factors and “real” characteristics of the offender are taken into account. Therefore, despite the need for reduced sentencing disparities, the compromise enacted by the Sentencing Commission allowed for deviations based on the conduct surrounding the offense.

Crucial to this system was section 1B1.3, entitled “Relevant Conduct.” Defined as “the cornerstone of the Federal Sentencing Guidelines” by the Chairman and General Counsel of the Sentencing Commission, the idea of “relevant conduct” embodied what the Commission saw as the fundamental policy decision underlying the Guidelines. A sentencing court, while adjusting the base offense level through specific offense characteristics, would look beyond the conviction offense to actual criminal conduct, which was termed “relevant conduct.” The parameters of this expanded view, which the sentencing guidelines call ‘Relevant Conduct,’ are potentially much broader than the minimum necessary to satisfy the elements of the convicted offense. The language of section 1B1.3(a)(1) provides a glimpse of how broad this provision is. It includes:

- all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense.

Despite the claim by the Sentencing Commissioners involved at the time that a relevant conduct provision was the “cornerstone” of the compromise system they created, vigorous debate occurred both in the courts and the academic community regarding whether the Commission had ignored the congressional directive given to it and exceeded its statutory authority by enacting the relevant conduct provision. Although section 1B1.3 survived the numerous legal challenges relating to its statutory authority, the decisions have all

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22. This sentencing system was described by the Sentencing Commission chairman and general counsel as “blend[ing] the constraints of the offense of conviction with the reality of the defendant's actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes.” Wilkins & Steer, supra note 3, at 497.
24. Wilkins & Steer, supra note 3, at 497.
25. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2).
27. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (emphasis added).
28. See, e.g., Lay, supra note 1, at 1764 (“If relevant conduct is indeed the ‘cornerstone’ of the federal guidelines, as Chairman Wilkins has claimed, it is a weak and crumbling foundation indeed.”); Lear, supra note 1, at 1179; Yellen, supra note 1, at 403.
evidenced a profound confusion as to the necessity of "relevant conduct" in fulfilling congressional purpose.29

Most courts relied on congressional intent as evidenced in 28 U.S.C. § 994 to give the Commission broad authority to promulgate guidelines.30 For example, in United States v. Galloway, the Eighth Circuit upheld the relevant conduct provision as within the authority granted to the Commission under 28 U.S.C. § 994(c)(2), which allows the Commission to promulgate guidelines that take into account "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense."31 The court relied upon the reference by Congress to "circumstances... which... aggravate the seriousness of the offense" as demonstrating clear congressional intent to allow the Commission to look beyond the charged conduct and therefore to enact section 1B1.3.32 However, the court equivocated somewhat, stating that "even if it is not so clear," a combination of other factors compelled this conclusion.33 These factors included the open-ended language contained in 28 U.S.C. § 994(c), which orders the Sentencing Commission to "consider whether [certain factors later enumerated within the statute], among others, have any relevance" in establishing guidelines.34 The phrase "among others' invites the Commission to consider sentencing factors that Congress failed to specifically list."35

Similarly, the Ninth Circuit opinion in United States v. Wong characterized the relevant conduct provision as "an effort to implement [the] objective" of 28 U.S.C. § 994(c)(2).36 However, the court hesitated in stating how necessary this provision was, quoting language from Galloway: "We are satisfied that within this broad grant of authority to the Commission, this specific statutory language of section 994(c)(2) gives the Commission full authority to adopt a

29. See, e.g., United States v. Thomas, 932 F.2d 1085, 1088-89 (5th Cir. 1993); United States v. Wong, 2 F.3d 927, 929-30 (9th Cir. 1993); United States v. Galloway, 976 F.2d 414, 419-22 (8th Cir. 1992) (en banc); United States v. Davern, 970 F.2d 1490, 1492-95 (6th Cir. 1992) (en banc).
30. See Galloway, 976 F.2d at 419-21; Wong, 2 F.3d at 929-30; Davern, 970 F.2d at 1495 n.6 ("Section 994(c)(2) authorizes the Sentencing Commission to consider 'the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense.'"); Thomas, 932 F.2d at 1089 ("We do not find the differences between [28 U.S.C. § 994(c)(2) and the language of section 1B1.3] to be any more than superficial.").
31. Galloway, 976 F.2d at 421 (quoting 28 U.S.C. § 994(c)(2)).
32. Id.
33. Id.
34. Id. (quoting 28 U.S.C. § 994(c)).
35. Id. at 420.
36. 2 F.3d 927, 929 (9th Cir. 1993).
relevant conduct guideline, although it certainly cannot be said that the Commission was required to do so.”

These opinions both ended with a justification for the conclusion they had reached, in that under the Chevron standard of review, the only “question for the court is whether the agency’s answer is based on a permissible construction of the statute.”

Both decisions provoked impassioned dissenting opinions, which claimed that the Sentencing Commission had far exceeded its statutory authority by enacting relevant conduct provisions. Judge Beam, in his Galloway dissent, first attacked the reasoning behind the oft-quoted depiction of relevant conduct as “the cornerstone of the federal sentencing guideline system.” According to Judge Beam, the authority for that proposition was questionable, because it was not clear that the Senate version of sentencing reform legislation “adopted a ‘real offense’ system to the extent the authors assert.”

Also, the statute which the majority relied on directed the Commission, when it promulgated guidelines, to pay “particular attention to the requirements of [28 U.S.C.] section 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities.” This latter subsection required the Commission to establish policies and practices that avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.” To do this, Congress established two factors as “the principle determinants” of whether two cases were so similar that a difference between their sentences should be considered a disparity: 1) the prior records of the offenders, and 2) the criminal conduct for which

37. Id. at 930 (quoting Galloway, 976 F.2d at 420) (emphasis added).
38. Id. (quoting Galloway, 976 F.2d at 420).
39. See id. at 930 (Norris, J., dissenting); Galloway, 976 F.2d at 438 (Beam, J., dissenting); id. at 436 (Bright, J., dissenting). Judge Norris, in his dissenting opinion in Wong, commented on the great amount of disagreement over “the controversial relevant conduct provision.” 2 F.3d at 930 n.1. He noted that, “[t]wo en banc decisions upholding the guideline last year produced between them five impassioned dissents.” Id. For support, he cited the dissent in Galloway. See id. at 930. He also cited the three dissenting opinions in United States v. Davern, 970 F.2d 1490 (6th Cir. 1992) (en banc). See id. (citing Davern, 970 F.2d at 1501 (Merritt, C.J., dissenting) ($ 1B1.3 exceeds statutory authority and is unconstitutional), 1513 (Martin, J., dissenting) ($ 1B1.3 exceeds statutory authority and is unfair, especially with regard to controlled substance offenses) and 1514 (Jones, J., dissenting)).
40. Galloway, 976 F.2d at 429 (Beam, J., dissenting) (quoting from Wilkins & Steer, supra note 3, at 496).
42. Id. at 432. 43. 28 U.S.C. § 991(b)(1)(B).
they are being sentenced. Judge Beam asserted that "the relevant conduct guideline promulgated by the Commission strays far from this goal . . . . Indeed, since its promulgation, courts have repeatedly struggled with the tendency of the relevant conduct provisions to dwarf the actual count of conviction." Therefore, these provisions violate the Commission's primary task, which was to equalize sentences between similar defendants found guilty of similar crimes.

Judge Norris, in his dissenting opinion in Wong, also argued that the Commission had erred in making relevant conduct the cornerstone of the Guidelines. In his view, Congress had delineated "with great care and specificity" how the Commission should structure sentencing reform. The Commission ignored the factors delineated by Congress in creating a guideline that punishes unconvicted conduct. "Congress, not the Commission, has the authority to lay cornerstones, and Congress has chosen convicted, not unconvicted, conduct, as the cornerstone and building blocks of a guidelines sentence."

Because the Supreme Court has never spoken directly to the issue of the statutory authority for relevant conduct, the enactment of a relevant conduct provision, although legally permissible, is not perfectly or inarguably grounded. From its inception, it has been deemed the "cornerstone" of the Guidelines, yet is also acknowledged to be simply a compromise between two "pure" models of sentencing. Furthermore, courts that have grappled with the statutory authority for relevant conduct have skirted the fundamental issue of whether this provision was necessary to achieve

44. Id.
45. Galloway, 976 F.2d at 432 (Beam, J., dissenting).
46. See id. at 433. Interestingly, the majority opinion in Wong, the Ninth Circuit decision upholding the relevant conduct provision, distinguished the facts in that case from those in Galloway and asserted that its holding would not offend the dissenters in Galloway. See United States v. Wong, 2 F.3d 927, 930 (9th Cir. 1993) ("The holding which the dissenting judges in Galloway would like to reach is actually a very narrow one. It is stated by Judge Beam: 'I would hold the provision unenforceable insofar as it permits offenders to be systematically penalized for factually and temporally distinct property crimes that have neither been charged by indictment nor proven at trial.' In our case, Wong's crimes were charged by the indictment, so even under the dissenters' view articulated in Galloway, Wong's entire fraud scheme would be considered at sentencing.").
47. See Wong, 2 F.3d at 931 (Norris, J., dissenting).
48. Id. at 930.
49. See id.
50. Id. at 931.
the congressional goals for the Guidelines or whether it was simply permissible for the Commission to have enacted it. In *Galloway* and *Wong*, the courts both stated that the specific statutory authority of § 994(c)(2) gives the Commission full authority to enact relevant conduct, yet both held only that the Commission's reading of that statute was a permissible construction. Although seemingly here to stay, relevant conduct remains a controversial element of the Guidelines.


Further complicating the issue of the Commission's authority to mandate broad sentencing inquiries under the Guidelines is the continuing presence in the post-Guideline world of a sentencing provision enacted in 1970, during the time of total judicial discretion at sentencing. In *Williams v. New York*, the Supreme Court held that the Constitution does not limit the evidence a judge may receive at sentencing.\(^{52}\) This decision was codified in the 1970 enactment of 18 U.S.C. § 3661.\(^{53}\) The statute was sweeping in the discretion it granted to sentencing judges: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence."\(^{54}\)

Approximately a decade later, Congress contemplated sentencing reform to curtail the seemingly unfair sentencing practices and widespread disparities resulting from the current system. The direct target of its disapproval seemed to be 18 U.S.C. § 3661, as it opened the sentencing inquiry as wide as possible. Remarkably, however, Congress did not repeal this broad statute during the reform of federal sentencing to curtail judicial discretion.\(^{55}\) Because no mention was made of this statutory provision during sentencing reform nor was any attempt made by Congress to reconcile these seemingly conflicting messages, 18 U.S.C. § 3661 has occupied an uneasy place in post-Guideline sentencing jurisprudence.\(^{56}\) This uneasiness has led to even greater ambiguity over the authority of the

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52. See 337 U.S. 241, 247 (1949).
54. Id.
Commission to limit or expand traditional judicial discretion. That ambiguity has led to a particularly ironic result: instead of the Commission being constrained by the existence of § 3661, this statute has been used to augment the Commission’s authority to create expansive guidelines.

The Supreme Court’s peculiar usage of 18 U.S.C. § 3661 in two cases involving the Guidelines has left the meaning of that statute and the Commission’s authority in a state of disarray.\textsuperscript{57} First, in \textit{Witte v. United States}, the Court held that consideration of uncharged cocaine importation in order to impose a higher Guideline sentence on marijuana charges was not “punishment” for cocaine conduct and therefore did not violate the double jeopardy clause of the Fifth Amendment.\textsuperscript{58} Confusion regarding the existence of informational discretion in a mandatory-guideline system came from the dicta in Justice O’Connor’s opinion for the Court, in which she claimed that the relevant conduct provisions were designed to channel sentencing discretion and “to make mandatory the consideration of factors that previously would have been optional.”\textsuperscript{59} Therefore, according to Justice O’Connor, section 1B1.3, the relevant conduct provision in the Guidelines, was the embodiment of 18 U.S.C. § 3661.

According to Justice O’Connor’s view, an inquiry that was previously permissible had now become mandatory. Under 18 U.S.C. § 3661, a judge was never required to engage in that inquiry; instead, he was merely permitted to do so by Congress. However, under section 1B1.3, a judge is now required to look at relevant conduct because the Commission has mandated that inquiry. Ironically, the very problem that drove the creation of the Guidelines—wide-ranging sentencing inquiries resulting in sentencing disparities—has been cemented into the Guidelines.

The Supreme Court further complicated the relationship between 18 U.S.C. § 3661 and the Guidelines in \textit{United States v. Watts}.\textsuperscript{60} There, the Court overturned two Ninth Circuit decisions and held that a sentencing court may consider conduct of which a defendant has been acquitted, so long as that conduct is later proven


\textsuperscript{58} 515 U.S. at 397.

\textsuperscript{59} Id. at 402 (citing United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.)). O’Connor quoted Breyer’s opinion in Wright, in which he explained that, “very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines’ enactment.” Id. (quoting Wright, 873 F.2d at 441).

\textsuperscript{60} 519 U.S. at 149.
by a preponderance of the evidence.\textsuperscript{61} In explaining this holding, the Court again relied on the judicial discretion codified in 18 U.S.C. § 3661, which states that "holdings [that would forbid reliance on acquitted conduct] conflict with the clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions, particularly \textit{Witte v. United States}.\textsuperscript{62}

The Court in \textit{Witte} had stated that relevant conduct embodied the discretionary factors a sentencing court used to take into account before the Guidelines were enacted.\textsuperscript{63} Thus the determinative issue for the Supreme Court in deciding \textit{Watts} was framed in the following way: whether or not sentencing judges could consider acquitted conduct at a sentencing hearing \textit{after} the Guidelines were enacted was dependent on whether sentencing judges could have considered acquitted conduct at a sentencing hearing \textit{before} the Guidelines came into existence.\textsuperscript{64} Somewhat absurdly in light of the massive 1984 Sentencing Reform efforts, the Court seemed to indicate that whatever was appropriate for a judge to consider before sentencing reform was appropriate afterwards, despite the presence of an entirely new statutory regime designed to limit the prior system. "Highly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics," said the Court in \textit{Watts}, without even a mention of Congressional sentencing reform or the goals behind it.\textsuperscript{65}

The two concurring opinions in \textit{Watts} further augmented the confusion over the conflation of judicial sentencing discretion and the Commission's authority to enact Guidelines and demonstrate the lack of consensus over the role of the Commission regarding relevant conduct.\textsuperscript{66} Justice Scalia and Justice Breyer each wrote separately to

\textsuperscript{61} See id. In \textit{Watts}, the Supreme Court overturned two Ninth Circuit decisions which had held that sentencing courts could not consider the conduct of the defendants' underlying charges of which they had been acquitted. Id. (overruling United States v. Watts, 67 F.3d 790 (9th Cir. 1995) and United States v. Putra, 78 F.3d 1386 (9th Cir. 1996)). Every other Court of Appeals had held that sentencing courts could consider acquitted conduct. See, e.g., United States v. Boney, 977 F.2d 624, 635-36 (D.C. Cir. 1992); United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Ryan, 866 F.2d 604, 608-09 (3rd Cir. 1989). The panel in \textit{Putra} explained that it was imposing "a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines." 78 F.3d at 1389.

\textsuperscript{62} \textit{Watts}, 519 U.S. at 149 (citations omitted).

\textsuperscript{63} 515 U.S. at 397.

\textsuperscript{64} 519 U.S. at 152.

\textsuperscript{65} Id. at 151-52 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

\textsuperscript{66} See generally id. at 158 (Scalia, J., concurring); id. at 158-59 (Breyer, J., concurring).
express their different, and disagreeing, visions regarding whether the Sentencing Commission might have the authority to reverse the Supreme Court's decision in *Watts* and mandate that sentencing courts disregard acquitted conduct. Justice Breyer argued that the relevant conduct provision was a policy decision by the Sentencing Commission to recognize the prior practice of sentencing judges, and consequently, "the Commission could decide to revisit this matter in the future." Breyer pointed to the fact that the Commission had previously considered barring the consideration of acquitted conduct under "relevant conduct." Thus, "the power to accept or reject such a proposal remains in the Commission's hands."

Justice Scalia adamantly disagreed with this conception of the Commission's authority. He argued, instead, that because 28 U.S.C. § 994(b)(1) requires that the Guidelines be "consistent with all pertinent provisions of title 18 of the United States Code," they must conform with 18 U.S.C. § 3661. Therefore, the Commission has no regulatory authority to forbid sentencing judges from looking at acquitted conduct.

These two opposing opinions illustrate the conceptual disaster that the Sentencing Commission's authority has become. Although both Justice Breyer and Justice Scalia agreed that sentencing judges currently have the ability to look at acquitted conduct at sentencing, their underlying conceptual visions could not be more different. Justice Breyer believes the Commission has complete authority to regulate the information that may be taken into account at a sentencing inquiry. Justice Scalia believes the sentencing judge retains full discretion in that inquiry under § 3661, effectively trumping the Commission's control.

The confusion over the Commission's relationship with the discretion of a sentencing judge can also be seen in the circuit court decisions previously discussed. These decisions, notably *United States v. Galloway* and *United States v. Thomas*, concern the statutory authority for section 1B1.3 of the Guidelines. In *Galloway*, the

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67. See generally id. at 158 (Scalia, J., concurring); id. at 158-59 (Breyer, J., concurring).
68. Id. at 159 (Breyer, J. concurring).
69. See id.
70. Id.
71. See id. at 158 (Scalia, J., concurring). For an excellent critique of Justice Scalia's opinion, see Hutchison, supra note 57, at 310-12.
72. Id. (quoting 28 U.S.C. § 994(b)(1)).
73. See id.
74. United States v. Galloway, 976 F.2d 414, 420-21 (8th Cir. 1992) (en banc); United States v. Thomas, 932 F.2d 1085, 1089 (5th Cir. 1991).
court buttressed its statutory arguments regarding § 994 with a historical analysis of the sentencing power of judges.\textsuperscript{75} Because courts had been allowed to consider uncharged criminal conduct at sentencing and Congress had enacted a statute codifying this discretion, the enactment of a relevant conduct provision was merely an implementation of what had long since been settled in the sentencing realm.\textsuperscript{76} Ironically, the case cited for this proposition, \textit{Williams v. New York}, was written at a time when federal judges had virtually unlimited sentencing discretion, the results of which many had thought drove Congress' desire to cut down on discretion through a guideline system.\textsuperscript{77} The majority in \textit{Galloway} dismissed congressional intent to limit judicial discretion and avoid sentencing disparities as unpersuasive: "To use the disparity argument to set aside the guideline is to ignore the statutory language in 18 U.S.C. § 3661, which, as we have noted above, clearly allows a judge to consider 'background, character, and conduct of a person' when determining a sentence."\textsuperscript{78}

This ambiguity over the Sentencing Commission's role regarding judicial discretion has left the Commission in a peculiar position. The statutory remnants of judicial discretion combined with the apparently broad authority that Congress gave the Commission to create guidelines has created a strange new world, where the old discretionary inquiry allowed by 18 U.S.C. § 3661 has been cemented into place by the Sentencing Commission. Therefore, in the name of certainty and fairness, and in the hopes of eliminating unfair sentencing disparities, the system has ended up in practice back at the broad-based sentencing inquiry that prevailed prior to 1984.

\textbf{C. Relevant Conduct and Beyond: The Story of U.S.S.G. § 2G2.2(b)(4)}

Against this background of muddled judicial discretion and agency authority, United States Sentencing Guideline section 2G2.2(b)(4) was enacted and subsequently amended. At first glance, this provision seems to be merely a singular occurrence that is unlikely to be repeated in other guidelines. However, section 2G2.2(b)(4) is quite the opposite—it is a warning of what the current confusion over the Commission's authority and judicial discretion can, and likely will, produce in the future.

Section 2G2.2(b)(4) is a sentencing enhancement that is applied to offenses falling under section 2G2.2, entitled "Trafficking in

\textsuperscript{75} 976 F.2d at 419 (citing Williams v. New York, 337 U.S. 241, 246 (1949)).
\textsuperscript{76} \textit{See id.} at 419-20.
\textsuperscript{77} \textit{See Williams}, 337 U.S. at 246.
\textsuperscript{78} \textit{Galloway}, 976 F.2d at 422.
Material Involving the Sexual Exploitation of a Minor; Receiving or Transporting... Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic.”

This specific offense characteristic was added to the sentencing guideline for possession of child pornography by amendment in 1991, pursuant to instructions given to the Commission by Congress in the Treasury, Postal Service, and General Government Appropriations Act of 1992.

Under section 2G2.2(b)(4), the base offense level ascribed to the crime of possession of child pornography (15) will be increased five levels, or by an increase of one-third, “[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.” Therefore, this enhancement mandates that a defendant convicted of possession of child pornography receive a sentence increased by 33 percent if the defendant engaged in the behavior described. In the Application Notes following section 2G2.2 of the 1998 Guidelines Manual, the Commission defined “[p]attern of activity involving the sexual abuse or exploitation of a minor[,]” for the purposes of subsection (b)(4), as “any combination of two or more separate instances of the sexual abuse or the sexual exploitation... of a minor by the defendant, whether or not the abuse or exploitation involved the same or different victims.”

Left ambiguous by the Commission was the breadth of this sentencing enhancement. The language “any combination” seemed to imply inquiring into the defendant’s entire life; however, since the creation of the Guidelines, sentencing judges had not been permitted to engage in such a wide-ranging inquiry into the defendant’s past criminal activity, unrelated to the charged offense. Unlike section 2G2.2(b)(4), which begins with the language “if the defendant engaged in a pattern of activity,” virtually all other specific offense characteristics which require enhancing the defendant’s sentence begin with limiting language, such as “if the offense involved” or “if the victim was.” The most comparable specific offense characteristic to section 2G2.2(b)(4) is that which applies to stalking and domestic violence, under section 2A6.2(b)(1). In this provision, the Commission provides for a two-level enhancement “[i]f the offense involved... a pattern of activity involving stalking,

80. See id. app. c, amend. 435 (1997).
81. Id. § 2G2.2(b)(4).
84. See id. § 2A6.2(b)(1).
threatening, harassing, or assaulting the same victim." However, even this provision, which also refers to a pattern of activity by the defendant, does not remotely approach the scope of the sentencing inquiry allowed under section 2G2.2(b)(4). Section 2A6.2(b)(1) is confined to conduct surrounding the offense of conviction, whereas section 2G2.2(b)(4) extends indefinitely.

Section 1B1.3 of the Guidelines requires that courts look at relevant conduct in applying sentencing enhancements to a criminal defendant's sentence. Relevant conduct, as defined in section 1B1.3, includes only acts that occurred during the commission of the offense, in preparation for that offense, or in furtherance of that offense; in other words, the sentencing inquiry was confined to conduct surrounding the offense for which the defendant was convicted. However, for section 2G2.2(b)(4), the language of the sentencing enhancement could be interpreted as mandating an inquiry stretching far beyond relevant conduct, the confines that had been set up by the Commission (and ostensibly desired by Congress) to constrain sentencing judges.

Therefore, because of the linguistic ambiguity of the enhancement and the potentially far-reaching implications of extending the sentencing inquiry beyond relevant conduct, most courts have interpreted this sentencing enhancement narrowly, as though it were circumscribed by the traditional parameters of section 1B1.3 so as to be limited to conduct related to the offense of conviction. In fact, the two appellate courts that have considered this issue have defined a pattern of activity as limited to conduct related to the offense charged. They relied on two textual reasons for support: 1) the provision's location in the Specific Offense Characteristic section of the guideline, and 2) the contrast between the language of the sentencing enhancement and the language of a similar discretionary departure contained in the guideline.

In Chapman, the First Circuit held that the pattern of activity enhancement was "inapplicable to past sexual abuse or exploitation unrelated to the offense of conviction." The court relied on the

85. Id. (emphasis added).
86. See id. § 1B1.3.
87. See id.
89. See Surratt, 87 F.3d at 819; Chapman, 60 F.3d at 901.
90. See Surratt, 87 F.3d at 819; Chapman, 60 F.3d at 901.
91. 60 F.3d at 901 (citing with approval the district court's holding in Surratt, 867 F. Supp. at 1320, regarding the exclusion of unrelated conduct).
placement of subsection (b)(4) under the heading of Specific Offense Characteristics, which only requires an increase in the defendant's sentence when, "as part of the offense of conviction, the defendant undertakes the actions listed therein." No persuasive authority was found that supported the government's proposition that "specific offense characteristic" stretched beyond that definition. Secondly, the court contrasted the language of subsection (b)(4), an enhancement, and the language of Application Note 5, which called for an upward departure for any instance of sexual abuse or exploitation "whether or not such sexual abuse occurred during the course of offense." Therefore, the court concluded that "[t]he absence of similar language in subsection (b)(4), combined with the fact that the subsection is classified under the rubric of 'Specific Offense Characteristics,' compels the conclusion that the application of the subsection does not require that the pattern of activity relate to the offense of conviction."  

In United States v. Surratt, the Sixth Circuit explicitly agreed with the Chapman court's reasoning and found "that there are limitations to what conduct the court may consider to determine the applicability of U.S.S.G. § 2G2.2(b)(4)." The government there sought to introduce evidence at sentencing showing that "for two decades, the defendant had engaged in the sexual abuse and exploitation of more than a dozen females." Included was evidence of sexual abuse of Surratt's young daughter and of his alleged molestations of other identified minors. The district court excluded this evidence as irrelevant to the charged offense and therefore did not apply the sentencing enhancement for a pattern of activity. In upholding this exclusion by the district court, the Sixth Circuit relied on the same factors as the court in Chapman: first, section 2G2.2(b)(4) is a Specific Offense Characteristic and secondly, the contrast with the

92. Id. (quoting Surratt, 867 F. Supp. at 1320) (emphasis added).
93. Id. (quoting U.S.S.G. § 2G2.2(b)(4) application note 5) (emphasis added).
94. Id.
95. Surratt, 87 F.3d at 818. The facts of Surratt are as follows: The defendant responded to an ad for child pornography that had actually been placed in a magazine by undercover postal inspectors. After return correspondence by the postal inspectors, Surratt ordered two magazines and one videotape depicting minors engaging in sexually explicit conduct. When law enforcement officials subsequently executed a federal search warrant at Surratt's house, they seized fifty-one videotapes, as well as adult pornography and photographs of the head of his minor daughter pasted over the faces of adult women in pornographic pictures. Further investigation revealed that Surratt had initiated sexually suggestive contact with at least ten neighborhood girls. See id. at 816.
96. Id. at 817 (emphasis added).
97. See id. at 816.
However, the interpretation of subsection (b)(4) as limited to "relevant conduct" seemed to displease the Sentencing Commission, and the Commission — without any apparent urging from Congress — attempted to correct the courts' errors. The previously ambiguous definition of "pattern of activity" in section 2G2.2 Application Note 2 was amended in the 1996 Guidelines Manual to explicitly include a much broader range of conduct. Pattern of activity was now defined as "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense, (B) involved the same or different victims, or (C) resulted in a conviction for such conduct."

In the historical note relating to this amendment, the Sentencing Commission explained its intention and the purpose of the revisions. First, the amendment was a clarification that "pattern of activity" should include conduct not part of the offense. This clarification was in part a response to the holding in Chapman that unrelated conduct could not be considered for the enhancement. The Commission went on to explain the scope of inquiry for this enhancement: "the conduct considered for purposes of the 'pattern of activity' enhancement is broader than the scope of relevant conduct typically considered under § 1B1.3 (Relevant Conduct)."

Never before had the Commission attempted to expand the sentencing inquiry concerning criminal conduct to include temporally distinct, factually unrelated activities by an offender. Although it was accepted that a court could look at past convictions to increase a prior offender's sentence, this inquiry was distinct from that undertaken regarding the crime charged, in which it was previously assumed that only conduct relevant to the crime could be considered.

99. See Surratt, 87 F.3d at 819.
100. See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 Application Note 1 (1996). The effective date of this amendment was November 1, 1996. See id. app. c, amend. 537. The placement of this definition was switched from Application Note 2 to Application Note 1. See id.
101. Id. app. c, amend. 537 (emphasis added).
102. Id.
103. See id. ("This revision responds in part to the holding in Chapman, 60 F.3d at 901, that the 'pattern of activity' enhancement is inapplicable to past sexual abuse or exploitation unrelated to the offense of conviction. The amended language expressly provides that such conduct may be considered.").
104. Id. (emphasis added).
105. See generally U.S. SENTENCING GUIDELINES MANUAL (1998). Also see the discussion below relating to a sentencing enhancement for stalking under U.S.S.G. section 2A6.2(b)(1).
The Commission can now push the envelope and require judges to look beyond "relevant conduct" in their sentencing inquiries precisely because of the ambiguity surrounding their authority and the confusion surrounding the discretion given to sentencing judges. Because two important issues remain undecided—first, whether relevant conduct is necessary or merely permissible in light of congressional purpose, and secondly whether the Commission could restrain a sentencing judge's discretion despite 18 U.S.C. § 3661—the Commission can take advantage of this situation to mandate wide-ranging inquiries with little fear of reprimand from either the judiciary or the legislature.106

III. Deference Run Wild: Appellate Review of the Sentencing Commission, From Mistretta to Stinson

A further complication in the muddy waters of the Commission's authority is the increasingly lenient judicial review of the actual Guidelines. Originally, the Supreme Court seemed to view the Commission as constrained by the specific delegation of authority by Congress; however, recent decisions have led to a new understanding of the Commission's discretion that greatly expands its powers beyond that of a standard administrative agency and strips the judiciary of its powers to oversee the Commission. When this increasingly deferential standard collides with the substantive developments that have occurred regarding the sentencing inquiry described above, it becomes apparent that the Commission has become an entirely different creature than originally understood.

First, it is necessary to understand how the current standard of review has developed over the course of time. In Mistretta v. United States, the Supreme Court first encountered the Sentencing Commission and the Guidelines, and the Court upheld the constitutionality of the Sentencing Commission's creation through an express delegation of authority from Congress and the Commission's statutory mandate to create sentencing guidelines.107 The majority opinion, written by Justice Blackmun, sheds light on the Court's original conception of the Commission's purpose and the constraints

106. Although various courts have applied the sentencing enhancement as amended, the only decision to address the constitutionality or statutory authority of the amended commentary to section 2G2.2(b)(4) was United States v. Hamilton, in which the court summarily dismissed the challenge. 175 F.3d 1026, 1999 WL 86053, at *1 (8th Cir. Feb. 2, 1999) (unpublished disposition) ("[T]he enhancement is expressly authorized by § 2G2.2(b)(4), as amended, and does not exceed the very broad constitutional power to legislatively define relevant factors at sentencing.").

by which it is bound.\textsuperscript{108} The Court found that Congress' delegation of authority was "sufficiently specific and detailed."\textsuperscript{109} As the Court explained, Congress had charged the Commission with clear goals and purposes and also had "prescribed the specific tool—the guidelines system—for the Commission to use in regulating sentencing."\textsuperscript{110} Also, Congress "legislated a full hierarchy of punishment... and stipulated the most important offense and offender characteristics to place defendants within these categories."\textsuperscript{111}

Despite this specific delegation of authority, the Court in\textit{Mistretta} acknowledged that the Sentencing Commission still enjoyed a great amount of discretion in formulating the Guidelines.\textsuperscript{112} However, this discretion was clearly viewed by the Court as confined to two areas defined by the explicit grant of authority from Congress.\textsuperscript{113} First, "the Commission does have discretionary authority to determine the relative severity of federal crimes and to assess the relative weight of the offender characteristics that Congress listed for the Commission to consider."\textsuperscript{114} This first area was created by 28 U.S.C. §§ 994(c) and (d), in which the Commission was instructed to consider enumerated factors as it deemed them to be relevant.\textsuperscript{115}

Secondly, the Commission was given discretion "to determine which crimes have been punished too leniently, and which too severely."\textsuperscript{116} According to the Court, the second area of discretion was created by 28 U.S.C. § 994(m) and would primarily involve the equalizing of punishment for similar crimes.\textsuperscript{117} Therefore, although the Commission had significant discretion,\textit{Mistretta} suggested that it was confined by the terms delineated by this delegation.

This broad grant of authority and significant discretion left lower federal courts in a quandary: in light of\textit{Mistretta}, how exactly should they review the Commission's specific constructions of the Sentencing Reform Act in creating particular guidelines? The responses from various courts of appeals were mixed, but most signaled that a wide

\textsuperscript{108} See id.
\textsuperscript{109} Id. at 374.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 377.
\textsuperscript{112} Id.
\textsuperscript{113} See id.
\textsuperscript{114} Id.
\textsuperscript{115} See id.
\textsuperscript{116} Id.
\textsuperscript{117} See id.
amount of latitude would be given to the Commission. For example, the Fifth Circuit applied the lenient interpretive standard for executive agency regulations developed by the Supreme Court in *Chevron v. Natural Resources Defense Council* to the Commission’s construction of the Act: “we review the Commission’s construction of the Sentencing Reform Act, as promulgated in the sentencing guidelines, to determine if it is arbitrary, capricious, or contrary to the Act.” Similarly, the Ninth Circuit held that a sentencing guideline must be upheld if it is “sufficiently reasonable” in light of the Congressional directives of the Sentencing Reform Act.

Therefore, post-*Mistretta*, the amount of discretion afforded the Sentencing Commission seemed to be fixed at a level analogous to that of a standard administrative agency. However, this standard of review was relaxed even further after the Supreme Court’s decision in *Stinson v. United States*. There, the Court analyzed the Commission’s authority differently than in *Mistretta*, resulting in a new avenue for the Commission to implement its own policy judgments without oversight from the judicial or legislative branch. In *Stinson*, the Supreme Court held that commentary in the Guidelines Manual is binding on federal courts. Although the Supreme Court acknowledged that the Sentencing Reform Act did not explicitly authorize guideline commentary, that fact was not dispositive. Furthermore, the Court also did not find persuasive the fact that Congress does not review amendments to the commentary under 28 U.S.C. § 994(p), which the Court of Appeals for the Eleventh Circuit had relied on to reach the opposite conclusion.

The Court drew an analogy between the Commission’s commentary concerning guidelines and “an agency’s interpretation of its own legislative rule,” because of two similarities. First, the express

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118. See, e.g., United States v. Wong, 2 F.3d 927, 930 (9th Cir. 1993); United States v. Galloway, 976 F.2d 414, 420 (8th Cir. 1992) (en banc).
120. United States v. Martinez-Cortez, 924 F.2d 921, 923 (9th Cir. 1991) (citing *Chevron*, 467 U.S. at 843-46).
122. Id. at 37-38. Extensive commentary follows all guidelines in the Sentencing Guidelines Manual, explaining what the guidelines are intended to mean. The Sentencing Commission has provided in a guideline that commentary may “interpret a guideline or explain how it is to be applied” or “provide background information, including . . . reasons underlying the promulgation of the guideline.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.7 (1998).
123. See *Stinson*, 508 U.S. at 41.
125. *Stinson*, 508 U.S. at 44.
delegation of rulemaking authority by Congress is similar to that of a federal agency and secondly, the functional purpose of commentary is to assist in the application of the rules created. Therefore, guideline commentary is binding on federal courts "unless it is plainly erroneous or inconsistent with the [guideline]." The authority to bind federal courts to a specific interpretation of a guideline gave the Commission tremendous discretion and, more importantly, an ability to skirt the more traditional method of amending a guideline. After the decision in Stinson, if the Commission decided to change a guideline, it would no longer have to amend the actual guideline, which requires congressional approval. Instead, the Commission could simply amend the commentary that explains the guideline, as long as "the guideline which the commentary interprets will bear the construction." As the Supreme Court frankly acknowledged in Stinson, the courts would be bound by this commentary "even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation that satisfies the standard ... set forth today." Indeed, no other administrative agency is afforded such complete discretion virtually without any judicial oversight. Therefore, the decision in Stinson handed the Sentencing Commission a tremendous opportunity to implement its vision of the Guidelines, with very little interference from the judicial or legislative branches of government.

The dramatic nature of the judiciary's hands-off approach to the Guideline commentary is illustrated best by section 2G2.2(b)(4). In this instance, when the Commission decided it disagreed with the judiciary's interpretation of this sentencing enhancement, the Commission was not required to amend the guideline itself, which would require submittal to Congress for a six-month period of review, during which time Congress could modify or disapprove it. Rather, the Commission could expressly overrule prior court decisions by amending the commentary, which was not subject to either legislative approval or strict judicial review. In fact, the Commission has used this method; it is precisely how the change to section 2G2.2(b)(4) was accomplished.

126. See id. at 44-45.
127. Id. at 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).
128. Id. at 46.
129. Id.
130. See PETER L. STRAUSS ET AL., GELHORN AND BYSE'S ADMINISTRATIVE LAW 64 (9th ed. 1995).
IV. The Future: Reigning in the Commission's Current Indiscretion

A. The Current State of Affairs

More than a decade after the supposed revolution in federal criminal sentencing, what has been achieved? If the enactment of section 2G2.2(b)(4) is any indication, federal criminal sentencing has become a radically different institution than what was desired and called for during congressional reform and, ironically, is not so different than pre-reform sentencing. The purpose behind the creation of the Commission was to limit and control judicial discretion. Regardless of whether that goal was desirable in theory, it has never become a reality. And through the collision of substantive and procedural developments discussed above, it is slipping further away. Instead, judicial discretion still exists through the interplay of "relevant conduct" in the Guidelines and § 3661. However, now it is cloaked in the Commission's guise, as the Guidelines themselves now mandate the broad inquiries of old. Furthermore, these mandates can be created with virtually no legislative or judicial oversight at all, as the Commission can simply place any questionable new idea in the Guidelines' commentary, which does not require congressional approval and receives virtually no judicial review whatsoever.

Why be concerned about this new sentencing world and how it differs from the original purpose of reform? The first and least important reason is because the Guidelines are shaping up to be an entirely different creature than first thought. When the success or failure of the Guidelines and the Commission is measured, the reality of the system and the disparity from what was intended should be taken into account.

Second, and more importantly, this system has profound implications for criminal defendants. As Judge Beam pointed out in his Galloway dissent, the Commission's primary task was to equalize sentences between similar defendants found guilty of similar crimes; however, since the "promulgation [of the relevant conduct guideline], courts have repeatedly struggled with the tendency of relevant conduct provisions to dwarf the actual count of conviction." In other words, the sentences that criminal defendants receive in the federal sentencing scheme often bear little relation to the amount of

133. United States v. Galloway, 976 F.2d 414, 432 (8th Cir. 1992) (en banc) (Beam, J., dissenting) (pointing out that, in Galloway's particular case, the "combination of present and prior convictions produces approximately a 15-month sentence, [but] unconvicted relevant conduct on its own doubles that sentence") (emphasis added).
time required for the charged offense; instead, the sentence is greatly increased for the conduct surrounding the offense. Again, this sentencing scheme necessarily leads to different sentences for the same crime.

Third, as illustrated by the sentencing enhancement for child pornography in section 2G2.2(b)(4), the Commission has pushed beyond the relevant conduct provision, mandating inquiry into conduct completely unrelated to the offense of conviction. This provision illustrates a new and frightening avenue the Commission could travel: judges could now be required by the Guidelines to look at the defendant's entire life to find unrelated criminal conduct with which to increase the sentence.

How is this different than the pre-Guidelines sentencing inquiry? Before the Guidelines, a judge had the discretion to choose whether or not to look that deeply into a defendant's life under 18 U.S.C. § 3661. However, now this discretion has been fundamentally altered. A judge must follow the Guidelines and, if requested by the government, engage in an inquiry that is as broad in scope as any engaged in before the Guidelines were created. Therefore, the post-Guideline sentencing scheme retains the expansiveness of the pre-Guideline sentencing inquiry, while abandoning the flexibility given to sentencing judges to decide whether to engage in that inquiry. No one seems to benefit from that scheme. Sentencing judges are required to look into behavior they may previously have ignored because it was irrelevant or unfair. Criminal defendants are sentenced on the basis of conduct for which they were not convicted and which is unrelated to the offense of conviction. Finally, the guideline system itself loses its legitimacy because it has failed in its singular broad purpose: to reduce unwarranted sentencing disparities.

Finally, and equally as important, we should be concerned because of the deference given the Commission by the legislature and judiciary. Although the Commission clearly has expertise in sentencing and therefore should be accorded some deference as an administrative agency, it should not be given more deference by the judiciary than any other agency. After Stinson, the courts could essentially wash their hands of responsibility for reviewing the commentary to the Guidelines. Because Congress also does not review the commentary to the Guidelines, this development left the Commission unchecked in the interpretations it gives to its Guidelines.

Again, the example of section 2G2.2(b)(4) illustrates the dangers of the current state of the Guidelines. Without congressional approval, the Commission overturned the judicial interpretation of
that sentencing enhancement through an amendment to the commentary. That amendment went further in scope than any other guideline, yet because it was contained in the commentary, it was effectively unreviewable by the courts or Congress. Therefore, a provision with profound implications not only for specific criminal defendants, but also for the institutional structure of federal criminal sentencing, has gone unnoticed.134

B. Changes for the Future

What does the future hold for federal criminal sentencing? To reign in a system gone awry, as discussed above, three changes are proposed. First, courts should re-evaluate the lenient standard of review that is currently applied to the Guidelines and especially to Guideline commentary. The deference currently given the Commission borders on total abdication of judicial review of this agency's actions. In Chevron v. Natural Resources Defense Council, the Supreme Court acknowledged that an agency may have particular expertise which should be accorded deference by the courts.135 However, that deference might not be as important in the realm of sentencing, for who better to evaluate the use of the Commission's expertise than judges, fellow experts in the area of sentencing? Here the Commission lies within the judicial branch, has federal judges as members, and acts within a realm of which judges have peculiar knowledge.136 Furthermore, as pointed out by Judge Beam in his dissent in Galloway, the separation of powers concern which requires "deference to the compromise between Congress and the executive in the usual regulatory regime is attenuated when, as here, the body responsible for promulgating the regulations is also within the same branch of government."137 The hands-off approach currently employed should be rejected in favor of a stricter review by courts of the Guidelines and their commentary, in which each provision is examined against the intent of Congress in creating the Commission. This more stringent review by the courts is supported by the original conception of the delegated authority given to the Commission, as

134. As discussed in footnote 106, the only decision to address the constitutionality or statutory authority of the amended commentary to section 2G2.2(b)(4) was United States v. Hamilton, in which the court summarily dismissed the challenge. 175 F.3d 1026, 1999 WL 86053, at *1 (8th Cir. Feb 2, 1999) (unpublished disposition) ("[The enhancement is expressly authorized by section 2G2.2(b)(4), as amended, and does not exceed the very broad constitutional power to legislatively define relevant factors at sentencing.").
136. See Galloway, 976 F.2d. at 434 (Beam, J., dissenting).
137. Id.
delineated in Mistretta.\textsuperscript{138} The Court acknowledged that the Commission had discretion but noted that it was explicitly defined by the specific grants of authority found in the Sentencing Reform Act.\textsuperscript{139} To return to this judicial relationship with the Commission would result in a system much closer to that conceptualized by Congress in the Sentencing Reform Act.

Secondly, Congress should act to refine the statutory authority of the Sentencing Commission. Through confusion over whether relevant conduct is necessary to implement the goals of Congress or whether it is just a policy choice made by the Commission, the Commission’s reach has grown farther and farther. The most sensible decision seems to be an overhaul of the relevant conduct provision. In its current form, the relevant conduct provision has been aptly criticized as creating a criminal justice system in which “prosecutors now effectively control both the charging system and the sentencing system. And to an ever-increasing extent, the two are one and the same.”\textsuperscript{140} Furthermore, every state sentencing commission in the United States, contrary to the federal commission, has adopted some form of conviction offense sentencing instead of pure “real offense” sentencing.\textsuperscript{141} They have done so because they believed that a system based on relevant conduct would violate due process and other constitutional provisions.\textsuperscript{142}

What should the limit be? Congress should make it clear that relevant conduct is the outer limits of the Commission’s authority, and that the Commission must not reach out to temporally distinct, unrelated activity, as it did in section 2G2.2(b)(4).

Third, the federal judiciary should struggle to reconcile their interpretations of 18 U.S.C. § 3661 with the guideline system. The current interpretation has resulted in a Commission that can do practically anything it wants in the name of judicial discretion. A more compelling interpretation, offered by Thomas W. Hutchison in his article Sentencing Discretion After Watts, is that section 3661 has been codified in the Guidelines at U.S.S.G. § 1B1.4, in which courts may “consider, without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law,” to determine whether a discretionary

\textsuperscript{138} See supra text accompanying notes 107-17.
\textsuperscript{139} See id.
\textsuperscript{140} United States v. Davern, 970 F.2d 1490, 1508 (6th Cir. 1992)(Merritt, C.J., dissenting).
\textsuperscript{142} See id. at 159-61.
departure is warranted from the guideline range. This interpretation would leave judges able to depart from the guideline range in unusual cases, without allowing in judicial discretion at every moment of guideline sentencing. To continue with the interpretation currently advocated by the Supreme Court would be to effectively subvert the congressional goal of placing careful limits on judicial discretion at sentencing.

Section 2G2.2(b)(4) is a warning of the havoc that the Sentencing Commission now has the power to wreak on our criminal punishment system. However, if the Congress, the Commission, and the judiciary begin to implement some of the changes outlined above, they may be able to collectively reign in the Sentencing Commission and provide us with the opportunity to experience the originally promised reform of federal criminal sentencing.

Conclusion

In 1984, Congress decided to reform federal criminal sentencing and to eliminate both the unfair practices of sentencing and the disparities that resulted. However, that vision for the future has not been realized. Instead, as evidenced by section 2G2.2(b)(4), the new sentencing system is beginning to look suspiciously like the old one which Congress wanted to overhaul. The combination of the original decision by the Commission to include a relevant conduct provision, the continued existence of 18 U.S.C. § 3661, and the deferential appellate review given to the Commission, has created a sentencing regime far different from that vision. Regardless of whether sentencing reform was originally a good idea, its success or failure can never be evaluated until we return to the model called for in 1984 and correct the Commission’s current indiscretions.

143. Hutchison, supra note 57, at 309. See also U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (citing 18 U.S.C. § 3661).