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Criminal Procedure—Commentary That Binds: The Increased Power of the United States Sentencing Commission in Light of Stinson v. United States, 113 S. Ct. 1913 (1993)

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CRIMINAL PROCEDURE—COMMENTARY THAT BINDS: THE INCREASED POWER OF THE UNITED STATES SENTENCING COMMISSION IN LIGHT OF *Stinson v. United States*, 113 S. Ct. 1913 (1993)

I. INTRODUCTION

> Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them.
> Bishop Hoadley[1]

Under fire for the ineffectiveness of the federal criminal justice system, Congress set out in 1984 to revamp the federal sentencing scheme. To accomplish this, Congress designated the United States Sentencing Commission ("Commission") as the guiding force in the fight against crime. To execute the task, Congress directed the Commssion to establish sentencing guidelines that all federal judges would use in sentencing offenders, in the hope of creating a system in which similar offenses would receive similar punishment. However, questions eventually arose regarding the constitutionality of this new scheme, forcing the Supreme Court to resolve the constitutional legitimacy of the Commission and its function.[2] Though the questions surrounding the guidelines may have subsided in the wake of *Mistretta v. United States*, new questions and controversies may soon be on the horizon.

In *Stinson v. United States*,[3] the United States Supreme Court examined the question of whether commentary to the United States Sentencing Guidelines ("guidelines") is binding on federal courts.[4] At his sentencing hearing, the district court sentenced Stinson under the career offender guidelines,[5] concluding that his conviction for

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1. *Reprinted in* WILLIAM P. STATSKY, LEGISLATIVE ANALYSIS: HOW TO USE STATUTES AND REGULATIONS 28 (1975).

2. Mistretta v. United States, 488 U.S. 361 (1989).

3. 113 S. Ct. 1913 (1993).

4. *Id.* at 1915.

5. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL §§ 4B1.1-4B1.2 (Nov. 1992) [hereinafter U.S.S.G.]. Under Section 4B1.1, the defendant must be assigned a category VI, the highest criminal history category in the sentencing scheme. *Id.* at § 4B1.1.

In Stinson's case, the district court determined that his adjusted base offense level was 35. Brief for the Respondent at 4, Stinson v. United States, 113 S. Ct. 1913 (1993) (No. 91-8685) [hereinafter Respondent's Brief]. Coupled with a criminal history category of VI, the sentencing range was 292 to 365 months. U.S.S.G. § 5A (sentencing table). The district court sentenced Stinson to the maximum 365 months imprisonment. United States v. Stinson, 943 F.2d 1268, 1269 (11th Cir. 1991).

possession of a firearm by a felon constituted a "crime of violence."[6]

After the decision was affirmed on appeal, the Commission amended the commentary to the career offender guidelines to indicate that possession of a firearm by a felon was not a "crime of violence."[7] Nevertheless, the United States Court of Appeals for the Eleventh Circuit denied Stinson's petition for a rehearing, holding that commentary to the guidelines is not binding on federal courts.[8] The Supreme Court disagreed and reversed the decision of the Eleventh Circuit.[9]

This note will examine the sentencing scheme prior to the enactment of the guidelines and the shortcomings which ultimately led to the creation of the United States Sentencing Commission. The note then will scrutinize the structure and methods of the Commission and the ways in which its activities directly affect the federal criminal justice system. Finally, this note will consider the practical effect of the Court's holding in *Stinson*. While Congress envisioned that the Commission would have primary responsibility for the development and adjustment of the guidelines, it was intended to be with Congressional oversight. However, since changes in commentary are not subject to Congressional review, the holding in *Stinson* provides the Commission with a means by which to circumvent Congressional review and with powers which arguably exceed the scope of Congress's original intent.

II. FACTS

On October 31, 1989, Terry Lynn Stinson entered the Sun Bank of Jacksonville, Florida, holding a hand grenade and a sawed-off shotgun.[10] Confronting a bank employee he demanded, "Give me the money or I'll throw this in your lap. Hang up the phone and give me the money now."[11] The employee put the money into a plastic bag while Stinson pointed the sawed-off shotgun at her.[12]

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6. *Stinson*, 943 F.2d at 1269.
7. U.S.S.G. § 4B1.2 cmt. 2.
8. United States v. Stinson, 957 F.2d 813, 814 (11th Cir. 1992).
9. *Stinson*, 113 S. Ct. at 1915.
10. Respondent's Brief at 2. Prior to the robbery, Stinson placed a pipe bomb in a local McDonald's in order to create a diversion. Telephone Interview with Ronald T. Henry, Assistant United States Attorney for the Middle District of Florida (Sept. 16, 1993). The diversion was successful, even though the bomb did not explode, since numerous police officers and members of the bomb squad were quickly dispatched to the McDonald's, thus increasing Stinson's chances of escaping. *Id.*
11. Respondent's Brief at 2.
12. *Id.*

After taking the money, Stinson ordered everyone to lie on the floor, threw the hand grenade onto the floor, and escaped with $9,427 in cash.[13] Stinson fled the scene in a pickup truck, which police later found abandoned near his apartment.[14] Stinson continued his flight in a van that he had stolen from a car dealership earlier in the day.[15] He subsequently drove to Gulfport, Mississippi, where police officers arrested him on November 3, 1989.[16]

At the time of his arrest, Stinson possessed three inactive hand grenades, ammunition, numerous components for the construction of bombs, a semi-automatic pistol, a stun gun, a sawed-off shotgun, and knives.[17] Stinson later pleaded guilty to a five count indictment charging him with bank robbery, felon in possession of a weapon,[18] and three other violations.[19] The district court sentenced him under the career offender guidelines,[20] finding that he met the three essential elements of the career offender provisions: (1) he was at least eighteen years old at the time of the offense; (2) he was convicted of a felony which was either a crime of violence or involved a controlled substance; and (3) he had at least two prior felony convictions which had involved either a crime of violence or a controlled substance.[21] The district court sentenced Stinson to a prison term of 365 months in addition to a mandatory five year term for using a firearm during the commission of a crime of violence.[22]

Under the career offender guidelines,[23] the offense level is determined by the statutory maximum of the crime of conviction.[24] Since conviction of the possession of a firearm offense with which

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13. *Id.* However, there was no explosion because the grenade was inactive. *Id.*
14. *Id.*
15. *Id.* He stole the van after asking the salesman if he could test drive it. During the test drive, Stinson pulled a gun on the salesman and took him to his (Stinson's) apartment, where he bound the salesman with rope and handcuffs and confined him in a closet. Before leaving, Stinson warned the salesman that the closet door was rigged with a bomb which would explode if opened. *Id.* at 2-3.
16. *Id.* at 3.
17. *Id.*; United States v. Stinson, 943 F.2d 1268, 1269 (11th Cir. 1991).
18. *See* 18 U.S.C. § 924(e)(1) (1988). A person who possesses a firearm and has three prior convictions for crimes of violence or drug offenses is subject to a statutory sentence of not less than fifteen years to life. *Id.*
19. *Stinson*, 943 F.2d at 1269. The offenses were use of a firearm during a crime of violence, violation of weapon registration laws, and transportation of stolen property in interstate commerce. *Id.*
20. U.S.S.G. §§ 4B1.1-4B1.4.
21. *Stinson*, 943 F.2d at 1270.
22. *Id.* at 1269.
23. U.S.S.G. § 4B1.1.
24. *Id.*

Stinson was charged carries a maximum sentence of life in prison,[25] the offense level is thirty-seven.[26] The district court could have used Stinson's conviction on the armed robbery charge as the predicate offense. However, since the maximum sentence for armed robbery is twenty-five years,[27] the offense level would have been thirty-two.[28] The government therefore urged the court to use Stinson's conviction of the possession of a firearm charge to increase Stinson's sentencing range.[29]

On appeal, Stinson argued that possession of a firearm by a convicted felon does not constitute a "crime of violence" under the career offender provision of the guidelines.[30] In its analysis, the Eleventh Circuit examined the definition of "crime of violence" as found in the guidelines.[31] Concluding that possession of a firearm by a convicted felon poses a "serious potential risk of injury to another,"[32] the court held that it constituted a "crime of violence" and affirmed the enhancement of Stinson's sentence.[33]

Less than one month after the Eleventh Circuit's decision, the Commission amended the commentary to guideline § 4B1.2.[34] The amendment stated that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."[35] Based on this amendment, Stinson petitioned the Eleventh Circuit

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25. *See supra* note 18.
26. U.S.S.G. § 4B1.1.
27. 18 U.S.C. § 2113(d) (1988).
28. U.S.S.G. § 4B1.1. It should be noted that Stinson's base offense level was reduced by two levels for acceptance of responsibility under U.S.S.G. § 3E1.1. Respondent's Brief at 4.
29. Telephone Interview with Ronald T. Henry, Assistant United States Attorney for the Middle District of Florida (Sept. 16, 1993). The sentencing range for an offense level of thirty and a criminal history category of VI is 168 to 210 months in prison. The sentencing range for an offense level of thirty-five and a criminal history category of VI is 292 to 365 months. U.S.S.G. § 5A. It is interesting to note that had the district court used Stinson's conviction on the armed robbery charge as the requisite "crime of violence," the amended commentary and the Supreme Court's analysis of it would have been unnecessary.
30. *Stinson*, 943 F.2d at 1270.
31. U.S.S.G. § 4B1.2. This section defines "crime of violence" as any offense, under federal or state law, which is punishable by more than one year in prison and either: (1) has as an element the use, attempted use, or threatened use of physical force against another; or (2) is a burglary of a dwelling, arson, or extortion, involves the use of explosives, or in some other way involves conduct which presents a serious potential risk of injury to another. *Stinson*, 943 F.2d at 1270.
32. *Stinson*, 943 F.2d at 1270.
33. *Id.* at 1273.
34. Respondent's Brief at 6.
35. U.S.S.G. § 4B1.2 cmt. 2.

for a rehearing, arguing that the amendment was retroactive and applicable to his sentence.[36]

The Eleventh Circuit defended its previous holding that possession of a firearm by a convicted felon is "categorically a 'crime of violence' "[37] by citing to other circuits which had reached the same conclusion.[38] The court then analyzed the authoritative weight of commentary.[39] Referring to the guidelines section that explains the significance of commentary,[40] the court noted that the commentary to that section provided that "courts will treat the commentary much like legislative history . . . ."[41] The court stated that § 4B1.2 did not clearly define "crime of violence" and looked to the commentary to clarify the meaning.[42]

After concluding that the authoritative weight of commentary was equal to that of legislative history, the Eleventh Circuit scrutinized the process by which the Commission promulgates guidelines and amendments.[43] Noting that the amendments to commentary are not reviewed by Congress,[44] the court rejected the argument that commentary is binding authority and refused to be bound by the amendment unless Congress amended the test of § 4B1.2 to exclude possession of a firearm by a convicted felon as a "crime of violence."[45] Stinson appealed to the United States Supreme Court which vacated the judgment of the United States Court of Appeals for the Eleventh Circuit and held that commentary to the guidelines is binding.

III. BACKGROUND

A. Pre-Guidelines Sentencing

Prior to the Sentencing Reform Act of 1984 ("Act"),[46] criminals in the federal system were sentenced according to a system of

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36. United States v. Stinson, 957 F.2d 813, 814 (11th Cir. 1992).
37. *Id.*
38. *See* United States v. O'Neal, 937 F.2d 1369 (9th Cir. 1990); United States v. Alvarez, 914 F.2d 915 (7th Cir. 1990); United States v. Goodman, 914 F.2d 696 (5th Cir. 1990); United States v. Williams, 892 F.2d 296 (3d Cir. 1989).
39. *Stinson*, 957 F.2d at 814.
40. U.S.S.G. § 1B1.7.
41. *Id.; see infra* note 120.
42. *Stinson*, 957 F.2d at 814.
43. *Id.* at 815.
44. *See generally* 28 U.S.C. § 994(p) (1988).
45. *Stinson*, 957 F.2d at 815.
46. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988) and 28 U.S.C. §§ 991-998 (1988)).

indeterminate sentencing.[47] Under this framework, a "three-way sharing" of sentencing responsibilities existed:[48] Congress passed criminal statutes which set a maximum term of imprisonment for offenders; judges decided what sentence to impose;[49] and the parole board, an agency within the Executive Branch,[50] subsequently determined the actual sentence an offender would serve.[51] As a result, wide disparities existed, with similar offenders serving vastly different amounts of time,[52] depending on the particular sentencing judge[53] and the decisions made by the parole board.[54] Consequently,

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47. Mistretta v. United States, 488 U.S. 361, 363 (1989); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685 (1992); Maureen Juran, *The Tenth Circuit's Approach to the Constitutionality of the Federal Sentencing Guidelines*, 67 DENV. U. L. REV. 545, 546 (1990); Julia Kazaks et al., Project, *Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 GEO. L.J. 853, 1423 n.2207 (1993). A concept known as "coercive rehabilitation" provided the underlying justification for the system of indeterminate sentencing. According to this concept, release from prison was tied to the completion of various types of vocational, educational, and counseling programs within the prison. S. REP. No. 225, 98th Cong., 2d Sess. 37-50 (1984), *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) 3182, 3223.

48. *Mistretta*, 488 U.S. at 364.

49. Freed, *supra* note 47, at 1687-88.

50. Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, § 2, 90 Stat. 219 (1976) (codified at 18 U.S.C. § 4202).

51. At that time, an offender was eligible for parole after serving one-third of the sentence. S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3223. Additionally, the parole board set a release date if it concluded that the offender had been rehabilitated. *Id.*

52. In 1974, the average sentence throughout the federal system for bank robbery was 11 years, yet the average sentence in the Northern District of Illinois was only 5 1/2 years. 1984 U.S.C.C.A.N. (98 Stat.) 3182, 3224. Similarly, a study reported in 1973 showed that the average length of sentences for forgery ranged from 30 months in the Third Circuit to 82 months in the District of Columbia. *Id.* at 3224 n.21. For interstate transportation of stolen vehicles, the same study revealed a range of sentences averaging from 22 months in the First Circuit to 42 months in the Tenth Circuit. *Id.*

53. One commentator has suggested that in some instances, judges imposed sentences based upon the offender's race, sex, or social class. Ilene N. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 884 (1990). However, the legislative history of the Act suggests that some of the disparity can also be attributed to the varying opinions of judges as to the true purposes of sentencing. S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3224 n.18. For example, one judge may have imposed a sizeable prison term in order to incapacitate an offender, whereas another judge may have chosen to impose a period of probation in order to rehabilitate him. *Id.* at 3224.

54. According to the Supreme Court's decision in *Mistretta*, the rationale behind parole was that it was actually possible to rehabilitate the offender, thus reducing the likelihood that he or she would revert to criminal activity upon returning to

complaints arose regarding the ineffectiveness of the sentencing system,[55] and rehabilitation as a goal of sentencing began to be questioned.[56] Congress therefore was forced to search for new methods of dealing with the sentencing of criminals.[57]

B. Post-Guidelines Sentencing

Under the Sentencing Reform Act of 1984,[58] Congress devised a new multipart plan in an effort to deal with the problems of the

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society. *Mistretta*, 488 U.S. at 363. Therefore, once the parole board determined that an offender had been rehabilitated, it exercised its discretion to shorten the offender's sentence and released him on parole. S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3221.

In order to make parole more predictable, the Parole Commission implemented its own guidelines in the early 1970s. Freed, *supra* note 47, at 1688 n.26. By doing so, the Commission had two goals: (1) to reduce unwarranted disparity in sentences by using the guidelines to recommend appropriate sentences for different offenses and offender characteristics, and (2) to increase certainty in prison release dates by setting a "presumptive release date." S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3229. However, in the eyes of the Senate Judiciary Committee ("Committee"), this split of authority between judges and the Parole Commission instead increased disparity and uncertainty due to the massive amount of discretion vested in both the Parole Commission and in the judicial branch. *Id.* In addition, the disparity and uncertainty also increased because some judges imposed sentences with an eye toward what action the parole board might eventually take. *Id.*; *see also* Freed, *supra* note 47, at 1688 (explaining that "some judges tried to anticipate parole when formulating a sentence").

55. Nagel, *supra* note 53, at 884.

56. *Mistretta*, 488 U.S. at 365. In the view of the Committee, two major problems surrounded the concept of rehabilitation: (1) it was doubtful that rehabilitation could occur in a prison environment, and (2) it was difficult for anyone to tell whether or when an offender had been rehabilitated. S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3221.

57. Prior to the final decision of whether to implement the Sentencing Guidelines, Congress contemplated two other options. One possibility was a strict determinate sentencing system in which judges would be forced to consider a series of alternative sentences prior to sentencing the individual. *Mistretta*, 488 U.S. at 367; *see also* S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3261. However, the Committee discarded this option because it believed that the Sentencing Guidelines would succeed in reducing unwanted disparity, while preserving flexibility to adjust individual sentences in light of unanticipated factors in individual cases. *Mistretta*, 488 U.S. at 367; *see also* S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3261.

The Committee also rejected a proposal which would have made the Sentencing Guidelines advisory but not mandatory. *Mistretta*, 488 U.S. at 367; *see also* S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3261. The Committee based its rejection on the results of a report by the National Academy of Science which showed poor results in those states which experimented with a voluntary system. S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3262. One witness before the Committee testified that judges in Massachusetts generally failed to follow the guidelines. S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3262.

58. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified

previous system.[59] The first part of the plan eliminated parole and abolished the United States Parole Commission[60] in order to reduce uncertainty regarding the actual amount of time an offender would serve.[61]

The second part of the new plan gave federal judges the power to set a determinate sentence that an offender would have to serve in full[62] except for any discount awarded for good behavior.[63] In addition, the judges were to impose a period of supervised release that offenders would serve upon release from prison.[64] Under this part, the judge would be required to impose a sentence within the applicable range of the guidelines in effect at the time of sentencing.[65] In deciding upon a particular sentence, the judge must consider numerous factors,[66] such as the nature and circumstances of the offense,[67] the history and characteristics of the defendant,[68] the goals of sentencing,[69] and the kinds of sentences available.[70]

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as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988) and 28 U.S.C. §§ 991-998 (1988)).

59. A significant aspect of this new plan was the rejection of the theory that rehabilitation is a central goal of imprisonment. *See* 28 U.S.C. § 994(k) (1988). Instead, the new system was designed to ensure that punishment serves retributive, educational, deterrent, and incapacitative goals. *Mistretta*, 488 U.S. at 367; 18 U.S.C. § 3553(a)(2) (1988).

60. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 218(a), 98 Stat. 2027; *Mistretta*, 488 U.S. at 367; Freed, *supra* note 47, at 1689.

61. S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3222; Freed, *supra* note 47, at 1689.

62. *Mistretta*, 488 U.S. at 367; Freed, *supra* note 47, at 1689.

63. 18 U.S.C. § 3624(b) (1988).

64. *Id.* § 3624(e).

65. *Id.* § 3553(a)(4), (b). One poll revealed that in fiscal year 1990, 83.3% of the defendants sentenced under the guidelines received "within-guidelines" sentences. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 19 (1991).

However, in order to preserve the desired flexibility in sentencing, S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3261, Congress has allowed judges to depart from the guidelines in cases where a factor exists which was not adequately taken into consideration by the Commission and which should result in a different sentence. 18 U.S.C. § 3553(b) (1988). Nonetheless, in making this determination, Congress has instructed the courts to consider only the sentencing guidelines, the policy statements, and the official commentary of the Sentencing Commission. *Id.* Some downward departure factors which were upheld by appellate courts between October 1, 1991, and September 30, 1992 include a defendant's diminished capacity, extraordinary postoffense restitution, and postoffense drug rehabilitation. U.S. SENTENCING COMM'N, ANNUAL REPORT tbl. 3 (1992). Downward departure factors that were not approved by appellate courts include a defendant's suicidal tendencies, health, mental and emotional condition, and employment record. *Id.* at tbl. 4.

66. 18 U.S.C. § 3553(a) (1988).

67. *Id.* § 3553(a)(1).

68. *Id.*

The third aspect of the new system established the review of sentences by the courts of appeals.[71] This marked a clear departure from the previous method of sentencing in which sentences ordinarily were not appealable to the courts of appeals,[72] but instead were reviewed by the parole boards.[73] Under the new system, however, either the defendant or the government can appeal a sentence.[74]

The fourth component of the plan established the United States Sentencing Commission.[75] The purposes of the Commission are: (1) to establish sentencing policies and practices for use in the federal system[76] and (2) to develop a system of determining the extent to which the guidelines are fulfilling the sentencing purposes expressed by Congress.[77]

1. Structure of the Commission

a. Composition

The Commission is composed of seven voting members and one permanent nonvoting member.[78] Each of the voting members serve

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69. *Id.* § 3553(a)(2); *Mistretta*, 488 U.S. at 367.

70. 18 U.S.C. § 3553(a)(3) (1988); *Id.* § 3551(b).

71. 18 U.S.C. § 3742 (1988); *Mistretta*, 488 U.S. at 368; Freed, *supra* note 47, at 1689-90.

72. Under the prior system, two statutes allowed for review of sentences: 18 U.S.C. § 3576 (1976) (pertaining to dangerous special offenders) and 21 U.S.C. § 849 (1976) (relating to dangerous drug offenders). S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3221 n.7.

73. Freed, *supra* note 47, at 1689-90. In addition, under the previous system, decisions of the parole board were generally reviewable only to determine whether the board had abused its discretion. *See* S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3221 n.7.

74. 18 U.S.C. § 3742(a), (b) (1988). These subsections provide that the government may appeal if the sentencing judge departs below the guideline sentencing range. Similarly, the defendant may appeal if the departure is above the guideline range. In addition, either party may appeal if the guidelines have been misapplied. *Id.*

75. 28 U.S.C. § 991(a) (1988). The Commission is located within the judicial branch, yet serves as an independent commission. *See* 28 U.S.C. § 991(a) (1988); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 98 (1988).

76. 28 U.S.C. § 991(b)(1), (2) (1988).

77. *See* 18 U.S.C. § 3553(a)(2), (b)(2) (1988). For purposes of sentencing under the guidelines, see *supra* note 59.

78. 28 U.S.C. § 991(a) (1988). The permanent nonvoting member is either the Attorney General of the United States or her designee. *Id.* In addition, under 18 U.S.C. § 3551 (1988), the chairman of the U.S. Parole Commission also served as a temporary ex-officio nonvoting member until the Parole Commission disbanded in 1992. *See* S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3343; *Mistretta*, 488 U.S. at 369 n.4.

six year terms,[79] and no voting member may serve more than two full terms.[80] With the advice and consent of the Senate,[81] the President appoints each of the voting members after consultation with judges, prosecutors, defense attorneys, and others having an interest in the criminal justice system.[82] Additionally, in order to keep appointments to the Commission from being based on politics, no more than four Commission members can come from the same political party.[83]

b. Responsibilities

The primary responsibility of the Commission is the promulgation and distribution of guidelines[84] and policy statements[85] to all courts of the United States and to the United States Probation System. The Commission is also charged with promulgating and distributing guidelines or general policy statements regarding revocation of probation,[86] modification of the length or conditions of supervised release,[87] and revocation of supervised release.[88]

Another major responsibility of the Commission is the frequent review and revision of the guidelines.[89] To accomplish this task, Congress mandated that the Commission consult with authorities within the criminal justice system.[90] In addition, each year the

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79. 28 U.S.C. § 992(a) (1988). However, the members of the Commission are subject to removal by the President, but only for neglect of duty, malfeasance in office, or other good cause. *Id.* § 991(a).

80. 28 U.S.C. § 992(b) (1988).

81. 28 U.S.C. § 991(a) (1988). In addition, the President, upon advice and consent of the Senate, appoints one of the members to serve as chairman of the Commission. *Id.*

82. *Id.*

83. S. REP. No. 225, *supra* note 47, *reprinted in* 1984 U.S.C.C.A.N. (98 Stat.) at 3343; 28 U.S.C. § 991(a) (1988).

84. 28 U.S.C. § 994(a)(1) (1988). In promulgating guidelines, the Commission is charged with providing information to assist judges in imposing sentences, such as whether to impose a sentence of imprisonment, probation, or fine; whether the amount of the fine or length of imprisonment or probation is appropriate; whether a period of supervised release is necessary; and whether multiple sentences should run concurrently or consecutively. *Id.* In addition, the Commission was charged with establishing guideline ranges consistent with the provisions of Title 18 of the United States Code. *Id.* § 994(b)(1).

85. 28 U.S.C. § 994(a)(2) (1988).

86. 18 U.S.C. § 3565 (1988).

87. *Id.* § 3583(e).

88. *Id.*

89. 28 U.S.C. § 994(o) (1988).

90. *Id.* Groups with which the Commission is to consult include representatives from the U.S. Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the Department of Justice, and the Federal Defenders System. Such interaction was designed to allow the Commission to "fine-tune" the guidelines in order to respond to emerging problems. Freed, *supra* note 47, at 1694.

Commission must review presentence reports, guideline worksheets, sentencing statements issued by judges, and plea agreements from numerous sentences.[91] The Commission then may promulgate amendments to the guidelines to implement any suggestions or improvements. Proposed amendments must be submitted to Congress for review.[92] The amendments go into effect either at a date specified by the Commission or after six months have passed from the date of submission.[93] However, these restrictions apply only to the guidelines,[94] thus leaving the door open for the amendment of commentary without Congressional review.[95]

c. Procedures

The Commission promulgates guidelines and policy statements by an affirmative vote of at least four of its members.[96] In establishing the guidelines, the Commission constructed a sentencing range[97] from which sentencing judges must choose the particular punishment an offender will receive.[98] Furthermore, in setting up this sentencing scheme, Congress instructed the Commission to consider two distinct categories: (1) categories of offenses[99] and (2) categories of offenders.[100]

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91. *Mistretta*, 488 U.S. at 369-70.

92. 28 U.S.C. § 994(p) (1988). Such amendments must be made, if at all, either at the beginning of a regular session of Congress or anytime before May 1. *Id.* In submitting an amendment, the Commission must also attach a statement of reasons for the modification. *Id.*

93. *Id.* The amendment cannot go into effect after November 1 of the year in which it was submitted unless the effective date is revised or the amendment is otherwise altered or disapproved by Congress. *Id.*

94. *Id.* § 994(a), (p).

95. *See infra* text accompanying notes 165-78.

96. 28 U.S.C. § 994(a) (1988).

97. *Id.* A separate sentencing range exists for each category of offense involving each category of defendant, and all sentencing ranges must comply with each of the pertinent provisions of Title 18 of the United States Code. 28 U.S.C. § 994(b)(1) (1988). Furthermore, the maximum range of imprisonment cannot exceed the minimum of that range by more than the greater of either 25% or six months, unless the minimum term of the range is 30 years or more, in which case the maximum term of such range can be life imprisonment. *Id.* § 994(b)(2).

98. 18 U.S.C. § 3553(b) (1988). However, a sentencing judge can depart either upward or downward from the guidelines. *See supra* note 65.

99. 28 U.S.C. § 994(c) (1988). The Commission must consider seven different factors when establishing the category of offenses: (1) the grade of the offense; (2) any aggravating or mitigating circumstances surrounding the commission of the offense; (3) the nature and degree of harm caused by the offense; (4) the community view of the offense; (5) the public concern over the offense; (6) the deterrent effect

The end result of these efforts is the sentencing table, which blends the categories of offenses with the categories of offenders to produce a grid composed of forty-three levels and six criminal history categories.[101]

2. Structure of the Guidelines Manual

Currently, the guidelines are set forth in a manual consisting of 371 pages.[102] Within the guidelines manual there are three kinds of text: the guidelines, policy statements, and commentary.[103]

a. The Guidelines

The guidelines were designed to direct the courts in determining the nature and length of sentences to be imposed in criminal cases.[104] Accordingly, they provide step-by-step instructions to aid courts in determining sentencing ranges.[105] The guidelines are binding on sentencing judges,[106] and the Supreme Court has upheld their constitutionality.[107]

b. The Policy Statements

Policy statements are a second type of text within the Guidelines Manual.[108] As stated previously, the Commission is responsible for promulgating policy statements which pertain to the application of guidelines or any other facet of sentencing that would advance the sentencing goals found in 18 U.S.C. § 3553(a)(2).[109] Though originally

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of a particular sentence; and (7) other incidences of the offense at both the national and local levels. *Id.*

100. 28 U.S.C. § 994(d) (1988). Congress also charged the Commission with considering the relevance of other factors such as the defendant's age, education, family ties and responsibilities, community ties, and criminal history. *Id.* However, Congress required the Commission to consider these factors only to the extent that they are relevant. *Id.*

101. U.S.S.G., pt. A, § (4)(h). In order to reduce unnecessary litigation, the ranges for each level overlap with those in the preceding and succeeding levels. *Id.*

102. U.S.S.G. In addition, a separate appendix contains over 350 pages of amendments to the guidelines. U.S.S.G. at app. C.

103. *Stinson*, 113 S. Ct. at 1917.

104. 28 U.S.C. § 994(a)(1) (1988); 18 U.S.C. § 3551(b) (1988).

105. U.S.S.G. § 1B1.1.

106. 18 U.S.C. § 3553(a)(4), (b) (1988).

107. *Mistretta*, 488 U.S. at 391.

108. *Stinson*, 113 S. Ct. at 1917.

109. 28 U.S.C. § 994(a)(2) (1988); *see* discussion *supra* note 59.

meant to be nonbinding,[110] the policy statements are also binding on federal judges.[111]

c. The Commentary

The third type of text in the Guidelines Manual is commentary.[112] Although the Sentencing Reform Act did not specifically authorize the promulgation of commentary, one of the statutory directives to sentencing courts refers to it.[113] The Guidelines Manual states that commentary may serve three possible functions:[114] (1) to interpret a guideline or explain how to apply it;[115] (2) to suggest instances in which departure from the guidelines may be warranted;[116] and (3) to provide background information regarding the guidelines, including the reasons for the promulgation of particular guidelines.[117] Prior to the Supreme Court's holding in *Stinson*, courts differed as to the authoritative weight of commentary.[118] However, beginning with the decision in *Williams v. United States*[119] and ending with its

110. Several passages within the guidelines manual indicate that the policy statements were originally intended to be nonbinding. *See* U.S.S.G. § 1B1.7 (stating that commentary and policy statements merely provide guidance for courts considering departures); U.S.S.G. § 1B1.7 commentary (indicating that portions of the guidelines manual not labeled as either guidelines or commentary should be interpreted as commentary and have the force of policy statements); U.S.S.G. § 1B1.10 commentary (stating that § 1B1.10 is a policy statement which provides guidance for courts considering a reduction in sentence). The Supreme Court also discussed the nature of policy statements in Williams v. United States, 112 S. Ct. 1112, 1125 (1992) (White, J., dissenting) (stating that "[e]ven though policy statements are numbered and grouped in the Guidelines Manual by means identical to actual guidelines . . . their purpose is limited to interpreting and explaining how to apply the guidelines, and—significantly—'may provide guidance in assessing the reasonableness of any departure from the guidelines' ").

111. Williams v. United States, 112 S. Ct. 1112 (1992).

112. *Stinson*, 113 S. Ct. at 1917.

113. 18 U.S.C. § 3553(b) (1988); *Stinson*, 113 S. Ct. at 1917. This statute directs a court, when considering a departure from the guidelines, to consider only the guideline provisions, the policy statements, and the official commentary of the Sentencing Commission. *See supra* note 65.

114. U.S.S.G. § 1B1.7.

115. Failure to follow the commentary may constitute an incorrect application of the guidelines, thus increasing the possibility of reversal on appeal. *See* 18 U.S.C. § 3742 (1988).

116. In this event, the commentary is to be given the legal equivalence of a policy statement. *See supra* note 110.

117. U.S.S.G. § 1B1.7.

118. *See generally* United States v. Wimbish, 980 F.2d 312 (5th Cir. 1992); United States v. Saucedo, 950 F.2d 1508 (10th Cir. 1991); United States v. Smeathers, 884 F.2d 363 (8th Cir. 1989); United States v. White, 888 F.2d 490 (7th Cir. 1989).

119. Williams v. United States, 112 S. Ct. 1112 (1992).

decision in *Stinson*, the Supreme Court has essentially abolished any distinction among the guidelines, policy statements, and commentary because all three parts are equally binding on the courts.

In attempting to explain the nature and authoritative weight of commentary, different sources have made numerous analogies. First, the Sentencing Commission compared the commentary to legislative history.[120] Under the rules of statutory construction, courts generally look first to the language of the statute.[121] However, if that language is unclear, courts must then look to the legislative history of the statute.[122] If commentary were considered analogous to legislative history, courts would look first at the language of the pertinent guideline and resort to the commentary only when the guideline itself is unclear.

A second analogy advanced is that commentary is similar to an administrative agency's interpretation of a statute that it administers.[123] Under this rule of construction, courts must defer to the agency's interpretation if the statute is ambiguous and if the interpretation is "a permissible construction of the statute."[124] If the statute is unambiguous, the language of the statute prevails.[125] Applying this analogy to commentary, courts would defer to the commentary if a particular guideline were unclear regarding a specific point and the commentary provided a logical explanation. However,

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120. U.S.S.G. § 1B1.7 commentary. Discussing the role of commentary, the Commission states that in seeking guidance as to the intent of the Commission in drafting a particular guideline, "the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of the drafter." *Id.*

121. Blum v. Stenson, 465 U.S. 886, 896 (1984); *see also* Illinois EPA v. United States EPA, 947 F.2d 283, 289 (7th Cir. 1991); Richards Medical Co. v. United States, 910 F.2d 828, 830 (Fed. Cir. 1990); *In re* Kelly, 841 F.2d 908, 912 (9th Cir. 1988). *See generally* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 139 (1975); NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION 1 (5th ed. 1992).

122. *Blum*, 465 U.S. at 896; *see also* Stupy v. United States Postal Serv., 951 F.2d 1079, 1081 (9th Cir. 1991); Hoechst Aktiengesellschaft v. Quigg, 917 F.2d 522, 526 (Fed. Cir. 1990).

123. *Stinson*, 113 S. Ct. at 1918; *accord* United States v. Joshua, 976 F.2d 844, 855 (3d Cir. 1992); Alabama Dry Dock & Shipbuilding v. Sowell, 933 F.2d 1561, 1567 (11th Cir. 1991); *see also* DICKERSON, *supra* note 121, at 162; SINGER, *supra* note 121, at 5.

124. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); *see also Illinois EPA*, 947 F.2d at 289; Newport News Shipbuilding & Dry Dock v. Howard, 904 F.2d 206, 209 (4th Cir. 1990); Lever Bros. Co. v. United States, 877 F.2d 101, 105 (D.C. Cir. 1989).

125. *Chevron*, 467 U.S. at 842-43. Generally, the function of regulations is to help implement or execute related statutes. STATSKY, *supra* note 1, at 2. However, regulations which go beyond the authority of the statute are invalid. STATSKY, *supra* note 1, at 2.

a court would be required to adhere to the text of the guideline if its language was unambiguous.

Third, the commentary also has been compared to an agency's interpretation of its own regulations.[126] The agency's interpretation normally is allowed to control as long as the interpretation does not violate the Constitution or a federal statute. Further, the agency's interpretation prevails unless it is clearly erroneous or incompatible with the regulation it interprets.[127] Under this analogy, the Commission would be comparable to an administrative agency which promulgates its own regulations (guidelines) and interprets them via the commentary. Consequently, the commentary would prevail as long as it: (1) is not a clearly erroneous interpretation of a guideline; (2) does not conflict with the guideline it interprets; and (3) does not violate the Constitution or a federal statute.

Thus, to resolve conflicting views among the circuits as to the nature of commentary, the Supreme Court had to decide which, if any, of these analogies pertained to the guidelines.

IV. Analysis

In vacating the decision of the Eleventh Circuit, the Supreme Court effectively equated commentary with an agency's interpretation of its own regulations by holding that commentary to the guidelines is binding on sentencing courts unless: (1) it violates the Constitution or a federal statute or (2) it is plainly erroneous or inconsistent with the guideline it interprets.[128]

The Court began its analysis by reviewing the role of the Sentencing Commission in establishing policies and procedures for sentencing in the federal criminal justice system.[129] The Court noted the three types of text in the guidelines and the function of each.[130]

The Court next discussed the weight of each of these three parts. The guidelines, the Court observed, bind judges as they carry out their responsibility of sentencing in criminal cases.[131] The Court stated that unless certain circumstances exist,[132] the sentencing court must sentence an offender to a term within the applicable guideline range as provided by Congress.[133] Similarly, the Court continued,

126. *Stinson*, 113 S. Ct. at 1919.
127. *Id.; see* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).
128. *Stinson*, 113 S. Ct. at 1915.
129. *Id.* at 1916; 28 U.S.C. § 991(b)(1) (1988).
130. *See supra* text accompanying note 103.
131. *Stinson*, 113 S. Ct. at 1917 (citing *Mistretta*, 488 U.S. at 391).
132. *See supra* note 65.
133. *Stinson*, 113 S. Ct. at 1917.

policy statements also are binding on sentencing courts and are authoritative in determining the meaning of applicable guidelines.[134] Finally, the Supreme Court held that the Eleventh Circuit was in error when that court rejected these principles as applicable to commentary.[135]

In its examination of the role of commentary, the Court stated that the amended commentary interpreted § 4B1.2 and explained the meaning of "crime of violence."[136] As a result, the Court concluded that commentary, which interprets a guideline or explains how to apply it, is controlling.[137] Furthermore, the Court stated that failing to follow the commentary could result in an incorrect application of the guidelines.[138] The Court then expanded the holding of *Williams*[139] to include commentary.[140]

In its analysis, the Court focused on the various comparisons that had been made regarding the authoritative weight of commentary. The Court discussed and rejected the analogy comparing commentary to legislative history and advisory committee notes.[141] The Court observed that, unlike legislative history or advisory notes, commentary is issued long after the guideline it interprets.[142] Furthermore, because the guidelines cannot become effective until the six month review period has passed,[143] the Court stated that announcing the initial intent behind a guideline long after it has already taken effect would be inconsistent with the entire review process.[144] In addition, the Court added that there is nothing in the guidelines

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134. *Id.* (citing Williams v. United States, 112 S. Ct. 1112, 1119 (1992)). In *Williams*, the district court departed upward due to the defendant's prior arrests, even though they did not result in criminal convictions. *Williams*, 112 S. Ct. at 1117. However, a policy statement to § 4A1.3 stated that a court could not base a departure on prior arrests alone. *Id.* As a result, the Supreme Court held that failure to follow a policy statement renders a sentence an incorrect application of the guidelines under 18 U.S.C. § 3742(f)(1) (1988), and thus subject to reversal on appeal. *Williams*, 112 S. Ct. at 1119-21.

135. *Stinson*, 113 S. Ct. at 1917.

136. *Id.*

137. *Id.* at 1917-18. The Court also pointed to the guidelines themselves, which state that failure to follow the commentary could result in reversal on appeal. *Id.* at 1918; *see also* U.S.S.G. § 1B1.7.

138. *Stinson*, 113 S. Ct. at 1917-18.

139. *See supra* note 110.

140. *Stinson*, 113 S. Ct. at 1918.

141. *Id.*

142. *Id.*

143. *See supra* text accompanying note 93.

144. *Stinson*, 113 S. Ct. at 1918.

or in the Act to indicate whether the weight of commentary hinges on it being issued contemporaneously with or subsequent to the guideline.[145]

The Court then rejected the analogy comparing commentary to an agency's interpretation of a statute it administers.[146] The Court found that while a legislative rule stems from the delegated authority for rulemaking, commentary has a different function: to explain the guidelines and show how to apply them in practice.[147] However, the Court held that commentary is analogous to an agency's interpretation of its own regulations.[148] Like an agency's promulgation of regulations, the Commission promulgates guidelines via the delegation of authority by Congress for rulemaking.[149] As a result, the Court held that commentary assists in the interpretation of guidelines that are within its area of expertise[150] and thus should be given equal weight with the interpretations by agencies of their regulations.[151]

Explaining its holding, the Court stated that such binding authority is consistent with the scope and intent of the Sentencing Reform Act.[152] The Court reasoned that the Commission not only promulgates guidelines and commentary, but also periodically reviews and revises both after consultation with various authorities in the federal criminal justice system.[153] To accomplish this, the Court explained, the Commission must be able to amend not only the guidelines, but also the commentary.[154] Consequently, the Court held that commentary is binding on the federal courts, and prior judicial decisions which conflict with it will not prevail.[155]

Confronted with the guidelines' position that the weight of commentary is equal to that of legislative history,[156] the Court dis-

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145. *Id.*

146. *Id.; see* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (holding that the statute governs if it is not ambiguous; otherwise, courts must defer to an interpretation as long as it is "a permissible construction of the statute").

147. *Stinson*, 113 S. Ct. at 1918.

148. *Id.* at 1918-19.

149. *Id.*

150. *Id.*

151. *Id.; see supra* text accompanying note 127.

152. *Stinson*, 113 S. Ct. at 1919.

153. *Id.*

154. *Id.*

155. *Stinson*, 113 S. Ct. at 1916 n.1 (noting that the amendment was contrary to the holdings of seven circuits).

156. U.S.S.G. § 1B1.7.

missed as "ironic" the Commission's views of how courts would treat commentary.[157] Instead, the Court focused on the language of § 1B1.7, which states that failure to follow the commentary could result in reversible error.[158]

Finally, applying its reasoning to the facts in *Stinson*, the Court observed that the exclusion of the felon-in-possession offense from the meaning of "crime of violence" could not be derived from the text of the guideline itself.[159] The Court concluded that the amendment to the commentary was a binding interpretation of "crime of violence" because it neither violated the Constitution nor a federal statute and was not inconsistent with § 4B1.2.[160]

In reaching its decision, the Court declined to address the Government's contention that the amendment should not be given retroactive effect.[161] The Eleventh Circuit did not consider this argument in its opinion, and thus the Court did not certify it as a part of the question formulated in the grant of certiorari.[162] The Supreme Court subsequently vacated Stinson's sentence and remanded the case to the Eleventh Circuit for resentencing and a determination whether amendments to commentary are retroactive.[163]

V. SIGNIFICANCE

At first glance, it may appear that the Supreme Court's holding has little significance, if any. However, a closer examination of the guidelines and commentary illustrates that this holding increased the power of the United States Sentencing Commission tremendously, perhaps even further than Congress originally intended. Furthermore, even though the Supreme Court did not rule on the issue of retroactivity, the decision regarding which amendments will be retroactive also appears to be within the complete discretion of the Commission.[164]

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157. *Stinson*, 113 S. Ct. at 1919-20. In U.S.S.G. § 1B1.7, the Commission stated that courts likely would look to the commentary for insight as to the intent of the Commission and would thus treat commentary similar to legislative history. U.S.S.G. § 1B1.7 commentary.

158. *Stinson*, 113 S. Ct. at 1920.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* On remand the Eleventh Circuit Court of Appeals determined that the amendment was retroactive since it clarified that "the offense of unlawful possession of a weapon is not a crime of violence." United States v. Stinson, 30 F.3d 121, 122 (11th Cir. 1994).

164. *See* U.S.S.G. § 1B1.10.

A. The Increased Power of the United States Sentencing Commission

As discussed earlier, any amendments to the guidelines must undergo a six month review period by Congress before they are enacted.[165] However, the commentary is not subject to Congressional review.[166] Applying the Court's holding in *Stinson*, it will be possible for the United States Sentencing Commission to effectively change the guidelines by amending the commentary, thus avoiding Congressional review. Though such a possibility may seem farfetched, at least one significant change has already been accomplished by the Commission through a change in the commentary. Succinctly, the Commission altered the effective sentencing range for certain drug offenses by amending the commentary. The amended commentary later provided the justification for an amendment to the guideline.

The sentencing range for drug offenses is primarily determined by the quantity of drugs involved. To assist with determining a single offense level, the Commission promulgated drug equivalency tables that are used to equate less common substances with more common types of controlled substances.[167] These tables appear in the commentary to the guidelines.

In 1989, the drug equivalency tables provided that one gram of methamphetamine (also known as "crank", "crystal", or "speed") was equal to one gram of heroin or five grams of cocaine.[168] However, in 1990 the Commission decided to distinguish between methamphetamine which is mixed with other substances and pure methamphetamine.[169] They did so by changing the commentary to provide tougher sentences for offenses involving purer substances. Thus, one gram of a mixture of substances containing methamphetamine was still equal to one gram of heroin.[170] However, one gram of pure methamphetamine became equivalent to ten grams of mixed methamphetamine.[171] This change was not subject to Congressional review.

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165. *See supra* text accompanying note 93.

166. *See supra* text accompanying notes 94-95.

167. U.S.S.G. § 2D1.1 commentary, application note 10. For example, assume that a defendant is convicted of possessing one gram of heroin. Under the drug equivalency tables, one gram of heroin is equivalent to one kilogram of marijuana. *Id.* Thus, the base offense level for possession of one gram of heroin and one kilogram of marijuana is the same—level ten. U.S.S.G. § 2D1.1(c).

168. U.S.S.G. § 2D1.1 commentary, application note 10.

169. *Id.*

170. *Id.*

171. *Id.*

In 1991, the Commission amended the guidelines to reflect the change in the commentary by including the formula for determining the actual (pure) amount of controlled substance.[172] In making this change, the Commission stated that it was simply clarifying what it meant in prior years regarding the equivalence of various controlled substances.[173] In reality, the Commission elevated the offense levels for all methamphetamine cases when purity is greater than ten percent.[174] For example, under the 1989 guidelines, one gram of methamphetamine was equal to one gram of heroin or five grams of cocaine.[175] Thus, in 1989, if a defendant was convicted of possessing five grams of methamphetamine, his base offense level would have been fourteen.[176] Assuming that the defendant's criminal history category was I, the defendant's sentencing range would have been between fifteen and twenty-one months.[177]

Under the 1990 guidelines, however, the result would have been drastically different depending upon the purity of the substance; if the defendant was convicted of possessing five grams of pure methamphetamine, his base offense level would have been twenty.[178] Assuming once again that the defendant's criminal history category

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172. U.S.S.G. § 2D1.1(c). The formula is the weight of the mixture multiplied by the purity of the mixture. *Id.* The Commission illustrated the formula by using an example involving PCP. For example, a mixture weighing ten grams and containing PCP at fifty percent purity contains five grams of PCP. *Id.* Of lesser importance, the Commission also changed the measuring stick to which other substances are to be compared from heroin to marijuana. U.S.S.G. § 2D1.1 commentary, note 10.

173. U.S.S.G. app. C, at 225.

174. U.S.S.G. § 2D1.1 commentary, application note 9. According to some prosecutors, the purity of methamphetamine is typically between thirty-eight and fifty percent. Telephone Interview with Robert J. Govar, Senior Litigation Counsel, United States Attorney's Office for the Eastern District of Arkansas (Sept. 17, 1993).

The Commission explained that the purity of a substance is indicative of the defendant's involvement in the chain of distribution, because controlled substances are often mixed with other substances as they pass from one person to another. *Id.* Thus, the Commission concluded that high levels of purity may indicate that a defendant plays a primary role in a drug enterprise and may be in close proximity to the supplier. *Id.* However, the "role in the offense," that is, proximity to the source, is already accounted for in § 3B1.1 and § 3B1.2, which provide for an increase or decrease by as much as four levels in a defendant's base offense level, pursuant to his role in the offense.

175. *See supra* text accompanying note 168. Under the 1989 guidelines, there is no distinction between pure methamphetamine and a mixture containing methamphetamine. U.S.S.G. § 2D1.1 commentary, application note 10.

176. U.S.S.G. § 2D1.1(c).

177. U.S.S.G. § 5A.

178. U.S.S.G. § 2D1.1 commentary, application note 10.

was I, his sentence would range from thirty-three to forty-one months, or more than double what it was under the 1989 guidelines.

Clearly, this change is substantial. Though it occurred before the Supreme Court's decision in *Stinson*, it is now binding on courts since the equivalency tables are within the commentary. Thus, the Commission has, in the wake of *Stinson*, clear power to alter the applicable punishment of offenders without Congressional oversight. Such a system therefore could allow the Commission to determine which standards will be reviewed by Congress by designating them as either amendments to the guidelines or as amendments to the commentary.

B. The Question of Retroactivity

At the end of its opinion, the Supreme Court left for the United States Court of Appeals for the Eleventh Circuit the question of whether the amended commentary at issue in *Stinson* should be applied retroactively.[179] However, regardless of the Eleventh Circuit's holding on remand, the issue of retroactivity had already been decided since the Commission determines which amendments will be retroactive.[180]

In sentencing a defendant, the sentencing court must apply the guidelines in effect at the time of sentencing.[181] By statute, after the sentence is imposed, the defendant may seek a modification of his sentence if a reduction in his sentence is consistent with the applicable policy statements issued by the Commission.[182] The Commission has addressed this issue in § 1B1.10, a policy statement that lists the amendments to guidelines which it considers to be eligible for retroactive application.[183] Under the present guidelines, the amended

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179. *Stinson*, 113 S. Ct. at 1920; *see supra* note 163.

180. U.S.S.G. § 1B1.10.

181. 18 U.S.C. § 3553(a)(4) (1988).

182. 18 U.S.C. § 3582(c)(2) (1988). This statute provides that:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Id. Factors considered by the Commission in determining which amendments will be retroactive include the purpose of the amendment, the magnitude of the impact on the guideline range as a result of the amendment, and the difficulty of applying the amendment retroactively. U.S.S.G. § 1B1.10 commentary.

183. U.S.S.G. § 1B1.10 commentary (policy statement).

commentary at issue in *Stinson* (Amendment 433) is specifically identified as being retroactive.[184] Furthermore, even though the text which provides for retroactivity is a policy statement,[185] it is still binding.[186]

Curiously, one amendment which operates to reduce a defendant's base offense level pursuant to acceptance of responsibility has not been determined to be retroactive by the Commission,[187] and courts have thus yielded to the Commission's determination.[188] Such adherence provides an example of the extent to which the Commission's power has increased.

VI. Conclusion

Without a doubt, the Commission has enormous power in determining how offenders are punished in our federal criminal justice system, and much of that power appears to have been intended by Congress when it created the sentencing guidelines system. The Supreme Court observed in *Mistretta* that "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit . . . ."[189] However, with the Supreme Court's holding in *Stinson*, the Commission's accountability to Congress may be more ephemeral than real, and the truth of Bishop Hoadley's observation may be more realistic than ever.

*Todd L. Newton**

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184. U.S.S.G. § 1B1.10 commentary (policy statement). The Supreme Court noted this in *Stinson*. *Stinson*, 113 S. Ct. at 1920.

185. U.S.S.G. § 1B1.10 commentary (policy statement).

186. This result follows from the application of the Court's holding in *Williams* that policy statements are binding on federal courts. *See also Stinson*, 113 S. Ct. at 1917.

187. U.S.S.G. § 3E1.1(a). Under this section, a defendant's base offense level can be reduced by two levels if the defendant "clearly demonstrates acceptance of responsibility for his offense. . . ." *Id.* This section was amended to add an additional one level reduction if a defendant assists the authorities in the investigation or prosecution of his offense. U.S.S.G. app. C (amend. 459).

188. *See generally* DeSouza v. United States, 995 F.2d 323, 324 (1st Cir. 1993); United States v. Caceda, 990 F.2d 707, 710 (2d Cir. 1993); United States v. Soffos, 993 F.2d 1541 (4th Cir. 1993) (unpublished per curiam); United States v. Dowty, 996 F.2d 937, 939 (8th Cir. 1993).

189. *Mistretta*, 109 S. Ct. at 666.

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