NACDL

Home > News And The Champion > Champion Magazine > 2008 Issues

The Champion

September 2008 , Page 40

Search the Champion Looking for something specific?

An Interview with John Steer

By The Champion

The U.S. Sentencing Commission oversees the operation and revision of the federal sentencing guidelines. For some observers, sentencing law and policy are the reasons our prison population has exploded since the commission's inception.

Former commission member John R. Steer talks to The Champion and discusses, among other things, whether he would exclude the use of acquitted conduct at sentencing; how the defense bar can influence the outcome of issues considered by the commission; and the potential of alternatives to incarceration to meet the needs of sentencing.

Case law handed down in recent years has untied the hands of judges, giving them discretion at sentencing rather than requiring them to plug in numbers that do not reflect the unique circumstances of each defendant. Thus, members of the defense bar have reason for hope. And yet they realize that the struggle for just, effective, and constitutional sentencing continues each day in courtrooms across the United States.

The Champion: First, let us welcome you to the defense bar. After your years as counsel to the Senate Judiciary Committee, and then as general counsel and vice chair of the U.S. Sentencing Commission, has your switch to defense advocacy changed your perspective on sentencing policy and the guidelines?

John Steer: No, at least not yet. Maybe I could give a more experienced and nuanced answer in a year or so. For now, however, I maintain the belief that a system of sentencing guidelines is good for defendants generally and sound public policy. I have always felt a guideline system needed to be reasonably flexible to accommodate individualized sentencing. And, I have always opposed statutory mandatory minimums because they conflict with the operation of the guidelines, are inflexible and often unduly harsh, and are not applied uniformly.

The Champion: Mandatory minimum sentences have many problems but have been politically popular, at least in the past. One of the goals of the Sentencing Reform Act (SRA), which created the Sentencing Commission, was to interpose a neutral, expert body between politics and policymaking. Some have observed, however, that the commission has become entwined with the political branches. How would you describe the role of politics in the decision making processes at the commission?

Steer: "Politics" has always played a role in decision making by the U.S. Sentencing Commission, but I think it has been a mostly healthy contribution. After all, in a legal and democratic sense, the commission exercises delegated legislative authority from Congress. Commissioners with whom I was privileged to work during my 12-plus years as general counsel and 8-plus as commissioner all believed strongly in the SRA and its laudable goals. They also realized, however, that federal sentencing policy is not always made and revised with that well-crafted Act as the only driver and constraint. Subsequent congressional directives and statutory penalty changes (particularly mandatory minimums) have sometimes proved difficult to reconcile with SRA objectives and empirical sentencing data.

Nevertheless, commissioners have done their best to recognize and faithfully implement evolving congressional intent, as best it could be discerned.

The Champion: In United States v. Kimbrough, the Supreme Court recently recognized that when Congress develops policies under certain circumstances, such as those surrounding the enactment of the 100-to-1 powder to crack cocaine ratio, it could result in guidelines that fail to reflect the commission's exercise of its institutional role as an expert agency. In those circumstances, the Court permits judges to reject the guidelines' recommended sentence in favor of one that better reflects the statutory factors at 18 U.S.C. § 3553(a). How do you think judges should treat guidelines that are based on congressional policies, as expressed through statutory mandatory minimums, increased maximums, or specific directives to the commission, rather than the commission's own expert analysis?

Steer: They should treat them with respect and appropriate deference as the starting point for sentence determination, consistent with recent U.S. Supreme Court pronouncements. They should then examine the correctly determined guideline range against the backdrop of any commission-recognized departures and the statutory precepts in 18 U.S.C. § 3553(a) as an aid in deciding whether a sentence within or outside the guideline range is most appropriate. I would be cautious in reading Kimbrough to suggest that all congressional expressions of sentencing policy are suspect or deserving of less respect. The Kimbrough holding was simply that the pre-2007 crack guidelines were not immune from the general advisory status of guidelines post-Booker. I think the U.S. Sentencing Commission deserves great credit for its series of studies and reports on cocaine sentencing policy that no doubt helped shape the Court's view that the pre-2007 sentencing guidelines for crack offenses were neither mandated by Congress nor entitled to any elevated policy status.

The Champion: The commission has indeed been at the forefront of the effort to reform the unjust penalties for crack cocaine, and helped lay the groundwork for the Court's recent decision. The rationale underlying Kimbrough, however, is broader than just the crack guideline, as several judges and appeals courts have recently held in child pornography, career offender, and "fast track" cases. The Court reasoned that guidelines that were not developed by the commission in its characteristic role as an expert agency do not have the same status as those that were. Kimbrough's message seems to be that if a guideline is based on a congressional directive instead of empirical evidence and independent research, and the result is a guideline that recommends sentences that are greater than necessary to satisfy sentencing purposes, the courts are free to reject the guideline.

Prior to Kimbrough and the Court's other recent decision, United States v. Gall, the commission encouraged sentencing judges to make calculation of the guidelines range the first step in the sentencing process, to then focus on a potential guidelines' departure, and only then to consider § 3553(a). Some judges, in the interim after Booker, changed very little in their approach to sentencing. They tended to impose a sentence within the guideline range unless there was something extraordinary or unusual about the case, which was very close to the old standard for departures. How can defense counsel ensure that judges exercise the increased discretion Booker, Rita, Gall and Kimbrough have given them?

Steer: Overall, the post-Booker system is already much more flexible. It affords judges greater latitude to disagree with the sentences available within the guideline range by relying on the general precepts embodied within § 3553(a) without having to tether a decision to sentence outside the range to an identified factor or factors. Of course, the big differences are in the more deferential standards of appellate review, and those approaches are still being developed. The job of defense counsel, I think, is more challenging now. It combines all the necessary skills of guideline advocacy with the necessary "know your judge" savvy of the pre-guideline era. And if it is done well, it will incorporate an ever-growing information base of case law, sentencing data, and up-to-date information about the kinds of sentences that best achieve sentencing goals.

The Champion: The guidelines result in very few offenders being eligible for non-prison sentences. Considering the country's high rate of incarceration and the rising cost of keeping so many non-violent offenders locked up for years on end, shouldn't the commission develop more alternatives to incarceration, at least for first-time non-violent offenders?

Steer: Probably so, and that is why the commission is now taking a new look at alternatives to imprisonment. I advocated greater use of evidence-based alternatives, those that can be proven to work and effectively meet the purposes of sentencing. It will be a challenge, however, to identify the categories of offenses and offenders that should benefit from expanded alternatives. The candidates most likely not to recidivate are typically white collar offenders. The guidelines initially were designed to provide short, sharp sentences of imprisonment for those offenders in order to further the goal of deterrence. I have no doubt that the greater certainty of going to prison, even for a relatively short period, can help deter antitrust, tax evasion, securities fraud, and many other white collar offenses. I think our punishment system can be principally faulted for imposing wastefully long terms of incarceration for many offenders. The guideline system would benefit from a systematic reassessment of punishment levels, and the commission ought to correct structural defects that can, in some cases, send offense levels literally "off the chart" of the sentencing table.

The Champion: Almost 20 years ago, you and Judge Wilkins wrote the article declaring relevant conduct the "cornerstone" of the guidelines. The Apprendi line of cases that led to the merits opinion in Booker, and ultimately to its remedial opinion declaring the guidelines advisory, raised new questions about the fairness of punishing defendants for unconvicted conduct. Do you think that relevant conduct should still be the cornerstone? Would you modify or change the relevant conduct rules? What do you think about using acquitted conduct at sentencing?

Steer: I believe "relevant conduct" is still a cornerstone in the construction of a just and effective sentencing policy. Historically, judges exercising unfettered discretion (within statutory parameters), parole authorities, and even pardon authorities, have taken into account all "relevant" offense conduct and offender characteristics that were probably accurate. The federal sentencing guidelines use relevant conduct, as expressed in USSG 1B1.3, as a way of structuring and weighing those factors.

That said, I think some changes to Section 1B1.3, Factors that Determine the Guidelines Range, are in order. The first change I would make, but not the most important, is to exclude "acquitted conduct" from this guideline, and move it to 5K2.21 (Dismissed and Uncharged Conduct) as a judge-discretionary factor. There are two reasons I now recommend this change. First, the inclusion of acquitted conduct in determining the guideline range under 1B1.3 is relatively rare and, in practice, entirely judge-discretionary. The Justice Department will defend (and successfully has defended, even post-Booker) a judge's decision to include acquitted conduct, but to the best of my knowledge, DOJ never appeals a judicial decision to exclude it. The relevant conduct guideline is supposed to produce a mandatory, relatively consistent application of guideline factors to the facts, rather than an application that varies from judge to judge according to the jurist's thinking regarding use of acquitted conduct. After all, 18 U.S.C. § 3742 and post-Booker case law say that both parties continue to have an enforceable right to a correct application of the sentencing guidelines, before the curtain opens on the enlarged stage of judicial discretion. I would move the consideration of acquitted conduct to that second stage, where I believe it more properly belongs.

The second reason I would exclude acquitted conduct from 1B1.3 relates to the whole gamut of policy objections to its mandatory inclusion. The federal guideline system is alone among sentencing reform efforts in using acquitted conduct to construct the guideline range. No state guideline system uses it. Let's lose it from 1B1.3.

The Champion: That's big news — one of the architects of relevant conduct now believes the mandatory inclusion of acquitted conduct in determining the guideline range should be ended. Did you do anything while at the commission to make this change?

Steer: Before I left the commission, I provided my colleagues with a draft amendment to accomplish that objective.

The second, and more important, change to relevant conduct I would recommend is to decrease the weight given to unconvicted counts that are part of the same course of conduct or scheme under 1B1.3(a)(2) and (3), relative to conduct included within the count of conviction. That is the aspect of the guideline that I find most difficult to defend. Why should, for example, the drugs associated with an uncharged, or charged and dismissed, count be given the same guideline weight as an equivalent drug quantity in the count(s) of conviction? Why don't we, instead, give less weight to the unconvicted conduct by, for example, counting all the drugs in the convicted counts but only half the drugs in the unconvicted conduct? I believe that, or some similar approach, would address another major unfairness perception about the guideline and, at the same time, provide an incentive to prosecutors to convict on more counts if they want the underlying conduct to count more. I realize some want to entirely exclude unconvicted conduct, but for many reasons that I can't adequately discuss here, I think that goes too far and would leave judges with an incomplete and possibly inaccurate assessment of the defendant's actual criminal conduct.

The Champion: The commission did not make changes to the Guidelines Manual after the Supreme Court's decision in Booker to reflect the guidelines' new advisory character. This year, however, the commission is making a few changes to Chapter One. Notably, the commission is reinstating a description of how the guidelines were developed that was moved to a historical footnote in a previous round of guideline amendments. This description includes the original commission's account of how a study of "past practice" was used as a starting point for the guidelines. Why was this material moved in the first place, and do you think the methodology it describes reflects the guidelines that are in effect today?

Steer: Well, I probably should confess that I was a principal advocate of moving the original introduction to the Historical Notes. My biggest concern was to preserve history as it had been written and avoid after-the-fact interpretive gloss by commissioners who were not part of the initial decisions. I think this year's amendment achieves a reasonable compromise. It restores the original introduction to a more elevated status, consistent with the manner in which it was discussed in the recent Supreme Court cases, but hopefully it will avoid the problem of post-ad hoc interpretive changes.

In my view, the methodology described in the original introduction less aptly reflects most of the current guidelines than the U.S. Supreme Court seems to realize. The proliferation of congressional directives and other statutory changes, and the commission's implementation of both, along with some important commission initiatives along the way, have changed sentences for many offenses substantially from the averages of pre-guideline practice. Kimbrough notwithstanding, I have difficulty understanding why the latter kind of sentencing policy (based on multivariate analysis of past sentencing practices) is entitled to any greater respect than the former (based on democratic processes and a broad variety of commission-assimilated information).

The Champion: What the Supreme Court seemed to be saying is that when the former kind of sentencing policy is driven by the politics of the moment rather than neutral empirical research, it is entitled to less respect. But these are the issues that courts will confront as we go forward with litigation under the advisory system. The commission's guideline development process, whether for the original guidelines or subsequent guideline amendments, is also likely to come under increased scrutiny. Some of our members devote considerable time and effort to attempting to participate in the guideline development process. Can those who advocate on behalf of the accused ever hope to have greater (or any) influence on the commission?

Steer: The influence of the defense bar actually has grown considerably over the years. The first advisory group adopted by the commission, the Practitioners Advisory Group (PAG), was formed in part to fill a void and ensure a better balance in the input received by the commission. Today, the defense bar is well organized, advocates strongly, and has a positive impact in shaping the outcome on many issues before the commission. Defense bar advocacy needs to be grounded in data and actual cases, as much as possible. Defense advocates also need to realistically recognize the responsibility commissioners feel to implement the Sentencing Reform Act and other legislation enacted by Congress as faithfully as possible.

Commissioner Michael Horowitz, a distinguished current member of the commission, of course is a member of the defense bar. The president could name other defense practitioners to the commission as voting members.

Congress also may decide at some point to amend the statute to add a non-voting defense representative, as the Judicial Conference has proposed.

No doubt adding a defense ex-officio would improve the perception of fairness, but what really matters is whether defense groups have a fair opportunity for input into commission policymaking and receive sufficient, timely data and other information from the commission. We took a number of steps to improve both during my tenure.

The Champion: The Pew Charitable Trusts recently reported that for the first time in the nation's history, more than one in 100 American adults is behind bars (www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf). The number of American adults is about 230 million, meaning that one in every 99.1 adults is behind bars. One in 36 Latino adults is behind bars, based on Justice Department figures for 2006. One in 15 black adults is too, as is one in nine black men between the ages of 20 and 34. Given all this, do you believe that the guidelines have been a success with respect to the goals of the SRA, and the goal of reducing racial disparity in particular?

Steer: The guidelines have probably been modestly successful in meeting the more ambitious SRA goals. If Congress was less active in shaping the commission's agenda and resulting allocation of staff resources, perhaps the commission could conduct more research to measure these objectives and effect appropriate policy responses. But, let's be realistic. These objectives are difficult to quantitatively assess, even in the best of circumstances, and politics likely will continue to temper any response.

I think both the federal system and many state penalty schemes can be faulted for producing unnecessarily long terms of imprisonment that serve no useful sentencing purpose after a certain point and yet are very costly to administer. We may also be sending to prison some offenders who can be effectively sentenced (meaning all relevant sentencing purposes addressed) without the traditional use of prison.

The guidelines apply the same, regardless of the offender's race. I can't assess the operation of the entire law enforcement and prosecution system, but the guidelines actually help to ensure that race is not a determining factor in the sentence of federally convicted offenders. No sentencing system, by itself, can adequately address crime problems in society that may impact different racial populations differently. However, one hopes that the sentencing system will respond to advances in our understanding of the most effective sentencing approaches. Of course, we know that some sentencing statutes, like 18 U.S.C. § 924(c) and the penalties for crack offenses, impact racial groups unequally. I have long supported commission efforts to have penalties for crack offenses re-examined, but for a host of substantive reasons unrelated to the differing racial impact.

The Champion: Congress directed the commission not to recommend a prison sentence or longer imprisonment based on education, vocational skills, employment record, family ties and responsibilities, or community ties, 28 U.S.C. § 994(e), and explained that the purpose of this provision was "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties." S. Rep. No. 98-225, at 175 (1983). But the commission's policy statements are written in such a way as to discourage decreasing sentences based on the presence or absence of these and a variety of similar factors. Such factors surely predict a defendant's reduced likelihood of recidivism in some cases. If one goal of sentencing is the protection of the public in an efficient manner, shouldn't judges therefore take such factors into account? Further, why shouldn't punishment for someone who comes from a broken home, an abusive home, or an impoverished environment — one that makes resort to crime so much more likely — be somewhat mitigated, especially when compared to someone who has had every advantage in life but nevertheless has chosen a criminal path?

Steer: The guidelines do not forbid consideration of those and other offender characteristics. The Policy Statements, written pre-Booker, limit the use of many offender characteristics "departures" to extraordinary cases. Otherwise, the factors were expected to be weighed within the range, and of course the ranges are as wide as the statute permits. Booker and subsequent case law give judges greater latitude to consider these factors in determining the ultimate sentence, and this opens up greater opportunities and responsibilities for effective defense advocacy.

The Policy Statements relating to both offense and offender characteristics probably need to be updated, particularly in light of the case law developments. But, is it really a good idea for the guidelines to increase sentences for younger offenders, those with less education or those from less advantageous family backgrounds? Likelihood of recidivism alone probably would suggest longer sentences for each such factor. In fact, a number of state guideline systems and the federal parole guidelines use some of these factors to lengthen sentences, but I question whether that would be acceptable or even a good idea in the federal guideline system.

The Champion: What tasks has the U.S. Sentencing Commission yet to undertake?

Steer: The commission's education, data collection and dissemination, and research roles are ongoing and should be robust, even in this new era of advisory guidelines and much more deferential appellate review. I think there also remains a lengthy potential policy agenda to ensure that guideline calculations more frequently and appropriately embody relevant offense and offender characteristics. I have already mentioned a number of those potential changes. Of course, it is entirely likely that Congress will remain an active force in shaping sentencing policy, giving the commission plenty to do in response. With an upcoming change in administration, the next president, attorney general, and Congress may launch even more ambitious sentencing policy changes. If so, hopefully they will use sentencing data and the expertise of the U.S. Sentencing Commission to better inform their decisions.

The Champion: What is your deepest regret from your tenure as legal counsel and then as commissioner?

Steer: I had a "good run" as both legal counsel and commissioner. One always would like to have accomplished more. However, I am grateful for the extraordinary opportunities I had to help draft the initial guidelines, defend their constitutionally as an amicus, contribute to their amendment and improvement over a period of years, teach them, and serve as a commissioner during a somewhat turbulent and challenging time. The people involved in the federal criminal justice system — prosecutors, defense attorneys, probation officers, judges, and others — have been wonderful people with whom to work. I hope to stay involved in both sentencing and organizational compliance and ethics matters. Accordingly, I look forward to ways in which, as a new member of the defense bar, I can hopefully apply some of my experiences and the expertise I have developed. n

John R. Steer was appointed as a member and vice chair of the U.S. Sentencing Commission in November 1999. Prior to his appointment, he served as general counsel of the commission, where he was responsible for advising the commission of the statutory mandates and the application and amendment of the federal sentencing guidelines. Steer recently joined Allenbaugh Samini LLP as a senior partner in the firm's office in Washington, D.C.

1660 L St. NW • 12th Floor • Washington, DC 20036 • Phone: **(202) 872-8600** / Fax: **(202) 872-8690**