The Federal Government's Enforcement Actions Against Internet Poker: An Example of Deterrence Without Draconian Punishment

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Judges often say that to sentence a criminal defendant is one of the hardest things they do on the bench. The whole process of punishment is fraught with emotion, driven in many cases by a natural human desire for retribution against a person who has violated our sense of what is right (as well as the law) and who, in some cases, has hurt others. Yet, since passage of the Sentencing Reform Act in 1984, federal criminal sentencing has been clothed in the appearance of mathematical precision and objectivity. Even after *Booker*, legislators and judges alike have maintained the fiction that unfairness in sentencing may be avoided through the consideration of objective factors that counsel the right sentence.

The Guidelines' façade of mathematical precision has been increasingly tainted by legislative directives that require sentences of greater duration without regard to whether they truly reflect the culpability of the individual defendants to whom they apply. In particular, on many occasions, Congress has mandated increases in the severity of sentences driven by the loss table that applies to many white-collar offenses. A number of judges—most notably Judge Jed S. Rakoff of the Southern District of New York— have concluded that these congressionally mandated increases have corrupted the Guidelines to such a degree that they are no longer useful guideposts. In our view, those legislative directives have created a system in which the goal of retribution now vastly outweighs any other sentencing purpose.

In this article, we consider the extent to which, as a result of the distortion of the loss table, the Guidelines no longer reliably produce sentences that serve another of the statutorily mandated purposes of sentencing: deterrence. Deterrence is indisputably a legitimate goal to be pursued through sentencing policy and practice; indeed, the law mandates deterrence as one consideration for fashioning an appropriate sentence. But the assumption that deterrence may be achieved solely through lengthy prison terms for nonviolent white-collar offenders rests on shaky ground. Perhaps the best example to demonstrate that deterrence may be achieved without draconian sentences is the U.S. government's recent crackdown on online poker in the United States, which largely achieved the former without resort to the latter.

I. Sentencing Reform—Good Intentions Led Astray

The original idea behind the Guidelines was that they would be the product of the Sentencing Commission's expertise regarding the seriousness of particular offenses and their appropriate punishments.[1] Initially, the Commission used an empirical approach to determine sentencing ranges for specific offense conduct. According to the Commission, the Guidelines were developed based on "pre-guidelines sentencing practice as revealed by [the Commission's] own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments."[2]

Although the original Guidelines may have represented a legitimate attempt to apply social science to regularize sentencing in a fair way, congressional interference has derailed that effort. By 2004, Congress had issued over eighty-five separate legislative enactments relating to the Guidelines, many containing multiple directives. These directives varied along a continuum from general to specific, leaving more or less discretion to the Commission to finalize the details of the mandated policy change. Where the directives were general, they permitted the Commission to apply its expertise in determining the appropriate and most effective way to proceed; indeed, in some cases, general directives required only that the Commission study particular issues and report back to Congress. But the more specific directives virtually excluded the application of the Commission's expertise, either by instructing the Commission to increase the offense level applicable to a particular offense, or even by dictating the size of the increase or the precise terms of a new upward offense adjustment.[3]

Economic crimes are one of the areas in which Congress has most frequently issued directives: a total of 16, trailing the 22 for drug trafficking crimes and edging out the 15 for sex crimes.[4] As the Sentencing Commission itself has noted, "The appearance early in the Guidelines era of . . . mandated sentence increases for economic crimes, and the perceived absence of empirical research establishing the need for them, led one former Commission to warn that the [Sentencing Reform Act's] promise of policy development through expert research was being supplanted by symbolic 'signal sending' by Congress."[5] Despite that

warning, Congress has continued to mandate increases in the severity of sentences for economic crimes, often as a political response to widely reported corporate scandals.[6] The result is that Guidelines calculations for economic crimes have become increasingly divorced from the empirical research that once may have given them legitimacy.

In particular, the upward enhancements that result from the loss table often have a disproportionate effect on sentences for economic crimes. For example, a defendant convicted of an economic offense is typically assigned a base offense level of 6 or 7, for which a defendant with no criminal history would fall in the advisory Guidelines range of 0 to 6 months.[7] But a defendant convicted of bank fraud with losses of $10 million would have his or her offense score increased by 20 levels.[8] Thus, the defendant's advisory Guidelines range would increase from 0 to 6 months to 63 to 78 months.[9] If the bank fraud resulted in losses of $100 million, the loss table dictates an upward adjustment of 26 levels, and the resulting advisory Guidelines range almost doubles, to approximately 10 to 12 years.[10]

The original rationale for the loss enhancement in such cases was that economic loss provides a direct measure of harm and a useful proxy for the defendant's culpability.[11] This rationale rests on the premise that an offense resulting in greater economic loss is more damaging than an offense resulting in little or no economic loss, and that a defendant who causes or intends greater economic harm is more culpable than one who causes or intends little or none.[12] But as the punishment ranges for white-collar crimes were driven higher and higher by congressional mandate, those advisory ranges lost touch with the basic purposes of sentencing, also mandated by statute. Now that the Guidelines are stripped of their empirical grounding, judges can no longer rely on them to produce a sentence likely to be sufficient, but not greater than necessary, to achieve the purposes of sentencing, such as deterrence. Although Congress justified severe sentences with lip service to the need for deterrence, its mandates seemed designed only to satisfy the public's desire for retribution against corporations and their officers, whose crimes were perceived as being particularly heinous.

Judge Jed S. Rakoff of the Southern District of New York has been one of the most articulate critics of the economic guidelines. In *United States v. Adelson*[13] and in *United States v. Gupta*,[14] Judge Rakoff noted the absence of any explanation for the drivers of high offense levels for those cases, particularly the loss table. As the loss table and other aspects of white-collar sentencing have more and more reflected political judgments—rather than the Commission's expertise—the Guidelines' approach to sentencing lost the basis for its legitimacy. Indeed, as Judge Rakoff has noted, the Guidelines now generate advisory sentence ranges that are no longer limited to the severity necessary to achieve deterrence, and therefore no longer comply with the law's mandate that a sentence be no greater than necessary to achieve that and other goals of punishment.

II. The Black Friday Poker Cases—Deterrence Achieved Without Draconian Sentences

One recent group of criminal prosecutions supports Judge Rakoff's observation that relatively lenient sentences are sufficient to deter white-collar crime. The government's recent prosecutions of defendants associated with the offering of online, real-money poker in the United States did not result in stiff sentences for any of the individuals who were indicted, yet the government appears to have driven all of the major offerors of online poker from the U.S. market. These cases thus appear to support the view that the draconian Guidelines sentences resulting from application of the loss table are simply not necessary to achieve the goal of deterrence that gives the punishment of criminal defendants its legitimacy.

On April 15, 2011—a day known in the online poker industry as "Black Friday"—federal authorities in the Southern District of New York unsealed an indictment charging eleven individuals with violations of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), the operation of illegal gambling businesses, conspiracy to commit bank and wire fraud, and money laundering.[15] Prosecutors alleged a massive operation involving the four largest poker operators—PokerStars, Full Tilt Poker, Absolute Poker, and Ultimate Bet. The charges also included allegations that some companies had defrauded their customers to the tune of many millions of dollars.

The Guidelines treat gambling offenses and fraud offenses very differently. Defendants convicted of operating or facilitating a gambling business receive a base level of 12—twice the base level assigned to defendants convicted of economic crimes.[16] The recommended sentencing range for a level 12 defendant with no criminal history is 10 to 16 months. However, the Guidelines provide no adjustment for gambling offenses based on loss or the size or scope of the gambling operation. On the other hand, gambling defendants who are also convicted of economic crimes, such as bank and wire fraud, may be subject to a loss enhancement under certain circumstances if their conduct resulted in a loss.[17] Thus, the charges against the defendants potentially exposed them to massive advisory Guidelines sentences upon a conviction for fraud or money laundering, given the enormous amounts of money involved in the online poker business in the United States.

To date, eight defendants have surrendered to authorities, all of whom have pleaded guilty, and five of whom have been sentenced and ordered to pay restitution. So far, the prison sentences handed down have been relatively lenient, ranging from 3 months to 3 years, with one defendant receiving a nonincarceration sentence of probation because of severe medical issues. Despite the massive size of the operations targeted by prosecutors and the potential for the individuals to receive lengthy sentences if they were convicted, all of the defendants sentenced to date—Brent Beckley, John Campos, Chad Elie, Ira Rubin, and Raymond Bitar—have received much shorter sentences.

Brent Beckley, a former employee of Absolute Poker and Ultimate Bet, pleaded guilty to conspiracy to operate an illegal gambling business and a related count for bank and wire fraud. He was sentenced to 14 months in prison and ordered to forfeit $300,000. As stipulated in his plea agreement, Beckley had a base level of 13 with no criminal history, so his Guidelines sentencing range was 12 to 18 months. When the court signaled that it was contemplating an upward departure to account for the size of Beckley's operation, the government actually *opposed* on the grounds that the Guidelines provide for no adjustment based on the scope or size of a gambling operation.[18] And even though Beckley had admitted to bank and wire fraud, there was no evidence of loss to any victim. As the prosecution stated, "There [wa]s no evidence that Beckley intended to cause ultimate financial losses to banks, and no banks [ha]d identified . . . actual losses attributable to Absolute Poker processing."[19] Thus, the court held that a sentence of 14 months was sufficient but not greater than necessary to achieve the goals of sentencing.

Utah banker John Campos pleaded guilty to a misdemeanor violation of 18 U.S.C. § 1306 for causing SunFirst Bank to process payments on behalf of two online gaming businesses.[20] Campos started with a base level of 12 under § 2E3.1, which was reduced by 4 points for his acceptance of responsibility and his minor role in the offense. The resulting offense level of 8 called for a sentence of 0 to 6 months. The court imposed a sentence of 3 months, the midpoint of that range.

Payment processor Chad Elie pleaded guilty to one count of bank fraud and was sentenced to 5 months in prison and ordered to forfeit $500,000. Under Elie's plea agreement, the parties agreed that Elie's base offense level of 12 should be reduced by 2 points for his acceptance of responsibility. As the prosecution noted in its sentencing memorandum, no adjustments were appropriate based on the size or scope of the gambling operation.[21] Moreover, the existence of bank and wire fraud did not require a different result because only "minimal estimated losses" resulted from Elie's conduct.[22]

Payment processor Ira Rubin received the harshest sentence, in large part because of his previous criminal history. Rubin pleaded guilty to one count of conspiracy related to his involvement with internet gambling, conspiracy to commit bank and wire fraud, and conspiracy to commit money laundering. As a result, he was sentenced to 3 years in prison and ordered to forfeit $5,000,000.[23]

Conversely, Full Tilt Poker chairman Ray Bitar received the most lenient sentence. Bitar pleaded guilty to one count of accepting funds in violation of UIGEA and one count of conspiracy to commit bank and wire fraud. Because he was waiting to receive a heart transplant and would lose that opportunity if incarcerated, the government consented to a nonincarceration sentence. As a result, the Court sentenced Bitar to time served with no supervised release, entered a money judgment in the amount of $40 million, and ordered the forfeiture of specific real property.[24]

The relatively lenient sentences these defendants received were based, at least in part, on the unique circumstances of these prosecutions. Again, engaging in a gambling business is one of the only economic offenses that does not implicate the loss table in § 2B1.1 (and therefore avoids the extreme effect that table has on Guidelines sentences). In addition, the bank fraud charge was based on the allegation that the defendants lied to the banks by concealing the type of businesses for which they were processing payments (that is, they did not tell them that the payments related to online poker). But the banks, which received enormous amounts of fees in connection with the payment processing, did not suffer losses in the manner normally associated with the commission of fraud against a bank. For that reason, even the defendants' offense level calculations for the bank fraud convictions were unusually low.

Nevertheless, the government still brought down a hammer on internet poker in the United States—even if it did not do so through the imposition of lengthy prison sentences. The government did not file criminal charges against the foreign companies that had offered internet poker in the United States. Two of the companies, Full Tilt Poker and PokerStars, were based in the Isle of Man in the United Kingdom and were regulated by authorities in Alderney, in the Channel Islands. The third company, Absolute Poker, had its servers in Canada and was regulated by the Kahnawake Gaming Commission of the Mohawk Territory of Kahnawake in Quebec, Canada. These companies offered internet poker in dozens of countries around the world.

Rather than charge the companies criminally—an approach fraught with complex cross-border issues—the government instead commenced one of the largest civil forfeiture actions in history. The government seized the dot-com internet addresses of the three online gaming sites—replacing them with a takedown notice—though the government subsequently entered into an agreement that allowed Full Tilt Poker and PokerStars to use the sites after implementing technology to block players' access from within the United States. More important, the government also seized hundreds of millions of dollars—freezing funds in dozens of bank accounts in fourteen countries—and sought forfeiture of that money. Settlements led to the forfeiture of well over $700 million from PokerStars and Full Tilt, as well as additional amounts from Absolute Poker and a number of individuals.

Through these measures, the government achieved almost complete deterrence in the field of online poker. Full Tilt Poker and Absolute Poker went out of business, and PokerStars left the U.S. market entirely. No other companies have stepped forward and openly offered internet poker in the United States without legal authority to do so.[25]

III. Conclusion

The fact that deterrence was achieved so effectively in the world of online poker without imprisoning anyone for

decades speaks volumes about the ability to achieve this goal in the wider context of all white-collar crime. In particular, the government's use of civil forfeiture appears to have provided the leverage that it needed to cause the companies in question to vacate the market, and to deter others from stepping in to take their place—just one example of the way the government may use other tools to achieve its enforcement goals without lengthy sentences.

Certainly, there are criminal defendants who deserve lengthy sentences. But the mechanical, unthinking application of the Guidelines to nonviolent economic crimes—and particularly the application of the loss table—simply cannot be justified as necessary for deterrence. As the Guidelines more and more reflect politicians' reflexive efforts to "get tough" on white-collar crime without regard to empirical evidence or any other legitimate basis, the Guidelines cease to be a useful measure for judges to use as a starting point in determining appropriate criminal sentences. Zealous advocates for criminal defendants need to bring to judges' attention all of the various characteristics of their clients in order to give those judges a basis on which to echo Judge Rakoff's conclusion that the Guidelines now serve as a poor measure of the imposition of justice in criminal cases. Who knows? Perhaps an increasing chorus of judicial critics of the current Guidelines will lead to a second generation of sentencing reform.

Notes

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1 *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) ("[I]n the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'" (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)).

2 U.S.S.G. § 1A1.5.

3 U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform 21–22 (Nov. 2004), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf.

4 *Id.*

5 *Id.* at 56 (citing Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289 (1989)).

6 *Id.* (noting such an amendment in 2003 in the wake of corporate scandals in 2002).

7 U.S.S.G. § 2B1.1(a)(2). A base offense level of 7 applies to defendants convicted of an offense for which the statutory maximum term of imprisonment is twenty years or greater. U.S.S.G. § 2B1.1(a)(1).

8 U.S.S.G. § 2B1.1(b)(1)(K).

9 U.S.S.G. Ch. 5, Pt. A (Sentencing Table).

10 *Id.*

11 Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. Rep. 167, 171 (2008).

12 Gabrielle S. Friedman et al., *Challenging the Guidelines' Loss Table*, 20 Fed. Sent. Rep. 174, 176 (2008).

13 *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

14 *United States v. Gupta*, 925 F. Supp. 2d 581 (S.D.N.Y. 2012).

15 Superseding Indictment, *United States v. Scheinberg*, No. 1:10-cr-00336-LAK (S.D.N.Y. filed Mar. 10, 2011).

16 U.S.S.G. § 2E3.1(a).

17 Defendants convicted of money laundering offenses are sentenced under U.S.S.G. § 2S1.1. The base level for a § 2S1.1 offense is equal to the base level of the underlying offense from which the laundered funds were derived if (A) the defendant committed the underlying offense and (B) the offense level for that offense can be determined. Otherwise, the base level is 8 plus an enhancement under § 2B1.1 corresponding to the value of the laundered funds. U.S.S.G. § 2S1.1(a). In the poker cases, all defendants convicted of money laundering offenses were sentenced based on the gambling offense from which the funds were derived.

18 Government's Sentencing Mem. at 4, *United States v. Beckley*, No. 1:10-cr-00336-LAK (S.D.N.Y. filed July 3, 2012). The court ultimately declined to depart upwardly.

19 *Id.*

20 Def.'s Sentencing Mem., *United States v. Campos*, No. 1:10-cr-00336-LAK (S.D.N.Y. filed June 13, 2012); Government's Sentencing Mem., *United States v. Campos*, No. 1:10-cr-00336-LAK (S.D.N.Y. filed June 20, 2012).

21 Government's Sentencing Mem. at 4, *United States v. Elie*, No. 1:10-cr-00336-LAK (S.D.N.Y. filed Sept. 26, 2012).

22 *Id.*

23 *United States v. Rubin*, No. 1:10-cr-00336-LAK (S.D.N.Y. filed Aug. 6, 2012).

24 *See* Minute Entry, *United States v. Bitar*, No. 1:12-cr-00529-LAP-3 (S.D.N.Y. Apr. 15, 2013); Consent Preliminary Order of Forfeiture as to Specific Property, *United States v. Bitar*, No. 1:12-cr-00529-LAP-3 (S.D.N.Y. filed Apr. 23, 2013).

25 New Jersey and Nevada are currently in the process of creating regulatory schemes and licensing companies to offer internet poker and other gaming as part of their broader regulatory schemes for gaming, but thus far, no companies are offering such services, and the services will, in any case, be geographically limited to those states.