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## Sentencing Guidelines: Where We Are and How We Got Here

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The title of our panel is, “Where We Are and How we Got Here.” My task is to explain “how we got here,” while the rest of the panel will explore where we are—that is, how well or poorly the federal guidelines system is working. The last panel of the day, of course, is “Where Should We Go From Here?” Inevitably, that question is going to be addressed, explicitly or implicitly, throughout the day.

Senator Kennedy introduced in 1977 the bill that would become the Sentencing Reform Act of 1984.<sup>1</sup> Its intellectual progenitor was Marvin E. Frankel, a distinguished federal judge in New York, who, in the early 1970s, had written a scathing attack on judicial sentencing discretion.<sup>2</sup> Frankel and other liberal reformers conceived of this first version of the Sentencing Reform Act as an anti-imprisonment and anti-discrimination measure. An adjunct to federal criminal code reform, the 1977 bill directed sentencing authorities to consider mitigating or aggravating personal characteristics of the defendant, encouraged alternatives to imprisonment, and recognized significant judicial discretion to depart from administrative sentencing guidelines.<sup>3</sup>

Senator Kennedy reintroduced his bill in each of the next four Congresses.<sup>4</sup> As the mood and concerns of the country changed, so did the provisions of this bill. Senator Strom Thurman became a co-sponsor and later on so did Senators Hatch and Biden.<sup>5</sup> The bill was ultimately enacted in 1984 as part of an

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1. S. 1437, 95th CONG., 1st SESS. (1977).

2. See generally MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

3. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 237-51 (1993).

4. *Id.* at 257-66.

5. Comprehensive Crime Control Act, S. 1762 (98th Cong., 2nd Sess.), Pub. L. No. 98-473, 98 Stat. 1987 (1984).

important criminal measure which included, in other provisions, significant mandatory minimum statutory sentences. Over the course of the four Congresses, the sources of plasticity in the early bill dissipated.

Whatever the early proponents of the Federal Sentencing Guidelines may have expected, the ultimate sponsors of the legislation clearly desired guidelines that were largely binding and sentences that were harsher than past practice. Many provisions of the statutes strongly encouraged certain policy choices that the first Sentencing Commission made, including its deviation from past sentencing practice for most crimes and its determination to issue detailed guidelines.

Since this conference will also consider state sentencing guidelines, it is worth mentioning that the transformation of Senator Kennedy's bill on the federal level is similar to what happened to state criminal justice legislation during these years. One political scientist who studied several states including California and Illinois, described the evolution of sentencing bills during this time as follows: "Due process liberals" initially sought to entice "law and order conservatives" to join with them on the theory that conservatives were equally dissatisfied with the regime of sentencing discretion, albeit for different reasons.<sup>6</sup>

The enticement worked, compromises were made, and in the end, the liberals were hoisted on their own petard. The new sentencing regimes were more responsive to a concern with overly lenient sentences by soft-hearted judges than they were to due process concerns or overall sentencing disparities. Whatever one's view of the wisdom of the Sentencing Reform Act of 1984, the guidelines that were promulgated in 1987, which continue in their essential structure today, are generally consistent with the terms of that statute and with its legislative history.

At the same time, however, the Sentencing Reform Act could have been implemented differently. Today's newly appointed Commission has statutory authority to implement the Sentencing Reform Act with less rigidity, less complexity, and a significantly larger nod to the exercise of guided judicial discretion supplemented with appellate review.<sup>7</sup> Specifically, the Commission is not statutorily compelled (1) to implement such an expansive concept of "real offense" sentencing, (2) to incorporate statutory, mandatory minimum sentences in the way that the current guidelines do, or (3) to require a motion from the government before a court may depart downward for substantial assistance to law enforcement authorities.<sup>8</sup> And, certainly, the Commission is

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6. See Jonathan D. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, 236-37; U.S. DEPARTMENT OF JUSTICE, *THE IMPLEMENTATION OF THE CALIFORNIA DETERMINANT SENTENCING LAW* 24, 29, 31, 45-46 (May 1982).

7. See generally 28 U.S.C. § 994 (1999).

8. See *id.*

not required to proclaim that most individual characteristics of defendants are largely irrelevant to sentencing.<sup>9</sup>

Having recounted, however briefly, “how we got here,” let me end my initial remarks by describing in very general terms some broader and important features of the Guidelines.

It seems to me there are three fundamental characteristics of the Federal Sentencing Guidelines which, when taken together, are of great significance not just for criminal sentencing but for the entire system of federal criminal law.

First, we have to understand that the Federal Sentencing Guidelines are not in any sense advisory. They are binding, mandatory rules which may be departed from only pursuant to the rules themselves.

Second, these rules are not determined by elected representatives through the process of legislation, but instead are promulgated by a central bureaucratic agency.

Third, the rules take into account an enormously wide variety of criminal conduct beyond the statutory elements of the offense of conviction.

Putting these three features together means that the Guidelines effectively operate as a criminal code in their own right, supplementing statutory criminal prohibitions. This is a significant change in our common-law tradition.

There are two especially striking aspects of *this* criminal code, as opposed to the federal criminal law of the preceding 200 years. First, this code is remarkably complex. As a practical matter, I wonder whether much of the complexity and detail of the Guidelines is necessary or helpful to the participants in criminal sentencing.

Second, this code is, formally at least, a closed system. I suspect that *actual* criminal sentencing is far more porous than the Guidelines would admit. Surely the Guidelines do not openly acknowledge the extent to which the formal demands of law are inevitably tempered in implementation. I venture to hypothesize that in many cases, in many districts of the country, the formal requirements of the Guidelines are met only on paper, not in reality, because to a large extent the Guidelines have driven underground the adversarial bargaining process and sentencing judges’ own efforts to ensure a just sentence.

I hope that the new Commission will thoughtfully reconsider both the complexity and the rigidity of the present Federal Sentencing Guidelines. The

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9. See 28 U.S.C. § 994(d) (1994)(stating that the Sentencing Commission may consider age, education, vocational skill, mental and emotional condition, physical condition, employment record, family ties, part played in the crime, criminal history, and “degree of dependence upon criminal activity for a livelihood” in establishing categories of defendants for sentencing purposes).

rule of law cannot prevail unless it is open to the possibility of correction, adjustment, and more complete justice.