

Day One

Welcome and Introductions

Welcome to the Law School

The Honorable Michael E. O'Neill, *Commissioner, U.S. Sentencing Commission*
Assistant Professor, George Mason University School of Law

Introductions

The Honorable John R. Steer, *Vice Chair and Commissioner, U.S. Sentencing Commission*

WELCOME AND INTRODUCTIONS

PROFESSOR O'NEILL: Good morning. On behalf of Dean Mark Grady, the faculty, the staff, and the students of the George Mason University School of Law, I would like to welcome you. I hope that your stay here in Washington is pleasant.

I guess it is fitting that we are meeting here in Northern Virginia. I don't know if you have had the chance to drive along the Dulles toll road from the airport today, but I imagine you couldn't fail to notice the number of high tech companies that have been sprouting up along what was a fairly sleepy suburb of Washington, D.C.

The emergence of these companies and the incredible technological innovations that they have given birth to demand that we reassess the application of criminal law and, in particular, federal sentencing to the world of cyberspace.

This law school, I am pleased to say, through its National Center for Technology and the Law, has been at the forefront of many of these efforts. It is, therefore, with great pleasure that I welcome you to our humble home here today.

Now, I would like to turn the time over to my colleague, vice chair of the Sentencing Commission, John Steer. John is likely one of the most knowledgeable individuals with respect to the guidelines that we have. He has been here from the very beginning and has had to withstand some of the slings and arrows thrown against the guidelines over the past several years, and he has also been here to shepherd what was once a legislative idea into a practical reality.

John has truly been an invaluable addition to the Sentencing Commission, in no small part due to his vast institutional knowledge of the system and his mastery of the sometimes arcane nuances of the sentencing guidelines themselves.

Therefore, without further adieu, I would like to turn things over to John Steer who will provide an introduction and an overview of our agenda for the next two days.

VICE CHAIR STEER: Thank you very much, Michael.

Good morning to all of you. On behalf of our Sentencing Commission chair, Judge Diana Murphy, and all of the members of the Sentencing Commission, I want to welcome you to this symposium and thank you in advance for your participation and the very valuable contributions that we are confident each of you will be making over the next two days.

If you have had a chance to look at the preface in your materials notebook, you saw that this is the third in the history of such events for our still young agency. In 1993, the Sentencing Commission inaugurated what commissioners then hoped would become a series of discussions on crime and punishment issues facing the United States.

We began that series with topics that were timely then, timely still today: a discussion on drug abuse and violence in America, focusing on causes, prevention, punishment, and treatment.

Two years later, we held a second symposium highlighting corporate crime in America, including the causes and cures for that form of lawbreaking.

Today, as you know, the Commission has organized this symposium to focus on economic crimes in their more traditional forms and in their new technology variations.

On the first day of the symposium, we will be looking at economic crimes in their basic and more usual forms that we are generally familiar with (*i.e.*, fraud, theft, and related offenses), but we are going to be asking you to help us to rethink how to best punish and formulate an effective and just sentencing policy for these offenses, administered through the federal sentencing guidelines.

In this regard, you will be hearing about a so-called "Economic Crimes Package" which, in simple terms, is a set of proposed changes to the sentencing guidelines for fraud, theft, and related offenses that is generally designed to better measure and weigh the pecuniary harm resulting from these offenses.

Now, don't be concerned if you are not familiar with the details of these proposals or even with the structure of the sentencing guidelines themselves. Those are details about which the Commission will worry in due course. For today, please concern yourselves with the big picture. That is how you can be most helpful to us and to all of us gathered here today.

Think broadly and creatively about the basic issue of punishment severity for these offenses and the considerations that ought to make a difference in determining the type and amount of punishment.

Tomorrow, hopefully, after you have helped us do a lot of outside-the-box thinking about how best to punish and deter traditional economic crimes, we will spend a day exploring together many of the challenging new technological variations of these crimes.

We will strive to better understand the basic similarities, as well as the important differences, in the nature of these technology-inspired economic offenses with which we must be concerned in this new millennium, and, of course, the implications of these similarities and differences for developing effective sentencing policy.

Briefly, our overall objectives in this symposium are—

First, in keeping with the academic setting here today at George Mason Law School, we hope to engender a lively, creative, and critical—in the best sense of that word—discussion, drawing on the varied expertise and perspectives that each of you as participants bring to this conference.

Second, consistent with the geographic proximity of this location to the seat of our national government, we hope to relate the intellectual energy of these discussions to real-world policy concerns facing law enforcement, Congress, and the Commission today, as we jointly seek to control various forms of economic crime.

Third, whatever your orientation in approaching these issues, whether it is as a judge, a prosecutor, an academic, a defense attorney, a business executive, or in some other way as a citizen, we hope you will take something valuable from this symposium that will help you in your work.

And, finally, through your active participation in this program today, you will be helping to inform and educate many other interested observers, as we will be webcasting live many of the sessions today and later publishing a record of the proceedings.

Also, the law school has volunteered to devote a special issue of their law review to academic papers contributed for this event.

At this juncture, I just want to briefly recognize and thank a few key persons and the organizations they represent for their valuable help in planning and conducting this program.

First, we owe a great debt of gratitude to the Criminal Law Committee of the Judicial Conference; its chair, Judge Billy Wilkins; and Sentencing Subcommittee chair, Judge Phil Gilbert, for their co-sponsorship of this symposium.

I spoke with Judge Wilkins yesterday. He is flying up this morning from Greenville, South Carolina, and will join us very shortly.

Judge Gilbert and a number of other current members and former members of the committee are here in the audience, and I would like them to stand as a group, if they could, and be recognized.

Judge Gilbert may be trying to push off a story on some of you. We were recently together at a Sentencing Institute in Phoenix, and Judge Gilbert may be trying to tell some of you that the sentencing commissioners gathered together in a group and shoved him off the stage and broke his arm. There is no truth in that. The truth of the matter is he loves the Commission so much he voluntarily took a fall for us.

I would also like to recognize another valuable co-sponsor, the National White Collar Crime Center; its director, Richard L. Johnson; and its director of research, Dr. Don Rebovich.

Dr. Rebovich is with us today. I don't believe Dr. Johnson is, but you will be hearing from Dr. Rebovich shortly.

We are also pleased to have as a co-sponsor, the American Bar Association White Collar Crime Committee. A number of committee members are with us today, and I would particularly like to recognize James Cole, the committee chair, if he is here.

Thank you, James.

Also, Mark Flanagan, co-chair of the Sentencing Subcommittee and liaison to the symposium. Is Mark here? I think he will be with us later.

Although not a co-sponsor, I would like to express our deep gratitude to the Department of Justice, Attorney General Reno; Deputy Attorney General Holder, from whom you will hear shortly; and many other DOJ representatives who will be contributing their time and expertise to our program over the next two days.

I would like to now briefly introduce the other members of the Sentencing Commission, each of whom will be participating in some phase of the program over the next two days:

Seated to my left, vice chair and judge, Ruben Castillo of the Northern District of Illinois;

Vice chair and judge, William Sessions, of the District of Vermont;

Judge Sterling Johnson of the Eastern District of New York;

Judge Joe Kendall from the Northern District of Texas.

Our chair, Judge Diana Murphy, is flying in this morning, having returned from a trip abroad. She will be bringing greetings to the group tonight at dinner.

Our *ex-officio* member, and representative of the Attorney General, Laird Kirkpatrick; and I don't believe our other *ex-officio* member, Michael Gaines, chair of the Parole Commission, could make it today. I would also like to recognize a few former sentencing commissioners who are with us in the audience today. As I mentioned, Judge Wilkins will be joining us. Also, former commissioner, Michael Block. Commissioner Block, thank you; we are glad to have you back. Judge Richard Conaboy, the second chair of the Commission from 1994 to 1998. Thank you, Judge Conaboy.

Judge Julie Carnes from the Northern District of Georgia. Has she arrived yet? Judge Deanell Tacha. I saw Judge Tacha. Thank you very much for joining us today. Former vice chair, Michael Gelacak. Is Mike here yet? And former vice chair, Michael Goldsmith, a professor of law at Brigham Young University, also will be with us later.

I have a few logistical notes but let me withhold them for now and, at this point, call on Judge Castillo to introduce our morning keynote speaker.

JUDGE CASTILLO: Let me, just as I always do, use a point of personal privilege. I think John left two important persons off the list of people who would be thanked and those are my fellow commissioners, Michael O'Neill and John Steer, who very much were in charge of this conference and were the driving forces for this conference.

I would like you to join me in a round of applause for their efforts.

Day One
Keynote Address

Introduction of Keynote Speaker

The Honorable Ruben Castillo, *Judge, U.S. District Court, N.D. IL,
Vice Chair and Commissioner, U.S. Sentencing Commission*

Keynote Address

The Honorable Eric H. Holder, Jr., *Deputy Attorney General of the United States*

KEYNOTE ADDRESS

JUDGE CASTILLO: Now, I have both a simple and a difficult job. How simple could it be to introduce someone like Eric Holder, especially in Washington, D.C.? You have his extensive bio that describes his exemplary career, so it is clear to me that I need to go off paper a little bit.

As you know, law enforcement is well represented, Eric, on the Sentencing Commission. The commissioners enjoy working with your *ex-officio* member, Laird Kirkpatrick. But, Eric, you also know that four of the seven commissioners have served as federal prosecutors. And, in fact, Commissioners Joe Kendall and Sterling Johnson were on the front lines as police officers.

All the commissioners have a deep commitment to law enforcement, and as such, I need to tell you that we all recognize the tremendous contribution your career has made to law enforcement here in D.C. as a judge, U.S. Attorney, and now throughout the country as the Deputy Attorney General.

Let me just pause here and say that because of some new law enforcement crisis that our country is facing even today as I speak—that I am sure we will all read about tomorrow—unfortunately, Eric is not going to be able to take any questions as he runs to deal with that crisis.

But, we all know that your fingerprints, Eric, and your DNA can be found all over the key DOJ initiatives in new technology crimes, health care fraud, efforts to stop our children from being exposed to violence, racial profiling, and efforts to increase diversity in the profession. These are initiatives that are critical and vital to our nation's interest.

Let me just say that we enjoy working with your team from Jim Robinson, the head of the Criminal Division; Josh Hochberg; Vicki Portney, who we see every day; and Jonathan Wroblewski. You have a very capable team, and we look forward to that partnership.

Now, there are very few saints in the world, and when you get to criminal justice, it is even harder. I once heard a story about how a preacher took a survey at his church and he said, "Any of you who know any saints raise your hands."

He was surprised when a man sitting in the front row raised his hand. The preacher said, "Well, what saint do you know?"

And he said, "Well, my wife's first husband."

Now, in the criminal justice system, it is even harder to obtain that status, and maybe Eric won't hit that status, but I want him to know that my own survey, informal as it is and as unscientific as it may be, tells me that among my fellow colleagues there is a huge respect for the career of Eric Holder.

In fact, we would like to claim you as one of our own by highlighting your own career as a judge here in D.C. We believe that everything that you achieve shows what judges can achieve throughout the criminal justice system.

So, without further adieu, let me just introduce you to one of the few people you can say who has the love, the admiration and respect of the federal judiciary and the criminal justice system, Eric Holder.

DEPUTY ATTORNEY GENERAL HOLDER: Good morning.

I can honestly say that that is the first time in Washington I have ever been compared to or mentioned in the same sentence as a saint. That is, you haven't actually talked to many members of Congress, obviously, recently.

It is good to be here and to be able to address the Sentencing Commission. It is good to have a Sentencing Commission again.

I noted with some degree of resignation the fact that we were only able to place four prosecutors or former prosecutors of the seven on the Commission. Our efforts to stack the Commission obviously were not successful. I say that only in kidding.

I really do appreciate, though, the opportunity to speak to you at this important symposium on federal sentencing policy for economic crimes and new technology offenses.

The prosecution of white collar crime, including health care, telemarketing and cybercrime of many varieties, has been a high priority at the Department of Justice. These crimes can affect many members of society, including the elderly and others targeted by criminals because of their particular vulnerability, and they can have devastating consequences.

Fraud, waste, and abuse in health care alone have produced staggering losses. Fiscal year 1999 overpayments in the Medicare Fee-For-Service Program were estimated at \$13.5 billion according to a comprehensive audit by the Office of the Inspector General at the Department of Health and Human Services. Of course, this figure does not tell us about the threat to the health and safety of countless Americans when fraudulent billing practices disguise inadequate or improper treatment for patients.

The technological advances of the late 20th century have had a dramatic impact on white collar crime. The Internet has placed instantaneous access to information and communication a keystroke away, creating vast opportunities not only for law abiding citizens but also for criminals who can now commit crimes with limited effort and with wide impact.

That type of cybercrime harms masses of victims and also interferes with the economic vitality of our nation by creating fear that a commercial transaction can end in victimization.

How many participants in this room, in this symposium, for example, have hesitated to rely on the convenience of the Internet to make a purchase out of fear that someone will steal your credit card number or fail to deliver the purchased goods as promised?

In recent years, both white collar crime and cybercrime have been an increasing priority for the Justice Department. We have encouraged cooperative efforts among federal, state, and local agencies, and we have also coordinated federal criminal prosecution with administrative or civil actions to maximize the advantages of both types of proceedings.

In addition, the Department has formed educational partnerships with the private sector and also with consumer organizations, such as the American Association of Retired Persons and the Better Business Bureaus, which allow us to reach millions of consumers with our anti-fraud messages.

We have also joined with industry groups through the Cybercitizen Partnership joint public awareness campaign to educate the nation's youth regarding responsible computing.

We are, therefore, very gratified that the Commission has identified white collar crime as a priority for its current sentencing guideline amendment cycle.

We also applaud the Commission's recent efforts in addressing specific areas of economic crime, such as mass marketing fraud, identity theft, trademark and copyright infringement, and cellular cloning. These efforts will have very real effects as the new provisions of the sentencing guidelines make their way into the courts. However, the comprehensive study of economic crime the Commission is now embarking on will be very valuable in determining how best to respond to some of the most fundamental issues in criminal sentencing, including the role of sentencing in crime prevention.

In my brief remarks this morning, I would like to discuss with you the trends that we at the Department have observed in white collar and new technology crimes and the need to respond to these trends with appropriate amendments to the sentencing guidelines.

We have recently taken a broad-based look at one very important branch of economic crime: consumer fraud, including investment fraud. To better prevent these offenses and to coordinate the government's efforts to fight this category of crime, we have sought to determine the types of fraud being committed in the computer age.

An important conclusion that has emerged from this effort is that, while criminals have modified their fraudulent pitches to exploit advancing technology, they have also kept many classic fraud schemes alive; for example, the "Ponzi" investment scheme, in which early investors are paid bogus profits from money paid by later investors who receive nothing, has migrated from word-of-mouth and mail to telemarketing fraud and, more recently, to the Internet.

Of course, the Internet allows a criminal's activities to have incredible breadth. A con artist can attract victims from many countries to a website with greater ease than a snake oil salesman could gather his victims in the town square in days gone by.

The ability to reach so many potential victims with such little effort means that, in many cases, the criminal need not steal large amounts of money from any one person. That, in turn, decreases the risk that any criminal investigation will ensue.

The widespread scope of criminal activity is not the only disturbing trend, however. Criminals have learned how to target particular groups of victims, including the most vulnerable members of our society. For example, lawbreakers may return to the victim of a prior fraud and offer to help him or her recoup his or her losses only to re-victimize that person with a new scheme.

Some white collar investment criminals take aims at particular ethnic groups. Con artists who engage in this type of targeting are often members of the same tightly knit group as the victims and count on the fact that the investors trust members of their own group because they feel a common bond.

Finally, targeting the elderly is a continuing trend but with some new twists. A series of investigations by the Securities and Exchange Commission in the last several years has identified deliberate

efforts by promoters of fraudulent investments to steal retirement savings. In several cases, these swindlers included with their sales literature documents that enabled a prospective investor to transfer individual retirement accounts to an IRA administrator who was friendly to the con artist.

The increasing use of the Internet not only has expanded the universe of potential victims and facilitated the creation of target groups, it has also significantly decreased the cost of committing a crime. Whereas start-up expenses in the past may have been necessary to cover the cost of printing brochures and mailing letters, the Internet has made these costs virtually disappear while, nevertheless, fostering a dramatic expansion of the target population.

For example, online auctions that may involve nickel and dime profits for each transaction are an appealing venue for some criminals, particularly when the relatively small profits from each victim are totaled.

All these factors add up to increased crime. Since its inception in May of this year, the FBI's Internet Fraud Complaint Center has received on average about 711 complaints every week. At this rate, the Center will receive about 37,000 complaints this year.

The Internet has also been used to foster securities fraud. Con artists may artificially inflate a stock's price by creating an apparent demand for thinly traded, lower-priced securities. The manipulators normally own a large number of shares in the company's stock and attempt to create a demand through the dissemination of false and misleading information, such as fake announcements about strategic alliances, future earnings, mergers or other important corporate developments.

In a stock manipulation, the price of the stock rises rapidly as consumers react to the false information by purchasing large amounts of the stock. The manipulators sell out during the run-up, causing the stock price, ultimately, to plummet as unwary investors are left holding vast numbers of shares of valueless stock.

Frequently, it is the discovery that the announcement was false rather than the manipulator's sales themselves that causes the price drop. Currently, this scheme is quite popular on the Internet. The Internet Fraud Complaint Center reports that nearly 17 percent of the complaints that it receives involve online securities fraud.

While use of the Internet to commit fraud has been a striking trend in recent years, there was also another trend of great significance, the rise of technology crime in which the target is technology itself.

Since the beginning of the year, for example, legitimate e-commerce has fallen prey to malicious computer hackers in the form of a denial of service attacks. These unlawful attacks involve the unauthorized intrusion into a large number of computers which were in turn used to launch attacks on several target computers, such as Yahoo!, eBay, and CNN.

We have also seen the emergence of fast-moving viruses that have caused damage to computer systems around the world. The "Melissa" virus, which first appeared on computers in March of 1999, caused an estimated \$80 million in damage to computers worldwide.

Even more destructive, was the "I love you" virus which appeared in May of this year and infected 45 million files in computer systems all over the globe and caused damage estimated at \$2.61 billion. Frighteningly, the "I love you" virus was followed by almost 30 copycat variants.

And finally, computer hackers use technology to break into financial computers and steal sensitive personal information, such as names, addresses, social security numbers, and credit card information.

With increasing frequency, online criminals also exploit weaknesses in private computer networks and then demand money from the vulnerable businesses. This is nothing more than the migration of extortion into the high-tech arena.

Seventy-four percent of businesses recently surveyed by the Computer Security Institute reported computer security breaches that included the theft of proprietary information, financial fraud, system penetration by outsiders, data or network sabotage, or denial of services attacks. Indeed, almost 20 percent of respondents reported ten or more such incidents.

These trends in white collar crime convince us that more must be done to prevent it and to protect the public. Of course, enforcement is a key component of a solution, and we are continually developing enforcement strategies to respond to ever-changing criminal activities. However, establishing appropriate sanctions is also paramount, and the Sentencing Commission's decision to reevaluate the economic crime guidelines, we believe, is a great beginning.

We now turn to the need to amend the sentencing guidelines for white collar offenses. Our study in this area in the past and our continued interest in it now convinces us that amendments are needed to ensure that the sentencing guidelines address new criminal conduct or techniques and, at the same time, achieve the purposes of sentencing set forth in the Sentencing Reform Act. As you know, these purposes are just punishment, deterrence, protection of the public from further crimes of the defendant, and rehabilitation.

Now, while the Commission has adopted several important amendments addressing specific types of economic crimes, such as identity theft and mass-marketing fraud, current guideline sentences for white collar offenders in many cases, we believe, are inadequate to achieve these purposes. Simply put, the guidelines often understate the true seriousness of white collar offenses; moreover, there are areas of white collar crime that the Commission has not specifically addressed in its recently promulgated amendments, including government procurement theft, bank fraud, and tax evasion.

In addition, there is a need to clarify aspects of the guidelines' commentary that have been a source of litigation. A comprehensive look at white collar sentencing, we believe, is in order; including the need for increases to the event's offense severity levels and revision of relevant guidelines' commentary.

This effort will have a far-reaching impact on many offenses and can send an important message that crime simply will not pay.

As to offense severity levels, we believe strongly that many offenses are underpunished; for example, a \$100,000 Medicaid fraud, up-quoting to obtain higher reimbursements by a doctor whose planning was more than minimal would result in an offense level of 12 if the defendant accepted responsibility for the offense. This offense level permits the judge to impose a sentence of just five months' imprisonment and five months of supervised release with conditions of confinement.

If the offense involved only minimal planning—for example, billing for medically unnecessary service for just a few patients and no cover-up scheme—the defendant could be eligible for a probationary sentence with conditions of confinement such as home detention. Yet, a fraud producing \$100,000 in loss is a serious offense and a short prison term of just five months or a probationary sentence is, we believe, inadequate to deter this conduct.

At much higher levels of loss, the situation is even worse relative to the magnitude of the offense. For example, if the Medicaid fraud were more widespread, involved sophisticated means, and produced over \$50 million in loss to the government, the guidelines sentence could be as low as 51 months or just over four years of imprisonment, assuming again that the defendant accepted responsibility for the offense.

An offense of this magnitude, we believe, should be subject to a sentence that will incapacitate the wrongdoers involved and send a strong message to the public that we will not tolerate unjust private enrichment from the public coffers.

The same can be said of crimes against private parties. These crimes cost all of us in the end, whether in the form of higher taxes or higher prices.

While the Commission established a two-level enhancement for fraud offenses involving sophisticated means, this enhancement does not apply to theft and many other economic crimes; moreover, offenders can commit straightforward fraud offenses that net them substantial amounts of money without much in the way of sophistication. For example, a business loan applicant who lies about his assets and obtains a \$300,000 loan with no intention of repaying it has not demonstrated a high level of sophistication, but the loss is very real, nonetheless.

It is significant that the median prison sentence for fraud in fiscal year 1999 was just 14 months, while for drug trafficking it was 51 months. Now while drug trafficking, obviously, creates many societal harms that affect the health and the safety of our nation and warrant substantial punishment, many fraud offenses create significant harms as well, including non-monetary ones. For example, bank fraud undermines our confidence in the banking system, while defense procurement fraud forces the government to devote considerable resources toward crime prevention and detection, rather than toward our national security; and health care fraud can cause grave harm to patients.

We urge the Commission to amend the loss tables so that the sentencing guidelines more accurately capture the magnitude and seriousness of white collar crime. The problem of underpunished economic offenses is not limited to fraudulent activity, but extends to many new technology offenses, something that is increasingly clear as we gauge the broad impact that these crimes have on citizens, business, and government.

Offenders should not have the sense that a probationary sentence or even a small prison sentence is a risk that they can assume and accept as a cost of doing business. Sentences must deter criminal activity and protect the public. The ease with which large-scale economic crime can now be accomplished makes it imperative that the Commission increase the impact of loss on the sentence provided by the guidelines.

The Commissioner has also indicated that it will study the definition of "loss" in the economic crime guidelines. And, while a detailed discussion is obviously beyond the scope of my brief remarks this morning, the current definition has many unclear aspects which have been the subject of Circuit conflicts.

The Commission is in the best position to resolve these conflicts as it reviews sanctions for white collar crime generally.

We urge the Commission to make appropriate amendments to the definition of "loss," with the aim of reducing unwarranted sentencing disparity. At the same time, we would caution against revision that will have the effect of causing a new round of litigation regarding issues that have previously been settled under the current definition.

Amendment of the sentencing guidelines that affect economic crime will not be an easy endeavor. We offer our assistance to the Commission in a very cooperative spirit. Our aim is the development of sentencing guidelines that provide proportionality and fairness and meet the purposes of sentencing, including deterrence and protection of the public.

We have every confidence in the Commission's ability to undertake these challenges in an efficient and a thoughtful manner, just as it has undertaken other difficult challenges in the past. We know that the Commission's industriousness and its drive to formulate thoughtful sentencing policy, as reflected in this wonderful symposium, will serve well in all its endeavors and we look forward to working with the Commission.

Thank you very much.

JUDGE CASTILLO: Thank you very much, Eric. I know you need to run. We look forward to working with the Department of Justice.

