

“THE POWER OF INFORMATION VERSUS
THE POWER OF ENFORCEMENT”

STATEMENT OF

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REGIONAL HEARINGS MARKING THE 25th ANNIVERSARY
OF THE PASSAGE OF THE SENTENCING REFORM ACT OF 1984

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INTRODUCTION

Judge Hinojosa, Members of the Commission, and distinguished guests:

I have been asked to comment on how the federal sentencing system operates and what changes I recommend for the system. I am grateful for the opportunity to make a few observations, in a few minutes, on this enormous subject.

I can best summarize my recommendation by saying what the United States Sentencing Commission should do *less* often: the Commission, I believe, should devote less attention to judicial discretion. Judges have shown us, in various settings, that they will follow the guidance offered in sentencing guidelines at a reasonable level, regardless of the amount of effort that the Commission devotes to the enforcement of the guidelines. The Commission should re-conceptualize its role as a source of *information* to sentencing actors—both judges and prosecutors—

about institutional and individual conduct, rather than a source of *limits on discretion* to be enforced. One important source of information should come from the innovative and relevant practices of actors in the state criminal justice systems.

THE DISCRETION CONTROL PROJECT WAS CENTRAL TO THE COMMISSION'S HISTORICAL WORK

The United States Sentencing Commission has devoted much attention and effort over the years to judicial compliance with the federal sentencing guidelines. In the early days, the Commission and its staff talked explicitly about their efforts to measure and promote “compliance” and to minimize departures from the presumptive guideline ranges. The problems with this vocabulary quickly became apparent, and the term “compliance” disappeared underground. But the underlying mindset, I believe, remained in place. The Commission and its staff over the years treated the percentage of “within guidelines” sentences as a crucial number to track and manage. Many of the Commission’s routine reports and functions aim to keep that percentage of within-guidelines sentences acceptably high. I’ll call this collection of practices the “discretion control project.”

A thorough history of the Commission would demonstrate the centrality of the discretion control project to its work. To take one small indicator, look at Appendix C of the guidelines. That list of amendments to the federal sentencing guidelines (725 of them, at last count) shows that control of discretion dominates the agenda. The great majority of those amendments involve (1) changes to reflect new statutory penalties that restrict judicial choices, (2) changes to encourage

judges to increase the penalties they impose, and (3) changes to reduce the number of sentences that judges impose below the presumptive range.

To take another indicator, consider the list of questions that you asked academic commentators to address during these hearings. Four of the eight questions on the list concentrate on the discretion control project:

How has the advisory nature of the federal sentencing guidelines after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) affected federal sentencing?

Does the federal sentencing system strike the appropriate balance between judicial discretion and uniformity and certainty in sentencing?

What type of analysis should courts use for imposing sentences within or outside the guideline sentencing range?

How have *Booker* and subsequent Supreme Court decisions affected appellate review of sentences?

Granted, there are reasons why the Commission has stressed the discretion control project, more so than its peer commissions at the state level. The number of federal judges applying the federal sentencing guidelines is larger than the number of judges that apply the typical set of state sentencing guidelines. The federal criminal justice system operates across an enormous number of legal cultures, with tremendously different caseloads in different districts. The centrifugal forces at work in the federal system are stronger than they are in most state systems.

Moreover, the control of discretion is certainly part of the Sentencing Commission's statutory mission, built into several provisions of the Sentencing Reform Act of 1984. The concept of "disparities" in sentencing was not well developed in 1984 — experience since that time has convinced us to view sentencing disparity in shades of gray rather than in black and white — but the Senators and House members who voted for the legislation certainly wanted the

Commission to promote more uniform sentencing practices among federal judges, along with other objectives.¹

It is also true that Congress, during the 25 years between 1984 and today, has periodically signaled to the Commission that it believes judges impose too many lenient sentences. They have encouraged the Commission — sometimes not so subtly — to prevent the lowest sentences that judges impose. The PROTECT Act in 2003 offered one vivid example, and an entire chorus of mandatory minimum penalty statutes sang the same tune.

These historical realities make it easy to understand why the Commission emphasized the control of judicial discretion in so much of its work. Nevertheless, I argue that the discretion control project occupies too much of the Commission's attention today. It distracts the Commission from other more productive tasks that are equally a part of the Commission's statutory mandate under the Sentencing Reform Act of 1984. And for reasons that I will now describe briefly, federal sentencing judges are likely to stay within reasonable boundaries, even without a vigilant Sentencing Commission looking over the judicial shoulder.

AN EQUILIBRIUM THEORY OF JUDICIAL RESPONSES TO SENTENCING GUIDANCE

I have watched federal sentencing policy unfold, for a few years as a prosecutor in the U.S. Department of Justice and for a longer time as an academic

¹ See Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFFALO CRIM. L. REV. 723 (1999) (electronic copy at <http://ssrn.com/abstract=162568>).

who specializes in sentencing institutions and the legal tools that affect the work of criminal prosecutors in state and federal systems. One overwhelming reality about federal sentencing jumps out at me on this 25th anniversary: the stability of federal practice. Every few years, events prompt many observers (myself included) to declare that “this changes everything.” Then we wait breathlessly for seismic changes, but they do not arrive. Federal sentencing has shown a remarkable ability to absorb shocks and to stay in equilibrium.

Consider just two of the major events in the history of federal sentencing during the guidelines era: *Koon* and *Booker*. In its 1996 decision in *Koon v. United States*,² the U.S. Supreme Court complicated and loosened the appellate standards of review for the decisions of federal sentencing judges. Many declared this decision to be the start of a new era of federal sentencing, leading to far more departures from the guidelines. As it turned out, the effect of *Koon* was real, but not transformational. In fiscal year 1995, the year before *Koon* was decided, judges departed from the guidelines in 9.4% of their cases. In fiscal year 1996, the same rate edged up to 11.2%, and it continued to climb until reaching a peak of 18.9% in 2001. In one sense, this is significant growth: departure rates more than doubled between 1995 and 2001. In a larger sense, however, these numbers show judges staying in equilibrium. Judicial departures throughout this period remained less important than “prosecutor departures” (the combination of substantial assistance departures and other government-sponsored requests for departures). More significantly, the total number of within-guidelines sentences remained the largest

² 518 U.S. 81 (1996).

single group of sentences (between 60% and 70% for every year during this period). The guidelines still created the center of gravity for federal sentencing, despite the major change to the legal landscape embodied in *Koon*.

The Supreme Court's 2005 decision in *Booker* brought even more profound changes to the legal doctrinal setting for federal sentencing. As you know, the Court in *United States v. Booker*³ declared that the Sixth Amendment right to a jury trial required federal courts to treat the federal sentencing guidelines as advisory rather than presumptive. Yet the federal judges absorbed even this largest of legal changes with equanimity. The true judicial departures were 5.2% in 2004, the year before *Booker* was decided. That rate increased to 13.6% in 2007, and to 14.7% in the fourth quarter of fiscal year 2008. Again, in relative terms this is a serious shift: nearly a tripling of the rate between 2004 and 2008. In the larger sense, however, judicial departures kept the same rough significance as a sentencing outcome. The judicial departures remained about half as common as government-sponsored departures (combining the substantial assistance and the early disposition program departures). And even in the era of "advisory" guidelines, sentences within the guidelines remained by far the most common outcome.

A quick survey of state sentencing guideline systems tells us that sentencing judges in all of these structured systems also stay within a rough equilibrium, regardless of gradations in the legal binding force of guidelines.

Consider Pennsylvania, for example. The state system offers very loose appellate review of sentences, resulting in guidelines with relatively weak binding

³ 543 U.S. 220 (2005).

power. Yet in 2007, Pennsylvania judges imposed 77% of the felony sentences within the “standard” guidelines range. The judges imposed another 14% of the sentences within the guideline ranges but outside the standard range (7% in the mitigated range and 7% in the aggravated range), while they imposed 9% of their sentences outside the three prescribed guideline ranges.⁴ Those percentages have remained approximately the same over the years, despite major changes in the statutory framework and in the guidelines themselves since the origin of the state guidelines in the early 1980s.

In North Carolina, a state with no “departures” as such, the judges in fiscal year 2007-2008 imposed 72% of their sentences within the standard presumptive range,⁵ quite similar to the 77% in Pennsylvania and reasonably close to the percentage of within-guidelines sentences imposed in a typical year in the federal system.

In Minnesota, the same rough proportions hold true. In 2007, Minnesota judges imposed 76% of their felony sentences within the guidelines range, along with 5% aggravated departures and 19% mitigated departures.⁶

I will not belabor the point by reviewing data from Washington, Oklahoma, Virginia, Maryland, and many other states that operate structured sentencing systems. Despite remarkably different appellate standards of review, and

⁴ See Pennsylvania Commission on Sentencing, *Sentencing in Pennsylvania, Annual Report 2007*, at 42.

⁵ See North Carolina Sentencing Policy and Advisory Commission, *Structured Sentencing Statistical Report for Felonies and Misdemeanors, Fiscal Year 2007-2008*, at 17. The North Carolina judges imposed 25% of felony sentences in the mitigated range, and 3% in the aggravated range.

⁶ See Minnesota Sentencing Guidelines Commission, *Sentencing Practices: Departure Data for Cases Sentenced in 2007*, at 5.

distinctive sentencing commissions and judicial cultures, each of these systems produces similar outcomes. Somewhere between 60% and 80% of the sentences fall into the designated “normal” range, whether the guidelines are denominated as “voluntary” or “presumptive.” Academic studies show that voluntary guideline systems of recent vintage hold almost the same power to unify judicial practice that one finds in presumptive guideline systems.⁷

All of these systems produce levels of judicial consistency that are consistent with the rule of law. The federal system may be on the lower end of the spectrum when it comes to the percentage of cases sentenced within the designated normal range — roughly 60% these days, compared to about 75% in many other jurisdictions. At the same time, the level of departures that judges themselves drive might be a bit low in the federal system — roughly 15% these days, compared to about 25% in many states. The modified real offense nature of the federal system might explain these differences, since much of the prosecutorial view of proper sentences in a state system can be built into the charge rather than a prosecutor-endorsed departure. The exceptionally high level of drug sentences in the federal system might also suppress the number of within-guideline sentences compared to the state systems, which start with lower penalties for drug offenses.⁸

Looking at the big picture, however, the similarities among federal and state judges stand out. It is striking that so many judges, across so many systems and times with completely different legal rules at work, produce similar patterns of

⁷ See John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235 (2006).

⁸ See Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001).

sentences. The precise legal consequences for imposing a system outside the normal range do not matter very much. New rules from the sentencing commission that make departures more difficult to sustain do not matter much. The power of appellate courts to overturn a sentence outside the normal range does not matter much. What seems to matter is widespread reporting about normal judicial behavior, and the obligation of judges who leave the normal range to identify themselves and to explain their reasons, however briefly.

Thus, if the United States Sentencing Commission were to devote less energy to its “discretion control project,” sentencing practice in the federal courts would likely remain in equilibrium. The momentum of past sentencing practices is powerful. Federal judges, like their state judicial counterparts, would continue to take their cues from the signals and public information that a guideline system make possible, regardless of the particulars of appellate review or amended guidelines.

COORDINATION THROUGH INFORMATION

What is the alternative? If the U.S. Sentencing Commission spends less time trying to devise rules that will constrain the discretion of sentencing judges, where should it redirect those resources?

The centerpiece of the Commission’s strategy should be information, not enforcement actions against non-compliant judges. The field of behavioral economics tells us about the power of “focal points,” those actions that one actor can predict that another actor will take because it is the normal thing to do. The Commission can accomplish a great deal by creating for federal sentencing judges a

set of “focal points” that specify normal behavior for sentencing, along with the circumstances that most often produce abnormal sentencing behavior.

In this vision, the Commission would become more of a resource for judges than a regulator of judges. When Congress becomes restive about the sentences that judges impose, the Commission should explain the judicial decisions rather than promising to rein in the judges.

The Commission’s reports would detail (as they have increasingly done in the post-*Booker* era) the usage of various provisions in the federal sentencing guidelines. Because federal prosecutors are responsible for about twice as many sentences outside the normal range as judges are, more detailed information about prosecutor choices should become a Commission priority. While current reports inform us about substantial assistance motions and early disposition program requests from prosecutors, judges could also benefit from learning about district-specific (and perhaps even prosecutor-specific) statistics on initial charges, amended charges, and sentencing recommendations of various types.

The Commission could also help federal judges by telling them more about the sentencing decisions of state judges. For instance, the Commission could help us build more information about what offenders do after completing their sentences in the state systems. Current information sources tell us about the prior arrests and sentences of a particular defendant, but we need to link the outcomes for particular offenders back to the “treatment,” offering to judges across jurisdictional lines a more detailed picture about the non-prison and prison options available.

Federal sentencing judges could use focal points based on typical state sentences for crimes with large volume counterparts in the federal system. The efforts of the Commission to standardize information across different states could also help the states themselves to make more informed choices as they design sentencing rules. Since we are speaking together today in Atlanta, I will invoke the example of the Centers for Disease Control, which is based in this city. The CDC compiles statistics from 50 distinct state health departments and standardizes the information that appears in different formats in various states. This standardization of state reports allows the CDC to portray the most typical national responses to health problems. The U.S. Sentencing Commission could find that a similar standardizing role for sentencing data would be fruitful.⁹

The Sentencing Reform Act of 1984 spoke about far more than “unwarranted disparities.” It envisioned a Sentencing Commission that would serve as a clearinghouse for existing knowledge and a catalyst for new learning. Much of that learning happens every day in the invisible laboratories of the criminal courtrooms around our country—both in the federal and state systems. The U.S. Sentencing Commission can perform a powerful service by compiling that localized wisdom and making it available everywhere.

⁹ For more details, see Marc L. Miller & Ronald F. Wright, *The Wisdom We Have Lost: Sentencing Information and Its Uses*, 58 Stan. L. Rev. 361 (2005) (electronic copy at <http://ssrn.com/abstract=838393>).