Chapter 3, Topic B

Legislative Background of the Federal Sentencing Reform Act of 1984

Though Judge Marvin Frankel’s ideas were the catalyst for many reforms, Senator Edward Kennedy was the central political figure who turned Judge Frankel’s ideas into a specific proposal for federal sentencing reform. Throughout the 1970s, Senator Kennedy championed Judge Frankel’s ideas, as shown in the following excerpt:

The absence in the federal criminal code of any articulated purposes or goals of sentencing has led to a situation where different judges often mete out different sentences to similar defendants convicted of similar crimes, depending on the sentencing attitudes of the particular judge. [Some] convicted offenders (including repeat offenders) escape jail altogether while others—convicted of the same crime—go to jail for excessively long periods.…

An important prerequisite of any effective crime-fighting program—certainty of punishment—is absent. In addition, the criminal justice system appears arbitrary and unjust, a game of chance in which the offender may “gamble” on receiving not just a lenient term of imprisonment but no jail sentence at all.… Sentencing disparity also strikingly demonstrates the fallacy of fighting crime by increasing maximum sentences which can be imposed. Counterfeiting carries a maximum penalty of fifteen years imprisonment; not only is the average sentence actually imposed less than five years, but almost 50% of convicted counterfeiters receive no imprisonment at all. Simply increasing maximum penalties is an exercise in futility.…

What can be done? I have introduced legislation in the U.S. Senate, [entitled] the Sentencing Guidelines bill, [which] would bring welcome uniformity to the sentencing process by articulating for the first time the general purposes and goals of sentencing that a judge should consider before imposing a sentence of imprisonment. The bill also provides for appellate review of sentences and creates a United States Commission on Sentencing to establish specific, fixed sentencing ranges for similar defendants who commit similar crimes.…

Edward M. Kennedy, Criminal Sentencing: A Game of Chance, 60 Judicature 208, 210-212
Despite the force of Senator Kennedy’s advocacy, it took nearly a decade before a version of his reform bill was passed into law as the Sentencing Reform Act of 1984 (SRA). In an account of the SRA’s legislative history, Kate Stith and Steve Koh observed that the “legislative history of federal sentencing reform [reveals a] subtle transformation of sentencing reform legislation: conceived by liberal reformers as an anti-imprisonment and antidiscrimination measure, but finally born as part of a more conservative law-and-order crime control measure.” Kate Stith & Steve Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 226 (1993). Cf. Marc L. Miller & Ronald F. Wright, Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice, 2 Buff. Crim. L. Rev. 723 (1999) (providing different account of the SRA’s legislative history, with greater emphasis on more liberal views of House members). What might appeal to a political conservative, such as Senator Orrin Hatch, about presumptive sentencing guidelines?

Though the passage of the SRA in 1984 created the U.S. Sentencing Commission and provided the statutory foundation for federal sentencing guidelines, the commission struggled to fulfill the SRA’s mandates, and its initial set of mandatory guidelines did not become effective until November 1987. In a decision challenging the constitutionality of the guidelines on separation of powers grounds, Justice Blackmun described the new legislation:

The Act, as adopted, revises the old sentencing process in several ways:

1. It rejects imprisonment as a means of promoting rehabilitation, and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals.

2. It consolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer. This is done by creating the United States Sentencing Commission, directing that Commission to devise guidelines to be used for sentencing, and prospectively abolishing the Parole Commission.

3. It makes all sentences basically determinate. A prisoner is to be released at the completion of his sentence reduced only by any credit earned by good behavior while in
4. It makes the Sentencing Commission’s guidelines binding on the courts, although it preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines. The Act also requires the court to state its reasons for the sentence imposed and to give “the specific reason” for imposing a sentence different from that described in the guideline.

5. It authorizes limited appellate review of the sentence. It permits a defendant to appeal a sentence that is above the defined range, and it permits the Government to appeal a sentence that is below that range. It also permits either side to appeal an incorrect application of the guideline.


The guidelines did not become fully operational until 1989 because many of the first guideline cases focused primarily on constitutional challenges to the SRA’s entire approach to sentencing reform. In Mistretta the Court addressed the question of whether the creation of the U.S. Sentencing Commission, as “an independent commission in the judicial branch of the United States,” was constitutional. The commission, as set out in the SRA, has seven voting members who are appointed by the president with the advice of the Senate. They serve for six years and may not serve more than two full terms. Initially, at least three of its members had to be federal judges, selected by the president from a list of six judges recommended by the Judicial Conference. The members of the commission are subject to removal by the president “only for neglect of duty or malfeasance in office or for other good cause shown.”

Initially the commission had to promulgate determinate sentencing guidelines. Congress charged it with meeting the purposes of sentencing set out in the SRA, to provide “certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records … while maintaining sufficient flexibility to permit individualized sentences,” where appropriate; and to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.” Congress further specified four “purposes” of sentencing that the commission was required to
pursue in carrying out its mandate: “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”; “to afford adequate deterrence to criminal conduct”; “to protect the public from further crimes of the defendant”; and “to provide the defendant with needed … correctional treatment.” In describing the desired guidelines, Congress directed the commission to develop a system of “sentencing ranges” applicable “for each category of offense involving each category of defendant.” For imprisonment sentences, Congress mandated that “the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months.” Moreover, it directed the commission to use current average sentences “as a starting point” for structuring the sentencing ranges.

To guide the commission in its formulation of offense categories, Congress directed it to consider seven factors: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense. Congress also set forth 11 factors for the commission to consider in establishing categories of defendants. These include the offender’s age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence on crime for a livelihood. Congress also prohibited the commission from considering the “race, sex, national origin, creed, and socioeconomic status of offenders” and instructed that the guidelines should reflect the “general inappropriateness” of considering certain other factors, such as current unemployment, that might serve as proxies for forbidden criteria.

The Sentencing Reform Act laid out even more detailed guidance for the commission concerning categories of offenses and offender characteristics. Congress directed that guidelines specify a term of confinement at or near the statutory maximum for certain crimes and ensure a substantial term of imprisonment for various other offenses. On the other hand, Congress directed that guidelines reflect the general inappropriateness of imposing a sentence of imprisonment for certain first-time offenders.

Following promulgation of the guidelines, the statute called for the commission to continually
review and revise them and report to Congress any amendments; the commission must also provide an annual analysis of the operation of the guidelines and issue “general policy statements” regarding their application.

In *Mistretta* the Court was asked to address the question of whether Congress granted the commission excessive legislative discretion, in violation of the nondelegation doctrine. Because Congress had provided detailed direction to the commission, the Court found no such violation. The Court also addressed the issue of whether the commission, which was placed in the judicial branch, violated the principles of separation of powers by undermining the independence of the judiciary. It likened the commission’s role to that of the Supreme Court in establishing rules of procedure:

Just as the rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases. In other words, the Commission’s functions, like this Court’s function in promulgating procedural rules, are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch.…

Justice Scalia dissented, referring to the commission as a “junior-varsity Congress,” an expert body with the right to make laws.

There is no doubt that the Sentencing Commission has established significant, legally binding prescriptions governing application of governmental power against private individuals—indeed, application of the ultimate governmental power, short of capital punishment. [The] decisions made by the Commission are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments.…

[This] case is … about the creation of a new Branch altogether, a sort of junior-varsity Congress. It may well be that in some circumstances such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.
NOTES

1. Judicial resistance to federal sentencing reform. Though Mistretta ultimately found the constitutional challenges to be unavailing, more than 200 district judges and one circuit court had ruled the SRA unconstitutional on various grounds. Commentators have suggested that federal judges’ apparent eagerness to strike down the SRA regime revealed their distaste for the entire agenda of guideline sentencing. See Michael Tonry, Sentencing Matters 73-74 (1996). More tellingly, federal judges were among the most vocal critics of the federal sentencing guidelines following their enactment. See, e.g., Jose A. Cabranes, Sentencing Guidelines: A Dismal Failure, N.Y. L.J. 2 (February 11, 1992); Marc Miller, Rehabilitating the Federal Sentencing Guidelines, 78 Judicature 180, 180-183 (1995) (detailing widespread judicial hostility to the federal guidelines). Some commentators and members of the commission suggested that these complaints simply represented judges’ displeasure over losing some of their broad sentencing powers. Others, however, believed that these judicial criticisms were sound indicators of serious problems with the SRA’s overall approach to sentencing reform. See Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998).

2. Congress’s mandatory sentencing provisions and their impact on the guidelines. In the very same legislative session in which it enacted the SRA, Congress began relying on mandatory sentencing laws to restrict judicial sentencing discretion. In 1984 Congress created a set of general minimum sentences for certain felonies and enacted a mandatory five-year sentence increase for crimes of violence involving a gun. Additional sentencing mandates followed nearly every two years—synchronized, not coincidentally, with the federal election cycle. Of most consequence, in 1986 Congress enacted a five-year mandatory enhancement for use of a firearm in a drug crime and created a broad set of mandatory minimum penalties for drug trafficking that linked the minimum sentence to the amount of drugs involved in the offense.

Though mandatory sentencing statutes have proved consistently popular with Congress, they have been assailed by judges, researchers, and commentators. In a speech about federal sentencing reform, Justice Stephen Breyer, a member of the original U.S. Sentencing Commission, effectively summarized the many criticisms of mandatory sentencing provisions:

[Statutory] mandatory sentences prevent the Commission from carrying out its basic, congressionally
mandated task: the development, in part through research, of a rational, coherent set of punishments. Mandatory minimums will sometimes make it impossible for the Commission to adjust sentences in light of factors that its research shows to be directly relevant…. They will sometimes prevent the application of Guidelines that would reduce a sentence in light of, for example, a minimal role in a drug offense, thereby sentencing similarly offenders who are very different, perhaps like a drug lord and a mule. Most seriously, they skew the entire set of criminal punishments, for Congress rarely considers more than the criminal behavior directly at issue when it writes these provisions.…

Moreover, mandatory minimums … may permit the prosecutor, not the judge, to select the sentence by choosing … to charge, or not to charge, a violation of a statute that carries a mandatory prison term. [A] 1991 Commission study indicates that in nearly 40% of the cases involving conduct to which a mandatory minimum attached, the offender received a sentence lower than the minimum, perhaps because the prosecutor charged a different crime…. In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions.


In addition to their direct consequences, the mandatory sentencing laws enacted in 1984 and 1986 skewed the initial development of the federal sentencing guidelines. Especially in the creation of the guidelines’ drug sentencing provisions, the U.S. Sentencing Commission felt it had to alter its standard approach to guideline development to harmonize its provisions with Congress’s sentencing mandates, which focused almost exclusively on drug quantities. See William W. Wilkins Jr. et al., Competing Sentencing Policies in a “War on Drugs” Era, 28 Wake Forest L. Rev. 305, 319-321 (1993).