

Research Methodology

As explained in the Introduction to the Report, my goal in undertaking this research was to collect compelling stories from federal judges that would add depth and perspective to the sentencing debate. My interest in this topic was sparked by over fifteen years as a federal prosecutor, law professor, and public interest lawyer in which I observed many federal judges who were frustrated with the Sentencing Guidelines regime but felt constrained from registering their complaints outside the confines of their chambers or their courtrooms. In 2002, the Open Society Institute awarded me a Soros Senior Justice Fellowship to gather and profile these cases in the hope of amplifying the role of judicial voice in sentencing policy.

At the outset, I recognized that a difficult methodological problem that had the potential to undermine the impact of my study. Sentencing hawks had long contended that pockets of liberal, activist judges were undermining sentencing severity and uniformity. Because inclusion in my study would be based upon a willingness to criticize the sentencing laws in some forum, my database would clearly have an element of self-selection, and thus my study could fairly be accused of documenting only the views of this disgruntled minority.

The Report itself attempts to tackle the question of sample bias. For example, by selecting only Republican appointees for profiling, I removed the most obvious source of “liberal” judges, those appointed by Democratic Presidents. In addition, throughout the Report, I compare my findings with the results of Sentencing Commission and Federal Judicial Center surveys of the entire federal judiciary as well as the official positions taken by the Judicial Conference and its Criminal Law Committee (both bodies dominated by Chief Justice Rehnquist designees during the Guidelines era). In this Appendix, I explain in more detail my selection methodology for the judges that I interviewed and profiled, and thereby, further demonstrate how my selection methods served to minimize self-selection bias.

In the first phase of the project, I conducted over 30 in-depth interviews with federal judges. Most of these interviews were conducted in-person although some were done by telephone. Each interview lasted at least a half hour and some ran over an hour in length. I covered a wide range of issues, using both broad and narrow questions to elicit views on mandatory minimums, the Sentencing Guidelines, prosecutorial discretion, cooperation agreements, sentencing severity, sentencing disparity, and sentences for specific crimes. I also asked judges what they generally said (or didn’t say) to defendants during a typical sentencing colloquy. While I had a checklist, most of the judges talked freely and covered many of my topics without prompting. I took handwritten notes during the interviews and transcribed the notes within a few weeks of each interview. However, because virtually every judge requested anonymity, the judges are referred to in the Report only by their general geographic location and an anonymous number.

To select judges to be interviewed, I first reached out to friends in academia, government, and law firms who knew federal judges well enough to make an initial introduction. I chose this method rather than cold calling or writing to judges myself because I was concerned the latter approaches

would tend to elicit more responses from judges who had strong views on sentencing issues.¹ Using the personal contact method, I pre-arranged one or two interviews in five separate judicial districts. Once in chambers with these judges, I then asked them to introduce me to his or her colleagues. I repeated this process with each judge and was thereby able to interview almost every active judge in these five jurisdictions. While not specifically named to preserve anonymity, these five jurisdictions were spread out across the Southwest, South, New England, and the Mid-Atlantic regions. I also conducted additional in-person and telephone interviews with judges from other regions including New York, the Midwest, and the West Coast. Using this selection method, I believe I was able to cull a cross-section of judicial opinion and intensity of feelings about the Guidelines regime. In fact, several judges interviewed said up front that sentencing was not at the top of their concerns.

I also attempted to use these interviews to obtain the names of individual cases to profile. Thus, near the conclusion of each interview, I asked each judge if he or she was willing to provide a case that illustrated an aspect of their dissatisfaction with the sentencing laws that they had already mentioned during the interview. Most judges politely declined, stating their preference to remain anonymous or were concerned that the case might at some point come back for re-sentencing and they wanted to avoid the appearance of partiality. Some claimed that they wished to help but could not remember sufficient information about the defendant's name or circumstances. In some instances where I was given a defendant's name, I was unable to obtain sufficient documentation to complete a profile. Thus, in the end, only one case profiled in this study came from the interview process.² In other words, with that one exception, the cases profiles in Appendix A and on the website were obtained without any judicial assistance.

Rather, I found the cases that were eventually profiled through the defendants via the files of Families Against Mandatory Minimums ("FAMM"). For more than fifteen years, FAMM has been the largest membership based organization leading the fight against mandatory sentencing laws and advocating for rational and proportionate sentences for non-violent offenders.³ From its inception, FAMM has collected data on its members by soliciting case summaries and media waivers from

¹In 1998, before the formal start of this project, Professor (now Dean) David Yellen and I sent a letter to every federal judge seeking sentencing stories. The response rate was quite low and there are no cases profiled in this study from that request, although some of the letters I received were used as supporting materials for the Report and for judges for whom I independently found pertinent cases.

²For this judge, fortuitously, I was later able to gather sufficient documentation to be able to present a second case for this judge's profile.

³In the interest of full disclosure, I served as the founding co-ordinator of the Tampa/St. Petersburg, Florida FAMM chapter in 1994-95, as the first Litigation Director for the FAMM national office, 1995-1996, and as a member of the Litigation Advisory Board thereafter. I have also co-authored amicus briefs on behalf of this organization as an academic.

inmates via its newsletter and by word of mouth.⁴ Fortuitously, one of the questions on almost every version of FAMM's "Case Summary form" asks the inmate if the judge had said anything sympathetic at the sentencing. In addition, some inmates wrote to directly to FAMM and provided this information. FAMM followed up on many of these cases and had already obtained the inmate's PSI and portions of the sentencing transcripts in its files by the time of my research.

While FAMM's database is now computerized, it was not in the early years. Therefore, with the help of several law student interns, I manually reviewed thousands of inmate files at FAMM's national office in Washington, D.C. Any case in which the inmate indicated that the judge had said something favorable about the inmate or critical of the sentence was pulled for my review. Cases in which the inmate had already been released or the judge was deceased were discarded. The rest of the inmates were sent a letter from me using the most recent prison address the inmate had given, and later by using the BOP's online inmate locator service.

The letter requested that these inmates send me a copy of their PSI and the sentencing transcript, if FAMM did not already have these documents. Many inmates responded but only a small number had the required documents. Complicating matters further, in September, 2002 the Bureau of Prisons directed that inmates could not longer have their PSI in their cells because of concerns that these documents sometimes revealed that an inmate had cooperated with the government.⁵ While a few case managers were willing to provide copy of the PSI pursuant to a written request from the inmate, most claimed that a court order was now necessary. With regard to transcripts, in a few cases, I ordered and paid for sentencing transcripts for files that were almost complete, but generally I relied on the inmates and their families for copies of these documents as well to contain my costs.

Once the documents collection process was exhausted, I conducted an additional winnowing process. As noted above, for the Report, I chose to eliminate any judge who was appointed by a Democratic President. If the file lacked either the PSI and at least some portion of the sentencing transcript, it was usually eliminated. However, a few exceptions were made, such as where the sentencing transcript was very thorough or where a judge's comments were contained in a newspaper article or letter. Some cases were excluded because the judge's comments were not really directed at sentencing severity or the lack of sentencing discretion.

If a file contained sufficient information, I drafted a profile and sent a copy to both the judge and inmate for comments. In cases where the inmate contested the government's version of the facts, I noted this disagreement in footnotes but generally stuck with the government's version of the facts. In my letters to the judges, I usually asked what sentence they would have imposed if more discretion had been available and those responses were included in the profile. In a few cases, the judges chose to clarify the comments they had made at sentencing and those statements were also incorporated

⁴FAMM's current Case Summary Form is available at <http://famm.org/Repository/Files/case%20summary.pdf>.

⁵See BOP Reg. PS 1351.05 (9/19/2002) available at http://bop.gov/policy/progstat/1351_005.pdf

into the profiles. However, the fact that a judge did not respond or chose to make no comment did not serve to exclude the profile from the study.

By using an inmate database to find these judges, I avoided some of the sample bias that would have resulted from a judge participation based study. In addition, inclusion in the study was based upon document availability rather than a substantive criteria, further advancing the random selection process. Obviously, however, my database excludes judges who (a) made statements indicating complete agreement with the sentence, and (b) privately disagreed with the sentence but chose to remain silent. The question that remains is whether the judges in this study who spoke out were significantly more opposed to the sentencing regime than the first two categories of judges. While the willingness to criticize the sentence in court seems intuitively likely to correlate to a greater hostility to the sentencing regime, my experience suggests that this bias may be less than one might initially assume. First, most of these sentencing hearing statements appear to have been made with no intent or expectation that they would be broadcast to a larger audience for several reasons. First, because these were generally run of the mill drug and gun cases, no press (and often no one but friends and family of the defendant) were generally present in the courtroom. Thus, the judges seem in most cases to be speaking directly to the defendant and his or her family out of compassion or a desire to disassociate themselves from the act rather than as an attempt to influence public opinion. In other cases, the judges stated that their comments were directed to future judges or pardon officials in the event that the sentencing law or the sentence might be revisited.

Moreover, some of the judges I interviewed indicated that although they might disagree with a sentence, they felt strongly it was inappropriate to criticize the sentence, arguing that such statement undermined respect of the law.⁶ Thus, while some selection bias was inherent in the study, the combination of the randomness of document availability and the low visibility under which most of these statements were made, gives me some grounds to believe that I was able to minimize this effect to the extent possible. However, I must acknowledge here, as I do in the Report, that my argument that the views of the judges profiled fairly represent judicial opinion at the time rests most strongly on the survey data and official positions of the federal judiciary in this period.

Sources and Citation

Each profile begins with a short profile of the judge's education and professional background and the judge's reputation among lawyers in their jurisdiction, and in some instances, a discussion of notable cases. Unless otherwise noted, all the information for this section was drawn from the Federal Almanac of the Judiciary. Citations to this source were omitted in the interest of brevity. Some profiles also contain a short section on the judge's views on sentencing policy. This section was included if the judge before or after the profile was drafted or if additional information was available about this judge's views either from published opinions or law review or press articles.

⁶See *United States v. Thompson*, 422 F.3d 1285, 1303 (11th Cir. 2005), Tjloflat, Circuit Judge, *especially concurring* (arguing that judges who criticize the sentence as they impose it are undermining the rule of law and do a disservice to the defendant).

These additional sources are generally cited in footnotes.

For the case profiles, the information about the offense is generally drawn from the Pre-Sentence Investigation report (“PSI” or “PSR”). Again, repeated PSI citations were omitted in the interest of space. If the inmate disagreed with the government’s version presented in the PSI, the inmate’s account is generally provided in footnotes with citations to letters to the author. Occasionally, additional details were culled from appellate opinions or press stories and those additions are noted.

All sentencing transcripts and judicial opinions are cited in full, as are letters from the inmates, family members and judges. These documents are on file with the author and available upon request. Each profile concludes with a summary of the sources relied upon.