JUDGE GERALD B. TJOFLAT ORAL HISTORY PROJECT

Hon. Timothy Corrigan Interview

Recorded November 5, 2021

***General Disclaimer**: The content of oral history interviews is personal, experiential, and interpretive because, by its nature, it relies on the memories, perceptions and opinions of individuals. Interviews should not be understood as statements of fact or opinion endorsed by the Bolch Judicial Institute, Duke Law School, or Duke University.*

Interview Transcript

Judge Gerald B. Tjoflat: I'm sitting here with the honorable Timothy J. Corrigan, the Chief United States District Judge of the Middle District of Florida, who happened to have clerked for me in 1980, 81 or thereabouts. And we're going to talk about my involvement over about a 15- or 16-year period in sentencing reform, which would include pretrial services and some other things, but mainly the evolution of sentencing in the federal courts from roughly prior to 1984 and after 1984.

Judge Timothy Corrigan: So, I am pleased and honored to be with Judge Tjoflat today. As he said, I did clerk for him back in 1981 right about when the circuit we were on — the Fifth Circuit when I started — and we were on the 11th Circuit when I finished. The birth of the 11th Circuit occurred during my clerkship, and it was a memorable year that I have with Judge Tjoflat. I am pleased to have been asked to help out with his oral history, and our topic today is Judge Tjoflat's involvement in issues involving sentencing and probation and pretrial dating back into the '70s and the '80s. Judge Tjoflat is one of the few jurists because of his length of service that would be able to talk with authority about the three phases that we've gone through in federal sentencing over the last 40 years or so.

First, the era of indeterminate sentencing was when a judge had virtually unbridled discretion as to what a sentence should be under what they called the "medical model." Secondly, after the passage of the Sentencing Reform Act, we had a strict guidelines-based a sentencing regime from about 1987 to 2005. And then, of course, in 2005, the Supreme Court decided the *Booker* case. And we've been in a model now where we have advisory guidelines, but the court has discretion to vary and depart from those guidelines. So, Judge Tjoflat can speak with authority on all three of those phases. But Judge, I thought we'd start at the beginning with some of the history of how you became involved in sentencing issues and what the early days back in the '70s were about.

Judge Gerald B. Tjoflat: Well, I came to the United States District Court in October 1970. So, that was my baptism to the sentencing model, as it were, at that time. As you mentioned, the

medical model, and for some listeners, I think I have described that this way: The sentences were basically indeterminate in the sense that there was a parole commission. If you sentence somebody to prison, the parole commission would oversee the prisoner's rehabilitation as it were in the prison with an eye to determining when the prisoner might be eligible for parole because his chances of recidivism would be small. It was kind of like a psychiatry board overseeing a mental hospital to determine when an inmate is capable of returning to normal life. So, that was the model. We had three sentences that could be imposed. Putting aside the maximum term of the sentence — let's say it was a hypothetical 10 years for a given offense — a judge could impose a sentence, make the prisoner eligible for parole after serving a third of the prison sentence, or the judge could make the prisoner eligible for parole less than a third, say, two years into the 10-year sentence, or the judge could simply make the prisoner eligible for parole immediately.

That's the indeterminate sentence you were talking about. In those days, all judges had a pre-sentence investigation prepared by a probation officer, which described the background of the defendant in great detail going into his grandparents, perhaps, but necessarily into his parents. His childhood upbringing, his education, employment skills, employment history, things of that sort. Whether or not, for example, the individual had been subjected to child abuse or alcohol or drug addiction or anything of that sort. All that was information for rehabilitative purposes. Of course, the pre-sentence report would describe the crime. Of course, the judge already knew what the crime was. So, say the defendant's offense calls for a maximum of 10 years imprisonment, then you would decide how many years of a prison term was called for. You'd decide what would the term be, say for five years or 10 years, and impose that in a hearing in which the defendant did not see the pre-sentence report, but his lawyer did and went over the pre-sentence report with the defendant, basically told him what was in it.

You would hear from the parties, and then you would give the defendant his right of allocution to say anything he wanted to say on his own behalf. Then you imposed the sentence, one of the three kinds of sentences I just mentioned earlier. There was no appeal of the sentence, and the judge didn't state on the record any of the reasons why the sentence was being imposed.

In common law, there were four purposes of sentencing. One was punishment, i.e., how much time should somebody serve in prison, say because they committed the crime. "Just deserts" is another way of putting it. Another purpose was general deterrence to deter others from committing the same offense. The third purpose of common law purpose, the sentencing was called incapacitation, or specific deterrence, how much prison time is necessary to keep this particular person from committing further crimes. Then there was a purpose of rehabilitation and in those days, there was thought that prisoners could rehabilitate. But by the time I came to the bench in 1970, the idea of prisons serving the purpose of rehabilitation was fading. One of the reasons why is that the parole commission was not very good at predicting recidivism. They would put people out on parole under supervision, of course, of a probation officer, and then they would commit a crime, and so this idea of the medical model wasn't working very well. There was another reason why there was some resistance to it, which had been building for a dozen years. When the parole examiners would come to the prison to interview the

inmate for the purpose of determining when to set his parole date in the future, the first thing that they'd want to do is ask him if he admitted that he committed the offense.

Of course, if he said he had a collateral proceeding going on, a writ of habeas corpus, and said he was challenging his conviction, the examiners didn't want to hear that. So, the first step toward rehabilitation would be to admit that you did it. And then there would be a correctional officer there, a counselor, telling the examiners how well the inmate had been doing. Maybe he'd been going to class at night. There's a community college professor coming in at night teaching English or something, or he'd been going to class and he'd been working in the prison industries. They'd been doing all these good things. So, the idea of holding the release date out as a kind of a carrot so that if the inmate did all these good things, he'd get out earlier. This seemed to some people to be cruel, unusual punishment.

Judge Timothy Corrigan: So, Judge, when I clerked that year in '81, you sat — even though you were a circuit judge — you sat as a district judge in a case up in Brunswick, Georgia involving drugs and law enforcement being involved in the drug trafficking in Baxley, Georgia. I'm sure you remember the case.

Judge Gerald B. Tjoflat: Absolutely.

Judge Timothy Corrigan: But it was during the time of indeterminate sentencing, and I was wondering if you could just talk about that case for a minute and how the principles of indeterminate sentencing played into that case.

Judge Gerald B. Tjoflat: Well, alright. That was a case with 19 defendants, and they were importing cocaine and heroin and marijuana, mostly heroin and cocaine by air. They were flying in along the Georgia coast. They had in their gang of 19 or so, a lieutenant in the Georgia Bureau of Investigation. The sheriff of Baxley County and all of his deputies. Anyhow, they had the chief of police and everybody in the police department. So, all of law enforcement were defendants in the case along with the civilians. They were landing these planes on a dairy farm of 5,000 acres owned by the Morris Brothers as you'll recall. Then when it rains in Georgia, in red Clay country, you can't land a plane because it gets stuck.

They had a landing, and the landing gear collapsed. So, to give you some idea of the power they had over Appling County — Baxley was a county seat. They had an International Harvester dealer out there throwing a tarpon over this huge plane, so they could fix the landing gear. So, anyway, finally all were caught.

The age group of the defendants was, say, somewhere between 25 and 80, really. So, for the latter part, the idea of rehabilitation in prison, for somebody of that older age group, they're not going to commit further crime. The sentence for, I'll call it the elderly defendants, was less prison time, and so forth. When you get into the real hardnosed drug dealers, and some were from Miami, and they were career criminals really, then the need for punishment and general deterrents was greater, so their prison terms were greater. That's sort of how that went. That was a funny case.

Judge Timothy Corrigan: So, it was very interesting. Of course, for a new law clerk who thought he was going to be clerking on the appellate court to get an opportunity to go down and have a case in the district court and watch you try the case. It was quite the case as you recall, and Main Justice came down. The defendants had very good lawyers, and it was quite the education for a young law clerk. I wanted to just get you to talk, if you could for a minute, about 1972 and Chief Justice Burgers' call to you and how that kind of got you going into the issues of sentencing and probation.

Judge Gerald B. Tjoflat: Well, he called me in the fall of '72 and had appointed me to the Judicial Conference of the United States Committee on the administration of the parole system. So, we called it the probation committee. Anyway, there were seven judges charged with overseeing all of sentencing and parole and probation during six-year terms on this committee. My first meeting with the committee was in January of '73. The chairman was Judge Frank Van Dusen, who was of the Third Circuit Court of Appeals. A bill to reform the federal criminal justice system had just been introduced. Of course, it had sentencing provisions in it at great length. He said to me, "Tjoflat, you're going to oversee all this sentencing stuff."

So, from then on, that was my job was as a member of the committee. By statute, every judicial circuit in the federal system was required to have the judges go to a sentencing institute for three or four days every three years. This committee planned the institutes and put the programs together with the assistance of the judges from the circuit involved. We had two or three of those a year. The first institute was for the Fourth and the Fifth Circuits in 1974 in Atlanta. So, we had all the district judges and some of the circuit judges from those two circuits together. We picked Atlanta because the Atlanta Penitentiary gave us an opportunity to spend one day at a penitentiary.

So, the program would be acquainting judges with the latest theories of crime and punishment, on the latest theories of rehabilitation of offenders and what works, what doesn't work, things that cause recidivism. So, we'd spend one or two days listening to lectures by and large on those things. On the third day, the judges would gather together at the prison and have lunch with the inmates, break up into groups, and then have a panel of inmates in an auditorium setting in which the inmates would describe what was good or bad about their incarceration at the institution, what they thought about the criminal justice system, etc. Judges would ask them questions. The Parole Commission members, at that time, would be invited. I remember Maurice Sigler was the chairman. He always came.

So, they would chime in with the discussion also, and then we'd have mock sentencing groups where we'd put, say, 10 or 12 judges sitting around a table, and we'd have mock cases say for example, John Doe committed a robbery. We'd have passed out a pre-sentence investigation report about John Doe, and in a short form, we'd write down what sentence to give John Doe for bank robbery. Well, let's say in one case John Doe is a single person, has a job, and the maximum term is, say, 20 years. So, they may say 10 years' incarceration. Well then, in the next case, John Doe is married, and his wife has cancer — it's terminal. He has two little children at home, the same robbery. Well, instead of 10 years, maybe they might put John Doe on

probation so he could take care of his wife and children. Or say, the third scenario is John Doe again, is a single man. He goes to the bank, and he has a gun. Now most of the judges would give him 20 years maximum sentence. Then we would take the fourth case. John Doe has a wife who has got cancer, and two small children, he goes in with a gun and that presents all kinds of problems with these judges. Some of them are giving a lesser sentence, even though he used the gun, because of the wife and children. Somebody else would say, "Well, I'm going to disregard the wife and children because we can't afford to have armed bank robberies. They put people in danger."

So, at any rate, that would show the disparity in sentencing, just a group of judges sitting around the table, sentencing in these hypothetical cases and coming up with disparate sentences. By the way, one of the things we were doing at that time, we were talking about in 1973, '74, '75, was that the government accounting office had been putting pressure on the judicial branch of government to do something about unwarranted sentencing disparity on the same courts. For example, you might have three or four judges, and they wouldn't even impose sentences alike in the same cases or even closely. To give you an extreme, during the Vietnam War, and thereafter, in the Northern District of California in San Francisco, say, they had eight judges out there, and if you were charged with evading the draft, we had a draft then during yet war they might put five people on probation and give the other five a maximum prison sentence. So, the disparity was all over. One of the reasons why we had these exercises, these sentencing institutes, was in order to bring some sense to sentencing in that similarly situated people would be treated alike.

Judge Timothy Corrigan: As you worked with what the Chief Justice had asked you to do, it looked like what would eventually be the Sentencing Reform Act of 1984 was going to come into fruition. But I know that was a long process, and there were a lot of ins and outs that got us to that point. And you were heavily involved in all that. Can you talk about that a little bit?

Judge Gerald B. Tjoflat: The first thing of significance that happened was that there was a building consensus — not only in the courts but elsewhere — that there ought to be appellate review of sentences. The defendant and also the government ought to be able to appeal the sentence. What happened first was the Judicial Conference Committee on the Administration of the Criminal Law circulated, through its advisory committee, an amendment to rule 35 of the criminal rules, which would provide for appellate review by the defendant before two or three district judges. Then they floated an amendment, a rule, which would have two district judges and a circuit judge and that met with opposition, basically, it would take judges out of service on a smaller court.

It would be unwieldy to do that. By 1976, the Criminal Law Committee floated another amendment to Rule 35, and this would provide for an appeal in the court of appeals. How it would work is this, if you were a defendant, you would petition a court of appeals for leave to appeal your sentence, and they would kind of give a tentative look at their record, and they might decide, three judges, that you should have a full-blown appeal. So, there would be an appeal before the court of appeals. The consensus at that time was that you could not provide

for an appeal by the government of a sentence, say, the government thought the sentence was too low. You couldn't do that unless you did it by legislative enactment. The rulemaking by the courts wouldn't be the same as legislative enactment.

That's what happens. The judiciary in 1976 ceased trying to provide for appellate review of sentencing to cure this unwarranted disparity by rulemaking. In the meantime, in 1975, Senator Kennedy introduced a bill in the Senate that called for a sentencing commission. This was the forerunner of what we have today, although it was hardly like the scheme we have today. It died. It didn't go anywhere. In 1977, another bill was introduced in the Senate joined by him, and I think Senator McClellan from Arkansas, and Senator Hruska from Nebraska with some other sponsors, a sentencing bill that was more like the one we have today. That was S. 1437. That was the number they gave it, and they had hearings. I testified for the Judicial Conference of the United States at the hearings on that bill.

The Judicial Conference's position was that if we're going to have a sentencing commission, it ought to be in the judicial branch and not in the executive branch. The judges, as a whole, I think, were concerned that if it was in the executive branch, you're letting the executive branch intrude too far into the judicial function of sentencing. At any rate, that bill was passed out of the Senate in 1978 by a vote 75 to 15 or 12, I think it was, 75 to 12, to give you some idea of the momentum that having a sentencing commission and appellate review of sentences Had. It wasn't very strong over in the House.

The House Judiciary Subcommittee on Criminal Justice, which had jurisdiction, was chaired by a congressman from South Carolina. Nothing happened. He retired and Father Robert Drinen, a Roman Catholic priest who was in the Congress and on the Judiciary Committee, became chair of that subcommittee. He was chair in '79, until 1981. When he stepped down. The Pope said he couldn't run again. His last term ended with the election of 1980. But at any rate, so here we have the Senate with a strong movement toward this bill, and the House is sort of dragging its feet, for one reason or another, probably thinking that if we have too much revision, with sentencing guidelines and determinant sentences, sentencing would be disparately heavy for those residing in the inner cities, say, where crime is more predominant, and maybe minorities might suffer disparate sentencing. So, that was the situation up until about 1980.

In 1979, now, S. 1437 didn't pass because it never got to the House. The House and Senate never had a conference. There's another bill, S. 1722 introduced in 1979 and it was much like 1437, but it caused all kinds of problems. I'll tell you what the problem of that bill was. It called for a sentencing commission. It would prescribe mandatory guidelines. The judges would have to follow the guidelines, unless the case was an outlier. It had aggravated or mitigating circumstances that the commission didn't take into account when they drew the guidelines. So, the government could appeal if it was too low and the defendant if it was too high. They had another provision that if the sentence was within the guidelines, then either side could petition the court of appeals to review it.

So, there was three ways of appealing a sentence, and it was unworkable. Northwestern has a Journal of Criminal Law and Criminology, and they were having an issue on sentencing that was

going to come out in 1981. This was bubbling up in 1980, and Marvin Wolfgang, a professor at Penn, asked me if I would write a piece on the practical applications of S 1722. So, I started doing that in the late summer, or early fall of 1980 because 1722 was pending in the Senate at the same time.

To give you some idea about how strange things happened, I was appointed to the U.S. delegation to the UN Congress on the Prevention of crime and Treatment of Offenders, which met every five years, starting in 1955 in a world capital. The 1980 meeting was going to be held in Caracas, Venezuela. I was the judge member, judge delegate, to this Congress, which was made up mainly of criminal justice people, the head of the FBI, the Deputy Attorney, the Director of the Bureau of Prisoners, and so forth. Father Drinen was there, and we had a long conversation, several long conversations because he was a chair of the House Judiciary Subcommittee on Crime and sentencing. They weren't doing anything. He was against the Senate proposal. This was a very friendly conversation, and I told him the judges were against the proposal also because they were wary of an executive branch agency, basically, as they saw it, promulgating guidelines, and you would be doing computer-type sentencing. You would have a pre-sentence report, and the probation officer would say, "Well, here's where it fits in the computer." They would plug in the numbers and out would come a sentence. So, the judge would not be exercising discretion.

Let me say that we had a sentencing institute in the Fourth and Fifth Circuits in 1974. We had a couple of sentencing institutes every year as we were going along. I was planning all of those and making a talk during the three days of the sentencing institute. I was informing the judges of the circuits of how the legislation was coming along. They were up in arms. They saw that their sentencing discretion would evaporate, and they would be nothing more but computers spitting out criminal sentences in serious cases that, to them, would not take into account all the aggravating and mitigating circumstances of a particular crime. So, the judges in the trenches, I'll put it that way, the district judges doing the sentencing, didn't like it very well.

So, that brought us up to 1981. Then there was another version of the Senate sentencing bill that passed. It passed in the Senate, but it didn't pass in the House, so it never went to conference. So, that brings us to 1983. By 1983, the judges were dissatisfied with what the sentencing commission bill looked like. Among other things, the sentencing commission wouldn't have any federal judges on it. So, you'd have people from all walks of life, as it were, promulgating these sentencing guidelines. The Judicial Conference instructed the Probation Committee, which meant I basically had to draw a bill for the judiciary.

So, I prepared a bill. It was S. 1172, and was introduced as 1172 in the Senate by Senator Dole in 1983 and also in the House. It was introduced by Congressman Rodino, who was chair of the House Judiciary Committee. I testified at hearings held in 1983 in August on that bill. There was a lot of testimony on that bill and on the pending Senate bill. But of course, the Senate bill, by this time, had probably 50 or 60 sponsors. In February 1984, the next year, it passed the Senate by a vote of 95 to one, to give you some idea. So, there we were.

Judge Timothy Corrigan: What eventually became the Sentencing Reform Act of 1984? How did that come about, and what were the key provisions that changed the face of federal sentencing rather dramatically?

Judge Gerald B. Tjoflat: Okay. The first thing, the Sentencing or Reform Act of 1984 became Title two of the Comprehensive Crime Control Act of 1984. That Act had a section on bail reform, on fine reform and some other things. It was a huge piece of legislation that came out of the Senate at the same time. In February when they passed the Sentencing Reform Act, they passed the whole works, and the House had a comparable bill, but it was going nowhere. It was in the House Subcommittee on Crime, which was chaired by John Conyers. John Conyers replaced Robert Drinan in 1981 as the chair of that subcommittee. He was right. He told me that the Senate bill was nothing. It was going to come down hard on Black people, in particular, and other minorities.

He didn't like the idea of the government having a right to appeal. So, he said, "I'm not against the right to appeal, but it should be the defendant's having a right to appeal, not the government." So, anyhow, that bill sat in the House Judiciary Subcommittee. Well, now, there is a general election in 1984, so we'll go around to September. Congress hasn't enacted a budget, and so they're debating a continuing resolution on the floor of the House in September. I'll never forget, it's about the 20th of September. The government will run out of money in about 10 days. The Senate Comprehensive Crime Control bill is sitting there, nobody's doing anything with it, and the House is doing nothing with it.

So, Congressman Lungren from California — he would've been on the House Judiciary Committee for a long time — moved to amend the rule under which the House was debating the continuing resolution so that it could have a nongermane amendment put on the continuing resolution bill. The motion went down on a party vote. Republicans voted to amend the rule. They wanted to put the Senate bill on top of the continuing resolution, the money bill, and the Democrats unanimously voted against it. Well, crime was a big issue in 1984 in the election, so the telephones started ringing, and within a couple of hours that afternoon, it became clear that something had to be done. So, Tip O'Neill, who was Speaker of the House, and Bob Michel, who was the minority leader, got together and reached a settlement, and the settlement was something like this. The House Judiciary Committee was instructed to vote out the Senate bill instantaneously.

The next step was they would amend the rule under which they were debating the continuing resolution to allow the Senate bill now voted out to be placed on top as an amendment. That carried all, I think, almost unanimously, and so it comes the 1st of October when the fiscal year is over, the 30th of September. Here we are with a continuing resolution, which is like a budget, with this crime control bill sitting on top of it, and it's in conference. As I mentioned before, one of the things the bill provides is for a sentencing commission that has no judges on it. So, something happened because while the House Senate Conference committee, finance committees, and budget committees are bickering over the money, I'm told that the Senator Kennedy came in and with a lot of votes and said, "You've got to amend this sentencing bill to

provide for three federal judges of the seven members." So, they did that. Of course, they did that by amendment to the bill, which the House passed along with the Senate. They did it in a conference, so now we have a sentencing commission bill, which will promulgate guidelines for sentencing. They appointed a Sentencing Commission. They have to draw guidelines, and all this has to be done by November 1, 1987.

Judge Timothy Corrigan: I think you told me when we were talking about this earlier, that because there was this three-year time lag between the passage of the bill and the actual implementation of this new guideline structure that there was continued pushback on the law. Can you describe that? What was the eventual outcome?

Judge Gerald B. Tjoflat: There were a lot of judges that were very, very upset — district judges and some appellate judges, court of appeals judges from around the country. They wanted this bill repealed, flat out. Chairman Conyers was sympathetic to that. As a matter of fact, he welcomed a bill to repeal the Sentencing Reform Act, in particular, not the other parts. So, a bill was introduced, either a bill was introduced or he was holding hearings. And this is in 1985 and 1986. There's a big buildup that started in the Eighth Circuit in Arkansas and Missouri and in Minnesota. As a matter of fact, they had a Judicial Conference that summer after the bill passed. They asked me to be on the program, and then they put me on the program so they could shoot me down.

Because they accused me of all kinds of mischief in the enactment of this bill. So, anyway, I testified in that subcommittee, before Congressman Chairman Conyers, and then, of course, Senator Kennedy was scared to death, I guess about as scared as you could be being a senator, that the House might pass a bill that would kill this statute. He was concerned about where was the judiciary in this? Where would we be on the Judicial Conference officially? So, I got a telephone call from a judge on my committee, David Mazzone from Massachusetts, a District Judge in Boston. I went to Washington, and met Dave. We entered the senate office building the old one where Senator Kennedy had his chambers.

We went in the side door and another side door and wound up in his chambers. We chatted about it. I told him that, as far as the Judicial Conference of the United States is concerned, we were not in favor of vacating the bill, Congress had considered the substitute bill that we had introduced in 1983, the one I had drawn. We were with the status quo. So, he held a hearing and didn't say much. To make a long story short, the bill was not repealed. So, now we've got a Sentencing Commission in place. This was an interesting period of time — drawing these guidelines — of the seven members of the Commission, the party in power had the privilege of appointing four members and the party not in power appointed three.

So, they were appointed. Justice Breyer, by the time was on the First Circuit Court of Appeals. He was now chief judge of the First Circuit. I had a very enjoyable time with him. He was the chief counsel for the Senate Judiciary Committee in the latter part of the '70s up until when he went on the bench in the First Circuit in December 1980.

He and I worked together on several provisions. I was going to mention one of them. This is a provision of the Sentencing Reform Act, which tells the sentencing commission how to draw guidelines, and it tells them how to categorize criminal offenses by certain criteria and categorize defendants. Because of the concern that the Sentencing Reform Act's guideline system would come down harder on minorities, especially those in the lower economic and socioeconomic status and in inner cities in particular, we revised these two categories. One was that the commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, or socioeconomic status of offenders. So, the commission in deciding what to do — not about the crime, but with the individual — could not take those things into account. Another provision was the commission shall assure that the guidelines of policy statements in recommending a term of imprisonment or the length of a term of imprisonment reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant. Well, that meant that all of those characteristics of people and the community would not be taken into account in a punitive sort of way.

But at any rate, Justice Breyer was a member of the Sentencing Commission. I was on two other committees. One was at the Federal Judicial Center. It had a committee on sentencing guidelines. We were working with the Sentencing Commission and also on two initial conference committees, an ad hoc committee on sentencing guidelines and one on educating federal judges and probation officers. Everybody having to do with the sentencing process would have to be educated as we went from this medical model of indeterminate sentences with the parole commission, which now has been abolished, to determinate sentencing.

So, going back to my hypothetical. John Doe has robbed the bank and he has have three or four hypotheticals. John Doe is single, not married. He robs the bank, with no gun. The maximum Senate says 20 years. The punishment and general deterrence needed for that sentence drawn by the guideline might be 15 years. In other words, anybody, regardless of their station in life or their responsibilities, robbed the bank without a gun. That's a 15-year sentence. Then let's take this second: John Doe has a wife who's dying of cancer and two children. What would the guidelines do about that? They wouldn't change the 15 years, because the need for punishment and general deterrence is the same, regardless of whether he has a wife and children, whether they're ill or not.

So, then the next little hypothetical. John Doe is single, and he robs the bank with a gun. What do the guidelines do? Well, they give him, say, 18 years and nothing extra for recidivism. Just 18 years because he doesn't have criminal records. So, you don't need to add to it. Next John Doe, he's now got the wife and the children, and he robs the bank with a gun. He's in the same position as John Doe without a wife and children, and out of the sentence, say, the 15-year sentence. He will serve the whole time less, 15% of the sentence. So, out of a 20-year sentence, you do 18 and a half years.

Judge Timothy Corrigan: Those of us who've sentenced under those guidelines know that the nature of the offense is taken into account, and then the criminal history is taken into account,

and you reach a matrix and you look for the guidelines that are applicable. You know, when I started doing that of course had been that way for a long time, but I imagine that had to be thought about. How did that matrix that we all are so familiar with come about?

Judge Gerald B. Tjoflat: The sentencing commission took all of the pre-sentence reports over the previous dozen years, say every pre-sentence report, if you'll recall, how they were written with a big social history and a description of the crime. They tried to make sense out of those reports. That's how they came to these numbers. That's how they came to the number of 15 and 19 say, or 18 in John Doe's case, and nothing for the wife and children. That's how they drew it. So, that became what we call "determinate sentencing."

One other thing was that Congress, after enacting the Sentence Reform Act and we go into guideline sentencing, Congress approves the guideline sentences, then what does the Congress do? They pass a bunch of mandatory minimum sentences in drug cases, which the judiciary abhors and with good justification because we already have guidelines. Why does the Congress have to say this is a minimum? The guidelines already have a minimum anyway.

Judge Timothy Corrigan: The Sentencing Reform Act was passed to remedy the perceived problems with the indeterminate model. As it evolved and before *Booker* came out, were there problems identified with the guidelines model?

Judge Gerald B. Tjoflat: Before *Booker*, there was very little discretion. A lot of district judges, in order to depart from the guidelines, had to mind-read the Sentencing Commission and say these circumstances the sentencing commission did not take it into account. There's no way of knowing that, and so imposing a sentence above the guidelines based on aggravating circumstances that the sentencing judge dreams up is tough business. If the judge finds circumstances to go underneath the guidelines, same thing. You're anticipating what the Sentencing Commission did or didn't do. Of course, the Sentencing Commission designed the guidelines to be one size fits all. So, there's no way in the world that all the guidelines could apply to every case.

Judge Timothy Corrigan: I wanted to, before we actually get to *Booker*, get your view now we've had three different ways of doing it. I'd like to get your view on what the best way is. But I did want to circle back on some of the history here. You touched on it briefly, but you and I talked about it in preparation. Your service on the US delegation to the UN Congress on the Prevention of Crime and Treatment of Offenders. You told me a number of stories about that, and I think our listeners might be interested. So, if you could take a couple of minutes and talk about that.

Judge Gerald B. Tjoflat: Well, the first Congress that I attended was in Caracas. Our delegation was put together by the State Department. The State Department says to the Chief Justice that we need a judge in the delegation. So, Chief Justice Burger appointed me because I was the chairman of this committee that had a lot to do [with sentencing]. I also, at the same time, was a member of the Advisory Corrections Council of the United States, which had a responsibility to look and oversee prisons in general and report to Congress. But anyway, the United States

was, in terms of the world, in pretty low status in 1980 — we had hostages in Iran. When we got to Caracas, it was about a 12-day session. It was obvious that the United States was held in pretty low esteem, generally speaking, and that the Soviets were riding very high.

I have to tell you one funny story about that. On Sunday before the Congress convened on Monday, just like a regular UN meeting, a lot of pomp and circumstance, the president of Venezuela on the podium with the admirals and generals and everybody standing behind him and ruffles and flourishes and trumpets blaring. So, on the evening before, they had a reception at the White House there. In Caracas in Venezuela, the president doesn't live there. It's used as a showplace, a place for gatherings like this. So, anyway, if you can imagine, they got all these countries and delegates walking around, and they have waiters going around with trays of lobster, shrimp or this, that and the other. Of course, alcohol, wine, and beer, and this, that, and the other. So, I'm standing there talking to somebody, and if you might remember it, there was a TV ad years ago, the Dodge Sheriff ad, and the sheriff had a shirt that didn't fit right. You could see his skin between the buttons. Anyway, there is a man from Poland, and he's standing there, and he says he wants to have a conversation with me. He's a communist, and he speaks English. You may remember there was a riot in Liberty City, Miami in 1980. One of the causes was this influx of Cubans coming, especially coming into South Florida and Black people were losing jobs. So, this riot took place, and there was a little sympathetic riot that was going on or about to go on in Orlando. So, this Polish communist says to me, "What do you think about this riot down there in Miami?" He knows more about the riot in Miami almost than I do, and he's giving me the business about this riot. I said to him, "What about Gdańsk?" Lech Wałęsa had just had a month previous to that led an uprising. So, I said to him, "What about Lech Wałęsa and Gdańsk?" This guy had a bodyguard bigger than he was, and he grabbed him. He says, "no politics, no, no." He took him away.

Anyway, one other little interesting thing in that meeting, to give you some idea of how low the United States was, the secretariat allots a half hour to a country to make a speech or a response. The Cuban delegate would get a speech from the Soviet desk to deliver after lunch at two o'clock. It was a "Yankee pig" speech, always a terrible one. He was sitting right behind me, and I wanted to throttle the guy, a young fella. Anyhow, there was a lot of that going on, and I noticed that third world country representatives would hardly speak to you. The Soviet domination in the meeting was so strong. The Soviet countries behind the Iron Curtain was so strong it was like the Soviet Union was a puppeteer, and these were all puppets. But anyway, a minister of justice from an African country said he wanted to see me, but he wasn't going to see me personally because that would be out of the way. So, I met with him at a coffee shop about two blocks from where we were meeting. One of the items on the agenda had to do with juvenile justice. The reason why he wanted to see me was because they idolized the American judicial system and wanted to know what I thought they should do if I had any ideas of what they should do establishing the juvenile justice system, making it separate from the system dealing with adults. We talked probably for an hour and a half down there, and so we finished our conversation, and we headed back to the meeting hall. He went this way. I went that way.

So, nobody would see that we were together. Anyhow, another Congress, I went back in 1985 to the Congress that met in Italy, and because of concerns for safety, it was not held in Rome. It was held in Milan. To give you some idea the difference in the atmosphere, the Soviet puppet counties spoke English. I was in a working group like I was in Caracas, and I was sitting in the back row. There were myself, United States, UK, an Englishman, and then three people from Russia or the Soviet Union. Next it was the KBG guy, and the Chief Justice of the Supreme Court of the Soviet Union and an Associate Justice. The atmosphere there was just so different in terms of the United States than it was in Caracas. About that time was when Glasnost had came on, so everybody saw some softening on the part of the Soviet Union. Some said that part of it was because of President Reagan's "Star Wars," that the Soviets were concerned about that. But anyway, there was a big difference there.

One experience I mentioned to you, two days before the meeting was over, the Deputy Attorney General Lowell Jensen asked me to take over the American desk. We had three working groups, [he asked me to take over] at the third working group. So, I went in there, and it was very quiet. What had happened was about 40 third-world countries had introduced a resolution for some kind of compensation that had to do with, something that was going on in Argentina, something that they were having difficulties there. It was against the United States and the Soviet Union. So, everything was quiet because the UN didn't move in those days if the United States and the Soviet Union opposed something. So, I was told the deputies had left that working group and they were upstairs with Madam Shahani. Madam Shahani was a Filipino woman who became the foreign minister for Corazon Aquino, who became president of the Philippines sometime after that, and she was the Secretary General, basically the Deputy Secretary General. So, I went up to her suite, and she was sitting behind a desk, and there were about 40 third-world country people who were behind this resolution sort of sitting against the wall with four or five French people, because they all spoke French. The French had to translate what was going on to them, and so in front of her desk was a card table, and the KGB guy was sitting there. And so, she told me to sit here opposite him, and then she said, "What's wrong with the resolution?" He pointed to me to speak, so I spoke. I said, "We understand what you want to do, but it's not the way to do it." And UN resolutions have a bunch of "whereas" clauses, and then they have a "now therefore, member nations should do this, that, and the other thing." So, anyway, she said, to the two of us, "You rewrite this resolution, and we're leaving, and we need it by 11 o'clock." There are only two more days left, and we had to go to the plenary hearing tomorrow, 11 o'clock, this is now 9:30, and so out they went. I said to him, "Why don't you start?" He said, "No, you start."

He was a very hardnosed guy. Anyhow, we'd start the first sentence and just interlineate, like editing an opinion. Madam Shahani would put her head in the door about every 20 minutes, want to know where are we, where are we? And by 11, we finished. So, we went into this caucus room down the hall, big room that had tables this way with all these delegates around. I said to him, "Why don't you present it?" He said, "No, you present it." I said, "Alright, I'll present it. I will tell the delegation, the people that if I make a mistake, you'll correct me." "Okay," he said.

So, anyway, I start reading the edited version very slowly because they have interpreters, and everybody is filling in their own copy. That took about an hour. When the KBG guy and I are doing our thing earlier, when he got to "member nations should," he said it has to be "member nations may." So, I don't know any better. I went along with "may." So, I finished reading our edited version of the resolution, Madam Shahani said, "You two, stay outside." So, in about 30 minutes, she came out and said, "Come back in." They read to us our revisions to the resolution that they wouldn't accept. They were really concerned about "member nations may." They said it had to be "member nations should." So, anyway, with that, the Soviet chap and I left the hall, went to another room, small room, and we're sitting across like a card table considering the objections that had been made, in particular, member nations may. And there are three Russian-speaking people behind me. We go over our edited resolution, and he wants to change some things and the whereases, but they don't amount much. I told them that we ought not do that because it really doesn't much matter. But when we got down to "member nations should" or "may," he said the word "should" in Russian is "must." So, we cannot have "member nations should," because that's "member nation must," and he can't agree to that. So, there's a lot of Russian going on back and forth behind me and him, and I said to him, "Why don't you do, like we do in the USA every now and then, about every other year we revise our dictionaries?"

So, I suggested, "you do your revision, and you just revise "must" and create a "should" — create a new word." He gave up. We left it "member nations should" and went back into this caucus room. Again, I read what we had done. I said, he will correct me if I'm wrong. When I got to "member nations should," and I read "should" the place erupted. There was a law professor from Madras, India sitting next to me in a chair, and he jumped up and grabbed me. He said, "thank you," or something like that. It was a big deal, and the State Department person who was there said to me, "You can tell the crowd that the US will join the resolution as a sponsor," and the Soviet abstained. So, anyway, that was fun.

Judge Timothy Corrigan: As we come close to our time here, I wanted to ask you, you've sentenced under indeterminate, you had a lot to do with the guidelines and the Sentencing Reform Act of 1984, and now you've been an appellate judge under the *Booker* regime since 2005. Is there a best system? What is your view of what the best sentencing system is?

Judge Gerald B. Tjoflat: I think the best sentencing system is to have appellate review, and you've got to have some guidelines because you have to be able to review. They're built around the four common law purposes of sentencing, which are historic: Punishment (or just deserts), general deterrences, specific deterrence (or incapacitation as they call it), and rehabilitation. All the guidelines are proxies for these purposes. The vertical scale on guidelines is a proxy for general deterrence and punishment. Of course, they're designed for one-size-fits-everything, and that's just not the case. I mean, a cattle rustler in Wyoming, that's bad news. You can't take that. A cattle rustler in Manhattan is something else. That's nothing. So, that's my thought about it. To allow the courts of appeals to basically evolve a system around those common law purposes of sentencing would be more flexible and would tell the district judges that you really do have a responsibility [to sentence]. It's more than just looking at these [guidelines]. It's not a computer matter. And that was always one of the things behind the objections in the first

place. By taking over so much power, the sentencing commission — especially when the guidelines are mandatory — is relieving the district judges of a lot of responsibility, such that they might say to themselves, "does it make any difference what I do because if I depart, they're going to slam me down. So, I just have to follow these rules." So, that's why I think that's different. We didn't mention the Pretrial Services Act. I don't know if we have time to do that.

Judge Timothy Corrigan: We can spend a few minutes on that. Yes. You and I did talk about that. Why don't you tell us about that.

Judge Gerald B. Tjoflat: The 1974 Speedy Trial Act had a provision to create a pilot project in 10 districts in the United States. Ten district courts piloted a project to provide what is called pretrial services. So, John Doe is arrested, he's indicted and arrested, taken into custody, and he goes before a judge to set bail. Under the Bail Reform Act of 1966, the judge takes certain criteria to account in how to frame the conditions of the bail. That act was passed to get rid of monetary bail. You've heard of bail bonds, they're out. But the trouble was, which led to this Speedy Trial Act provision. The trouble was there was still too much detention in county jails. That's where most federal prisoners were being kept too, and it was too expensive and just counterproductive.

There was too much crime if they were released. Too much crime was being committed by the individual awaiting trial and sometimes not showing up for trial. So, the question was whether if we provided a good investigation before the bail hearing, the bail judge would have a good grasp of where this defendant is coming from and if I release him on bail, where's he going to be? And so forth. Can I frame conditions and not detain him in jail awaiting trial? So, they assigned the Probation Committee the job of overseeing this pilot project, which is about five years. There were pretrial services handled out of two places: 1) the probation office, using probation officers to investigate the accused persons before they appear for arraignment, and 2) to create a separate unit called a separate agency, as it were, with probation officers doing the same thing. The difference being that probation officers would be wearing two hats, one as a probation officer owing an allegiance to the chief probation officer. The other had pretrial services. So, the idea was that if you had a separate unit, they have allegiance only to one master. So, anyway, the experiment was run for five years, and a lot of data was accumulated and a Speedy Trial Act, a Pretrial Services Act in 1982 was introduced in '81, and then in '82 was inactive. The findings that we had were the following: Number one, the amount of detention in jail pending trial was cut way down. So, that saved taxpayers a lot of money. Number two, the amount of crime committed while released on bail was reduced substantially. That was a big plus and number three, they were reporting to court when they were supposed to on time. So, we had fewer fugitives, and so that was good. The second point was it was more beneficial to operate the pretrial services out of a separate unit, but not the probation office. Now, we did have a couple of interesting things that happened along the way. When the pilot project started, the probation officers across the country were upset to learn that a separate unit might be established to do pretrial services. They wanted all that in the probation office. The

ringleader of the whole push for that was the chief probation officer in Brooklyn, a portion of the East District of New York working for those judges there.

Those judges were adamantly opposed to having pretrial services separately. And their unit, under the pilot project, they were in a separate unit and they didn't like it. They wanted everything done in the probation office. So, anyway, this pro-pretrial services project was a product of the House judiciary Subcommittee on Crime, which was chaired by William Hughes of New Jersey. He was very enthusiastic, and he wanted to see pretrial services delivered in a separate unit, not in the probation service. He was upset about the movement that was going on while the project was carried out. He was upset about this big push to have it all done in the probation service. So, I was at a meeting in Williamsburg, Virginia, a weekend after the Judicial Conference met in March, this was the end of March.

It was a meeting hosted by the Chief Justice, the Attorney General of the United States, and the chairs of the House and Senate Judiciary Committee. We got there on Friday and through Sunday morning, and William Hughes was there, he got close to Chief Justice Burger and was complaining like hell about this push by the probation officers to t have this service done in the probation officer, not pretrial, not the separate unit and he was upset. I was going to fly out of Virginia to Miami, because I was holding court Monday on a three-judge panel. The Chief Justice said, "You've got to see Mr. Hughes tomorrow night." So, I called my colleague, Pete Fay, down in Miami to sit for me on Monday on the calendar. I went to see Chairman Hughes on Monday afternoon. I left his chambers, as it were, at about 11 o'clock at night, something like that. He's telling me that I have got to make sure that the court in Brooklyn backs having pretrial services in a separate office just got to be, he said, "You are chairman. You can do that." I said, "I'm one of a bunch of Article III judges all with life tenure, so it doesn't matter." I said, "You're a chairman of the House committee, and you can order people to do all kinds of things." So, anyway, later I went up to Brooklyn, and the biggest advocate for pretrial services in probation and not the separate unit, the biggest antagonism was Judge Tom Platt. Well, the chief judge of the Southern District of New York, across the river as it were, was Charlie Brieant. Charlie and Tom Platt had been law partners long before they went on the bench. So, I called Charles and I said, "You've got to pick me up at the airport. We have to go to Brooklyn and meet with these judges and I need you for moral support." So, we got there, and Jack Weinstein, who was the Chief Judge of the Eastern District of New York in Brooklyn, we went into his office and he said, "I don't think you're going to get anywhere with those guys. I agree with you, but I'm not even going to the meeting." So, Charlie and I went to the meeting with the judges, had a Danish and coffee, and they were ice cold on the idea. So, we left, and Platt told Charlie Brieant later on, "Don't bring Tjoflat around here anymore. We're going to stick to our guns." So, that was the end. As it turned out, Hughes got the word out that he would have the House Appropriations Committee cut the appropriations to the judiciary for some of probation offices if the judiciary didn't cave in to his wishes. So, the cave in occurred, but it was the right thing to do. There was a hearing, and I testified in favor of having separate operations. Tom Plat came, and he testified against heaven separate operations.

Judge Timothy Corrigan: Of course, in my early career as a judge, I was a magistrate judge. So, I had very frequent interaction with the Bail Reform Act and pretrial services.

Judge Gerald B. Tjoflat: Say that again.

Judge Timothy Corrigan: I saw the benefit.

Judge Gerald B. Tjoflat: I did.

Judge Timothy Corrigan: So, judge, we could talk a long time about these issues. I know this is one small part of the oral history that's trying to chronicle your 50 years as a federal judge. I've enjoyed this time together, and I hope you feel like you've gotten to kind of say the things you want to say. This is now getting into the realm of almost history. It's an important history that probably isn't very well known, and you're probably one of the primary persons who can elucidate this history. I appreciate you inviting me to participate, and I don't know if you have any concluding remarks, but as we close out, I just wanted to thank you.

Judge Gerald B. Tjoflat: Well, it's been a good ride and I've enjoyed the meeting with you recalling all these things.

Judge Timothy Corrigan: Very good. I appreciate it. I'll look forward to the finished product on the oral history, and I've enjoyed our time together today. Thank you very much.