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Where Does Bernie Go From Here? Part II With Lawyer Alan Ellis



Back in March, after Bernie Madoff entered his guilty plea, we [chatted](#) with [Alan Ellis](#), a lawyer specializing in federal sentencing and Bureau of Prison matters and the author of the [Federal Prison Guidebook](#). Ellis [dropped a lot of knowledge](#) on us. So much, in fact, that we had to pick up the phone and check in with him today on the latest news that Judge Denny Chin had sentenced Madoff to a 150-year prison term.

Hi Alan, thanks for taking the time. First off, what do you make of the sentence?

I was really surprised. I'd predicted a sentence in the 25-35 year range. But Judge Chin obviously felt he deserved much more.

Why didn't you expect he'd get the maximum?

I didn't expect 150 because 150 was the statutory maximum. It's the kind of sentence the media puts into its stories because it sounds good — which drives defense lawyers up the wall, by the way — but rarely get handed down.

My prediction was based on the fact that I thought he was going to get more than the Enron defendants got, so that's why I was thinking 35 years, which also would effectively have been a life sentence. [Ed. note: Enron's Jeff Skilling, who received the longest sentence of all the Enron defendants, received an initial sentence of 24 years.] That said, the judge has read a lot of things that I haven't read, like victim-impact statements that I wasn't privy to, so it's a bit hard to judge from afar.

Okay, so what happens now? Everything gets moved to the Bureau of Prisons now, right?

Right. My guess is that Madoff will be sent back to the [Metropolitan Correctional Center, where he's been since March] for about six weeks, or until all of the requisite documentation is collected and sent to the Bureau of Prisons Designation Center in Grand Prairie, Texas. From there, they'll sort it all out and decide where he'll go.

But in this case, I think it's going to be a little bit different. I think once the documents are received in Grand Prairie, the Bureau could take it to the highest levels of the Department of Justice, which will help make the call.

Why do you say that?

Well, because it's so high profile. The DOJ has to have an extreme sensitivity over the case; it really doesn't want to do the wrong thing. It's really going to sweat over the details on this, I'd imagine. [Ed. note: We placed a call to the Bureau of Prisons, which said that it alone would make the call, not a higher level of the DOJ.]

Does the length of his sentence change the calculation on where he might get sent?

It does. The way it works is that the Bureau first assigns what's called a sentence-length public safety factor, which is largely based on the length of the sentence and largely dictates the security level of the prison to which a defendant is sent. From there, the Bureau can impose what's called a security management variable, which essentially allows it to depart from what the SLPSF prescribes.

Under what I thought he'd get, 30-35 years, he'd score out with a public safety factor of medium. From there, I thought that the BoP might impose a lesser security management variable. I thought they'd say 'hey, the guy scores out as a medium, but for safety reasons — we don't want him getting killed — we're going to designate him to a low-security facility, where he'll be in a safer environment.'

But with a sentence of 150 years, I'd imagine it's different, right?

It is. Right now, he'll start out with a public safety factor of high, and it's really unclear to me whether the BoP will bump him down from a maximum-security facility. I suppose they could keep him in a maximum facility and try to ensure his safety by keeping him in solitary confinement, called a "special housing unit." Typically, to justify getting sent to the "shu," the BoP needs to see an actual and verified threat to an inmate, but they might not require that in this case, given how high-profile Madoff is.

Just because someone is high-profile doesn't necessarily mean that safety is an issue, right?

Right. I mean, Michael Vick was high profile, but was he in danger? I highly doubt it. He's a sports hero and he's, physically speaking, a big guy. But with Madoff, something else could factor in. There's an expression in prison that gets applied to prisoners — "mice who want to become rats" — which essentially refers to wanting to increase your stature in prison, or "making your bones." One way an inmate might "make his bones" is by hurting Bernie Madoff.

And that's essentially the worst possible thing that could happen to the Bureau of Prisons, right? I mean, that's a huge black eye if that happens.

Right. And the BoP assignment is going to reflect that. The BoP wants to appear as people who run a professionally managed facility, and for that reason, there's going to be a lot of soul-searching over where they put this guy. If you put him at a low-security as opposed to a high-security prison, it might not look too good. At the same time, I've heard people say to me 'put him in the Supermax,' which is where they keep the worst of the worst, people like [Unabomber] Ted Kaczynski and [convicted spy] Robert Hanssen. One could argue, actually, that the Supermax might be the safest place for him. Sending him to a Supermax might also square with Judge Chin's punishment, with which he was clearly saying that Madoff is among the worst of the worst.

The Supermax, it should be noted, isn't just for violent criminals. It's for those deemed the worst, broadly speaking.

Judge Chin mentioned that he'd recommend Madoff be housed in the northeast. Does the Bureau of Prisons have to follow this?

Not at all. And, frankly, I'd be very surprised if he was sent to the northeast. I'd guess that they're going to put him far away from the media, in a very well-run but

not at all. And, frankly, I'd be very surprised if he was sent to the northeast. I'd guess that they're going to put him far away from the media, in a very well-run but isolated facility in the middle of nowhere. But it needs to be a very well-run facility, in my opinion.

Bernie's been in the MCC for a few months now, and nothing all that bad seems to have happened to him. Are we to assume from this that he'll be a guy who gets along okay in prison?

I'm not sure. It's possible. MCC is a very tough place, so it's certainly possible. Bernie has proven he has people skills.

That said, at MCC, Madoff hasn't been in the general population; he's largely been segregated, so it might not be an analogous experience.

One question I have is how is he going to be treated by the staff. I think that the answer to every one of his questions is going to be no. If he asks to switch to a lower bunk, to adjustments made to his schedule, things like that, the answer's going to be no.

Otherwise, what kind of life with he have? I imagine he'll have some sort of job?

Right. Everybody has a job. Most involve menial labor at first, like working in the kitchen or the laundry room, but you can work your way up to a clerical position.

In talking to lawyers prior to the sentencing, I got the sense that what Madoff's lawyer, Ira Sorkin, really wanted was to provide Madoff some 'daylight' at the end. That is, to win him a sentence that he could potentially see the end of, in order to provide him some hope.

But that clearly didn't happen. So if someone like Madoff comes to you, what do you tell him? How do you encourage him to keep his spirits up, get out of bed in the morning, if he has no hope of ever getting out?

Jeff Skilling worked his way down from a medium-security facility to a low-security facility. And that's what it is — what keeps you going, the hope that at some point down the line, you'll be able to improve your conditions.

I've had lifers in maximum-security prisons go down to mediums; you can always decrease your level. I had a big drug kingpin from Mexico who got sentenced to the Florence [Supermax facility in Colorado] to medium. A lot of that depends on how well you get along with the staff.

Secondly, if Madoff is able to provide more assistance to the government in its investigation, he could earn himself a reduction in his sentence. But that's entirely up to the government's discretion, and will really depend on how badly they want their money back.

Lastly, any grounds for Madoff to appeal his sentence?

I haven't reviewed the presentencing report, so I don't know if his guidelines were correctly calculated. But even if they were, he could appeal on the grounds that his sentence was unreasonable. The standard on that, generally speaking, is whether the sentence is sufficient "but not greater than necessary to achieve the purposes of sentencing." He's going to have to convince the Second Circuit of that, which I'd imagine might be tough.

I know federal judges are appointed for life, but I can't imagine any judge would want to endure the public fallout that would ensue if he or she reduced Bernie Madoff's sentence, right?

Judges are not immune from public pressure. I clerked for a federal judge and during one sentencing, an attorney asked my judge for a "lenient sentence" for his client. Later, in chambers, the judge told me that I should learn a lesson from this, that is: "never ask a judge for a lenient sentence, because you'll never get it." A judge never wants to get written up in the papers as being lenient. Merciful, maybe, but not lenient.

Very good. Thanks for taking the time, Alan. We really appreciate it.

My pleasure.

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