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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

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June 16, 2011

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
10th Street and Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Mr. Attorney General:

We write to express my disappointment with the Department of Justice's recent testimony to the United States Sentencing Commission in support of retroactive application of the Sentencing Commission's guidelines implementing the Fair Sentencing Act of 2010 ("the Act").

As recently as April 25, 2011, you wrote to Senator Durbin that "the Act is silent as to whether the new threshold quantities for statutory mandatory minimum sentences apply to conduct that occurred prior to its enactment. As a result, pursuant to the Savings Statute, Title 1, United States Code, section 109, the new law applies only prospectively...." You also "concluded that a judge lacks authority to sentence below an applicable mandatory minimum triggered by a finding of guilt for an offense that occurred prior to enactment of the Fair Sentencing Act." We agree with those statements.

Since both the statutory language and intent of Congress unambiguously demonstrate that the Act applies prospectively only, we were therefore surprised and disappointed that you testified that the Commission should apply its guidelines implementing the Act retroactively. Having failed to convince the Congress to apply the Act retroactively, supporters of retroactivity should not be permitted to circumvent the considered deliberation of the people's representatives by obtaining a contradictory result through an unelected agency. Although you properly advocated that the Commission should "honor[] not only the letter of this law, but also the spirit of its intent," retroactivity in any form is contrary both to the letter the spirit of the Act. Moreover, although we agree with your statement before the Commission that sentencing policies should be "tough," "predictable," seek to promote "public safety," "reduc[e] recidivism," "and minimize[e] the negative, often devastating effects of illegal drugs," we believe that the Department's advocacy of retroactivity thwarts each of those desirable goals. Reducing sentences is not tough, creates unpredictability, harms public safety, promotes recidivism, and increases the negative, often devastating effects of illegal drugs, both for those whose sentences are reduced and in the consequent diminished deterrent effect on other potential drug offenders.

Although you did not personally deliver this portion of the Department's testimony, we also take strong exception to the Department's arguments in favor of limiting retroactive

application of sentencing guidelines to those offenders who would obtain only a quantity-based sentencing reduction, are crack offenders who did not receive a weapons enhancement, and whose Criminal History Categories were I, II, or III as determined at the original sentencing. The Department claims that all of these factual predicates for its proposed retroactivity “should have been determined in prior court action and should be documented in the court’s file in most cases, [such that] courts will be able to determine eligibility for retroactivity based solely on the existing record and without the need for transporting the defendant back to court or holding any extensive fact finding. Retroactivity would be available to a class of non-violent offenders who have limited criminal history and did not possess or use a weapon, and thus to offenders who pose the least risk of danger to public safety.” In reality, both of these contentions of the Department are erroneous.

First, whatever the Department’s intentions and hopes, it cannot control the actions of the judges who will be required to review any of the thousands of petitions that will be submitted by currently incarcerated inmates. Those inmates will include not only those who would be eligible for the retroactive application of the sentencing guidelines that the Department seeks, but others who are ineligible but mistakenly believe that they may qualify and face no incentive not to seek a shorter sentence or release. Thousands of such petitions will inevitably be filed if the Department’s proposal were to become law. Department attorneys will be required to respond to each of these petitions, as will paralegals and clerk’s office personnel. The magistrate judges to whom these petitions are assigned may or may not call for hearings on any of these petitions.

In any case in which a hearing is set, the Marshals Service will need to transfer the prisoner. Department attorneys would need to spend time preparing for and appearing at any such hearings. Attorneys will need to be appointed for the offenders. It is also possible that in some of these hearings, agents might need to testify concerning the quality or quantity of the substance at issue in the conviction. The magistrate judge and his or her law clerks will consume time to prepare for and conduct the hearing, as well as to issue a written opinion, the disposition of which will necessitate the time of a district court judge and his or her clerks, as well as the associated appellate judges, court clerks, and law clerks who would dispose of the appeal of an unsuccessful prisoner. Successful prisoners may be entitled to a resentencing hearing, which will be followed by administrative paperwork prepared by a Department attorney, the transfer of the paperwork to archives, as well as an order to the Bureau of Prisons, whose personnel processes its own paperwork. If the Department is so certain that the resentencings can occur without hearings or transporting prisoners, then it should be more than willing to determine how its existing budget can cover the costs it would incur if it is mistaken, as well as prevent the attorney time and administrative duties associated with retroactivity from interfering with prosecuting criminals.

Even when a judge does not order a hearing, addressing each individual petition requires the time and resources of United States Attorneys’ offices and courts, each of which are already stretched by limited budgets. If the Department’s retroactivity proposal were to be adopted by the Commission, the Department should begin planning which criminal prosecutions it is willing to forego that it otherwise would have initiated. We would request that you provide any cost estimate that the Department has prepared in conjunction with its retroactivity proposal.

Second, the Department's proposal would in no way be limited to those "offenders who pose the least risk of danger to public safety," as it would allow retroactive reduction of sentences to offenders whose Criminal History Categories include Level III. Many of these offenders will be violent offenders, with a concomitantly large risk of recidivism. Offenders at level III possess up to six criminal history points. Since offenders accrue three criminal history points for every sentence exceeding thirteen months, eligible offenders for retroactive application of the guidelines under the Department's proposal could include violent offenders, including offenders who could have received two previous sentences for murder, serious assault, or aggravated robbery. So long as these offenders were violent at times other than when they committed their crack cocaine offenses, they could qualify for the Department's proposed reduced sentences. It is not the crack cocaine offense for which they were convicted that makes these offenders violent, but rather who these offenders are as demonstrated by their prior violent convictions. The earlier release of these violent offenders contemplated by the Department's proposal would recklessly create a dangerous threat to public safety. "Least risk" is not "no risk."

Finally, not only do we strongly disagree with the Department's proposal and its faulty rationale, but we will consider any future Department request for leniency negatively. We supported the Act in good faith to reduce a sentencing disparity. We did so secure in the belief that you have publicly stated you share, that the Act applied prospectively only. If the Department or the Sentencing Commission abuse their authority by unreasonably expanding the applicability of legislation providing leniency far beyond the clear intent of Congress, then we will have no choice but to oppose any additional legislative efforts that would provide for leniency in sentencing to any degree.

Sincerely,

Handwritten signature of Jeff Anderson, written in cursive and underlined.Handwritten signature of Chuck Grassley, written in cursive and underlined.Handwritten signature of John Conyn, written in cursive and underlined.

Cc: Sentencing Commissioners
The Honorable Patrick J. Leahy