

**Chief Judge Patti B. Saris**  
**Chair, United States Sentencing Commission**  
**Smith College Remarks**  
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Thank you. I'm deeply honored to be with you on Constitution Day at Smith College. I know Smith College well. I became friendly with President McCartney when she was Dean of The Harvard School of Education and was so innovative in promoting educational leadership. My mother-in-law and sister-in-law went here. It is the largest of the seven sisters and its graduates have gone on to be leaders in the country: Feminist Betty Friedan, First Lady, Nancy Reagan, Chef Julia Child and Author, Piper Kerman, author of *Orange is the New Black*, which is particularly relevant to today's talk on mass incarceration.

On Constitution Day we are encouraged to *learn* about our system of government and the rights that we hold; and to think critically about how we can *contribute* to society using that very system. I will focus my remarks on the relationship between the Constitution and a topic of great importance to college students and all others across the country: criminal justice.

Let's start with the Constitution. Individual rights are an important component of the Constitution. Indeed, the Framers' experience with British rule convinced the Framers that certain rights needed to be enshrined in the Constitution.

The Constitution contains a number of rights directly related to criminal justice. For example, the Fourth Amendment protects our bodies and effects from unreasonable searches and seizures. The Fifth guarantees due process before an individual's life, liberty, and property may be taken. The Fourteenth Amendment requires equal protection of the law. The Sixth entitles criminal defendants to the presumption of innocence, to proof beyond a reasonable doubt, to a lawyer, to a trial by a jury of his or her peers, and to confront adverse witnesses. The Eighth Amendment prohibits the government from imposing "cruel and unusual" punishments.

The Constitution also applies to sentencing. In the last decade, there have been about a dozen cases in the Supreme Court addressing constitutional challenges to sentencing laws, including whether an increase in sentence based on sentencing factors requires a jury finding or whether a sentencing statute is too vague. The Supreme Court's decisions on the Constitution have changed the sentencing landscape.

Criminal justice eludes an easy, static definition. Its meaning may vary according to our own experiences and perspectives. From generation to generation, that meaning may vary according to the particular challenges or circumstances of the era. But the Framers established a baseline of what criminal justice must contain, regardless of our unique views or the changing times.

I have had the privilege of serving as a federal district court judge for twenty-two years now and over that time have gained a greater understanding of the federal criminal justice system. I have also seen how the Supreme Court case law has evolved, how the statutes and sentencing guidelines have changed over time, and how the realities on the ground have evolved. The past six years serving as chair of the United States Sentencing Commission have provided me an opportunity to understand better the impact of the sentencing laws in the federal system.

I first began thinking about sentencing when I was just a little older than you, and at the ripe age of 28 I went down to Washington, DC in 1979 to serve as a staff counsel for Senator Edward Kennedy on the Senate Judiciary Committee. I was there when the sentencing reform legislation, which eventually set up the Commission, was first being debated. It is amazing to be coming before you now as the chair of the Commission when we as a society are again debating sentencing policies more than 30 years later, but from a very different perspective.

The United States Sentencing Commission was created as an independent bipartisan Commission within the judiciary 30 years ago to eliminate unwarranted disparities in federal sentencing. Previously, judges had almost unlimited discretion to sentence defendants as they saw fit. That meant that two similarly situated defendants who had committed the same crime might receive very different sentences depending on what district they were in or what judge they were before. Bank robbers in Texas were getting much harsher sentences than bank robbers in California. The Sentencing Commission was tasked with developing proportionate sentencing guidelines assigning sentencing ranges based on an offender's conduct and criminal history.

I want to focus today particularly on the sentencing of drug offenders in the federal system. Drug offenders make up about a third of the offenders sentenced federally every year and a majority of the prisoners serving in the federal Bureau of Prisons, they are in many ways the key to the size and nature of the federal prison population.

The laws and guidelines governing federal drug sentencing, which we all know as the War on Drugs, were put into place in the late 1980s and early 1990s, before the time that most of you were born. We have now had a generation – your lifetime to this point – to study the effects of these laws and policies.

In the 1980s, rates of violent crime in America, particularly in cities, were high, and the public saw increasing drug use and the drug trade as major contributors to the violence. High profile tragedies, most notably the death from a cocaine overdose of Len Bias, a University of Maryland basketball star and the first draft pick of the Boston Celtics, convinced many on both sides of the aisle in Congress that America faced a drug crisis. I remember worrying about “crack babies.” There was a sense that our communities were veering out of control, and new approaches were needed. Congress passed, quickly and with overwhelming bipartisan support, the Anti-Drug Abuse Act of 1986, which imposed new, harsh mandatory minimum penalties for drug trafficking – essentially the statutory penalty scheme we still have today. There was a sense then that efforts toward rehabilitation of offenders had failed and that harsh punishments were needed.

Much has changed in the generation since the current federal statutory and guideline sentencing scheme was put into place. When Congress began serious debates about sentencing requirements less than 5 years ago, crime rates had fallen dramatically from their high point in the 1980's. Disturbingly, homicides have very recently begun to climb again in certain cities like Chicago and Baltimore, but, overall, violent crime rates continue to be at historic lows.

There is no consensus as to why this dramatic reduction in crime rates occurred. Some have attributed this fall in crime rates to tough state and federal sentences for drug crime and violent crime put into place in the 1980s and 90s and rigorous enforcement of those laws. Some

criminologists recognize that more enforcement and longer sentences may have contributed to reductions in crime, but see a variety of other factors as having played at least as large a role – like economic and demographic changes, better policing methods, changes in culture and attitudes.

While crime was decreasing, prison populations and costs were skyrocketing. The federal prison population is almost three times what it was in 1991. At the peak of the federal prison population, federal prisons were roughly 38 percent over capacity, and federal prison spending exceeded six billion dollars a year, making up more than a quarter of the budget of the entire Department of Justice.

In the context of a budget crisis, as the Department of Justice’s budget flattened, a consistent increase in federal prison costs meant less money for federal law enforcement and prosecutors, for services to victims, for aid to state and local law enforcement, for crime prevention programs, and many other priorities.

The rise in state prison populations was even more rapid. In the states, prisons are often one of the largest budget items. That means that, in times of budget austerity, both as states have received less federal support and as their prisons continued to consume ever increasing resources, they have less money for education, roads, and other services. Spurred on by these budget constraints and also by new research and new ideas, many states began to try new approaches, including lowering penalties for drug crimes and other street offenses. Rehabilitation, once dismissed as a failure in the 80s, has returned as a major emphasis.

Finally, mass incarceration of drug offenders has had a particularly severe impact on some communities in the past 30 years. Inner-city communities and racial and ethnic minorities have suffered from our emphasis on harsh drug penalties. Sentencing Commission data shows that Black and Hispanic offenders make up a majority of federal drug offenders. A large number of black offenders remain subject to the tough mandatory minimum drug sentencing laws and get less relief from the safety valve designed to help low-level non violent offenders.

Harsh drug penalties damage the respect of some for the fairness of the criminal justice system.

So what have we learned then about drug sentencing policy in the generation since these federal sentences and guidelines were put into place? Appropriate to the theme of Constitution Day, it is important to remember that there are two systems of government. While I talked a great deal about criminal justice in the federal system, it is also important to look at what is happening in state and local governments across the nation – what many call the real “laboratories” of reform and policy change.

At the state level, we have seen that many states have been able to reduce their prison populations and save money without seeing an increase in crime rates. Michigan, New York, and Rhode Island all significantly decreased drug sentences, with Michigan and Rhode Island rolling back mandatory minimum penalties for drug offenses. Each state saw reductions in prison population accompanied by decreases in crime rates. South Carolina eliminated mandatory minimum penalties for drug possession and some drug trafficking offenses and increased

available alternatives to incarceration for drug offenses. It too has seen reductions in its prison population and a drop in crime rates. Other traditionally conservative states like Texas, Georgia, and South Dakota have shifted their emphasis from harsh punishment of drug offenses to a greater focus on alternative approaches, without seeing an increase in crime rates. Respected organizations like the Vera Institute and the Pew Charitable Trust have studied these state reforms and found significant progress.

This real-life experience in the states, together with new academic research, has begun to indicate that drug sentences may now be longer than needed to advance the purposes for which we have prison sentences, including public safety, justice, and deterrence. Some prominent scholars have written that lengthy periods of incarceration are unlikely to have a deterrent effect and that even the incapacitation effect – keeping dangerous people off the streets – becomes less significant as prisoners get older.

The Commission has been working on this issue for several years. In a large-scale study of federal mandatory minimum penalties in 2011 it concluded there are too many federal mandatory minimum penalties and that many of them, particularly for drug offenses, are too severe and apply too broadly. The Commission found that when mandatory minimum penalties are perceived by many throughout the criminal justice system as excessive, disparate sentencing practices result. For example, certain particularly severe penalty provisions, like one that doubles the mandatory minimum if there is a prior conviction, are used regularly by prosecutors in some districts, while in other districts we found prosecutors do not use them at all.

The Commission found that mandatory minimum penalties sweep more broadly than Congress likely intended. Many in Congress emphasized the importance of these penalties for targeting kingpins and high-level members of drug organizations. Yet the Commission found that 23 percent of federal drug offenders were low-level couriers who transported drugs, and nearly half of these individuals were charged with offenses carrying mandatory minimum penalties. The category of offenders most often subject to mandatory minimum penalties involved street level dealers – many levels down from kingpins and organizers Congress likely intended to cover.

The Commission has also found that mandatory minimum drug penalties have contributed to growing prison populations. Certainly, a major contributing factor has been an increase in the number of federal prosecutions. The Department of Justice prosecutes more than double the number of offenders each year than it prosecuted twenty years ago. But long sentences play a major role as well. The number of offenders in federal prisons who were convicted of violating a law carrying a mandatory minimum penalty increased from just over 40,000 offenders in 1995 to more than 100,000 in 2015. More than half (59.4%) of the total federal prison population is now serving a mandatory minimum sentence.

In the last several years, we have been able to see and measure the real world effect of modest reductions in federal drug sentences. In 2007, the Commission reduced sentences by an average 27 months for offenders convicted of trafficking in crack cocaine, three years before Congress acted to reduce the disparity in sentences between crack and powder cocaine offenders. In the Fair Sentencing Act of 2010, Congress reduced the crack powder ratio from 100:1 to 18:1. The Commission compared those offenders whose sentences were reduced with a similarly

situated group of offenders previously released after serving their full sentences. For a period of two years, there was no statistical difference between the groups in their rates of recidivism, which was approximately 30 percent for both groups. Reducing sentences for crack offenders did not make those offenders more likely to commit new crimes or less likely to cooperate with law enforcement.

There have been significant changes in the political landscape. Budget concerns, as well as new ideas about fairness, justice, and effective sentencing policy, have led leaders from across the political spectrum and in all branches of government to rethink approaches to sentencing. For several decades, the push from Congress and from the executive branch has been toward steadily increasing federal sentences. As recently as six years ago when I became chair of the Commission, many in Congress were still vocally advocating for tougher sentencing and asking why judges were such liberal sentencers.

Recently, though, federal leaders have begun to change their perspective. As I just mentioned, the action, first by the Commission in 2007 and then by Congress with the Fair Sentencing Act in 2010, to reduce the disparity in sentences between crack and powder cocaine, received bipartisan support and the reduction did not appear to have harmed public safety.

Following on this success, in the past year, several major pieces of legislation aiming to reduce sentences have received broad bipartisan support. Prominent democrats like Senators Patrick Leahy, Dick Durbin, and Corey Booker, and Congressman Bobby Scott have introduced and strongly supported legislation reducing sentences. But so have prominent republicans like Senators Charles Grassley, Mike Lee, Rand Paul, and Congressmen Bob Goodlatte and Raul Labrador. Different pieces of bipartisan sentencing reform legislation have moved through the Senate and House Judiciary Committees. At the same time, attitudes from outside advocates and thinkers have shifted over the past generation as well. Across the political spectrum, a wide range of “unlikely allies” are working together to achieve transformative change in the criminal justice system.

So the question then is, given that the ground seems to be ripe for a once in a generation shift in federal sentencing policy, particularly in the area of drug sentencing, what kinds of changes are needed?

The Sentencing Commission has advocated for a set of legislative changes to address mandatory minimum drug penalties. Those mandatory minimum penalties are written into the law, so only Congress can change them. The Commission, which has members from across the country and the political spectrum, has unanimously endorsed a set of important legislative proposals, many of which have been picked up in current legislation.

In addition to working with Congress for statutory changes, the Commission responded with its own actions. To give you just a few examples:

- In 2007, the Commission authorized individuals convicted of crack-cocaine offenses to seek reduced sentences under lowered, and more balanced ranges. In our last report on the subject, the Commission found that over 16,000 individuals had been granted a reduced sentence, which shaved, on average, 17 percent off their sentence. Over 93

percent of the individuals who received a reduced sentence were African-American or Hispanic.

- In 2014, the Commission reduced the drug quantity table by two-levels across the board, and we authorized individuals to obtain reduced sentences under the revised guidelines. As of June 30 of this year, over 28,000 individuals benefited from receiving reduced sentences. The average reduction, again, was 17 percent by about 25 months. Black and Hispanic individuals made up 73 percent of those who obtained this sentencing reduction.

The Commission worked closely with the President, the Attorney General and both sides of the aisle in Congress to bring down the prison population. Just recently the Federal Bureau of Prisons has seen a significant decline in its population for the first time in recent history, the prison is over capacity by only about 17%, the number of federal convictions is declining, and the Department of Justice is focusing on better education and programming for prisoners.

I have talked a lot about what the Commission is doing, and what Congress, the Attorney General and others are doing, to reexamine drug sentences a generation after the current federal drug sentencing system was put into place. I want to ask you to think about, what this generation – your generation – can do to get involved in the discussion about possible changes to federal sentences.

With a generation gone by since the current federal sentencing structure was put into place, and much experience and data now to guide us, we are overdue as a society, and as a federal criminal justice community, to reconsider our approach to federal sentencing.

There is so much you can do to make our criminal justice system fairer. You can help organizations which assist prisoners to reenter their community so that they can succeed and not recidivate. Right now, at the federal level, almost 50% of offenders were rearrested for a new crime or rearrested for a violation of supervision conditions in 8 years. You can participate in efforts to improve drug treatment, education and vocational training for former prisoners. You can work with juvenile offenders. We need to study and address the collateral consequences of a felony conviction like its impact on the ability of former prisoners to get adequate housing or student loans and to consider more alternatives to incarceration and, of course, you can get involved personally in efforts to improve the criminal justice laws.

Constitution Day is a day to reflect on where America stands in its path towards a “more perfect” Union. Much progress has been made since thirty-nine founders assembled in Philadelphia to sign our organizing charter. Our work as a nation is not complete, however.

The task for all of you is to identify the tasks that remain, and to ask yourself how you intend to close the gap between the principles of the Constitution and the realities of our society. America is predicated on the concept of *active* liberty – participating in democracy so as to make our liberty meaningful and to make our country *more* perfect.

In this respect, Constitution Day is a call to educate ourselves about the meaning of the Constitution; more than that, it is a call to action, to do what we can to realize our constitutional ideals.

## **Conclusion**

The twin virtues of education and action are found in the purpose of Smith College. In her will, Sophia Smith wrote that, through the education of women, “their weight of influence in reforming the evils of society will be greatly increased” and “their power for good will be incalculably enlarged.”

I commend each of you for your pursuit of higher education and I wish you well in your continued studies at this amazing institution. More than that, I look forward to your important contributions to our criminal justice system, and to our enduring Republic. Thank you.