

Testimony of Pat Nolan

Director of the Center on Criminal Justice Reform at the American Conservative Union
Foundation

Before the U.S. Sentencing Commission

June 10, 2014

Judge Saris and distinguished Commissioners: Thank you for allowing me to comment on the proposal to apply the recent sentence reductions retroactively. My name is Pat Nolan. I am Director of the Center on Criminal Justice Reform at the American Conservative Union Foundation. Prior to my work at ACUF I worked alongside Chuck Colson for 15 years as President of Justice Fellowship. I was a member of the California State Assembly for 15 years, four of those as the Assembly Republican Leader. I was a leader on crime issues, particularly on behalf of victims' rights. I was one of the original sponsors of the Victims' Bill of Rights and received the Victims' Advocate Award from Parents of Murdered Children. I was prosecuted for a campaign contribution I accepted which turned out to be part of an FBI sting. I pleaded guilty to one count of racketeering and served 29 months in federal custody. So, I have seen our criminal justice system from both sides.

I sit before you as a conservative Republican, a former legislator and former prisoner who is convinced that this country needs a more rational approach to apprehending, prosecuting, and sentencing those who traffic in drugs.

I am part of the Right on Crime Campaign, a national movement of conservative leaders urging states to make sensible and proven reforms to our criminal justice system - policies that will cut prison costs while keeping the public safe. Among the prominent signatories are Reagan administration attorney general Ed Meese; former House Speaker Newt Gingrich; former Secretary of Education Bill Bennett, David Keene former chair of the American Conservative Union, former Drug Czar Asa Hutchinson; Grover Norquist of Americans for Tax Reform; and Tony Perkins of the Family Research

Council. We all agree that we can keep the public safe while spending fewer tax dollars if we spend them more effectively

Reforms suggested by Right on Crime have been adopted in Texas, South Carolina, Pennsylvania, Missouri, Ohio, Georgia, Oklahoma, Kentucky, Alaska, and Mississippi. Texas, for instance, scrapped plans to build more prisons, and put much of the savings into drug courts and treatment. The results are impressive: Crime rates are at their lowest since 1968; the falling inmate population enabled the state to close a prison; and Texas has avoided \$3 billion in prison costs.

The Pew Charitable Trusts recently reported that states that have cut their imprisonment rates (coupled with other reforms) have experienced a greater crime drop than those that increased incarceration. The 10 states with the largest decreases in imprisonment rates had a 12 percent average reduction in crime, a decline greater than the crime rates in the 10 states that have continued to increase their incarceration rates. The states have shown that by intelligently differentiating between offenders that continue to pose a danger from those who we are merely angry at we can lower the number of prisoners, keep crime down, and save taxpayers money.

This Commission has already moved us in the right direction with your recent changes to the guidelines. I respectfully ask that you take the next important step: to apply those changes retroactively.

While I was in prison I saw the bitterness created by the wide disparity in punishment of those who dealt in powder cocaine with those who sold crack. After Congress recognized the injustice of this disparity and passed the Fair Sentencing Act, this commission wisely applied it retroactively.

Failure to make the new guideline sentences retroactive will maintain a terrible injustice in the system as offenders incarcerated under the new sentences arrive, serve their time and go home while inmates convicted of the same offense under the old law will remain behind bars for several more years.

And it will be very hard to explain to offenders' spouses and children why they must suffer without a parent and partner when someone who did the same thing gets to go home. To those of us in the community 23 extra months may not seem that long. But to someone inside prison it seems like forever. Think of the family events they will miss if held for a longer time: graduations of their children and grandchildren, walking their daughters down the aisle at their weddings, funerals of parents and loved ones, coaching soccer, leading a Girl Scout troop.

I know the importance of these family occasions. The first furlough from my halfway house was the day of my eldest daughter's First Communion. My 3 year old son ran through the house, shouting to all who could hear, "My daddy home, my daddy home". It would have broken my heart to miss that special day for my daughter and my family. It would have been even more devastating if someone convicted of the same offense were let out and I had to remain in prison. Supportive families are the most important factor in helping offenders make the difficult transition from prison to freedom successfully. Why would we keep these families apart a day longer than necessary, particularly when this Commission has recognized the injustice of those original sentences?

If you approve retroactivity, those offenders will not be getting off easily. The average offender benefiting from retroactivity will see their sentence drop from 125 months to 102 months. That is not a light sentence in anyone's book.

Some have warned that you will unleash a wave of violent criminals if you apply the new sentences retroactively. That is not borne out by past experience. Kingpins and violent drug dealers will not be set free if you make the Amendment retroactive. In fact, not a single offender will be released automatically. Retroactivity will merely permit certain offenders who have already served long sentences to request a reduction in their sentence. The decision to grant a sentence reduction can only be made by the sentencing judge. If there is reason to believe that the offender remains a danger to the community the government can present that evidence to the judge. In fact, the statute that allows retroactivity also directs the courts to take public safety into account.

No one wants to inflict an increase of violence on our cities. But we know from past experience that that won't happen. In 2007 I testified at the Commission's hearing on whether to make its recently-enacted two level downward adjustment retroactive. I listened as several officials with impressive titles made breathless predictions that mayhem, violence and social disintegration would follow retroactivity as surely as night follows day. An assistant US Attorney flatly predicted that "these offenders likely will reoffend and will do so within a short time of getting out of jail." She testified that retroactivity would contribute to the growing violent crime problem, increase the numbers of murders and undermine public safety. Of course, those overheated predictions were wrong, and there was no crime wave.

Again in 2011, when the Commission was considering making the Fair Sentencing Act retroactive, the same organizations made their dire predictions of a crime wave they said would result. The representative of the Fraternal Order of Police stated, "These criminals are responsible for creating and feeding the addiction of 1.4 million Americans." And he predicted that "Early release of these criminals would serve only to further the destruction of our communities from cocaine." The President of the National Association of Assistant U.S. Attorneys flatly predicted an "...immeasurable crime impact occasioned by the earlier release of thousands of drug dealers..."

And now they are back again with their same dire predictions. These modern Cassandras are wrong on both logic and the facts. Logically, does anyone seriously think that spending an additional 23 months behind bars will form an offender's conscience if 102 months in custody hasn't changed their outlook? The Commission's recidivism study bears this out. It found no difference in recidivism between offenders who received a reduced sentence retroactively under the 2007 Crack Cocaine Amendment than similarly situated offenders who did not receive a reduced sentence.

So, for those who predict that applying the new guidelines retroactively will set free thousands of violent criminals to run riot in our cities, I would press them to explain why this retroactivity would be different than the results of the Commission's 2007 and 2011 decisions.

I also wonder whether any of these organizations will be held accountable for their consistently erroneous predictions. Fool me once, shame on you...But this is now the third time they have given baseless testimony. Surely there must be an appropriate sanction for repeatedly misleading this Commission about the impact of your decisions.

The Bible tells us that we are to seek punishment in proportion to the crime. The same punishment should be meted out for the same offense; measure for measure and pound for pound. This Commission has the opportunity to restore fairness and balance to our drug sentences. As a matter of principle and justice the Commission should make the new sentences retroactive. Thank you.



THE
AMERICAN
CONSERVATIVE
UNION
FOUNDATION

Pat Nolan
Director, Center for Criminal Justice Reform
(703) 777-1871
1331 H Street, NW, Suite 500, Washington, DC 20005

July 5, 2014

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Retroactivity of the amendment to the drug sentencing guidelines

Dear Judge Saris and commissioners,

First, I want to thank you again for inviting me to testify before the Commission on behalf of the American Conservative Union Foundation. I am proud to be part of the large and growing chorus of conservative voices raised in support of fundamental reforms in our criminal justice system. An important part of our reform efforts in the states and at the federal level is aimed at making our sentencing structures more just. It is as part of that effort to make our laws more just that I urge you to apply the lowered guideline range for drug offenses retroactively.

I am writing to supplement my written testimony to respond directly to the Department of Justice's effort to severely limit those eligible for retroactivity. At the hearing, I pointed out the injustice of prisoners sentenced under the old guidelines remaining in prison while inmates convicted of the same crime enter prison, serve their sentence and go free. If the Commission severely restricts eligibility for retroactivity as suggested by DOJ, similar injustices will occur.

To be just, sentences should be tailored to the actions of the individual offender and the impact the crime had on its victims and the community. Of course, public safety is a key factor to be considered. However, the determination of dangerousness should be based on the actual risk posed by the individual offender; not the broad and blunt categories proposed by the Department which are arbitrary stand-ins for dangerousness.

These rigid categories would operate like the mandatory minimums which the Commission has criticized. Chuck Colson, my former colleague, condemned mandatory minimums as "impos(ing) a single, one-size-fits-all sentencing structure with no regard for the

seriousness of the crime or for an offender's threat to the community.” The Department’s exclusions would do the same, stripping judges of the discretion to make sound retroactivity decisions.

You have equipped judges with sentencing and retroactivity instructions in the Guidelines and Congress has done so in federal statutes. Isn’t the better course to allow them to apply their judgment and let them do their job? We know that states around the country -- red, blue and purple -- are turning away from rigid risk categories to more nuanced factor-based assessments that give judges room to get it right, for every defendant they face. They have seen good results. I am confident you will as well.

Please don’t take a backward step. I urge you to reject line-drawing and instead allow our courts to protect our communities and do justice – case by case.

Sincerely,

Pat Nolan