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Chair, United States Sentencing Commission
Speech to Georgetown University Law Center¹
“A Generational Shift For Drug Sentences”
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Thank you, Professor Appelbaum and Shari, for the kind welcome and introduction and thank you to Georgetown Law Center for inviting me, and to the American Criminal Law Review for sponsoring this speech and working so hard to set it up. I also want to thank the very diverse and impressive group of organizations co-sponsoring this event – the American Civil Liberties Union, the Georgetown Criminal Law Association, the Federalist Society, the American Constitution Society, and the Federal Legislation and Administrative Clinic here at Georgetown.

I have had the privilege of serving as a federal district court judge for twenty 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 changed. The past three years serving as chair of the United States Sentencing Commission has 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 your age and I came down to Washington 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. The Sentencing Commission was tasked with developing proportionate sentencing guidelines assigning sentencing ranges based on an offender’s conduct and criminal history. Thirty years later, the Commission continues to amend the guidelines as new laws are passed, as circumstances change, and as we learn more about what sentences work best and are most appropriate.

I. A Generation of Drug Sentences in the Federal System

I want to talk to you today about 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

¹ A version of this speech will be found at 52 Am. Crim. L. Rev. (forthcoming 2014).

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 were put into place in the late 1980s and early 1990s, around 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.

At the same time, the Sentencing Commission was putting together the initial sentencing guidelines. The Commission conducted exhaustive studies of past federal sentences imposed by federal judges, state sentences, criminal conduct at the state and federal levels, and best practices, and sought to develop fair and proportionate guidelines. The Commission also looked to the penalties set by Congress, viewing statutory mandatory minimum penalties in particular as laws the Commission was bound to follow. Early on, the Commission generally set guidelines at or above mandatory minimum penalties. In fact, drug guideline levels were set slightly above the mandatory minimum penalties, even for the lowest level drug offenders with minimal criminal history. Why? The rationale was that there would still be some room for their sentences to move down before hitting the mandatory minimum. That way, these offenders would have some incentive to plead and cooperate.

Federal drug trafficking sentences are calculated in roughly this way: a base offense level is calculated based on the quantity of drugs involved. For instance, a drug trafficking offense involving 200 grams of heroin would result in a base offense level of 26. That base offense level yields a range slightly above the five year mandatory minimum penalty. So that base offense level for the offender with 200 grams of heroin would lead to a sentencing range of 63 to 78 months, above the mandatory minimum penalty of five years, or 60 months.

The guideline range for more serious offenders can be increased based on a variety of factors including possession of a weapon, use of violence, an aggravating role in the offense, and the offender’s criminal history. Factors like acceptance of responsibility and a mitigating role in the offense (for example mules and couriers) can reduce an offender’s guideline range. Cooperation with the government, or meeting certain “safety valve” requirements as a low-level non-violent offender can now lead to a sentence below the mandatory minimum penalty for some offenders.

II. What Has Changed in Criminal Justice Over the Past Generation?

Much has changed in the generation since the current federal statutory and guideline sentencing scheme was put into place. As a starting point, crime rates have fallen dramatically. Violent crime rates in the last few years have been at their lowest point in 40 years. In many major cities, homicide rates are a small fraction of what they were in the early 1990s.

There is no consensus as to why this dramatic reduction in crime rates has 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. The National District Attorneys Association, in testimony before the Sentencing Commission this month, emphasized the progress in reducing crime in recent years and recommended against changing drug sentences. 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 – economic and demographic changes, better policing methods, changes in culture and attitudes, among other factors.

While crime was decreasing, prison populations and costs were skyrocketing. The federal prison population is almost three times what it was in 1991. Federal prisons are roughly 38 percent over capacity, and federal prison spending exceeds six billion dollars a year, making up more than a quarter of the budget of the entire Department of Justice. Keep in mind that the Department of Justice budget includes not just federal prosecutors, but also the Federal Bureau of Investigation, the Drug Enforcement Administration, and a significant number of programs to help victims of crime and support state and local law enforcement.

This increasing utilization of resources for federal prison populations has occurred during a mounting budget crisis. As the Department of Justice's budget has flattened and even decreased, a consistent increase in prison costs has 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. In fact, just recently the Federal Bureau of Prisons has seen a decline in its population for the first time in recent history, likely due in part to the fact that the Department of Justice, facing budget constraints, is prosecuting fewer cases.

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 have begun to try new approaches, including lowering penalties for drug crimes and other street offenses. Rehabilitation, 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 borne the brunt of our emphasis on incarceration. Sentencing Commission data shows that Black and Hispanic offenders make up a majority of federal drug offenders. In some communities, large segments of a generation of people have spent a significant amount of time in prison.

While estimates vary, it appears that Black and Hispanic individuals are disproportionately under correctional control as compared to population demographics. This damages the economy and morale of communities and families as well as the respect of some for the criminal justice system.

III. What Have We Learned About Drug Sentences Over the Past Generation?

So what have we learned then about drug sentencing policy in the generation since these federal sentences and guidelines were put into place? 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 positive results.

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 certain particularly severe penalty provisions, like one that doubles the mandatory minimum if there is a prior conviction, we found that in some districts, prosecutors use them regularly, while in others, 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 were charged with offenses carrying mandatory minimum penalties. The category of offenders most often subject to mandatory minimum penalties were street level dealers – many levels down from kingpins and organizers.

The Commission 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 they 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 111,000 in 2010, an increase of 178.1 percent.

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 modestly reduced sentences by on average 27 months, or 2 levels, for offenders convicted of trafficking crack cocaine, three years before Congress acted to reduce the disparity in sentences between crack and powder cocaine offenders. 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 at approximately 30 percent.

Similarly, the Commission found that the trial rate for crack offenders remained virtually unchanged after sentences were lowered. So reducing sentences for crack offenders did not make those offenders more likely to commit new crimes or less likely to cooperate with law enforcement.

IV. Changes in the Political and Policy Landscape Over a Generation

At the same time, there have been significant changes in the political landscape. In the last two years, 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 a few years ago when I became chair of the Commission, many in Congress were still vocally advocating for tougher sentencing.

Recently, though, federal stakeholders 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.

In the past year, following on this success, several major pieces of legislation aiming to reduce sentences have received broad bipartisan support. Prominent liberal democrats like Senators Dick Durbin and Patrick Leahy and Congressman Bobby Scott have introduced and strongly supported legislation reducing sentences. But so have prominent conservative republicans like Senators Mike Lee, Rand Paul, and Ted Cruz, and Congressman Raul Labrador. Two different pieces of bipartisan sentencing reform legislation have moved through the Senate Judiciary Committee this year and the house judiciary committee has created a bipartisan Over-Criminalization Task Force, which is considering sentencing reform among other issues.

Attitudes from outside advocates and thinkers have shifted over the past generation as well. At a Commission hearing a few weeks ago, a witness from the Texas Public Policy Foundation's Right on Crime Initiative made a strong conservative case for reducing drug sentences. The Heritage Foundation has been active on this issue as well. Other traditionally more liberal organizations like the American Civil Liberties Union and Families Against Mandatory Minimums have also been active.

V. What Legislative Changes Are Needed?

So the question then is, given that the ground seems to be ripe for a once in a generation shift in federal sentencing policy, 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. While commissioners approach criminal justice issues from a variety of philosophies and backgrounds, all of them are passionate about addressing budget and overcrowding concerns and improving the fairness, justice, and effectiveness of drug sentences. And all of us are strongly informed by the findings of Commission researchers identifying major disparities and concerns resulting from the current mandatory minimum drug laws.

The Commission, first in the 2011 Mandatory Minimum Report to Congress and then in a written statement and a letter to the Senate Judiciary Committee last fall, recommended a series of changes to the drug sentencing laws. Specifically, we recommended that Congress:

- Reduce the current mandatory minimum penalties for drug offenders;
- Consider expanding the "safety valve," which allows sentences below mandatory minimum penalties for non-violent, low-level drug offenders, to offenders with slightly greater criminal histories; and
- Make the Fair Sentencing Act of 2010, which reduced the disparity in treatment of crack and powder cocaine, retroactive.

Last month, the Senate Judiciary Committee passed legislation that corresponded to all of those recommendations with bipartisan support.

VI. The Commission's Review of Drug Guidelines

At the Commission level, we are also acting to reexamine drug sentences in our own annual amendment cycle. Should the Commission decide at its public meeting in April, that changes to the sentencing guidelines are appropriate after careful consideration of all the comments and statistical evidence – consideration that is ongoing, with no decisions made yet – those changes could happen this year and could be an important first step, one which could inform future congressional action.

In January, the Commission proposed an amendment to the federal sentencing guidelines which would reduce by two levels the base offense levels for drug trafficking offenses that correspond to specified drug quantities in the guidelines, across all drug types. The proposed amendment would be a more modest change than those that Congress is considering. The amended guideline would continue to link guideline ranges to existing mandatory minimum penalties, but would place the guideline ranges lower for most drug offenders. This is an amendment that the Commission put on its priority list last spring.

Several weeks ago, the Commission held a public hearing on this and other proposed amendments. We heard from a variety of distinguished witnesses –the Attorney General of the United States, a district attorney, a representative of the conservative group Right On Crime, Federal Public Defenders, among others. We have received thousands of letters from a variety of organizations and individuals. We have heard from some who have supported the proposed amendment including defense attorneys, civil rights organizations, sentencing reform organizations, faith groups, Right On Crime, prominent bipartisan Senators, and the Department of Justice. They have argued that reducing drug sentences will reduce prison spending and overcrowding, free up money for other more effective criminal justice priorities, help address budget shortfalls, increase cooperation with law enforcement in certain communities, and lead to more just results, all without harming public safety or undercutting law enforcement.

Some have opposed the proposed amendment, including the National District Attorneys Association, the National Association of Assistant United States Attorneys, and the Chair of the House Judiciary Committee and Ranking Members of the Senate Judiciary Committee. They argue that reducing drug sentences will undermine public safety, including threatening the reduction in crime rates we have experienced over the past generation. These are arguments the Commission will consider very seriously before making any decision.

Should the Commission decide to reduce drug guideline levels by two, and should Congress not vote to disapprove of the amendment, the effect, though much smaller than what Congress could achieve through legislation, would be significant. We expect that almost 70 percent of drug trafficking offenders would see their sentences reduced, and for those offenders, sentences would decrease by an average of 11 months from an average of 62 months to an average of 51 months. Within five years, the federal prison population would be reduced by more than 6,500. Over time, the effects could be much greater. Indeed, the offenders sentenced in just the first year after the change would, over time, serve almost 14,000 fewer years than they would have without the change.

It is worth noting that the Commission is considering these changes not only because of new state-based evidence and our experience with the reduction in crack guidelines, but also because the law and the sentencing guidelines overall have changed since the guidelines for drug quantity were put into place a generation ago. Then, drug quantity was virtually the sole driver of drug sentences. Now, there are multiple enhancements for violence, firearms, aggravating role, stash houses and a whole host of other factors to help ensure that dangerous offenders receive long sentences. Quantities may no longer need to serve as the primary proxy for seriousness, although the amount of drugs remains a relevant measure of harm. Also, Congress in 1994 added the “safety valve,” which provides for sentences below mandatory minimum levels for

offenders with a low criminal history and no aggravating factors and gives those offenders substantial incentive to plead. It may no longer be necessary to set the guidelines above mandatory minimum penalties to encourage low-level offenders to plead or cooperate. That change may explain why our examination of crack offenders whose penalties were modestly reduced did not show any drop in levels of cooperation.

As I mentioned, we will vote on this amendment in two weeks' time.

VII. How Your Generation Can Get Involved in Federal Sentencing Issues

I have talked a lot about what the Commission is doing, and what Congress 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 drug 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 drug sentencing. The Sentencing Commission hopes to continue playing a leading role in this important discussion that can begin to move the country toward rational and necessary changes. We look forward to your participation in this important national conversation going forward. Thank you, and I welcome your questions.

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