

## OVERHAUL DRUG SENTENCING

DRUG SENTENCES AS  
A REFORM PRIORITY

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After witnessing the election of 121 new members of Congress and a new President who will appoint a majority of U.S. Sentencing Commissioners within the next year, observers of the federal sentencing system may be tempted to call now for comprehensive change. The agenda for change could be lengthy. Many aspects of the system have come in for severe criticism. But reform of government operations rarely turns out to be comprehensive, especially when an existing system is complicated, decentralized, and not fully understood.

If it becomes important for those who wish to improve federal sentencing to choose their priorities, I have a suggestion: begin with the drug cases. If Congress and the Commission can address the injustice and irrationality of the current system for sentencing drug offenders, they can take the edge off many other problems in federal sentencing.

The sheer number of drug cases makes this a promising place to start. The largest single group of new entries into federal prisons have committed drug-related crimes, and their lengthy sentences will keep them in the system longer than most other offenders. Of the 33,000-plus cases sentenced under the guidelines in 1991, 45 percent were drug cases.<sup>1</sup> Drug cases account for many of the instances where judges feel they must impose unduly harsh sentences.<sup>2</sup> Mandatory minimum statutes impose astonishingly lengthy prison terms based on the amount and type of drug involved, without accounting for the offender's actual level of involvement in the distribution system.<sup>3</sup> Even where the prosecutor, the investigators, or the evidence allow a defendant to be sentenced outside a mandatory minimum statute, the guidelines themselves take mandatory minimums as the appropriate starting point and impose far more lengthy sentences than are available under state law. They do so

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with only a perfunctory attempt to account for personal characteristics or an assessment of the defendant's place in the distribution system.<sup>4</sup>

Other recurring areas of controversy in federal sentencing take their starkest form in drug cases. The much-maligned power of the prosecutor to allow a defendant to be sentenced below the guideline or statutory range through a motion based on "substantial assistance" is often the single most important decision in a drug case. Disputes about admission of evidence of relevant conduct, and the procedures for testing its reliability, most often occur when prosecutors convict a defendant for a small amount of drugs and use relevant conduct to prove a larger conspiracy or a larger amount of drugs involved.<sup>5</sup> Manipulation of sentencing factors by investigators occurs most commonly in drug cases.<sup>6</sup> The sense of urgency and outrage these practices create could be dissipated by treating drug cases differently.

A new approach could begin with repeal of mandatory minimum sentences tied to the amount and type of drugs. Congress could remove the largest obstacle to just sentencing in the federal system by enacting words to this effect: "The sentencing court shall determine appropriate sentences for any violations under this chapter [dealing with controlled substances offenses] in accordance with §3553 of title 18, and shall not be bound by any minimum penalty previously mandated by statute."

Congress might also take precautions against the siren song of mandatory minimum sentences by amending its internal rules. Any crime bill proposing a change in sentencing practices should not be reported out of committee in either house until the relevant committee has, with the cooperation of the Sentencing Commission, studied the likely impact of the change on correctional resources. Any bill increasing the use of correctional resources must, before leaving the committee, account for the resources needed either by suspending enforcement until proper appropriations are made, or by directing the Commission to reduce its guidelines for other crimes to free up the additional resources.

While waiting for these reforms in the legislative process, the Commission should not remain idle. It should uncouple its guidelines from mandatory minima, even if Congress

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delays in repealing the statutes. Guidelines should look to a drug defendant's place in the distribution organization and to the duration and scope of the activity, with amount serving as only one indicator. The Commission should abandon the sometimes foolish reliance on the weight of the medium for carrying the drug, a reliance suggested by statute.<sup>7</sup> It might also reach its own judgment about whether dealing in particular drugs, such as crack cocaine, should result in radically more harsh punishments than dealing in other drugs which wreak comparable harms.

Admittedly, any of these changes could result in a guideline sentence for a drug case that differs significantly from the sentence mandated by statute. In any case of conflict, the statute would control. But guidelines uncoupled from irrational sentencing statutes would not be a futile exercise. They would provide guidance to Congress on potential amendments, and they would signal clearly to judges where the responsibility lies for perceived injustices.

There are certainly drug offenders who deserve extremely stiff punishment, but the current system does not identify them in a satisfactory way. A system that pretends to

show no mercy leaves mercy invisible, largely in hands of prosecutors and investigators. If the new Congress and new Commission can take some of the steps mentioned here to improve sentencing in drug cases, other more general sentencing problems could soon begin to disappear as well.

## FOOTNOTES

<sup>1</sup> U.S. Sentencing Comm'n, *1991 Annual Report* 47, 50.

<sup>2</sup> See *United States v. Concepcion*, 795 F. Supp. 1262 (E.D.N.Y. 1992) (Judge Weinstein finds guidelines sentences unjust and inconsistent with purposes of sentencing for several drug defendants); *Sentencing Protest*, 77 ABA J 41 (Dec. 1990) (federal judge resigns after sentencing drug offender to 19 years imprisonment).

<sup>3</sup> U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991).

<sup>4</sup> The recent amendments to the "role in the offense" guidelines are, however, a step in the right direction. See §3B1.

<sup>5</sup> See, e.g., *United States v. Nunez*, 958 F.2d 196, 198-99 (7th Cir. 1992); *United States v. Cousineau*, 929 F.2d 64, 67 (2d Cir. 1991); Federal Judicial Center, *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* 7-8 (Oct. 1992) (collecting relevant conduct decisions involving drugs).

<sup>6</sup> See *United States v. Mosley*, 965 F.2d 906 (10th Cir. 1992); *United States v. Sivils*, 960 F.2d 587 (6th Cir. 1992); *United States v. Barth*, 788 F. Supp. 1055 (D. Minn. 1992).

<sup>7</sup> See e.g., 21 U.S.C. §841(b)(2)(B)(v) (1988).