The Many (Opaque) Echoes of Compromise Crack Sentencing Reform

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This past summer, Congress finally scaled back the (in)famously harsh mandatory minimum statutory sentencing provisions for federal crack cocaine offenses by passing the Fair Sentencing Act (FSA) of 2010. Through the reprinting of primary materials and some related original commentary, this issue of Federal Sentencing Reporter is principally devoted to setting forth the essential facets of the FSA’s change to federal sentencing law for crack offenses. This issue also seeks to spotlight and frame some critical legal, policy, and practice issues that now confront everyone dealing with the new federal sentencing landscape following the passage of the FSA. This introductory commentary will provide basic background information about the enactment of the FSA and its many (still opaque and uncertain) consequences.

I. The Political Path to Compromise Reform of Crack Sentences

In September 2007, then presidential candidate Barack Obama delivered a major policy speech at Howard University in which he asserted that it was “time to seek a new dawn of justice in America.” Through this speech, then senator Obama pledged that, as president of the United States, he would be willing “to brave the politics” in order to “fix our criminal justice system” so as “to ensure that this country has a criminal justice system that inspires trust and confidence in every American, regardless of age, or race, or background.” These comments, together with Obama’s emphasis on hope and change throughout his presidential campaign, heartened many of those who had long labored for criminal justice reforms and who were especially eager to eliminate rigid and severe mandatory minimum sentencing provisions and harsh drug sentences terms.

A few years later, President Obama’s administration could be fairly criticized for not prioritizing criminal justice reform during his first term and for not yet taking politically risky positions on a range of crime and punishment issues. In one important and high-profile area, however, the Obama administration made good on the President’s campaign pledge “to seek a new dawn of justice in America.” Only months after taking office, the Justice Department under President Obama went to Capitol Hill to urge Congress to end the disparity in punishment levels under federal sentencing law for powder and crack cocaine offenses. In April 2009, Assistant Attorney General Lanny Breuer stated in direct terms that the 100-to-1 crack-powder sentencing ratio, which had defined federal punishment terms for more than two decades, failed “to appropriately reflect the differences and similarities between crack and powder cocaine” and was “especially problematic because a growing number of citizens view it as fundamentally unfair.” Thus, he concluded, “Congress’s goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine.”

Though the broad importance of the Justice Department’s call for Congress to completely eliminate the sentencing disparity between crack cocaine and powder cocaine cannot be overstated, the precise impact of this call for reform cannot be easily assessed. Many advocates for crack-powder reform certainly believed that, with the President’s party in control of both houses of Congress, complete equalization of crack and powder cocaine sentences was a real possibility. But with some legislators still expressing concern about the symbolic and practical impact of drastic reductions in crack sentencing levels, Congress made no serious movement on this front through 2009 as legislative concern focused on other issues.
In March 2010, the legislative logjam concerning crack sentencing reform finally broke when the Senate Judiciary Committee unanimously passed an amended version of Senator Richard Durbin’s (D-Ill.) bill, S. 1789, which called for a reduction (but not an elimination) of the sentencing disparity between federal crack and powder cocaine offenses. This bill, which became the text of the enacted Fair Sentencing Act (and is reprinted in this issue), raised from 5 grams to 28 grams the amount of crack cocaine needed to trigger a five-year mandatory minimum prison sentence and raised from 50 grams to 280 grams the amount needed to trigger a ten-year minimum sentence. The bill also eliminated a mandatory minimum sentencing term for simple possession of crack and ordered the U.S. Sentencing Commission to revise the drug sentencing guidelines in accord with both the new mandatory minimum provisions and the Act’s instruction that drug crimes involving other aggravating factors be subject to increased guideline sentencing ranges. A week after the Senate Judiciary Committee acted, the full Senate unanimously voted in favor of all the sentencing changes spelled out in the Fair Sentencing Act of 2010.

The bill that emerged from the Senate was rightly described as a compromise solution to the long-assailed 100-to-1 crack-powder disparity, and many reform advocates were disappointed that the Justice Department’s call to completely eliminate the crack-powder disparity did not carry the day. A press release from the ACLU, for example, described the bill as “a step forward” while also lamenting that it “still leaves a hefty and unnecessary disparity.” Other advocates for reform likewise viewed the new compromise sentencing ratio of 18-to-1 as an improvement, but were disappointed that the FSA was not a truly complete solution to the injustices produced by a significant crack-powder sentencing differential. Nevertheless, Julie Stewart, president of prominent advocacy group Families Against Mandatory Minimums, concluded that “given the politics of the day (and the past fifteen years) the Senate bill is likely to be the best we can get . . . [and] that nothing short of this compromise would actually make it out of the Senate.” Stewart explained why her group would back this compromise solution to the crack-powder disparity in these terms:

Since 1995, when Congress killed the reform of the crack sentencing guidelines, nearly 75,000 people have received federal crack cocaine sentences. We will not allow another 75,000 to be sentenced at the current unjustifiable levels.

To prevent that, however, we will accept some compromises that are hard to swallow. I don’t look forward to that, but I won’t let the perfect be the enemy of the good. Too many people have already suffered, which is why we will support this imperfect bill.

As the Senate bill moved to the House of Representatives, a few legislators expressed concern that the Fair Sentencing Act did not go far enough in dealing with the crack-powder disparity. But the unanimous vote in the Senate and the support coming from advocacy groups for getting something done eventually led the full House to back the Senate version of statutory sentencing reform for crack offense. Without any sizable or significant legislative debate, the full House passed the Fair Sentencing Act in late July 2010. President Obama formally signed the bill into law in early August 2010.

II. The Immediate Legal Aftermath of the Fair Sentencing Act
The signing of the Fair Sentencing Act into law on August 3, 2010, marked the closure of many long-standing political battles over cocaine sentencing reform. But it also marked the start of many new legal issues and concerns for those involved in the sentencing of federal defendants convicted of crack offenses. In the wake of the FSA’s enactment, the U.S. Sentencing Commission, as well as federal sentencing judges and litigants, had lots of new work to do—and none of this work was routine or straightforward.

The FSA required the U.S. Sentencing Commission to amend the federal sentencing guidelines in accord with the terms of the FSA “as soon as practicable, and in any event not later than 90 days” following its enactment. Working swiftly, the Sentencing Commission within a matter of weeks gave notice and received comment on an array of policy and pragmatic issues it confronted in seeking to amend many federal sentencing guidelines to conform with the terms of the FSA. Finalized “temporary” amendments to the guidelines were issued in October 2010 and became effective on November 1, 2010. Those important and consequential amendments are reprinted in this issue.
During the period in which the Sentencing Commission was revising the federal sentencing guidelines, a large number of defendants whose sentences were still the subject of federal litigation began to ask courts to revise their sentencing terms. Stressing the fact that the FSA included no express provision concerning retroactive application, a number of circuit courts swiftly ruled that defendants sentenced before the FSA became law could get no benefit from its new sentencing provisions.10

For defendants who had committed their crack offenses but were not yet sentenced as of August 2010, the sentencing story was more dynamic. In some courtrooms, district judges concluded they must still apply the now-changed original statutory sentencing provisions to defendants who committed their crimes before the FSA was signed into law on August 3, 2010. A number of other district judges, however, concluded that those defendants not yet initially sentenced could and should be subject to the revised sentencing provisions of the Fair Sentencing Act. We reprint in this issue the opinion of United States District Court Judge D. Brock Hornby in United States v. Douglas, which effectively canvasses the debate over the application of the FSA to pipeline cases and which quickly became a point of reference for many sentencing judges facing this issue in the months following the passage of the FSA.

III. The Many (Opaque) Echoes of Compromise Crack Sentencing Reform

Before too long, the various legal issues surrounding the implementation and application of the FSA will settle out. But the echoes of the Act seem likely to reverberate for an extended period, and the import and impact of those echoes appear at this moment to be opaque and uncertain.

For starters, the U.S. Sentencing Commission will have to review, and may find it needs to revise, the guideline amendments it hurried to complete in the ninety days after the enactment of the FSA. Those amendments were promulgated pursuant to the Commission's emergency amendment authority, and the Sentencing Commission will have to make them permanent in its next standard amendment cycle. In all likelihood, some sentencing reform advocates will urge the Commission to tweak or perhaps even significantly change how it amended the drug sentencing guidelines in the wake of the FSA. And even if the U.S. Sentencing Commission does not make any significant new alterations to the guidelines when it makes the post-FSA amendments permanent, the Commission will still then have to face the consequential and complicated issue of whether and how to make these FSA-directed amendments to the guidelines applicable retroactively to defendants previously sentenced under the old crack guidelines.

In addition, Congress and the Justice Department and sentencing reform advocates need to consider and assess whether the compromise solution to the crack-powder disparity is all the change currently needed to federal drug sentencing laws. With other political and legal issues surrounding federal criminal justice reform and many other pressing national concerns, there is every reason to expect that many members of Congress and many officials in the Justice Department are inclined to consider the FSA's compromise reforms "good enough for government work" and are eager to turn to other matters. But sentencing reform advocates may not be eager to drop long-standing advocacy for complete equalization of crack-powder sentencing terms, and they also are sure to push Congress to expressly provide for the FSA to be applicable retroactively to all defendants previously sentenced under the 100-to-1 ratio.

Moreover, all of this uncertainty about crack sentencing law, policy, and practice arises at a time when concern is rising about both the so-called war on drugs and the advisory federal sentencing guideline system created by the Supreme Court in its landmark 2005 Booker ruling. Though the judges forced to sort through the legal implications of all sentencing changes may hope that legislators and policy advocates leave well enough alone for the time being, vocal and long-standing advocates for significant federal sentencing reforms clearly would like to have the passage of the FSA serve as just the first step in a long march to a significantly transformed federal sentencing system. Two original articles in this issue—one setting forth proposals for revisions to mandatory minimum sentencing provisions, another urging significant clemency developments in order to help achieve justice for those sentenced under the old crack laws—spotlight the many different approaches and methods of reform that thoughtful advocates of improved federal sentencing justice will continue to raise in the wake of the FSA.

And, not to be forgotten, a number of parts to the modern massive criminal justice system may well further alter the shape and direction of federal sentencing’s never-ending evolution. Two additional original articles in this issue—one discussing the sentencing concerns raised by the new
landmark federal health care legislation, the other spotlighting how lower courts are dealing with the fallout from the Supreme Court’s important recent Sixth Amendment ruling in \textit{Padilla v. Kentucky}—provide further reminders that the forces affecting federal sentencing law and policy may be too dynamic to ever be predictable.

\textbf{Notes}

2. \textit{Id}.
3. \textit{Id}.
7. \textit{Id}.
10. See, \textit{e.g.}, United States v. Carradine, 621 F.3d 575, 580 (6th Cir. 2010); United States v. Gomes, 621 F.3d 1343, 1346 (11th Cir. 2010).