Worth Fighting For: Keeping the Promise of Sentencing Reform

On January 20, 2008, I stood on my porch and listened to the roar of the crowd that had gathered a mile south on the National Mall to see Barack Obama sworn in as the forty-fourth president of the United States. Despite the cold weather, everyone on my block was outside. They seemed to want to be with other people at this historic moment, not alone in front of their TV sets. With the words “I will faithfully execute the office of president of the United States,” my neighborhood exploded with shouts and fireworks. At that moment, it seemed to many that anything was possible.

That belief has proven to be both correct and far too optimistic.

I suspect that, based on our political preferences, each of us could come up with a list of promises kept and promises broken. But on sentencing reform, the record is mixed. In two years, the President resolved a problem that has hounded sentencing policy for nearly two decades: He reduced the disparity between crack and powder cocaine sentences. His Department of Justice also issued the Holder Memorandum and called for a review of some mandatory minimums. However, the Obama administration has failed to offer a cohesive criminal justice strategy, which leaves many in the sentencing reform community guessing at the administration’s priorities.

The next two years will be a critical time in terms of sentencing policy. The Obama administration has the power to lead the fight for real reform. Or, it can push for policies and laws that will, at best, mostly leave systemic injustice untouched and, at worst, exacerbate it.

I. A Slow Start

Early signs were promising. Even before President Obama took office, he had the full attention of a criminal justice community anxious for reform. In a keynote speech at Howard University in Washington, D.C., he zeroed in on race and the criminal justice system in the United States. He vowed that as President, he would fight for a system that valued both public safety and fairness. Then senator Obama promised that his administration would review sentences “to see where we can be smarter on crime and reduce the blind and counterproductive warehousing of non-violent offenders.”

Although the President-elect’s Web site listed no criminal justice agenda, it did list the complete equalization of crack and powder cocaine sentences as one of Obama’s top civil rights priorities. His campaign staff eagerly absorbed information on the U.S. Sentencing Commission’s decision in 2007 to make modest reductions to the crack sentencing guidelines retroactive. Even without a clearly articulated criminal justice legislative agenda, many advocates hoped that the administration would engage the criminal justice community in an active and productive dialogue about broader reform.

Initially, the administration did just that. The transition team was quick to reach out to the criminal justice community, holding lengthy meetings with advocates to gather recommendations for a reform agenda. After the inauguration, domestic-policy staff made themselves available to sentencing reform and other advocates for information exchange and strategy discussions.

Also that first year, Attorney General Eric Holder announced the formation of the Department of Justice’s internal Sentencing and Corrections Working Group. A department-wide effort to examine federal sentencing and corrections policy, the working group is focusing on the federal sentencing structure, charging and plea negotiation policies, crack cocaine sentencing, the capital case process, and prisoner reentry programs, among other things. As part of the working group’s process, the administration launched listening sessions—stylized conversations between Department of Justice officials and criminal justice advocates, experts, and practitioners, as well as other stakeholders—on criminal justice and sentencing reform concerns.

But for all the discussions and listening sessions and memos, few tangible reforms emerged from the first year. Advocates celebrated when the Department of Justice came out in favor of eliminating the disparity between crack and powder cocaine sentences. But the first year also saw the passage and signing of one bill containing a mandatory minimum—without any strenuous objection from the White House or the Department.
II. The Second Year: Two Steps Forward, One Step Back

A key recommendation of the reform community was realized when, on May 19, 2010, Attorney General Eric Holder issued new guidelines giving prosecutors more flexibility in recommending sentences for criminal offenses. The memo replaced the memo issued by former attorney general John Ashcroft, which had required prosecutors to charge the most serious readily provable offense.

Although the shift in language is subtle—it told prosecutors to “generally” advocate for a within-guideline-range sentence instead of telling them they “must” do so—the change in principle is dramatic.6 The attorney general heralded the new policy as essential to the administration of justice. “Equal justice,” Holder said, “depends on individualized justice.”7 The memorandum goes on to say that decisions regarding charging, plea agreements and advocacy at sentencing must be made on the merits of each case, taking into account an individualized assessment of the defendant’s conduct and criminal history and the circumstances relating to commission of the offense (including the impact of the crime on victims), the needs of the communities we serve, and federal resources and priorities.8

The memo is a ringing endorsement of discretion, judgment, and the value of individualized consideration—all the antithesis of mandatory minimum sentencing and rigid adherence to guideline calculations.

Unfortunately, only days after the release of the Holder Memorandum, a slightly different Department of Justice testified before the U.S. Sentencing Commission on the issue of mandatory minimums.9 Refreshingly, the Department’s testimony first called for a review of some mandatory minimums, saying that “reforms of some of the current mandatory minimums are needed to eliminate excess severity in current statutory sentencing laws and to help address the unsustainable growth in the federal prison population.”10 Sally Quillian Yates, United States Attorney, Northern District of Georgia, asserted.

We believe that no new mandatory minimum should be proposed unless there is substantial evidence that such a minimum would rectify a genuine problem with imposition of sentences below the advisory guidelines; would not have an unwarranted adverse impact on any racial or ethnic group; and would not substantially exacerbate prison crowding.11

Then, moments after Yates acknowledged the “heavy price” extracted by mandatory minimums, she identified white-collar offenses and possession of child pornography as crimes for which the Commission should consider recommending modest mandatory minimum sentences.12 Whether Yates speaks for the President is questionable, but it is nonetheless disturbing to hear a Department of Justice representative imply that new mandatory minimums may be needed.

Two months later, the Department sent its annual letter to the U.S. Sentencing Commission, calling again for a reevaluation of fraud and child pornography sentences, but stopping short of asking for higher sentences or mandatory minimum sentences.13 The Department did make clear, though, that if it were to recommend new mandatory minimum sentences for economic crimes, it would likely emphasize only one factor to consider at sentencing: the amount of the loss.14

If the Department of Justice represented by Ms. Yates wins the day, then sentencing reform advocates have reason to be concerned. To outside observers, the call for new mandatory minimums for white-collar offenses appears to come at a time when the public is asking for the heads of corrupt corporate executives.15 The Department should not repeat the mistakes of the past. The Department recognized that the mandatory minimum penalty structure for crack cocaine created disparities that undermined faith in the criminal justice system; it should not create new mandatory minimums for the financial services sector that will do the same thing. Moreover, to the extent that there is a “genuine problem with the imposition of sentences below the advisory guideline,” it is wholly inappropriate to cure it with mandatory minimums.15 At least, as the Department suggests in its letter to the Commission, the Commission must first examine whether the guidelines, not the judges, are the problem. In other words, the administration should, before proposing mandatory minimums as a cure for variances, propose amending the guidelines so that they reflect sentences that judges feel comport with the mandate in 18 U.S.C. § 3553(a).

That said, the Obama administration has a crowning criminal justice legislative achievement it can point to from its first two years: crack cocaine sentencing reform. Congress created crack penalties in 1986 at the height of a public and media frenzy over the emergence of crack cocaine and in the wake of basketball star Len Bias’s untimely death from a cocaine overdose.16 Defendants convicted with just five grams of crack cocaine, the weight of two pennies, were subject to a five-year mandatory minimum sentence. The same five-year penalty was triggered for the sale of powder cocaine only when an offense involved 500 grams, 100 times the minimum quantity for crack.17 This differential came to be known as the 100-to-1 ratio.

For years, crack cocaine sentences were criticized as flawed and illogical, because they had been created in the heat of the drug war without any scientific basis for their severity.18 The law was also perceived to be racist: Eighty
The Obama administration might wish to champion. A signal a new mood on the Hill for the kind of reforms that issue, was championed by tough-on-crime warriors may and Dan Lungren (R-Cal.), rose to speak in support of the others, James Sensenbrenner (R-Wis.), Ron Paul (R-Tex.), (R-Tex.), rose on the floor to speak against it, and three the House side, only one Republican, Rep. Lamar Smith sponsor and passed that chamber unanimously. On bipartisan support. The Senate bill had strong bipartisan added their voices to the campaign for reform. Most important, the new administration supported reform. Driven by its preelection goal of eliminating the cocaine sentencing disparity and supported by the Department of Justice’s earlier statements in favor of complete elimination of the sentencing disparity between crack and powder cocaine, the administration worked behind the scenes and actively pushed Congress for legislative change. Reform came at last on August 3, when the President signed into law the Fair Sentencing Act of 2010. The bill passed with the support of the administration, Senators Richard Durbin (D-Ill.), Jeff Sessions (R-Ala.), Lindsey Graham (R-S.C.), and Orrin Hatch (R-Utah), and Representatives James Clyburn (D-S.C.), John Conyers (D-Mich.), and Robert “Bobby” Scott (D-Va.). It was the result of years of advocacy from groups ranging from the civil rights and civil liberties organizations, to the American Bar Association, to sentencing reform groups and drug policy groups, to faith-based organizations. The new legislation repealed the mandatory minimum for simple possession of crack cocaine—the first repeal of a mandatory minimum since the Nixon administration—and reduces the so-called 100-to-1 disparity to a fairer (though imperfect) 18-to-1. Under the new law, 28 grams of crack cocaine will trigger a five-year prison sentence and 280 grams of crack will trigger a ten-year sentence. The law could affect an estimated 3,000 cases annually, reducing sentences by an average of about two years and saving $42 million in prison costs over five years. It is critical to note that the bill passed with significant bipartisan support. The Senate bill had strong bipartisan sponsorship and passed that chamber unanimously. On the House side, only one Republican, Rep. Lamar Smith (R-Tex.), rose on the floor to speak against it, and three others, James Sensenbrenner (R-Wis.), Ron Paul (R-Tex.), and Dan Lungren (R-Cal.), rose to speak in support of the bill. That sentencing reform, once a toxic and untouchable issue, was championed by tough-on-crime warriors may signal a new mood on the Hill for the kind of reforms that the Obama administration might wish to champion.

III. The Next Two Years
The administration has a unique opportunity to live up to the promises of its early days and promote more sentencing reforms over the next two years. As a result of the economic crisis and publicity surrounding crack sentencing reform, the public is sensitized to the need for change. Politically, the passage of the crack law with near-unanimous support from both houses of Congress demonstrates strong bipartisan backing for criminal justice reform—as does the advancement of the National Criminal Justice Commission Act, a bill designed to produce a top-to-bottom review of the criminal justice system. This once-rare bipartisanship on criminal justice issues offers the President an opportunity to push for further reforms. Success will require a commitment of his time, energy, and political capital to produce results. He will have tamp down political and practical fears within his administration and the Department of Justice.

Proposals for additional mandatory minimums and calls to increase already long sentences for some crimes are likely, and the administration and the Department of Justice may not be always able to stop them. But the President can—and may have to, given the outcome of the midterm elections—push even harder than he did during his first two years in office. In his 2007 remarks at the Howard University Convocation, Obama said, “It’s not enough just to look back in wonder of how far we’ve come—I want us to look ahead with a fierce urgency at how far we have left to go.” President Obama should set a clear and strong reform agenda that is promoted by both the administration and the Department to create a sentencing system that is reliable, fair, and proportionate while securing public safety and supporting successful rehabilitation and reentry.

IV. An Agenda for Reform
The Obama administration should set itself three tasks for sentencing reform for the upcoming year: (a) to require all new sentencing laws to be evidence based and to oppose those that are not cost effective, (b) to push a series of achievable and necessary reforms, and (c) to advance larger systematic reforms consistent with the President’s calls for individualized and appropriate punishment.

A. Evidence-Based Sentencing
The best way to prevent sentencing based on politics and fear is to require that those who propose sentence enhancements identify not only cost, something that Congress already requires, but also how the enhancement will address an identified need. Both of the last mandatory minimums that passed the Senate Subcommittee on Crime and Drugs set mandatory minimums below the average sentence. The new sentences were proposed without strong evidence showing that current law failed to meet the purposes of punishment or that the new sentences would do a better job. The administration should oppose all mandatory minimums and excessive
sentences that are proven to be indefensible, unnecessary, or unwarranted.

B. Achievable Reforms

Although systemic reform of the criminal justice system is needed, President Obama can make vital and positive contributions simply by focusing on several smaller—and achievable—reforms.

The first and perhaps most evident short-term fix is retroactive application of the Fair Sentencing Act. I was present at the Department of Justice celebration following the signing of the crack sentencing reform legislation when Attorney General Holder told the audience that the administration was proud of the achievement but also disappointed by its limitations.

Holder may have been referring to the compromise that maintained a disparity between crack and powder cocaine, but he could have been talking about the other failure of the new law: It does not apply to those already serving prison terms for crack cocaine offenses. As a result, two similarly culpable people who commit the same crack offense can receive drastically different sentences depending solely on when they were sentenced. To even the most casual observer of criminal justice policy, this policy is costly, unjust, and, arguably, morally bankrupt. Receiving a fair sentence should be a matter of justice, not a matter of luck.

Beyond that, the administration could easily endorse changing the manner in which the Bureau of Prisons (BOP) calculates good time credits, which currently deprives federal prisoners of seven days of the sentence reduction they should receive for every year of their sentence. Federal law permits the BOP to award fifty-four days for every year of a prisoner’s “term of imprisonment.”31

Since 1988, the BOP has awarded good time credit based on the assumption that “term of imprisonment” means time actually served by the prisoner, not the sentence imposed by the judge. The way the BOP calculates good time, prisoners earn a maximum of forty-seven days of good time for each year to which they are sentenced, instead of the fifty-four days per year.32 This difference of seven days adds up and, according to Supreme Court Justice John Paul Stevens, “imposes tens of thousands of years additional prison time on federal prisoners” and “comes at a cost to the taxpayers of untold millions of dollars.”33

Another politically viable reform includes the elimination of the sentence stacking provisions for gun offenses in 18 U.S.C. § 924(c). Federal law imposes a five-, seven-, or ten-year mandatory minimum on anyone whose drug crime or crime of violence involved a gun. Second and subsequent convictions trigger a twenty-five-year sentence. All sentences are mandatory and consecutive to any other sentence imposed in the case.34 The enhanced sentence for repeat offenders is used on first-time offenders as well, even though their second conviction may not follow a conviction and incarceration. Such is the case of Weldon Angelos, who received a fifty-five-year sentence for three sales of marijuana while armed with a gun. Because he was charged under § 924(c), he received consecutive sentences of five, twenty-five, and twenty-five years for the three charges, all of which occurred in a short period with no intervening convictions or incarceration.35 This unintended consequence results in unduly severe sentences that do nothing to deter recidivists.

The administration could also work with Congress to improve and expand the federal safety valve36 in three ways. First, the safety valve currently applies only to defendants with limited criminal history.37 Congress could easily amend the safety valve and make it available to some offenders when judges find that their criminal history rating overstates their actual criminal history and risk of recidivism. Another safety valve criterion is frequently misconstrued as a requirement that the defendant “tell all” to the prosecution, including implicating others in the offense.38 It was not intended as such. Congress should substitute a defendant’s demonstrated acceptance of responsibility for this criterion. Doing so will ensure that true and repentant first offenders receive the benefit of the safety valve as Congress intended. Finally, Congress could expand the safety valve to apply not only to drug defendants but also to all defendants subject to mandatory minimums who otherwise meet the eligibility criteria of the safety valve.

Finally, the administration should energetically support efforts to create a balanced National Criminal Justice Commission. The National Criminal Justice Commission Act,39 proposed by Senator Jim Webb (D-Va.), would be charged with examining all aspects of the nation’s criminal justice system. Its members would be selected by both Democratic and Republican political leaders in Washington and in the states, and would identify shortcomings and recommendations for reform. Should the administration choose not to shoot for the moon in the next two years, then it should, at a minimum, support the Commission as a way to create the potential for real, systemwide reform.

C. Big Ideas

If the President implemented the aforementioned recommendations, the sentencing community will not have the direction or the incentive to work on the systemic reforms so desperately needed.

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safety valve for judges to use when the mandatory minimum offends the parsimony mandate of 18 U.S.C. sec. 3553(a). The reform should be larger than that. It should, like the review called for in the National Criminal Justice Commission Act, reexamine every step of the criminal justice system, from before the crime to after reentry, and enact changes where appropriate.

The President has a number of options, none of which are mutually exclusive. He can continue to act much as he did in the first two years of his presidency, which would bring potential for positive change but would not ensure it. Or, the President can choose to engage in the practical fights for small but significant sentencing reform. If he does so, the number of people in prison or the length of sentences may be reduced, but perhaps not drastically enough to dramatically reverse spending on prisons or ameliorate the community impact of the current incarceration model. The President also could choose to boldly fulfill the promises he made at Howard University: to “work every day to ensure that this country has a criminal justice system that inspires trust and confidence in every American,” and to push for “a crime policy that’s both justice-oriented and practical.” Or, the President can choose to engage in the practical fights for small but significant sentencing reform. If he does so, the number of people in prison or the length of sentences may be reduced, but perhaps not drastically enough to dramatically reverse spending on prisons or ameliorate the community impact of the current incarceration model. The President also could choose to boldly fulfill the promises he made at Howard University: to “work every day to ensure that this country has a criminal justice system that inspires trust and confidence in every American,” and to push for “a crime policy that’s both justice-oriented and practical.”

Notes


7 Id. at 1.

8 Id.
2010), at http://www.famm.org/repository/Files/Federal%20Good%20Time%20FAQs%206.7.10.pdf.
37 § 3553(f)(1).
38 § 3553(f)(5).
40 See supra note 1.