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Fair Sentencing

The Fair Sentencing Act

The American Civil Liberties Union (ACLU).

In 2010, Congress passed the Fair Sentencing Act (FSA), which reduced the sentencing disparity between offenses for crack and powder cocaine from 100:1 to 18:1. The scientifically unjustifiable 100:1 ratio meant that people faced longer sentences for offenses involving crack cocaine than for offenses involving the same amount of powder cocaine – two forms of the same drug. Most disturbingly, because the majority of people arrested for crack offenses are African American, the 100:1 ratio resulted in vast racial disparities in the average length of sentences for comparable offenses. On average, under the 100:1 regime, African Americans served virtually as much time in prison for non-violent drug offenses as whites did for violent offenses. The FSA represents a decade-long, and truly bipartisan, effort to reduce the racial disparities caused by the draconian crack cocaine sentencing laws and to restore confidence in the criminal justice system — particularly in communities of color.

Under the old law, conviction for possession with intent to distribute five grams of crack cocaine and 500 grams of powder cocaine triggered the same five-year sentence. Fifty grams of crack cocaine and five kilograms of powder cocaine triggered the same 10-year sentence. This created what is commonly referred to as the 100-to-1 ratio between crack and powder cocaine. The FSA increased the amounts of crack cocaine needed to trigger the five- and 10-year mandatory minimums, reducing the 100-to-1 ratio to a ratio of 18-to-1. Under the FSA, 28 grams of crack triggers a five-year mandatory minimum, and 280 grams of crack triggers a 10-year mandatory minimum. The FSA did not change the powder cocaine triggering weights. It also eliminated the current five-year mandatory minimum for simple possession (without intent to distribute) of crack cocaine.

In another step toward fairness, in 2011, the U.S. Sentencing Commission voted to retroactively apply the new FSA Sentencing Guidelines to individuals sentenced before the law was enacted. This decision will help ensure that over 12,000 people — 85 percent of whom are African-Americans — will have the opportunity to have their sentences for crack cocaine offenses reviewed by a federal judge and possibly reduced. (Even though people sentenced before the FSA can benefit from the retroactive Sentencing Guideline amendments, they remain subject to pre-FSA statutory mandatory minimums).

Now, the U.S. Supreme Court will decide whether people whose offenses predate the enactment of the FSA but who were sentenced afterwards should get the benefit of the new, fairer 18:1 statutory ratio, or instead be sentenced under the 100:1 ratio that Congress has repudiated.

The FSA was a step toward fairness, but the 18:1 ratio was a compromise and it still reflects outdated and discredited assumptions about crack cocaine. Because crack and powder cocaine are two forms of the same drug, there should not be any disparity in sentencing between crack and powder cocaine offenses – the only truly fair ratio is 1:1.

Being soft on sentencing means more violent crime. It's time to get tough again.

By U.S. Attorney General, Jeff Sessions, June 16, 2017. [Editorial in The Washington Post.](#)

Drug trafficking is an inherently violent business. If you want to collect a drug debt, you can't, and don't, file a lawsuit in court. You collect it by the barrel of a gun. For the approximately 52,000 Americans who died of a drug overdose in 2015, drug trafficking was a deadly business. Yet in 2013, subject to limited exceptions, the Justice Department ordered federal prosecutors not to include in charging documents the amount of drugs being dealt when the actual amount was large enough to trigger a mandatory minimum sentence. Prosecutors were required to leave out objective facts in order to achieve sentences lighter than required by law. This was billed as an effort to curb mass incarceration of low-level offenders, but in reality it covered offenders apprehended with large quantities of dangerous drugs. The result was that federal drug prosecutions went down dramatically — from 2011 to 2016, federal prosecutions fell by 23 percent. Meanwhile, the average sentence length for a convicted federal drug offender decreased 18 percent from 2009 to 2016.

Before that policy change, the violent crime rate in the United States had fallen steadily for two decades, reaching half of what it was in 1991. Within one year after the Justice Department softened its approach to drug offenders, the trend of decreasing violent crime reversed. In 2015, the United States suffered the largest single-year increase in the overall violent crime rate since 1991.

And while defenders of the 2013 policy change point out that crime rates remain low compared with where they were 30 years ago, they neglect to recognize a disturbing trend that could reverse decades of progress: Violent crime is rising across the country. According to data from the FBI, there were more than 15,000 murders in the United States in 2015, representing a single-year increase of nearly 11 percent across the country. That was the largest increase since 1971. The increase in murders continued in 2016. Preliminary data from the first half of 2016 shows that large cities in the United States suffered an average increase in murders of nearly 22 percent compared with the same period from a year earlier.

As U.S. attorney general, I have a duty to protect all Americans and fulfill the president's promise to make America safe again. Last month, after weeks of study and discussion with a host of criminal-justice participants, I issued a memorandum to all federal prosecutors regarding charging and sentencing policy that once again authorizes prosecutors to charge offenses as Congress intended. This two-page guidance instructs prosecutors to apply the laws on the books to the facts of the case in most cases, and allows them to exercise discretion where a strict application of the law would result in an

injustice. Instead of barring prosecutors from faithfully enforcing the law, this policy empowers trusted professionals to apply the law fairly and exercise discretion when appropriate. That is the way good law enforcement has always worked.

Defenders of the status quo perpetuate the false story that federal prisons are filled with low-level, nonviolent drug offenders. The truth is less than 3 percent of federal offenders sentenced to imprisonment in 2016 were convicted of simple possession, and in most of those cases the defendants were drug dealers who accepted plea bargains in return for reduced sentences.

Federal drug offenders include major drug traffickers, gang members, importers, manufacturers and international drug cartel members. To be subject to a five-year mandatory sentence, a criminal would have to be arrested with 100 grams or more of heroin with the intent to distribute it — that is 1,000 doses of heroin.

The truth is that while the federal government softened its approach to drug enforcement, drug abuse and violent crime surged. The availability of dangerous drugs is up, the price has dropped and the purity is at dangerously high levels. Overdose deaths from opioids have nearly tripled since 2002. Overdose deaths involving synthetic opioids rose an astonishing 73 percent in 2015. My fear is that this surge in violent crime is not a “blip,” but the start of a dangerous new trend — one that puts at risk the hard-won gains that have made our country a safer place.

Some skeptics prefer to sit on the sidelines and criticize federal efforts to combat crime. But it’s not our privileged communities that suffer the most from crime and violence. Minority communities are disproportionately impacted by violent drug trafficking. Poor neighborhoods are too often ignored in these conversations. Regardless of wealth or race, every American has the right to demand a safe neighborhood. Those of us who are responsible for promoting public safety cannot sit back while any American communities are ravaged by crime and violence.

There are those who are concerned about the fate of drug traffickers, but the law demands I protect the lives of victims that are ruined by drug trafficking and violent crime infecting their communities. Our new, time-tested policy empowers police and prosecutors to save lives.

Making America scared again won’t make us safer

By Sally Q. Yates, June 23, 2017. Editorial in The Washington Post.

Sally Q. Yates served in the Justice Department from 1989 to 2017 as an assistant U.S. attorney, U.S. attorney, deputy attorney general and, briefly this year, as acting attorney general.

In today’s polarized world, there aren’t many issues on which Democrats and Republicans agree. So when they do, we should seize the rare opportunity to move our country forward. One such issue is criminal-justice reform, and specifically the need for sentencing reform for drug offenses.

All across the political spectrum, in red states and blue states, from Sen. John Cornyn (R-Tex.) and the Koch brothers to Sen. Patrick Leahy (D-Vt.) and the American Civil Liberties Union, there is broad consensus that the “lock them all up and throw away the key” approach embodied in mandatory minimum drug sentences is counterproductive, negatively affecting our ability to assure the safety of

our communities. But last month, Attorney General Jeff Sessions rolled back the clock to the 1980s, reinstating the harsh, indiscriminate use of mandatory minimum drug sentences imposed at the height of the crack epidemic. Sessions attempted to justify his directive in a Post op-ed last weekend, stoking fear by claiming that as a result of then-Attorney General Eric H. Holder Jr.'s Smart on Crime policy, the United States is gripped by a rising epidemic of violent crime that can only be cured by putting more drug offenders in jail for more time.

That argument just isn't supported by the facts. Not only are violent crime rates still at historic lows — nearly half of what they were when I became a federal prosecutor in 1989 — but there is also no evidence that the increase in violent crime some cities have experienced is the result of drug offenders not serving enough time in prison. In fact, a recent study by the bipartisan U.S. Sentencing Commission found that drug defendants with shorter sentences were actually slightly less likely to commit crimes when released than those sentenced under older, more severe penalties.

Contrary to Sessions's assertions, Smart on Crime focused our limited federal resources on cases that had the greatest impact on our communities — the most dangerous defendants and most complex cases. As a result, prosecutors charged more defendants with murder, assault, gun crimes and robbery than ever before. And a greater percentage of drug prosecutions targeted kingpins and drug dealers with guns.

During my 27 years at the Justice Department, I prosecuted criminals at the heart of the international drug trade, from high-level narcotics traffickers to violent gang leaders. And I had no hesitation about asking a judge to impose long prison terms in those cases. But there's a big difference between a cartel boss and a low-level courier. As the Sentencing Commission found, part of the problem with harsh mandatory-minimum laws passed a generation ago is that they use the weight of the drugs involved in the offense as a proxy for seriousness of the crime — to the exclusion of virtually all other considerations, including the dangerousness of the offender. Looking back, it's clear that the mandatory-minimum laws cast too broad a net and, as a result, some low-level defendants are serving far longer sentences than are necessary — 20 years, 30 years, even mandatory life sentences, for nonviolent drug offenses

Under Smart on Crime, the Justice Department took a more targeted approach, reserving the harshest of those penalties for the most violent and significant drug traffickers and encouraging prosecutors to use their discretion not to seek mandatory minimum sentences for lower-level, nonviolent offenders. Sessions's new directive essentially reverses that progress, limiting prosecutors' ability to use their judgment to ensure the punishment fits the crime.

That's a problem for several reasons. First, it's fiscally irresponsible and undermines public safety. Since 1980, the U.S. prison population has exploded from 500,000 to more than 2.2 million, resulting in the highest incarceration rate in the world and costing more than \$80 billion a year. The federal prison population has grown 700 percent, with the Federal Bureau of Prisons budget now accounting for more than 25 percent of the entire Justice Department budget. That has serious public safety consequences: Every dollar spent imprisoning a low-level nonviolent drug offender for longer than necessary is a dollar we don't have to investigate and prosecute serious threats, from child predators to

terrorists. It's a dollar we don't have to support state and local law enforcement for cops on the street, who are the first lines of defense against violent crime. And it's a dollar we don't have for crime prevention or recidivism reduction within our prison system, essential components of building safe communities.

But just as significant are the human costs. More than 2 million children are growing up with a parent behind bars, including 1 in 9 African American children. Huge numbers of Americans are being housed in prisons far from their home communities, creating precisely the sort of community instability where violent crime takes root. Indiscriminate use of mandatory minimum sentencing has caused many Americans to lose faith in the criminal-justice system, undermining the type of police-community relationships that are so crucial to making our streets safer.

While there is always room to debate the most effective approach to criminal justice, that debate should be based on facts, not fear. It's time to move past the campaign-style rhetoric of being "tough" or "soft" on crime. Justice and the safety of our communities depend on it.

Sessions's new criminal charging policy would drag the country backward.

Opinion. By Editorial Board, The Washington Post. May 12, 2017.

Attorney General Jeff Sessions announced on Friday a new Justice Department policy designed to "enforce the law fairly and consistently." It will not achieve that aim. Instead, the attorney general's plan unintentionally underscores the case for Congress to reform the nation's unjust sentencing laws.

Mr. Sessions withdrew a sentencing policy crafted by Obama Attorney General Eric H. Holder Jr., which has been in effect since 2013. In its place, Mr. Sessions commanded federal prosecutors to "charge and pursue the most serious, readily provable offense," a policy that will undoubtedly put some people in prison longer than is just or practical.

Mr. Holder's policy had effectively softened harsh mandatory sentences for lower-level offenders. Even the body in charge of sentencing guidelines, the federal Sentencing Commission, concluded several years ago that sentencing standards had cracked down too hard on relatively minor offenders, such as drug couriers and mules, rather than being focused on kingpins and other major players. But under the law, the commission was unable to fully address the problems it identified. Mr. Holder also faced legal constraints, though he pressed against them aggressively: His policy involved declining to list the quantity of drugs in the possession of certain petty, nonviolent defendants, so as not to trigger automatic, harsh sentences. In a response to Mr. Sessions's move obtained by MSNBC's Rachel Maddow, Mr. Holder noted on Friday that federal prosecutors focused on "more serious drug cases" after his policy took effect.

Mr. Sessions justified his policy shift in part by arguing it would promote consistency in federal sentencing. But some prosecutors still will shrink from throwing the book at defendants, while others will not. Moreover, if every new attorney general dramatically shifts charging policy, over time a great many people who committed the same crime may be locked up for very different periods.

Mr. Sessions's new policy is not maximally draconian. At a Friday news conference, the attorney general noted that he will allow prosecutors "to avoid sentences that would result in an injustice." But getting an exception from his charge-the-maximum policy will require supervisor authorization and a written explanation. That will likely happen much less often than it should.

Mr. Holder's policy was not perfect either. It seemed to order prosecutors to change the crime to fit the punishment, in tension with what the law demanded. The right response to this imperfection, though, is not to return to a differently flawed sentencing policy, but for Congress to act. Current law still reflects the get-tough-on-crime mood of decades ago that a growing, bipartisan group of officials has concluded is outmoded, expensive and, often, counterproductive.

Congress should not have dithered while states and the executive branch attempted to ease the sting of the system it created. Now, as the attorney general reimposes the full severity of the laws Congress passed, the need to move is only greater. Lawmakers established mandatory minimum sentences. Lawmakers ultimately must be the ones to reshape them.